CALIFORNIA COURT OF APPEALS EXPANDS A BORROWERS' RIGHT TO ATTORNEYS' FEES UNDER HOBR

HARDIE V. NATIONSTAR

By T. Robert Finlay, Esq.

Although it has been effective since January 1, 2013, California's Homeowner's Bill of Rights (HOBR) is still working its way through the trial and appellate courts, with parties searching for clarification on many of its unclear provisions. One issue ripe for interpretation is under what circumstance is the borrower the prevailing party and entitled to attorneys' fees. *Civil Code* Sections 2924.12(i) and 2924.19(h)[1] give the court the discretion to award reasonable attorney fees and costs to the "prevailing borrower," who is defined as a borrower that "obtained injunctive relief or was awarded damages." There is no question that borrowers who prevail on their HOBR claims at trial are entitled to their fees. Likewise, under the Court of Appeals' 2015 decision in *Monterossa v Superior Court*[2], it is equally as clear that borrowers obtaining a preliminary injunction under HOBR are entitled to their fees in bringing the injunction even if the borrower does not ultimately prevail on the merits of their lawsuit. But, until recently, servicers have often successfully argued that borrowers who obtain a temporary restraining order ("TRO") are NOT entitled to attorneys' fees just for obtaining the TRO as it was not within the scope of the term "injunctive relief." Unfortunately, the Court of Appeals recently published decision in *Hardie v Nationstar*[3] determined that borrowers prevailing on a TRO hearing are eligible for attorneys' fees and costs under HOBR because a TRO should be considered a form of injunctive relief. This decision will undoubtedly increase the motivation for borrowers claiming violations of HOBR to seek TROs.

A TRO is an injunction in the sense that it enjoins a particular act pending a hearing on preliminary injunction. *Chico Feminist Women's Health Center v. Scully*, (1989) 208 Cal.App.3d 230, 237, fn. 1. However, it is distinguishable in the following ways:

1. A TRO may be issued **"ex parte"** and, sometimes, even without notice (*e.g.* where a foreclosure sale is just days or even hours away) as its purpose is to preserve the status quo;

2. In contrast to the ex parte TRO proceeding, a hearing on the preliminary injunction is a full evidentiary hearing giving all parties the opportunity to present arguments and evidence. Civ. Proc. Code (CCP) § 527;

3. A bond is not essential for a TRO unlike a preliminary injunction which is not effective until the undertaking is filed. *CCP* § 529;

4. The TRO is transitory in nature and terminates automatically when a preliminary injunction is issued or denied. *Landmark Holding Group v. Superior Court*, (1987) 193 Cal.App.3d 525, 529. When issued without notice, the TRO is only supposed to last for 15 days, though, for good cause, the Court can set the expiration for up to 22 days from the date of issuance. CCP § 527(d).

The most troubling aspect of the TRO is the short notice required prior to the *ex parte* hearing. In California State courts, a borrower need only provide telephonic notice by 10:00 am the day before an 8:30 am TRO hearing and, as noted, in emergency situations, no notice might need to be given at all. With less than 24 hours' notice required, most telephonic, email or fax TRO notices do not make it to the right internal personnel to hire counsel in time to appear at the hearing. Even if counsel is hired, he or she often does not have sufficient information to effectively oppose the TRO. Making matters worse, many judges "rubber stamp" TROs to stop foreclosure sales, believing that a short continuance until the Preliminary Injunction hearing, will not cause the servicer significant harm.

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[1] *Civil Code* Section 2924.12(i) applies to servicer's who conduct more than 175 qualifying foreclosures a year. Section 2924.19(h) applies to those under 175 annual qualifying foreclosures.

[2] *Monterossa v Superior Court*, (2015) 237 Cal.App.4th 747.

[3] *Hardie v. Nationstar Mortgage LLC*, 2019 WL 947085 (5th Dist., Feb. 27, 2019)

How can servicers avoid being subjected to attorneys' fees and costs under the *Hardie* Rule?

