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3
4 IN THE UNITED STATES DISTRICT COURT
5
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

7 ALDORAN MARK A. MANNING,

8 Plaintiff,

No. C 11-00578 JSW

9 v.

10 HOMESALES, INC., ET AL.,

11 Defendants.

**ORDER DENYING EX PARTE
APPLICATION FOR
PRELIMINARY INJUNCTION,
STAY, OR TEMPORARY
RESTRAINING ORDER**

12
13 On February 8, 2011, Plaintiff Mark A. Manning, proceeding *pro se*, filed a complaint
14 and petition for temporary restraining order ("TRO"). By order dated February 9, 2011, the
15 Court denied the TRO petition pursuant to Federal Rule of Civil Procedure 65(b)(1) and Civil
16 Local Rule 65-1(b).

17 On February 16, 2011, Plaintiff filed an amended complaint and ex parte application for
18 an order to show cause re preliminary injunction, stay or temporary restraining order. Liberally
19 construed, the amended complaint alleges that this Court has diversity jurisdiction on the
20 grounds that Plaintiff resides at the subject property located in California and Defendant
21 Homesales, Inc. is a citizen of another state. (Am. Compl. at 11.) Plaintiff seeks relief to
22 prevent removal of personal property or tenants from the property located at 2100 Edgebrook
23 Place, Hayward, California 94541. Plaintiff represents that one of the tenants is severely
24 disabled and in need of special care which the property is equipped to handle. (Ex Parte Appl.
25 ¶ 2.) Plaintiff further represents that he is the president of ALDORAN; that on April 12, 2010,
26 Plaintiff requested a Validation of Debt by Defendant, and that having received no response, the
27 former owners of the property, T. and L. Ellis, quitclaimed their property interest to ALDORAN
28 on May 20, 2010; that on October 12, 2010, Defendant Homesales, Inc., filed an unlawful

1 detainer on the previous owners of the property but not on ALDORAN; that on January 4, 2011,
2 Homesales, Inc. was awarded a writ of possession and order to vacate on January 11, 2011; that
3 on January 18, 2011, the Alameda County Sheriff Department and Mark Rodrigues, Real Estate
4 Agent for Coldwell Banker, proceeded with eviction; that on January 14 and 19, 2011, Plaintiff
5 contacted the Sheriff Department to state that ALDORAN was the owner of record; that on
6 January 21, 2011, ALDORAN's tenants returned to the property; that on January 31, 2011,
7 members of the Sheriff Patrol Division and Mr. Rodrigues met Plaintiff at the property and
8 returned the property back to Mr. Rodrigues; that on February 9, 2011, Plaintiff retook
9 possession of the property and has been told that all personal property would be destroyed as of
10 February 20, 2011. (Ex Parte Appl. ¶¶ 3-12.)

11 Plaintiff alleges that the destruction of personal property will cause irreparable injury
12 because the cost of moving and storing the personal property would exceed \$10,000 and moving
13 the tenant with special needs into a special care facility would cost thousands of dollars to
14 Plaintiff who has responsibility to relocate the tenants under a lease agreement. (*Id.* ¶ 13.)
15 Plaintiff seeks a stay or temporary restraining order to maintain the status quo. Defendants have
16 not been served; Plaintiff represents that he notified a real estate agent by email and left a
17 voicemail for an attorney for Homesales to inform of his intention to file a motion for notice of
18 stay or TRO.

19 In order to obtain a temporary restraining order or preliminary injunctive relief, Plaintiff
20 "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable
21 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that
22 an injunction is in the public interest." *Winter v. Natural Resources Defense Council*, 555 U.S.
23 7, 129 S. Ct. 365, 374 (2008) (citations omitted). The *Winter* court also noted that because
24 injunctive relief is "an extraordinary remedy," it "may only be awarded upon a clear showing
25 that the plaintiff is entitled to such relief." 129 S.Ct. at 375-76 (citing *Mazurek v. Armstrong*,
26 520 U.S. 968, 972 (1997) (*per curiam*)). Thus "[i]n each case, courts 'must balance the
27 competing claims of injury and must consider the effect on each party of the granting or
28 withholding of the requested relief.'" *Id.* at 376 (citing *Amoco Production Co. v. Gambell*, 480

1 U.S. 531, 542 (1987)). On an ex parte motion for a TRO, the moving plaintiff must allege
2 “specific facts in an affidavit or a verified complaint clearly show[ing] that immediate and
3 irreparable injury, loss, or damage will result to the movant before the adverse party can be
4 heard in opposition.” Fed. R. Civ. Proc. 65(b)(1)(A).

