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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LYNN GREELEY DIRIENZO,

Plaintiff and Respondent,

v.

ONEWEST BANK, FSB et al.,

Defendants and Appellants.

G047653

(Super. Ct. No. 30-2012-00566906)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Dykema Gossett, J. Kevin Snyder and James M. Golden for Defendants and Appellants.

Lynn Greeley DiRienzo, in pro. per.; Law Office of Timothy L. Joens, Timothy Lea Joens; Kirk & Toberty, and J. Douglas Kirk for Plaintiff and Respondent.

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The trial court issued a preliminary injunction prohibiting defendants from foreclosing on plaintiff's residence during the pending action. We affirm.

I

FACTS<sup>1</sup>

*The Loan and the Parties*

DiRienzo's second amended complaint alleged four varieties of fraud (intentional misrepresentation, negligent misrepresentation, false promise, and concealment), causes of action for violation of the Rosenthal Fair Debt Collection Practice Act, violation of Business and Professions Code section 17200, wrongful foreclosure, and injunctive relief.<sup>2</sup> According to the complaint, DiRienzo purchased her residence in 2005, for \$1.6 million. She put over \$330,000 down and financed the remaining amount with a \$1,248,324 adjustable rate mortgage from IndyMac Bank FSB (IndyMac Bank), secured by a first deed of trust.

The complaint further alleges that in 2006, Deutsche Bank National Trust Company (Deutsche Bank), trustee of the IndyMac Mortgage Loan Trust 2006-AR2, entered into an agreement with IndyMac Bank whereby IndyMac Bank would act as servicer on approximately \$14 billion in residential loans on behalf of Deutsche Bank, including DiRienzo's loan. In 2008, the federal Office of Thrift Supervision closed IndyMac Bank and the Federal Deposit Insurance Corporation (FDIC) was appointed conservator of the newly formed IndyMac Federal Bank (IndyMac FB), which acted as the servicer of DiRienzo's loan between July 2008 and March 2009.

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<sup>1</sup> As the trial court found in plaintiff Lynn Greely Dierenzo's favor, we set forth the facts in conformance with the principle of appellate procedure that conflicts in the evidence are resolved in favor of the prevailing party below. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

<sup>2</sup> Injunctive relief is a remedy, not a cause of action. (*County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973.)

In March 2009, OneWest Bank FSB (OneWest) acquired a number of IndyMac FB's assets, including its deposits, and Deutsche Bank appointed OneWest to service the loans. (Deutsche Bank and OneWest are collectively referred to as defendants.) OneWest serviced the loans through IndyMac Mortgage Servicing (IndyMac MS) and identified itself to DiRienzo "as an 'IndyMac' entity."

*DiRienzo Attempts to Modify the Loan*

DiRienzo made minimum monthly payments on the negative amortization loan. In 2008, she received notice that her adjustable rate mortgage reached its "principal balance cap limitation" and her new loan payment would be adjusted beginning July 1. Her monthly payment had been \$4,659, and her new monthly "fully amortized payment" was \$9,032.41. After she received notice of the increase, DiRienzo requested a loan modification from IndyMac MS. She had a five-year adjustable rate negative amortization mortgage and wanted a 30-year fixed rate loan at 6.35 percent, with a 60-month interest only provision. She also wanted a reduction of principal—the value of her property had decreased from \$1.6 million to approximately \$1.2 million. DiRienzo was current on her loan payments at the time she requested a modification.

DiRienzo stated all her communications concerning loan modifications were with entities that represented themselves with a derivation of IndyMac, such as IndyMac Bank, IndyMac FB, IndyMac Home Loan Services, and IndyMac MS, a division of OneWest. Between June 2008 and November 2008, her modification request was not acted on because she was current on her loan payments. When she inquired as to the loan modification, she was told she would not be considered for a loan modification while she was current on her loan payments, and that she needed to be "at least two months delinquent" in her payments to get a modification. At the end of November 2008, she received a letter informing her there were no available loan modification

programs because she had “been able to continue making . . . payments.” DiRienzo decided “to do as demanded by IndyMac” and stopped making payments, so she would be two months delinquent on the loan. However, in April 2009, DiRienzo made a payment in excess of \$19,000 and brought her account current.

According to DiRienzo, in October 2009, a vice president of IndyMac MS, “advised” her that her loan modification “would only be further processed under the Federal HAMP<sup>3</sup> program if [she] became seriously delinquent (more than 2 months).” DiRienzo said the vice president concealed from her (1) the fact that a HAMP loan modification was not possible because the unpaid principal on her loan exceeded \$750,000 and (2) OneWest was unwilling to approve any loan modification resulting in a reduction of principal. DiRienzo stopped making further payments on her loan in April 2010, based on the statements of the vice president.

