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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RITA JERVISS, et al.,
Plaintiffs,
v.
SELECT PORTFOLIO SERVICING,
INC. et al.,
Defendants.

No. 2:15-cv-01904-MCE-KJN

ORDER

Through this action, Rita and Vince Jerviss (“Plaintiffs”) seek to enjoin Select Portfolio Servicing, Inc. (“SPS”) and National Default Servicing Corporation (collectively, “Defendants”) from conducting an allegedly “dual tracked” trustee’s sale of their home in violation of the California Homeowner’s Bill of Rights. Presently before the Court is Plaintiffs’ Motion for a Temporary Restraining Order (“Motion”) filed on September 29, 2015. ECF No. 12. On October 1, 2015, Defendants filed an opposition to Plaintiffs’ Application. (ECF No. 14). For the reasons that follow, Plaintiffs’ Application is GRANTED.

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BACKGROUND¹

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3 Plaintiffs' home is located at 193 Glacier Circle, Vacaville, California, 95687
4 ("Subject Property"). Their mortgage loan boarded for servicing with SPS on October 1,
5 2008. ECF No. 14 at 2. Although SPS had already previously modified their loan,
6 Plaintiffs found themselves in arrears on their mortgage payments in 2013 and began
7 applying for a second loan modification. The application process took nearly two years
8 as SPS repeatedly requested additional documents before it would declare Plaintiffs'
9 application complete.²

10 On March 26, 2015, Defendants recorded a Notice of Trustee's Sale on the
11 Subject Property, scheduling a sale date of April 16, 2015. For reasons unapparent from
12 the record, Defendants postponed the Trustee's Sale, and acknowledged that Plaintiffs'
13 application was complete on April 29. By letter dated May 14, 2015, Defendant SPS
14 denied Plaintiffs' application. Plaintiffs timely appealed the denial by letter dated June 8,
15 2015. On July 15, 2015, Defendant SPS denied Plaintiffs' appeal. ECF No. 14-1 at 52.
16 Defendants then rescheduled the Trustee's Sale for August 17, 2015.

17 On August 12, 2015, Plaintiffs filed a complaint in Sacramento County Superior
18 Court, alleging five causes of action against Defendants for negligence and for violations
19 of Civil Code sections 2923.6(c), 2923.6(e), 2923.7, and 2924.10. The Superior Court
20 issued a Temporary Restraining Order ("TRO") on August 14 enjoining Defendants "from
21 conducting or carrying to completion any Trustee's Sale of the Subject Property" and
22 scheduled the Motion for Preliminary Injunction to be heard on September 22. On
23 August 16, Defendants rescheduled another Trustee's Sale of the Subject Property for
24 October 2, 2015. However, the day Defendants' opposition to the Motion for Preliminary
25 Injunction was due in Superior Court, Defendants instead removed the case to this

26 ¹ Unless otherwise noted, the following facts are taken from Plaintiffs' Motion for a Temporary
27 Restraining Order ("Motion") and supporting evidence. ECF No. 12.

28 ² The factual issue at the heart of this dispute is when Defendant SPS received a complete loan
application from Plaintiffs. That dispute is discussed more fully below.

1 Court. The previously issued TRO expired, and Plaintiffs filed a new application for
2 temporary relief here.

3 4 **STANDARD**

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6 The purpose of a temporary restraining order is to preserve the status quo
7 pending the complete briefing and thorough consideration contemplated by full
8 proceedings pursuant to a preliminary injunction. See *Granny Goose Foods, Inc. v.*
9 *Teamsters*, 415 U.S. 423, 438-39 (1974) (temporary restraining orders “should be
10 restricted to serving their underlying purpose of preserving the status quo and preventing
11 irreparable harm just so long as is necessary to hold a hearing, and no longer”); see also
12 *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006); *Dunn v.*
13 *Cate*, No. CIV 08-873-NVW, 2010 WL 1558562, at *1 (E.D. Cal. April 19, 2010).

