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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

U.S. BANK NATIONAL ASSOCIATION, a
national banking association, as successor-in-
interest to the FEDERAL DEPOSIT
INSURANCE CORPORATION, Receiver
for Park National Bank,

Plaintiff,

vs.

SANDY K. FRIEDRICHS, an individual; and
DOES 1 through 50, inclusive,

Defendants.

CASE NO. 12cv2373-GPC(KSC)

**ORDER GRANTING
DEFENDANT'S MOTION FOR
PRELIMINARY INJUNCTION;
SETTING BRIEFING SCHEDULE**

[Doc. No. 3.]

On October 15, 2012, Defendant filed an *ex parte* motion for temporary restraining order and preliminary injunction seeking to restrain Plaintiff from foreclosing Defendant's property located at 1340 La Mirada Drive, San Marcos, California 92078. (Dkt. No. 3.) On October 18, 2012, the Court denied Defendant's *ex parte* motion for a temporary restraining order because the Court concluded that Defendant had not shown irreparable harm since Plaintiff had moved the sale of the property to November 15, 2012. (Dkt. No. 6.) The Court set a briefing schedule as to the motion for preliminary injunction. Defendant filed a supplemental brief on October 29, 2012. (Dkt. No. 15.) Plaintiff filed a reply on October 31, 2012. (Dkt. No. 16.) On November 9, 2012, the Court held a hearing on the motion for preliminary injunction. Brian Tanada appeared on behalf of Plaintiff and Sandy Zappia and non-party Albert Zappia appeared *pro se*. Based on the reasoning below, the Court GRANTS

1 Defendant's motion for preliminary injunction.

2 **Procedural Background**

3 On July 13, 2012, Plaintiff U.S. Bank National Association ("U.S. Bank"), as successor to the
4 Federal Deposit Insurance Corporation ("FDIC"), as Receiver for Park National Bank ("Park
5 National") filed a complaint in the Superior Court of San Diego against Defendant Sandy Friedrichs
6 for appointment of receiver and judicial foreclosure. On September 28, 2012, Defendant Sandy Zappia
7 and non-party Albert Zappia, Defendant's husband, proceeding *pro se*, removed the case to this Court.
8 (Dkt. No. 1.) On October 12, 2012, the case was transferred to the undersigned judge. (Dkt. No. 2.)

9 On October 15, 2012, Defendant filed an *ex parte* motion for temporary restraining order and
10 preliminary injunction seeking to restrain Plaintiff from foreclosing Defendant's business property
11 located at 1340 La Mirada Drive, San Marcos, California 92078. (Dkt. No. 3.) On October 18, 2012,
12 the Court denied Defendant's *ex parte* motion for a temporary restraining order because the Court
13 concluded that Defendant had not shown irreparable harm since Plaintiff had moved the sale of the
14 property to November 15, 2012. (Dkt. No. 6.) The Court set a briefing schedule as the motion for
15 preliminary injunction. Defendant filed a supplemental brief on October 29, 2012. (Dkt. No. 15.)
16 Plaintiff filed an opposition on October 31, 2012. (Dkt. No. 16.) Defendant filed a reply on November
17 1, 2012. (Dkt. No. 28.)

18 **Factual Background**

19 Around April 9, 2007, GreenPoint Mortgage Funding lent Defendant, on a recourse basis, the
20 principal sum of \$340,000, secured by the property located at 1340 La Mirada Drive, San Marcos, CA
21 92078. (Dkt. No. 5-1, Ocepek Decl. ¶¶ 5-6; Ex. 1.) The loan was memorialized in a written
22 Promissory Note. (*Id.*) On April 18, 2007, GreenPoint recorded a "Deed of Trust, Assignment of
23 Rents, Security Agreement and Fixture Filing" ("Deed of Trust") with the San Diego County
24 Recorder's Office. (*Id.* ¶ 7; Ex. 2.) Defendant executed the Deed of Trust as trustor, to GreenPoint,
25 as beneficiary, and to Marin Conveyancing Corp., as trustee. (*Id.*) According to the title policy issued
26 in connection with the Loan, the Deed of Trust constitutes a first priority lien on the Property. (*Id.* ¶
27 7; Ex. 2.)

