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3 UNITED STATES DISTRICT COURT  
4 NORTHERN DISTRICT OF CALIFORNIA  
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7 JEFFERY D. ROSAL,

No. C 09-1276 PJH

8  
9 Plaintiff,

**ORDER DENYING SECOND EX  
PARTE MOTION FOR TEMPORARY  
RESTRAINING ORDER**

10 v.

11 FIRST FEDERAL BANK OF  
12 CALIFORNIA, et al.,

13 Defendants.  
\_\_\_\_\_ /

14 Plaintiff Jeffery Rosal ("plaintiff") filed this action on March 24, 2009 against  
15 defendants First Federal Bank of California, Seaside Financial Corporation, T.D. Service  
16 Company, ServiceLink and All Phase Brokers (collectively "defendants"), alleging various  
17 state and federal claims arising out of the initiation of a non-judicial foreclosure sale of real  
18 property purchased by plaintiff located at 25114 Adriano Street, Fremont, California 94536  
19 (the "property"). Also on March 24, 2009, plaintiff filed an *ex parte* motion for temporary  
20 restraining order ("TRO") and for preliminary injunction seeking to prevent defendants from:  
21 (1) instituting, prosecuting, or maintaining foreclosure or sale proceedings on the property;  
22 and (2) taking any steps to deprive him of ownership and/or possession of the property,  
23 including recording any deed and instituting eviction proceedings.

24 On March 26, 2009, this court issued an Order denying plaintiff's *ex parte* motion for  
25 TRO and for preliminary injunction. In that Order, the court stated that if plaintiff served  
26 defendants with all of the documents he had filed in this matter, including the complaint, the  
27 *ex parte* motion and the Order by March 27, 2009, and provided proofs of service to the  
28 court by March 31, 2009, a hearing on plaintiff's request for a preliminary injunction would  
be scheduled for May 6, 2009. The court further stated that if plaintiff did not serve the

1 papers as directed, he may instead notice a motion for a preliminary injunction for the next  
2 available hearing date.

3 To date, plaintiff has neither served the documents as directed by the court nor  
4 noticed a motion for preliminary injunction. Instead, on April 6, 2009, plaintiff filed a second  
5 *ex parte* motion for TRO and for preliminary injunction, seeking the same relief as he  
6 sought in his first *ex parte* motion.<sup>1</sup> Plaintiff's second *ex parte* motion is predicated, in part,  
7 on First Federal Bank of California's purported filing of an unlawful detainer action against  
8 plaintiff in the Superior Court of California, County of Alameda on April 1, 2009.

9 Under Civil Local Rule 65-1(b), "[u]nless relieved by order of a Judge for good cause  
10 shown, on or before the day of an *ex parte* motion for a temporary restraining order,  
11 counsel applying for the temporary restraining order must deliver notice of such motion to  
12 opposing counsel or party." Civ. L.R. 65-1(b). Rule 65(b) of the Federal Rules of Civil  
13 Procedure further specifies that a court may issue a TRO without notice to the adverse  
14 party only if: (1) specific facts in an affidavit or a verified complaint clearly show that  
15 immediate and irreparable injury, loss, or damage will result to the movant before the  
16 adverse party can be heard in opposition; and (2) the movant's attorney certifies in writing  
17 any efforts made to give notice and the reasons why it should not be required.  
18 Fed.R.Civ.P. 65(b); see also Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1130-  
19 31 (9th Cir. 2006). There are "very few circumstances justifying the issuance of an *ex parte*  
20 TRO." Reno, 452 F.3d at 1131. For example, courts have granted such a TRO "where  
21 notice to the adverse party is impossible either because the identity of the adverse party is  
22 unknown or because a known party cannot be located in time for a hearing." Id. Courts  
23 have also recognized "a very narrow band of cases in which *ex parte* orders are proper  
24 because notice to the defendant would render fruitless the further prosecution of the  
25 action." Id.

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<sup>1</sup> Also on April 6, 2009, plaintiff filed a proof of service indicating that the summons was served on Pat Player, the person designated to accept service of process on behalf of defendant First Federal Bank of California.

