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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

BRENDA BARDASIAN et al., Petitioners, v. THE SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent; SANTA CLARA PARTNER'S MORTGAGE CORPORATION et al., Real Parties in Interest.	C068488 (Super. Ct. No. 34201000082041)

ORIGINAL PROCEEDINGS in mandate. David I. Brown, Judge. Peremptory writ issued.

United Law Center, John S. Sargetis and Stephen J. Foondos for Petitioners.

No appearance for Respondent.

AlvaradoSmith, S. Christopher Yoo and Lashon Harris for Real Party in Interest JP Morgan Chase Bank, N.A.

McCarthy & Holthus, Matthew Podmenik, Melissa Robbins Coutts, and Andrew Hall for Real Party in Interest Marix Servicing, LLC.

Before a notice of default may be filed, a lender must contact the borrower in person or by phone to assess the borrower's financial situation and explore options to prevent foreclosure. (Civ. Code, § 2923.5, subd. (a) (hereafter section 2923.5).) Here, petitioners Brenda Bardasian (Brenda) and Matt Bardasian moved for a preliminary injunction to enjoin the trustee's sale of their house because the lender had not complied with section 2923.5. Real parties in interest Marix Servicing LLC (Marix) and JP Morgan Chase Bank, N.A. (JP Morgan Chase) opposed the motion. The trial court ruled the Bardasians "established that [the lender] did not comply with Civil Code section 2923.5 prior to the issuance of the notice of default." The trial court enjoined the foreclosure sale "pending compliance with Civil Code 2923.5." The trial court, however, required the Bardasians to "post a preliminary injunction bond in the amount of $20,000" and make $500 monthly payments to Marix because the Bardasians are "behind almost $100,000 on [their] payments, and it is inequitable to allow [them] to continue to live in the house for free. . . ."

The Bardasians did not post the $20,000 bond or make the first $500 monthly payment, so the trial court granted Marix's motion to dissolve the preliminary injunction.

On the Bardasians' petition for writ of mandate in this court, we hold the trial court could not order the Bardasians to

post an undertaking[1] because it ruled *on the merits* that the lender had not complied with section 2923.5. Because the trial court erred in ordering the Bardasians to post an undertaking, the trial court likewise erred in dissolving the injunction for their failure to do so. We will therefore direct the trial court to vacate its order dissolving the injunction and to modify its order granting the injunction to delete the bond requirement and monthly $500 payment.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2010, the Bardasians filed a complaint against Santa Clara Partner's Mortgage Corporation and others alleging fraud and related causes of action arising out of the Bardasians' mortgage loan that closed in October 2005 for their house on Vallejo Drive in Orangevale.

On September 16, 2010, a notice of default was recorded against the property. A declaration attached to the notice of default stated, "Bank of America Home Loans . . . has contacted the borrower to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." The declaration was signed by a "Mortgage Servicing Specialist" of "BAC Home Loans."

In December 2010, the Bardasians filed a motion for a preliminary injunction to enjoin a trustee's sale of their home. The grounds for the motion included the following: "[t]he

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[1] The terms "undertaking" and "bond" are interchangeable. (Code Civ. Proc., § 995.210.)

[n]otice of [d]efault did not comply with Civil Code section 2923.5 which requires as a prerequisite to the issuance of a [n]otice of [d]efault that a borrower be contacted by phone or in person to assess their financial condition and explore options to foreclosure." The matter was removed to federal district court before the trial court issued a ruling and was therefore dropped from the trial court's calendar.

In March 2011, the Bardasians filed a new motion for preliminary injunction to enjoin Bank of America and BAC Home Loans from conducting a trustee's sale of their home. Attached was Brenda's declaration stating, "At no [time] prior to the issuance of the Notice of Default has any person or entity acting on behalf of anyone claiming to be my lender or anyone contacted me to explore options to foreclosure or to assess my financial condition." "At no time was there any personal meeting or telephonic meeting between me or any defendant or any person acting on their behalf to discuss options to foreclosure or to assess my financial condition." "At all times I was available to meet with or talk to by telephone anyone acting on [behalf of] any defendants . . . either in person or telephonically, to provide me options other than foreclosure."

BAC Homes Loans and Bank of America responded they were the wrong parties to the lawsuit. The current servicer of the loan was Marix and the current investor was JP Morgan Chase.

