UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JANAR WASITO,

Plaintiff,

v.

SPECIALIZED LOAN SERVICING, LLC; GSAA 5-11; GOLDMAN SACHS MORTGAGE COMPANY; JPM CHASE BANK,

Defendants.

Case No.: 3:17-cv-01279-BEN

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Janar Wasito, proceeding pro se, filed an ex parte motion for a temporary restraining order ("TRO") to postpone the foreclosure sale on his residence. This Court granted the ex parte motion, temporarily restraining Defendants Specialized Loan Servicing, LLC ("SLS") and U.S. Bank, N.A. ("U.S. Bank") (erroneously sued as GSAA 5-11) from foreclosing on Plaintiff's home. The basis for the TRO was two-fold: (1) Defendants had not put forth evidence to show that they followed the statutory procedures to nonjudicially foreclose; and (2) Plaintiff offered to tender the indebtedness. The Court held a preliminary injunction hearing on July 13, 2017.

Because Plaintiff has not demonstrated a likelihood of success on the merits, the Court **DENIES** Plaintiff's motion for a preliminary injunction.

BACKGROUND

I. Plaintiff's Loan

In May 2005, Plaintiff obtained a mortgage loan from Residential Mortgage Capital ("RMC") for $650,000, which was reflected in a promissory note secured by a deed of trust encumbering the real property at 1703 La Playa Avenue #C, San Diego, CA 92109. The property is Plaintiff's primary residence. The Deed of Trust identifies Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary, solely as nominee for the lender RMC and its successors and assigns. In 2014, MERS assigned the beneficial interest in the Deed of Trust to Defendant U.S. Bank, N.A., as Trustee, Successor in Interest to Wachovia Bank, N.A., as Trustee for GSAA Home Equity Trust 2005-11. Non-party Wells Fargo Bank, N.A. ("Wells Fargo") was the servicer of the loan and, in October 2016, Defendant SLS became the servicer.

II. The Foreclosure Proceedings

Plaintiff has not made a mortgage payment since May 2015. Wells Fargo and SLS have reviewed and denied Plaintiff's applications for a loan modification eight times specifically, on or about October 3, 2013, October 23, 2013, February 5, 2016, March 7, 2016, April 18, 2016, March 28, 2017, April 14, 2017, and June 5, 2017.

On August 10, 2016, Wells Fargo, as servicing agent for U.S. Bank, N.A., as Trustee, Successor in Interest to Wachovia Bank, N.A., as Trustee for GSAA Home Equity Trust 2005-11 substituted NBS Default Services, LLC ("NBS") as the Trustee. Subsequently, on August 11, 2016, NBS recorded the Notice of Default ("NOD"). NBS's representative declares that it mailed Plaintiff a copy of the recorded notice via certified mail the next day. On May 24, 2017, NBS recorded the Notice of Trustee's Sale ("NOS"). NBS's representative declares that it mailed Plaintiff a copy of the Notice of Sale on May 22, 2017, two days before the recordation date. The foreclosure sale has been postponed numerous times and is now set for July 28, 2017.

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III. The Lawsuit

Plaintiff filed an amended complaint against SLS, GSAA 5-11, Goldman Sachs Mortgage Company ("Goldman Sachs"), and JPM Chase Bank ("Chase") in San Diego County Superior Court on June 7, 2017. The complaint contends that on May 30, 2017, Plaintiff first received notice of the foreclosure by finding a letter entitled "Urgent Notice of Foreclosure." The letter was actually an advertisement from a company called The Mortgage Fighter. He contends that at no time prior to May 30, 2017 did he receive "any email, phone call, or other notice that SLS was attempting a lien or a foreclosure sale." (Am. Compl. ¶ 4). He thought he was still negotiating with SLS for a modification of his mortgage.

