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3 **UNITED STATES DISTRICT COURT**

4 EASTERN DISTRICT OF CALIFORNIA

5
6 SALMA H. KHAN;

7 Plaintiff,

8 v.

9 CITIMORTGAGE, INC.,

10 Defendant.

Case No. 1:13-CV-01378-LJO-JLT

MEMORANDUM ORDER GRANTING IN
PART AND DENYING IN PART
DEFENDANT'S MOTION TO EXPUNGE
LIS PENDENS

(Doc. 9)

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13 Before the Court in the above-styled and numbered cause of action is Defendant
14 CitiMortgage, Inc.'s "Motion for an Order Expunging the Notice of Pendency of Action Recorded
15 by Plaintiff Salma H. Khan," filed August 4, 2015 (Doc. 9). Plaintiff did not file an Opposition. The
16 Court deems the matter appropriate for resolution without oral argument. Fed.R.Civ.P. 78; Local
17 Rule 230(g). Having considered the parties' briefing, the record, and the relevant law, the Court will
18 grant in part and deny in part Defendant's motion.

19 **I. BACKGROUND**

20 Plaintiff Salma H. Khan ("Plaintiff") commenced this action on July 23, 2013, by filing a
21 Complaint in the California Superior Court for the County of Kern against Defendants CitiMortgage,
22 Inc. ("CitiMortgage") and Wilmington Trust Co. ("Defendants"). *See* Compl., Doc. 1-2. The action
23 arises out of an allegedly wrongful foreclosure proceeding relative to the real property at 11622
24 Harrington Street, in Bakersfield, within Kern County, California ("the Property"). *See* Compl.,
25 Doc. 1-2. Asserting diversity jurisdiction, Defendants removed to this Court pursuant to 28 U.S.C.
26 §§ 1332(a), 1441(b). Defendants moved to dismiss the Complaint, *see* Doc. 6, and in its September
27 2013 2015 Order, the Court granted Defendants' unopposed motion, dismissing with prejudice all of
28 Plaintiffs' claims. *See* Doc. 7.

1 In the instant motion (Doc. 9), filed nearly two years after the Court rendered final judgement
2 in 2013, CitiMortgage moves to expunge the notice of lis pendens that Plaintiff recorded on July 26,
3 2013 against the Property. *See* Doc. 11, Tom Decl., Ex. 1. Plaintiff does not oppose the motion, and
4 on September 1, 2015, CitiMortgage filed a notice of non-opposition (Doc. 13).

5 The matter is now ripe for review.

6 **II. DISCUSSION**

7 **A. Motion to Expunge Lis Pendens**

8 Federal courts look to state law when deciding matters involving lis pendens. *See* 28 U.S.C.
9 § 1964. Under California Code of Civil Procedure § 405.20, “[a] party to an action who asserts a real
10 property claim may record a notice of pendency of action, [a lis pendens], in which that real property
11 claim is alleged.” The effect of a lis pendens “is that anyone acquiring an interest in the property
12 after the action was filed will be bound by the judgment.” *BGJ Assocs., LLC v. Superior Court*, 75
13 Cal. App. 4th 952, 966 (1999). “Once a lis pendens is filed, it clouds the title and effectively
14 prevents the property’s transfer until the litigation is resolved or the lis pendens is expunged.” *Id.* at
15 967.

16 Under California law, parties at any time in the pendency of the litigation may ask the court
17 in which the action is pending to expunge the notice of lis pendens. Cal.Code Civ. Proc. § 405.30. A
18 court shall order that the notice be expunged if (1) “the court finds that the pleading on which the
19 notice is based does not contain a real property claim”; or (2) “the court finds that the claimant has
20 not established by a preponderance of the evidence the probable validity of the real property claim.”
21 *Id.* §§ 405.31-2. “Probable validity” of a claim means that it is more likely than not that a plaintiff
22 will obtain a judgment against the defendant. *Orange County v. Hongkong and Shanghai Banking*
23 *Corp. Ltd.*, 52 F.3d 821, 824 (9th Cir. 1995) (citing Cal.Code Civ. Proc. § 405.3). It is a plaintiff’s
24 burden to establish probable validity. Cal.Code Civ. Proc. § 405.32.

