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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

Robert Perry; Tammy M. Rey,)	Case No.: 10-CV-03167-LHK
)	
Plaintiffs,)	
v.)	
)	ORDER DENYING STAY PENDING
National Default Servicing Corporation;)	APPEAL
Kondaur Capital Corporation; EMC Mortgage)	
Corporation; GMAC Mortgage LLC; Mortgage)	[re: docket no. 30]
Electronic Registration Service, Inc.; And All)	
Persons Unknown Claiming Any Legal or)	
Equitable Right, Title, Estate, Lien or Interest in)	
the Property Described in the Complaint Adverse)	
to Plaintiffs' Title, or Any Cloud Upon)	
Plaintiffs' Title Thereto, Does 1-100,)	
)	
Defendants.)	
)	

This action, initially filed in state court, was removed by Defendant Kondaur Capital Corporation on July 20, 2010. Before removal, the state court issued an ex parte temporary restraining order enjoining Defendants from conducting a July 6, 2010 foreclosure sale of the Plaintiffs' home, located at 1383 Perry Court, Hollister, CA 95023 ("the Property"). After removal, this Court granted Plaintiffs' ex parte motion for a temporary restraining order enjoining an August 6, 2010 foreclosure sale, and set a hearing on August 13, 2010 to determine whether the sale should be further enjoined by preliminary injunction. Dkt. No. 14.

Case No.: 10-CR-03167-LHK
ORDER DENYING STAY PENDING APPEAL

1 In considering the Plaintiffs’ request for a preliminary injunction, the Court considered the
2 following factors: (1) likelihood of success on the merits; (2) likelihood that the moving party will
3 suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities; and (4)
4 whether an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct.
5 365, 374 (2008). Applying this standard to the circumstances of this case, the Court determined
6 that Plaintiffs were not entitled to a preliminary injunction, and denied Plaintiffs’ motion in an
7 Order signed August 20, 2010. The Court’s reasoning is laid out in the Order. *See* Dkt. No. 29.
8 As a result, the temporary restraining order was dissolved.
9

10 On August 23, 2010, Plaintiffs moved this Court for a stay pending appeal of the
11 preliminary injunction denial, pursuant to Fed. R. App. P. 8(a). Dkt. No. 30. Plaintiffs’ motion is a
12 two paragraph document that cites no legal authority other than Appellate Rule 8(a). *Id.* The
13 standard for staying an order pending appeal is nearly identical to the standard for granting a
14 preliminary injunction: “. . . (1) whether the stay applicant has made a strong showing that he is
15 likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay;
16 (3) whether issuance of the stay will substantially injure the other parties interested in the
17 proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).
18 The Court already considered these factors, and concluded that (1) Plaintiffs have very little or no
19 likelihood of success on any of their alleged causes of action (2) the loss of Plaintiffs’ home
20 constitutes irreparable harm (3) equity favors the Defendants because Plaintiffs have been living in
21 their home without making mortgage payments for over two years and (4) the public interest would
22 best be served by allowing Defendants to proceed with the sale. In light of all these factors, the
23 Court determined that Plaintiffs were not entitled to an order further enjoining sale of the Property.
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26 In their ex parte Motion for Stay, Plaintiffs make no argument that a stay pending appeal is
27 warranted, other than to state that the Court’s denial of the preliminary injunction was “clearly
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1 erroneous” and that the loss of Plaintiffs’ home constitutes irreparable harm. The Court already
2 considered the harm to Plaintiffs in its decision declining to impose a preliminary injunction
3 against a foreclosure sale on the house, and re-alleging this harm does not change the Court’s
4 analysis under the *Hilton* standard. It is Plaintiffs’ burden to demonstrate that a stay is
5 appropriate. *Nken v. Holder*, 129 S. Ct. 1749, 1760-61 (2009). Because Plaintiffs have submitted
6 no new facts or legal argument, and because the standards for granting injunctive relief and for
7 staying an order are virtually identical, Plaintiffs have failed to carry this burden. *See United States*
8 *v. Lang*, No. 06cv2648 JM(LSP), 2008 U.S. Dist. LEXIS 67572 at *4 (S.D. Cal. Sept. 2, 2008)
9 (denying request to stay an order of foreclosure because the moving party failed to “set forth any
10 analysis in support of the likelihood of success on the merits element.”).

11
12 Accordingly, the Court DENIES Plaintiffs’ request for a stay pending appeal.

13
14 **IT IS SO ORDERED.**

15 Dated: August 24, 2010

16 
17 LUCY H. KOH
18 United States District Judge