He complains that Defendants have not responded to his requests for information and have not properly reviewed his requests for a loan modification or evaluated all loss mitigation options available to him. Although these allegations are not in his complaint, Plaintiff's main theory is that Wells Fargo improperly denied him a loan modification in 2013. Because he was allegedly improperly denied a loan modification in September 2013, he believes he overpaid his monthly mortgage payments until May 2015. At the hearing, he asserted that he discovered Wells Fargo's error in the last month while preparing this lawsuit.

Plaintiff brings claims for: (1) violations of Regulation X, 12 C.F.R. § 1024.1, *et seq.*, under the Real Estate Settlement Procedures Act ("RESPA"); (2) violations of Regulation Z, 12 C.F.R. § 1026.1, *et seq.*, under the Truth in Lending Act ("TILA"); (3) negligence; (4) violations of California Business and Professions Code § 17200; (4) quiet title; (5) cancellation of instruments; (6) violations of the Americans with Disabilities Act ("ADA"); and (7) declaratory relief.

Defendants SLS and U.S. Bank removed this action to federal court on June 22, 2017 based on federal question jurisdiction. Goldman Sachs and Chase did not join in the notice of removal because, according to SLS and U.S. Bank, they have not been

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properly joined or served. *See* 28 U.S.C. § 1446(b)(2) (explaining that only defendants properly joined or served must join in the removal).

On June 28, 2017, Plaintiff filed an ex parte motion for a temporary restraining order to postpone the foreclosure sale on his home. (*See* ECF Nos. 8, 10, 12).[1] The Court issued a TRO on July 6, 2017. The Court granted Plaintiff's motion as to Defendants SLS and U.S. Bank, but denied it as to Defendants Goldman Sachs and Chase as they had not received notice of the application.

The Court heard arguments on Plaintiff's request for a preliminary injunction on July 13, 2017.

LEGAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy." *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014) (quoting *Munaf v. Geren*, 553 U.S. 674, 689 (2008)). A plaintiff seeking a preliminary injunction must establish that he is (1) likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The *Winter* factors are considered in conjunction with the Ninth Circuit's "sliding scale" approach, which provides that "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 739 (9th Cir. 2011).

DISCUSSION

Plaintiff can satisfy only one of the *Winter* factors—that he is likely to suffer irreparable harm. *See Jones v. H.S.B.C. (USA)*, 844 F. Supp. 2d 1099, 1101 (S.D. Cal. 2012) (losing one's home may constitute irreparable injury). However, such an injury is

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[1] Plaintiff filed this ex parte motion three times. The Court reviewed and considered all versions of his motion.

insufficient to secure an injunction absent a demonstration of likely success on the merits. *Id.; Dep't of Parks & Recreation of Cal. v. Bazaar del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006) ("[I]f the plaintiff shows no chance of success on the merits, . . . the injunction should not issue."). As discussed below, Plaintiff cannot demonstrate a likelihood of success on the merits, that the balance of equities tips in his favor, or that the public interest favors enjoining the foreclosure.

I. Likelihood of Success on the Merits

Plaintiff alleges seven claims for relief. The Court addresses each below, explaining that Plaintiff has not demonstrated a likelihood of success on any of these claims.

A. Cancellation of Instruments

The Court issued the TRO because it found that Plaintiff had raised questions going to the merits of whether the Notice of Default and Notice of Trustee's Sale should be cancelled. California Civil Code section 3412 provides that a "written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." Cal. Civ. Code § 3412. To succeed, Plaintiff must provide facts showing the apparent invalidity of the instrument. *Watson v. Bank of Am., N.A.*, No. 16-cv-513-GPC (MDD), 2016 WL 3552061, *19 (S.D. Cal. June 30, 2016) (citing *Ephraim v. Metro. Trust. Co. of Cal.*, 28 Cal. 2d 824, 833 (1946)). At the preliminary stage of the TRO, the Court read Plaintiff's complaint liberally and found that he alleged two procedural violations potentially rendering the NOD and NOS invalid. Defendants have now supplemented the record, making clear that Plaintiff is not likely to succeed on this claim.

