

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ISABEL SANTOS, individually and as	)	Case No. 12-3296-SC
trustee and beneficiary of the	)	
Yolanda Maria Santos Trust,	)	ORDER DENYING MOTION FOR
	)	<u>CIVIL CONTEMPT SANCTIONS</u>
Plaintiff,	)	
	)	
v.	)	
	)	
REVERSE MORTGAGE SOLUTIONS, INC.;	)	
NDEX WEST, LLC; and DOES 1 through	)	
20,	)	
	)	
Defendants.	)	
	)	

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**I. INTRODUCTION**

Now before the Court is Plaintiff Isabel Santos's ("Plaintiff") motion for civil contempt sanctions. ECF No. 53 ("Mot."). Santos asserts that Defendants Reverse Mortgage Solutions, Inc. ("RMS") and NDEX West, LLC ("NDEX") (collectively, "Defendants") violated a preliminary injunction enjoining the sale of Plaintiff's home by, inter alia, sending Plaintiff sixty-four separate notices of sale in the last several months. The Motion is fully briefed, ECF Nos. 49 ("Opp'n"), 53 ("Reply"), and appropriate for determination without oral argument per Civil Local Rule 7-1(b). For the reasons set forth below, the Motion is DENIED. However, the Court orders Defendants to cease and desist much of

1 the conduct described below.

2  
3 **II. BACKGROUND**

4 In June 2009, Plaintiff's mother, the late Yolanda Maria  
5 Santos, took out a federally insured reverse mortgage loan secured  
6 by her residence at 930 Santa Cruz Drive, Pleasant Hill, California  
7 (the "Property"). On or around February 7, 2011, Yolanda Maria  
8 Santos died. Plaintiff alleges that, following her mother's death,  
9 she continually attempted to enter into a payment plan that would  
10 pay off the reverse mortgage loan and allow her to purchase the  
11 Property. Plaintiff further alleges that RMS unlawfully refused to  
12 permit her to purchase the Property and instead insisted that the  
13 Property either be foreclosed or sold to some third party. NDEX  
14 began foreclosure proceedings in February 2012.

15 On June 8, 2012, three days before the scheduled trustee's  
16 sale of the Property, Plaintiff filed a complaint in the California  
17 Superior Court by and for Contra Costa County - Martinez (the  
18 "state court"), asserting four causes of action: (1) breach of  
19 contract, (2) declaratory relief, (3) slander of title, and (4)  
20 cancellation of written instruments pursuant to California Civil  
21 Code section 3412. On June 26, 2012, the state court issued a  
22 tentative ruling granting Plaintiff's motion for a preliminary  
23 injunction. ECF No. 18-5 at 1. Two days later, on June 28, the  
24 state court affirmed its tentative ruling and issued a preliminary  
25 injunction, which provided: "Defendants and their employees,  
26 agents, and persons acting with them or on their behalf are  
27 enjoined and restrained from selling, transferring any ownership  
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1 interest in or further encumbering the property . . . ." Id. at 1-  
2 2.

3 On June 26, the same day the state court issued its tentative  
4 ruling, Defendants filed a notice of removal in federal court. ECF  
5 No. 1. The Court takes judicial notice of the fact that Defendants  
6 did not file a copy of the notice of removal with the clerk of the  
7 state court until July 3, 2012. Soon after the case was removed,  
8 Defendants moved for the Court to dissolve the preliminary  
9 injunction entered by the state court. ECF No. 12. That motion  
10 was denied on October 12, 2012. ECF No. 25 ("Oct. 12 Order"). The  
11 Court concluded: "By failing to identify any relevant change in law  
12 or circumstance, Defendants fail to persuade the Court that it  
13 should reconsider the state court's earlier entry of a preliminary  
14 injunction, including the state court's decision to do so without  
15 requiring a bond." Id. at 15-16.

16 Plaintiff now claims that Defendants engaged in a pattern of  
17 harassment after the state court entered the preliminary injunction  
18 and this Court refused to dissolve it. This pattern began on  
19 September 13, 2012, when Plaintiff was contacted by an appraiser  
20 whom RMS sent to do an interior appraisal of the house. ECF No. 36  
21 ("Pl.'s Decl.") ¶ 8. Plaintiff's counsel, Daniel J. Hanecak  
22 ("Hanecak"), subsequently informed Defendants that they should  
23 contact him before attempting to inspect or appraise the Property.  
24 ECF No. 43 ("Hanecak Decl.") ¶ 4, Ex. 1. Defendants apparently  
25 ignored this request, as Plaintiff was contacted by another  
26 appraiser on February 20, 2013, and, on June 30, 2013 a man visited  
27 Plaintiff's home at 8:45 p.m. to take photos for "the bank." Pl.'s  
28 Decl. ¶ 12; ECF No.53-1 ("Pl.'s Supp. Decl.") ¶ 3.