28 On August 1, 2008, Park National recorded an "Assignment of Deed of Trust" whereby

1 GreenPoint assigned all of its right, title, and interest in, to and under the Note, Deed of Trust and
2 Assignment to Park National. (Id. ¶ 9; Ex. 3.) The loan assignment was notarized on April 25, 2007
3 but executed by Patrick Nygard, Assistant VP of GreenPoint, on February 29, 2008.

4 On October 30, 2009, the FDIC placed Park National into receivership and assigned the assets
5 of Park National, including the Loan, to U.S. Bank. (Id. ¶ 10; Ex. 4.) The Note was assigned from
6 GreenPoint to Park National by way of an Endorsement on the last page of the Note. (Id. ¶ 6 ; Ex. 1.)
7 When the FDIC closed Park National, the Note was assigned by the FDIC as Receiver for Park
8 National to U.S. Bank by way of an Allonge to Note. (Id.) As a result of the Endorsement and
9 Allonge, U.S. Bank is the current holder of the Note.

10 In late March 2012, non-party Albert Zappia submitted a check in the amount of \$287,734.26
11 to U.S. Bank as an attempted payoff for the Loan. (Id. ¶ 12; Dkt. No. 1-2 at 55.) The check bore the
12 notation “EFT Only for Discharge of Debt.” (Dkt. No. 1-2 at 55.) The check was returned because
13 it was written on a closed account. (Dkt. No. 5-1, Ocepek Decl., Ex. 5.)

14 A U.S. Bank statement dated April 16, 2012 indicated that the amount due was \$0.00. (Dkt.
15 No. 1-2 at 57.) In subsequent correspondence, outside counsel for U.S. Bank informed Defendant
16 about the insufficient funds and that the loan was in default. (Dkt. No. 1-2 at 59.) Starting in April
17 and May 2012, Defendant failed to make her monthly loan payment. (Dkt. No. 501, Ocepek Decl. ¶
18 13.) Defendant’s failure to pay the Loan is a default on the obligations for which the Deed of Trust
19 is security. (Id.)

20 Around June 22, 2012, U.S. Bank recorded a Substitution of Trustee, wherein Beacon Default
21 Management, Inc. became the successor trustee under the Deed of Trust. (Id. ¶ 14; Ex. 6.) U.S. Bank
22 started non-judicial foreclosure proceedings by recording a notice of default and election to sell around
23 June 22, 2012. (Id. ¶ 15; Ex. 7.) Around September 12, 2012, U.S. Bank noticed a trustee’s sale on
24 the property for October 18, 2012. (Id. ¶ 16.) The sale has been postponed until November 15, 2012.
25 (Id. ¶ 17.)

26 Discussion

27 To obtain a preliminary injunction, the moving party must show: (1) a likelihood of success
28 on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary

1 relief; (3) that the balance of equities tips in the moving party's favor; and (4) that an injunction is in
2 the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

3 Under the Ninth Circuit's "sliding scale" approach, the first and third elements are to be
4 balanced such that "serious questions" going to the merits and a balance of hardships that "tips
5 sharply" in favor of the movant are sufficient for relief so long as the other two elements are also met.
6 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011). A preliminary
7 injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the
8 plaintiff is entitled to such relief," Winter, 555 U.S. at 22, and the moving party bears the burden of
9 meeting all four Winter prongs. See Cottrell, 632 F.3d at 1135; DISH Network Corp. v. FCC, 653
10 F.3d 771, 776–77 (9th Cir. 2011).

11 **A. Likelihood of Success on the Merits**

12 Defendant argues that the Assignment from GreenPoint to Park National Bank is invalid
13 because it was not properly notarized. The Assignment was executed on February 29, 2008 by Patrick
14 Nygard; however, the Assignment was notarized months earlier in April 2007. (Dkt. No. 5-1, Ex. 3.)
15 Defendant cites to California law that states that a document that a notary witnesses must be complete
16 at the time of notarization. Cal. Gov't Code § 8205(a)(2). Therefore, since the Assignment was
17 notarized in April 2007 and the document was executed and signed on February 29, 2008, Defendant
18 argues the document was not properly notarized and not properly assigned.

19 In a declaration, Plaintiff states that the "loan assignment was executed and notarized in April
20 2007 and became effective in February 2008 when the sale of the Loan to Park National was
21 consummated." (Dkt. No. 5-1, Ocepek Decl. ¶ 9.) Plaintiff's declaration does not clarify the
22 discrepancy. At the hearing, Plaintiff's counsel stated that Ocepek's statements are based on a review
23 of the loan documents and not personal knowledge. On its face, there appears to be a discrepancy as
24 the Assignment that raises questions as to the validity of the transfer to Park National Bank.

