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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT H. ZAKAR, VALERIE ZAKAR,)	Case No.: 11cv0457 AJB (WVG)
)	
Plaintiffs,)	
v.)	ORDER DENYING PLAINTIFFS'
)	MOTION FOR A PRELIMINARY
CHL MORTGAGE PASS-THROUGH)	INJUNCTION
TRUST 2006-HYB3 MORTGAGE PASS-)	
THROUGH CERTIFICATES, SERIES 2006-)	
HYB3, et al.,)	
)	
Defendants.)	
_____)	

Presently before the Court is Plaintiffs' motion for preliminary injunction, seeking the enjoinder of a foreclosure sale. (Doc. No. 2).

BACKGROUND

On or about January 19, 2006, Plaintiffs obtained a \$792,000 loan in order to purchase real property in San Diego.¹ The note on the property is secured by a Deed of Trust recorded on January 24, 2006. The Deed of Trust identifies America's Wholesale Lender ("AWL") as the lender, ReconTrust Company, N.A. ("Recon") as the trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary.

¹ It appears that Plaintiffs obtained an additional loan when purchasing the property. Inasmuch as Plaintiffs' pending foreclosure results from a default on the \$792,000 loan, the Court will not address the documents associated with the secondary mortgage loan.

1 After Plaintiffs became delinquent on their mortgage payments, Recon recorded a Notice of
2 Default and Election to Sell Under the Deed of Trust on August 19, 2009. On April 5, 2010, Recon
3 recorded a Notice of Trustee’s Sale of the Property, referencing a sale date of April 26, 2010. The
4 foreclosure sale scheduled for April 26th did not occur. On July 6, 2010, Recon filed a Corporation
5 Assignment of Deed of Trust (“Corporation Assignment”) in which MERS assigned its beneficial
6 interests under the Deed of Trust to “The Bank of New York Mellon FKA The Bank of New York as
7 Trustee for the Certificateholders CWMBS, Inc. CHL Mortgage Pass-Through Trust 2006-HYB 3
8 Mortgage Pass-Through Certificates, Series 2006-HYB3.” Plaintiffs allege that the foreclosure was
9 subsequently rescheduled for March 8, 2011.²

10 Plaintiffs filed this action on March 4, 2011. The Complaint sets forth eleven causes of action:
11 (1) wrongful foreclosure by a stranger, (2) intentional fraud, (3) fraudulent concealment, (4) negligence,
12 (5) violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. 1961 *et*
13 *seq.*, (6) violation of the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601 *et seq.*,
14 (7) violation of California Financial Code § 50505, (8) unfair debt collection practices under the
15 Rosenthal Act, California Code § 1788(e)-(f), and the Fair Debt Collection Practices Act (“FDCPA”),
16 15 U.S.C. 1692 *et seq.*, (9) violation of California Civil Code § 2923.5, (10) violation of California Civil
17 Code § 2923.6, and (11) unlawful, unfair or deceptive practices.

18 LEGAL STANDARD

19 In determining whether to grant a preliminary injunction, the Court applies the standard
20 articulated in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365 (2008). A party
21 seeking a preliminary injunction must demonstrate: (1) the likelihood of success on the merits; (2) the
22 likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in
23 his favor; and (4) that an injunction is in the public interest. *Id.* at 374. Injunctive relief is “an
24 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to
25 such relief.” *Id.* at 375-76.

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28 ² The Court assumes for the purpose of this opinion that the foreclosure sale did not take place
on March 8, 2011 inasmuch as the parties have not notified the court otherwise.

1 **DISCUSSION**

2 As to each of the causes of action in the Complaint, Plaintiffs have failed to show the requisite
3 likelihood of success on the merits to warrant equitable relief. Notably, a party moving for injunctive
4 relief must demonstrate irreparable injury is “likely” in the absence of an injunction, rather than merely
5 possible. *See id.* at 375.

6 Plaintiffs' motion for a preliminary injunction primarily relies upon Plaintiffs' first cause of
7 action alleging that the foreclosure sale is being conducted by a stranger without the lawful ability to
8 foreclose. Specifically, Plaintiffs contest the validity of the Corporation Assignment of Deed of Trust
9 recorded on July 06, 2010. The Corporation Assignment purports to assign all beneficial interest under
10 the Deed of Trust from MERS to "The Bank of New York Mellon FKA The Bank of New York as
11 Trustee for the Certificateholders CWMBS, Inc. CHL Mortgage Pass-Through Trust 2006-HYB 3
12 Mortgage Pass-Through Certificates, Series 2006-HYB3." Plaintiffs' claim that this was an impermissi-
13 ble assignment and argue that the beneficiary of the mortgage note is currently unknown which
14 invalidates the foreclosure proceedings. However, as previously noted, the Deed of Trust identifies
15 Recon as the trustee. There is no indication that the Corporation Assignment displaced Recon from its
16 original capacity as trustee. Nor have Plaintiffs provided any authority suggesting that the allegedly
17 improper assignment of the beneficiary's interest precludes the trustee from instituting foreclosure
18 proceedings. Under California Civil Code § 2924(a)(1), the foreclosure process may be conducted by
19 the "trustee, mortgage or beneficiary or any of their authorized agents." Cal. Civ. Code § 2924(a)(1).
20 Inasmuch as Recon recorded both the Notice of Default on April 9, 2009, and the Notice of Trustee's
21 Sale on April 5, 2010, it does not appear that Plaintiffs' home is being unlawfully foreclosed upon by
22 stranger. Accordingly, Plaintiffs have not established that they are likely to prevail on their first claim.

