Filed 1/3/13 Flaherty v. Bank of America CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

VINCE FLAHERTY, Plaintiff and Appellant, v. BANK OF AMERICA, N.A. et al., Defendants and Respondents.	B230938 (Los Angeles County Super. Ct. No. SC108012)

APPEAL from an order of the Superior Court of the County of Los Angeles, Craig D. Karlan, Judge. Affirmed in part, reversed in part, and remanded.

Vince Flaherty, in pro. per., for Plaintiff and Appellant.

Akerman Senterfitt, Donald M. Scotten, Imran Hayat, Shiraz Simonian and Charles K. LaPlante for Defendant and Respondent Bank of America, N.A.

INTRODUCTION

Plaintiff and appellant Vince Flaherty appeals from the requirement and amount of the bond ordered as part of a preliminary injunction issued in his favor to halt a foreclosure by the bank.[1] Specifically, Flaherty contends that the trial court erred by granting his application for issuance of a preliminary injunction on the condition that he post a $433,000 undertaking with the trial court, failing to hold a hearing on whether he was required to post an injunction bond, denying his request to file a reply to the opposition to his motion for reconsideration, and setting the hearing on his motion for reconsideration contesting the required undertaking on a date that he was obligated to appear in another courtroom on another matter.

We hold that the trial court did not err by requiring Flaherty to post the bond, but the trial court did err in calculating the amount of undertaking based on Flaherty's alleged past amounts due. We do not reach Flaherty's other contentions. We remand the matter to the trial court to reconsider the amount of the bond, taking into account the proper criteria.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2004, Flaherty executed a note, in the principal amount of $3.8 million subject to an adjustable rate of interest, in favor of defendant and respondent BA. The note incorporated an adjustable rate rider and was secured by a deed of trust on real property owned by Flaherty in Los Angeles. According to BA, Flaherty defaulted on the note, and in September 2009, a notice of default and election to sell under deed of trust was filed.

On May 18, 2010, Flaherty applied for a temporary restraining order to prevent BA from selling the property at a trustee's sale. The application provided that in early

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[1] Flaherty represents himself—in propria persona—in this appeal. He erroneously refers to Bank of America, N.A. (BA) as real party in interest, and erroneously names the Superior Court of Los Angeles County as a respondent. Although his briefs in many respects appear to be in the nature of a petition for writ of mandate, we treat them as briefs in support of his appeal.

May 2010, Flaherty was given notice of a trustee's sale on the property and scheduling a trustee's sale of his property on May 19, 2010. In support of his request, Flaherty declared that in 2004 he "accepted a mortgage loan from [BA] and signed" a note and deed of trust. The note that Flaherty said "I believe I signed," was attached, unsigned, to his declaration. That note is an adjustable rate note, dated October 14, 2004, promising to pay BA $3.8 million at an initial annual interest rate of 4.125 percent. The monthly payments would be "interest only" through November 1, 2007. The initial interest rate was subject to change effective November 1, 2007, based upon 2.25 percent of a specific index, but the interest rate for that first year of increase would not exceed 6.125 percent, and the maximum interest rate over the course of the loan would not exceed 10.125 percent. Flaherty declared that, "The Note called for payments of approximately $13,000 per month. When my first payment turned out to be about $16,000 I complained and was told that the payment was higher because I had wanted cash out. I was satisfied with that."

Flaherty declared that in December 2007 his monthly note payment increased to approximately $28,000, and when he "complained" that his adjustable rate payment "had adjusted so high," BA sent him a copy of a note he purportedly executed. The note Flaherty received from BA provided that the initial annual interest rate was 5.125 percent, the interest rate for the first year of increase would not exceed 7.125 percent, and the maximum interest rate over the course of the loan would not exceed 11.125 percent. The note Flaherty received from BA purportedly bore Flaherty's signature, but according to Flaherty, "I do not recall ever seeing or discussing" it. The trial court granted Flaherty's application for a temporary restraining order, ordering that BA and its trustees and agents are temporarily restrained from selling the property that was the subject of the scheduled trustee's sale.

