

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BRIAN THIEL, No. 2:10-cv-00645-MCE-DAD

Plaintiff,

v.

MEMORANDUM AND ORDER

GMAC MORTGAGE, LLC and DOES 1 through 100, inclusive,

Defendants.

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Presently before the Court is Plaintiff's Ex Parte Application for Temporary Restraining Order and Preliminary Injunction ("Application") pursuant to Federal Rule of Civil Procedure 65(b). Plaintiff Brian Thiel seeks to enjoin Defendant GMAC Mortgage, LLC from conducting a trustee sale of his home, which is currently scheduled for April 9, 2010.

Issuance of a temporary restraining order, as a form of preliminary injunctive relief, is an extraordinary remedy, and Plaintiffs have the burden of proving the propriety of such a remedy by clear and convincing evidence.

1 See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Granny Goose
2 Foods, Inc. v. Teamsters, 415 U.S. 423, 442 (1974). Certain
3 prerequisites must be satisfied prior to issuance of a temporary
4 restraining order ("TRO"). See Granny Goose Foods, Inc. v.
5 Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 439
6 (1974) (stating that the purpose of a TRO is "preserving the
7 status quo and preventing irreparable harm just so long as is
8 necessary to hold a hearing [on the preliminary injunction
9 application], and no longer"). In general, the showing required
10 for a temporary restraining order is the same as that required
11 for a preliminary injunction. Stuhlbarg Int'l Sales Co., Inc.
12 v. John D. Brush & Co., Inc., 240 F.3d 832, 839 (9th Cir. 2001).
13 Following the Supreme Court's decision in Winter v. Natural
14 Resources Defense Council, 129 S. Ct. 365 (2008), the party
15 requesting preliminary injunctive relief must show that "he is
16 likely to succeed on the merits, that he is likely to suffer
17 irreparable harm in the absence of preliminary relief, that the
18 balance of equities tips in his favor, and that an injunction is
19 in the public interest." Stormans, Inc. v. Selecky, 586 F.3d
20 1109, 1127 (9th Cir. 2009) (quoting Winter, 129 S. Ct. at 374;
21 see also American Trucking Assocs. Inc. v. City of Los Angeles,
22 559 F.3d 1046, 1052 ("To the extent that our cases have suggested
23 a lesser standard [than that required for injunctive relief by
24 Winter], they are no longer controlling, or even viable.")).
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1 The Court has reviewed Plaintiff's Ex Parte Application for
2 Temporary Restraining Order. Plaintiff has failed to show the
3 requisite likelihood of success on the merits to warrant
4 equitable relief. Furthermore, even if his success was certain,
5 enjoining foreclosure is an improper remedy.

6 According to Plaintiff, Defendant falsely represented that
7 the loan terms of Plaintiff's home mortgage would be modified if
8 he became delinquent on his payments. Defendant then failed to
9 provide such modification when Plaintiff eventually defaulted.
10 In light of Defendant's failure to abide by their purported
11 agreement, Plaintiff believes he is entitled to injunctive relief
12 enjoining the scheduled foreclosure of his home.

13 However, Plaintiff has failed to set forth any information
14 supporting the existence of the agreement as alleged. At best,
15 Plaintiff provides that his office manager, Jessica Silva, spoke
16 to a series of Defendant's representatives who informed her that
17 Plaintiff was *eligible* for a loan modification and that such
18 modification would not be granted unless Plaintiff was in default
19 for roughly three months.

20 This is hardly tantamount to a binding obligation upon which
21 this Court may provide the extraordinary relief requested. Based
22 on the information provided, the Court is not persuaded that the
23 alleged discussion between parties was sufficient to alter the
24 written mortgage loan contract to which Plaintiff is currently
25 bound. Even assuming that the conversation Plaintiff describes
26 amounts to a valid agreement, nowhere does Plaintiff evidence the
27 terms of that agreement or in what manner it extinguished the
28 right to foreclose held by Defendant.

1 The very purpose of a TRO is to preserve the status quo,
2 which in this case is one in which Plaintiff's home was
3 contracted as security interest for the loan Defendant provided.
4 Thus, to enjoin Defendant from exercising its rights over said
5 security interest, would not preserve, but would drastically
6 alter, the status quo.

7 Moreover, an order enjoining foreclosure is simply not a
8 proper remedy for Plaintiff's claims. Plaintiff only directly
9 attacks the foreclosure proceedings by way of his argument that
10 Defendant had agreed to modify the loan. Plaintiff, however, has
11 not challenged the validity of the loan document itself. As it
12 stands, Plaintiff may still pursue payment on his mortgage as an
13 adequate remedy at law. Plaintiff has submitted no evidence or
14 authority supporting the proposition that a proper remedy for
15 failure to modify a valid loan instrument is to allow Plaintiff
16 to continue to possess a home on which he has defaulted.

17 For the reasons stated above, Plaintiff's Application for
18 Temporary Restraining Order is DENIED.

19 IT IS SO ORDERED.

20 Dated: April 5, 2010



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23 MORRISON C. ENGLAND, JR.
24 UNITED STATES DISTRICT JUDGE
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