1 The court has reviewed plaintiff's complaint, second *ex parte* motion and declaration,  
2 as well as the declaration of plaintiff's counsel, Kelly Robinson. Based on this review, the  
3 court finds that plaintiff's second *ex parte* motion must be denied for failure to comply with  
4 Civil Local Rule 65-1(b) and Rule 65(b) of the Federal Rules of Civil Procedure. While  
5 plaintiff filed a proof of service of the summons on First Federal Bank of California,<sup>2</sup> he did  
6 not file a proof of service of the complaint on First Federal Bank, nor did he file proofs of  
7 service of the summons and complaint on Seaside Financial Corporation, T.D. Service  
8 Company, ServiceLink and All Phase Brokers. Nor has plaintiff presented evidence that he  
9 notified Seaside Financial Corporation, T.D. Service Company, ServiceLink and All Phase  
10 Brokers of the instant motion or shown good cause why he should be relieved of this  
11 obligation. Instead, plaintiff's counsel submitted a declaration indicating that she orally  
12 notified First Federal Bank of California of the instant motion on April 3, 2009. The court  
13 finds that plaintiff has failed to demonstrate compliance with Civil Local Rule 65-1(b).

14 In addition, the court finds that plaintiff has failed to demonstrate compliance with  
15 Rule 65(b) for two reasons. First, plaintiff has not filed an affidavit or a verified complaint  
16 that sets forth facts "clearly showing" that immediate and irreparable injury, loss, or damage  
17 will result to him before defendants can be heard in opposition to his *ex parte* motion. In  
18 fact, in support of his *ex parte* motion, plaintiff submitted his own declaration attesting that,  
19 on March 17, 2009, he received a notice from All Phase Brokers, which stated, "Notice to  
20 Occupants - Please contact me ASAP. Ownership of this property has been  
21 sold/transferred to the bank. Please contact me ASAP to avoid eviction!" Thus, the  
22 injunctive relief plaintiff seeks related to the non-judicial foreclosure appears to be moot.  
23 Further, to the extent plaintiff seeks to enjoin the eviction proceedings purportedly  
24 commenced on April 1, 2009, the court finds that plaintiff has not set forth specific facts or  
25 otherwise shown that his eviction from the property is imminent such that immediate injury  
26 will result absent the issuance of an *ex parte* TRO without notice. Moreover, the court  
27 notes that while plaintiff asserts that eviction proceedings have been commenced, and that  
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<sup>2</sup> A review of the record in this case reveals that this is the only document that has been served on any defendant.

1 a response to the complaint for unlawful detainer is due on April 6, 2009, plaintiff has  
2 offered no evidence corroborating this assertion.

3 Second, while plaintiff's counsel's declaration contains facts stating that she gave  
4 oral notice of her intention to file the instant motion to counsel for First Federal Bank of  
5 California, it does not contain any facts setting forth the efforts made to give notice to the  
6 other defendants and the reasons why it should not be required. In short, plaintiff has failed  
7 to present persuasive evidence demonstrating that his case falls within the "very few  
8 circumstances" justifying the issuance of an *ex parte* TRO.

9 Finally, in addition to the foregoing shortcomings, the court finds, as noted in its  
10 Order denying plaintiff's first *ex parte* motion, that plaintiff's delay in requesting a TRO  
11 militates against its issuance. Plaintiff was aware of the non-judicial foreclosure sale in  
12 June 2008, but did not file suit until March 2009.

13 For the reasons stated above, plaintiff has failed to demonstrate that a TRO should  
14 issue without notice to all defendants under both Rule 65(b) and Civil Local Rule 65-1(b).  
15 Accordingly, plaintiff's second *ex parte* motion for TRO and for preliminary injunction is  
16 DENIED. Because plaintiff did not comply with this court's March 26, 2009 Order directing  
17 him to serve various documents on defendants by March 27, 2009, a hearing on plaintiff's  
18 request for a preliminary injunction will not be scheduled for May 6, 2009. Plaintiff,  
19 however, may notice a motion for a preliminary injunction for the next available hearing  
20 date.

21 **IT IS SO ORDERED.**

22 Dated: April 10, 2009



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PHYLLIS J. HAMILTON  
United States District Judge

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