On October 4, 2010, Flaherty filed a first amended complaint against BA and

defendant and respondent Northwest Trustee Services, Inc. (erroneously named as Northwest Trustee Services) (Northwest)[2] consisting of over 100 pages and eighteen causes of action including causes of action for breach of contract, fraud, negligent misrepresentation, and declaratory relief, and a request for injunctive relief. Flaherty alleged, inter alia, that in connection with a refinance of his residence he executed a "standard mortgage" promissory note with an interest rate of 4.125 percent, but unbeknownst to him, the documents BA recorded included an interest rate of 5.125 percent, and he believes BA forged his signature on those documents. Flaherty alleged that he made all of the monthly loan payments to BA for three years until he learned that his monthly payments claimed by BA had increased beyond what Flaherty was expecting. Flaherty alleged BA breached the express terms of "the Note and/or Trust Deed" and the implied covenant of good faith and fair dealing by, among other things, "switch[ing] a few key loan documents with others containing a higher annual percentage." He alleged that BA made fraudulent representations to induce him to sign the loan documents, including that "it was advantageous for Flaherty to accept the [BA] loan because there was value in the utility of money, and that waiting and reapplying after a required six month period of time was therefore not in his best interest," BA's "initial interest rate could also reset down instead of up in 3 years time," BA "would have no problem refinancing the loan as long as Flaherty's credit score and conditions remained the same," BA and its agents "were not charging a commission or in any way profiting on the sale of the loan," and BA concealed that they "switched Flaherty's loan." Flaherty alleged that BA negligently misrepresented that it had not entered into a loan modification with him. In his declaratory relief cause of action, Flaherty sought a declaration of the parties' rights and obligations under the loan documents.

On November 9, 2010, the trial court granted Flaherty's application for issuance of a preliminary injunction on the condition that by December 15, 2010, he post a $433,000 undertaking with the trial court. Flaherty filed a motion for reconsideration requesting

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[2] Northwest provided notice that it does not have a monetary status in this case, and therefore it will not file a respondent's brief.

that the trial court preliminarily enjoin BA from proceeding with the trustee sale without requiring him to post a bond. The motion was scheduled to be heard on March 2, 2011. At a December 1, 2010, hearing, the trial court granted Flaherty's ex parte application for an order specially setting the hearing on his motion for reconsideration,[3] and scheduled the hearing on the motion for December 14, 2010. At the December 14, 2010, hearing on Flaherty's motion for reconsideration the trial court took the matter under submission, and on January 3, 2011, denied the motion. Flaherty appeals from that portion of the preliminary injunction as to the bond requirements.

DISCUSSION

A. The Bankruptcy

We take judicial notice that a discharge of debtor was issued on March 27, 2012, in Flaherty's Chapter 7 bankruptcy action, case No. 2:11-bk-48587-BR,[4] granting Flaherty a discharge under section 727 of the Bankruptcy Code (11 U.S.C. § 727). We requested that the parties submit letter briefs addressing the effect, if any, of Flaherty's bankruptcy proceeding on the debt and lien and on any issue in this appeal.
We have reviewed the parties briefs and conclude that Flaherty has failed to establish that BA's lien is no longer enforceable.

"[A] secured creditor may bypass a debtor's bankruptcy proceedings and enforce its lien in the usual way, because unchallenged liens pass through bankruptcy unaffected. See *Long v. Bullard*, 117 U.S. 617, 620-21, 29 L.Ed. 1004, 6 S.Ct. 917 (1886); *Dewsnup v. Timm*, 502 U.S. 410, 418, 116 L.Ed.2d 903, 112 S.Ct. 773 (1992). See also *Johnson v. Home State Bank*, 501 U.S. 78, 84, 115 L.Ed.2d 66, 111 S.Ct. 2150 (1991) (bankruptcy extinguishes *in personam* claims against the debtor but generally has no effect on *in rem* claims against the debtor's property)." (*Shook v. CBIC* (*In re Shook*) (Bankr. 9th Cir.

