

United States District Court
For the Northern District of California

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E-Filed 07/09/2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JASON RIVERA, an individual; and
MIKALA RIVERA, an individual,

CASE NO. C 10-02439 RS

Plaintiffs,

**ORDER DENYING PRELIMINARY
INJUNCTION**

v.

BAC HOME LOANS SERVICING, L.P., et
al.,

Defendants.

_____ /

1 I. INTRODUCTION

2 Plaintiffs Jason and Mikala Rivera filed their Complaint on June 2, 2010 alleging thirteen
3 causes of action, including violations of the Real Estate Settlement Procedures Act, 12 U.S.C. §
4 2605 *et seq* (“RESPA”), the Truth in Lending Act, 15 U.S.C. § 1601 *et seq* (“TILA”) and its
5 implementing regulations, 12 C.F.R. § 226 *et seq* (“Regulation Z”), and a number of state law
6 claims. On June 4, 2010, plaintiffs filed an emergency motion for a temporary restraining order
7 (“TRO”) enjoining defendants ReconTrust Company, N.A. (“ReconsTrust”) and BAC Home Loans
8 Servicing, LP (“BAC”) from conducting a trustee’s sale of plaintiff’s property at 153 Smith Street,
9 Alamo, California, 94507 (the “Property”). Plaintiffs represented that the trustee’s sale was
10 scheduled to take place on June 9, 2010 at 11:00 a.m. This Court issued the TRO along with an
11 order to show cause why a preliminary injunction should not be granted. That motion came on for
12 hearing on June 17, 2010.

13 II. BACKGROUND

14 The Riveras explain that, on August 18, 2006, they purchased the Property after negotiating
15 a mortgage and home equity line of credit (“HELOC”) with defendant Countrywide Bank, N.A.
16 (“Countrywide Bank”), whose successor in interest is defendant Bank of America, N.A. (“BofA”).
17 The mortgage and HELOC (together, the “Home Loans”), which were secured by a deed of trust
18 (“Deed of Trust”), were brokered by Countrywide Home Loans, Inc. (“CHL”), which was
19 subsequently assigned by Countrywide Bank to BofA. ReconTrust was the initial trustee on the
20 Deed of Trust. The promissory note executed pursuant to the Home Loans, as well as the Deed of
21 Trust, was serviced by defendants Aqura Loan Services, Merscorp, Inc., and BAC.

22 According to the complaint, during the application process, CHL misrepresented the
23 Riveras’ income and provided falsified income documentation to Countrywide Bank in order to
24 secure a mortgage and HELOC for which the plaintiffs would not have otherwise qualified. The
25 complaint also alleges that Countrywide Bank failed to provide a number of material disclosures
26 regarding, among others, the applicable interest rate, closing costs, and right to cancel under the
27 Home Loans.

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1 Indeed, the Supreme Court in *Winter* rejected just such a “sliding scale” approach to the preliminary
2 injunction standard. In so doing, Court reversed the Ninth Circuit’s adoption of a balancing
3 approach where “the required showing of irreparable harm varies inversely with the probability of
4 success,” *LGS Architects, Inc. v. Concordia Homes*, 424 F.3d 1150, 1155 (9th Cir. 2005), and flatly
5 rejected at least one half of the conceptual continuum, insisting instead that a plaintiff must *always*
6 show a likelihood of irreparable harm. *Winter*, 129 S. Ct. at 374. Indeed, the Ninth Circuit has
7 since acknowledged that *Winter* rejected its earlier preliminary injunction standard as “too lenient.”
8 *See American Trucking Association v. City of Los Angeles* 559 F.3d 1046, 1052 (9th Cir. 2009). In
9 *American Trucking*, the Court went on to recite *Winter*’s standard and insisted that, “[t]o the extent
10 that our cases have suggested a lesser standard, they are no longer controlling, or even viable.” *Id.*
11 Here, plaintiffs have failed to show a substantial likelihood of success on the merits as to any of the
12 thirteen claims for relief.