25 Defendant asks the Court to grant its request to expunge the notice of lis pendens. Plaintiff
26 does not dispute the motion. As such, and based on the Court’s prior dismissal of the action in its
27 entirety, she fails to meet her burden to show by a preponderance of the evidence that any claims are
28 “probably viable” for the purposes of the instant motion. *Id.* (“the court shall order that the notice be

1 expunged if the court finds that the claimant has not established by a preponderance of the evidence
2 the probable validity of the real property claim. The court shall not order an undertaking to be given
3 as a condition of expunging the notice if the court finds the claimant has not established the probable
4 validity of the real property claim.”); *see also Howard S. Wright Constr. Co. v. Superior Court*, 106
5 Cal.App.4th 314, 319 (2003) (“A notice of lis pendens may be expunged if the trial court finds that
6 the plaintiff-claimant ‘has not established by a preponderance of the evidence the probable validity
7 of the real property claim.’”).

8 Accordingly, the Court concludes that it must grant the motion to expunge. *See* Cal.Code
9 Civ. P. § 405.32.

10 **B. Attorneys’ Fees**

11 CitiMortgage also moves for attorneys’ fees related to the instant motion. Defense counsel
12 filed a declaration indicating that his hourly fee is \$250, and that as a result of “having to” file this
13 motion, CitiMortgage incurred \$650.00 in attorney’s fees based on 2.6 hours researching, drafting
14 and preparing the instant motion and related documents. *See* Doc. 11, Tom Decl. ¶ 7. Counsel also
15 estimated that he would spend an additional 2 hours preparing for and appearing at a hearing on this
16 motion and suggested that additional hours would be necessary to draft a reply. As neither a reply
17 nor a hearing was necessary, the Court disregards any hours expended in those efforts.

18 California Code of Civil Procedure section 405.38 provides that the prevailing party on a
19 motion to expunge a lis pendens “shall ... be awarded the reasonable attorney’s fees and costs of
20 making or opposing the motion unless the court finds that the other party acted with reasonable
21 justification or that other circumstances make the imposition of attorney’s fees and costs unjust.”
22 Cal.Civ.Proc.Code § 405.38.

23 Here, Defendant apparently made no effort to contact Plaintiff to request that she voluntarily
24 withdraw the notice. Absent such a showing, the Court finds the motion premature and perhaps
25 unnecessary. For the price of a phone call or a stamp Defendant may have been able to avoid adding
26 to the Court’s impacted docket. In addition, Plaintiff has long since lost her home to the foreclosure
27 proceedings and likely has other significant fallout from the financial difficulties. *See O’Connor v.*
28 *Sabadell United Bank, N.A.*, No. 14-CV-00180-JCS, 2014 WL 3845224, at *2 (N.D. Cal. Aug. 5,

1 2014); *cf. Bergman v. Bank of Am.*, No. C-13-00741 JCS, 2013 WL 5863057 at * 34 (N.D.Cal. Oct.
2 23, 2013); *cf. Edwards v. Aurora Loan Services, LLC*, 2011 WL 1668926, at *20 (E.D.Cal. May 2,
3 2011) (“Plaintiff has faced economic difficulties involving the foreclosure of her real property, and
4 defendant has not convincingly demonstrated that plaintiff acted without substantial justification in
5 this litigation or in recording the lis pendens.”). The Court concludes that circumstances render the
6 imposition of attorneys’ fees unjust. Cal.Civ.Proc.Code § 405.38.

7 **III. CONCLUSION AND ORDER**

8 For the foregoing reasons, the Court concludes that expunging the lis pendens is appropriate
9 pursuant to California Code of Civil Procedure § 405.31-32, but that awarding attorneys’ fees would
10 be unjust under the circumstances, *see id* § 405.38.

11 Accordingly, **IT IS HEREBY ORDERED** that Defendant’s motion to expunge the lis
12 pendens (Doc. 9) is **GRANTED IN PART** and **DENIED IN PART**, as follows:

13 (1) Plaintiff’s lis pendens related to the Property located at 11622 Harrington Street,
14 Bakersfield, in Kern County California, recorded as document number 0213105295 with
15 the office of the Kern County Recorder, is hereby ordered expunged from the public
16 record; and,

17 (2) To the extent that Defendant CitiMortgage, Inc. moves for attorneys’ fees, the motion is
18 **DENIED**, pursuant to Cal.Code Civ. Proc § 405.38.

19 IT IS SO ORDERED.

20 Dated: September 28, 2015

/s/ Lawrence J. O’Neill
21 UNITED STATES DISTRICT JUDGE