DiRienzo’s action did not have the desired effect. Her FICO credit score dropped from 735 to 682 as a result of her delinquency on the loan. She was eventually told her modification would not be considered due to her credit score. In 2011, Deutsche Bank initiated foreclosure proceedings through Aztec Foreclosure Corporation. DiRienzo thereafter brought the present action to halt the foreclosure proceedings.

### *The Preliminary Injunction*

On October 15, 2012, the superior court heard argument on DiRienzo’s request for a preliminary injunction prohibiting defendants from foreclosing on her property during the pendency of the action. The court found it reasonably probable DiRienzo would prevail on the merits on her causes of action for misrepresentation and concealment, in that she relied on defendants’ direction to miss payments on her loan and, as a result, her credit score was adversely affected. The court further found

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<sup>3</sup> Home Affordable Modification Program.

defendants were “never going to [give DiRienzo] a [principal] reduction of a HAMP modification” and DiRienzo would likely suffer irreparable injury if the injunction did not issue, given the fact that a single-family dwelling is conclusively presumed incapable of being adequately compensated by pecuniary compensation. (Civ. Code, § 3387.) The court granted the request for a preliminary injunction and ordered DiRienzo to post a \$50,000 bond as surety.

## II

### DISCUSSION

Defendants appeal from the trial court’s order granting DiRienzo a preliminary injunction preventing them from foreclosing on DiRienzo’s residence during the pendency of the lawsuit. They contend that if she has a remedy for any purported wrongs, her remedy is damages, not an injunction.

The purpose of a preliminary injunction is to preserve the status quo until a final determination is made following trial. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528 [preliminary injunction issues when, after balancing equities, the court concludes the defendant should be restrained from taking certain action].) A plaintiff is entitled to the issuance of a preliminary injunction when the court finds pecuniary compensation to the plaintiff would be inadequate (Code of Civ. Proc., 526, subd. (a)(4)) or the proper pecuniary compensation would be difficult to ascertain (Code of Civ. Proc., § 526, subd. (a)(5)). A decision to issue a preliminary injunction rests within the superior court’s sound discretion. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.) A court abuses its discretion when its decision exceeds “the bounds of reason or contravened the uncontradicted evidence.” (*Continental Baking Co. v. Katz, supra*, 68 Cal.2d at p. 527.)

An order granting a preliminary injunction is appealable. (Code of Civ. Proc., § 904.1, subd. (a)(6); *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th

182, 208.) We presume an order granting an injunction is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Consequently, an appellant bears the burden of establishing an abuse of discretion. (*Alvarez v. Eden Township Hospital Dist.* (1961) 191 Cal.App.2d 309, 311-312.) As a reviewing court, we “do[] not resolve conflicts in the evidence, reweigh the evidence, or assess the credibility of witnesses. [Citation.]” (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1450.) If the evidence before the trial court was in conflict, ““we must interpret the facts in the light most favorable to the prevailing party and indulge all reasonable inferences in support of the trial court’s order.” [Citation.]” (*Ibid.*)

In a case such as this, where the preliminary injunction is prohibitory—that is to say it prohibits, rather than requires a party to perform a certain act—our scrutiny of review is not heightened. (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1048) Rather, “[w]e review an order granting a preliminary injunction under an abuse of discretion standard. [Citations.] Review is confined . . . to a consideration whether the trial court abused its discretion in ““evaluat[ing] 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 the defendant is likely to suffer if the preliminary injunction were issued.”” [Citation.]” (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) “[T]he greater the plaintiff’s showing on one, the less must be shown on the other to support an injunction. [Citation.]” (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.)

The court below found: (1) defendants recommended to DiRienzo that she miss payments on her loan, (2) DiRienzo relied on the recommendations to her detriment, (3) it was reasonably probable DiRienzo would prevail on her claims of misrepresentation and concealment, and (4) she would suffer irreparable injury if a

preliminary injunction did not issue, because loss of a single-family dwelling—the property defendants seek to foreclose on—is conclusively presumed to be incapable of “being adequately relieved by pecuniary compensation.” (See Civ. Code, § 3387.) DiRienzo’s reliance on the recommendations was detrimental to her interests, because missing payments adversely affected her credit score which, in turn, prejudiced her ability to obtain a loan from other lenders and resulted in a waste of her time because defendants were not going to give her a loan modification with a principal reduction or a HAMP modification.

Thus, the showing on the issue of irreparable injury to DiRienzo if the injunction did not issue was compelling. On the other hand, should the court issue the preliminary injunction and DiRienzo then fails to prevail on the merits of the action, the resulting harm to defendants is not irreparable; they would be entitled to foreclose on the residence and sell it, achieving their goal. Defendants do not contend the value of the property is likely to be less in the future than it was at the time foreclosure proceedings began.

