

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CANDACE LOUISE CURTIS

Plaintiff,

V.

ANITA KAY BRUNSTING, AND
AMY RUTH BRUNSTING

Defendants.

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4:12-CV-00592

MEMORANDUM AND RESPONSE OF DEFENDANTS TO PLAINTIFF'S
"RENEWED APPLICATION FOR EX PARTE TEMPORARY RESTRAINING ORDER,
AND ASSET FREEZE, TEMPORARY AND PERMANENT INJUNCTION"

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants Anita Kay Brunsting and Amy Ruth Brunsting respond to Inst. #35
("the Renewed Application") filed by Plaintiff.

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING.

1. This is a diversity action and a suit among sisters involving a family trust. Plaintiff, a trust beneficiary, sues her sisters, Trustees. The real property of the Trust, a farm, is located in Iowa. There are other holdings of stock and bank accounts. The Court recently conducted a status conference and entered a docket control order. Plaintiff has sent some requests for production to Defendants, which are not yet due.

STATEMENT OF THE ISSUES TO BE RULED ON, AND THE STANDARD OF REVIEW THAT APPLIES.

2. At issue is a request for injunctive relief. "A preliminary injunction may be issued to protect the plaintiff from irreparable injury and to preserve the district court's power to

render a meaningful decision after a trial on the merits.”¹ It is, however, “extraordinary” relief. Granting or refusing a temporary injunction is in the sound discretion of this Court.²

This Court “balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.”³ Additionally, the Fifth Circuit has also established four prerequisites for grant of a preliminary injunction: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.⁴

ARGUMENT:

PLAINTIFF’S REQUEST FOR INJUNCTIVE AND OTHER RELIEF SHOULD BE DENIED.

3. The purpose of injunctive relief is to preserve the status quo and not to adjudicate the merits. Plaintiff’s request does not seek to maintain the status quo, but to materially alter it. Further, her requests for relief reach the merits; she requests, for example, that

¹ *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974).

² *Nalco Chemical Co. v. Hall*, 347 F.2d 90 (5th Cir. 1965).

³ *Wooten v. Ohler*, 303 F.2d 759, 762 (5th Cir. 1962).

⁴ *Queen v. Ocwen Loan Servicing, LLC*, 12-CV-2049, 2012 WL 5198358 (S.D. Tex. Oct. 19, 2012) (Ellison, J.), citing *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572–73 (5th Cir. 1974) (attached to Appendix).

Defendants marshal their proof in support of an affirmative defense advanced in their Answer.⁵ Plaintiff also seeks to compel an accounting, and seeks documents such as tax returns and farm records for a period beginning two years before the sisters' father's death. These latter requests are discovery matters (and discovery has been sent by Plaintiff to Defendants), not matters of equitable relief.

Plaintiff also seeks "repatriation" of Defendants' "personal assets."⁶ But following Supreme Court precedent, the Fifth Circuit has held several times, as a general federal rule of equity, that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment.⁷

4. Plaintiff's underlying complaint seeks money damages, punitive damages, and "legal fees and costs" from the Trustees.⁸ Plaintiff seeks injunctive relief that includes a request to restrain Defendants, as trustees, from any actions in connection with the trusts – her requested "asset freeze." And Plaintiff requests that financial institutions and others, that are not parties before this Court, likewise be enjoined from any actions in connection with the Family Trust.

⁵ See Inst. #35 (Renewed Application) at 9 (demanding a "show of proof").

⁶ See Inst. #35, proposed Order, at numbered paragraph 7.

⁷ See *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988), citing *De Beers in Federal Savings & Loan Insurance Corp. v. Dixon*, 325 U.S. 212, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945).

⁸ See Inst. # 1 at 12.

Plaintiff cannot establish any of the four prerequisites to the issuance of a preliminary injunction. Regarding the likelihood Plaintiff will prevail on the merits, Plaintiff acknowledges that she has received spreadsheets; accounting information; lists of assets as of December 2012; and schedules reflecting transfers, deposits, electronic fund transfers, gifts, payment of Iowa state and federal taxes, and payments of their brother's medical bills from 2010 to 2012.⁹ Plaintiff apparently disputes the accuracy of the spreadsheets (she refers in her Affidavit to “anomalies” and “false assertions” that “raise questions”).¹⁰ Questions raised, or the lack of additional information, does not entitle Plaintiff to a prejudgment asset freezing of the Trust.¹¹ The presence of this documentary evidence – that she received from Defendants – does not establish a likelihood Plaintiff will prevail on the merits of her suit for money damages.