1. Requirement to Provide NOD and NOS to Plaintiff

Plaintiff first alleged that he had not been provided with the Notice of Default and Notice of Sale. The California Civil Code requires the mortgagee, trustee, or authorized agent "provide" the mortgagor or trustor a copy of the recorded notice of default, a copy

of the recorded notice of sale, and an attached separate summary document of each. Cal. Civ. Code § 2923.3(a). Section 2924b explains that the notices must be mailed by certified or registered mail and provides deadlines to complete the mailing.

Defendants demonstrate that they complied with these requirements through a declaration from Les Poppitt, Director of Foreclosure Operations at NBS Default Services. Poppitt declares that after NBS recorded the Notice of Default on August 11, 2016, it mailed a copy and the summary document to Plaintiff via certified mail the next day. Poppitt attaches an "Affidavit of Mailing," executed on day of the mailing by the individual who made the mailing.

Poppitt also declares that on May 22, 2017, NBS mailed a copy of the NOS to Plaintiff via certified mail. He again attaches an Affidavit of Mailing. Two days later, on May 24, NBS recorded the NOS. Oddly, the May 22 Affidavit of Mailing includes the May 24 recorded NOS. The Court queried defense counsel about this discrepancy at the hearing, and he explained that the wrong exhibit may have been attached to the filing.

This inconsistency does not warrant an injunction. Defendants have clearly "provided" Plaintiff with notice of the recorded NOS by virtue of this lawsuit. Further, the California legislature has not authorized injunctive relief under these circumstances. The nonjudicial foreclosure statute provides a private right of action to enjoin a non-judicial trustee's sale where a mortgage servicer, beneficiary, trustee, or authorized agent materially violates any one of nine specified statutory provisions. Cal. Civ. Code §§ 2924.12(a)(1), 2924.19(a)(1). The particular provisions related to providing the NOD and NOS to Plaintiff are *not* among the specified provisions. Thus, Plaintiff cannot receive injunctive relief for technical violations of those sections. *See Hinrichsen v. Bank of Am., N.A.*, No. 17-cv-219, 2017 WL 1885788, at *6 (S.D. Cal. May 9, 2017) ("Because the legislature deliberately chose to authorize injunctive relief only for particular violations it identified, but not for a violation of § 2924(a)(6), there is no private right of action for injunctive relief . . . under § 2924(a)(6).").

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Finally, Poppitt declares that on May 25, 2017, NBS posted a copy of the NOS on the front door of Plaintiff's condo complex and in the Superior Court. And on May 24, May 31, and June 7, 2017, NBS published the NOS in The Daily Transcript. These publications comply with the requirements of California Civil Code section 2924f.

2. Requirement to Conduct Pre-Foreclosure Outreach

Plaintiff also alleged that he was not contacted prior to the recording of the NOD. California's nonjudicial foreclosure scheme prohibits a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a notice of default until 30 days after the servicer has contacted the borrower in person or by telephone "to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." Cal. Civ. Code §§ 2923.5, 2923.55.

Defendants submit a declaration from Mark McCloskey, Assistant Vice President of SLS, to demonstrate compliance with the outreach requirements. McCloskey declares that a representative of Wells Fargo, the servicer at the time, called Plaintiff by telephone on October 10, 2014, November 4, 2014, November 10, 2014, November 20, 2014, and December 2, 2014 to discuss foreclosure prevention alternatives.[2] During the November 10 call, Wells Fargo offered to conduct a secondary review of Plaintiff's loan modification application, which had been denied a year earlier in October 2013. Wells Fargo asked for additional documents to conduct the review. During that call, the representative also provided Plaintiff with the telephone number for the Department of Housing and Urban Development.

On or about December 18, 2014, the representative executed a Declaration of Compliance to evidence Wells Fargo's compliance with the outreach requirements. The Declaration of Compliance is attached to the Notice of Default. At no time prior to the

[2] When SLS became the servicer of the loan, it acquired all of Wells Fargo's servicing records and integrated them into its own records. (McCloskey Decl. ¶ 4).

execution of the Declaration of Compliance did Plaintiff provide the requested documents.

