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28***E-FILED 11-18-2010***

NOT FOR CITATION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

RAJ KUMARI SHARMA and KARTARI LAL
SHARMA,

No. C10-04548 HRL

Plaintiffs,

**ORDER (1) GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO EXPUNGE LIS PENDENS
AND (2) DENYING AS MOOT
DEFENDANT'S MOTION FOR
TELEPHONIC APPEARANCE**

v.

WACHOVIA, DOES 1-10,

Defendants.

[Re: Docket Nos. 4, 16]

_____ /

This lawsuit arises out of the non-judicial foreclosure sale of real property owned by plaintiffs Raj Kumari Sharma and Kartari Lal Sharma. In essence, plaintiffs say that they were duped into accepting a home loan they could not afford. According to their complaint, plaintiffs contacted defendant Wachovia to obtain a loan modification. Plaintiffs further allege that defendant advised them to stop making their monthly mortgage payments because they qualified for Wachovia's "Assistance Program." Plaintiffs say that, based on Wachovia's advice, they stopped making their mortgage payments, but that Wachovia nonetheless foreclosed on the property in February 2010 and sold it without contacting plaintiffs about a loan modification.

The Sharmas filed suit in Santa Clara County Superior Court, asserting four state claims for relief: (1) Breach of Duty of Good Faith and Fair Dealing; (2) Unfair Business Practices

1 (Cal. Bus. & Prof. Code § 17200); (3) Misrepresentation and Fraud; and (4) Unjust Enrichment.
2 They seek to recoup \$321,764.04 in payments made to Wachovia, as well as punitive damages,
3 attorney’s fees and costs. Wachovia removed the matter here, asserting diversity jurisdiction.

4 Now before the court is Wachovia’s motion to expunge lis pendens and for an order
5 deeming the lis pendens void. Plaintiffs oppose the motion. All parties have expressly
6 consented that all proceedings in this matter may be heard and finally adjudicated by the
7 undersigned. 28 U.S.C. § 636(c); FED. R. CIV. P. 73. The court deems the matter appropriate
8 for determination without oral argument. Civ. L.R. 7-1(b). The November 23, 2010 hearing is
9 vacated, and defendant’s motion for telephonic appearance is denied as moot. Upon
10 consideration of the moving and responding papers,¹ as well as the arguments of counsel, this
11 court grants the motion to expunge lis pendens, but denies defendant’s request for an award of
12 its fees and costs.

13 Federal courts look to state law in matters concerning lis pendens. 28 U.S.C. § 1964.
14 “A party to an action who asserts a real property claim may record a notice of pendency of
15 action in which that real property claim is alleged.” CAL. CODE CIV. PRO. § 405.20. The
16 purpose of a lis pendens is to give “constructive notice that an action has been filed affecting
17 title or right to possession of the real property described in the notice.” *BGJ Associates, LLC v.*
18 *Super. Ct.*, 75 Cal. App.4th 952, 966, 89 Cal. Rptr.2d 693 (2000). “Its effect is that anyone
19 acquiring an interest in the property after the action was filed will be bound by the judgment.”
20 *Id.* Once filed, a lis pendens clouds title and, in effect, prevents the property’s transfer until the
21 litigation is resolved or the lis pendens is expunged. *Id.* Because of the “serious consequences
22 flowing from it . . . lis pendens is a provisional remedy which should be applied narrowly.” *Id.*
23 at 967.

24 Plaintiffs do not dispute that, in recording the lis pendens, they failed to comply with the
25 proof of service requirements under California Code of Civil Procedure section 405.22.
26 Accordingly, it appears that the lis pendens is void. CAL. CODE CIV. PRO. § 405.23 (“Any

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28 ¹ Pursuant to Fed. R. Evid. 201, defendant’s request for judicial notice is granted.

1 notice of pendency of action shall be void and invalid as to any adverse party or owner of
2 record unless the requirements of Section 405.22 are met for that party or owner and a proof of
3 service in the form and content specified in Section 1013a has been recorded with the notice of
4 pendency of action.”).

5 Even if the lis pendens were not void, on the record presented, the court concludes that
6 the lis pendens should be expunged. Although plaintiffs argue that the instant motion is
7 premature, a motion to expunge lis pendens may be brought at any time after notice of
8 pendency has been recorded. CAL. CODE CIV. PRO. § 405.30. The party who recorded the
9 notice of lis pendens bears the burden of proof in opposing a motion to expunge. *Id.* There are
10 several statutory bases for expunging a lis pendens, including that the pleading on which the
11 notice is based does not contain a real property claim. *Id.* § 405.31. Expungement under
12 California Code of Civil Procedure section 405.31 “concerns judicial examination of
13 allegations only.” *BGJ Associates, LLC*, 75 Cal. App.4th at 956 (quoting Comment to §
14 405.31). “Rather than analyzing whether the pleading states any claim at all, as on a general
15 demurrer, the court must undertake the more limited analysis of whether the pleading states a
16 real property claim.” *Id.*

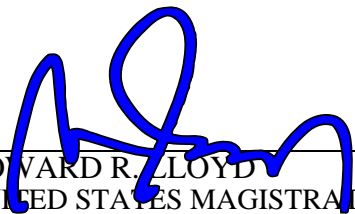
17 Here, plaintiffs’ lawsuit essentially is an action seeking money damages for wrongful
18 foreclosure and fraud. “[A]n action for money *only*, even if it relates in some way to specific
19 real property, will not support a lis pendens.” *BGJ Associates, Inc.*, 75 Cal. App.4th at 967
20 (citations omitted). Plaintiffs assert that the instant lawsuit is actually one to set aside or cancel
21 the trustee’s sale for irregularities in the sale notice or procedure. They do not dispute
22 Wachovia’s assertion that no valid tender was made prior to the sale in question. Instead,
23 plaintiffs argue that the tender rule does not apply to them. As noted above, however, their
24 complaint seeks only money damages allegedly caused by the purported wrongful sale.
25 Moreover, “[a] valid and viable tender of payment of the indebtedness owing is essential to an
26 action to cancel a voidable sale under a deed of trust.” *Karlsen v. Am. Savings & Loan Ass’n*,
27 15 Cal. App.3d 112, 117, 92 Cal. Rptr. 851 (1971) (holding that where no valid tender was
28

1 made, the trustee's sale, although initially voidable, became valid and proper). Plaintiffs have
2 cited no authority to the contrary.

3 Accordingly, the lis pendens shall be expunged.² The court shall award the party
4 prevailing on a motion to expunge lis pendens reasonable attorney's fees and costs of making or
5 opposing the motion, unless the court finds that the other party acted with substantial
6 justification or that other circumstances make such an award unjust. CAL. CODE CIV. PRO. §
7 405.38. Because the record presented indicates that plaintiffs are experiencing financial
8 difficulties, an award of attorney's fees and costs would be unjust. Accordingly, defendants'
9 request for an award of attorney's fees and costs is denied.

10 SO ORDERED.

11 Dated: November 18, 2010

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14 HOWARD R. LLOYD
15 UNITED STATES MAGISTRATE JUDGE

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² The court need not reach defendant's alternative request for an order requiring plaintiffs to post a bond.

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5:10-cv-04548-HRL Notice has been electronically mailed to:
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