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[3] The record does not include Flaherty's ex parte application.

[4] Evidence Code section 452, subdivision (d) provides that judicial notice may be taken of "[r]ecords of . . . any court of this state . . . ."

2002) 278 B.R. 815, 821.) "[A] bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*." (*Johnson v. Home State Bank*, *supra*, 501 U.S. at pp. 84-85 [after the personal obligation secured by mortgage lien is discharged in a chapter 7 proceeding, the mortgage lien remains a claim against the debtor which can be rescheduled in a chapter 13 proceeding].) Thus, "[e]ven after the debtor's personal obligations have been extinguished, the mortgage holder still retains a 'right to payment' in the form of its right to the proceeds from the sale of the debtor's property. Alternatively, the creditor's surviving right to foreclose on the mortgage can be viewed as a 'right to an equitable remedy' for the debtor's default on the underlying obligation. Either way, there can be no doubt that the surviving mortgage interest corresponds to an 'enforceable obligation' of the debtor." (*Ibid*.)

Therefore, the bankruptcy proceeding and discharge of Flaherty does not preclude BA from foreclosing on its deed of trust.

B. The Undertaking in Support of the Preliminary Injunction

1. Standard of Review and Applicable Principles

"Generally, a superior court's ruling on an application for a preliminary injunction is reviewed for an abuse of discretion. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286 [219 Cal.Rptr. 467, 707 P.2d 840].) The party challenging the superior court's order has the burden of making a clear showing of such an abuse. (*Biosense Webster, Inc. v. Superior Court* (2006) 135 Cal.App.4th 827, 834 [37 Cal.Rptr.3d 759].) Appellate courts typically state that an abuse of discretion occurs when the lower court exceeds the bounds of reason or contravenes the uncontradicted evidence. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527 [67 Cal.Rptr. 761, 439 P.2d 889].)" (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 738-739.)

There is no challenge to the preliminary injunction—just as to the bond. "[Code of Civil Procedure s]ection 529, subdivision (a),[5] requires that the amount of the undertaking be sufficient to 'pay to the party enjoined such damages . . . as the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction.' Thus, the trial court's function is to estimate the harmful effect which the injunction is likely to have on the restrained party, and to set the undertaking at that sum. (*Hummell v. Republic Fed. Savings & Loan Assn*. (1982) 133 Cal.App.3d 49, 51 [183 Cal.Rptr. 708]; *Greenly v. Cooper* (1978) 77 Cal.App.3d 382, 390 [143 Cal.Rptr. 514].) That estimation is an exercise of the trial court's sound discretion, and will not be disturbed on appeal unless it clearly appears that the trial court abused its discretion by arriving at an estimate that is arbitrary or capricious, or is beyond the bounds of reason. (*Greenly, supra*, at p. 390.)" (*ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 14.)

2. Background

After the trial court granted Flaherty's request for a temporary restraining order against BA, Flaherty submitted a reply to BA's opposition to the request for preliminary injunction, contending, inter alia, that in or about November 2004 he executed a promissory note in favor of BA reflecting an interest rate of 4.125 percent, but that note had been "switched" by BA to the promissory note upon which BA relies, setting forth an interest rate of 5.125 percent.

At the November 9, 2010, hearing on Flaherty's application for issuance of a preliminary injunction, the trial court granted the application on the condition that by December 15, 2010, he post a $433,000 undertaking with the trial court, stating that there might be a possibility of Flaherty prevailing on his claim that BA "switch[ed] the notes, which would be the breach of contract [cause of action]. And [Flaherty] would certainly be entitled to dec. relief as to what the terms are."

