

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

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

ERNESTO S. PURUGAN and ISABELITA  
G. PURUGAN,

Plaintiffs,

vs.

HSBC BANK USA, NATIONAL  
ASSOCIATION as Trustee for ACE  
SECURITIES CORP. HOME EQUITY LOAN  
TRUST, SERIES 2005-HE7, ASSET  
BACKED PASS-THROUGH CERTIFICATES;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., and DOES 1 through  
100,

Defendants.

Case No: C 12-5168 SBA

ORDER DENYING APPLICATION FOR  
A TEMPORARY RESTRAINING ORDER

On October 4, 2012, Plaintiffs Ernesto S. Purugan and  
Isabelita G. Purugan, through counsel, filed the instant mortgage  
fraud action in this Court against Mortgage Electronic  
Registration Systems, Inc. and HSBC Bank USA, among other  
Defendants. Dkt. 1. Along with their Verified Complaint,  
Plaintiffs filed a Motion for a Temporary Restraining Order  
("TRO") to enjoin the non-judicial foreclosure sale of their home

1 which is currently scheduled for October 11, 2012.<sup>1</sup> Dkt. 2.  
2 According to the Certification of Plaintiffs' counsel, he did not  
3 provide notice of the TRO request to any of the Defendants  
4 ostensibly because "there would be too little time, even if  
5 defendants had notice, to assign defense counsel to oppose the  
6 requested relief." Epsa Certificate ¶ 3, Dkt. 4.

7 Under Federal Rule of Civil Procedure 65, a TRO may be issued  
8 without notice to the adverse party or its counsel only if  
9 "(A) specific facts in an affidavit or a verified complaint  
10 clearly show that immediate and irreparable injury, loss, or  
11 damage will result to the movant before the adverse party can be  
12 heard in opposition; and (B) the movant's attorney certifies in  
13 writing any efforts made to give notice and the reasons why it  
14 should not be required." Fed. R. Civ. P. 65(b)(1); N.D. Cal. Civ.  
15 R. 65-1(b) ("Unless relieved by order of a Judge for good cause  
16 shown, on or before the day of an ex parte motion for a temporary  
17 restraining order, counsel applying for the temporary restraining  
18 order must deliver notice of such motion to opposing counsel or  
19 party."). There are "very few circumstances justifying the  
20 issuance of an ex parte TRO." See Reno Air Racing Assoc. Inc. v.  
21 McCord, 452 F.3d 1126, 1131 (9th Cir. 2006). For instance, notice  
22 may be excused where it "is impossible either because the identity  
23 of the adverse party is unknown or because a known party cannot be  
24 located in time for a hearing." Id. Or, notice may not be  
25 required where providing "notice to the defendant would render

26  
27  
28 <sup>1</sup> The action was reassigned from Magistrate Judge Elizabeth Laporte to Judge Armstrong on October 5, 2012. Dkt. 8.

1 fruitless the further prosecution of the action" because the  
2 adverse party is likely to destroy evidence. Id.

3 Plaintiffs have failed to demonstrate good cause to be  
4 excused from the notice requirement set forth in Rule 65(b)(1).  
5 Their only explanation for not providing notice is that Defendants  
6 allegedly would not have sufficient time to assign counsel before  
7 the date of the trustee's sale. Epsa Certificate ¶ 3. However,  
8 this assertion is entirely speculative and without foundation.  
9 Moreover, Plaintiffs have been on notice since October 24, 2011,  
10 that their Property was to be sold at a trustee's sale. On that  
11 date, a Notice of Trustee's Sale was recorded against the subject  
12 property which set a sale date of November 11, 2011. Compl. ¶ 22.  
13 Plaintiffs allege that "[t]he sale was postponed numerous times  
14 and is now scheduled for October 11, 2012." Id. Yet, despite  
15 their longstanding awareness of the impending trustee's sale,  
16 Plaintiffs offer no explanation why they waited until only a week  
17 before the sale date to seek a TRO without notice. As such, any  
18 exigency is of Plaintiffs' own making. See Quach v. Bank of Am.,  
19 Nat. Ass'n, No. 12-5037 EJD, 2012 WL 4498873, at \*4 (N.D. Cal.,  
20 Sept. 28, 2012) (finding that an ex parte TRO to enjoin a  
21 foreclosure sale was not justified where plaintiffs were aware for  
22 months of the potential trustee's sale) (Davila, J.); William W.  
23 Schwarzer, et al., California Practice Guide: Federal Civil  
24 Procedure Before Trial § 13:95 (The Rutter Group 2010) ("An  
25 important factor will be whether the applicant could have sought  
26 relief earlier by a motion for preliminary injunction, avoiding  
27 the necessity for a last-minute TRO. Delay in seeking relief may  
28 be evidence of laches . . . or negate the alleged threat of

1 'immediate' irreparable injury. . . . The court has discretion to  
2 deny the application on either ground").

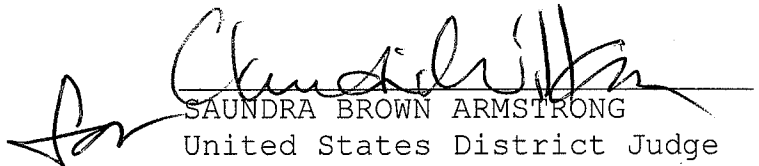
3 In sum, Plaintiffs have failed to demonstrate good cause to  
4 excuse their failure to provide notice of the instant TRO motion  
5 to Defendants. Plaintiffs may renew their motion after they have  
6 provided proper notice to Defendants of the Verified Complaint and  
7 their motion for a TRO. In addition, before renewing their  
8 motion, Plaintiffs must first meet and confer with Defendants in  
9 an effort to reach a mutually agreeable postponement of the  
10 trustee's sale to facilitate Defendants' ability to submit a brief  
11 in response to Plaintiffs' motion. Any renewed motion for a TRO  
12 must include a certification that Plaintiffs have complied with  
13 the aforementioned meet and confer requirement. Accordingly,

14 IT IS HEREBY ORDERED THAT:

- 15 1. Plaintiffs' Motion for a TRO is DENIED without  
16 prejudice.
- 17 2. This Order terminates Docket No. 2.

18 IT IS SO ORDERED.

19 Dated: October 10, 2012

20   
SAUNDRA BROWN ARMSTRONG  
United States District Judge