

CAUSE NO. 2023-14624

Claudia Orellana,
Plaintiff(s),

v.

Lakeview Loan Servicing, LLC,
Defendant(s),

§ IN THE DISTRICT COURT OF
§
§
§
§ **HARRISCOUNTY, TEXAS**
§
§
§
§ 165th JUDICIAL DISTRICT
§

PLAINTIFF’S MOTION TO SET ASIDE SUBSTITUTE TRUSTEE SALE

TO THE HONORABLE JUDGE OF THE COURT:

NOW COMES **Claudia Orellana**, the Plaintiff, complaining of Defendants Lakeview Loan Servicing, LLC, and would show the Court the following:

Brief Summary

1. The Current Trustee, attorneys of Robertson, Anschutz, Schneid, Crane & Partners, PLLC, violated the TRO signed by the Court expressly prohibiting the Current Trustee from conducting the March 7, 2023, trustee sale of the Plaintiff’s Property, 10343 Leafy Autumn Path, Houston, Texas 77044, even though the Current Trustee had constructive knowledge of the effective TRO.

Factual Background

2. February 21, 2023, the Plaintiff entered a contract with Fort Worth Buys Houses LLC. Joshua Fuller is a managing member Fort Worth Buys Houses LLC.
3. February 21, 2023, on behalf of the Plaintiff, Mr. Fuller called the Defendant, Lakeview Loan Servicing, informed the Defendant that Mr. Fuller could close before March 7, 2023, if the Defendant would provide the Plaintiff a payoff statement. A representative of the Defendant promised the Plaintiff that a payoff statement would be provided Monday, March 6, 2023.
4. Monday, February 27, 2023, the Plaintiff again requested a payoff statement from the loan servicer, and informed a representative of the loan servicer that the Plaintiff has a buyer under contract with a closing date of March 7, 2023, ready, willing, and able to close within days and pay off the Defendant in full, provided the March 7, 2023, sale is canceled.

5. Monday, March 6, 2023, Mr. Fuller called the Defendant to inquire about the payoff and was told a payoff could not be provided March 6, 2023, but one would be provided within two weeks.
6. Since Plaintiff has requested a payoff statement and tendered paying the Note in full, the Defendant has not sent the Plaintiff a payoff statement. Consequently, the Plaintiff could not close March 7, 2023.
7. Monday, March 6, 2023, at approximately 10 p.m. the Plaintiff's attorney, James Minerve, faxed the trustee, William Attmore, an Attorney of Robertson, Anschutz, Schneid, Crane & Partners, PLLC, the pleadings to this Cause 2023-14624 (the "Pleadings"), including a Certificate of Compliance with Local TRO Notice Rules (the "Certificate"). See Exhibit A
8. The Certificate explained that Plaintiff's counsel would be submitting an application for a TRO to the Harris County District Ancillary Court Tuesday morning, March 7, 2023 and has a TRO hearing set at 9:10 a.m. and will request the Court to sign the TRO Order ex parte in chambers; and the Certificate requested that Mr. Attmore please call James Minerve with the name and phone number of an attorney who could participate in the TRO hearing in-person, via video conference or via phone Tuesday morning, March 7, 2023; and the Certificate included Plaintiff's counsel's phone number and fax. Exhibit B
9. March 7, 2023, at 9:39 a.m. Plaintiff's counsel emailed bond payment instructions to Mr. Fuller. See Exhibit C
10. Following the bond payment instructions the Plaintiff called the Harris County District Clerk to inquire what type of payment the District Clerk accepted to pay the bond. The District Clerk's Office told the Plaintiff that the District Clerk only accepted money orders to pay the bond.
11. March 7, 2023, the Harris County Ancillary Court held a Zoom TRO hearing in the above captioned Cause at 9:45 a.m. Mr. Attmore nor any other attorney for the Defendant appeared at the TRO hearing. Mr. Minerve appeared for the Plaintiff.
12. March 7, 2023 at the TRO Zoom hearing the Plaintiff's counsel requested a \$250 bond. At 10:04 a.m. the Court signed the TRO and stated she would set the bond as requested, \$250. However, the bond was actually set at \$200. See Exhibit D
13. Shortly after 10:04 Plaintiff's counsel's legal assistant called the Mr. Attmore's office to make Mr. Attmore aware of the signed TRO and nominal bond. However, no one answered and the voicemailbox was full.