The *Hardie* decision highlights the servicer's need for internal procedures to quickly identify when a TRO is being noticed and to immediately funnel it to the legal department or other appropriate person so that they can hire counsel. With the referral to outside counsel, we suggest including (1) the status of any current loss mitigation discussions; (2) if possible, copies of loss mitigation notes, applications, denials, etc.; (3) any known bankruptcy information; and (4) contact information for the person responsible for postponing the sale. With this information, outside counsel can then quickly determine whether the TRO is likely to be granted, in which case counsel may recommend postponing the foreclosure sale. Postponing the sale will allow counsel to argue that the TRO should be denied because there is no risk of "immediate" harm.

Most California lawsuits include, in addition to the typical HOBR claims, causes of action for negligent loan modification review, promissory estoppel, wrongful foreclosure, etc. A TRO based on non-HOBR claims does not trigger the borrower's immediately right to attorneys' fees. With that in mind, if the court is inclined to grant the TRO, counsel should ask the court to clarify that the TRO is based on the non-HOBR claims. Judges often blindly grant TROs thinking there is no harm to the lender. If the distinction is pointed out, some judges may still grant the TRO but NOT on the HOBR claims to avoid triggering Borrower's right to attorneys' fees. Along the same lines, if the servicer cannot hire counsel in time to oppose the TRO, counsel can later argue, in opposition to the Preliminary Injunction, that the TRO was granted based on the non-HOBR claims.

Final thoughts and a (small) silver lining:

In recognition of the obvious negative implications of its ruling, the *Hardie* Court did provide one important, positive constraint on potential abuses. Specifically, the Court confirmed that an attorney fee award under HOBR is *not mandatory* just because injunctive relief was granted: "Furthermore, the award of attorney's fees under section 2924.12 is discretionary. (§ 2924.12, subd. (h) [fees "may" be awarded].) By permitting, rather than requiring a court to award attorney's fees, section 2924.12 allows courts to avoid awards that would be inequitable or unconstitutional. The ex parte nature of the proceedings, the relative merits of the TRO application, and a party's ultimate ability to obtain statutory compliance through imposition of an injunction are relevant factors the court may consider in determining whether to award fees."

Prior to the *Hardie* decision, many courts viewed an attorney fee award as mandatory under HOBR. At least now, servicers can cite to *Hardie* for reasons why, even if a TRO or Preliminary Injunction is granted, the court should still deny the borrowers request for attorneys' fees.

Despite this "saving" clause, the *Hardie* decision increases the likelihood that borrowers will seek TROs and, if they prevail, move for fees. Again, the best recourse is to immediately hire counsel to oppose the TRO and, if it is going to be granted, seek to clarify that the TRO is based on the non-HOBR claims. In addition, counsel should always push the court to condition the TRO or Preliminary Injunction on the posting of a bond. That way, if the borrower fails to timely post the bond, counsel can argue that the injunction never took effect and, therefore, the borrower is not the prevailing party under Section 2924.12(i) or 2924.19(h). Another option, if subsequent facts are developed to show that the TRO was improperly granted (*e.g.* based on misrepresentations by the borrower that the short time frame for response did not allow the servicer or investor to present at the hearing, or where the TRO was issued without notice of the hearing), is to move to dissolve the TRO or Preliminary Injunction. If all that fails, counsel can still argue that the court should exercise its "discretion" to deny all or a part of the borrower's fee request.

In conclusion, servicers and investors should make sure that their staff is trained on what constitutes ex parte notice in California and what to do when they receive notice. That is the first line of defense in seeking to avoid the risk of attorneys' fees and costs under HOBR.

If you have any questions regarding this article, a particular case or California's Homeowner's Bill of Rights (HOBR), please feel free to contact Robert Finlay @ rfinlay@wrightlegal.net.

T. Robert Finlay, Esq.
rfinlay@wrightlegal.net

Robert Finlay is a founding Partner of WFZ.

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