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5 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

At the November 9, 2010, hearing, Flaherty advised the trial court that as of May 2009 he owed BA about $433,000 for past due monthly mortgage payments, his creditors seized his bank and brokerage accounts, he owed creditors approximately $13 million on several promissory notes, and he owned real property valued at about $15 million to $16 million. The following exchange occurred at the hearing: "[Trial court:] Tender is required. And tender in this case, even if I put on my equitable hat and give you every benefit of the doubt—it was originally at $12,000? [¶] [BA's counsel:] I believe so, approximately. [¶] [Trial court:] So we're talking about 36 months. You can do the math, 36 times 12. Is that 432? That would be the minimum required, 432,000, on this loan. That would be the minimum. [¶] . . . [¶] I need to tell you, that is my tentative in terms of what the tender would be required in order for me to maintain the preliminary injunction. I believe a tender is required. [¶] . . . [¶] This isn't a fraudulent loan. You sought it out. The distinction is the following: We have people come into court and say I didn't take the loan. That is not my signature. . . . Those people I'm not going to require tender if they can establish the validity of their claim . . . . [¶] . . . [¶] [Flaherty:] You are saying I have to post a lot of money. [¶] [Trial court:] You have to post an undertaking in that amount. [¶] [Flaherty:] I'm trying to tell you I've had writs of execution. I've had my bank accounts seized. . . . [¶] . . . [¶] I can make payments but I can't come—the only way I can come up— [¶] [Trial court:] How could you make payments if your bank accounts are seized? [¶] [Flaherty:] I'm receiving foreign income. [¶] [Trial court:] Is that legal? You don't have to disclose that. I don't even want—I don't even want to know. You have a fifth amendment privilege. I don't want to hear an answer. [¶] [Flaherty:] I can't just give a large chunk like $400,000, but I can make my payments on this note. . . . [¶] . . . [¶] [Trial court:] You can pay $16,000 a month? [¶] [Flaherty:] Yes. Twelve would be better. You mentioned twelve before, but— [¶] [Trial court:] Just the reality. Twelve was the lowest possible number I could get to based on the original monthly payment. . . . [¶] . . . [¶] [Flaherty:] [Y]ou know that I can't tender 400,000. [¶] [Trial court:] [T]he problem is I don't see how I can treat you different than anybody else that comes in here. [¶] . . . [¶] [Flaherty:] [T]here

is fraud here, Your Honor. I shouldn't have to pay them. [¶] [Trial court:] Your affidavit—your position is you have only been paying at 4.125 [percent], not 5.125 [percent]. Your position is up to October of '07 you paid in full and there is no mistakes. [¶] [Flaherty:] To December. [¶] [Trial court:] It was in December '07 when they raised it up. That's when the problem occurred. And that's why I'm saying I will give you the benefit of the doubt and we will go back. [¶] . . . [¶] That is my tentative, Mr. Flaherty. I can't treat you differently than anybody else. [¶] . . . [¶] [$433,000] is the lowest possible number that this court could come up with in terms of equity and fairness. And it waives all penalties, late fees, everything. It simply is the minimum monthly that you would have to pay. [¶] . . . [¶] Whether [other homeowners who are granted a preliminary injunction against the foreclosure sale of their home] have [the ability to post an injunction bond] or not, I still have to apply the law equally. [¶] [Flaherty:] It doesn't require that I should have to post a bond? [¶] [Trial court:] We disagree on that. . . . [N]ot only do I believe that law says that [you must post a bond]; equity demands it. You can't live in a place without paying a mortgage for three years. . . . [¶] . . . [¶] You have to post that undertaking to demonstrate to the court and to [BA] that yes, you want equity and you're willing to do equity. And by willing to do equity, it means that you will pay all the amounts you are required to. And the reality is you're probably going to be required to pay more. . . . [¶] . . . [¶] [Flaherty:] If I can just tell you what I can do. Reasonably, probably a hundred thousand dollars within a couple of weeks, but not $400,000 for the reasons I've described. [Trial court:] As I said, [Flaherty, requiring that you post a bond in the amount of $433,000 is] giving you every benefit. [¶] . . . [¶] You're not claiming this is a fraudulent loan. You're claiming they changed the terms of the loan. [Flaherty:] They changed the loan. They ordered a different loan than what I got. [¶] [Trial court:] That is why I'm putting you back where you would have been if you had gotten [that] loan. [Flaherty:] That's fair, Your Honor. [¶] [Trial court:] And that's [$432,000] from the date of the breach to the present, without any penalty, without interest. I didn't add anything. [¶] . . . [¶] My goal is to give you a fair number and that's what I've done." The trial court took the matter under submission.

