

2004 Cal. App. Unpub. LEXIS 8501,\*

JOSEPH SULAK et al., Plaintiffs and Appellants, v. MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC. et al., Defendants and Respondents.

E035021

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

2004 Cal. App. Unpub. LEXIS 8501

September 20, 2004, Filed

**NOTICE:**

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**PRIOR HISTORY:**

APPEAL from the Superior Court of Riverside County, No. RIC 398123. Richard T. Fields, Judge.

**DISPOSITION:**

Affirmed.

**COUNSEL:** Joseph Sulak and Carol Sulak, in pro. per., for Plaintiffs and Appellants.

Moss Pite & Duncan and Michelle A. Mierzwa for Defendants and Respondents.

**JUDGES:** Ward J.; Hollenhorst Acting P. J., Richli J. Concurred.

**OPINION BY:** Ward

**OPINION**

Plaintiffs and appellants Joseph Sulak and Carol Sulak appeal orders of the trial court denying their ex parte application for a temporary restraining order (TRO) and denying a preliminary injunction in their consumer fraud action. The TRO and preliminary injunction sought to halt foreclosure proceedings on grounds of alleged procedural irregularities. These irregularities also underlay plaintiffs' fraud claims. By the time of the preliminary injunction hearing, however, the foreclosing party had rescinded the assertedly [\*2] faulty sale, thereby eliminating the procedural irregularities underlying plaintiffs' complaint. Because the basis for plaintiffs' attack on the foreclosure proceeding no longer existed, plaintiffs could not show a likelihood of prevailing in the action. The court therefore properly denied the application for a

preliminary injunction. We affirm the orders of the court. n1

----- Footnotes -----1

Plaintiffs' request to take judicial notice filed on February 10, 2004, is denied.

----- End Footnotes-----

## FACTS AND PROCEDURAL HISTORY

Plaintiffs purchased a home in Lake Elsinore in 1983. At that time, they executed a \$ 75,000 note and a deed of trust in favor of defendant Directors Mortgage Loan Corporation (Directors). Directors later changed its name to Norwest Mortgage, Inc. (Norwest), and ultimately to Wells Fargo Home Mortgage (Wells Fargo). For convenience, Directors, Norwest and Wells Fargo will be referred to by the entity's ultimate name, Wells Fargo.

In 1995, Wells Fargo assigned the deed of trust to Harbourton Mortgage Company, L.P. (Harbourton). [\*3] Wells Fargo assigned the note to Harbourton by endorsing the note and delivering it to Harbourton. In 1997, Harbourton assigned the deed of trust to Source One Mortgage Services Corporation (Source One). Harbourton assigned the note to Source One as well, by endorsing the note and delivering it to Source One. On March 17, 1999, Source One assigned the deed of trust to defendant and respondent Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for defendant and respondent Aurora Loan Services, Inc. (Aurora). Source One endorsed the note and delivered it to Aurora. Aurora currently holds the original note.

Plaintiffs made payments on the note to Aurora after the 1999 assignment. In January of 2003, plaintiffs wrote to Aurora, asking about the relationship between it and MERS. Aurora explained that it was the holder of the promissory note. MERS was a tracking entity holding the deed of trust as Aurora's nominee.

Plaintiffs responded by making a purported "Good Faith Offer" to Aurora to buy out the note. (**Civ. Code, § 1485** ["An obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with intent [\*4] to extinguish the obligation".]) Aurora did not respond, and plaintiffs viewed themselves as relieved from the obligation under the note. Essentially, plaintiffs called "Olly olly oxen free" on the note and deed of trust, and stopped making payments.

By April of 2003, the loan was in default. Aurora began nonjudicial foreclosure proceedings, through Loanstar Mortgage Services, L.L.P. (Loanstar). Loanstar recorded and served a notice of default and notice of sale under the deed of trust. Loanstar's documents bore the warning that it was a debt collector, and the notification was an attempt to collect a debt.

Under the federal Fair Debt Collection Practices Act, title **15, United States Code Annotated section 1692 et seq.**, upon notice of debt collection, a consumer may, within 30 days, write to dispute the debt or to demand validation of the debt. (U.S.C.A. **§ 1692g(a)(4)-(5)**.) In May of 2003, plaintiffs timely wrote to Loanstar, demanding validation of the debt.