14 Issuance of a temporary restraining order, as a form of preliminary injunctive
15 relief, is an extraordinary remedy, and Plaintiffs have the burden of proving the propriety
16 of such a remedy. See *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). In general,
17 the showing required for a temporary restraining order and a preliminary injunction are
18 the same. *Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839
19 n.7 (9th Cir. 2001).

20 The party requesting preliminary injunctive relief must show that “he is likely to
21 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
22 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
23 the public interest.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20
24 (2008); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter*).
25 The propriety of a TRO hinges on a significant threat of irreparable injury that must be
26 imminent in nature. *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 674 (9th
27 Cir. 1988).

28 Alternatively, under the so-called sliding scale approach, as long as the Plaintiffs

1 demonstrate the requisite likelihood of irreparable harm and show that an injunction is in
2 the public interest, a preliminary injunction can still issue so long as serious questions
3 going to the merits are raised and the balance of hardships tips sharply in Plaintiffs'
4 favor. Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-36 (9th Cir. 2011)
5 (concluding that the "serious questions" version of the sliding scale test for preliminary
6 injunctions remains viable after Winter).

8 ANALYSIS

10 A. Irreparable Harm

11 Plaintiffs have easily established that they will be irreparably harmed if
12 Defendants proceed with a Trustee's Sale on October 2, 2015. Plaintiffs aver that if
13 Defendants proceed with the Trustee's Sale, they will be forced to move out of their
14 home and that they have no other place to go. ECF No. 12 at 16, ¶ 11. Defendants
15 offer no evidence to the contrary. "The loss of one's home through foreclosure generally
16 is considered sufficient to establish irreparable harm." Tamburri v. Suntrust Mortg., Inc.,
17 2011 WL 2654093 at *2 (N.D. Cal. 2011). Accordingly, Plaintiffs have established the
18 requisite likelihood of imminent irreparable harm necessary to support the issuance of a
19 TRO.

20 B. Balance of the Equities and Public Interest

21 The balance of the equities here tips sharply in Plaintiffs' favor. If Defendants are
22 permitted to proceed with the Trustee's Sale scheduled for October 2, Plaintiffs will be
23 homeless. ECF No. 12 at 16, ¶ 11. For their part, Defendants do not identify any
24 hardship if a TRO issues enjoining the Trustee's Sale. The Court struggles to find any
25 possibility of serious hardship to Defendants given the fact that the security they have in
26 the Subject Property still remains if the Court preserves the status quo. Defendants may
27 lose some money in the short term, but this is nothing compared to the likelihood that
28 Plaintiffs will forever lose their home if the Trustee's Sale proceeds as scheduled. See

1 Naderski v. Wells Fargo Bank, N.A., 2011 WL 1627161 at *2 (C.D. Cal. 2011) (finding
2 that balance of hardships favored plaintiff because if the sale was not enjoined plaintiff
3 “is likely to forever lose his home, whereas defendants will only experience a temporary
4 delay in earning income from their investment.”).

5 The public interest factor favors Plaintiffs as well. “Numerous courts have
6 indicated that it is in the public interest to allow homeowners an opportunity to pursue
7 what appear to be valid claims before being displaced from their homes.” Tamburri,
8 2011 WL 2654093 at *5 (internal quotation omitted). Defendants make no argument to
9 the contrary in their opposition papers. Accordingly, Plaintiffs need only show that there
10 are “serious questions going to the merits” in order to obtain the relief they seek. See
11 Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-36 (9th Cir. 2011).

12 **C. Serious Questions Going to the Merits**

13 Plaintiffs have three causes of action that provide a basis for injunctive relief here
14 (Plaintiffs Second, Third, and Fifth Causes of Action). For the reasons that follow, the
15 Court finds that Plaintiffs have shown serious questions going to the merits as to their
16 Second and Fifth Causes of Action.³

17 Plaintiffs’ second cause of action is for violation of Civil Code section 2923.6(c),
18 which provides:

19 If a borrower submits a complete application for a first lien
20 loan modification offered by, or through, the borrower’s
21 mortgage servicer, a mortgage servicer, mortgagee, trustee,
22 beneficiary, or authorized agent shall not record a notice of
23 default or notice of sale, or conduct a trustee’s sale, while the
24 complete first lien modification application is pending.