On April 6, 2011, the Bardasians moved ex parte for a temporary restraining order to restrain the trustee's sale of their home that was scheduled for April 14, 2011, and for an

order to show cause why the preliminary injunction should not issue.

Also on April 6, 2011, the Bardasians amended the operative complaint to substitute Marix and JP Morgan Chase for fictitious Doe defendants.

On April 7, 2011, the court granted the temporary restraining order and set an order to show cause hearing.

On April 19, 2011, JP Morgan Chase filed its preliminary opposition. In it, JP Morgan Chase did not "mount its defense" but noted it needed more time to do so because the matter had just been "recently referred to [JP Morgan Chase's] counsel" (which the court allowed via a continuance of the hearing on the preliminary injunction). It did, however, argue an undertaking should be required if the court granted the preliminary injunction. It argued for "no less than $47,085.64" based on six months of "reasonable rent" for the property and attorney fees and costs of $25,000. The "reasonable rent" calculation was included in a declaration of its attorney, which the attorney based on the mortgage loan amount of $613,950 and calculated to be $3,680.94 per month.

Marix also filed an opposition, but it is not in our records.[2]

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[2] JP Morgan Chase contends the Bardasians' writ petition in this court failed to comply with the California Rules of Court requiring "an adequate record" and should be denied. (Cal. Rules of Court, rule 8.486(b).) We are aware the record the Bardasians have provided us with fails to include the reporter's transcript of the hearing on the motion for the preliminary

On May 20, 2011, the court granted the Bardasians' "[a]pplication for [p]reliminary [i]njuction" "to the limited extent set forth below":

"Plaintiff seeks postponement of the foreclosure sale until the defendants comply with Civil Code [section] 2923.5. Plaintiff has established that BAC Home Loan Servicing did not comply with Civil Code section 2923.5 prior to the issuance of the notice of default on September 15, 2010." "Plaintiff states under penalty of perjury that no contact was ever made at least 30 days before the notice of default was issued."

"Marix contends that Civil Code [section] 2923.5 was complied with because (1) plaintiff obtained a loan modification in 2007, and (2) the declaration attached to the notice of default establishes that the statute was complied with. Marix also contends that since plaintiff referred to the wrong property address, the incorrect lender's name, and the incorrect date of the recordation of the deed of trust in her initial declaration, that her statements about failure to contact her are not reliable. Plaintiff has filed a supplemental declaration containing corrections . . . . The Court is

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injunction and Marix's opposition to the motion for preliminary injunction, both which are required by the rule. (Cal. Rules of Court, rule 8.486(b)(1)(B) & (D).) However, we have discretion to decide whether to deny the petition because of the failure to include these documents. (Cal. Rules of Court, rule 8.486(b)(4).) We exercise our discretion to allow the petition because, as will be shown, our ruling rests of the trial court's decision to grant the preliminary injunction on the merits, something that was plainly demonstrated by the court's written ruling contained in the record.

persuaded on the evidence before it that plaintiff was not contacted in person at least 30 days before September 15, 2010."

"Plaintiff explains . . . that during the loan modification in 2007, in which the construction loan was replaced with a conventional loan, the subject matter of Civil Code section 2923.5 was never discussed. The Court finds that the loan modification three years before the notice of default was filed is not [in] compliance with that code section."

"The Court also rejects Marix's argument that the form declaration attached to the [notice of default] is sufficient and establishes compliance with Civil Code section 2923.5." The declaration "does not satisfy defendant's evidentiary burden on a motion for preliminary injunction to rebut plaintiffs' evidence that no such contact was made. The declaration attached to the notice of default was not filed in connection with this proceeding and is hearsay. Even if it was submitted in support of the opposition, the declaration is conclusory, as it does not state when the contact was made or by whom. As stated in *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, at 235, 'somebody is not telling the truth and it is the trial court's job to determine who it is.'"

"Pursuant to *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 223, if Civil Code section 2923.5 is not complied with,

then there is no valid notice of default, and without a valid notice of default, a foreclosure sale cannot proceed." [3]

"The foreclosure sale is enjoined pending compliance with Civil Code [section] 2923.5, and the issuance of another Notice of Default after such compliance. At such time as compliance is met, defendants may file a motion to dissolve the preliminary injunction so that the foreclosure sale may then go forward."