On this record, Defendants have demonstrated compliance with the outreach requirements. The statute only requires contact and some analysis of the borrower's financial situation, not an affirmative modification of the loan. *See Daveport v. Litton Loan Servicing, LP*, 725 F. Supp. 2d 862, 877 (N.D. Cal. 2010).

In conclusion, Defendants have demonstrated compliance with the two alleged procedural violations. As such, Plaintiff has not demonstrated the invalidity of the NOD or NOS, and his claim for cancellation of instruments is likely to fail.

3. Claims Under Regulation X and Regulation Z

Plaintiff's claims under Regulation X of RESPA and Regulation Z of TILA are premised on SLS's and non-party Wells Fargo's purported failures to respond to his written Requests for Information ("RFI") and a Notice of Error ("NOE") by the statutory deadline.

These claims do not support Plaintiff's request for an injunction. Injunctive relief may only be awarded if the movant is entitled to such relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Under these federal statutes, a plaintiff's relief is limited to monetary damages. *See* 15 U.S.C. §§ 1640(a), 2605(f); *see also Tarrolly v. MUFG UnionBank N.A.*, No. CV 15-02540, 2015 WL 12659909, at *5 (C.D. Cal. May 21, 2015) ("Even if Plaintiffs were successful on their RESPA claims, an injunction preventing the foreclosure sale would not be available." (citing cases)). Thus, Plaintiff is not entitled to injunctive relief on these claims.

Furthermore, regardless of the availability of injunctive relief, Plaintiff has not demonstrated a likelihood of success on the merits. To begin, it is unclear which section of TILA or Regulation Z that Plaintiff contends Defendants violated. He cites to 12 C.F.R. § 1026.36, but he has not alleged any facts to permit the Court to infer a violation of that section.

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His claims focus on Regulation X, which details procedures a servicer must comply with to respond to a RFI or NOE. *See* 12 C.F.R. §§ 1024.35, 1024.36. Plaintiff claims that SLS failed to respond to his RFIs and NOE by the statutory deadlines. But Defendants provide SLS's letters responding to Plaintiff's RFIs and NOE, and their responses are within the statutory time limits. The response letters provide some information and state that other requested information would not be forthcoming because Plaintiff's requests were too broad or sought proprietary information. *See* 12 C.F.R. § 1024.35(e)(4), (g) (servicer not required to provide proprietary documents or respond to overbroad notices of error); 12 C.F.R. § 1024.36(f) (servicer not required to provide proprietary documents or respond to overbroad requests for information). Plaintiff offers no argument why these responses violate RESPA.

4. Negligence

Plaintiff brings a negligence claim for SLS's and non-party Wells Fargo's alleged failure to timely acknowledge and respond to his RFIs and NOE. He claims that SLS and Wells Fargo had a duty to exercise reasonable care in processing and reviewing his RFIs and NOE. (Am. Compl. ¶ 44). Thus, Plaintiff premises the duty of care on the statutory duties imposed on servicers by Regulation X of RESPA.

Plaintiff cannot succeed on his request for injunctive relief on this claim. Because RESPA does not permit injunctive relief, Plaintiff cannot avoid that limit by pleading a negligence claim predicated on a RESPA violation. *See Laine v. Wells Fargo Bank & Co.*, No. C 13-4109, 2014 WL 12579637, at *1 (N.D. Cal. Jan. 9, 2014) (holding that plaintiff may not seek injunctive relief through a negligence claim based on a RESPA violation because RESPA does not allow injunctive relief). Moreover, a negligence claim based on a RESPA violation likely fails on the merits for the same reasons discussed in the section above.

