

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

3
 4 KEVIN E. GILMORE,

No. C 14-2389 CW

5 Plaintiff,

ORDER GRANTING
 APPLICATION FOR A
 TEMPORARY

6 v.

RESTRAINING ORDER
 AND ORDER TO SHOW
 CAUSE AND SETTING
 PRELIMINARY
 INJUNCTION HEARING

7 WELLS FARGO BANK NA, a national
 8 bank; NDEX WEST LLC, a Delaware
 limited liability company;

9 Defendants.

(Docket No. 12)

10 _____/

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 12 On May 7, 2014, Plaintiff Kevin Gilmore filed an Alameda
 13 County superior court action, alleging that Defendants Wells Fargo
 14 Bank NA and NDEX West LLC wrongly initiated foreclosure
 15 proceedings against him in violation of the California Homeowner
 16 Bill of Rights (HBOR). The superior court granted a temporary
 17 restraining order (TRO) barring foreclosure of Gilmore's property
 18 and set a preliminary injunction hearing for June 5, 2014.

19 Defendants removed the action to federal court. On June 3, 2014,
 20 Gilmore filed an ex parte application to extend the superior
 21 court's TRO. The Court GRANTS the TRO and sets a preliminary
 22 injunction hearing.
 23

24 BACKGROUND

25 Unless otherwise noted, the facts are taken from Gilmore's
 26 accompanying declaration. See Docket No. 12-3. Gilmore inherited
 27 the property from his grandfather. On June 21, 2007, he took out
 28

1 a promissory note in the principal sum of \$375,000 to World
2 Savings Bank, FSB. Through a series of mergers, the servicing of
3 his loan was transferred to Wachovia and then to Wells Fargo.
4 Wells Fargo asked Gilmore several times to provide proof of hazard
5 insurance on the property, but because of several transfers of his
6 loan, Gilmore did not know where he should send proof. As a
7 result, Gilmore's loan servicer force-placed insurance on the
8 property.
9

10 Due in part to the force-placed insurance, as well as other
11 financial obligations, Gilmore became delinquent on his loan. On
12 or about March 21, 2012, Wells Fargo recorded and served a Notice
13 of Default. Gilmore applied for a loan modification but was
14 rejected because he had excessive financial obligations.
15

16 In early 2014, Gilmore had a material change in his financial
17 circumstances -- his income increased and his financial
18 obligations decreased by about \$1,000 a month. He submitted a
19 first lien loan modification application to Wells Fargo,
20 documenting these changes. On March 24, 2014, he received a
21 letter from Wells Fargo acknowledging receipt of his application.
22 Gilmore Decl., Ex. A. He responded requesting the status of his
23 loan and, on April 21, 2014, received another letter from Wells
24 Fargo stating:
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26 As of the date of this letter, your mortgage loan is due for
27 the December 15, 2010, through April 15, 2014 monthly
28 installments. **Foreclosure is active and a foreclosure sale
date is currently scheduled for May 19, 2014. However, your
mortgage loan is currently being reviewed for possible**

DISCUSSION

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2 The Homeowner Bill of Rights prohibits a mortgage servicer
3 from engaging in what is known as "dual-tracking." "If a borrower
4 submits a complete application for a first lien loan modification
5 offered by, or through, the borrower's mortgage servicer, a
6 mortgage servicer . . . or authorized agent shall not record a
7 notice of default or notice of sale, or conduct a trustee's sale,
8 while the complete first lien loan modification application is
9 pending." Cal. Civ. Code § 2923.6(c). Before recording a notice
10 of default or conducting a trustee's sale, the mortgage servicer
11 must first make a written determination that the borrower is not
12 eligible for a loan modification. Id. Denial of the loan
13 modification triggers a thirty-day appeal period. Cal. Civ. Code
14 § 2923.6(d). If a loan modification is offered, but the borrower
15 either rejects the offer or accepts the offer but breaches the
16 loan modification agreement, then the mortgage servicer may
17 initiate foreclosure proceedings. Cal. Civ. Code § 2923.6(c).

18
19
20 It appears that Wells Fargo did not provide Gilmore with a
21 final disposition of his most recent loan modification application
22 before initiating foreclosure proceedings. Wells Fargo's letter
23 to Gilmore plainly states that its review of his application is
24 ongoing, yet a foreclosure sale has already been scheduled.

25
26 The fact that Gilmore previously applied for but was denied a
27 loan modification is not determinative. Where "there has been a
28 material change in the borrower's financial circumstances since

1 the date of the borrower's previous application and that change is
2 documented by the borrower and submitted to the mortgage
3 servicer," there is an exception to the general rule that a
4 mortgage servicer is not obliged to evaluate applications from
5 borrowers who "have already been evaluated or afforded a fair
6 opportunity to be evaluated for a first lien loan modification
7 prior to January 1, 2013." Cal. Civ. Code § 2923.6(g). Here,
8 Gilmore experienced substantial improvement in his financial
9 circumstances and documented this with his mortgage servicer,
10 which was the reason for his second application for loan
11 modification.
12

13 Wells Fargo also is not likely to be exempt in this case from
14 the HBOR. Under section 2924.12(g), a signatory to the consent
15 judgment entered in the case United States of America et al. v.
16 Bank of America Corporation et al., Case No. 1:12-cv-00361 RMC,
17 "that is in compliance with the relevant terms of the Settlement
18 Term Sheet of the consent judgment with respect to the borrower
19 who brought the action pursuant to this section while the consent
20 judgment is in effect shall have no liability for a violation" of
21 section 2923.6. While Wells Fargo is a signatory to that consent
22 judgment, Gilmore asserts that Wells Fargo has not provided it
23 with an online portal that would allow him to check the status of
24 his loan modification, which is required by the Settlement Term
25 Sheet. Gilmore Decl. ¶ 22; Pivtorak Decl., Ex. A (Settlement Term
26 Sheet) at A-25. Gilmore's complaint also alleges that Wells Fargo
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28

1 engaged in dual-tracking, which is barred by the Settlement Term
2 Sheet. Settlement Term Sheet at A-17-A-21. Accordingly, it
3 appears that Wells Fargo is not exempt from the HBOR with regards
4 to Gilmore's claims. Gilmore has therefore established that he is
5 likely to succeed on the merits of his claim.

6 The other factors also weigh in favor of granting a TRO.
7 Gilmore would suffer immediate and irreparable injury if the
8 superior court's TRO, due to expire tomorrow, were not extended.
9 Wells Fargo or its authorized agent could initiate foreclosure
10 proceedings as soon as the TRO expires. Gilmore would lose real
11 property, which is always considered unique, and that loss would
12 constitute irreparable injury. See Sundance Land Corp. v. Cmty.
13 First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 661 (9th Cir. 1988).
14 Gilmore's property is particularly unique to him because it is his
15 childhood home. Because the possible injury is severe, the
16 balance of hardships weighs in Gilmore's favor. A TRO would delay
17 possible foreclosure for only a short period of time, and so the
18 potential harm to Wells Fargo would not be substantial. Because
19 of the "adverse impact foreclosures have on households and
20 communities," there is a "strong public interest in preventing
21 unlawful foreclosures." Sharma v. Provident Funding Associates,
22 LP, 2010 WL 143473, at *2 (N.D. Cal.).

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26 CONCLUSION

27 The Court GRANTS Gilmore's application for a TRO, which has
28 issued in a separate order.

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The Court has further set a preliminary injunction hearing
and briefing schedule by separate order.

IT IS SO ORDERED.

Dated: 6/5/2014



CLAUDIA WILKEN
United States District Judge