



09-CV-00662-AF

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VICTOR KOTOK, and NADEZHDA
KOTOK

Plaintiffs,

v.

HEMCOMINGS FINANCIAL, LLC,
et al.,

Defendants.

)
) CASE NO. C09-662 RSM
)
)
) ORDER DENYING PLAINTIFFS'
) MOTION FOR TEMPORARY
) RESTRAINING ORDER AND
) PRELIMINARY INJUNCTION
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I. INTRODUCTION

This matter comes before the Court on Plaintiffs' "Motion and Memorandum for Temporary Restraining Order and Preliminary Injunction to Restrain Trustee's Sale." (Dkt. #15). Plaintiffs argue that the Court should enter an order restraining a trustee's sale from occurring on Friday, June 12, 2009. Plaintiffs indicate they will suffer irreparably injury without injunctive relief, and that public policy supports Plaintiffs' request. Defendants respond that Plaintiffs fall well short of meeting their burden in justifying injunctive relief.

For the reasons set forth below, the Court agrees with Defendants, and DENIES Plaintiffs' motion in its entirety.

II. DISCUSSION

A. Background

The instant lawsuit arises out of a purchase of real property in Federal Way, Washington by Plaintiffs Victor and Nadezhda Kotok. Plaintiffs, who are of Ukranian

1 descent, allege that when they purchased their first home in the fall of 2005, a loan officer at
2 Defendant CTX Mortgage Company LLC ("CTX Mortgage") made several
3 misrepresentations about the terms of their loan.

4 Plaintiffs specifically contend that the loan officer indicated that: (1) Plaintiffs had a
5 home loan with an interest rate of 1.627% when in fact the interest rate on the loan was
6 7.75%; and (2) Plaintiffs' loan would have a fixed rate for five years with an adjustable rate
7 thereafter, when in fact the loan was a three-year ARM which provided only a three-year
8 period with the fixed interest rate. Plaintiffs further allege that CTX Mortgage failed to
9 provide them with key documents relating to the loan.

10 Furthermore, Plaintiffs claim that they were made aware of these misrepresentations in
11 the fall of 2008. They allege that they were notified by CTX Mortgage that the fixed-rate
12 period on their loan had ended. They claim that this resulted in a higher adjusted interest rate.
13 Therefore they allege they could not meet their mortgage payments. It appears that Plaintiffs
14 stopped making payments sometime in the fall of 2008.

15 Due to Plaintiffs' failure to make their payments, Defendant Chicago Title Insurance
16 Company of Washington ("Chicago Title") sent Plaintiffs a notice of Foreclosure and Notice
17 of Trustee's Sale in February of 2009. Chicago Title is the trustee under the Deed of Trust on
18 the property at issue. The trustee's sale is scheduled for June 12, 2009.

19 As a result of the impending trustee's sale, and based on the alleged misrepresentations
20 described above, Plaintiffs brought the instant lawsuit on April 30, 2009 in King County
21 Superior Court. Plaintiffs name CTX Mortgage, Chicago Title, and Homecoming Financial
22 LLC ("Homecoming"), the bank that financed the loan, as Defendants. Plaintiffs claim that
23 Defendants violated the provisions of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601
24 *et. seq.*, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, and the
25 Washington Consumer Protection Act ("CPA"). (Dkt. #12, Pls.' Am. Compl., ¶¶ 30-41).

26 Defendants subsequently removed the case to this Court on May 13, 2009. Defendants
27 brought a motion to dismiss shortly thereafter. (Dkt. #7). Plaintiffs brought the instant
28 motion for temporary restraining order on June 1, 2009. The Court entertained oral argument

1 on June 11, 2009, and following the argument, the Court denied Plaintiffs' motion. The Court
2 informed the parties that it would issue an Order explaining the Court's reasoning in further
3 detail. The Court's reasons are set forth below.

4 **B. FRCP 65**

5 As an initial matter, the Court notes temporary restraining orders ("TROs") are
6 generally issued by a court without notice to the opposing party. Here, Plaintiffs noted their
7 motion for a TRO nine days after they filed their motion. Defendant Homecoming clearly
8 responded before the noting date, and the Court entertained oral argument on Plaintiffs'
9 motion. Thus, all parties have had notice of Plaintiffs' requested relief. And while a party
10 can certainly seek a TRO with notice, Plaintiffs' requested declaratory relief effectively seeks
11 to permanently enjoin the trustee's sale from occurring. The Court therefore construes
12 Plaintiffs' motion as one for a preliminary injunction.