5. § 17200 Violation

Plaintiff's claim under section 17200 of the California Business & Professions Code (*i.e.*, California Unfair Competition Law ("UCL")) alleges that Defendants have

engaged in unfair, fraudulent, and unlawful business practices in connection with servicing his loan, processing his requests for alternatives to foreclosure, and proceeding with the foreclosure of his home. (Am. Compl. ¶ 53). He contends the unfair business practices include but are not limited to (1) negligently reviewing his loan modification application, (2) failing to evaluate him for all loss mitigation options and notify him appropriately, (3) improperly instituting foreclosure proceedings, (4) concealing the nature of certain fees on his account, (5) clouding title to his property, and (6) foreclosing without legal authority. (*Id.*)

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "A plaintiff alleging unfair business practices under [the UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of Cal., Inc.*, 14 Cal. App. 4th 612, 619 (1993). Plaintiff has not met this standard. *See Watson*, 2016 WL 3552061, at *16 (holding that plaintiff inadequately pled a UCL claim based on the exact same allegations that appear in Plaintiff's amended complaint). Plaintiff's allegations are conclusory and do not provide facts to support a UCL claim. He lumps all Defendants together and fails to specify which Defendant committed which act. He has not stated with particularity the circumstances constituting fraud. *See id.* at *17 (allegations of fraud, including a claim under the "unfair" prong based on fraudulent conduct, must comply with the heightened pleading requirements of Rule 9(b)). Nor has he demonstrated a likelihood of success on a viable antecedent claim. *See id.* at *16 (a claim under the "unlawful" prong requires a viable antecedent claim). Based on the evidence provided by Defendants, Defendants have legal authority to foreclose, have followed the statutory procedures, and have evaluated Plaintiff for loan modifications multiple times. Plaintiff has not demonstrated a likelihood of success on this claim.

6. Quiet Title

Plaintiff seeks to quiet title to his property. Under California law, to state a claim for quiet title, a plaintiff must allege in a verified complaint: (1) the property's legal

description and its street address or common designation; (2) Plaintiff's title and the basis of the title; (3) the adverse claims to the title against which a determination is sought; and (5) a prayer for the determination of the plaintiff's title against the adverse claims. Additionally, "a plaintiff seeking to quiet title in the face of a foreclosure must allege tender or an offer of tender of the amount borrowed." *Watson v. Bank of Am., N.A.*, No. 16-cv-513-GPC (MDD), 2016 WL 3552061, *19 (S.D. Cal. June 30, 2016) (citing *Arnolds Mgmt. Corp. v. Eischen*, 158 Cal. App. 3d 575, 578 (1984)); *Sipe v. McKenna*, 88 Cal. App. 2d 1001, 1006 (2d Dist. 1948) ("A party may not without payment of the debt, enjoin a sale by a trustee under a power conferred by a deed of trust, or have his title quieted against the purchaser at such sale.").

Plaintiff has not demonstrated a likelihood of success on his quiet title claim. Plaintiff's complaint is not verified and is wholly conclusory. Importantly, Plaintiff admitted that he cannot tender the indebtedness. Plaintiff contends that he need only allege a credible offer of tender and not actually tender the debt. At the hearing, Plaintiff argued that his statement in the amended complaint that "Plaintiff[] ha[s] the present ability to tender the indebtedness and hereby offer[s] to tender such amount" constitutes a credible offer of tender. He further argues that he is excused from tendering because he disputes the amount owed.

The Court acknowledges that in some foreclosure cases, courts in this Circuit have only required a credible tender offer or, in certain limited circumstances, have excused the tender requirement. *See Kimball v. Flagstar Bank F.S.B.*, 881 F. Supp. 2d 1209, 1220 (S.D. Cal. 2012) ("In order to allege a claim to quiet title, Plaintiff must allege tender or offer of tender of the amounts borrowed."). *But see Hamilton v. Bank of Blue Valley*, 746 F. Supp. 2d 1160, 1170 (E.D. Cal. 2010) ("It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." (citing *Shimpones v. Stickney*, 219 Cal. 637, 649 (1934)). However, Plaintiff has neither demonstrated a "credible" offer nor a valid excuse. As this case is at the preliminary injunction stage, Plaintiff must show a likelihood of success on the merits and cannot rely

