

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 VOLCANO DEVELOPERS, LLC, et al.,)
4)
5 Plaintiffs,) Case No.: 2:11-cv-00504-GMN-PAL
6 vs.)
7) **ORDER**
8 BONNEVILLE MORTGAGE)
9 COMPANY, et al.,)
10)
11 Defendants.)

12 Pending before the Court is Plaintiffs’ Application for a Temporary Restraining Order
13 (ECF No. 20) and Motion for a Preliminary Injunction (ECF No. 19). Defendants have filed
14 Responses (ECF Nos. 22, 23, & 24), to which Plaintiffs have filed Replies (ECF Nos. 26 & 27).
15 For the reasons that follow, both Plaintiffs’ Application (ECF No. 20) and its Motion (ECF No.
16 19) will be DENIED.

17 **I. Standard for Granting a TRO or Preliminary Injunction**

18 Temporary restraining orders (“TROs”) are governed by the same standards applicable
19 to preliminary injunctions. *See Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc.*,
20 181 F. Supp. 2d 1111, 1126 (E.D. Cal. 2001). A TRO or preliminary injunction may be issued
21 if a plaintiff establishes: (1) that he is likely to succeed on the merits; (2) that he is likely to
22 suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips
23 in his favor; and (4) that an injunction is in the public interest. *Winter v. Natural Resources*
24 *Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, “serious questions going to the
25 merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of
a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of
irreparable injury and that the injunction is in the public interest.” *Alliance for the Wild Rockies*

1 v. *Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

2 “It frequently is observed that a preliminary injunction is an extraordinary and drastic
3 remedy, one that should not be granted unless the movant, *by a clear showing*, carries the
4 burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (quoting 11 C. Wright,
5 A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948 (2d ed. 1995)).

6 **II. Analysis**

7 Plaintiffs seek to enjoin Defendants from foreclosing on the real property located at
8 5439 South Decatur Blvd., Las Vegas, Nevada, 89118. They bring their request for a TRO or
9 preliminary injunction on three separate grounds. First, they contend that the Notice of Default
10 is deficient under Nev. Rev. Stat. § 107.080 because it “does not even specify the amount of the
11 Default.” (Mot. 11:1, ECF Nos. 19 & 20.) Second, they argue, somewhat confusingly, that
12 “Plaintiffs made a payment on May 5 2011 so as to the amount for which is allegedly owing,
13 Defendants do not know of.” (Mot. 11:2-3, ECF Nos. 19 & 20.) Third, they explain that “it
14 seems that said Notice of Default was done in retaliation of Plaintiffs [sic] initiation of said
15 proceedings against Defendants collectively.” (Mot. 11:3-4, ECF Nos. 19 & 20.) All three of
16 these grounds are insufficient to warrant injunctive relief.¹

17 First, Nev. Rev. Stat. § 107.080 does not require that a Notice of Default explicitly state
18 the exact amount of the default. Instead, Nev. Rev. Stat. § 107.080(3)(a) merely requires that
19 the Notice of Default “[d]escribe the deficiency in performance or payment” Here, the
20 Notice of Default adequately describes the deficiency in performance, stating:

21
22 ¹ Plaintiffs also briefly argue that “Plaintiffs’ Application and Motion for a Preliminary Injunction should be granted since
23 Plaintiff is very likely to succeed on the merits of their claims for the failure to have the Loan Assumption Agreement
24 transferred from WOLFE to ELEZRA.” (Mot. 13:3-6, ECF Nos. 19 & 20). However, Plaintiffs fail to explain how the
25 likelihood of success on the merits with regard to that claim is relevant to the foreclosure proceedings that were initiated in
May of 2011. As Defendants accurately observe in their Response, “Plaintiffs also fail to provide this Court with any
evidence that the failure to consummate the assumption caused the financial issues which led to the default and
commencement of trustee’s sale proceedings by [Defendants].” (Resp. 7:18-20, ECF No. 23.) Plaintiffs do not rebut this
observation in their Reply, nor do they provide any other basis for finding that the resolution of their claims related the Loan
Assumption Agreement is relevant to the instant motions. Thus, this argument fails to establish that Plaintiffs are entitled to
the “extraordinary and drastic remedy” of injunctive relief.

1 That a breach of the obligations for which said Deed of Trust is
2 security has occurred in that payment has not been made of:
3 INSTALLMENT OF PRINCIPAL AND INTEREST PLUS
4 IMPOUNDS AND / OR ADVANCES WHICH BECAME DUE ON
5 05/01/2011 PLUS LATE CHARGES, AND ALL SUBSEQUENT
6 INSTALLMENTS OF PRINCIPAL, INTEREST, BALLOON
7 PAYMENTS, PLUS IMPOUNDS AND / OR ADVANCES AND
8 LATE CHARGES THAT BECOME PAYABLE.