23 As to the remaining claims, Plaintiffs rely entirely upon the allegations contained within the
24 Complaint to demonstrate their likelihood of success on the merits.

25 In their second cause of action, Plaintiffs allege intentional fraud. Plaintiffs have not demon-
26 strated a likelihood of success on the merits of this claim inasmuch as they have not pled all of the
27 necessary elements of a fraud claim. One of the essential elements of fraud is the justifiable reliance of
28 the plaintiff. *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996). Plaintiffs contend that the

1 Defendants fraudulently recorded the Corporation Assignment with the forged signature of a notary.
2 There is no indication, however, that Plaintiffs justifiably relied upon the allegedly fraudulent Corpora-
3 tion Assignment in any way. A fraud claim cannot succeed on its merits without evidence of justifiable
4 reliance.

5 Nor have Plaintiffs demonstrated a likelihood of success based on the merits of their third cause
6 of action alleging fraudulent concealment. The Complaint describes an overall scheme by Defendants to
7 conceal vital information from borrowers when originating, selling, and foreclosing upon mortgage
8 loans. However, Plaintiffs do not offer any evidence to support this claim nor have Plaintiffs disclosed
9 what evidence, if any, they intend to offer later in the litigation. Accordingly, Plaintiffs have not met
10 their burden with regard to their fraudulent concealment claim.

11 Plaintiffs' fourth cause of action alleges that the Defendants negligently breached their duty of
12 care to the Plaintiffs throughout the loan transaction. In order to establish negligence, Plaintiffs must
13 establish first that Defendants owed Plaintiffs a legal duty of care. The Complaint lists the various ways
14 that Defendants allegedly breached their duty to the Plaintiffs, but does not provide any statutory or
15 common law basis for finding that a legal duty existed. Accordingly, Plaintiffs have not established a
16 likelihood of success on the merits of their negligence claim.

17 Similarly, Plaintiffs have failed to demonstrate a likelihood of success on the merits of their fifth
18 claim. Plaintiffs' RICO claim alleges that the defendants engaged in a pattern of racketeering by
19 sending numerous loan-related documents in the mail with the intention of compelling Plaintiffs to part
20 with large sums of money or to abandon their property. However, as with their fraudulent concealment
21 claim, Plaintiffs have not identified any of the specific documents that support their racketeering claim
22 and have not provided sufficient information regarding the contents of the documents to establish a
23 likelihood of success on the merits of their RICO claim.

24 Plaintiff's sixth cause of action alleges that the Defendants violated §2605 of RESPA by: (1)
25 failing to comply with certain disclosure requirements at the closing on the property, and (2) failing to
26 provide a response to Plaintiffs' Qualified Written Request within 60 days after receipt of the request.
27 Defendants' contend that these claims are time-barred inasmuch as claims brought under § 2605 are
28 subject to a three-year statute of limitations period. 12 U.S.C. § 2614. The closing on the property

1 occurred in 2006 and Plaintiffs have not indicated when they submitted their Qualified Written Request.
2 Inasmuch as Plaintiffs have not offered any justification for finding that their RESPA claims are not
3 time-barred, they have not established a likelihood of success on the merits of their RESPA claim.

4 For the same reason, Plaintiffs have not established a likelihood of success on the merits for their
5 seventh cause of action. California Financial Code § 50505 provides that any person who violates any
6 provision of RESPA or its regulations has also violated § 50505 of the California Residential Mortgage
7 Lending Act. As discussed above, it is unclear from the Complaint whether Plaintiffs' RESPA claims
8 survive the applicable statute of limitations.