13 To obtain a preliminary injunction, the party seeking this equitable remedy must
14 demonstrate either: (1) probable success on the merits and the possibility of irreparable harm;
15 or (2) that serious questions have been raised and the balance of hardships tips in their favor.
16 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). Each of "these two
17 formulations represent two points on a sliding scale in which the required degree of
18 irreparable harm increases as the probability of success decreases." *Id.* (internal citation and
19 quotation omitted). In other words, the greater the relative hardship to the party seeking the
20 injunction, the less probability of success must be shown, and vice versa. *See Clear Channel*
21 *Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). "Because a
22 preliminary injunction is an *extraordinary* remedy, the movant's right to relief must be clear
23 and unequivocal." *Wilderness Workshop v. U.S. Bureau of Land Management*, 531 F.3d
24 1220, 1224 (10th Cir. 2008) (citation omitted) (emphasis added). Accordingly, the Court
25 examines each factor below.

26 1. Irreparable Injury

27 A party seeking the injunction must "show the possibility of irreparable injury if
28 preliminary relief is not granted." *Earth Island Institute v. U.S. Forest Service*, 442 F.3d

1 1147, 1177 (9th Cir. 2006). The showing of irreparable harm is considered “the single most
2 important prerequisite for the issuance of a preliminary injunction.” *Dominion Video*
3 *Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (collecting
4 cases). As a result, the alleged injury must be imminent and it must be likely. *Caribbean*
5 *Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citation omitted).

6 Here, Plaintiffs contend that injunctive relief must issue because if the trustee’s sale
7 occurs as scheduled, it will result in the sale of Plaintiffs’ primary residence. Plaintiffs
8 contend that “no injury, loss or damage could be more irreparable to plaintiffs than losing
9 their home.” (Dkt. #15 at 7). However, conclusory allegations are insufficient to establish
10 even the possibility of irreparable harm. *See In re Excel Innovations, Inc.*, 502 F.3d 1086,
11 1099 (9th Cir. 2007). Merely suggesting what is universally accepted as true – that a loss of a
12 home would be irreparable – is legally unacceptable in the context of a preliminary injunction.
13 Plaintiffs may, for example, have the resources to find temporary housing while pursuing their
14 claim. It is certainly reasonable to believe that Plaintiffs have been making plans to find such
15 housing considering that they received notice of the trustee’s sale in February of this year.
16 Regardless, Plaintiffs fail to show any evidence to the Court indicating their true financial
17 circumstances, thereby precluding the Court from making a justifiable determination that
18 Plaintiffs will suffer irreparable harm.

19 In any event, Plaintiffs ignore the well-established principle that irreparable injury
20 cannot be established where harm is measurable in damages. *See eBay Inc. v. MercExchange,*
21 *LLC*, 547 U.S. 388, 391 (2006) (recognizing that a plaintiff must demonstrate “that remedies
22 available at law, such as monetary damages, are inadequate to compensate for that injury”).
23 Mere economic injury will not support a request for injunctive relief. *See Rent-A-Center, Inc.*
24 *v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). Should
25 Plaintiffs prevail in this case, the monetary damages are clear and certain. Plaintiffs’ claims
26 arise out of a single mortgage transaction, and the amounts that have already been paid by
27 Plaintiffs to Defendants are most likely undisputed. Therefore Plaintiffs have failed to show
28 that they will suffer irreparable injury.

1 2. Success on the Merits

2 Notwithstanding Plaintiffs' failure to establish irreparable harm, Plaintiffs also cannot
3 demonstrate a probable likelihood of success on the merits. *See Napster*, 239 F.3d at 1013.
4 According to the file Defendant Homecomings possesses, Plaintiffs received a number of loan
5 documents and disclosures near the time the loan closed in October 2005, including: an
6 Adjustable Rate Note; an Adjustable Rate Mortgage, a Deed of Trust; a Federal Truth-in-
7 Lending Disclosure Statement; a First Payment Notice; a Statement of Occupancy; and a
8 HUD Estimated Settlement Statement and HUD-1 Certification. (Dkt. #21, Decl. of Zeitz, ¶
9 11, Exs. A-G). Each of these documents contains Plaintiffs' signature or initials. (*Id.*). These
10 facts establish that Plaintiffs clearly had notice regarding the terms of their loan.