13 IV. DISCUSSION

14 A. TILA

15 Plaintiffs contend that they are entitled to rescind the Home Loans under TILA, which grants
16 borrowers the right to rescind within three days after executing a consumer credit transaction. 15
17 U.S.C. § 1635(a). Section 1635(f) imposes a three year time limit for rescission where a creditor
18 fails to disclose that right to rescind. 15 U.S.C § 1635(f); 12 C.F.R. § 226.23(a)(3). Here, plaintiffs
19 purchased the property on August 18, 2006, but did not bring these TILA claims until June 2010,
20 nearly four years later. Although TILA does recognize the principal of equitable tolling under
21 certain circumstances, that principal will not save the Riveras’ TILA claim as the Ninth Circuit has
22 observed: “Congress placed a three year absolute limit on rescission actions, demonstrating its
23 willingness to put a limit on the scope of some types of TILA actions.” *King v. California*, 784 F.2d
24 910, 914 (9th Cir. 1986). “At least in the rescission context,” the Circuit reasoned, “Congress did
25 not intend to prolong the limitations period.” *Id.* Additionally, whether or not a statute of
26 limitations should be equitably tolled is a factual determination that “focuses on whether there was
27 excusable delay by the plaintiff and may be applied if, *despite all due diligence*, a plaintiff is unable
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1 to obtain vital information bearing on the existence of his claim.” *Huseman v. Icicle Seafoods, Inc.*,
2 471 F.3d 1116, 1120 (9th Cir.2006) (quotations and citations omitted) (emphasis in original). Even
3 if plaintiffs were legally entitled to equitable tolling of their claims, they have not alleged any facts
4 in the Complaint that would warrant tolling the statute of limitations here.

5 Moreover, the right to rescind does not apply to residential mortgage transactions. 15 U.S.C.
6 § 1635(e); 12 C.F.R. § 226.23(f). A “residential mortgage transaction” consists of “a transaction in
7 which a mortgage, deed of trust... or equivalent consensual security interest is created or retained
8 against the consumer’s dwelling to finance the acquisition... of such dwelling.” 15 U.S.C. §
9 1602(w); 12 C.F.R. § 226.2(a)(24). Plaintiffs rely upon *Semar v. Platte Valley Fed. Sav. & Loan*
10 *Assoc.* for the proposition that borrowers have three days to rescind consumer credit transactions
11 where the borrower’s principal dwelling is the security interest. 791 F.2d 699, 701 (9th Cir. 1986).
12 That case is distinguishable from the facts here, though, because it involved homeowners who took
13 out a long-term loan to pay off a one-year second trust deed loan on their house. *Id.* Here, there is
14 no allegation that either the HELOC or the mortgage was a consumer credit transaction executed for
15 any purpose other than for acquiring the Property. Indeed, both the Complaint and the
16 Memorandum in Support of Ex Parte Application maintain that the Riveras executed the mortgage
17 and HELOC at the same time precisely in order to purchase the Property. Compl. at ¶¶ 12, 16; Doc.
18 No. 8 at 1. In other words, the mortgage and the HELOC, together constituting the Home Loans,
19 are residential mortgage transactions exempt from the right to rescind, and plaintiffs’ TILA claims
20 therefore cannot halt foreclosure.

21
22 **B. California Rosenthal Act**

23 California’s Rosenthal Fair Debt Collectors Practice Act prohibits “debt collectors from
24 engaging in unfair or deceptive acts or practices in the collection of consumer debts.” Cal. Civ.
25 Code § 1788.1(b). Under the statute, a “debt collector” is “any person who, in the ordinary course
26 of business, regularly, on behalf of himself or herself or others, engages in debt collection.” Cal.
27 Civ. Code § 1788.2(c). Denial of a restraining order is appropriate when a plaintiff fails to allege
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1 that a defendant is a debt collector as defined under the statute. *See Ines v. Countrywide Home*
2 *Loans, Inc.*, No. 08cv1267 WQH (NLS), 2008 WL 2795875, *2 (S.D. Cal. Jul 18, 2008); *Izenberg v.*
3 *ETS Servs.*, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008) (“[t]he [Rosenthal Act] applies only to
4 debt collectors”). Moreover, courts have regularly held that mortgage servicing companies and
5 mortgage lenders are not debt collectors under the statute. *See Caballer v. Ocwen Loan Serv.*, 2009
6 WL 1528128, *1 (N.D. Cal. 2008) (“creditors, mortgagors and mortgage service companies are not
7 ‘debt collectors’ and are exempt from liability”); *Ines*, 2008 WL 2795875, *3.