The trial court issued a minute order stating, "The application for issuance of a preliminary injunction is conditionally GRANTED. . . . [Flaherty] has provided evidence that there is a 'reasonable probability' he will prevail on the first four causes of action. Nevertheless, [Flaherty] does not dispute that he is in default on the Note. Accordingly, the preliminary injunction is GRANTED (prohibiting the Defendants from selling or otherwise foreclosing on the properties at issue) on condition that [Flaherty] post an undertaking with the court in the amount of $433,000.00 to be filed no later that [*sic*] December 15, 2010. If the undertaking is not filed, the preliminary injunction will be dissolved on December 16, 2010, without further order of the court, hearing or notice to the parties."

After the trial court granted Flaherty's application for issuance of a preliminary injunction, Flaherty filed a motion for reconsideration requesting that the trial court preliminarily enjoin BA from proceeding with the trustee sale without requiring him to post a bond. Flaherty contended, inter alia, that the trial court had discretion to waive the necessity of providing a bond and he is financially incapable of posting the required bond. Charles W. Sachs, Flaherty's handwriting expert, submitted a declaration in support of Flaherty's motion for reconsideration opining that Flaherty's purported signatures on the note and adjustable rate rider were not Flaherty's signatures but instead were forgeries.

At the hearing on Flaherty's motion for reconsideration, the trial court attempted to state its ruling on the motion, but because it was interrupted on numerous occasions, it ultimately took the matter under submission. During the hearing, the trial court stated, "The bond amount that I set in my mind was the low end of the range. It wasn't the high end. . . . [¶] . . . [¶] [I]t was a bond the defense requested. I went along with it. And I went along with it understanding and knowing that this was the low end of the range which is why I'm not inclined to change that number." Flaherty contended that he was unable to pay the bond required for the issuance of the preliminary injunction, and it is unconstitutional to require a party to post a bond that it cannot afford.

On January 3, 2011, the trial court issued a minute order denying Flaherty's motion for reconsideration of the trial court's November 9, 2010, order requesting that "it . . . not condition the issuance of the preliminary injunction on [Flaherty's] posting of an undertaking. . . . [Flaherty] has failed to provide any new facts, circumstances, or law justifying a modification of the court's order. [¶] . . . [¶] [Flaherty's] new law consists of his citation to *Conover v. Hall* (1974) 11 Cal.3d 842, 847, for the proposition that the court has discretion to waive the bonding requirement in cases where the party seeking the injunction is unable to afford the cost of an expensive bond. Conover, however, is over thirty years old. It does not constitute new law. Moreover, Conover is clearly distinguishable, as in that case the Plaintiffs were welfare recipients and none had a gross monthly income of over $540. *Id*. at 852. Here, in contrast, [Flaherty] has not made a proper showing that he is indigent or that the liens, levies, and seizures of his accounts and assets render him unable to pay the undertaking. [Flaherty] has never stated the amount of any lien, what property the lien has attached to, what property has been seized, or the value of such property. [Flaherty] only asserts in vague terms in his Reply in support of the preliminary injunction that 'Wells Fargo Bank and the tax authority have seized Flaherty's savings account, checking account, and brokerage account.' [Citation.] [Flaherty] does not state that he does not have any other assets such that he is unable to pay the bond."

