

15. MABRY V. AURORA LOAN SERVICES, LLC, ET AL.

Motion for preliminary injunction:

The application is granted.

Evidentiary issues

This court has permitted additional or supplemental declarations after the matter was remanded from the Court of Appeal in light of the this court's opinion that new factual issues may have been created which were not apparent to the parties prior to the granting of the writ by the Court of Appeal. But even if this court confines the basis of its determination herein to the state of the record presented to the Court of Appeal, this court's ruling would be the same.

The court grants the defendant's requests for judicial notice, filed October 20, 2009 and October 23, 2009[, and plaintiffs' request for judicial notice, filed November 15, 2010].

The court has considered all of the defendant's objections, and they are all overruled except as specifically sustained below:

Objection nos. 1 and 6 are sustained on grounds of relevance.

Objection no. 3 is sustained on grounds of lack of personal knowledge.

Discussion

Civil Code §2923.5 was enacted July 8, 2008. Before a lender may serve a notice of foreclosure under non-judicial foreclosure procedures, it must comply with the provisions of Civil Code §2923.5. The version of that section in effect when the instant Notice of Default was filed stated in pertinent part:

"(a)(1) A mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until 30 days after contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (g).

"(2) A mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgagee, beneficiary, or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting to occur within 14 days. The assessment of the borrower's financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the

borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically."

The provisions of paragraph (3) of subdivision (a) do not apply to this case because the Notice of Default was filed after the "enactment of this section." Section 2923.5 goes on to state:

"(g) A notice of default may be filed pursuant to Section 2924 when a mortgagee, beneficiary, or authorized agent has not contacted a borrower as required by paragraph (2) of subdivision (a) provided that the failure to contact the borrower occurred despite the due diligence of the mortgagee, beneficiary, or authorized agent. For purposes of this section, "due diligence" shall require and mean all of the following:

"(1) A mortgagee, beneficiary, or authorized agent shall first attempt to contact a borrower by sending a first-class letter that includes the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

"(2)(A) After the letter has been sent, the mortgagee, beneficiary, or authorized agent shall attempt to contact the borrower by telephone at least three times at different hours and on different days. Telephone calls shall be made to the primary telephone number on file.

"(B)

"(C) A mortgagee, beneficiary, or authorized agent satisfies the telephone contact requirements of this paragraph if it determines, after attempting contact pursuant to this paragraph, that the borrower's primary telephone number and secondary telephone number or numbers on file, if any, have been disconnected.

"(3) If the borrower does not respond within two weeks after the telephone call requirements of paragraph (2) have been satisfied, the mortgagee, beneficiary, or authorized agent shall then send a certified letter, with return receipt requested.

"(4)

"(5) The mortgagee, beneficiary, or authorized agent has posted a prominent link on the homepage of its Internet Web site, if any, to the following information:

"(A) Options that may be available to borrowers who are unable to afford their mortgage payments and who wish to avoid foreclosure, and instructions to borrowers advising them on steps to take to explore those options.

"(B) A list of financial documents borrowers should collect and be prepared to present to the mortgagee, beneficiary, or authorized agent when discussing options for avoiding foreclosure.

"(C) A toll-free telephone number for borrowers who wish to discuss options for avoiding foreclosure with their mortgagee, beneficiary, or authorized agent.

"(D) The toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency."

By the preponderance of the evidence the court hereby finds as follows:

On July 15, 2008, prior to default, the plaintiffs telephoned the lender to request information about their loan. They spoke with an employee of the lender, who provided information about the plaintiffs' options to avoid foreclosure. At some time later, but on or about July 15, 2008, the lender mailed to the plaintiffs a letter confirming their conversation and again explaining the plaintiffs' options to avoid foreclosure.

Plaintiffs defaulted in their mortgage payments in August, 2008. On or about September 15, 2008, the lender sent another letter to the plaintiffs advising them that they were then two months in arrears on the mortgage payments. That letter also contained information about ways the plaintiffs could avoid foreclosure. Neither the above referenced telephone call nor the two letters advised the plaintiffs that they had the right to request a subsequent meeting and, if requested, the mortgagee, beneficiary, or authorized agent would schedule the meeting to occur within 14 days. As a result of those omissions, the defendants have not complied with the requirements of section 2923.5(a)(2). Further, inasmuch as the plaintiffs initiated contact with the defendants, rather than the other way around, it is debatable whether the defendant satisfied the requirement of subdivision (a)(2) to "contact the borrower in person or by telephone." Nonetheless, the court hereby finds that contact was made.

The court also finds the defendant did not adequately fulfill the due diligence requirements to benefit from the exceptions to subdivision (a). Before a notice of default may be filed pursuant to Section 2924 when a lender has not contacted a borrower as required by paragraph (2) of subdivision (a), the lender shall satisfy the due diligence provisions of subdivision (g). "Due diligence" under the statute requires compliance with all of the elements of subsection (g). In the present case, the defendant has omitted several of those elements.

Even though defendant may have called the plaintiff's more than 30 times, there is no evidence the calls were at "different hours." (See subsection (g)(2)(A).) The court finds that the plaintiffs' primary telephone number was not disconnected. The court finds that the plaintiffs did not respond to any of those telephone calls within two weeks. However, the court finds that the defendants did not then send a certified letter, with return receipt requested.

The court finds the defendant provides no evidence it posted a prominent link on the homepage of its Internet Web site containing all of the information required under subsection (g)(5)(A) through (D).

The court does not find persuasive the testimony of defendant's witness Cheryl Marchant because she has no specific personal knowledge of the facts concerning the communication between the plaintiffs and the defendant's employees assigned to the file prior to filing the Notice of Default. Rather, Ms. Marchant testifies merely based upon her interpretation of the defendant's business records.

The court finds that the Notice of default does contain the statutorily required form language that the lender contacted the borrower, tried with due diligence to contact the borrower, etc. However, the declaration on the Notice of Default is not made under penalty of perjury, and therefore, has no evidentiary value concerning whether the defendant otherwise satisfied the provisions of section 2923.5.

The court finds that the provisions of subsection (h) do not apply. The court finds no proof that any of the following occurred: (1) the plaintiffs surrendered the property; (2) the plaintiffs contracted with an organization, person, or entity whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries; or (3) the plaintiffs filed bankruptcy under any of Chapters 7, 11, 12, or 13 of Title 11 of the United States Code and the bankruptcy court has not entered an order closing or dismissing the bankruptcy case, or granting relief from a stay of foreclosure.

With regard to item (3) just mentioned, the court finds that the Bankruptcy Court has entered an order dismissing the bankruptcy case prior to the filing of the Notice of Default.

The court orders that the plaintiffs shall prepare, file and serve the order staying the foreclosure proceedings until the defendant has complied with the requirements of Civil Code §2923.5.