9 Plaintiffs' eighth cause of action contends that Defendants engaged in unfair debt collection
10 practices in violation of the Rosenthal Act and the FDCPA. Plaintiffs allege that Defendants acted
11 unlawfully in the following ways: calling Plaintiffs and threatening to take their home, falsely stating the
12 amount of a debt, increasing the amount of a debt by including amounts that are not permitted by law or
13 contract, and using unfair and unconscionable means in an attempt to collect a debt. However, the
14 Complaint does not provide authority for finding that Defendants constitute debt collectors or that
15 foreclosure pursuant to a deed of trust constitute debt collection under these statutes. *See Izenberg v.*
16 *ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008)(finding that plaintiffs had not pled an
17 FDCPA claim because foreclosing on a property pursuant to a deed of trust is not collection of a debt
18 within the meaning of the FDCPA); *Castaneda v. Saxon Mortg. Servs., Inc.*, 687 F. Supp. 2d 1191, 1197
19 (E.D. Cal. 2009)(holding that foreclosure pursuant to a deed of trust does not constitute debt collection
20 under the Rosenthal Act). Nor does the Complaint provide sufficient factual detail regarding the
21 Defendants' objectionable actions for the Court to determine whether they constituted violations under
22 the Rosenthal Act and the FDCPA. Accordingly, Plaintiffs have not established a likelihood of success
23 on the merits of Plaintiffs' claims.

24 In their ninth cause of action, Plaintiffs' allege that all of the Defendants except for Recon failed
25 to comply with the due diligence requirements in California Civil Code § 2923.5(a). This provision
26 prohibits mortgagees, trustees, beneficiaries, or authorized agents from filing a notice of default on an
27 owner's principal residence until 30 days after contact is made with the owners or 30 days after
28

1 satisfying the statutory due diligence requirements. Cal. Civ. Code § 2923.5(a). However, there is no
2 indication that any of the Defendants other than Recon filed a Notice of Default that would trigger
3 § 2923.5(a)'s requirements. The sole Notice of Default mentioned in the Complaint was filed by Recon
4 and accompanied by a declaration attesting to Recon's compliance with § 2923.5 . Thus, Plaintiffs have
5 not established a likelihood of success on the merits of their ninth cause of action.

6
7 Plaintiffs' tenth cause of action alleges that Defendants violated California Civil Code
8 § 2923.6(a) by failing to implement a loan modification or workout plan rather than foreclosing upon
9 Plaintiffs' property. Plaintiffs contend that a private right of action exists for § 2923.6 under California
10 Business & Profession Code § 17200 which permits recovery for "any unlawful, unfair or fraudulent
11 business act or practice." Cal. Bus. & Prof. Code § 17200. While § 17200 may provide a private right of
12 action for violations of § 2923.6(a), Plaintiffs have not provided any authority suggesting that §
13 2923.6(a) imposes a duty on Defendants that would result in liability to the Plaintiffs in this situation.
14 Subsection (a) of § 2923.6 provides that loan servicers who modify individual loans within a loan pool
15 are not violating their duty to maximize net present value under their pooling and servicing agreements,
16 so long as the modified loan was at risk of default.³ Cal. Civ. Code § 2923.6(a); see *Nool v. HomeQ*
17 *Servicing*, 653 F. Supp. 2d 1047, 1052 (E.D. Cal. 2009). The duties owed by loan servicers to the other
18 members of pooling and servicing agreements are irrelevant to Plaintiffs inasmuch they were not parties

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20 ³ California Civil Code § 2923.6(a) states as follows:

21 (a) The Legislature finds and declares that any duty servicers may have to maximize net present value
22 under their pooling and servicing agreements is owed to all parties in a loan pool, or to all investors
23 under a pooling and servicing agreement, not to any particular party in the loan pool or investor under a
24 pooling and servicing agreement, and that a servicer acts in the best interests of all parties to the loan
25 pool or investors in the pooling and servicing agreement if it agrees to or implements a loan
26 modification or workout plan for which both of the following apply:

25 (1) The loan is in payment default, or payment default is reasonably foreseeable.

26 (2) Anticipated recovery under the loan modification or workout plan exceeds the
27 anticipated recovery through foreclosure on a net present value basis.

1 to said agreements. Accordingly, Plaintiffs have not established a likelihood of success on the merits of
2 their tenth cause of action.

3 Plaintiff's eleventh cause of action alleges unlawful, unfair, or deceptive practices by Defendants
4 in violation of California Business and Profession Code § 17200. This claim incorporates each of the
5 allegedly unlawful acts alleged in the preceding ten causes of action to create a separate cause of action
6 through § 17200. Having found that Plaintiffs failed to establish a likelihood of success on the merits of
7 their first ten claims, the Court reaches the same conclusion as to their eleventh cause of action by virtue
8 of the reasoning detailed above.


9 Because Plaintiffs have failed to show the requisite likelihood of success on the merits, the Court
10 does not consider the remaining three factors.

11 **CONCLUSION**

12 For the foregoing reasons, Plaintiffs' have not carried their burden of showing that a preliminary
13 injunction should be issued. Accordingly, the Court DENIES Plaintiffs' motion.

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15 IT IS SO ORDERED.

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17 DATED: April 4, 2011

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20 Hon. Anthony J. Battaglia
21 U.S. District Judge
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