on his pleadings. He has not done that. Plaintiff's tender allegation is completely conclusory. He has not shown that he has the funds to tender the debt or that some other entity, like a surety, has undertaken performance of his obligations. *See Kimball*, 881 F. Supp. 2d at 1222-23 (plaintiffs did not adequately allege ability to tender where they failed to provide any facts demonstrating they had the financial resources or could readily obtain the amount due). Absent such proof, Plaintiff's generic statement of a tender offer is insufficient for the Court to exercise its equitable powers and enjoin an otherwise legitimate foreclosure sale. *See Karlsen v. Am. Sav. & Loan Ass'n*, 15 Cal. App. 3d 112, 118-19 (1971) (holding that generic statements in complaint did not constitute tender) ("The basic rule is that an offer of performance is of no effect if the person making it is not able to perform. Simply put, if the offeror is without the money necessary to make the offer good and knows it, the tender is without legal force or effect.").

Plaintiff's argument that he need not tender because he disputes the amount owed is without legal support. While there is an exception to the tender requirement if the borrower's action attacks the validity of the underlying debt, *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 112-13 (2011); *Stockton v. Newman*, 148 Cal. App. 2d 558, 564 (1957) (trustor sought rescission of the contract to purchase the property and the promissory note on the grounds of fraud), Plaintiff does not attack the validity of the debt. He contests the amount owed but not the fact of the debt. Plaintiff is not excused from the tender requirement. *See Burns v. HSBC Bank USA*, No. 12-01748, 2013 WL 12132062, at *6 (C.D. Cal. June 10, 2013) (plaintiffs not excepted from tender rule where they did not dispute the debt itself).

7. ADA Violation

Plaintiff pleads an ADA violation because "Defendants have failed to adequately accommodate" his disabilities. (Am. Compl. ¶ 58). Plaintiff has not demonstrated a likelihood of success on this claim. He does not identify which provision of the ADA Defendants allegedly violated, and his allegations of a violation are completely conclusory. Plaintiff has not alleged any incident where he was denied appropriate

accommodations, nor has he explained a causal connection between his disabilities and Defendants' conduct.

8. Declaratory Relief

Plaintiff has not shown a likelihood of success on this claim. Plaintiff's declaratory relief claim is duplicative of his other claims, and he has not demonstrated a viable underlying claim. *Shaterian v. Wells Fargo Bank, N.A.*, 829 F. Supp. 2d 873, 888 (N.D. Cal. 2011) ("[The declaratory relief claim] is ultimately a request for relief, and [Plaintiff] is not entitled to such relief absent a viable underlying claim.").

II. Balance of Equities

If the sale occurs, Plaintiff will lose his home. But this is not the Court's only consideration. Plaintiff has not demonstrated a likelihood of success on the merits. He admits that he has not made a loan payment in over two years, that he has been reviewed and denied loan modifications several times, and that he cannot tender the indebtedness. The balance of equities does not favor Plaintiff. *See Tarrolly*, 2015 WL 12659909, at *8 (finding that equities favored defendants where plaintiff had been afforded loan modification at least twice); *Haffeman v. Wells Fargo,* No. 12-cv-00046, 2012 WL 827034, at *4 (S.D. Cal. Mar. 9, 2012) (declining to issue TRO and holding that balance of equities did not favor plaintiffs where they could not tender, even though the court identified technical violations of the notice requirements).

III. Public Interest

In this case, an injunction is not in the public interest. While the public has an interest in ensuring that foreclosures are done properly, Plaintiff has made no showing that any impropriety occurred here. On the other hand, the public also has an interest in resolving in-default loans affecting home values and banks. Enjoining a facially legitimate foreclosure sale is not in the public interest.

CONCLUSION

While the Court is sympathetic to the loss of Plaintiff's home, it would be inequitable to issue a preliminary injunction under the circumstances of this case.

Plaintiff has not shown on this record that he is likely to succeed on the merits, that the balance of hardships tips in his favor, or that the public interest favors enjoining the foreclosure. The Court **DENIES** the motion for a preliminary injunction.

IT IS SO ORDERED.

Dated: July 17, 2017

Hon. Roger T. Benitez
United States District Judge