5 Following *Winter*, courts in the Ninth Circuit may apply a sliding scale test when there is
6 a lesser showing of likelihood of success that amount to “serious questions on the merits” and
7 the balance of hardships tips strongly in the plaintiff’s favor, as long as the plaintiff satisfies the
8 other two prongs under *Winter* by showing that there is a likelihood of irreparable injury and
9 that the injunction is in the public interest. *Alliance For The Wild Rockies v. Cottrell*, --- F.3d
10 ----, 2011 WL 208360, *7 (9th Cir. 2011), *reh’g en banc denied*.

11 The amended complaint purports to challenge the non-judicial foreclosure as fraudulent
12 on the ground that Defendant Homesales does not possess the “GENUINE ORIGINAL
13 PROMISSORY NOTE.” (Am. Compl. at 9.) The amended complaint contains an attachment
14 appearing to be a document entitled “Trustee’s Deed Upon Sale” concerning a deed of trust for
15 the subject property dated June 2, 2004, executed by T. and L. Ellis, which states that the unpaid
16 debt on the property plus costs was \$381,401.52 and that the property was sold by NDEX West,
17 L.L.C., as Trustee under the Deed of Trust, to Homesales, Inc. at public auction on September 8,
18 2010. The amended complaint does not provide allegations or documentary evidence related to
19 the June 2, 2004 deed of trust or the debt owed on the property. Although the factual allegations
20 are selective and incomplete, even as liberally construed, they fail to demonstrate a likelihood of
21 success or even serious questions on the merits of the claims for failure to meet the tender
22 requirement to set aside a trustee’s sale under California law.

23 Plaintiff has not alleged that he can, or would, tender the amounts due on the property,
24 which is a prerequisite to maintaining this claim. “Under California law, in an action to set
25 aside a trustee’s sale, a plaintiff must demonstrate that he has made a ‘valid and viable tender
26 [offer] of payment of the indebtedness.’” *Pantoja v. Countrywide Home Loans, Inc.*, 640 F.
27 Supp. 2d 1177, 1184 (N.D. Cal. 2009) (quoting *Karlsen v. American Sav. & Loan Assn.*, 15 Cal.
28 App. 3d 112, 117 (1971)); *see also Arnolds Mgmt. Corp. v. Eischen*, 158 Cal. App. 3d 575, 578

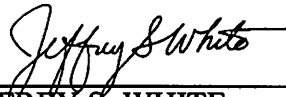
1 (1984) (“[A]n action to set aside a trustee’s sale for irregularities in sale notice or procedure
2 should be accompanied by an offer to pay the full amount of the debt for which the property was
3 security.) “A plaintiff must (1) demonstrate a willingness to pay and (2) show the ability to
4 pay.” *Pantoja*, 640 F. Supp. 2d at 1184 (citing *In re Worcester*, 811 F.2d 1224, 1231 (9th
5 Cir.1987)).

6 Furthermore, Plaintiff has not demonstrated immediate irreparable injury. It appears
7 from the face of the complaint, the ex parte application and the supporting documents that the
8 foreclosure on the subject property occurred over four months ago, and Plaintiff has retaken
9 possession of the property after deputies from the Alameda County Sheriff Department “turned
10 the property back over to the Real Estate Agent.” (Ex Parte Appl. ¶ 11.) The extent of harm
11 alleged in the ex parte application relates to the monetary cost of relocating tenants under
12 Plaintiff’s contractual obligations: “the amount that will be needed to move and store the
13 contents will be above \$10,000 and the move for the special needs person into a special care
14 facility will also be in the thousands and will be our responsibility to place him and the other
15 tenants as we are under a lease agreement with them.” (Ex Parte Appl. ¶ 13.) Such alleged
16 monetary harm does not rise to the level of irreparable injury. *See Oakland Tribune, Inc. v.*
17 *Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

18 On the record currently before the Court, it cannot find that Plaintiff has met his burden
19 of showing either a likelihood of success on the merits or the possibility of immediate
20 irreparable injury. Even assuming that Plaintiff has shown that the balance of hardships weighs
21 in his favor, Plaintiff has failed to demonstrate “serious questions” about the merits of his
22 claims under the sliding scale test. Accordingly, the Court denies Plaintiff’s ex parte application
23 for preliminary injunction, stay or temporary restraining order.

24 **IT IS SO ORDERED.**

25
26 Dated: February 17, 2011



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE