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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JESSE GOMEZ et al.,

Plaintiffs and Appellants,

v.

JP MORGAN CHASE BANK et al.,

Defendants and Respondents.

A132040

(Contra Costa County  
Super. Ct. No. MSC1100183)

Homeowners Jesse and Linda Gomez sued their home mortgage lender alleging breach of contract, fraud, and other wrongs in connection with the lender's denial of loan modification and initiation of foreclosure proceedings. Homeowners filed a motion for a preliminary injunction to stop foreclosure, and the court denied the motion. In later proceedings, the court sustained a demurrer to the homeowners' complaint but that is the subject of a separate appeal. This appeal concerns only the order denying a preliminary injunction. We affirm that order.

I. FACTS<sup>1</sup>

Plaintiffs Jesse and Linda Gomez had a home mortgage loan with Washington Mutual Bank (Washington Mutual), a subsidiary of JP Morgan Chase Bank, N.A. (Chase Bank). Plaintiffs defaulted on the loan and, in June 2009, executed a trial plan agreement that temporarily adjusted their monthly mortgage payments. The written agreement

<sup>1</sup> The statement of facts is based on the allegations in plaintiffs' complaint, which we accept as true for purposes of this appeal.

provides: “If all payments are made as scheduled, we will reevaluate your application for assistance and determine if we are able to offer you a permanent workout solution to bring your loan current.” In March 2010, the lender verbally informed plaintiffs that a permanent loan modification was approved and that plaintiff homeowners would soon receive documents finalizing the modification. No permanent loan modification was finalized. An appraisal was conducted and, after numerous delays and inconsistent communications, the lender sent a letter to plaintiffs in December 2010 saying that permanent modification was denied because the house had a “negative NPV,” or net present value. Plaintiffs were advised that the lender would proceed with foreclosure.

## II. TRIAL COURT PROCEEDINGS

In January 2011, plaintiffs filed this action against Washington Mutual, Chase Bank, and Chase Home Finance. Plaintiffs asserted multiple causes of action, including breach of contract, unfair business practices, and fraud. The following month, plaintiffs filed a motion for a temporary restraining order and a preliminary injunction to stop foreclosure. Plaintiffs did not submit declarations in support of the motion but instead relied entirely upon the allegations of their verified complaint. The court set a hearing for March 2011. Defendants Chase Bank and Chase Home Finance (collectively, Chase) filed opposition to the motion in advance of the hearing, and plaintiffs replied. The court denied the motion, and later denied a motion for reconsideration. This appeal followed, and the parties completed briefing in February 2012. In April 2012, we asked the parties to advise us if foreclosure had proceeded and rendered the appeal moot. We were informed that there has been no foreclosure. We therefore turn to consideration of the appeal.

## III. DISCUSSION

“ [T]rial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely

to suffer if the preliminary injunction were issued.’ ” (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) “The moving party must prevail on both factors to obtain an injunction. Thus, where the trial court denies an injunction, its ruling should be affirmed if it correctly found the moving party failed to satisfy either of the factors.” (*Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1145.) 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.” (*Cohen, supra*, at p. 286.)

Plaintiffs contend that the trial court here abused its discretion in denying a preliminary injunction. The basis for their contention is narrow: plaintiffs assert that Chase failed to prove that it holds the mortgage loan promissory note or otherwise has an interest in the property upon which it can foreclose, and therefore failed to show harm from an injunction. On this point, plaintiffs observe that the court denied defendant Chase’s request for judicial notice of uncertified deeds of trust and other documents pertaining to the property, and assert that this ruling left no admissible evidence that Chase holds an interest in the property.

There are several problems with plaintiffs’ appeal. First, the record is inadequate because the memorandum in support of the motion for preliminary injunction was not designated for inclusion in the clerk’s transcript and thus was not provided to us. We cannot meaningfully review an order denying a motion when we do not have the motion papers. “ “ “A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.” [Citation]’ [Citations.] ‘A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.’ ” (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

A second problem with the appeal is that plaintiffs' complaint never alleged that Chase lacked interest in the property to be foreclosed. In fact, plaintiffs alleged that "[t]he Gomez mortgage loan has been serviced by defendant WASHINGTON MUTUAL for several years," and that Chase owns Washington Mutual. The complaint is founded on the premise that Chase holds a mortgage interest in the property and has abused its position by wrongfully denying loan modification. Plaintiffs cannot now disclaim the allegations of their complaint when those allegations provided the factual basis for their motion.

A third problem with the appeal is that plaintiffs are mistaken in thinking that defendants must produce the original promissory note to initiate foreclosure procedures. "California law does not require production of the original note prior to initiation of nonjudicial foreclosure proceedings." (*Serrano v. World Savings Bank, FSB* (N.D. Cal., May 3, 2011, No. 11-CV-00105 LHK) [2011 WL 1668631, p. 2]; see also *Aguilera v. Hilltop Lending Corp.* (N.D. Cal., Aug. 25, 2010, No. C 10 0184 JL) [2010 WL 3340566] [collecting cases].) California statutes (Civil Code § 2924 et seq.) set forth a comprehensive framework for a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust. (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440.) That statutory framework "permits a notice of default to be filed by the 'trustee, mortgagee, or beneficiary, or any of their authorized agents.' The provision does not mandate physical possession of the underlying promissory note in order for this initiation of foreclosure to be valid." (*Ibid.*) Plainly stated, plaintiffs' " 'produce the note' theory as a means to challenge a proper foreclosure has no legal basis and cannot support any viable claims." (*Aguilera, supra*, at p. 4.)

#### IV. DISPOSITION

The order denying a preliminary injunction is affirmed.

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Sepulveda, J.\*

We concur:

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Ruvolo, P.J.

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Reardon, J.

\* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.