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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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THOMAS & KAREN RYAN, NO. CIV. 2:10-2928 WBS GGH
Plaintiffs,
v. MEMORANDUM AND ORDER RE:
MOTION FOR PRELIMINARY
BAC HOME LOANS SERVICING, LP, INJUNCTION
Defendant.

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Plaintiffs Thomas and Karen Ryan filed this action, pro
se, against defendant BAC Home Loans Servicing, LP ("BAC"),
alleging federal and state law claims arising from defendant's
allegedly wrongful acts in conjunction with a mortgage on
plaintiffs' home. Plaintiffs now move for a preliminary
injunction to enjoin foreclosure of plaintiffs' home.¹

¹ Previously, in other matters, for the reasons stated in Amstadter v. Bank of America, Civ. No. 2:09-2826, 2009 WL 5206640 (E.D. Cal. Dec. 22, 2009), the undersigned judge has recused from handling cases in which any of the countless subsidiaries of the Bank of America were parties because the spouse of one of my law

1 I. Procedural and Factual Background

2 Plaintiffs filed their Complaint in this action on
3 November 1, 2010, and filed a motion for preliminary injunction
4 on the same day. (Docket Nos. 1, 3.) Upon receipt of the
5 motion, the court ordered plaintiffs to serve notice of the
6 motion on defendant by November 4, 2010, and to file proof of
7 service of the motion on defendant by November 5, 2010. (Docket
8 No. 6.) Plaintiffs have failed to do so. The briefing schedule
9 required defendant to submit a reply by November 8, 2010, and
10 plaintiffs to submit a response by November 10, 2010. (Id.)
11 Defendant, having not been served, has of course not filed
12 anything with the court.

13 "The court may issue a preliminary injunction only on
14 notice to the adverse party." Fed. R. Civ. P. 65(a)(1). Exhibit
15 1 to the Motion, entitled "Affidavit of Service," seems to be
16 insufficient as proof of notice. In the document, plaintiffs
17 state that they "served a signed copy of this Petition for TRO"
18 on defendant "by way of facsimile" on October 29, 2010, and also
19 spoke on the phone to someone named "Whitney" at defendant's
20 offices. (Original Petition & Req. for Temporary Inj. ("Mot.")
21 Ex. 1 at 1.) Given that this occurred before the instant case
22 was filed, it is unclear what the "Petition for TRO" involved.
23 Whether defendants were on notice or not is irrelevant, as the
24 court will deny the motion.

25 The facts contained in the Complaint are slim at best.

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27 clerks owns a small amount of stock in the Bank of America.
28 Because that law clerk is presently on maternity leave, and has
been so since before the Complaint in this action was filed,
there is no reason for recusal in this matter.

1 The court can discern only that plaintiffs entered into a loan
2 transaction with defendant to refinance their residence located
3 at 301 Gibson Drive, Unit 412, in Roseville, California. (Compl.
4 at 1.) The Complaint does not contain facts regarding, for
5 example, the date the loan transaction occurred, who the actual
6 parties to the loan were, whether plaintiffs have defaulted on
7 the loan, or who is attempting to foreclose on the loan.

8 Plaintiffs may or may not be describing the terms of
9 their actual loans when they explain how interest rates work by
10 stating that "[u]sing the instant case as an example, a
11 303,120.00 note at 7.7390% interest over 30 years will produce
12 \$256,097.06. . . . Using Plaintiffs [sic] 2nd Loan an example, a
13 37,890.00 note at 12.1740% interest over 30 years will produce
14 \$70,869.58." (Id. at 4-5.)

15 Plaintiffs also claim that "the entity now claiming
16 agency to represent the holder of the security instrument is not
17 the original lender." (Id. at 12.) It is unclear whether anyone
18 is actually attempting to foreclose on the property. (See id. at
19 32 (foreclosure sale set for the week of October 4, 2010); Mot.
20 Ex. 1 at 1 (no foreclosure sale scheduled); id. (foreclosure sale
21 set for December 6, 2010).)

