

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 07/01/2013

TIME: 02:00:00 PM

DEPT: 53

TEMPORARY JUDGE: Rudolph Loncke
CLERK: K. Pratchen
REPORTER/ERM: S. Adams CSR# 12554
BAILIFF/COURT ATTENDANT: C. Chambers

CASE NO: **34-2013-00144287-CU-WE-GDS** CASE INIT.DATE: 05/28/2013
CASE TITLE: **Sese vs. Wells Fargo Bank NA**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,10012106

EVENT TYPE: Motion - Other - Civil Law and Motion

MOVING PARTY: Danilo Sese

CAUSAL DOCUMENT/DATE FILED: Motion for Preliminary Injunction, 06/03/2013

APPEARANCES

Aldon L Bolanos, counsel, present for Plaintiff(s).

Danilo Sese, Plaintiff is present.

D Dennis La, counsel, present for Defendant(s) telephonically.

Walter Dauterman, counsel, present for the Plaintiff.

Nature of Proceeding: Motion for Preliminary Injunction

TENTATIVE RULING

Plaintiff Danilo Sese's Motion for Preliminary Injunction is ruled upon as follows.

Plaintiff seeks a preliminary injunction enjoining the foreclosure sale of his home. Plaintiff contends that Defendant Wells Fargo Bank, NA engaged in improper "dual tracking" of his loan modification application and the concurrent foreclosure proceeding in violation of the Homeowner Bill of Rights.

In deciding whether to enter a preliminary injunction, the court must evaluate two interrelated factors: (1) the likelihood that the applicant will prevail on the merits at trial, and (2) the interim harm that the applicant will likely suffer if preliminary relief is not granted, as compared to the likely harm that the opposing party will suffer if the preliminary injunction issues. (See, e.g., *Langford v. Superior Court (Gates)* (1987) 43 Cal.3d 21, 28.) One of these two factors may be accorded greater weight than the other depending on the applicant's showing. (See *Commons Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 447.)

"[T]he party seeking the injunction must present sufficient evidentiary facts to establish a likelihood that it will prevail." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1478.) In support of his motion, Plaintiff presents evidence that after a Notice of Default was recorded against the property on January 28, 2013, he applied for mortgage assistance from Wells Fargo. (Sese Decl. ¶¶ 4-6.) Plaintiff presents evidence that he responded to Wells Fargo's repeated requests for information, and provided all of the documents requested. (Sese Decl. ¶¶ 6-8.) Plaintiff states in his declaration that on May 9, 2013, he received a letter from Wells Fargo stating that it had received his documents and was considering his loan modification application. (Sese Decl. ¶9, Ex. 6.) However, on May 11, 2013, Plaintiff received a Notice of Trustee's Sale indicating his home was scheduled to be sold on June 4, 2013. (Sese Decl. ¶10, Ex. 7.) On May 18, 2013, Plaintiff received a

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letter from Wells Fargo stating that it needed additional information, which Plaintiff states he already provided, in order to assess his loan modification application. (Sese Decl. ¶¶11, Ex. 8.) Plaintiff presents evidence that Wells Fargo never provided a written determination of that his application was incomplete or rejected in any way. (Sese Decl. ¶¶9.)

Plaintiff argues that Wells Fargo's conduct violated various provisions of the recently-enacted Homeowner Bill of Rights. Plaintiff contends that the Civil Code §2923.6(c) prohibits a lender from recording a notice of default or notice of sale, or conducting a trustee's sale while a loan modification application is pending. A lender must make a written determination that the borrower is not eligible for a loan modification before it may proceed with the foreclosure process. (Civil Code §2923.6(c)(1).) Plaintiff's evidence indicates that Wells Fargo issued the Notice of Trustee's Sale before it issued any determination of his eligibility for a loan modification. This is sufficient to demonstrate Wells Fargo's failure to comply with Civil Code §2923.6 and shift the burden to Wells Fargo to refute Plaintiff's showing.

In opposition, Wells Fargo presents evidence that Plaintiff had received a prior modification of the loan at issue here in May of 2012. (Dolan Decl. ¶¶10, Ex. D.) Wells Fargo's evidence indicates that Plaintiff defaulted on this modified loan, resulting in the January 28, 2013 recordation of the Notice of Default. (Dolan Decl. ¶¶11.)

Wells Fargo contends under Civil Code §2924.12(g), it is not liable for any violation of Civil Code §2923.6. Civil Code §2924.12(g) provides:

"A signatory to a consent judgment entered in the case entitled United States of America, et al v. Bank of America, et al., filed in the District Court for the District of Columbia, case number 1:12-cv-00361 RMC, that is in compliance with the relevant terms of the Settlement Term Sheet of that consent judgment with respect to the borrower who brought an action pursuant to this section while the consent judgment is in effect shall have no liability for a violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17."

Wells Fargo presents evidence that it is a signatory to the consent judgment described in Civil Code §2924.12(g), and thus that it is immune from liability under §2923.6. However, §2924.12(g) requires that the signatory be "in compliance with the relevant terms of the Settlement Term Sheet of that consent judgment". Wells Fargo did not provide the Settlement Term Sheet or any other persuasive evidence to establish that it is in fact in compliance with the consent judgment. Wells Fargo's contention that its compliance is shown by the fact that it previously offered Plaintiff a loan modification is not sufficient. Further, Plaintiff, on reply, provides a copy of relevant portions of the Settlement Term Sheet that prohibit signatories from engaging in "dual tracking". (Bolanos Reply Decl. Ex. 2, p. A-17.) As Plaintiff argues, he has presented evidence that Defendant did engage in "dual tracking" when processing his modification application, which Plaintiff contends indicates Wells Fargo's failure to comply with the consent judgment.

Wells Fargo also argues that it may proceed with foreclosure because Plaintiff defaulted on his first loan modification. Civil Code §2923.6(c)(3), a provision of the Homeowner Bill of Rights, permits foreclosure proceedings where "[t]he borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification." However, as Plaintiff argues on reply, the Homeowner Bill of Rights became effective on January 1, 2013, after Plaintiff received the first loan modification. Wells Fargo cites no authority for retroactive application of the provisions of the Homeowner Bill of Rights.

Next, Wells Fargo presents evidence that Plaintiff failed to provide a "complete" application for a loan modification, and therefore cannot invoke the protections of Civil Code §2923.6. Wells Fargo presents

notes of calls and copies of letters sent to Plaintiff requesting additional information. (Dolan Decl. ¶¶12, 13.) However, this evidence does not refute Plaintiff's testimony that Wells Fargo repeatedly requested information from Plaintiff that he had previously submitted. (Sese Decl. ¶10; Sese Reply Decl. ¶¶2-4, Ex. 2.)

Finally, Wells Fargo argues that the Homeowner Bill of Rights is preempted by the federal Home Owners' Loan Act ("HOLA"). Wells Fargo cites no authority holding that the HOLA preempts any provisions of the Homeowner Bill of Rights, let alone the specific provisions Plaintiff alleges were violated here. The *Mabry* case (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208) did not address the Homeowner Bill of Rights and does not establish preemption.

Based on the foregoing, the Court concludes that Plaintiff has met his burden to demonstrate a likelihood of prevailing on the merits of his claims.

Further, the Court agrees that Plaintiff will undoubtedly suffer great injury if his residence is sold. Accordingly, the relevant factors favor Plaintiff, and the court will grant the motion for preliminary injunction.

Bond is set in the amount of \$10,000.

The prevailing party shall prepare a formal order for the Court's signature pursuant to C.R.C. 3.1312.

COURT RULING

The matter was argued and submitted. The Court affirmed the tentative ruling.