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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DAPHNE L. BURTON,

Plaintiff and Appellant,

v.

NDEX WEST, LLC, et al.,

Defendants and Respondents.

B232119

(Los Angeles County  
Super. Ct. No. SC111507)

APPEAL from an order of the Superior Court of Los Angeles County,  
Cesar C. Sarmiento, Judge. Affirmed.

Daphne L. Burton, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent Ndex West, LLC.

Barrett Daffin Frappier Treder & Weiss, Edward A. Treder and  
Thomas K. Agawa for Defendants and Respondents PHH Mortgage Corporation  
and PNC Bank, N.A.

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Daphne L. Burton appeals the denial of a preliminary injunction to enjoin a foreclosure sale. She contends Ndex West, LLC (Ndex West), PHH Mortgage Corporation (PHH Mortgage) and PNN Bank, N.A. (PNN Bank) failed to contact her in person or by telephone before recording a notice of default to explore options to avoid foreclosure, as required by Civil Code section 2923.5, and failed to show that they made diligent efforts but were unable to contact her.<sup>1</sup> She also contends defendants failed to comply with the statutory requirements for posting a notice of trustee's sale.

We conclude that Burton failed to establish a reasonable probability of prevailing on the merits and that the trial court properly denied a preliminary injunction. We therefore will affirm the order denying a preliminary injunction.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

#### *1. Factual Background*

Burton purchased real property in the City of Los Angeles in June 2005 and has resided there since that time. She executed a deed of trust in favor of PHH Mortgage as beneficiary securing an adjustable rate note in connection with the purchase. PHH Mortgage later assigned the deed of trust to Mortgage Electronic Registration Systems, Inc. (MERS).

Burton submitted an application in January or February 2009 to reduce her monthly payments. She made several telephone calls checking on the status of her application and was told in September 2009 that her payments would not be reduced

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<sup>1</sup> All statutory references are to the Civil Code unless stated otherwise.

because her income was insufficient. She submitted another application in March 2010 to reduce her monthly payments.

Ndex West, as trustee, recorded a notice of default and election to sell under deed of trust in August 2010. A Declaration of Compliance dated July 1, 2010, attached to the notice of default stated: “The mortgagee, beneficiary or authorized agent has contacted the borrower to discuss the borrower’s financial situation and to explore options for the borrower to avoid foreclosure in compliance with Cal. Civ. Code Section 2923.5. Thirty days or more have elapsed since the borrower was contacted.” An “X” was marked next to this paragraph.

Another paragraph in the notice of default, next to which no “X” was marked stated: “The mortgagee, beneficiary or authorized agent tried with due diligence but was unable to contact the borrower to discuss the borrower’s financial situation and to explore options for the borrower to avoid foreclosure as required by Cal. Civ. Code Section 2923.5. Thirty days or more have elapsed since these due diligence efforts were completed.” A third paragraph in the notice of default, next to which no “X” was marked, stated that the mortgagee, beneficiary or authorized agent was not required to comply with section 2923.5 for specified reasons. There was an empty box next to each stated reason.

MERS apparently assigned the deed of trust to PNN Bank in September 2010.

Ndex West, as trustee, posted a notice of trustee’s sale stating that a trustee’s sale would take place on December 21, 2010. A representative of PHH Mortgage later notified Burton that the sale had been postponed. Burton later learned from a third party

that the sale had been rescheduled for February 22, 2011, although she had received no formal notice of the new sale date. She called Ndex West on February 15, which confirmed the new sale date.

2. *Trial Court Proceedings*

Burton filed a complaint against Ndex West, PHH Mortgage and PNC Bank on February 17, 2011. She alleges that defendants failed to comply with section 2923.5 because they failed to contact her in person or by telephone to explore options to avoid foreclosure. She alleges that the statement to the contrary in the Declaration of Compliance is false. She also alleges that defendants failed to post a notice of sale on the property at least 20 days before the sale date as required by section 2924.

Burton alleges counts for (1) violation of sections 2923.5 and 2924; (2) negligence; (3) unfair competition (Bus. & Prof. Code, § 17200 et seq.); (4) common law unfair competition; (5) intentional misrepresentation; and (6) conspiracy. She prays for temporary and permanent injunctions and damages.

The trial court issued a temporary restraining order on Burton's ex parte application on February 17, 2010, and issued an order to show cause regarding the issuance of a preliminary injunction. The court scheduled a hearing on the order to show cause for March 1, 2010.

Burton filed a memorandum, declaration and exhibits in support of her request for a preliminary injunction. Her declaration described her applications to reduce her monthly payments and the telephone calls that she made "throughout the year 2010" checking on the status of her proposed loan workout package. She declared that in

those calls, “I was never advised of specific traditional workout options available to me, including deeds-in-lieu of foreclosure. The workout options were referred to generically as homeowner’s assistance—without specific reference to what assistance might be available.” She also declared that at 10:30 a.m. on December 1, 2010, she did not see any notice of trustee’s sale posted on the property, and that she first saw the notice of sale on December 2, 2010. The court continued the hearing on the order to show cause to March 17, 2010.