8 Here, although the Complaint states that “Plaintiffs allege that Defendants are debt
9 collectors,” none of the evidence submitted suggests that this is the case. Indeed, other than this
10 single reference to the defendants as “debt collectors,” elsewhere in the Complaint plaintiffs refer to
11 Countrywide Bank as the “loan originator,” CHL as the “loan broker,” ReconTrust as the “trustee”
12 and BAC as the servicer of the promissory notes and Deed of Trust. Compl. at ¶¶ 14, 34, 38.
13 Moreover, nowhere in the Complaint or in plaintiffs’ Memorandum in Support of Ex Parte
14 Application is there an allegation that the defendants engaged in any debt collection activity other
15 than the foreclosure of the Property, which is not a debt collector’s act under California Civil Code
16 section 1788.2(c). *See Izenberg*, 589 F. Supp. 2d at 1199 (“foreclosure does not constitute debt
17 collection under the [Rosenthal Act]”). Because the defendants are not “debt collectors” under
18 California law, plaintiffs’ Rosenthal Act claim lacks a substantial likelihood of success.
19 Accordingly, the Riveras’ request for preliminary injunctive relief is simply not viable under their
20 second claim for relief.

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22 C. RESPA

23 Plaintiffs’ third claim for relief alleges a violation of 12 U.S.C. sections 2605(e) and 2608.
24 RESPA claims under sections 2608 and 2605 are subject to a one-year statute of limitations and a
25 three-year statute of repose, respectively. 12 U.S.C. § 2614. Because more than three years passed
26 between the execution of the loans and the filing date, and because plaintiffs have not alleged any
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1 facts in the Complaint that would warrant tolling the statute of limitations, plaintiffs' claims for
2 damages under RESPA are time barred.¹ See *Huseman*, 471 F.3d at 1120.

3 Moreover, both 12 U.S.C. section 2506 and 2608 outline the remedies available to a private
4 citizen. Section 2605 provides that individuals damaged by a RESPA violation are entitled to
5 receive actual damages, as well as any additional damages the court may allow "in the case of a
6 pattern or practice of noncompliance with the requirements of this section, in an amount not to
7 exceed \$1,000." 12 U.S.C. § 2605(f)(1)(A) & (B). Section 2605 also allows prevailing plaintiffs to
8 recover attorney's fees and costs. 12 U.S.C. §§ 2605(f)(3). Similarly, section 2608 provides for
9 damages "equal to three times all charges made for such title insurance." 12 U.S.C. § 2608(b).
10 None of these remedies, however, would permit a permanent injunction against foreclosure.

11 The standard for a preliminary injunction is functionally the same as for a permanent
12 injunction; the only difference is that the plaintiff must show a likelihood of success, as opposed to
13 actual success, on the merits. It follows, therefore, that a party may not obtain *preliminary*
14 injunctive relief where he or she could not obtain *permanent* injunctive relief. *Amoco Prod. Co. v.*
15 *Village of Gambell*, 480 U.S. 531, 546 n.12 (1987); see also, *Chung v. NBGI, Inc.*, No. 09-04878,
16 2010 WL 841297 at *3 (N.D. Cal. Mar. 10, 2010) ("the question before the Court is not whether
17 plaintiff is likely to succeed in proving that defendants violated these statutes, but whether she is
18 likely to succeed on her claim for injunctive relief as a remedy for any such violation"). In this
19 instance, even if plaintiffs had included facts which suggest that their RESPA claims were timely
20 (which they have not), the proper remedy would be drawn from statutory damages, fees and costs.
21 Plaintiffs, therefore, have failed to show substantial likelihood of a successful permanent injunction
22 on the merits, so their RESPA claims cannot stop foreclosure.²

23 ¹ The Complaint alleges that the defendants failed to provide a proper written explanation or
24 response to plaintiffs' "Qualified Written Request." Compl. at ¶ 62. However, it makes no
25 averments as to when that Qualified Written Request was sent, nor is a copy of the Qualified
Written Request attached to the Complaint or included with any of the other filings.

26 ² A similar issue arises as to the claims for relief for violation of the Rosenthal Act, California
27 Business and Professions Code section 17200 *et. seq.*, breach of fiduciary duty, breach of contract,
28 breach of implied covenant of good faith and fair dealing, predatory lending, negligence, usury,
accounting and quiet title, for which it is unclear whether a proper remedy would permit plaintiffs'
to stop foreclosure. Because other bases exist to deny a preliminary injunction premised on these
claims for relief, however, the Court does not reach that issue.