25 Plaintiffs’ Fifth Cause of Action arises under Civil Code section 2924.10, which in
26 turn requires:

27 ³ Plaintiffs have not shown serious questions going to the merits regarding their Third Cause of
28 Action for violation of Civil Code §2923.6(e). Section 2923.6(e) provides that under the circumstances
here, a notice of default or notice of sale may not be recorded, or a trustee’s sale conducted until 15 days
after the denial of the borrower’s appeal. In their moving papers, Plaintiffs contend they never received a
response to their appeal. However, Defendants provided the Court with a copy of a July 15, 2015, denial
letter. ECF No. 14-1 at 52. Accordingly, section 2923.6(e) apparently did not bar Defendants from
proceeding with the foreclosure.

1 (a) When a borrower submits a complete first lien
2 modification application or any document in connection with a
3 first lien modification application, the mortgage servicer shall
4 provide written acknowledgment of the receipt of the
5 documentation within five business days of receipt.

6 The crux of the dispute between Plaintiffs and Defendants as to both of these
7 causes of action hinges on when their loan modification application became “complete.”
8 Plaintiffs aver that after nearly two years of submitting documents, their application was
9 complete by the end of February 2015, and that Defendant SPS must have received it
10 no later than the first week of March 2015. ECF No. 12 at 5. Defendant SPS did not
11 deny the application until May 14, 2015. *Id.* at 29. Thus, according to Plaintiffs,
12 Defendants’ decision to record a Notice of Trustee’s Sale on the Subject Property on
13 March 26, 2016, violated Civil Code section 2923.6(c).

14 Defendants argue that Plaintiffs’ Loan file shows that although Plaintiffs’ submitted
15 documents to SPS on March 9 and March 23, their submissions remained incomplete
16 until at least late April when Defendant SPS acknowledged that their application was
17 complete. ECF No. 14-1 at 3, ¶ 10; ECF No. 12 at 26.

18 Curiously, although Defendants have submitted five different documents from
19 Plaintiffs’ Loan File to support other arguments in their Opposition, they provide no
20 documentation to corroborate their assertion that Plaintiffs’ application was incomplete
21 as of March 23, 2015. Defendants could have easily put this issue to bed by
22 documenting the incompleteness of Plaintiffs’ application with correspondence from their
23 Loan File. Because Defendants were unable to do so, the Court infers that the evidence
24 from the Loan File, if any, is adverse to Defendants. See e.g. Interstate Circuit v. U.S.,
25 306 U.S. 208, 226 (1939) (“The production of weak evidence when strong is available
26 can lead only to the conclusion that the strong would have been adverse. Silence then
27 becomes evidence of the most convincing character.” (citations omitted)). Plaintiffs have
28 therefore established serious questions going to the merits of their Second and Fifth
Causes of Action. Accordingly, Plaintiffs’ application is GRANTED.


1 **CONCLUSION**

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3 For the reasons stated above, Plaintiffs' Motion is GRANTED. Defendants are
4 enjoined from performing any act in furtherance of holding a Trustee's Sale of the
5 Subject Property while this TRO remains in effect.

6 This TRO will expire on October 9, 2015 at 10:00 AM, when the Court will hold a
7 hearing to consider whether Plaintiffs are entitled to a preliminary injunction. The Court
8 will treat Plaintiffs' Motion for a Temporary Restraining Order as Plaintiffs' Motion for a
9 Preliminary Injunction for the purposes of the October 9 hearing. Plaintiffs are directed
10 to file any supplemental briefing they wish the Court to consider no later than October 6.
11 Defendants are directed to file any supplemental opposition they wish the Court to
12 consider no later than October 7. In preparing supplemental briefing, the parties shall
13 review and comply with Local Rule 230(d).

14 IT IS SO ORDERED.

15 Dated: October 5, 2015

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18 MORRISON C. ENGLAND, JR., CHIEF JUDGE
19 UNITED STATES DISTRICT COURT
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