11 Nevertheless, Plaintiffs claim that these documents were dated on November 1, 2005, or
12 one day after the deal closed. Plaintiffs contend that this is a per se violation of TILA because
13 all disclosures must be made to Plaintiffs prior to the consummation of the loan. Plaintiffs
14 cite the entire statutory framework of 15 U.S.C. § 1601, *et seq.*, in support of this statement,
15 and pinpoint only 15 U.S.C. § 1640. (*See* Dkt. #22 at 3). However, not only is TILA
16 comprised of a series of lengthy and complex statutes, there is a whole series of regulations
17 interpreting these statutes. Furthermore, 15 U.S.C. § 1640 entitled "Civil Liability" is much
18 more complex than Plaintiffs represent to the Court. There are several sections and
19 subsections to this statute, and there is no language within this statute that suggests that what
20 Plaintiffs allege occurred in this case is a per se violation of TILA. Indeed, Plaintiffs did not
21 make any specific reference in any of their pleadings, nor did they cite to any specific statutes
22 during oral argument.

23 The record also tellingly establishes that Plaintiffs' monthly mortgage payments were
24 actually reduced on December 1, 2008. Plaintiffs' mortgage payment prior to this date was
25 \$2,219.27 for principal, interest, taxes and insurance, at an interest rate of 7.75%. (Decl. of
26 Zeitz, ¶ 8). Following the reduction, Plaintiffs' payment fell to \$1,674.31 for principal,
27 interest, taxes and insurance at an interest rate of 6.25%. (*Id.* at ¶ 9). This significantly
28 undermines Plaintiffs' assertions that a higher interest rate caused them to stop making

1 payments. (See Dkt. #15 at 5) (“Plaintiffs made most required payments on the Loan since
2 consummation. However, they have not been able to pay the amount each month *under the*
3 *higher adjusted interest rate.*”) (emphasis added).

4 Plaintiffs contend that this fact has no bearing to the instant motion for preliminary
5 injunction. Plaintiffs simply maintain that Defendants’ conduct was a per se violation of
6 TILA and RESPA, and that these statutes are “strict liability” statutes. These arguments are
7 without merit. Even assuming Plaintiffs’ naked allegations that Defendants made
8 misrepresentations throughout the closing process, Plaintiffs cannot identify how they were
9 disadvantaged in any way as a result of these misrepresentations. It is undisputable that
10 Plaintiffs’ mortgage payments were reduced three years after closing. The Court is hard
11 pressed to see how Plaintiffs will succeed on any of their claims in light of this fact. But for
12 Plaintiffs’ failure to pay a *lower* monthly mortgage payment, no trustee sale would have been
13 scheduled by Defendants.

14 Plaintiffs’ inability to offer any objective evidence to the contrary acknowledges that
15 they simply have no foundation to stand upon. In fact, the only piece of evidence submitted
16 by Plaintiffs’ counsel during oral argument cuts in Defendants’ favor. This document is a
17 Truth-in-Lending Disclosure Statement that is dated ten days *prior* to closing date of the loan.
18 The document further establishes that: (1) the interest rate on the loan was intended to be set
19 at 7.75%; (2) Plaintiffs were to expect their mortgage payments to be set at \$1,930.38 before
20 interest, taxes and insurance; and (3) the loan had a variable rate feature.¹ These terms are
21 consistent with the ultimate terms of the loan.

22 As a result, the Court concludes that Plaintiffs have failed to meet their burden in
23 justifying the issuance of an injunction. The Court additionally finds it unnecessary to
24 address the parties’ arguments regarding whether Plaintiffs’ claims are time-barred or whether
25 Plaintiffs have a claim under the Washington CPA. The reasons described above are
26 sufficient in denying Plaintiffs’ motion. The Court shall discuss these arguments in detail in
27 its subsequent order regarding Defendants’ motion to dismiss.

