

E.3.2 Sample Federal Court Motion for Temporary Restraining Order with Brief, Supporting Papers, and Order

E.3.2.1 Introduction

This set of documents seeks a temporary restraining order in federal court against a non-judicial foreclosure, on the ground that the consumer rescinded the transaction under TILA. These documents are adapted from a set contributed by Karen Merrill Tjapkes, a Michigan attorney. The TILA complaint that was filed in the case is included on the companion website to this book. Practitioners should check local rules, which may require litigants to present additional forms or papers when seeking a TRO.

Appendix E.3.1 is another sample set of federal court TRO papers. The companion website for this book includes a third set of federal TRO papers, contributed by Brian Mildenberg, a Pennsylvania attorney, for use in a judicial foreclosure state. Practitioners should consult § 8.4.2, *supra*, before seeking federal injunctive relief against a state judicial foreclosure.

E.3.2.2 Motion for Temporary Restraining Order with Request for Expedited Consideration

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

[plaintiff][CONSUMER]
Plaintiff,

[vs]

[defendant]LONG BEACH MORTGAGE
COMPANY, WASHINGTON MUTUAL,
and AIM FINANCIAL, INC.

Defendants.

**MOTION FOR TEMPORARY RESTRAINING ORDER
EXPEDITED CONSIDERATION REQUESTED**

Plaintiff, [Consumer], by counsel, moves this court for a temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b) enjoining defendants, Long Beach Mortgage

Company and Washington Mutual, from proceeding with the Sheriff's Sale scheduled for March 14, 2007.

1. Plaintiff filed this action on or about March 2, 2007, alleging violations of the Truth in Lending Act, the Real Estate and Settlement Procedures Act, the Credit Repair Organizations Act and state law, and seeks rescission of the mortgage and money damages.

2. Notwithstanding plaintiff's rescission of the loan and the filing of this lawsuit, defendants have declared the mortgage in default and have begun foreclosure proceedings, advertising that plaintiff's home will be sold at a Sheriff's Sale on March 14, 2007.

3. Plaintiff's counsel has attempted to contact defendants' counsel in the foreclosure action, and their office has indicated that they do not have the authority to adjourn or cancel the sheriff's sale.

4. Plaintiff's counsel has not yet been able to effect service of the Summons and Complaint in this matter.

5. A temporary restraining order is appropriate in that:

A. Plaintiff is likely to succeed on the merits of her claim.

B. Unless defendants' conduct is enjoined and plaintiff granted her requested relief, plaintiff will be irreparably injured in that she will lose her home, potentially becoming homeless, and her home will be sold without proper adjudication of her claims in this lawsuit.

C. If the Sheriff's Sale is not enjoined, greater injury will be inflicted upon plaintiff in the loss of her home than upon defendants.

D. The public interest will be served by allowing plaintiff to remain in the home, preventing her from potentially becoming homeless.

6. Because the Sheriff's Sale is scheduled for March 14, 2007, there is not sufficient time to effect service of this motion on Defendants or schedule a hearing prior to the Sheriff's Sale.

7. The bond requirements of Federal Rule of Civil Procedure 65(c) should be waived because of plaintiff's fixed income.

8. The factual and legal basis in support of plaintiff's request herein are further set forth in the attached Brief in Support of Plaintiff's Motion for Temporary Restraining Order, Plaintiff's Affidavit, and Plaintiff's Counsel's Certification.

WHEREFORE, Plaintiff respectfully requests that this Court issue a Temporary Restraining Order enjoining the Defendants from pursuing non-judicial foreclosure, including the Sheriff's Sale scheduled for Wednesday, March 14, 2007, and for such other relief as this Court deems just and equitable.

[Attorney]
Dated: [Date]

E.3.2.3 Plaintiff's Affidavit in Support of Motion for Temporary Restraining Order

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
STATE OF MICHIGAN
COUNTY OF KENT

[CONSUMER]
Plaintiff,

[vs]

[defendant]LONG BEACH MORTGAGE COMPANY, WASHINGTON MUTUAL, and AIM FINANCIAL, INC.
Defendants.

PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

[Consumer], being duly sworn, states the following:

1. I am the Plaintiff in this action.
2. I make this affidavit based on personal knowledge, that I am competent to testify to the facts set forth herein and if called as a witness would so testify.
3. I reside at [Address], Grand Rapids, Michigan. I purchased my home in 1967.
4. I live on a fixed income of Social Security benefits in the amount of \$926.00 per month and a pension payment in the amount of \$142.50 per month.
5. I refinanced my home with the assistance of AIM Financial, Inc. with Long Beach Mortgage Company on or about April 24, 2006. I send my payments to Washington Mutual.

