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* E-filed 10/1/08*

NOT FOR CITATION
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GILBERTO FERNANDEZ, JR.,
Plaintiff,

Case No. CV 08-02909 HRL

v.

**ORDER DENYING PLAINTIFF'S
APPLICATION FOR TEMPORARY
RESTRAINING ORDER**

ALLIANCE BANCORP, GMAC MORTGAGE,
NCC SERVICING, INC., EXECUTIVE
TRUSTEE SERVICES, LLC, CONSUMER
SOLUTIONS REO, LLC, FIRST AMERICAN
TITLE COMPANY, SELECT PORTFOLIO
SERVICING, INC., HENRY M. PAULSON JR.
as Secretary of the Treasury of the United States,
MICHAEL B. MUKASEY, US Attorney
General and Alien Property Custodian,
Defendants.

Re: Docket No. 57

According to the allegations of his "Second Amended Petition to Set Aside and Void Foreclosure Sale . . ." ("Petition"), Gilberto Fernandez borrowed \$1.25 million from defendant Alliance Bancorp in August 2006. He executed a note secured by a Deed of Trust on real property at 1461 Burrows Road, Campbell, California. (It is not clear if this was a purchase money loan or a refinancing.) In the months that followed, the note was sold or assigned to other entities, all of whom are named as defendants in this suit. At some point, plaintiff stopped making payments. The note was declared in default, and the property was eventually sold at a trustee's sale on April 22, 2008.

Plaintiff sues all the entities involved in the loan or in its foreclosure. He alleges a list of claims for relief which, although primarily sounding in fraud, also include breach of contract,

1 usury, conversion, and racketeering. For example, plaintiff claims the defendant companies
2 "expand[ed] and contract[ed] the money supply at timed intervals so as to purposely dispossess
3 economically vulnerable Californians and Americans from their property." (Pet. ¶ 100.) Further,
4 he was "required to gift his property to the Mortgage Company without any corresponding
5 considerations in return." (Pet. ¶ 43.) In fact, Fernandez alleges the United States has been in
6 "bankruptcy" since 1933, and that Federal Reserve Notes have no intrinsic value. (Pet. ¶ 46-47.)
7 In other words, what he borrowed from Alliance Bancorp was not really "money," so: (1) he
8 should not have to pay it back, and (2) he should keep his property.

9 Fernandez seeks to set aside the foreclosure sale, cancel the note and deed of trust, and
10 recover both compensatory and punitive damages. In the alternative, in case his claims against
11 the corporate defendants should fail, he sues the United States Secretary of Treasury and the
12 Attorney General to compensate him ". . . for claims and services under the functional reserve
13 flat monetary system." (Pet. ¶ 112.) Those defendants that have appeared in the action have
14 filed motions to dismiss which are set for hearing in the future.

15 APPLICATION FOR A RESTRAINING ORDER

16 On September 22, plaintiff filed a "Verified Emergency Motion for a Temporary
17 Restraining Order and Preliminary Injunction." Apparently, title to the Borrows Road property
18 is now held by defendant Consumer Solutions, which has brought an unlawful detainer action in
19 the local state court to evict Fernandez. Plaintiff wants this court to stop Consumer Solutions
20 from going forward with the eviction.

21 LEGAL STANDARD

22 The standard for issuing a TRO is the same as that for issuing a preliminary injunction.
23 *See Brown Jordan International, Inc. v. The Mind's Eye Interiors, Inc.*, 236 F.Supp.2d 1152,
24 1154 (D.Hawai'i 2002); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887
25 F.Supp. 1320, 1323 (N.D.Cal.1995). Under the traditional test for granting preliminary
26 injunctive relief, the applicant must demonstrate (1) a likelihood of success on the merits; (2) a
27 significant threat of irreparable injury; (3) that the balance of hardships favors the applicant; and
28 (4) whether any public interest favors granting an injunction. *See Owner-Operator Indep.*

1 *Drivers Ass'n, Inc. v. Swift Transportation Co., Inc.*, 367 F.3d 1108, 111 (9th Cir. 2004). In the
2 Ninth Circuit, “[t]he moving party must show either (1) a combination of probable success on
3 the merits and the possibility of irreparable injury, or (2) that serious questions are raised and
4 the balance of hardships tips sharply in favor of the moving party.” *Stulbarg Int’l Sales Co.,*
5 *Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839-40 (9th Cir. 2001). ““These two
6 formulations represent two points on a sliding scale in which the required degree of irreparable
7 harm increases as the probability of success decreases.”” *LGS Architects, Inc. v. Concordia*
8 *Homes of Nevada*, 434 F.3d 1150, 1155 (9th Cir. 2006) (quoting *A&M Records, Inc. v. Napster,*
9 *Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)).

10 DISCUSSION

11 Since plaintiff proceeds *pro se*, the court is inclined to overlook his failure to
12 conscientiously follow the procedural requirements for applications for immediate relief found
13 in Federal Rule of Civil Procedure 65 and Civil Local Rule 65-1(a).

14 The court is less inclined to sympathize with plaintiff's delay. He had notice of default in
15 February 2007. He had notice of the intended sale by the trustee a month later. He did nothing
16 to pursue whatever legal remedies he might have imagined he had. In April 2008, more than a
17 year later, the property was sold, and still, plaintiff did nothing. Finally, when the eviction suit
18 was filed in June 2008, he filed the instant action. Even then, he did not plead entitlement to an
19 injunction to halt the eviction. Yet, that is the relief he seeks in his "Emergency Motion."¹

20 Under these circumstances, it would take a powerful showing of probable success on the
21 merits to prompt the court to now order Consumer Solutions to back off. Yet, plaintiff offers
22 nothing that this court would consider relevant evidence, and no pertinent legal authority. His
23 arguments—to the extent the court understands them—are transparently flawed. Without
24 intending to disparage plaintiff's sincerity or his personal convictions, his theories of why he
25 should win this suit appear to be nonsensical. If plaintiff is living in the Burrows Road property,
26 his eviction will likely be a hardship. However, he has had ample time to prepare for the
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¹ Plaintiff does not indicate whether or not the eviction action has gone to judgment.

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eventuality. Because plaintiff has seemingly no chance to prevail on the merits of his case (at least, as presently plead), the court must deny his request for a Temporary Restraining Order.

If plaintiff has additional information that might support a preliminary injunction, he may submit it with a properly noticed motion.

The request for a temporary restraining order is DENIED.

IT IS SO ORDERED.

Dated: 10/1/08



HOWARD R. LOYD
UNITED STATES MAGISTRATE JUDGE