28

¹ This document is attached as Appendix A to this Order.

1 **III. CONCLUSION**

2 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
3 and the remainder of the record, the Court hereby finds and ORDERS:

4 (1) Plaintiffs' "Motion and Memorandum for Temporary Restraining Order and
5 Preliminary Injunction to Restrain Trustee's Sale" (Dkt. #15) is DENIED.

6 (2) The Clerk is directed to forward a copy of this Order to all counsel of record.
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8 DATED this 11th day of June, 2009.
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11 RICARDO S. MARTINEZ
12 UNITED STATES DISTRICT JUDGE
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TRUTH-IN-LENDING DISCLOSURE STATEMENT
(THIS IS NEITHER A CONTRACT NOR A COMMITMENT TO LEND)

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Exhibit A

LENDER: CTX MORTGAGE COMPANY
33801 1ST WAY SOUTH SUITE 391

APPLICATION DATE: PRELIMINARY FINAL

BORROWERS: FEDERAL WAY WA 98003-
VIKTOR KOTOK
NADEZHDA KOTOK
ADDRESS: 29517 21ST PLACE SOUTH #2
FEDERAL WAY, WA 98003
PROPERTY: 30020 12TH AVENUE SW
FEDERAL WAY, WA 98023
PER TITLE

PREPARED DATE: 10/21/2005
LOAN NO.: 220628842

Type of Loan: VA Conventional
 FHA FmHA

INTEREST RATE: 7.750 (e)

The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you on your behalf.	The amount you will have paid after you have made all payments scheduled.
1.627 % (e)	\$63,374.23 (e)	\$287,889.28 (e)	\$331,263.51 (e)

PAYMENT SCHEDULE: (e) denotes - ALL NUMERIC DISCLOSURES EXCEPT THE LATE PAYMENT DISCLOSURE ARE ESTIMATES.

36	\$1,930.38	01/01/2006							
1	\$805.21	12/01/2035							

DEMAND FEATURE: This loan does not have a Demand Feature
 This loan has a Demand Feature as follows:

VARIABLE RATE FEATURE: This loan has a Variable Rate Feature.
Variable Rate Disclosures have been provided to you earlier.

SECURITY: You are giving a security interest in the property located at: 30020 12TH AVENUE SW
FEDERAL WAY, WA 98023

ASSUMPTION: Someone buying this property cannot assume the remaining balance due under original mortgage terms
 may assume, subject to lender's conditions, the remaining balance due under original mortgage terms.

FILING/RECORDING FEES: \$ 80.00 (e)

*SEE "IMPORTANT HAZARD INSURANCE NOTIFICATION" ON DISCLOSURE NOTICES FORM PROVIDED.
PROPERTY INSURANCE: Property hazard insurance in the amount of \$ --- with a mortgage clause to the lender is a required condition of this loan. Borrower may purchase this insurance from any insurance company acceptable to the lender.
Hazard insurance is is not available through the lender at an estimated cost of ** for a 1 (one) year term.
** COST OF .2% TO 2.50% OF THE MORTGAGE AMOUNT. PREMIUM AMOUNTS AND AVAILABILITY VARY BASED UPON INSURANCE UNDERWRITING FACTORS. ***THE LESSER OF THE LOAN AMOUNT OR REPLACEMENT VALUE.

LATE CHARGE: If your payment is more than 15 days late, you will be charged a late charge of 5.000% of the overdue payment.
**OVERDUE PRINCIPAL & INTEREST PAYMENT

PREPAYMENT PENALTY: If you pay off early, you May Will not have to pay a penalty.
 May Will not be entitled to a refund of part of the Finance Charge.

See your contract documents for any additional information regarding non-payment, default, required repayment in full before scheduled date, and prepayment refunds and penalties.

I/We hereby acknowledge reading and receiving a complete copy of this disclosure along with copies of documents referred to in this disclosure.
 VK 10.21.05 *ND* 10.21.05
 VIKTOR KOTOK Borrower/Date NADEZHDA KOTOK Borrower/Date
 _____ Borrower/Date _____ Borrower/Date

EXHIBIT A