"Plaintiff shall post a preliminary injunction bond in the amount of $20,000 **and** on condition that plaintiff make monthly payments of [$500 commencing June 1 and playable to the trust account of Marix].[4] Plaintiff is behind almost $100,000 on her payments, and it is inequitable to allow her to continue to live in the house for free. . . ."

On June 7, 2011, Marix filed a motion to dissolve the preliminary injunction because the Bardasians had not posted the

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[3] *Mabry v. Superior Court*, *supra*, 185 Cal.App.4th at page 208 is the only comprehensive opinion to date about section 2923.5. It held the following: (1) section 2923.5 may be enforced by a private right of action; (2) a borrower does not have to tender the full amount of mortgage indebtedness due as a prerequisite to bringing an action under section 2923.5; (3) section 2923.5 is not preempted by federal law; and (4) the extent of the private right of action under section 2923.5 is a postponement of an impending foreclosure to permit the lender to comply with section 2923.5. (*Mabry*, at p. 214.) *Mabry* reached the appellate court by way of a writ filed by the Mabrys six days before their home was scheduled for foreclosure. (*Id.* at pp. 216-217.)

[4] In the tentative ruling, the monthly payments were $2,813.94.

$20,000 bond or made the first $500 payment. The court granted the motion.

On June 22, 2011, the Bardasians filed a petition for writ of mandate in this court requesting us to direct the trial court to issue an order enjoining Marix and JP Morgan Chase from selling the property until they complied with section 2923.5 and that such order not require posting a bond.

We issued an alternative writ of mandate directing the trial court to grant the relief or show cause why the relief should not be granted.[5] Thereafter, the trial court stayed its order dissolving the injunction.

DISCUSSION

The Bardasians contend the trial court erred in requiring them to post an undertaking. They present the following four theories as to why the court erred: (1) the trial court already ruled on the merits of their claim that the lender failed to comply with section 2923.5; (2) the trial court based the amount of the undertaking on matters extraneous to the issuance of the injunction; (3) the trial court based the amount of the undertaking on figures put forth by the attorney for JP Morgan

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[5] By issuing an alternative writ of mandate, '"we have necessarily determined that there is no adequate remedy in the ordinary course of law and that [this] case is a proper one for the exercise of our original jurisdiction.'" (*Brooks v. Small Claims Court* (1973) 8 Cal.3d 661, 663.) For this reason, we reject Marix's preliminary argument that we should deny the Bardasians' writ because, according to Marix, there was an adequate legal remedy available to the Bardasians (i.e., appellate review).

Chase, for which no foundation existed; and (4) requiring a plaintiff who raises a challenge under 2923.5 to post an undertaking renders that statute a "dead letter." We find the Bardasians' first theory persuasive and do not address the others.

"[A] preliminary injunction is an order that is sought by a plaintiff prior to a full adjudication of the merits of its claim" and requires evaluating "the likelihood that the plaintiff will prevail on the merits." (*White v. Davis* (2003) 30 Cal.4th 528, 554, italics omitted.) "[T]he whole theory of a preliminary injunction is . . . to preserve the rights of the party until the truth of the charge can be regularly investigated. It is called by the code a 'provisional remedy.'" (*Lambert v. Haskell* (1889) 80 Cal. 611, 621.)

When the trial court grants a preliminary injunction, it "must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages . . . the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." (Code Civ. Proc., § 529, subd. (a); see *Lambert v. Haskell*, *supra*, 80 Cal. at pp. 620-621 [the undertaking provided for in the Code of Civil Procedure applies to preliminary injunctions].) Thus, the purpose of an undertaking is to protect the defendant against losses incurred (due to granting the preliminary injunction) if the defendant prevails on the merits.

When the court grants an injunction based on a decision on the merits, then, the court cannot order an undertaking because the injunction is not "preliminary" at all. (See *Shahen v. Superior Court* (1941) 46 Cal.App.2d 187, 189 [bond cannot be ordered on a permanent injunction issued after a trial on the merits].) Thus, the question here is whether the trial court issued a decision on the merits when it granted the preliminary injunction? If it did, no undertaking could be required. We hold it did.

