

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

ROBERT N. WELLS,

Plaintiff,

v.

CAM XI TRUST, *et al.*,

Defendants.

Case No. 16-cv-07380 JST

**ORDER GRANTING SECOND
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND SETTING
SCHEDULE**

Re: ECF No. 8

Plaintiff has filed an application for an ex parte temporary restraining order. ECF No. 8.
For the reasons stated below, the application is GRANTED.

I. BACKGROUND

A. Factual History

Plaintiff Robert N. Wells is the mortgagor and resident of a home located at 151 Northcreek Circle, Walnut Creek, CA 94598. Non-party American Brokers Conduit was the original lender on Wells' mortgage loan, and defendant CAM XI Trust purports to have acquired an interest in the loan based on a chain of assignments that began in June 2011. American Brokers Conduit, however, ceased operations and closed on or before November 30, 2010.

In August 2016, CAM XI recorded a notice of default, which stated Wells owed \$213,453.17. Wells acknowledges that he stopped paying his mortgage in June 2015, and he admits that he was "in arrears for approximately \$29,400.00" but denies he owes the full amount of \$213,453.17. ECF No. 8-4 ¶ 9.

1 In December 2016, Wells received a notice of trustee’s sale, which set the date of sale
2 for January 3, 2017, at 9:00 a.m. *Id.*, Exh. A.

3 **B. Procedural History**

4 On December 29, 2016, Wells filed a complaint against CAM XI and another defendant,
5 BSI Financial Services, which is the purported servicer of his loan, alleging wrongful
6 foreclosure, breach of contract, and related claims, and seeking cancellation of the loan against
7 his home and related relief. Wells asserts that American Brokers Conduit lacked authority to
8 assign his loan in June 2011, which assignment began the chain of assignments ending with
9 CAM XI, inasmuch as American Brokers Conduit had ceased operations prior to that date.
10 Thus, he argues, the initial purported assignment and each subsequent assignment, was void,
11 depriving defendants of authority to foreclose. ECF. No. 1.

12 The same day, Wells also filed an Ex Parte Application for Temporary Restraining
13 Order to enjoin the pending foreclosure of his home, with a trustee’s sale scheduled for
14 January 3. An order denied that first application because Wells failed to allege any effort to
15 give defendants notice of his TRO application or any reason why notice should not be required,
16 pursuant to Rule 65(b)(1) and Civil Local Rule 65-1(b). That denial was without prejudice to a
17 renewed motion that satisfied those requirements. ECF No. 7.

18 On December 30, Wells filed the instant second motion for a TRO, in which he alleged
19 his counsel had faxed and emailed a letter to defendants containing the TRO papers. ECF
20 No. 8-2.

21 For the reasons stated below, Wells’s motion is GRANTED. Defendants are
22 temporarily enjoined from conducting a trustee’s sale of Wells’s home.

23 **II. LEGAL STANDARD**

24 The same legal standard applies to a motion for a temporary restraining order and a
25 motion for a preliminary injunction. *See Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240
26 F.3d 832, 839 n.7 (9th Cir. 2001). A plaintiff seeking either remedy “must establish that he is
27 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
28 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the

1 public interest.” *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052
2 (9th Cir. 2009) (quoting *Winter v. Nat. Resources Defense Council*, 555 U.S. 7, 20 (2008)). The
3 purpose of such a temporary restraining order is to preserve the status quo and to prevent
4 irreparable harm “just so long as is necessary to hold a hearing, and no longer.” *Granny Goose*
5 *Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 439 (1974).

6 III. DISCUSSION

7 This order finds that Wells has met his burden in requesting a temporary restraining
8 order. On the present record, Wells is likely to succeed on the merits of his claim that the initial
9 assignment from American Brokers Conduit was void, he is likely to suffer irreparable harm,
10 and the balance of equities and the public interest favor granting a temporary restraining order,
11 at least where a bond is posted.

12 This order first takes judicial notice of certain facts that are necessary to Wells’s motion,
13 but absent from the sworn record. It then addresses the *Winter* factors.