25 In addition, Defendant argues that Plaintiff failed to identify the Note ever being owned by
26 Lehman Brothers Small Finance ("Lehman Brothers") and how her loan was later transferred to Park
27 National Bank. (Dkt. No. 15, D's Mem. in Support of Prelim. Injunction, Exs. A, B.) By letter,
28 Lehman Brothers informed Defendant that it purchased the Note from GreenPoint as of July 1, 2007.

1 (Id.) On March 17, 2008, Park National wrote Defendant indicating that it purchased her loan from
2 Lehman Brothers. (Id.) Since there is no mention of Lehman Brothers in Plaintiff's documents,
3 Defendant argues that the assignment to Plaintiff U.S. Bank is not valid as there was a break in the
4 chain of ownership. Plaintiff did not address this issue in its reply. At the hearing, Plaintiff's counsel
5 noted that he conducted further research subsequent to the filing of the reply and offered to file a
6 supplemental brief.

7 Further, Defendant argues that the endorsement of the Note from GreenPoint to Park National
8 Bank is not valid because the endorsement fails to provide any identifying information to indicate
9 which loan the endorsement is referencing. (Dkt. No. 5-1 at 17.) In opposition, Plaintiff argues that
10 an endorsement of a negotiable instrument must be "made on [the] instrument" citing to Cal. Com.
11 Code § 3204. According to Plaintiff, the endorsement was on the last page of the Note and thus was
12 affixed to the Note.

13 Plaintiff's counsel should brief whether the endorsement at issue is an endorsement or an
14 allonge and whether the endorsement and/or allonge was properly affixed to the Note. See Multibank
15 2009-1RES-ADC Venture v. San Diego Comm. Hous. Corp., 2011 WL 1044612 (S.D. Cal. 2011)
16 (concluding that the evidence did not demonstrate that the allonge was affixed to the note as there was
17 no evidence that it was stapled or otherwise attached to the Note).

18 Therefore, based on what has been presented to the Court, the Court concludes that Defendant
19 has made a sufficient showing of a likelihood of success on the merits as to the validity of the
20 Assignment and Note.

21 **B. Irreparable Harm to the Moving Party**

22 Defendant claims that she will suffer economic harm and displacement as her business is
23 located at the property in dispute. She states that she has about 20 to 30 employees and the building
24 is customized for the production of her company's goods. Plaintiff argues that Defendant can be
25 compensated through monetary damages. The Court concludes that in the short term, Defendant will
26 suffer irreparable harm as it would affect her business and employees.

27 **C. Balancing the Equities**

28 In balancing the equities, the Court considers the impact on Plaintiff U.S. Bank. The Court will

1 order Defendant to post a bond and require Defendant to make monthly payments in an amount similar
2 to what Defendant was paying prior to the default to be deposited into the Clerk of Court's Registry.
3 These measures will limit the harm to Plaintiff and therefore, the balance of equities tip in favor of the
4 Defendant.

5 **D. Public Interest**

6 Since the injunction is narrow and limited in scope, the Court finds that the public interest is
7 a neutral factor.

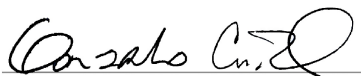
8 **Conclusion**

9 Based on the above, at this time, the Court finds that Plaintiff has demonstrated the factors to
10 justify a preliminary injunction. Accordingly, the Court **GRANTS** Defendant's motion for preliminary
11 injunction pending further briefing by the parties. IT IS HEREBY ORDERED Plaintiff shall file a
12 supplemental brief addressing the issues discussed above on or before **November 16, 2012**. Defendant
13 shall file a supplemental response on or before **November 30, 2012**.

14 Defendant shall post a bond with the Clerk of Court in the amount of \$100,000 no later than
15 **November 15, 2012** pursuant to the procedures outlined in Civil Local Rule 65.1.2. Defendant shall
16 also deposit with the Registry of the Clerk of Court the amount of \$2,100.00 on or before **November**
17 **15, 2012** and shall additionally deposit \$2,100.00 on a monthly basis to be made by the 15th of every
18 month until further order of the Court.

19 IT IS SO ORDERED.

20
21 DATED: November 9, 2012

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23 HON. GONZALO P. CURIEL
24 United States District Judge
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