Ndex West removed the action to the federal district court on March 4, 2010. The federal district court remanded the action to the superior court on March 11, 2011. Defendants filed no written opposition in connection with the order to show cause.

The trial court ruled on the order to show cause in a minute order filed on March 18, 2011. The court concluded that Burton had shown an immediate threat of irreparable injury and that the harm she would suffer from the denial of a preliminary injunction outweighed the harm defendants would suffer if a preliminary injunction were issued. The court also concluded, however, that Burton had failed to show a reasonable probability of prevailing on any cause of action alleged in the complaint, and therefore denied a preliminary injunction.

The trial court rejected Burton’s argument that defendants had failed to contact her in person or by telephone as required by section 2923.5, stating, “Civil Code § 2923.5 does not require that the mortgagee contact the borrower in person or by telephone if the mortgagee has tried with due diligence to contact the borrower, as provided by C.C. § 2923.5(g).” The court also stated that *Mabry v. Superior Court*

(2010) 185 Cal.App.4th 208 held that the declaration required under section 2923.5 need not be made under penalty of perjury and may track the language of the statute. The court stated that the Declaration of Compliance here tracked the language of section 2923.5 and therefore was sufficient, and stated, “Plaintiff therefore cannot state a claim for failure to comply with § 2923.5.”

The trial court also rejected Burton’s argument that the notice of trustee’s sale was untimely, stating that a notice of sale must be posted in a conspicuous place on the property only “ ‘where possible and where not restricted for any reasons,’ ” quoting section 2924, subdivision (b)(1). The court also stated that the fact that Burton did not see the notice of sale at 10:30 a.m. on December 1, 2010, did not prove that no notice was posted on that date.

Burton timely appealed the order denying a preliminary injunction.<sup>2</sup> She also filed a petition in this court for a writ of supersedeas in April 2011. We summarily denied the petition.

### ***CONTENTIONS***

Burton contends she established a reasonable probability of prevailing based on defendants’ failure to (1) contact her in person or by telephone to explore options to avoid foreclosure, as required by section 2923.5, and (2) timely post a notice of trustee’s sale on the property.

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<sup>2</sup> An order denying a preliminary injunction is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(6).)

## ***DISCUSSION***

### ***1. Standard of Review***

A trial court deciding whether to issue a preliminary injunction must weigh two interrelated factors: (1) the likelihood that the moving party ultimately will prevail on the merits, and (2) the relative interim harm to the parties that would result from the issuance or nonissuance of a preliminary injunction. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999.) On appeal, we review the decision for abuse of discretion. (*Ibid.*) We review any factual findings underlying the decision under the substantial evidence standard and independently review any questions of law. (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 739; *Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1094-1095.)

### ***2. Burton Failed to Establish a Reasonable Probability of Prevailing Based on Failure to Comply with Section 2923.5***

Burton contends defendants failed to contact her in person or by telephone as required under section 2923.5 because she initiated the contact. She also contends defendants failed to comply with the statute because they failed to discuss specific options to avoid foreclosure, such as a deed in lieu of foreclosure, a loan workout or a short sale.

Section 2923.5 requires a mortgagee, trustee, beneficiary or authorized agent to either contact the borrower 30 days before recording a notice of default pursuant to section 2924 or comply with specified due diligence requirements in an effort to contact

the borrower. (§ 2923.5, subd. (a)(1).) Subdivision (a)(2) sets forth the contact requirement:

“A mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgagee, beneficiary, or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting to occur within 14 days. The assessment of the borrower’s financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.”

The notice of default must include a declaration stating that the mortgagee, beneficiary or authorized agent has contacted the borrower in accordance section 2923.5 or has exercised due diligence in an effort to contact the borrower as required by the statute, or that no contact was required pursuant to a statutory exception. (§ 2923.5, subd. (b).)

*Mabry v. Superior Court, supra*, 185 Cal.App.4th at page 225, held that section 2923.5 creates an individual private right of action, but the borrower’s remedy is limited to postponement of the foreclosure sale. (See also *Mabry, supra*, at p. 231.) *Mabry* also held that the statute must be construed narrowly in order to avoid



preemption by federal laws governing loan servicing.<sup>3</sup> Accordingly, *Mabry* concluded that the statutory obligation to “contact the borrower in person or by telephone in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure” (§ 2923.5, subd. (a)(2)) is necessarily limited to a simple assessment and a simple exploration that would not turn the mortgagee, beneficiary or authorized agent into a loan counselor.<sup>4</sup> (*Mabry, supra*, at p. 232.)