6. At the closing, I was given a “Notice of Right to Cancel” indicating that I had three days to cancel the transaction; however none of the dates were filled in on the document.

7. On January 31, 2007, my attorney sent a rescission notice to Long Beach Mortgage Company and Washington Mutual.

8. I understand Long Beach Mortgage Company and Washington Mutual have refused to honor that rescission notice.

9. Further, I understand that Long Beach Mortgage Company and Washington Mutual have decided that I am in default on my mortgage and have scheduled a Sheriff’s Sale for March 14, 2007.

10. If my home is sold at the Sheriff’s Sale on March 14, 2007, I do not have anywhere to go and I do not have the financial resources to move. I am worried that, if the sale goes through, I will become homeless.

FURTHER AFFIANT SAYETH NOT.

[Consumer]

Dated: [Date]

E.3.2.4 Attorney Statement in Support of Motion for Temporary Restraining Order

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

[plaintiff][CONSUMER]
Plaintiff,

[vs]

[defendant]LONG BEACH MORTGAGE
COMPANY, WASHINGTON MUTUAL,
and AIM FINANCIAL, INC.
Defendants.

**ATTORNEY STATEMENT IN SUPPORT OF MOTION FOR TEMPORARY
RESTRAINING ORDER**

[Attorney] states as follows:

1. I am the attorney for Plaintiff [Consumer] in this matter.

2. I have made the following attempts to contact Defendants to provide notice of this action and resolve the issue of the sheriff's sale without the requested temporary restraining order:
 - A. I informed Defendants' foreclosure counsel, [Defendant's Attorney], that we had rescinded the mortgage, intended to file this lawsuit and requesting that they adjourn the sheriff's sale by facsimile dated February 28, 2007. I did not receive a response.

 - B. I provided Defendants' foreclosure counsel, [Defendant's Attorney], with a copy of the pleadings filed in this matter by facsimile dated March 6, 2007. I did not receive a response.

 - C. On March 9, 2007, I spoke with a paralegal at [Defendant's Attorney] who indicated that they did not have authority to adjourn or cancel the sheriff's sale.

3. Due to the proximity of the Sheriff's Sale date and because Defendants have failed to provide their attorneys with authority to adjourn the Sheriffs Sale, it is necessary to file this Motion for a Temporary Restraining Order.

I declare under penalty of perjury that the foregoing is true and correct.

[Attorney]
Dated: [Date]

E.3.2.5 Brief in Support of Motion for Temporary Restraining Order

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

[CONSUMER]
Plaintiff,

[vs]

[defendant]LONG BEACH MORTGAGE

COMPANY, WASHINGTON MUTUAL,
and AIM FINANCIAL, INC.
Defendants.

BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff, [Consumer], has filed the instant lawsuit against defendants Long Beach Mortgage Company, Washington Mutual, and AIM Financial, Inc., alleging violations of the Truth in Lending Act, the Real Estate and Settlement Procedures Act, the Credit Repair Organizations Act and state law arising from a mortgage loan between the parties. Because defendants Long Beach Mortgage Company and Washington Mutual have failed to adjourn the Sheriff's Sale scheduled for March 14, 2007, plaintiff has filed a Motion for Temporary Restraining Order.

I. FACTUAL BACKGROUND

[Consumer] purchased the home located at [Address], Grand Rapids, Michigan in 1967. In 2006, [Consumer] was contacted by AIM Financial, Inc. regarding refinancing her mortgage loan. The representatives of AIM Financial, Inc. led [Consumer] to believe they could give her a lower interest rate and payments around \$500 per month while paying off her mortgage and some other debts.

AIM Financial, Inc. provided [Consumer] with a Good Faith Estimate showing that she would receive a fixed rate mortgage in the amount of \$76,000 with payments of \$547.10 per month for thirty years. Based upon the representations of AIM Financial, Inc. and its agents, [Consumer] decided to refinance on the terms that they promised.

