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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MOHAMMED DANESH-BAHREINI et  
al.,

Plaintiffs and Appellants,

v.

JPMORGAN CHASE BANK, N.A., et al.,

Defendants and Respondents.

A132719

(Contra Costa County  
Super. Ct. No. MSC1100398)

**INTRODUCTION**

Plaintiffs Mohammed Danesh-Bahreini and Shahnaz Danesh have appealed from an order of the Contra Costa County Superior Court denying their request for a preliminary injunction preventing the sale of their home in connection with the nonjudicial foreclosure by defendants JPMorgan Chase Bank, N.A., et al. Plaintiffs contend that they were entitled to the preliminary injunction because they alleged defendants had violated California Civil Code section 2923.5, among other things. While this appeal was pending, the trial court sustained defendants' demurrer and dismissed all of plaintiffs' claims in the underlying action with prejudice. Dismissal of plaintiffs' underlying claims in their entirety renders their appeal of the denial of the preliminary injunction moot. We therefore dismiss this appeal as moot.

## STATEMENT OF THE CASE

Plaintiffs stopped making payments on their home loan in 2010, while making several unsuccessful attempts to modify their loan. In November 2010, defendants initiated nonjudicial foreclosure proceedings.

Plaintiffs filed a verified complaint in February 2011, alleging among other things that defendants had failed to strictly comply with Civil Code section 2923.5 in connection with the foreclosure. Plaintiffs sought a temporary restraining order and preliminary injunction of the sale. The trial court issued a temporary restraining order and order to show cause on February 23, 2011. The court denied the preliminary injunction at a hearing on May 26, 2011. The order denying the preliminary injunction was filed on June 22, 2011.

Plaintiffs appealed the denial of the preliminary injunction on June 22, 2011. (Code Civ. Proc., § 904.1, subd. (a)(6).)<sup>1</sup> Their central claim on appeal is that constitutional due process guarantees of the California and United States Constitutions mandate that the trial court issue a preliminary injunction staying eviction *whenever* a homeowner alleges a violation of section 2923. Plaintiffs maintain that this is so because *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208 requires a factual determination of the allegations, but also holds that the only remedy provided by section 2923.5 is a postponement of the sale before it happens. Once the sale has occurred, section 2923.5 provides no remedy. (*Id.* at p. 235; *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 206; *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1616.)<sup>2</sup> Briefing was completed in the appeal on January 31, 2012.

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<sup>1</sup> Plaintiffs also sought a stay in this court of the nonjudicial foreclosure sale. On August 29, 2011, we treated the request as a petition for writ of supersedeas with a request for a stay (see Cal. Rules of Court, rules 8.112 and 8.116) and denied it without prejudice, finding that appellants had neither provided an adequate record nor made an adequate showing on the petition.

<sup>2</sup> As described in *Hamilton v. Greenwich Investors XXVI, LLC, supra*, 195 Cal.App.4th 1602, 1616: “In *Mabry*, the court resolved several questions about Civil

Meanwhile, on May 27, 2011, defendants filed a demurrer to the complaint. After determining that trial court proceedings were not stayed by appeal of the preliminary injunction denial, the trial court on October 27, 2011, sustained defendants' demurrer to plaintiffs' complaint without leave to amend with respect to the first and second causes of action for violations of sections 2923.5 and 2923.6. The demurrer was sustained with leave to amend for the third through seventh causes of action.

Plaintiffs sought relief under Code of Civil Procedure section 473, arguing counsel had failed to seek oral argument following the court's tentative ruling on the demurrer due to excusable neglect. The court granted the motion for relief under Code of Civil Procedure section 473, in part, finding excusable neglect. It refused to vacate the minute order sustaining the demurrer, but set a second hearing on the merits of the demurrer for February 23, 2012. Following that hearing, the court reaffirmed its previous ruling on the demurrer in all respects and denied plaintiffs' motion to vacate that order. Plaintiffs' counsel stipulated at the hearing that, if the court did not grant leave to amend its first and second causes of action, plaintiffs would elect not to amend the remaining causes of action. Accordingly, the trial court sustained the demurrer and dismissed the entire action against defendants with prejudice on March 1, 2012.

