UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

PENNY L. PATINO,

Plaintiff,

v.

FRANKLIN CREDIT MANAGEMENT CORPORATION, et al.,

Defendants.

Case No. 16-cv-02695-LB

ORDER GRANTING THE PLAINTIFF'S TEMPORARY RESTRAINING ORDER

Re: ECF Nos. 67, 69, 70

INTRODUCTION & BACKGROUND

In this mortgage-foreclosure case, the defendants are moving forward with a trustee's sale of Ms. Patino's home. The court assumes familiarity with the case's facts and incorporates by reference its order on the defendants' most recent motion to dismiss.[1] To summarize, though, Ms. Patino — whose history of mental and physical abuse and cognitive abilities rendered her unable to understand the significance of her financial decisions — obtained a $155,571.67 home-equity credit line.[2] She alleges that, although suffering from a mental disorder, she properly rescinded the loan under the Truth in Lending Act ("TILA").[3] But her lender, Cal State 9 Credit Union, refused

[1] Order – ECF No. 51.

[2] Second Amended Compl. ("SAC") – ECF No. 65, ¶¶ 17, 20.

[3] Id. ¶¶ 21–23.

to accept her rescission and returned her check (for the full loan balance) with an "X" and the word "void" written on it.[4] Ms. Patino's "post[-]traumatic stress disorder prevented [her] from fully understanding this sequence of events, and from fully understanding that no rescission had taken place."[5] And because the loan was never cancelled, Ms. Patino "was compelled to continue to make her line of equity payments, which payments included principal and interest."[6] Ms. Patino thus seeks relief under TILA and asserts additional claims for wrongful foreclosure, unfair business practices, breach of contract, intentional and negligent infliction of emotional distress, and quiet title. She seeks damages, and declaratory and injunctive relief.

Now, after moving the trustee's sale multiple times, the defendants are proceeding with the sale of Ms. Patino's home. Ms. Patino seeks a temporary restraining order ("TRO").[7] The court ordered the defendants to respond (they did),[8] and the court held a hearing on the matter. For the reasons stated on the record at the hearing, and as described below, the court grants Ms. Patino's TRO.

LEGAL STANDARD

A temporary restraining order preserves the status quo and prevents irreparable harm until a hearing can be held on a preliminary injunction application. See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 439 (1974). A temporary restraining order is an "extraordinary remedy" that the court should award only when a plaintiff makes a clear showing that it is entitled to such relief. See Winter v. Natural Res. Defense Council, Inc., 555 U.S. 7, 22 (2008). A temporary restraining order may be issued without providing the opposing party an opportunity to be heard only if "specific facts in an affidavit or a verified

[4] Id. ¶ 23.

[5] Id. ¶ 28.

[6] Id. ¶ 27.

[7] See ECF Nos. 67, 69, 70.

[8] See Opposition – ECF No. 72.

complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A).

The standards for a temporary restraining order and a preliminary injunction are the same. See *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A movant must demonstrate (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm that would result if an injunction were not issued, (3) the balance of equities tips in favor of the plaintiff, and (4) an injunction is in the public interest. See Winter, 555 U.S. at 20. The irreparable injury must be both likely and immediate. See id. at 22–23. "[A] plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." Caribbean Marine Servs. Co., Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988).

Before Winter, the Ninth Circuit employed a "sliding scale" test that allowed a plaintiff to prove either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) [ ] serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." See Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9th Cir. 1999). In this continuum, "the greater the relative hardship to [a movant], the less probability of success must be shown." Id. After Winter, the Ninth Circuit held that although the Supreme Court invalidated the sliding scale approach, the "serious questions" prong of the sliding scale survived so long as the movant satisfied the other elements for preliminary relief. Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1131–32 (9th Cir. 2011). Thus, a preliminary injunction may be appropriate when a movant raises "serious questions going to the merits" and the "balance of hardships tips sharply in the plaintiff's favor," provided that the other elements for relief also are satisfied. Id. at 1132, 1135.