22 Plaintiffs bring claims for breach of fiduciary duty,
23 negligence and negligence per se, fraud, breach of the implied
24 covenant of good faith and fair dealing, a violation of the Truth
25 in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f, and intentional
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1 infliction of emotional distress.²

2 II. Discussion

3 "A plaintiff seeking a preliminary injunction must
4 establish that he is likely to succeed on the merits, that he is
5 likely to suffer irreparable harm in the absence of preliminary
6 relief, that the balance of equities tips in his favor, and that
7 an injunction is in the public interest." Winter v. Natural Res.
8 Def. Council, Inc., --- U.S. ----, 129 S. Ct. 365, 374 (2008).
9 In Winter, the Court reaffirmed the traditional standard for
10 granting a preliminary injunction and rejected the Ninth
11 Circuit's variations of the standard, such as requiring only a
12 "possibility" of irreparable harm if the plaintiff shows a strong
13 likelihood of prevailing on the merits. Id. at 375. As the
14 Supreme Court has repeatedly recognized, injunctive relief is "an
15 extraordinary and drastic remedy, one that should not be granted
16 unless the movant, by a clear showing, carries the burden of
17 persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)
18 (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice
19 and Procedure § 2948, pp. 129-30 (2d ed. 1995)); see Winter, 129
20 S. Ct. at 375-76.

21 A. Likelihood of Success on the Merits

22 Plaintiffs have failed to make any factual allegations
23 that could support any claim to relief. For example, the
24 "Affidavit of Notice" attached to the motion notes that
25 "ReconTrust has a date of 12-6-10 on their website" for the

26
27 ² Plaintiffs might also be bringing a claim for
28 violations of the Real Estate Settlement Procedures Act
("RESPA"), 12 U.S.C. §§ 2601-2617, as they allege violations of
it without naming it as a claim.

1 foreclosure sale (Mot. Ex. 1 at 1), but the only defendant in the
2 case is BAC. Other than naming BAC as the defendant on the first
3 page of the Complaint, plaintiffs do not allege how BAC was
4 involved in the loan or any actionable conduct that it performed.
5 Plaintiffs' complete lack of factual allegations makes it
6 impossible to find that they have a likelihood of success on the
7 merits.

8 Furthermore, the legal bases for plaintiffs' claims are
9 flawed. The Complaint seems to boil down to the idea that
10 lenders should not allow borrowers to borrow more than they can
11 afford. (See Compl. at 13.) However, there is generally no
12 actionable duty between a lender and borrower arising out of a
13 loan transaction. "Absent 'special circumstances' a loan
14 transaction 'is at arms-length'" and no duties arise from the
15 loan transaction outside of those in the agreement. Rangel v.
16 DHI Mortg. Co., No. CV F 09-1035 LJO GSA, 2009 WL 2190210, at *3
17 (E.D. Cal. July 21, 2009) (quoting Oaks Mgmt. Corp. v. Super.
18 Ct., 145 Cal. App. 4th 453, 466 (4th Dist. 2006)). Plaintiffs
19 have not alleged any reason why defendant owes them a duty to
20 prevent them from taking out a loan they could not afford.

21 Plaintiffs also allege that the lien should not be
22 separated from the security instrument, presumably because they
23 believe production of the original note is required for non-
24 judicial foreclosure. (See Compl. at 14.) However, "under
25 California law there is no requirement for the production of the
26 original note to initiate a non-judicial foreclosure." Foster v.
27 SCME Mortg. Bankers, Inc., No. CIV 2:10-518 WBS GGH, 2010 WL
28 1408108, at *5 (collecting cases).