1 D. Misrepresentation

2 The Riveras’ fourth claim for relief for fraud alleges that the defendants inflated plaintiffs’
3 income on their loan application. Compl. at ¶ 69. Under California Code of Civil Procedure section
4 338(d), “[a]n action for relief on the ground of fraud or mistake” must be brought within three years
5 after the party discovers the fraud. Cal. Civ. Proc. Code § 338. Additionally, a party alleging fraud
6 has a duty to exercise diligence in discovering the fraud, such that the three years begins to run
7 when that party “has the opportunity to obtain knowledge from sources open to his investigation.”
8 *Lee v. Escrow Consultants, Inc.*, 210 Cal. App. 3d 915, 921 (1989).

9 Here, the Riveras signed the loan documents on August 18, 2006, but did not file suit until
10 June 2, 2010, almost four years later. There were no averments made, or evidence presented in the
11 filings or at the oral argument, suggesting that plaintiffs lacked access to the loan documents for
12 those four years. Certainly, then, the plaintiffs had “the opportunity to obtain knowledge from
13 sources open to [their] investigation.” In other words, the Riveras’ claim for fraud is time-barred,
14 and is therefore not substantially likely to succeed on its merits.

15 E. Breach of Fiduciary Duty and Negligence

16 The Riveras’ fifth and tenth claims for relief for breach of fiduciary duty and negligence,
17 respectively, are based on the proposition that the defendants “owed a fiduciary duty to the
18 Plaintiffs’ to act primarily for their benefit, to act with proper skill and diligence, and not to make a
19 personal profit from the agency at the expense of their principal, the Plaintiffs.” Compl. at ¶ 79. It
20 is settled California law, however, that “[t]he relationship between a lending institution and its
21 borrower-client is not fiduciary in nature.” *Nymark v. Heart Fed. Savings and Loan Ass’n*, 231 Cal.
22 App. 3d 1089, 1093, fn. 1 (1991); *see also, Oaks Management Corp. v. Superior Court*, 145 Cal.
23 App. 4th 453, 466 (2006) (“a loan transaction is at arms-length and there is no fiduciary relationship
24 between the borrower and lender”). Moreover, California courts have routinely found that, under a
25 standard borrower/lender relationship, a lender has no duty to disclose to a borrower what the
26 borrower may or may not be able to afford. *See Wagner v. Benson*, 101 Cal. App. 3d 27, 34-35
27 (1980).

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1 Here, plaintiffs have made no averments, nor provided any evidence, to suggest that the
2 relationship between the defendants and the Riveras is anything more than a routine relationship
3 between a lender and borrower. The only agreements alleged in the Complaint are the Home Loans
4 themselves; there are no averments that these agreements created anything more than an obligation
5 by CHL to fund a loan, and an obligation by the Riveras to repay that loan. Therefore, by failing to
6 establish a fiduciary duty owed by defendants, plaintiffs have not met their burden as to likelihood
7 of success on the merits on a claim for relief based upon breach of a fiduciary duty or negligence.

8 F. Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing

9 Plaintiffs' claims for relief allege breach of contract (sixth) and breach of the implied
10 covenant of good faith and fair dealing (seventh). Compl. at ¶¶ 84-97. Under California law, the
11 elements of breach of contract claim are: "(1) the contract, (2) plaintiff's performance or excuse for
12 nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom." *Wall Street*
13 *Network, Ltd. v. New York Times Co.*, 164 Cal. App. 4th 1171, 1179 (2008) (citations omitted).
14 Similarly, the implied covenant of good faith is generally grounded in contract, not in tort law.
15 Section 205 of the Restatement of Contracts states that, "[e]very contract imposes upon each party a
16 duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second)
17 of Contracts § 205 (2009). Indeed, the implied covenant of good faith is intended to ensure
18 compliance with the agreed terms of a contract. *See April Enterprises, Inc. v. KTTV*, 147 Cal. App.
19 3d 805, 816 (1983) ("it is implied in law that a party to a contract will not do anything which would
20 deprive the other party of the benefits of the contract").