The new mortgage loan originated by Long Beach Mortgage Company closed on or about April 24, 2006. The terms of the loan included the following:

- a. A total loan amount of \$80,750;
- b. An "amount financed" of \$77,424.60;
- c. A "finance charge" of \$255,877.80, including prepaid finance charges in the amount of \$3,325.40;
- d. A disclosed annual percentage rate of 10.359% and an initial note rate of 8.5% that will never decrease but may increase to 14.5%.
- e. Monthly payments of \$591.97 per month, increasing to \$699.77 per month after twenty-four months.
- f. An adjustable rate rider permitting the lender to change the interest rate and a penalty for prepayment.

g. Fees and closings costs, including but not limited to a broker underwriting fee to AIM Financial Inc. of \$400.00, a broker origination fee to AIM Financial, Inc. in the amount of \$1,211.00, a processing fee to AIM Financial, Inc. in the amount of \$500.00.

h. AIM Financial Inc. also received a premium yield adjustment, also known as a yield spread premium, in the amount of \$1,211.25 directly from Long Beach Mortgage Company.

[Consumer] did not receive the closing documents prior to closing and at the closing [Consumer] was rushed through signing the documents. [Consumer] did not have any reason to suspect that the documents which she would sign at closing would differ in any way from the previous estimates she had been provided by AIM Financial, Inc. However, the mortgage loan that [Consumer] ended up with has a much higher payment and is an adjustable rate mortgage. Additionally, the application that [Consumer] signed at closing inflated [Consumer]'s income above that which she had reported to AIM Financial, Inc., which she did not realize until after she was able to review the documents later.

The mortgage loan that [Consumer] ended up with has a much higher payment and is an adjustable rate mortgage, which [Consumer] did not know until after she was able to review the documents later.

At the closing, [Consumer] was given a copy of the Truth in Lending Act's required "Notice of Right to Cancel," indicating that she had three days to cancel the transaction. However, [Consumer]'s copy of the Notice of Right to Cancel was not completed and did not contain the date of closing or the date by which she could cancel; instead the form simply has blank lines (Exhibit 1).

Upon knowledge and belief, Washington Mutual has taken assignment of the mortgage loan and is currently servicing the loan.

On January 31, 2007, [Consumer], through counsel, sent a letter to Long Beach Mortgage Company and Washington Mutual notifying them that she was rescinding the loan (Exhibit 2). As of this date, Long Beach Mortgage Company and Washington Mutual have failed to respond to the rescission letter and instead have initiated non-judicial foreclosure proceedings. A foreclosure sheriff's sale is scheduled for March 14, 2007 (Exhibit 3).

II. ARGUMENT

In considering injunctive relief, the court must consider four factors:

1. Whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits;
2. Whether the plaintiff has shown irreparable injury;

3. Whether the issuance of an injunctive order would cause substantial harm to others; and

4. Whether the public interest would be served by issuing the injunction.

Friendship Materials Inc. v. Michigan Brick Inc., 679 F.2d 100, 102 (6th Cir. 1982), citing *Mason v. County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977). In this case, Plaintiff's request meets all four of these requirements.

A. LIKELIHOOD OF SUCCESS ON THE MERITS

In this matter, defendants have violated the disclosure requirements of the Truth in Lending Act as well as state law. Plaintiff has rescinded the mortgage loan, but Defendants have failed to honor that rescission.

Specifically, the Truth in Lending Act mandates that consumers have a right to rescind a transaction when it is a consumer credit transaction in which a non-purchase money lien or security interest is placed on the consumer's principal dwelling. 15 U.S.C. § 1635. The lender must give the consumer a notice regarding the right to rescind. 12 C.F.R. § 226.23(b)(1). The notice must include various information, including the date the rescission period expires. 12 U.S.C. § 226.23(b)(1)(v).

Usually a consumer has three days to exercise their right of rescission, however, if a lender fails to give the required disclosures the right of rescission can be extended for up to three years. 15 U.S.C. § 1635(f). A failure to include the date the rescission period expires has been found to be a material violation of the Truth in Lending Act, and as such, triggers the consumer's extended right to rescind the transaction. See *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699 (9th Cir. 1986) (rescission notice that omitted expiration date, although it stated that the right expired after three days, was a violation); *Williamson v. Lafferty*, 698 F.2d 767 (5th Cir. 1983) (failure to fill in expiration date violated TILA); *Reynolds v. D & N Bank*, 792 F. Supp. 1035 (E.D. Mich. 1992) (creditor's failure to fill in expiration date was a violation); *New Maine Nat'l Bank v. Gendron*, 780 F. Supp. 52 (D. Me. 1991) (rescission right is extended when expiration date has been omitted); *Armstrong v. Nationwide Mortg. Plan*, 288 B.R. 404 (Bankr. E.D. Pa. 2003) (notice lacked date of transaction as well as deadline for rescission).