Ordinarily, a trial court evaluates "two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) Generally, "[t]he granting or denying of a preliminary injunction does not constitute an adjudication of the ultimate rights in controversy." (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) Here, however, the trial court did not undertake to decide the likelihood that the Bardasians would be able to prove at trial that the lender failed to comply with section 2923.5. Instead, the court decided that question on the merits when it stated, "Plaintiff has established that BAC Home Loan Servicing did not comply with Civil Code section 2923.5 prior to the issuance of the notice of default on September 15, 2010."

The court based its decision on Brenda's declaration that stated, "no contact was ever made at least 30 days before the notice of default was issued." In relying on Brenda's declaration, the court specifically rejected Marix's challenge to her credibility that had alleged Brenda was "not reliable" because her initial declaration referred to the wrong property address, the incorrect lender's name, and the incorrect date of the recordation of the deed of trust. The court found that Brenda's supplemental declaration containing these corrections cured the problem.

In crediting Brenda's declarations, the court also rejected Marix's two substantive arguments why the lender had complied with section 2923.5. Marix's first argument was that a loan modification in 2007 contained adequate notice under 2923.5. Besides noting that Brenda's reply declaration stated "that during the loan modification in 2007 . . . the subject matter of Civil Code section 2923.5 was never discussed," the court "f[ou]nd[] that the loan modification three years before the notice of default was filed is not compliance with the code section." Marix's second argument was that "the form declaration attached to the [notice of default] is sufficient and establishes compliance with Civil Code section 2923.5." The court rejected this argument because the declaration was hearsay and even if it was not, it was conclusory, as it did not state who made the contact and when.

JP Morgan Chase and Marix argue the trial court's ruling was not a final adjudication on whether there was compliance.

JP Morgan Chase points out the trial court was presented with competing declarations and the court concluded only that the declaration presented by Marix (which was BAC Home Loans' declaration) "does not satisfy defendant's evidentiary burden on a motion for preliminary injunction to rebut plaintiffs' evidence that no such contact was made." JP Morgan Chase argues the trial court's conclusion did not "preclude a later determination that the injunction could have been wrongfully issued." After all, as Marix points out, here, no defendant had filed an answer or conducted discovery before the injunction, and Marix and JP Morgan Chase had been made parties only about five weeks before the court's ruling.

None of these arguments undermine the fact the court ruled on the merits here. We stress two salient facts Marix and JP Morgan Chase overlook. One, the trial court's ruling on the preliminary injunction here stated its job was to "'determine'" who "'is not telling the truth.'" It did so when crediting Brenda Bardasian's declarations. There was nothing more to be done to resolve the merits. Two, the trial court's ruling did not leave open the possibility that it might determine later the injunction was issued wrongfully. To the contrary, the court ruled, "Plaintiff has established that BAC Home Loan Servicing did not comply with Civil Code section 2923.5 prior to the issuance of the notice of default on September 15, 2010." The

court noted if Civil Code section 2923.5 is not complied with, then there is no valid notice of default, and without a valid notice of default, a foreclosure sale cannot proceed. The court then "enjoined" the foreclosure sale "pending compliance with Civil Code [section] 2923.5, and the issuance of another Notice of Default after such compliance."

The trial court ruled on the merits of the Bardasians' claim for injunctive relief when it held that BAC Home Loan Servicing did not comply with section 2923.5 prior to issuing the notice of default. Such compliance was the only issue in this suit. Because it ruled on the merits of the Bardasians' claim, the court could not order the Bardasians to provide an undertaking. (*Lambert v. Haskell*, *supra*, 80 Cal. at pp. 620-623; *Shahen v. Superior Court*, *supra*, 46 Cal.App.2d at p. 189.) The court therefore erred when it dissolved the injunction based on the Bardasians' failure to comply with the undertaking requirement because the imposition of that requirement was unauthorized in the first place.

DISPOSITION

Let a peremptory writ of mandate issue directing the trial court to: (1) modify its May 20, 2011, order to delete the requirement the Bardasians post a $20,000 bond and make $500 monthly payments to Marix; (2) vacate its order dissolving the injunction; and (3) enter a new order denying the motion to dissolve the injunction. The alternative writ and stay are discharged with the finality of this opinion. The Bardasians

shall recover their costs for this mandamus proceeding. (Cal. Rules of Court, rule 8.493(a)(1).)

ROBIE, J.

We concur:

RAYE, P. J.

HOCH, J.