Burton applied to reduce her monthly payments, which she also described as a proposed “loan workout,” in early 2009 and again in March 2010. She declared that she made several telephone calls checking on the status of her applications and was told in September 2009 that her proposed reduction was rejected because of her insufficient income. She also declared that she “made numerous calls throughout the year 2010 to check on the status of my loan workout package” and that “workout options were referred to generically as homeowner’s assistance—without specific reference to what assistance might be available.”

We conclude that the telephone calls initiated by Burton satisfied the requirement stated in section 2923.5, subdivision (a)(2) that the mortgagee, beneficiary or authorized

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<sup>3</sup> Several federal district courts have held that the Home Owners’ Loan Act (12 U.S.C. § 1461 et seq.) preempts section 2923.5 as applied to federal savings associations. (E.g., *Taguinod v. World Savings Bank, FSB* (C.D.Cal. 2010) 755 F.Supp.2d 1064, 1073-1074; *Ngoc Nguyen v. Wells Fargo, N.A.* (N.D.Cal. 2010) 749 F.Supp.2d 1022, 1033.) We need not decide that question.

<sup>4</sup> *Mabry v. Superior Court, supra*, 185 Cal.App.4th at pages 233-234, also held that the declaration required under section 2923.5, subdivision (b) need not be signed under penalty of perjury. The Declaration of Compliance here was signed under penalty of perjury, so this part of the holding in *Mabry* is inapposite.

agent “shall contact the borrower in person or by telephone.” The purpose of the contact requirement is fully satisfied if the contact occurs regardless of who initiated the contact. If the borrower initiates a call in which the parties discuss the borrower’s financial condition and explore options for the borrower to avoid foreclosure, we can see no good reason to construe section 2923.5, subdivision (a)(2) as requiring the mortgagee, beneficiary or authorized agent to initiate another call for the same purpose.

We also conclude that the discussions described in Burton’s declaration included an assessment of her financial situation and exploration of options to avoid foreclosure. Such an assessment and exploration need not be extensive or amount to loan counseling. (*Mabry v. Superior Court, supra*, 185 Cal.App.4th at p. 232.) Defendants assessed Burton’s financial situation when they informed her that her income was insufficient to support her first application to reduce her monthly payments. They explored options to avoid disclosure by discussing her loan workout application with her and by notifying her of the possibility of receiving homeowner’s assistance. This satisfied the statutory requirement. Contrary to Burton’s argument, *Mabry* did not suggest that the borrower must be informed of any particular options to avoid disclosure. Instead, *Mabry* cited deeds in lieu of foreclosure, loan workouts and short sales as examples of options to avoid foreclosure and stated that the mortgagee, beneficiary or authorized agent is required to do no more than notify the borrower of the availability of those types of options. (*Mabry v. Superior Court, supra*, 185 Cal.App.4th at p. 232.) Burton’s declaration shows that her discussions with defendants’ representatives before the

August 23, 2010, recordation of the notice of default included the required assessment and exploration.

Accordingly, we conclude that the evidence compels the conclusion that Burton failed to establish a probability of prevailing on the merits of her complaint based on defendants' alleged failure to comply with section 2923.5. The denial of a preliminary injunction on this ground therefore was proper regardless of the reasons stated by the trial court.<sup>5</sup>

3. *Burton Failed to Establish a Reasonable Probability of Prevailing Based on Failure to Timely Post a Notice of Trustee's Sale*

Burton's contention that the notice of trustee's sale was untimely is based on her declaration that she first saw the notice of the December 21, 2010, sale date posted on the property on December 2, 2010, and that she did not see any such notice on the property as of 10:30 a.m. on December 1, 2010.<sup>6</sup> The trial court concluded that this evidence was insufficient to prove that no notice of trustee's sale was posted on December 1, 2010. Burton has shown no abuse of discretion in this regard. The fact

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<sup>5</sup> The trial court apparently concluded that defendants had established "due diligence" under section 2923.5, subdivision (g) despite the fact that the Declaration of Compliance indicated not that efforts to contact the buyer had been unsuccessful, but that the borrower had been contacted. The court also erroneously stated that because the Declaration of Compliance was sufficient Burton could not state a claim for failure to comply with section 2923.5 while failing to address the other evidence showing that defendants had complied with the statute as it should have.

<sup>6</sup> A notice of trustee's sale must be posted in a conspicuous place on the property at least 20 days before the sale date, "where possible and where not restricted for any reason." (§ 2924f, subd. (b)(1).) If the trustee's sale is postponed to a date within one year after the original sale date, there is no need to post a new notice. (§ 2924g, subd. (c).)

that no notice of trustee's sale was posted as of 10:30 a.m. does not indicate that no notice was posted later in the day, and Burton cites no authority for the proposition that a notice of trustee's sale must be posted by 10:30 a.m.

***DISPOSITION***

The order dated March 18, 2011, denying a preliminary injunction is affirmed.  
Defendants are entitled to recover their costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.