Flaherty has not posted a bond. Thus, there is no preliminary injunction in effect. At oral argument, BA confirmed it has yet to proceed with the foreclosure sale. Both parties agree that Flaherty is able to appeal the amount of the bond. That issue is not moot because the determination of that issue will affect the imposition of an injunction.

3. Analysis

Flaherty contends that the trial court abused its discretion in requiring him to post a bond because he could not afford to do so. Flaherty does not contend on appeal that he was indigent or otherwise dispute the trial court's findings that he did not show that he was indigent. Instead, he argues that *Conover v. Hall*, *supra*, 11 Cal.3d 842 and related

authorities do not require that the person otherwise obligated to post the injunction bond be indigent to relieve him or her of the obligation to do so; "[t]he issue turns upon the principle that no person . . . should be denied the right to have their case heard by the barrier of an unaffordable bond." (Italics deleted.)

Although section 529, subdivision (a) provides that if an injunction is granted, an undertaking is required, a trial court has discretion to relieve an indigent plaintiff who could not afford to post an injunction bond under section 529. The Supreme Court said in *Beaudreau v. Superior Court* (1975) 14 Cal.3d 448 that in *Conover v. Hall, supra,* 11 Cal.3d at pages 850-853, it "held that a court granting an injunction had the discretion to relieve the plaintiff upon the ground of indigency from the requirement of an injunction bond under section 529 of the Code of Civil Procedure despite the fact that the plaintiff did not proceed formally in forma pauperis and that the court did not conduct a formal inquiry into the plaintiff's assets where it could reasonably conclude from the facts before it that the plaintiff was poor and could not afford to post the bond." (*Beaudreau v. Superior Court*, *supra*, 14 Cal.3d at p. 454, fn 8.) *Conover v. Hall, supra,* 11 Cal.3d 842, nonetheless "did not state or imply that courts must in all cases waive undertaking requirements for indigent litigants." (*McColm v. Westwood Park Assn*. (1998) 62 Cal.App.4th 1211, 1222.)

Section 995.240 provides in part, "The court may, in its discretion, waive a provision for a bond in an action or proceeding and make such orders as may be appropriate as if the bond were given, if the court determines that the principal is unable to give the bond because the principal is indigent and is unable to obtain sufficient sureties, . . . In exercising its discretion the court shall take into consideration all factors it deems relevant, including but not limited to the character of the action or proceeding, the nature of the beneficiary, whether public or private, and the potential harm to the beneficiary if the provision for the bond is waived." (See *Williams v. Freedomcard, Inc.* (2004) 123 Cal.App.4th 609, 614.) "The enactment of section 995.240 did not create a new rule of law. Instead, it codified the common law authority of the courts recognized in *Conover v. Hall* [, *supra*] 11 Cal.3d [at pp.] 850-852 [114 Cal.Rptr. 642, 523 P.2d

682]. (Cal. Law Revision Com. com., 18 West's Ann. Code Civ. Proc. (2009 ed.) foll. § 995.240, p. 211.)" (*Smith v. Adventist Health System/West*, *supra*, 182 Cal.App.4th at p. 740, fn. 9.)

In *Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427, the trial court ordered that the plaintiff file an undertaking pursuant to section 1030 because the plaintiff resided outside the state. In opposing the defendants' motion to dismiss the plaintiff's lawsuit for his failure to post the undertaking, the plaintiff stated that because he obtained an order from the trial court finding him to be in forma pauperis, relieving him of the obligation to pay court fees and costs, the trial court was required to waive the undertaking. (*Id*. at p. 1430.) In reversing the trial court's dismissal of the plaintiff's lawsuit, the court held that "given the finding of indigency necessarily underlying the in forma pauperis order, the trial court acted arbitrarily and capriciously in refusing to either vacate or reduce the amount of the undertaking." (*Id*. at p. 1435.)