1 Defendants have also sent Plaintiff a deluge of notices in the  
2 last several months. On January 11, 2013, Plaintiff received  
3 sixteen notices of postponement of the trustee's sale from NDEX.  
4 The notices were addressed to her deceased mother and stated:

5  
6 You are hereby notified that the . . . Trustee's Sale  
7 has been postponed to 02/11/2013 . . . YOU MAY NOT  
8 RECEIVE WRITTEN NOTICE OF POSTPONEMENT EACH TIME THE  
9 TRUSTEE'S SALE IS POSTPONED . . . UNLESS YOU TAKE  
10 ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A  
11 PUBLIC SALE WITHOUT FURTHER NOTICE.

12  
13 On February 11, 2013, Plaintiff received another sixteen notices of  
14 postponement, stating that the trustee's sale had been postponed  
15 another month, to March 11, 2013. Other than the listed dates, the  
16 February 11, notices were identical to the January 11 notices.  
17 NDEX continued to send notices in March and April 2013. In four  
18 months, Plaintiff received sixty-four notices of postponement from  
19 Defendant. The letters continued even after Plaintiff's counsel  
20 requested that Defendants cease and desist. See Hanecak Decl. Ex.  
21 2.

22 Additionally, Plaintiff complains that she continues to  
23 receive phone calls from interested buyers because the sale of her  
24 home is listed as "active" on foreclosureradar.com. Plaintiff  
25 states that buyers call on a weekly basis and sometimes drive by  
26 the house and take photographs.

27 **III. LEGAL STANDARD**

28 Federal courts "have inherent power to enforce compliance with  
their lawful orders through civil contempt." Spallone v. United  
States, 493 U.S. 265, 276 (1990) (quotations omitted). The party

1 moving for sanctions "has the burden of showing by clear and  
2 convincing evidence that the contemnors violated a specific and  
3 definite order of the court." Stone v. City & Cnty. of San  
4 Francisco, 968 F.2d 850, 856 n.9 (9th Cir. 1992). "The burden then  
5 shifts to the contemnors to demonstrate why they were unable to  
6 comply. . . . They must show they took every reasonable step to  
7 comply." Id. (internal citations omitted).

8  
9 **IV. DISCUSSION**

10 Plaintiff argues that Defendants violated the state court's  
11 preliminary injunction, as well as the Court's Order declining to  
12 dissolve the preliminary injunction, by (1) sending Plaintiff  
13 sixty-four letters noticing a sale of the Property over the course  
14 of four months, (2) calling Plaintiff to schedule interior  
15 appraisals of the Property on multiple occasions, and (3) listing  
16 the sale of the Property as active on foreclosureradar.com.

17 Defendants respond that the state court had no jurisdiction to  
18 issue the preliminary injunction, reasoning that the case was  
19 removed before the injunction could take effect. Opp'n at 7. This  
20 argument lacks merit. The state court issued a tentative ruling on  
21 June 26 and entered a final order on the preliminary injunction on  
22 June 28. While Defendants filed a notice of removal in federal  
23 court on June 26 (the same day as the tentative order), they did  
24 not file a copy of the notice of removal with the state court until  
25 July 3.

26 The removal statute provides that "promptly" after filing the  
27 notice of removal, a defendant "shall give written notice thereof  
28 to all adverse parties and shall file a copy of the notice with the

1 clerk of such State court, which shall effect the removal and the  
2 State court shall proceed no further unless and until the case is  
3 remanded." 28 U.S.C. § 1446(d). Pursuant to § 1446(d), the state  
4 court retained concurrent jurisdiction over the action until  
5 Defendants (1) filed the notice of removal in federal court, (2)  
6 gave notice to Plaintiff, and (3) gave notice to the state court.  
7 See Gutierrez v. Empire Mortgage Corp., CVF10-0079 AWI GSA, 2010 WL  
8 1644714, at \*2 (E.D. Cal. Apr. 21, 2010); Miller v. Aqua Glass,  
9 Inc., CIV. 07-3088-CL, 2008 WL 2854125, at \*2 (D. Or. July 21,  
10 2008).