That brings us to the trial court’s conclusion that DiRienzo is likely to prevail on two of her claims—misrepresentation and concealment. Misrepresentation and concealment are forms of fraud. (Civ. Code, § 1710, subs. 1, 2 [misrepresentation], 3 [concealment]; *First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 744 [negligent misrepresentation]; *Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 608-609 [concealment].) Negligent misrepresentation has five elements: “(1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. [Citations.]” (*Ragland v. U.S. Bank National Assn.*, *supra*, 209 Cal.App.4th at p. 196.) In order to prevail on a claim of misrepresentation, a plaintiff ““must

demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions.’ [Citation.]” (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 326-327, fn. omitted.) However, the plaintiff need not demonstrate the alleged misrepresentations “‘were the sole or even the decisive cause of the injury-producing conduct.’ [Citation.]” (*Id.* at p. 327.) The misrepresentation of a material fact may consist of an act of concealment or nondisclosure. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 481.) Viewing the evidence in favor of the trial court’s action, DiRienzo relied on misleading statements (see *Ragland v. U.S. Bank National Assn.*, *supra*, 209 Cal.App.4th at pp. 196-197 [borrower advised to miss loan payments to qualify for refinance loan and missed payments based on the representations]), including concealment of the fact that her loan could not qualify for a HAMP modification because the amount of the unpaid balance exceeded the amount permitted by HAMP. Having given credence to DiRienzo’s evidence, the trial court did not err in concluding it was reasonably probable she would prevail on her misrepresentation and concealment causes of action.

The thrust of DiRienzo’s request for a preliminary injunction was that it would be manifestly unfair and inequitable for defendants to sell her residence when they advised her to become delinquent in her payments so she could obtain a loan modification, knowing the type modification they told DiRienzo she could apply for (HAMP) could not be obtained due to the amount of the outstanding loan.

DiRienzo had a negative amortization loan. Because she made minimum monthly payments early on in the loan term, the principal on the loan increased over \$109,000. Around June 2008, one of the IndyMac entities informed her the mortgage payments would increase from \$4,639.54 a month to \$9,032.41. DiRienzo was current on her payments at the time. She requested the loan servicer, IndyMac MS, modify her

loan from a five-year interest only adjustable rate to a 30-year fixed interest rate loan with the first 60 monthly payments as interest-only payments. Pursuant to advice from IndyMac representatives, DiRienzo discontinued making monthly payments in April 2010, so she could obtain a loan modification. Still, in July 2010, she made a payment of \$7,805.05 to show her good faith and her sincerity in an attempt obtain a loan modification. Two months later, she made a payment of \$5,000. In November 2010 DiRienzo learned a notice of default had been recorded.

Contrary to what had been represented to her, DiRienzo was not eligible for a HAMP modification. Her reliance on representations that she should become delinquent on her loan, not only adversely affected her credit score such that she was not granted the modifications she requested, she could not turn to other lending institutions to refinance her loan. We cannot say, therefore, the trial court erred in concluding the representations to DiRienzo were deceptive or misleading, and her reliance on the representations caused her injury.

Defendants contend the trial court did not comply with its obligation to weigh the evidence, as demonstrated by a statement the court made at the hearing on the preliminary injunction. During argument, defense counsel contended it did not make sense for DiRienzo to think she could get a loan modification by defaulting on her loan. At that point, the court interrupted and stated, “Now you’re arguing facts that would go to a jury. That I can’t take part in.” We do not find the trial court’s remark indicated the court failed to consider evidence. If a borrower who has been current on her loan, is informed her loan payments will double to over \$9,000 a month—an amount she cannot afford to pay—we cannot say a person in that situation would not take the advice of her lender to miss payments in order to qualify for a loan modification under a new federal loan program for homebuyers who cannot afford their house payments. (See *Ragland v. U.S. Bank National Assn.*, *supra*, 209 Cal.App.4th 196-197 [borrower missed loan

payments based on representations made by lender].) As stated above, in deciding whether to issue a preliminary injunction, the superior court weighs the likelihood of the plaintiff prevailing at trial and the relative harm that would result if a preliminary injunction does not issue. (*King v. Meese* (1997) 43 Cal.3d 1217, 1226. Necessarily, the court must weigh evidence and resolve any conflicts in making these determinations. (*Kohn v. Superior Court* (1966) 239 Cal.App.2d 428, 430.) But the standard is whether there is a *likelihood* of the plaintiff prevailing. A temporary injunction is not a final determination of the merits of the lawsuit. (*Paul v. Allied Dairymen, Inc.* (1962) 209 Cal.App.2d 112, 121 [“the ultimate rights of the parties are not determined in connection with the application for preliminary injunction”].) In other words, the court determines whether there is sufficient evidence to support issuing the preliminary injunction, not whether it is a lock the plaintiff will prevail. Having found the evidence supported issuing the preliminary injunction, the court did not have to find there was evidence permitting adverse inferences.