In *Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, the trial court ordered that the out-of-state plaintiff file an undertaking pursuant to section 1030. The plaintiff filed several declarations claiming that he was indigent and he could not afford to post the undertaking. (*Id*. at pp. 426-428.) The trial court found that the plaintiff's declarations were conclusionary and lacked in the required facts to establish his alleged indigency. (*Id*. at pp. 427-428.) The court reversed the trial court's dismissal of the plaintiff's lawsuit and the order requiring the plaintiff to post the undertaking, and remanded the matter to the trial court, "to conduct a new hearing on [the plaintiff's] request for a waiver of the undertaking requirement, consider all financial information submitted by [the plaintiff] as well as any other relevant factors, indentify any deficiencies or omissions in the information submitted and provide [the plaintiff] an opportunity, in conformity with the procedures detailed in [former] rule 3.53(b) [permitting additional documentation in support of an application to proceed in forma pauperis], to respond to the [trial] court's concerns. Based upon that information, and considering the arguments of all parties, the [trial] court is to exercise its discretion and determine whether a waiver, in whole or in part, is appropriate." (*Id.* at p. 436.)

The above authorities, relied upon by Flaherty, concern a plaintiff's claim that he or she is indigent. As noted above, Flaherty makes no such claim.

Although Flaherty alleged that BA acted fraudulently, BA must be protected against damages in the event it is ultimately determined that Flaherty's claims do not entitle him to the injunction. Section 529 governs injunction bonding, and provides that when an injunction is granted "the court . . . *must require an undertakin*g on the part of the applicant to the effect that the applicant will pay to the party enjoined such damages, not exceeding an amount to be specified, as the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." (Italics added.) This provision is mandatory, except when the court relieves a litigant in cases of indigency. (§ 995.240.)

Flaherty challenges the amount of the required injunction bond. The trial court determined that the amount of Flaherty's undertaking should be approximately equivalent to the amount of Flaherty's past arrearages allegedly owed BA under the note secured by the deed of trust. BA contends that the trial court did not abuse its discretion by "tying the bond amount to [Flaherty's] arrearages" because the arrearages are "a continuing injury to BA," directly caused by the injunction.

"It is well settled the damage recoverable under an injunction bond . . . is for all loss proximately resulting from the injunction; the factors to be considered in determining the loss depend upon the circumstances of the case; the measure of damage will vary with those circumstances; arbitrary rules do not govern; equitable principles are applied; and the allowance, although often difficult to measure accurately, should furnish just and reasonable compensation for the loss sustained. [Citations.]" (*Surety Sav. & Loan Assn. v. National Automobile & Cas. Ins. Co*. (1970) 8 Cal.App.3d 752, 757.)

Basing the amount of the undertaking using Flaherty's past arrearages is not "an estimate [of] the harmful effect which the injunction is likely to have on" BA if it is subsequently determined that the sale under a deed of trust was wrongfully enjoined. Flaherty's arrearages may be a continuing injury to BA, but BA contended prior to the issuance of the injunction that it was entitled to sell Flaherty's property in an attempt to

satisfy the *entire* encumbrance securing it and thus the entirety of the debt owed to BA—at least up to the value of the property—is the continuing injury to BA, directly caused by the injunction. The debt owed BA occurred prior to the injunction. The pendency of the injunction will not affect that debt—just delay its payment. To base the amount of the bond on the past arrearages allegedly owed BA under the note essentially would provide BA with double security for at least a portion of the debt—the lien on the real property and the amount of the bond would overlap. Therefore, the debt cannot be the basis of determining the amount of the injunction bond in an amount to compensate BA if it is ultimately determined that Flaherty was not entitled to the injunction.

In calculating the amount of the undertaking, the damages BA would reasonably and foreseeably suffer based on a delay in the sale of the property caused by the wrongful injunction might include lost interest. "[W]here a sale under a deed of trust wrongfully is enjoined compensation for the delay caused by the injunction may include an award to the beneficiary of interest on the amount which would have been received from the enjoined sale, provided the amount of the award, taking into consideration the amount received from the subsequent sale, may not exceed the actual loss sustained." (*Surety Sav. & Loan Assn. v. National Automobile & Cas. Ins. Co.*, *supra*, 8 Cal.App.3d at p. 759.)