Nor do these claims and concerns establish irreparable harm. The claim of an irreparable injury must be harm that is actual and imminent, not speculative or remote.¹² In addition to the speculative nature of Plaintiff's concerns and “questions,” she has not explained why money damages are not measurable or adequate. Plaintiff will presumably

⁹ See Inst. #35 (“Renewed Application”) at 3. She has attached 30 pages of these documents to her Application.

¹⁰ See Inst. #34 (affidavit).

¹¹ Plaintiff also claims in her affidavit that she has not received information from “Carl Brunsting [her brother] that may have been produced in any of the three state court actions and Plaintiff is concerned about that fact.” Inst. #34 at 2. It is unclear why her brother's non-disclosures have relevance to this Application.

¹² *Watson v. Federal Emergency Mgmt. Agency*, 437 F.Supp.2d 638, 648 (S.D. Tex. 2006).

have an adequate opportunity at a trial on the merits, after discovery, to try and prove she suffered some compensable injury from the administration of the Trust. Defendants will have their opportunity to prove their defenses, including the fact they have administered the Trust properly, and in good faith according to its terms and the Texas Trust Code, along with the application of any exculpatory provisions in the Trust applicable to alleged errors of judgment or mistake of fact or law or ordinary negligence. “The possibility that adequate compensatory . . . relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”¹³

Thus, irreparable harm – which must be proven *likely* if injunctive relief will be granted ¹⁴ – is absent here.

A preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion.¹⁵ Plaintiff Curtis has not met her burden for injunctive relief, or shown entitlement to the other varied relief she requests in her proposed Order; moreover, the public interest would not be served by entry of the proposed Order. Defendants request the Court deny the Renewed Application.

¹³ *Sampson v. Murray* 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974).

¹⁴ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

¹⁵ *Planned Parenthood of Houston & S.E. Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005); *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572–73 (5th Cir. 1974).

5. Finally, Rule 65 directs that the Court may issue a preliminary injunction “only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined” Plaintiff’s motion is absent any suggestion as to what would be a proper amount of security to protect these Defendants during the litigation. While Defendants claim there is no need to enter an injunction, based on the Application before the Court, any injunction against them would require appropriate security.

CONCLUSION AND RELIEF SOUGHT.

Defendants Anita Kay Brunsting and Amy Ruth Brunsting pray that the Court deny the Renewed Application, and any request for preliminary injunctive relief, and grant Defendants any other and further relief as this Court may find proper.

Respectfully submitted,

MILLS SHIRLEY L.L.P.

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service on known Filing Users will be automatically accomplished through the Notice of Electronic Filing; those who are not filing users will be served by email and regular mail.

/s/ George W. Vie III

George W. Vie III

Appendix Tab 1

2012 WL 5198358

Only the Westlaw citation is currently available.

United States District Court,
S.D. Texas,
Houston Division.

Derek QUEEN et al., Plaintiffs,

v.

OCWEN LOAN SERVICING, LLC, Defendant.

Civil Action No. 12–cv–2049. | Oct. 19, 2012.

Attorneys and Law Firms

Walter Earl Strickland, Jr., Attorney at Law, Houston, TX,
for Plaintiffs.

Papool S. Chaudhari, Reyes Browne, Dallas, TX, for
Defendant.

Opinion

MEMORANDUM AND ORDER

KEITH P. ELLISON, District Judge.

*1 Pending before the Court is Defendant's Motion to Dismiss. (Doc. No. 3). This case is brought by Plaintiffs Derek Queen, et al. ("Plaintiffs"), who seek to enjoin a foreclosure of property. After considering the motion, all responses thereto, and the applicable law, the Court finds that Defendant's Motion to Dismiss must be **GRANTED**.

I. BACKGROUND

In July 2006, Plaintiffs obtained a loan from Argent Mortgage Company on the property, 3313 Calumet Street, Houston, Texas 77004 (the "Property"). (Doc. No. 1, Ex. B pp. 3–7, *hereinafter* "Complaint" p. 2.) Argent Mortgage Company later conveyed the mortgage lien to Ocwen Loan Servicing, LLC ("Defendant"). (*Id.*) Plaintiffs do not contest that Defendant has a lien on the Property. (*Id.*) After Plaintiffs defaulted on the loan, Defendant served them with notice of a foreclosure sale. (*Id.*) Plaintiffs do not contend that Defendant failed to comply with statutory or common law foreclosure requirements. Rather, Plaintiffs acknowledge that Defendant was "in compliance with the procedures surrounding a foreclosure sale." (*Id.*) The foreclosure sale was set for July 3, 2012. (*Id.*) The Harris County Court granted a temporary restraining order enjoining the foreclosure sale until July 13,

2012. (Doc. No. 1, Ex. B.) Though the temporary restraining order has expired, Defendant has not yet foreclosed on the Property.