14 A. Judicial Notice

15 Wells did not submit a sworn statement supporting his contention that American
16 Brokers Conduit, the original lender for the mortgage at issue here, ceased all operations and
17 closed on November 30, 2010. Nevertheless, the undersigned takes judicial notice of the fact
18 that American Home Mortgage Corporation did business as American Brokers Conduit, and
19 that American Home Mortgage Corporation was liquidated on or before November 30, 2010
20 pursuant to a plan of bankruptcy. *See In re American Home Mortgage Holdings, Inc., et al.*,
21 No. 07-11047 (Bankr. D.Del. Feb. 23, 2009) (Dkt. No. 7042); *id.* (Bankr. D.Del. Nov. 30, 2010)
22 (Dkt. No. 9519).

23 B. Success on the Merits

24 The present record supports Wells’s contention that CAM XI never acquired a valid
25 interest in his mortgage and thus lacks authority to foreclose, inasmuch as the first assignment
26 in that sequence occurred *after* the initial lender, American Brokers Conduit, had ceased
27 operations and shut down. Under *Yvanova v. New Century Mortgage Corporation*, a mortgagor
28 may challenge a foreclosure based on allegations that assignments of the loan were void. 62

1 Cal. 4th 919, 939 (2016). Although *Yvanova* was limited to post-foreclosure claims, the
2 undersigned has previously concluded that the California Supreme Court will likely extend
3 *Yvanova* to pre-foreclosure claims. See *Lundy v. Selene Fin., LP*, 15-CV-05676-JST, 2016 WL
4 1059423, at *10 (N.D. Cal. Mar. 17, 2016). This order likewise assumes, solely for the sake of
5 assessing the likelihood of success on the merits on this application for a temporary restraining
6 order, that the California Supreme Court would extend *Yvanova* to pre-foreclosure challenges.
7 For the avoidance of any doubt, this issue may be revisited at subsequent proceedings, including
8 at the hearing following this order.

9 Accordingly, Wells has demonstrated a sufficient likelihood of success on the merits
10 that the initial assignment of his loan was void. This order declines to address the merits of the
11 balance of Wells’s causes of action.

12 **C. Irreparable Harm**

13 Wells has provided a declaration stating that he will suffer irreparable harm if an
14 injunction is not granted. He avers that absent a temporary restraining order, he will lose his
15 home. Although Wells has not stated that he would be homeless if forced out of this particular
16 home, “[i]t is well-established that the loss of an interest in real property constitutes an
17 irreparable injury.” *Park Village Apt. Tenants Ass’n v. Mortimer Howard Trust*, 636 F.3d 1150,
18 1159 (9th Cir. 2011). Wells has satisfied this factor.

19 **D. Balance of the Equities and the Public Interest**

20 This temporary restraining order will delay the trustee sale of the property for a short
21 period of time, until the court can hold a hearing on a motion for a preliminary injunction,
22 which will occur in less than two weeks. This brief delay of the sale for the purpose of allowing
23 consideration of the issues herein with the benefit of full briefing does not overcome the
24 irreparable harm that will occur if Wells loses his home.

25 This order acknowledges, however, that Wells filed his initial motion without giving
26 notice to defendants on Thursday, December 29, and he filed the instant motion on Friday,
27 December 30, effectively guaranteeing that defendants could not be heard either in writing or at
28 a noticed hearing before the scheduled trustee’s sale on Tuesday, January 3 (particularly given

1 that January 2 is a court holiday). Wells knew of the trustee’s sale, however, weeks earlier.
2 Ordinarily, a “long delay before seeking a preliminary injunction implies a lack of urgency and
3 irreparable harm.” *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th
4 Cir. 1985). To offset any imbalance, this order will require Wells to post a bond in the amount
5 of \$29,400, which is the amount he admits is owed on his loan.

6 **CONCLUSION**

7 For the reasons stated above and to the extent stated above, Wells’s application for a
8 temporary restraining order is **GRANTED**. The order will *not* take effect unless and until a bond
9 in the amount of \$29,400 is posted with the Court registry by January 3, 2017 at 11:00 a.m.

10 This order sets the following briefing schedule. Defendants shall respond to Wells’s
11 opening brief by **January 5, 2017** at 5:00 p.m. Wells may reply by **January 9, 2017** at 5:00
12 p.m. The motion will be heard in Courtroom 7 on the 19th Floor at the Federal Courthouse at
13 450 Golden Gate Ave., San Francisco, on **January 11, 2017** at 8:30 a.m.

14 **IT IS SO ORDERED.**

15
16 Dated: December 30, 2016

17 
18 _____
19 JON B. TIGAR
20 UNITED STATES DISTRICT JUDGE
21
22
23
24
25
26
27
28