On August 8, 2003, Loanstar recorded a notice of trustee's sale, setting the foreclosure sale for August 22, 2003. Then, Aurora became aware of the validation request; on August 30, 2003, Aurora's counsel sent a letter to [\*5] plaintiffs, enclosing copies of the deed of trust, the assignments, and the endorsed note. By that time, Loanstar had already postponed the foreclosure sale.

In the meantime, on August 19, 2003, plaintiffs filed an action for fraud in the Riverside County Superior Court. On the same date, plaintiffs moved ex parte for a TRO to halt the impending foreclosure sale. The court denied the TRO application on August 20, 2003, based on the court's assessment that plaintiffs would be unlikely to prevail at trial.

On September 30, 2003, plaintiffs filed a second ex parte application for a TRO, and order to show cause (OSC) for a preliminary injunction. The court again denied the TRO application on grounds both of the inability to establish a likelihood of success on the merits, and because the ex parte notice was not timely.

On October 28, 2003, plaintiffs filed their first amended complaint, alleging 12 causes of action, for fraud, violations of the debt collection practices act, violations of state unfair competition law, and other theories. On October 30, 2003, plaintiffs filed a third application for a TRO, and an OSC re preliminary injunction. The court denied the TRO because the ex [\*6] parte notice was untimely, but set an OSC hearing on the preliminary injunction.

The parties argued the preliminary injunction OSC on December 3, 2003. The court denied the OSC for a preliminary injunction on grounds that plaintiffs had not shown a likelihood of prevailing on the merits of the complaint.

Between the time the third TRO was denied and the time of hearing on the OSC for preliminary injunction, Aurora had instructed Loanstar, its foreclosure trustee, to rescind the notice of sale recorded on August 8, 2003. Aurora directed Loanstar to start over with an entirely new notice of sale, which was to be recorded, mailed, published and posted before proceeding with the foreclosure.

Plaintiffs filed a notice of appeal, seeking review of the denial of the three TRO applications, as well as of the order denying the preliminary injunction.

## ANALYSIS

### I. Standard of Review

"The appellate standard for reviewing preliminary injunctions is well established. In deciding whether to issue a preliminary injunction, a trial court weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the [\*7] parties from the issuance or nonissuance of the injunction. [Citation.] 'Generally, the ruling on an application for a preliminary injunction rests in the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal absent a showing that it has been abused. [Citations.]'

[Citation.]" ([Hunt v. Superior Court \(1999\) 21 Cal.4th 984, 999.](#))

## II. The Trial Court Properly Denied the Preliminary Injunction

Each time plaintiffs applied for equitable relief, the trial court determined that the balancing of relative harms to the parties favored plaintiffs, who were at risk of losing their home by foreclosure. The court denied the request for a preliminary injunction, however, because there was little likelihood that plaintiffs would prevail on the merits of their claims.

The function of the preliminary injunction was to halt the impending foreclosure sale. Plaintiffs asserted that the foreclosure proceedings were improper because of certain procedural irregularities.

For example, plaintiffs asserted that the foreclosure proceedings violated the Fair Debt Collection Practices Act. The Fair Debt Collection Practices Act provides [\*8] that, upon notice to the consumer of a debt collection action, the consumer may timely request validation of the debt. Title [15, United States Code Annotated section 1692g\(b\)](#) provides that, upon filing a dispute of the debt or requesting validation, the debt collector shall cease collecting the debt until the validation has been provided. Plaintiffs urge that Loanstar proceeded to schedule the foreclosure sale before any validation documentation was provided.

In a variation on this theme, plaintiffs claimed that the violations of the Fair Debt Collection Practices Act constituted unfair competition law violations under state law.

Plaintiffs further argued that the collection action was improper because the deed of trust and note were assigned to MERS, not to Aurora or Loanstar. MERS, in turn, was a corporation not authorized to conduct intrastate business in California. Thus, plaintiffs argued, MERS should be disqualified from acting to defend itself against plaintiffs' action, and neither Aurora nor Loanstar had standing.

Plaintiffs also contended that their "good faith offer" to buy out the loan had extinguished the debt.

Several of plaintiffs' other causes of action, such as [\*9] intentional infliction of emotional distress, involved money damages, and therefore the preliminary injunction did not implicate those causes of action.