21 The basis for plaintiffs' contract claims is that the defendants "promised to provide Plaintiffs
22 with an affordable loan." Compl. at ¶ 85. Nothing in the Complaint, or in any of the evidence
23 presented to the Court, however, suggests that such an agreement existed. Again, the only contracts
24 in evidence are the Home Loan documents, which simply create a lender/borrower relationship but
25 do not, at least as alleged in the Complaint, require the defendants to provide the Riveras with an
26 affordable loan. *See, e.g., Nymark*, 231 Cal. App. 3d at 1093, fn. 1; *Wagner*, 101 Cal. App. 3d at
27 34-35; *Oaks Management Corp.*, 145 Cal. App. 4th at 466 (a lender has no duty to disclose to a
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1 borrower what the borrower may or may not be able to afford). Absent any applicable contractual
2 relationship, then, plaintiffs cannot meet their burden of establishing a substantial likelihood of
3 success on the merits as to a breach of contract or breach of covenant of good faith claim.

4 G. Predatory Lending

5 The eighth claim for relief is for predatory lending in violation of California Financial Code
6 section 4970 *et. seq.* Section 4970 only applies, however, when the loan is a “covered loan” as
7 defined in the statute. *Wolski v. Fremont Investment & Loan*, 127 Cal. App. 4th 347, 351 (2005).
8 Whether or not a loan is covered depends on the size of the loan and “[t]he total points and fees
9 payable by the consumer.” Cal. Fin. Code § 4970(b). Because plaintiffs fail to make any averments
10 as to the specific terms of the loan, they cannot establish that it is a covered loan. Therefore, they
11 fall short of establishing a likelihood of success on the merits as to this claim for relief.

12 H. UCL

13 The Riveras aver in their ninth claim for relief that defendants engaged in unfair or
14 unlawful business practices in violation of California’s Unfair Competition Law (“UCL”).
15 Cal. Bus. & Prof. Code § 17200 (prohibiting “unlawful, unfair or fraudulent” business
16 practices). They argue broadly that the defendants’ acts constitute unfair or unlawful
17 business practices “within the meaning” of the Code but do not actually differentiate
18 between the defendants or pin their allegations to a particular prong of the UCL’s prohibition
19 against “unfair, unlawful or fraudulent” business practices.

20 Under the “unlawful” prong, the UCL incorporates other laws and treats violations of
21 those laws as unlawful business practices independently actionable under state law.
22 *Chabner v. United Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of
23 almost any federal, state, or local law may serve as the basis for a UCL claim. *Saunders v.*
24 *Superior Ct.*, 27 Cal. App. 4th 832, 838-39 (1994). Where a plaintiff cannot state a claim
25 under the “borrowed” law, however, he or she cannot state a UCL claim either. *See, e.g.,*
26 *Ingels v. Westwood One Broadcasting Servs., Inc.*, 129 Cal. App. 4th 1050, 1060 (Cal. Ct.

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1 App. 2005) (“[a] defendant cannot be liable under [section] 17200 for committing unlawful
2 business practices without having violated another law”) (citation omitted).

3 Under a “fraud” theory, a plaintiff must show that “members of the public are likely
4 to be ‘deceived’” by the defendant’s practices. *In re Tobacco II Cases*, 46 Cal. 4th 298, 312
5 (2009) (citing *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 951 (2002)). Where a plaintiff alleges that
6 the defendant failed to disclose material facts, he or she must first establish that the
7 defendant had a duty to disclose those facts. *See Berryman v. Merit Prop. Mgmt., Inc.*, 152
8 Cal. App. 4th 1544, 1557 (2007) (“Absent a duty to disclose, the failure to do so does not
9 support a claim under the fraudulent prong of the UCL.”).

10 As to UCL’s “unfair” prong, California courts traditionally have applied a balancing
11 test. Under this test, “the determination of whether a particular business practice is unfair
12 necessarily involves an examination of its impact on its alleged victim, balanced against the
13 reasons, justifications and motives of the alleged wrongdoer.” *Motors, Inc. v. Times Mirror*
14 *Co.*, 102 Cal. App. 3d 735, 740 (1980); *see also People v. Casa Blanca Convalescent Homes*
15 *Inc.*, 159 Cal. App. 3d 509, 530 (1984) (stating that a practice in California is unfair “when it
16 offends an established public policy or when the practice is immoral, unethical, oppressive,
17 unscrupulous or substantially injurious to consumers.”). In *Cel-Tech Communications, Inc.*
18 *v. Los Angeles Cellular Telephone Co.*, however, the California Supreme Court rejected that
19 test and instead held that in a claim brought by a competitor, “any finding of unfairness . . .
20 [must] be tethered to some legislatively declared policy.” 20 Cal. 4th 163, 185 (1999). The
21 Ninth Circuit has observed that these two options—to apply *Cel-Tech* directly to consumer
22 cases and require that the unfairness be tied to a “legislatively declared” policy as in *Scripps*
23 *Clinic*, or to adhere to the former balancing test as stated in cases such as *Motors, Inc.*—are
24 not mutually exclusive. *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir.
25 2007).