11 Thus, the preliminary injunction took effect six to eight days  
12 before state court was divested of jurisdiction. To the extent  
13 that Defendants removed to avoid the state court's preliminary  
14 injunction, they have engaged in improper (and unsuccessful) forum  
15 shopping. If there was any ambiguity about whether the state  
16 court's preliminary injunction remained in force, it was resolved  
17 by the Court's October 12 Order, which denied Defendants' motion to  
18 dissolve the injunction.

19 Defendants further argue that Plaintiff's motion for sanctions  
20 is untimely. Opp'n at 6. This argument is also unavailing. The  
21 evidence shows that Plaintiff's counsel attempted to resolve this  
22 matter informally, before appealing to the Court for relief. This  
23 was good sense, not delay. In any event, Plaintiff's motion was  
24 filed on May 14, 2013, only one month after Plaintiff received  
25 foreclosure notices forty-nine through sixty-four.

26 Finally, Defendants contend that they did not violate the  
27 preliminary injunction since the injunction only prohibits the sale  
28 of the Property. Id. at 5. Defendants argue that they merely

1 maintained the status quo by postponing the sale pursuant to  
2 California Civil Code section 2924g(c)(1)(A), which provides that  
3 the "trustee shall postpone the sale . . . [u]pon the order of any  
4 court of competent jurisdiction." Id. Defendants also argue that  
5 they were required to provide Plaintiff's deceased mother with  
6 written notices of the postponements pursuant to the Civil Code  
7 section 2924(a)(5). Section 2924(a)(5) provides that whenever a  
8 sale is postponed for a period of at least ten days, written notice  
9 shall be provided to the borrower.

10 Defendants have a point. Nothing in the preliminary  
11 injunction expressly prohibits them from postponing the sale or  
12 noticing that postponement. For that reason, the Court DENIES  
13 Plaintiff's motion for civil contempt sanctions. However, while  
14 Defendants may have complied with the letter of the law, they  
15 appear to have done so in a manner calculated to harass Plaintiff.  
16 Even if Defendants were required to send Plaintiff's deceased  
17 mother a notice of postponement, there was no reason for Defendants  
18 to send sixteen notices per month, month after month. Nor does the  
19 Court see any purpose in postponing the trustee's sale from month  
20 to month when the trial in this matter is set for November 18,  
21 2013.

22 To avoid any further harassment of Plaintiff, the Court ORDERS  
23 Defendants to postpone the trustee's sale of the Property to  
24 sometime after December 1, 2013. The trustee's sale shall be  
25 postponed again if the trial in this matter is continued.  
26 Defendants may notify Plaintiff (or attempt to notify her deceased  
27 mother) of the postponement in a manner consistent with their  
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1 obligations under California law; however, they shall not send any  
2 more notifications than are necessary.

3       The Court further ORDERS that Defendants and their employees,  
4 agents, and persons acting with them or on their behalf shall not  
5 visit the Property for any purpose without first coordinating with  
6 Plaintiff's counsel. As discussed above, the state court's  
7 preliminary injunction shall remain in effect during the pendency  
8 of this action or until the injunction is dissolved by the Court,  
9 and any attempt by Defendants to sell, transfer, or encumber the  
10 Property in the meantime shall constitute a violation of that  
11 injunction. Failure to comply with this Order or the preliminary  
12 injunction, or any future attempts to harass Plaintiff in  
13 connection with the threatened foreclosure of the Property will  
14 result in sanctions. Since there is no indication that Defendants  
15 have any control over foreclosureradar.com, the Court declines to  
16 issue an order relating to the website.

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V. CONCLUSION

For the foregoing reasons, Plaintiff Isabel Santos's motion for civil contempt sanctions is DENIED. The Court hereby ORDERS that Defendants shall postpone the trustee sale of the Property to some date after December 1, 2013. The Court further ORDERS that Defendants and their employees, agents, and persons acting with them or on their behalf shall not visit the Property for any purpose without first coordinating with Plaintiff's counsel. Defendants shall also comply with the other requirements set forth in Section IV supra.

IT IS SO ORDERED.

Dated: July 22, 2013

  
UNITED STATES DISTRICT JUDGE