ANALYSIS

1. A Temporary Restraining Order is Appropriate to Preserve the Status Quo

First, the facts alleged in the Second Amended Complaint ("SAC") raise (at least) serious questions going to the merits of Ms. Patino's claims. The defendants argue the opposite because, they say: (1) Ms. Patino signed an interest-reduction agreement that affirmed the loan (defeating

her rescission claim) and waived her right to TILA set off and recoupment; (2) she should be judicially estopped from making her claims because she did not disclose them in her prior bankruptcy filings; and (3) she has unclean hands because she has not made loan payments since November 2008, owes $93,909.25 in interest, and did not fully cooperate in earlier ADR processes.[9]

At this stage of the case, the court denies the defendants' arguments. Ms. Patino argues that the interest-reduction agreement is unenforceable. For example, she argues that the agreement is unconscionable, there was no intentional waiver, the terms are ambiguous, and she did not have the capacity to enter into the agreement. In light of the allegations in the SAC, these arguments are potentially meritorious.

The court also will not now judicially estop Ms. Patino from asserting her claims. Morris v. California, 966 F.2d 448, 453 (9th Cir.1991) ("[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion.") (internal quotations omitted). Judicial estoppel is an equitable doctrine that prevents a party from benefitting by taking one position but then later seeking to benefit by taking a clearly inconsistent position. Hamilton v. State Farm Fire & Cas. Ins. Co., 270 F.3d 778, 782 (9th Cir. 2001). It is intended to protect the integrity of the judicial process by preventing a litigant from "playing fast and loose with the courts." Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990). Courts consider several factors to determine whether to invoke judicial estoppel, including: (1) "a party's later position must be 'clearly inconsistent' with its earlier position"; (2) the party must have "succeeded in persuading a court to accept that party's earlier position"; and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Hamilton v. State Farm Fire & Cas. Ins. Co., 270 F.3d 778, 782–83 (9th Cir. 2001) (citing New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001)) (internal quotations omitted). On balance, these factors do not weigh in favor of judicially estopping Ms. Patino from asserting her claims, at least not at this

[9] See Opposition at 2–4.

stage of the case. This is especially true in light of her mental capacity and the absence of indicia of bad-faith, fast-and-loose conduct.

And for similar reasons — particularly the absence of bad faith — the court will not now hold that Ms. Patino is barred by unclean hands.

Second, there is a likelihood of irreparable harm if the TRO is not granted. If the sale goes forward, Ms. Patino will lose her home. Any monetary recovery will not necessarily compensate her for that harm, and so the loss is irreparable. And this harm is likely and immediate because the sale is scheduled for tomorrow, April 6, 2017.

Third, the balance of equities tips strongly in favor of granting the TRO. On one hand, Ms. Patino stands to lose her home. On the other hand, the defendants have identified only a single burden if the TRO is granted: "If the sale on April 6, 2017 does not move forward, the sale cannot be postponed any further, and therefore the notice of sale will need to be reset[and] the Defendants will incur additional fees and costs."[10] The balance of equities favors granting the TRO.

Fourth, the parties did not identify a public interest implicated by the TRO. The court finds that the public interest will not be harmed by stopping the sale of Ms. Patino's home.

In sum, Ms. Patino raises "serious questions going to the merits" of her claims and the "balance of hardships tips sharply" in her favor. Alliance for Wild Rockies, 632 F.3d at 1132, 1135. Because she also satisfies the other elements for a TRO, see id., the court grants her application.

2. Process Moving Forward

At the TRO hearing, the court discussed with the parties the process moving forward. Ms. Patino wants to first address the defendants' anticipated motion to dismiss. The defendants want to first brief and hold a hearing on a preliminary injunction. Because this TRO was issued with notice to the defendants, the court need not set a preliminary-injunction hearing "at the earliest

[10] Opposition at 2.

possible time" (*i.e.* within 14 days) under Rule 65(b). *See* O'Connell & Stevenson, Rutter Group Prac. Guide: Federal Civ. Pro. Before Trial § 13:126 (The Rutter Group 2017) ("If the affected party had notice of the TRO application, the Federal Rules do not state when the preliminary injunction hearing must be heard.").

The court therefore establishes the following process. First, the defendants may move to dismiss Ms. Patino's SAC. The briefing and hearing will proceed on the normal timeline. Second, within seven days of the court's order on the defendants' motion to dismiss (assuming that order does not moot the injunction) Ms. Patino may file a preliminary-injunction motion with any additional information (or say that she relies on her existing filing). She must notice the hearing for a date within two weeks of filing her motion. The defendants' opposition (or a statement that relies on the initial filing and adds any additional information) will be due within seven days of the motion, and Ms. Patino's reply within four days after that.

IT IS SO ORDERED.

Dated: April 5, 2017

LAUREL BEELER
United States Magistrate Judge

United States District Court
Northern District of California