During the pendency of the appeal of the court's denial of the preliminary injunction, defendants have repeatedly moved to dismiss the appeal as moot. On December 22, 2011, defendants argued that the appeal was moot because the court had sustained their demurrer to the two causes of action that formed the bases for the appeal. On February 3, 2012, aware that the trial court was again considering the demurrer, we denied defendants' motion to dismiss, but granted both parties' motions to augment the

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Code section 2923.5. . . . *Mabry* held that section 2923.5 may be enforced by a private right of action; '[o]therwise the statute would be a dead letter.' (*Mabry, supra*, 185 Cal.App.4th at p. 214.) However, the right of action 'is limited to obtaining a postponement of an impending foreclosure to permit the lender to comply with section 2923.5.' (*Ibid.* [§ 2923.5 is not preempted by federal law, 'but, we must emphasize, it is not preempted because the remedy for noncompliance is a simple postponement of the foreclosure sale, nothing more'.]) . . . (*Mabry*, at pp. 217-225, 226-232.)

record. We also denied plaintiffs' motion for calendar preference.<sup>3</sup> On March 22, 2012, defendants filed a renewed motion for involuntary dismissal due to mootness and an accompanying request for judicial notice following the trial court's sustaining of the defendants' demurrer with prejudice, as to all causes of action. We hereby grant defendants' and plaintiffs' separately filed requests for judicial notice of the March 5, 2012 order and judgment dismissing plaintiffs' action with prejudice as to all defendants. (Evid. Code, § 452, subds. (a), (d).)<sup>4</sup>

### DISCUSSION

The trial court had jurisdiction to adjudicate the demurrer pending appeal. "An appeal from an order denying a preliminary injunction does not deprive the trial court of jurisdiction to proceed to try the case on the merits." (*MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 623 (*MaJor*); 6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 402, p. 344.) "In order to avoid this result the plaintiff may request a stay of trial court proceedings while the appeal from denial of the preliminary injunction is pending." (*Id.* at pp. 623-624.) Plaintiffs here failed to obtain such stay,

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<sup>3</sup> On February 8, 2012, after we denied their motion to dismiss, defendants' filed a request for judicial notice of the register of actions of the Contra Costa County Superior Court for the period from August 31, 2011 to January 30, 2012, on the grounds it was relevant to plaintiffs' claims that defendants misrepresented the nature of the first order sustaining their demurrer. We grant the motion for judicial notice (Evid. Code, § 452, subd. (d)), but conclude it has no relevance to our determination here.

<sup>4</sup> Plaintiffs have sought judicial notice of the court's tentative ruling of September 29, 2011 denying their request for a stay of the action below pending appeal and continuing the hearing on the demurer to October 27, 2011. We hereby grant judicial notice of that tentative ruling. (Evid. Code, § 452, subds. (a), (d).)

Plaintiffs also request that we take judicial notice of a consent judgment filed in *United States et al. v. Bank of America Corp., et al.* (filed April 4, 2012, Civil Action No. 120361) in the United States District Court for the District of Columbia. We grant judicial notice pursuant to Evidence Code section 452, subdivisions (d) and (e), but conclude the consent judgment has no relevance to our determination here.

although the foreclosure sale apparently still had not occurred at the time trial court granted judgment below.<sup>5</sup>

We are persuaded that the judgment against plaintiffs moots their appeal of the preliminary injunction denial.

“A preliminary injunction is a device to protect the rights of litigants pending a final determination of the merits of the action; it is but an adjunct to the action and its fate is hinged to the main action. The general purpose of such an injunction is to preserve the status quo until a final determination of the merits of the action. [Citation.]” (*City of Oakland v. Superior Court* (1982) 136 Cal.App.3d 565, 569.) Given that purpose, an appeal from the denial of a preliminary injunction is rendered moot by the court’s final judgment on the merits against the party that sought the preliminary injunction. (See *MaJor, supra*, 7 Cal.App.4th at p. 623; accord, *Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 398-399 [same].)