1 Finally, plaintiffs allege that defendant charged fees
2 in violation of the Real Estate Settlement Procedures Act
3 ("RESPA") when the loan transaction occurred and that plaintiffs
4 are "unable to determine whether or not the . . . fees are valid
5" (Compl. at 15-16.) Plaintiff alleges the following
6 RESPA violations:

7 Good Faith Estimate not within limits, No HUD-1 Booklet,
8 Truth in Lending Statement not within limits compared to
9 Note, Truth in Lending Statement not timely presented,
10 HUD-1 not presented at least one day before closing, No
11 Holder Rule Notice in Note, No 1st Payment Letter. The
12 closing documents included no signed and dated: Financial
13 Privacy Act Disclosure; Equal Credit Reporting Act
14 Disclosure; notice of right to receive appraisal report;
15 servicing disclosure statement; borrower's Certification
16 of Authorization; notice of credit score; RESPA servicing
17 disclosure letter; loan discount fee disclosure; business
18 insurance company arrangement disclosure; notice of right
19 to rescind.

20 (Id. at 17.) This allegedly shows that "lender intended to
21 defraud borrower in the amount of \$1,364,168.13." (Id. at 18.)
22 However, even if these RESPA claims have merit, they have no
23 relation to the impending foreclosure sale. See 12 U.S.C. § 2605
24 (remedy for RESPA violation is monetary damages and costs, not
25 injunctive relief).

26 By failing to allege any of the relevant facts that
27 could justify relief and by relying on inadequate legal theories,
28 plaintiffs have completely failed to demonstrate a likelihood of
success on the merits.

29 B. Irreparable Harm

30 Plaintiffs argue that they will suffer irreparable harm
31 absent the issuance of a preliminary injunction because
32 "Plaintiffs will suffer the complete loss of the property."
33

1 (Mot. at 31.) "Clearly, loss of a home is a serious injury."
2 Alcaraz v. Wachovia Mortg. FSB, 592 F. Supp. 2d 1296, 1301 (E.D.
3 Cal. 2009). "However, whether a particular foreclosure
4 constitutes irreparable harm turns in part on the reasons for
5 foreclosure." Mandriques v. World Sav., Inc., No. C 07-4497,
6 2009 WL 160213, at *3 (N.D. Cal. 2009) (citing Parker v. U.S.
7 Dep't of Agric., 879 F.2d 1362, 1367-68 (6th Cir. 1989));
8 see Alcaraz, 2009 WL 30297, at *4 (denying motion for preliminary
9 injunction because "the record suggests that Ms. Alcaraz sought a
10 loan beyond her financial means and expectation of job loss[,].
11 . . [and the] resulting harm does not alone entitle her to
12 injunctive relief"). Here, plaintiffs have not provided any
13 explanation as to why they are in their present predicament.
14 Since plaintiffs have not shown that the irreparable harm they
15 will allegedly experience is caused by defendant, this factor
16 does not favor granting plaintiffs' motion.

17 C. The Balance of Equities and the Public Interest

18 Plaintiffs argue the balance of equities favors
19 granting a preliminary injunction because "if plaintiffs are
20 forced to vacate the property, the property will sit empty for
21 the duration of the action. Plaintiffs will suffer loss of the
22 use of said property and will loose [sic] opportunity to maintain
23 same" (Mot. at 32.) While "the potential loss of [a]
24 Plaintiff's home through foreclosure generally presents a
25 hardship that weighs in his favor," Saba v. Caplan, No. C 10-
26 02113, 2010 WL 2681987, at *5 (N.D. Cal. July 6, 2010), since
27 plaintiffs have not shown they did not create the hardship they
28 are experiencing, this factor does not weigh in their favor.

1 Finally, plaintiffs argue that "there are already a
2 great number of empty houses with the current residential
3 foreclosure mess." (Mot. at 32.) The court will not enjoin one
4 foreclosure sale simply because the "foreclosure mess" has
5 resulted in empty houses. Plaintiffs have failed to explain what
6 "critical public interest," Indep. Living Ctr. of S. Cal. v.
7 Maxwell-Jolly, 572 F.3d 644, 659 (9th Cir. 2009), favors
8 enjoining a foreclosure that plaintiffs have not alleged to be
9 illegal. This factor does not weigh in plaintiffs' favor.

10 IT IS THEREFORE ORDERED that plaintiff's motion for a
11 preliminary injunction be, and the same hereby is, DENIED.

12 DATE: November 12, 2010

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15 WILLIAM B. SHUBB
16 UNITED STATES DISTRICT JUDGE
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