14. Prior to 10:30 a.m. March 7, 2023, the Plaintiff tendered a \$250 money order to pay the bond and was rejected, because the bond was set at \$200. See Exhibit E
15. March 7, 2023, at 12:30 p.m. the Plaintiff returned and paid the bond with a \$200 money order. See Exhibit F
16. March 7, 2023, Mr. Minerve's Office emailed Mr. Atmore to confirm the March 7, 2023, auction of the Property was canceled. See Exhibit G
17. March 7, 2023, at 6:06 p.m. Mr. Atmore emailed Mr. Minerve, stating that the Property was auctioned at 10:39 a.m. to a third party, because Mr. Atmore considered the TRO ineffective because the bond was not paid until 12:30 p.m. See Exhibit H

Arguments

Violation of Effective TRO Upon Tendering of Bond Payment

18. In the order granting any temporary restraining order or temporary injunction, the court will set the amount of security to be given by the applicant. Tex. R. Civ. P. 684. Because the purpose of a restraining order is not to prevent the collection of the debt but merely to prevent a foreclosure sale, the bond that must be provided by the applicant need not be in the amount of the debt. See *Lee v. Howard Broadcasting Corp.*, 305 S.W.2d 629, 636 (Tex. Civ. App.—Houston 1957, writ dismissed). Nor must the bond be equal to the value of the property or the interest that will accrue while the injunction remains in force. See *Metropolitan Life Ins. v. La Mansion Hotels*, 762 S.W.2d 646, 653 (Tex. App.—San Antonio 1988, writ dismissed moot). The bond amount may be large, where the restraining order will deprive the creditor of a valuable right for a significant period of time. See *Riverdrive Mall, Inc. v. Larwin Mortgage Investors*, 515 S.W.2d 2, 4 (Tex. Civ. App.—San Antonio 1974, writ refused n.r.e.). If the debtor is indigent and the property subject to foreclosure is his or her homestead, the debtor may file an affidavit seeking relief from the requirement of filing a bond. See Tex. Civ. Prac. & Rem. Code § 65.041 et seq.
19. Generally, the amount of a bond rests in the trial court's discretion. *Genssler v. MONTGOMERY County*, 584 S.W.3d 1, 3 (Court of Appeals of Texas, First District, Houston October 7, 2010).
20. Before 10:30 a.m. the TRO became effective upon the Plaintiff tendering the TRO bond to the Harris County District Clerk.
21. As stated, the Plaintiff tendered a \$250 money order to cover a \$200 TRO Bond, which made

the TRO effective.

22. The last paragraph of the Posted TRO states the following: “UPON THE PLAINTIFF POSTING A BOND OF \$200, THE CLERK OF THIS COURT IS DIRECTED TO ISSUE A TEMPORARY RESTRAINING ORDER IN CONFORMITY WITH THE LAW AND THE TERMS OF THIS ORDER.”
23. The tasks of the District Clerk in posting the TRO bond is ministerial in nature. When the Plaintiff tendered the \$250 money order, which was more than enough to pay the bond, the District Clerk was required to electronically publish notice of the effective TRO Order, so that the public could have actual notice of the TRO Bond. However, the District Clerk’s failure to publish the TRO did not diminish the effectiveness of the TRO, nor change the fact that once the Plaintiff did all that was required under Texas Civil Practices and Remedy Code 166 and the signed TRO, the Defendant was imputed with constructive knowledge of the effective TRO, and was thus prohibited from foreclosing.
24. Consequently, the Current Trustee was prohibited at 10:39 a.m. March 7, 2023 from auctioning the Property, because the Trustee is imputed with constructive knowledge of the effective TRO.
25. Because an order setting aside a trustee’s foreclosure sale revives the debt, if there is an ongoing dispute as to the validity of that debt, the order setting aside the sale is a mere interlocutory order not subject to immediate appeal. See *Kaplan v. Tiffany Dev. Corp.*, 69 S.W.3d 212, 217 (Tex. App.—Corpus Christi 2001, no pet.) (when order setting aside foreclosure sale left issues of whether foreclosure was legal and whether note was usurious, order was unappealable interlocutory order).

Respectfully submitted,

/s/ James Minerve

James Minerve
State Bar No. 24008692
13276 N HWY 183, ste. 209
Austin, Texas 78750
(888) 819-1440 (Office)
(210) 336-5867 (Mobile)
(888) 230-6397 (Fax)
jgm@minervelaw.com
Attorney for Plaintiff CLAUDIA
ORELLANA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent to the following in accordance with the Texas Rules of Civil Procedure on this 30th day of March 2023:

William Attmore
Managing Attorney – Texas
Robertson, Anschutz, Schneid, Crane & Partners, PLLC
5601 Executive Drive, Suite 400
Irving, Texas 75038
Phone: 817-873-3080 Ext. 53112
Fax: 817-796-6079
Email: wattmore@raslg.com

/s/ James Minerve

JAMES MINERVE