Plaintiffs oppose defendants’ motion to dismiss the appeal from the court’s denial of their request for preliminary injunction. They argue that the issues arising on their appeal from the preliminary injunction are distinct from those they expect to raise in their anticipated appeal from the judgment. They also seek to distinguish *MaJor, supra*, 7 Cal.App.4th 618.

In *MaJor*, the owners of a condominium brought an action against the homeowners association, alleging the latter unreasonably interfered with their right to use the recreational facilities of the project by classifying them as nonresidents once they moved out, leaving MaJor, the mother of one of the plaintiffs, in residence. MaJor joined in the suit and plaintiffs moved for a preliminary injunction. The trial court denied the preliminary injunction. The Court of Appeal reversed the order denying the preliminary injunction as to plaintiffs other than MaJor and remanded for further proceedings. However, the appellate court held MaJor’s appeal moot because she had moved out of the project after suffering a stroke and also because the trial court had sustained a demurrer

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<sup>5</sup> Plaintiffs contend in their opposition to this motion that the “foreclosure sale has not taken place, and is currently not scheduled.”

to the mother's Unruh Civil Rights Act cause of action, her only basis for a preliminary injunction. (*MaJor, supra*, 7 Cal.App.4th at pp. 623-624.) Contrary to plaintiffs' claim here that the primary basis for mootness was MaJor's having moved out of the condominium, the appellate court recognized that "Ms. MaJor might recover from her stroke and might move back . . . thus raising the possibility the alleged discrimination might be repeated." (*Id.* at p. 623.) However, the appellate court determined it "need not consider these possibilities because the appeal is mooted for a second reason"—the sustaining of the demurrer.

According to the *MaJor* court: "A preliminary injunction is an interim remedy designed to maintain the status quo pending a decision on the merits. [Citation.] It is not, in itself, a cause of action. Thus, a cause of action must exist before injunctive relief may be granted. [Citation.] Accordingly, where the complaint fails to state a cause of action an order granting a preliminary injunction must be reversed. [Citation.]" (*MaJor, supra*, 7 Cal.App.4th at p. 623.)<sup>6</sup> *MaJor* continued: "An appeal from an order denying a preliminary injunction does not deprive the trial court of jurisdiction to proceed to try the case on the merits. [Citation.] If the court can try the case on the merits then a fortiori it can determine the case has no merit by sustaining a demurrer without leave to amend. In the present case, the trial court having sustained a demurrer without leave to amend to the only cause of action which might have supported a preliminary injunction in favor of Ms. MaJor, her appeal from the denial of a preliminary injunction is moot." (*MaJor, supra*, 7 Cal.App.4th at p. 623.)

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<sup>6</sup> As Witkin observes: "where the provisional remedy [of a preliminary injunction] is granted, and the defendant appeals, the action may be tried and decided while the appeal is pending. The preliminary injunction will then be merged in the permanent injunction [if plaintiff prevails] or will terminate on denial of a permanent injunction [if defendant prevails]. In either case, the appeal from the order granting the preliminary injunction is rendered moot and may be dismissed." (6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 402, p. 344, italics added.)

Nor do we agree with plaintiffs here that the issue is one of broad public interest, likely to recur, evading effective review and thus warranting our exercise of discretion to resolve it. (See *Malatka v. Helm* (2010) 188 Cal.App.4th 1074, 1088.)

In sum, no relief is available to plaintiffs in this appeal. Even if we accepted their claims on appeal that the court erred in failing to issue a preliminary injunction while it determined the merits of defendants' demurrer, we could afford plaintiffs' no effective remedy now when that issue has been resolved in the trial court. (See *MaJor, supra*, 7 Cal.App.4th at p. 623; *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888.) If plaintiffs maintain that the trial court erred in sustaining the demurrer, they may pursue their remedy by appeal from the judgment of dismissal.

**DISPOSITION**

Defendants' motion to dismiss this appeal is granted. The appeal is dismissed. In the interests of justice, the parties shall bear their own costs on this appeal.

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Kline, P.J.

We concur:

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Haerle, J.

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Richman, J.