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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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GARY L. FOSTER,

Plaintiff,

v.

NO. CIV. 2:10-518 WBS GGH

ORDER RE: MOTION FOR
INJUNCTION PENDING APPEAL

SCME MORTGAGE BANKERS, INC. a
California corporation; CLEVER
KEY FINANCIAL, LLC, a
California limited liability
company; WEST COAST MORTGAGE,
a business entity of unknown
form, HOMECOMING FINANCIAL,
LLC, a Delaware limited
liability company f/k/a
HOMECOMINGS FINANCIAL NETWORK,
INC.; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. a
Delaware corporation; DEUTSCHE
BANK TRUST CO. AMERICAS;
AURORA LOAN SERVICERS, LLC a
Delaware limited liability
company; CAL-WESTERN
RECONVEYANCE CORPORATION, a
California corporation;
FREDERICK WINSTON WILLIAMS II,
an individual; and DEBORAH
DIAZ, an individual,

Defendants.

_____ /

1 On June 29, 2010, plaintiff filed a Notice of Appeal to
2 the United States Court of Appeals for the Ninth Circuit (Docket
3 No. 87) from this court's Order of June 25, 2010 (Docket No. 85),
4 denying his motion for a preliminary injunction. Plaintiff now
5 moves to enjoin defendants from instituting a foreclosure sale on
6 plaintiff's property, recording any deeds or mortgages regarding
7 the property, or otherwise acting to deprive plaintiff of control
8 of his home pending appeal. (Docket No. 91.)

9 Once a notice of appeal is filed, the district court is
10 divested of jurisdiction over the matters being appealed.
11 Natural Resources Def. Council, Inc. v. Southwest Marine Inc.,
12 242 F.3d 1163, 1166 (9th Cir. 2001). However, the principle of
13 exclusive appellate jurisdiction is not absolute. Id. Rather,
14 the trial court retains the inherent power during the pendency of
15 an appeal to act to preserve the status quo to ensure the
16 effectiveness of the eventual judgment. See id.; Tribal Village
17 of Akutan, 859 F.2d 662, 663 (9th Cir. 1988).

18 Federal Rule of Civil Procedure 62(c), which allows a
19 district court to "in its discretion . . . suspend, modify,
20 restore, or grant an injunction during the pendency of the appeal
21 upon such terms as to bond or otherwise as it considers proper
22 for the security of the rights of the adverse party," codifies
23 the exception to the general rule of exclusive appellate
24 jurisdiction. Rule 62(c) "does not restore jurisdiction to the
25 district court to adjudicate anew the merits of the case"
26 McClatchy Newspapers v. Cent. Valley Typographical Union No. 46,
27 686 F.2d 731, 734 (9th Cir. 1982). In addition, pursuant to
28 Federal Rule of Appellate Procedure 8(a)(1), to obtain an

1 injunction pending appeal from the Ninth Circuit, "[a] party must
2 ordinarily move first in the district."¹

3 In deciding whether to grant an injunction pending
4 appeal, courts apply the same standard employed when considering
5 a motion for a preliminary injunction. Akutan, 859 F.2d at 663;
6 Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983); accord
7 Humane Soc. of U.S. v. Gutierrez, 558 F.3d 896, 896 (9th Cir.
8 2009). In order to obtain a preliminary injunction, the moving
9 party "must establish that he is likely to succeed on the merits,
10 that he is likely to suffer irreparable harm in the absence of
11 preliminary relief, that the balance of equities tips in his
12 favor, and that an injunction is in the public interest." Winter
13 v. NRDC, 129 S. Ct. 365, 374 (2008); Humane Soc., 558 F.3d at
14 896. As the Supreme Court has repeatedly recognized, injunctive
15 relief is "an extraordinary and drastic remedy, one that should
16 not be granted unless the movant, by a clear showing, carries the
17 burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972
18 (1997); see Winter, 129 S. Ct. at 375-76.

19 For the reasons stated the court's previous orders
20 denying plaintiff's motion for a temporary restraining order
21 (Docket No. 22) and motion for a preliminary injunction (Docket
22 No. 85), plaintiff has failed to establish either a likelihood of
23 success on the merits of his claims or that he is likely to
24 suffer irreparable harm if the court does not issue an

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26 ¹ Pursuant to Federal Rule of Appellate Procedure
27 8(a)(2), a motion for injunction pending appeal may be made to
28 the court of appeals or to one of its judges. Such a motion must
"state that, a motion having been made, the district court denied
the motion or failed to afford the relief requested." Fed. R.
App. P. 8(a)(2)(A).

1 injunction. The only claims under which plaintiff could possibly
2 nullify the pending foreclosure sale are his wrongful foreclosure
3 and quiet title claims. As explained in the court's April 7,
4 2010 and June 20, 2010 Orders, plaintiff's wrongful foreclosure
5 claim is based on the roundly rejected theory that only the
6 holder of his Note can foreclose on his property. (Docket No. 22
7 at 8-11; Docket No. 85 at 6.) Plaintiff also cannot sustain a
8 quiet title action without paying the entirety of his mortgage
9 debt. Watson v. MTC Fin., Inc., No. Civ. 2:09-01012 JAM KJM,
10 2009 WL 2151782 (E.D. Cal. Jul. 17, 2009) (quoting Shimpones v.
11 Stickney, 219 Cal. 637, 649 (1934)). Plaintiff has not specified
12 either a factual error nor any rationale for concluding that the
13 court's previous determination of his likelihood of success on
14 the merits was incorrect, and accordingly the court will not
15 stray from its previous rulings.

16 Plaintiff has also failed to make any convincing
17 showing that irreparable harm will be suffered if an injunction
18 pending appeal is not granted. Although plaintiff once again
19 invokes the maxim that losing one's home is irreparable harm, he
20 still has not shown that success on any of the causes of action
21 for which he seeks an injunction would somehow affect the
22 foreclosure of his home. (See Docket No. 85 at 3-5.)
23 Plaintiff's claims seek damages that would not be in jeopardy
24 regardless of any foreclosure sale on his property. Accordingly,
25 for the same reasons as the court found that a preliminary
26 injunction would be unnecessary and inappropriate an injunction
27 pending appeal just as unnecessary and inappropriate in light of
28 plaintiff's claims.

1 IT IS THEREFORE ORDERED that plaintiff's motion for an
2 injunction pending appeal be, and the same hereby is, DENIED.

3 DATED: July 1, 2010

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6 WILLIAM B. SHUBB
7 UNITED STATES DISTRICT JUDGE
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