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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEVIN SINGH,
Plaintiff,
v.
BANK OF AMERICA, N.A.,
RECONTRUST COMPANY,
Defendant.

No. 2:13-cv-00729-MCE-AC

MEMORANDUM AND ORDER

On April 15, 2013, Kevin Singh (“Plaintiff”) filed this action against Bank of America (“BoA”) and ReconTrust. Plaintiff’s Complaint alleges BoA engaged in loan modification discussions with Plaintiff while ReconTrust simultaneously advanced the foreclosure process in contravention of California’s Homeowners Bill of Rights. On April 17, 2013, the Court granted Plaintiff’s Application for Temporary Restraining Order (“TRO”) preventing Defendant from selling Plaintiff’s home on April 22, 2013. (ECF Nos. 9, 11). On April 29, 2013, the Court held a preliminary injunction hearing. At issue was whether Defendant should be enjoined from foreclosing on Plaintiff’s home throughout the litigation. At the hearing, the Court orally GRANTED Plaintiff’s Application for a Preliminary Injunction for the reasons described below. (ECF No. 14.)

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BACKGROUND

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3 ReconTrust is a subsidiary of BoA. ReconTrust provides mortgage default
4 services to BoA. Plaintiff owns real property and improvements thereon located in West
5 Sacramento, California, which is located within the Eastern District of California
6 (hereinafter referred to as “the property” unless specified otherwise). The property was
7 purchased by Plaintiff with a loan obtained through BoA and evidenced by a promissory
8 note. (ECF No. 5-2.) The promissory note is secured by a deed of trust which is
9 recorded against the property. Plaintiff defaulted on the loan in 2008. (*Id.*) In 2012,
10 Plaintiff and BoA began negotiating a modification of the loan that would allow plaintiff to
11 remain current on his obligation. (*Id.*) During the negotiations, Plaintiff provided BoA
12 detailed information about Plaintiff’s financial situation in exchange for the possibility of a
13 lower monthly payment and interest rate. BoA has not made a written determination as
14 to whether Plaintiff qualifies for a loan modification. (ECF No. 10.) Even though Plaintiff
15 and BoA were negotiating a loan modification, ReconTrust went ahead with the
16 foreclosure process.

17
18 **ANALYSIS**

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20 A preliminary injunction is an extraordinary remedy, and Plaintiffs have the burden
21 of proving the propriety of such a remedy by clear and convincing evidence. See
22 Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S.
23 423, 442 (1974). The party requesting preliminary injunctive relief must show that “he is
24 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence
25 of preliminary relief, that the balance of equities tips in his favor, and that an injunction is
26 in the public interest.” Winter v. Natural Resources Defense Council, 555 U.S. 7, 20
27 (2008); Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting Winter).

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1 Plaintiff's Complaint alleges that the Court has diversity jurisdiction. In
2 Defendant's Opposition, Defendant argues the Court does not have jurisdiction to hear
3 this suit because the parties are not completely diverse. (ECF No. 16.) Under 28 U.S.C.
4 § 1332(a), diversity jurisdiction exists where the amount in controversy exceeds \$75,000
5 and no defendant party shares citizenship in the same state as Plaintiff. Exxon Mobil
6 Corp. v. Allapattah Servs., Inc. 545 U.S. 546, 553 (2005) (citing Strawbridge v. Curtiss,
7 3 Cranch 267, 2 L. Ed. 435 (1806)). Article III courts are courts of limited jurisdiction,
8 and are presumptively without jurisdiction over civil actions. Kokkonen v. Guardian Life
9 Ins. Co. of Am., 511 U.S. 375, 377 (1994). The burden of establishing the contrary rests
10 upon the party asserting jurisdiction. Id. In BoA's Opposition and at the hearing, BoA's
11 counsel asserted that ReconTrust is a citizen of California which destroys the complete
12 diversity citizenship requirement under 28 U.S.C., section 1332(a). At the hearing, the
13 Court expressed concern over BoA's lack of admissible proof that ReconTrust's "main
14 office" is located in California. Regardless, Plaintiff agreed to dismiss Defendant
15 ReconTrust within two days of the hearing to prevent the Court from dismissing the
16 entire case for lack of subject matter jurisdiction. On April 30, 2013, Plaintiff filed a
17 Notice of Voluntary Dismissal. (ECF No. 21.) Now, Bank of America, a citizen of North
18 Carolina, is the remaining Defendant and it is diverse from Plaintiff, a citizen of
19 California. Thus, the Court has diversity jurisdiction to hear this case.

