

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2015-01928-B

SCOTT A. MCNULTY,
Plaintiff

vs.

RESIDENTIAL MORTGAGE LOAN TRUST 2013-TT2,
By U.S. Bank National Association,
Not In its Individual Capacity, But Solely As Legal Title Trustee,
Defendant

**MEMORANDUM AND ORDER ON
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Scott A. McNulty ("McNulty") commenced this action on November 30, 2015. [D. 1]. The sole defendant is Residential Mortgage Loan Trust 2013-TT2 ("RMLT"), the current holder of a note and mortgage on 10 Brookside Lane, Amesbury, Massachusetts (the "property"). McNulty and his then-wife gave the mortgage on September 29, 2004 to secure a promissory note in the amount of \$287,000. McNulty last paid on the mortgage loan in 2005. When McNulty filed this action on November 30, 2015, a foreclosure sale of the property was scheduled for the next business day, December 1, 2015. McNulty's motion for a temporary restraining order [D. 4], enjoining the scheduled foreclosure, was allowed by the court

(Fahey, J.). A short order of notice issued returnable on December 8, 2015, for a hearing on McNulty's motion for a preliminary/permanent injunction enjoining RMLT from going forward to a foreclosure sale of the property, which is now scheduled, subject to this court's decision on the requested preliminary/permanent injunction, for December 15, 2015. A hearing was held on December 8, 2015. McNulty was present and provided two documents for the court's consideration. RMLT was present by counsel, and submitted a written opposition to McNulty's request for a preliminary/permanent injunction, along with an affidavit and numerous exhibits. [D. 6, 7]. For reasons discussed below, McNulty's motion for a preliminary/permanent injunction enjoining RMLT from foreclosing on the property is **DENIED**.

DISCUSSION

The court's consideration of McNulty's request for a preliminary injunction is governed by the well-established standards for the issuance of preliminary injunctions. In *John T. Callahan & Sons, Inc. v. City of Malden*, 430 Mass. 124, 130-131 (1991) (quoting *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 87-88 (1984)), the Supreme Judicial Court articulated the well-established standard for issuance of injunctive relief as follows:

[T]o issue injunctive relief correctly, a judge initially must consider whether the plaintiff has demonstrated that without the relief he would suffer irreparable harm, not capable of remediation by a final judgment

in law or equity. *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). The plaintiff also must show that there is a likelihood that he would prevail on the merits of the case at trial. The judge then must balance these two factors against the showing of irreparable harm which would ensue from the issuance, or the denial, of an injunction and the 'chance of success on the merits' presented by the defendant. *Id.* at 617. An injunction may issue properly only if the judge concludes that the risk of irreparable harm to a plaintiff, in light of his chances of success on his claim, outweigh[s] the defendant's probable harm and likelihood of prevailing on the merits of the case.

The court finds that McNulty has not established a likelihood of success on the merits of his claim against RMLT. Granted, the chain of title of the mortgage in this case is lengthy and complicated. Over a year ago, in October 2014, the housing court found defects in the chain of title of the mortgage that precluded foreclosure. The housing court also found defects in notice required by the mortgage. In allowing McNulty's motion for a temporary restraining order, this court (Fahey, J.) noted that the prior summary judgment ruling of the housing court is in McNulty's favor. That is certainly correct, but the appearance of counsel for RMLT and its opposition papers establish that the title and notice defects that existed in October 2014 no longer exist. RMLT has now established a good chain of title of the mortgage, properly recording all assignments that now put the mortgage (and note) in RMLT's hands. RMLT also started anew on the foreclosure process and corrected any notice defects.

McNulty submitted an affidavit by an attorney suggesting that a filing in the

land court action that determined that neither McNulty nor his former wife were entitled to the benefits of the Servicemember's Civil Relief Act. The court agrees with RMLT that any defects in that case does not affect the bona fides of the pending foreclosure sale. McNulty also claims he requested a modification of his mortgage loan in January 2015, and no action was ever taken by RMLT. The record does not support McNulty's claim. He did not ask for a modification. He asked for an alternative to foreclosure such as a short sale or deed-in-lieu of foreclose. RMLT informed McNulty's counsel that it could accept such an alternative, and McNulty never pursued the matter further.

In sum, the record reflects that RMLT has corrected the defects that prevented foreclosure in 2014, and has now complied with all statutory and mortgage requirements for foreclosure to proceed. McNulty has presented nothing to the court to permit this court to conclude that he is likely to show that the foreclosure of the property is not in accordance with law. "The sine qua non of this [PI] inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *New Comm Wireless Servs., Inc. v. SprintCom Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). In any event, a balancing of harms does not favor McNulty. He has maintained possession of the property for ten years, despite not making a single

mortgage payment during that time.

ORDER

McNulty's motion for a preliminary injunction and/or permanent injunction is **DENIED**. The scheduled foreclosure may take place on December 15, 2015, or on a date thereafter in accordance with the law and power of sale. As McNulty's claim in his complaint is mooted by the denial of the requested relief, and no other cause of action is stated, judgment of dismissal shall enter.


Timothy Q. Feeley
Associate Justice of the Superior Court

December 9, 2015