26 Here, plaintiffs fail to establish a claim for relief under any of the UCL prongs; they
27 fail to show a substantial likelihood of success as to any of the other causes of action and
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1 make no averments of a deceptive or unfair business practice. Therefore, they fail to
2 advance any factual support for their conclusory claim that they suffered as a result of
3 “Defendants’ wrongful conduct” and thereby fall short of a showing of any prospect of
4 success on the merits.

5 I. Usury

6 Plaintiffs’ eleventh claim for relief avers that the interest rate on the loan was
7 usurious. Compl. at ¶ 114. In California, a claim for usury requires “(1) [t]he transaction
8 must be a loan or forbearance; (2) the interest to be paid must exceed the statutory
9 maximum; (3) the loan and interest must be absolutely repayable by the borrower; and (4)
10 the lender must have a willful intent to enter into a usurious transaction.” *Ghirardo v.*
11 *Antonioli*, 8 Cal. 4th 791, 798 (1994) (citations omitted). Here, the Complaint makes no
12 averments as to the willful intent of the defendants to enter into a usurious transaction, nor
13 does it suggest that the loan and interest were “absolutely repayable” by the Riveras.
14 Therefore, the claim for usury also fails as a basis for preliminary injunctive relief.

15 J. Accounting

16 The twelfth claim for relief seeks an accounting from the defendants. Notwithstanding
17 the fact that accounting is more appropriately characterized as a form of relief rather than as
18 an independent claim, *Borrego v. BMG U.S. Latin*, 92 Fed. App’x 572, 573 (9th Cir. 2004)
19 (citing *Hillman v. Stults*, 263 Cal. App. 2d 848, 876 (1968)), plaintiffs fail to show the need
20 for such an accounting.

21 To assert a right to accounting, plaintiffs must demonstrate either “(1)... the
22 relationship of the parties created an equitable duty to account...; (2)... the complicated
23 nature of accounts would make it difficult, if not impossible, for a jury to unravel the
24 numerous transactions; [or] (3)... an accounting on an otherwise legal claim [is] incidental to
25 a demand for an injunction or other equitable relief.” *Towers v. Titus*, 5 B.R. 786, 793
26 (N.D.Cal.1979) (citing 9 Wright & Miller § 2310). Moreover, they must prove that “some
27 balance is due the plaintiff[s] that can only be ascertained by an accounting.” *Teselle v.*
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1 *McLoughlin*, 173 Cal. App. 4th 156, 179 (2009). Here, nothing in the Complaint suggests
2 that defendants owe the Riveras any amount of money - indeed, it appears just the opposite -
3 or that the nature of the transaction or the relationship of the parties necessitates an
4 accounting. Therefore, plaintiffs fail to establish a substantial likelihood of success on their
5 claim for an accounting.

6 **K. Quiet Title**

7 The Complaint's last claim for relief is for "quiet title" to the Property. Defendants
8 make a number of arguments against "quiet title," but it is dispositive as to this claim that,
9 under California law, a borrower may not assert "quiet title" against a mortgagee without
10 first paying the outstanding debt on the property. *See Miller v. Provost*, 26 Cal. App. 4th
11 1703, 1707 (1994) ("a mortgagor of real property cannot, without paying his debt, quiet his
12 title against the mortgagee") (citation omitted). Therefore, because the Riveras have not
13 paid their outstanding debt on the Property, their claim for "quiet title" fails as a basis for
14 preliminary injunctive relief.

15 **V. CONCLUSION**

16 A preliminary injunction is an "extraordinary" remedy that is not lightly granted. A moving
17 party must demonstrate some likelihood of success on the merits. Plaintiffs have failed to do so
18 here, and their motion for preliminary injunctive relief therefore must be denied.

19
20 **IT IS SO ORDERED.**

21
22 Dated: 07/09/2010

23 
24 RICHARD SEEBORG
25 UNITED STATES DISTRICT JUDGE