

California HOBR – When is a Borrower Entitled to Attorneys’ Fees After Enjoining a Foreclosure Sale?

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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, searching for clarification on many of its unclear provisions. One issue ripe for interpretation is under what circumstance is the borrower deemed 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 recent Court of Appeals decision in *Monterossa v Superior Court*², it is now equally as clear that borrowers obtaining a preliminary injunction under HOBR are entitled to their fees in bringing the injunction. But, is the granting of a temporary restraining order (“TRO”) considered injunctive relief for purposes of obtaining attorney fees under HOBR? If so, what is to preclude borrowers from systematically applying for TROs (which are often unopposed and usually granted) for the express purpose of funding the litigation with an award of attorneys’ fees obtained due to the preparation of the Complaint and other pre-litigation matters?

To determine whether obtaining a basic TRO entitles borrowers to a fee award requires a closer examination of Section 2924.12(i) and the *Monterossa* decision. In *Monterossa*, the court addressed whether Section 2924.12(i) allows for an interim award of attorneys’ fees after the borrower obtains a preliminary injunction as a result of a violation of *Civil Code* §§ 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17. In *Monterossa*, the Borrowers/Petitioners filed an ex parte application for a TRO and request for issuance of an order to show cause regarding a preliminary injunction, seeking to prevent the trustee's sale of their residence. At the preliminary injunction hearing, the court found (on undisputed evidence since the lender offered no evidence to oppose the borrowers’ claim) that the lender had engaged in “dual tracking” by recording a notice of trustee’s sale while engaged in the loan modification process (prohibited by *Civil Code* §2924.6(c)) and granted the preliminary injunction. Thereafter, Petitioners filed a motion for attorney fees and costs, which the superior court denied, reasoning that the language of the applicable statute was consistent with the award of attorney fees at the conclusion of the action.

The Court of Appeal reversed and concluded that a borrower who obtains a preliminary injunction under Section 2924.12 is a prevailing borrower within the meaning of the statute. In short, trial courts may award attorney fees upon issuance of injunctive relief, which includes the issuance of a preliminary injunction, as well as a permanent injunction. The *Monterossa* court opined that the statute refers to “injunctive relief,” which plainly incorporates both preliminary

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.

and permanent injunctive relief. However, *Monterossa* did not address the issue of whether the statute also provided for such an award where the borrower obtains a TRO, *but no preliminary injunction*. Although there are similarities between a TRO and a preliminary injunction, a TRO does not fall within the “injunctive relief” set forth in the statute which would entitle a prevailing borrower to attorney fees.

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 notice may be dispensed as its purpose is to preserve the status quo³;
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.

The differences between the TRO and a preliminary injunction demonstrate that a borrower who obtains only a TRO rather than a preliminary injunction or permanent injunction, has not obtained “injunctive relief” and has not “prevailed” under *Civil Code § 2924(i)* as interpreted by *Monterossa*. Granting of a TRO does not reflect on the merits of the underlying dispute, and does not qualify the enjoining party to “prevailing party” status. *Thomas v. Quintero*, (2005) 126 Cal.App.4th 635, 652, 664, fn. 21.

In the context of what *Monterossa* recognizes as a unique statutory scheme of HOBR, the best a plaintiff can hope for is a preliminary injunction. HOBR provides an opportunity for a servicer, mortgagee, trustee, beneficiary or authorized agent to correct and remedy a HOBR violation, which gives rise to the action of injunctive relief, and then move to dissolve the preliminary injunction pursuant to Section 2924.12(i). This compliance with HOBR could potentially moot the borrower’s request for a permanent injunction. Given that the borrower has effectively prevailed in the action by obtaining a preliminary injunction forcing compliance with the statute, the Legislature must have intended to authorize attorney fees and costs pursuant to Section 2924.12(i). *Monterossa, supra*, at 754. However, that same rationale is not present in connection with a TRO that can be issued on an ex parte basis, without a bond, where the arguments have not been fully presented, where a defendant may not have appeared in the action yet, and which was only intended to last pending the hearing on the preliminary injunction. A borrower might obtain a TRO for a short period of time and then fail to obtain a preliminary injunction because of the failure to demonstrate a likelihood of success on the merits with respect to an alleged

³ Under current California ex parte requirements, a borrower could file suit Tuesday morning, give notice by Tuesday at 10:00 a.m. for an ex parte TRO hearing the next day at 8:30 a.m. Given the tight time frame, many servicers are not able to hire counsel fast enough to oppose the TRO hearing.

HOBRR violation. A borrower in that situation cannot be deemed a “prevailing borrower” because they would not have obtained a preliminary injunction forcing compliance with the statute as set forth in *Monterossa*.

In sum, if attorney’s fees are allowable for the mere issuance of a TRO in a HOBRR matter, then plaintiffs in these types of cases would receive an absolute windfall at the outset of the matter (1) with little to no evidentiary proof of a HOBRR violation; (2) without an objection by defendants who have not yet retained counsel, or who are unable to prepare an opposition and/or attend the TRO due to the short notice of the hearing; and (3) without allowing defendants an opportunity to remedy the alleged violation as contemplated by HOBRR. Not only would this be unfair, but it also was not what the Legislature intended.

Final thoughts and recommendations:

While *Monterossa* held that attorneys’ fees are *available* to borrowers who obtain a preliminary injunction, it does not necessarily mean that every borrower receiving a preliminary injunction will also get a fee award. There are several additional considerations to keep in mind. First, was the injunction granted based on a HOBRR claim? Most California cases involve a hybrid of HOBRR and non-HOBRR claims. It is important for defense counsel to clarify under which theory the court is granting the injunction. We recommend raising this in the opposition to the OSC re: Preliminary Injunction or at the injunction hearing, rather than after the court has granted the injunction. Second, it is key to clarify whether the injunction is conditioned upon the posting of a bond. If so, and the borrower fails to timely post the bond, one could argue that the preliminary injunction never took effect and, therefore, the borrower is not the prevailing party under Section 2924.12(i). Lastly, the requested attorneys’ fees must be “reasonable.” At most, a prevailing borrower would only be entitled to fees incurred in obtaining that relief. We have seen many borrowers seek excessive litigation and pre-litigation fees in obtaining an injunction. Arguing that the fees must be “reasonable” can help limit the fee recovery.

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