It is also possible the court simply misspoke and what it meant to say was defendants’ argument—that the timing of DiRienzo’s default, which occurred months after she received the letter indicating the loan would not be processed because she was current in her payments, and the fact that she subsequently made a partial payment did not make sense—could be made to the jury. Indeed, the court’s earlier statement—“I believe there were personal representations from the agents that told her she should stop paying, put herself in default”—make evident the court considered the evidence. It is also patent the court did not discredit DiRienzo’s evidence. As noted above, as an appellate court, we do not reweigh the evidence. (*Whyte v. Schlage Lock Co., supra*, 101 Cal.App.4th at p. 1450.)

Ultimately, a fact finder may not believe DiRienzo was told to fall behind in her payments, or that information was withheld from her. If the jury finds for

defendants, DiRienzo will likely lose her residence to foreclosure, but defendants have not demonstrated the preliminary injunction prejudiced their interests. However, if the jury finds for DiRienzo and defendants foreclose on her residence in the interim, she would suffer an irreparable injury. (See *Continental Baking Co. v. Katz*, *supra*, 68 Cal.2d at p. 528 [court should consider “whether a greater injury will result to the defendant from granting the injunction than to plaintiff from refusing it”].) Defendants have failed to demonstrate the trial court abused its discretion, not only in finding DiRienzo is reasonably likely to prevail on the merits, but also in finding she would suffer an irreparable injury if the preliminary injunction did not issue. (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 863 [appellant must demonstrate abuse of discretion on both factors].)

Lastly, defendants’ contention that the trial court erred in issuing a preliminary injunction because DiRienzo did not allege a cause of action that would entitle her to a permanent injunction is without merit. While the court sustained demurrers to the seventh cause of action for wrongful foreclosure (see *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104 [action to set aside a foreclosure sale is an equitable action]), the court did so only because it found the action was premature. It would defy reason to hold DiRienzo, on a proper showing, is not entitled to a preliminary injunction halting foreclosure during the pendency of her action, but that *after* foreclosure occurs she could seek equitable relief.

Moreover, the case upon which defendants rely, *Voorhies v. Greene* (1983) 139 Cal.App.3d 989, is distinguishable. Voorhies was an attorney in an incorporated law firm. His employment was terminated by the corporation and he was locked out of the building owned by the corporation. (*Id.* at pp. 992-993.) He filed a complaint alleging a number of causes of action and requested a temporary restraining order requiring that he be maintained as an employee of the law firm during the pendency of the lawsuit. The

superior court issued a preliminary injunction, but stayed the injunction for seven days to permit the defendants to appeal. (*Id.* at p. 993.) The defendants filed an appeal and a petition for a writ of supersedeas. (*Id.* at pp. 993-994.)

The *Voorhies* court considered our Supreme Court's decision in *San Antonio Water Co. v. Bodenhamer* (1901) 133 Cal. 248. In that case, the water company had a contract with the defendant whereby the water company supplied water for irrigation and domestic use from water on the defendant's land. A dispute arose wherein the water company claimed the defendant was forcefully preventing it from accessing the water on his land. (*Id.* at pp. 249-250.) Without notice to the defendant, the trial court issued an injunction giving the water company access to water on defendant's land. (*Id.* at p. 250.) In reversing the trial court, the Supreme Court stated, "[A]s a general rule, courts of equity will not interfere by preliminary injunctions *to change the possession of real property*, the title being in dispute'; nor is it a proper remedy for recovering possession of personal property. [Citations.]" (*Id.* at p. 251; *Voorhies v. Greene*, 139 Cal.App.3d at p. 996, italics added.)

The *Voorhies* court found the facts presented therein were similar in legal effect to those in *San Antonio Water Co. v. Bodenhamer*, in that *Voorhies* contended he had been dispossessed from property he owned. (*Voorhies v. Greene, supra*, 139 Cal.App.3d at p. 996.) Additionally, the court concluded injunctive relief should not be granted on "mere allegations of wrongful discharge from employment" because damages are an adequate remedy at law. (*Id.* at p. 997.) The present case is distinguishable on two grounds. First, here the preliminary injunction did not "change the possession" of real or personal property; DiRienzo was, and remains, in possession of her residence. Second, unlike wrongful discharge from employment where damages are an adequate remedy, a single-family dwelling is conclusively presumed incapable of being adequately

compensated by pecuniary compensation. (Civ. Code, § 3387.) Accordingly, we affirm the trial court's order.

III

DISPOSITION

The order of the superior court is affirmed. DiRienzo shall recover her costs of appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.