9 (Ex. B, Resp., ECF No. 23.) Further, the Notice provides Plaintiffs with the requisite contact
10 information to allow them “[t]o find out the amount you must pay” or “to arrange for payment
11 to stop foreclosure.” (*Id.*) Because this Notice complies with the statutory requirements,
12 Plaintiffs are not likely to succeed on the merits of this argument, nor do they raise a serious
13 issue going to the merits.

14 Plaintiffs’ second argument is a bit more difficult to decipher, but it appears that
15 Plaintiffs are contending that it was inappropriate for Defendants to file a Notice of Default in
16 light of the fact that Plaintiffs made a payment on May 5, 2011. In support of this line of
17 argument, Plaintiff Danny Itzhaki declared that he “made a payment to Defendants in the
18 amount of \$4,000.00 for the month of May, which was cashed by Defendants.” (Mot. 16:14-15,
19 ECF Nos. 19 & 20.) However, noticeably absent from Plaintiffs’ Motion or Mr. Itzhaki’s
20 declaration is any allegation that the \$4,000.00 payment effectively cured the default. As this
21 Court has previously explained, “[i]n Nevada, a wrongful foreclosure claim is properly pled
22 only if the plaintiff alleges that she was not in default.” *Rupe v. First Franklin Financial Corp.*,
23 No. 2:11-cv-00166-GMN, 2011 WL 2559623, at *2 (D. Nev. June 27, 2011). Here, Plaintiffs
24 do not argue that they are no longer in default, nor does the evidence support that position.
25 Indeed, the letter from Defendants to Plaintiffs dated May 17, 2011--to which Plaintiffs do not
object--clearly states that the amount due on May 1, 2011 was \$5,754.00. (*See* Ex. C, Resp.,
ECF No. 23.) \$4,000.00 would therefore have been inadequate to cure Plaintiffs’ default.
Because Plaintiffs have failed to show that they were not in default at the time Defendants

1 commenced foreclosure proceedings, Plaintiffs are not likely to succeed on the merits of this
2 claim, nor do they raise a serious issue going to the merits.

3 Lastly, Plaintiffs ask the Court to enjoin the foreclosure proceedings because they
4 believe that the proceedings were commenced in retaliation for Plaintiffs instituting this
5 lawsuit. Plaintiffs claim that retaliatory intent can be gleaned from Defendants' activities
6 because "[c]ommon practice is generally to issue some kind of communication notifying
7 Plaintiffs that the amount is late or due, and then follow through with alternative measures. In
8 this case, after cashing the mortgage payment, Defendants filed the notice of Default." (Mot.
9 11:8-11, ECF Nos. 19 & 20.) Common practice or not, the May 17, 2011 letter from
10 Defendants to Plaintiffs--which Plaintiffs do not contest--demonstrates that Defendants did, in
11 fact, provide Plaintiffs with informal notice of the amount due more than a week before filing
12 the Notice of Default. (*See* Ex. C, Resp., ECF No. 23.) Further, the June 3, 2011 letter from
13 Defendants to Plaintiffs--which Plaintiffs also do not contest--demonstrates that Defendants
14 actually returned the \$4,000.00 payment to Plaintiffs, as it was insufficient to remedy the
15 amount of the default. (*See* Ex. D, Resp., ECF No. 23.) Thus, even if a court may enjoin
16 foreclosure proceedings when it finds that the proceedings were undertaken with retaliatory
17 intent (Plaintiffs cite no authority indicating that courts have the ability to do so), Plaintiffs are
18 not likely to succeed on the merits of such a claim, nor do they raise a serious issue going to the
19 merits.

20 Because all three of Plaintiffs' arguments in support of injunctive relief fail, their
21 Application for a Temporary Restraining Order (ECF No. 20) and Motion for a Preliminary
22 Injunction (ECF No. 19) will be denied.

23 **CONCLUSION**

24 **IT IS HEREBY ORDERED** that Plaintiffs' Application for a Temporary Restraining
25 Order (ECF No. 20) is **DENIED**.

1 **IT IS FURTHER ORDERED** that Plaintiffs' Motion for a Preliminary Injunction
2 (ECF No. 19) is **DENIED**.

3 DATED this 1st day of August, 2011.

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Gloria M. Navarro
United States District Judge