There are other possible sources of damage. For example, "compensation for the loss might include the loss resulting from decline in the value of the security. Damage for the decline is the difference between the amount for which the security would have sold at the enjoined foreclosure sale and the amount for which it would have sold at a foreclosure sale immediately following the injunction period, not to exceed the difference between the amount of the obligation secured and the amount that would have been received from the later foreclosure sale. In the event a later sale actually occurs, the measure is the difference between the amount of the obligation secured and the amount actually received from that sale." (5 Cal. Real Estate Law & Practice (Matthew Bender 2011) § 120.92[2], p. 120-44.2 (Matthew Bender); *Yellen v. Fidelity & Casualty Co*. (1931) 115 Cal.App. 434, 440-441.)

In addition, "'It is now well settled that reasonable counsel fees and expenses incurred in successfully procuring a final decision dissolving the injunction are recoverable as "damages" within the meaning of the language of the undertaking, to the extent that those fees are for services that relate to such dissolution [citations].' [Citations.]" (*ABBA Rubber Co. v. Seaquist*, *supra*, 235 Cal.App.3d at pp. 15-16.) "Compensation for the loss might also include the costs required to protect the property, as by the hiring of guards, during the period the injunction was in force." (5 Matthew Bender, *supra*, § 120.92[2], p. 120-44.2; *Surety Sav. & Loan Assn. v. National Automobile & Cas. Ins. Co*., *supra*, 8 Cal.App.3d at p. 758 ["The finding on the issues of proximate cause and the amount of damage respecting the loss on account of the employment of guards is supported by substantial evidence"].)

Thus, the amount of an injunction bond might include not only the cost of addressing a potential decrease in the value of the property—either by market conditions or damages or lack of upkeep—if that decrease would render the value of the property less than the amount secured and loss of interest, but also might take into account other factors, such as the possibility of added liens on the property for (e.g. nonpayment of real estate taxes).

Because an undertaking based on an approximate amount of Flaherty's past arrearages allegedly owed BA is not a proper measure of BA's future damages caused by a delay in the sale of the property, we remand the matter to the trial court to determine the amount of the undertaking.

As noted, the trial court has discretion to relieve an indigent plaintiff who could not afford to post an injunction bond under section 529. It has been almost two years since the trial court issued the injunction order, and since then, at least some of Flaherty's financial circumstances may have changed, including by virtue of Flaherty's chapter 7 bankruptcy action, case No. 2:11-bk-48587-BR.[6] We do not express an opinion on

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[6] If the principal amount owing was discharged as to Flaherty, that might be a factor as to the appropriate amount for the bond.

whether Flaherty is indigent. There must be sufficient evidence of indigency before the trial court may dispense with a bond.

C. Other Issues.

In view of our disposition on the merits, we do not have to consider Flaherty's other issues.

DISPOSITION

We reverse the order imposing the undertaking and, remand the matter to the trial court to determine the amount of the undertaking consistent with this opinion. The order is otherwise affirmed, and the preliminary injunction remains in effect. The parties shall bear his or its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

I concur:

KRIEGLER, J.

I respectfully dissent. In my view, the trial court did not abuse its equitable discretion in selecting the bond amount. (Code Civ. Proc., § 529, subd. (a); *White v. Davis* (2003) 30 Cal.4th 528, 551.) The trial court selected the lowest sum it thought appropriate for the bond amount. Perhaps the trial court should have selected a greater sum; but plaintiff, Vince Flaherty, has no basis to complain because a lesser amount was selected than should have been. (*In re Marriage of Moore* (1980) 28 Cal.3d 366, 374; see Eisenberg et al., Cal. Practice Guide: Civil Appeals And Writs (The Rutter Group 2012) ¶ 8:198, p. 8-144 (rev. # 1, 2012).) I would affirm.

TURNER, P. J.