The trial court determined that, despite plaintiffs' arguments, they were unlikely to prevail on the merits of the relevant causes of action. We agree. First, it is unclear whether the Fair Debt Collection Practices Act applies to mortgage foreclosures. Second, the sole remedy provided for violations of the Fair Debt Collection Practices Act is money damages; injunctive or other equitable relief is not available. A violation of the Fair Debt Collection Practices Act would therefore provide no ground to require a foreclosure to be halted. Third, the violation of the Fair Debt Collection Practices Act upon which plaintiffs relied consisted solely of Aurora's and Loanstar's failure to stop all foreclosure activity before providing a validation of the debt. As it turned out, however, validation of the debt was eventually provided, before any foreclosure took place. In fact, Aurora directed Loanstar to *rescind* the notice of the foreclosure sale, and to begin foreclosure

proceedings again. Any new notice of foreclosure will naturally [\*10] post-date the validation of the debt. Because the cause of action for violation of the state unfair competition law also consists solely of the alleged Fair Debt Collection Practices Act violation, the rescission of the foreclosure sale notice obviates any violation of the unfair competition law. Fourth, although plaintiffs disputed the validation of the debt, claiming that the note was not properly endorsed and transferred to each assignee, plaintiffs' own first amended complaint shows otherwise. It contains a copy of the note, including endorsements. Fifth, plaintiffs' claims of fraud are not specifically pleaded in the first amended complaint. Sixth, plaintiffs have not shown that the debt is not valid, and they have made no attempt to redeem the loan or bring it current. Their attack on the foreclosure sale apparently amounts to the assertion that they should be allowed to keep the property, without having to pay. To the extent plaintiffs claim that the debt was extinguished by their "good faith offer" to buy out the loan, the argument is without merit. The offer, at least on its face, contained conditions which the creditor was not bound to accept (to produce the original note [\*11] for plaintiffs' inspection before they liquidated any assets to pay off the loan), and evidenced only a conditional intent to pay.

These were the matters before the court at the time it considered the issuance of the preliminary injunction. The order denying the preliminary injunction is necessarily limited to that basis. (See, e.g., [People ex rel. Gallo v. Acuna \(1997\) 14 Cal.4th 1090, 1109](#); [Howard S. Wright Construction Co. v. Superior Court \(2003\) 106 Cal.App.4th 314, 320](#).) In reviewing the matter for abuse of the trial court's discretion, we do not reweigh the evidence. ([Howard S. Wright Construction Co. v. Superior Court, supra, 106 Cal.App.4th at p. 320](#).) "Our role is to interpret the facts and to make all reasonable inferences in support of the order issued." ([Dodge, Warren & Peters Ins. Services, Inc. v. Riley \(2003\) 105 Cal.App.4th 1414, 1420](#).)

Given the matters presented to the trial court, its evaluation of plaintiffs' likelihood of prevailing in the action was manifestly neither arbitrary, capricious nor patently absurd. The trial court properly denied the preliminary injunction.

### III. The Orders [\*12] Denying the TRO's Were Proper

Plaintiffs raise several separate arguments concerning the trial court's assertedly erroneous denial of their applications for a TRO to enjoin the foreclosure sale. For example, plaintiffs argue that the court erred in failing to find, under the state unfair competition law, that defendants' actions constituted a pattern of behavior or a course of conduct within the reach of the statute. Plaintiffs further complain that the court applied an improper standard for granting a TRO under the unfair competition law: plaintiffs urge that they were required only to show "unfair," "unlawful" or "deceptive" conduct to be entitled to injunctive relief. The court therefore erred in requiring them to demonstrate the lack of an adequate legal remedy, the possibility of irreparable harm, or the probability of success on the merits.

As to each of these supposed errors, plaintiffs argue that the "TRO should have been granted and the Trustees Sale should have been enjoined and rescinded by the trial court, until validation was mailed." It would be pointless and futile, however, to issue a ruling requiring what has already been done: Aurora eventually did provide validation [\*13] of the debt. It also rescinded the notice of sale and directed Loanstar to begin new foreclosure proceedings, so as to remove any specter of impropriety from the procedures used to invoke the sale. The law does not require a futile act. (See generally, [Civ. Code, §](#)

3532 ["The law neither does nor requires idle acts.")

DISPOSITION

For the reasons stated, the orders denying the TRO's and the preliminary injunction are affirmed.

Ward, J.

We concur:

Hollenhorst, Acting P. J.

Richli, J.