Plaintiffs allege that Defendant refused to discuss payments to redress the delinquency, and charged interest and fees that added approximately \$6,000 to the amount owed. (Compl. p. 3.) At the time of the scheduled foreclosure sale, Plaintiffs claim that the amount owed was in dispute. (*Id.*) Plaintiffs request that the Defendant be enjoined from foreclosing on the Property because they can "have another mortgage company in 60–90 days ready, willing and able to refinance the loan as soon as Defendant can produce an accurate payoff." (*Id.*)

Plaintiffs filed suit in state court, and Defendant timely removed to federal court. (Doc. No. 1.) Defendant then filed this Motion to Dismiss. (Doc No. 3.)

II. LEGAL STANDARD

"To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief-including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.' " *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir.2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). That is, a complaint must contain sufficient factual matter that, if it were accepted as true, would "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim need not give rise to "probability," but need only plead sufficient facts to allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). A pleading also need not contain detailed factual allegations, but it must go beyond mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted).

*2 While the court must accept well-pleaded facts as true, *Iqbal*, 556 U.S. at 678, it should neither "strain to find inferences favorable to the plaintiffs" nor "accept 'conclusory allegations, unwarranted deductions, or legal conclusions.'" *R2 Investments LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir.2005) (quoting *Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 365 F.3d 353, 362 (5th Cir.2004)). A court should not evaluate the merits of the allegations, but must

satisfy itself only that plaintiff has adequately pled a legally cognizable claim. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir.2004).

III. ANALYSIS

Plaintiffs seek to enjoin a foreclosure of the Property to allow themselves more time to refinance the debt. Defendant argues that this is not a cognizable claim, and the complaint should be dismissed because no cause of action has been pled.

A. Temporary Injunction

Plaintiffs request a temporary injunction enjoining Defendant from selling the property “so long as the Plaintiffs close on refinancing the property within a reasonable time.” (Compl. p. 4.) “A preliminary injunction may be issued to protect the plaintiff from irreparable injury and to preserve the district court's power to render a meaningful decision after a trial on the merits.” *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974). Granting or refusing a temporary injunction is in the sound discretion of the trial judge. *Nalco Chemical Co. v. Hall*, 347 F.2d 90 (5th Cir.1965). In exercising that discretion, the judge “balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.” *Yakus v. United States*, 321 U.S. 414, 440, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Wooten v. Ohler*, 303 F.2d 759, 762 (5th Cir.1962). The Fifth Circuit has also laid out four prerequisites for the “extraordinary relief of preliminary injunction.” *Allison v. Froehlke*, 470 F.2d 1123 (5th Cir.1972). The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the

preliminary injunction will not disserve the public interest. *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572–73 (5th Cir.1974) (citations omitted).

Plaintiffs fail to plead the first prerequisite since they do not plead a claim on which they are likely to prevail on the merits. Plaintiffs seek to enjoin Defendant from foreclosure until they can refinance the Property. The purpose of the injunction is not to protect Plaintiffs from irreparable injury or maintain the status quo until a trial on the merits; it is simply to gain relief from foreclosure. There is no recognized cause of action under the Texas Property Code that would require a lien holder to allow a homeowner time to refinance property before a foreclosure sale. *See* Tex. Prop.Code § 51.002. Plaintiffs have not pled a legal claim and no extraordinary circumstance exists to warrant the issuance of a temporary injunction. Therefore Defendant's motion to dismiss this claim must be granted.

B. Negligent Misrepresentation

*3 Plaintiffs plead negligent misrepresentation in their response to the motion to dismiss. However, this is a new cause of action that was not raised in the complaint and cannot be pled for the first time in a response to a motion. The Court need not determine the merits of this claim at this time.

IV. CONCLUSION

For the reasons discussed above, Defendant's Motion to Dismiss is **GRANTED**. Plaintiffs are granted leave to file an amended complaint, consistent with this Memorandum and Order, by October 29, 2012.

IT IS SO ORDERED.