In this case, the Notice of Right to Cancel provided to plaintiff consumer failed to include the necessary dates, including the date on which the rescission date expired (Exhibit 1). Because the notice is flawed, plaintiff has a continuing right to rescind the transaction which she exercised by letter on January 31, 2007 (Exhibit 2). Although the defendants have failed to take the necessary steps to reflect it, their security interest in the property is terminated under 12 U.S.C. § 1635 and they should not be permitted to proceed with the scheduled foreclosure sheriff's sale.

B. IRREPARABLE INJURY

If a temporary restraining order is not granted, plaintiff will suffer an irreparable injury in that she will lose the ownership of her home. The risk is neither remote or a mere possibility; rather, it is immediate in nature and very likely to happen on March 14, 2007. The loss of the home would be devastating to plaintiff who is a senior citizen living on a fixed income and would very likely render her homeless. If plaintiff loses her home, she can never be adequately compensated by monetary damages. In addition, if Court ultimately finds that Plaintiff has validly rescinded her loan, but the foreclosure sale has proceeded as scheduled, it will be much more difficult to afford effective relief to the Plaintiff, because the home will have passed to a third-party buyer. The foreclosure sale must be enjoined to preserve the *status quo* pending adjudication of this case on the merits.

Thus, because the harm to plaintiff will be immediate an irreparable, this Court should grant Plaintiff's motion for a temporary restraining order.

C. BALANCE OF HARMS

The harm plaintiff will suffer if the property goes to foreclosure outweighs any harm to the defendants. If plaintiff succeeds on the merits of her case, she will remain the owner of the property at issue. If not, defendants would be free to continue with their foreclosure proceedings. There is a sufficient equity cushion in the home to protect defendants fully from any slight loss that might possibly be caused by the delay. Thus, Defendant will ultimately lose nothing in affording plaintiff the opportunity to have these claims fully adjudicated.

D. THE PUBLIC INTEREST

Plaintiff submits the public interest favors the granting of the requested relief. The public has an interest in the orderly administration of justice with respect to this transaction which will be defeated if the relief sought is not granted. Public policy favors the proper adjudication of claims of predatory lending against homeowners. Additionally, public policy dictates that the plaintiff should not be rendered homeless without a full adjudication of her case on the merits.

E. NO BOND SHOULD BE REQUIRED

Rule 65 requires security for a temporary restraining order only in such sum as the Court deems proper. In this case, to require a bond in any substantial amount is effectively to deny plaintiff the relief requested. Plaintiff is of limited economic means and her income consists of \$926 per month in Social Security benefits and \$142.50 from a pension. Her fixed expenses are roughly equivalent to her income. In addition, defendants are already protected by their first-lien security interest in plaintiff's home, so additional security in the form of a bond should be unnecessary.

However, if the court determines it must establish a bond, the plaintiff recommends that her bond be set at the amount of her monthly house payment, \$591.97.

III. CONCLUSION

Plaintiff has shown a temporary restraining order should be issued because of her likelihood of success on the merits, the irreparable harm that will result if the order is not granted, the relative lack of harm to defendants if the order is granted, and the order will serve the public interest. Accordingly, plaintiff requests that this Court grant the Motion for Temporary Restraining Order enjoining any foreclosure sale or sheriff's sale pending an adjudication of the plaintiff's complaint.

[Attorney]

Dated: [Date]

E.3.2.6 Temporary Restraining Order

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF MICHIGAN

[plaintiff][CONSUMER]
Plaintiff,

[vs]

[defendant]LONG BEACH MORTGAGE
COMPANY, WASHINGTON MUTUAL,
and AIM FINANCIAL, INC.
Defendants.

TEMPORARY RESTRAINING ORDER

In accordance with the Opinion issued on this date:

IT IS HEREBY ORDERED that Plaintiff [CONSUMER]'s Ex Parte Motion for Temporary Restraining Order (Dkt. No. ___) is **GRANTED**, effective Monday, March 12, 2007 at 11:45 a.m., to the extent that this Temporary Restraining Order issues for the purpose of preserving the *status quo* pending a hearing on the issue of whether a preliminary injunction should issue.

IT IS FURTHER ORDERED that Defendants and their agents, officers, employees, and assigns, including the Kent County Sheriff's Department and any court officers of Kent County Circuit Court, are enjoined from selling [Address], Grand Rapids, Michigan in a Sheriff's sale pending hearing of this matter.

IT IS FURTHER ORDERED that bond in this issue is waived.

IT IS FURTHER ORDERED that a hearing is scheduled for _____, at 10:00 a.m. before _____ at [Address].

[Judge]

[Date]