20 BoA and other lenders' practice of negotiating with homeowners in default on their
21 loans for a loan modification while simultaneously advancing the foreclosure process is
22 commonly referred to as "dual tracking." Dual tracking has been heavily criticized by
23 both state and federal legislators. In July 2012, California passed legislation referred to
24 as "The California Homeowner Bill of Rights" which prohibits dual tracking. As of
25 January 1, 2013, "The California Homeowner Bill of Rights went into effect and it offers
26 homeowners greater protection during the foreclosure process. Cal. Civ. Code
27 § 2923.6(b) (2013).

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1 Section 2923.6(b) states “it is the intent of the legislature that the mortgage servicer offer
2 the borrower a loan modification or work out a plan if such a modification or plan is
3 consistent with its contractual or other authority.” The statute further provides that “if a
4 borrower submits a complete application for a first lien loan modification . . . the
5 mortgage servicer . . . shall not record a notice of default or notice of sale, or conduct a
6 trustee’s sale, while the complete first lien loan modification application is pending.” Cal.
7 Civ. Code § 2923.6(c) (2013).

8 At the preliminary injunction hearing, Plaintiff maintained that BoA never
9 responded to Plaintiff’s complete application for a first lien loan modification. BoA does
10 not dispute Plaintiff’s assertion. Neither Plaintiff nor BoA provided the Court with any
11 new evidence at the preliminary injunction hearing. Because BoA has failed to respond
12 to Plaintiff’s application for a first lien loan modification after January 1, 2013, section
13 2923.6 applies to this case and prevents BoA from conducting a trustee’s sale while
14 Plaintiff’s application for a first lien loan modification is pending.

15 Accordingly, Plaintiff has adequately shown he is likely to succeed on the merits
16 in light of California’s new Homeowners’ Bill of Rights. Plaintiff has also met the
17 remaining factors of the preliminary injunction standard. Plaintiff has demonstrated that
18 Plaintiff will suffer “irreparable harm” if he loses his home because “[he] and [his] family
19 will have nowhere to go and nowhere to stay. . . [his] children will need to leave their
20 schools.” (ECF No. 5-2.) Further, the balance of equities tips in Plaintiffs’ favor as a
21 TRO merely delays Defendant’s right to foreclose. Finally, an injunction is in the public’s
22 interest as it enforces a recently enacted law designed to protect the public.

23 BoA asked the Court to order Plaintiff to make \$2,700 monthly bond payments if
24 the Court granted Plaintiff’s Application for a Preliminary Injunction. (ECF No. 16.)
25 Federal Rule of Civil Procedure 65(c) states “the court may issue a preliminary injunction
26 order...only if the movant gives security in an amount that the court considers proper to
27 pay costs and damages sustained by any party found to have been wrongfully enjoined
28 or restrained.” (Emphasis added.)

1 In light of Rule 65, the Court orders Plaintiff to post a \$1,000 bond within seven days of
2 the date of the preliminary injunction hearing.

3
4 **CONCLUSION**

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6 Accordingly, the Court GRANTS Plaintiff's Application for a Preliminary Injunction
7 and orders Plaintiff to pay \$1,000 bond by **Monday, May 6, 2013**. (ECF No. 14.)

8 Pursuant to Plaintiff's filing, ReconTrust is dismissed and no longer a Defendant in this
9 case. (ECF No. 21.)

10 IT IS SO ORDERED.

11 DATE: May 1, 2013

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14 MORRISON C. ENGLAND, JR., CHIEF JUDGE
15 UNITED STATES DISTRICT COURT
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