IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY KUMI, **Plaintiff,** **v.** **UNITED ASSET MANAGEMENT, LLC and FCI LENDER SERVICES, INC.,** **Defendants.**	**CIVIL ACTION FILE** **NO. 1:21-CV-4949-MHC**

ORDER

This case comes before the Court on Plaintiff Mary Kumi ("Kumi")'s Motion for Temporary Restraining Order and Preliminary Injunction[1] ("Pl.'s Mot.") [Doc. 3].

I. BACKGROUND

According to the allegations in her Complaint, Kumi has owned her home in Auburn, Georgia, for sixteen years. Compl. [Doc. 1] ¶ 7. In November 2005, Kumi obtained her first and second mortgage from IndyMac Bank, F.S.B.

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[1] Because Defendants have received notice of Plaintiff's motion, have prepared a written response thereto [Doc. 6], and appeared at a Zoom hearing conducted by the Court on December 6, 2021, the Court will treat Plaintiff's motion as a Motion for Preliminary Injunction. See FED. R. CIV. P. 65(a).

("IndyMac") for her home. Id. ¶¶ 8-9. The principal balance of the first mortgage was for $175,343 and the second mortgage was for $43,836. Id. ¶¶ 10-11. Kumi struggled to stay current on her mortgages for years, and decided to "walk away" from her home until she was offered an opportunity to modify her loan on her first mortgage in 2013 by Ocwen Loan Servicing, LLC ("Ocwen"). Id. ¶¶ 12-13. Kumi then began payments based upon the modification to her first mortgage with Ocwen and has remained current with those payments to date. Id. ¶ 14.

It was Kumi's understanding that the modification with Ocwen resolved all pending issues with respect to both her first and second mortgages, which understanding was bolstered by the fact that Kumi does not recall receiving monthly mortgage statements or any other correspondence regarding her second mortgage for nearly 10 years. Id. ¶¶ 15-16. That changed when Kumi received a "Borrower Welcome Letter" from Defendant FCI Asset Lender Services, Inc. ("FCI") dated May 20, 2021, which stated that the serving of the "Promissory Note" had been transferred to FCI from Sortis Financial, Inc., effective May 7, 2021; the letter claimed a debt amount of $87,344.77. Id. ¶ 17. Kumi was not familiar with Sortis Financial, and the letter failed to provide identifying information about the original loan terms. Id. ¶ 18.

Kumi then received another "Welcome Letter" dated June 11, 2021, that notified Kumi that Defendant United Asset Management, LLC ("UAM") was now the owner of the "2nd lien mortgage" on her property, and that the loan had been sold to UAM on March 1, 2021—also referencing Sortis Financial as the previous servicer, and also failing to provide any information to identify the loan. Id. ¶ 19.

These letters prompted Kumi to contact PHH Mortgage Corporation, the servicer of her first mortgage, to obtain verification as to the status of her second mortgage; she received a reply stating: "Thank you for the recent communication regarding the account referenced above in which you inquired if the second lien is active and the status of the second lien. We are unable to locate the second lien with the Deed amount of $43,836.00." Id. ¶ 23. Kumi also contacted both OneWest/CIT ("CIT"), the company that acquired the bulk of IndyMac's assets from FDIC receivership, and Regions Bank ("Regions"), the last servicer she dealt with on the second mortgage in 2010. Id. ¶ 26. CIT reported that the second mortgage was transferred in 2006, but could not find the transferee's name, and Regions was unable to locate any record of the loan in the system. Id. Kumi only then confirmed that the second mortgage has been transferred by going to the Gwinnett County courthouse, where she found an assignment had been recorded on October 15, 2021. Id. ¶ 30.

On August 11, 2021, Defendants' foreclosure counsel sent Kumi a letter demanding her to cure an alleged default of $49,971.60. Id. ¶ 24. On August 17, 2021, FCI sent the first monthly mortgage statement to Kumi after it acquired the servicing of the loan in May 2021. Id. ¶ 25. On or around November 2, 2021, foreclosure counsel sent a notice scheduling Kumi's home for foreclosure on December 7, 2021. Id. ¶ 27.

On December 3, 2021, Kumi filed a Complaint [Doc. 1] against UAM and FCI (collectively "Defendants") asserting the following claims: breach of contract and unauthorized amounts charged (Count One), violations of the Truth in Lending Act, 15 U.S.C. § 1601 et seq. ("TILA") (Count Two), violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1691 et seq. ("FDCPA") against FCI (Count Three), wrongful attempted foreclosure (Count Four), and attorney's fees (Count Five). Compl. ¶¶ 37-82. Kumi seeks to enjoin Defendant from proceeding with foreclosure of the second mortgage, a declaratory judgment that Defendants are not entitled to interest and fees during the period when she was not receiving a mortgage statement, and damages under TILA and the FDCPA. Id. at 31. Kumi also filed her Motion for Preliminary Injunction that same date, which seeks to enjoin the foreclosure sale on December 7, 2021, and during the pendency of her lawsuit. Pl.'s Mot. at 1.

In their Response in Opposition to Motion for Preliminary Injunction ("Defs.' Resp.") [Doc. 6], Defendants claim they "do not currently have access to copies of all prior monthly mortgage statements and correspondence sent to Plaintiff by prior servicers" and cannot refute Plaintiff's allegations "[w]ithout being given a reasonable opportunity to obtain these documents." Defs.' Resp. at 8-9. However, rather than agree to postpone the scheduled foreclosure, Defendants propose allowing the foreclosure to proceed and that any Deed Under Power of Sale "be held in escrow and not recorded in the real estate records" until the claims in the Complaint can be resolved. Id. at 10.

At the hearing conducted on Kumi's Motion for Preliminary Injunction on December 6, 2021, Defendants' counsel admitted that it was likely that Kumi, at a minimum, could establish that Defendants committed one or more violations of TILA through their actions since obtaining rights to the second mortgage in question.

II. LEGAL STANDARD

In order to obtain a preliminary injunction, a plaintiff must demonstrate: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that granting the relief

would not be adverse to the public interest. Scott v. Roberts, 612 F.3d 1279, 1290 (11th Cir. 2010); Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1225-26 (11th Cir. 2005). A preliminary injunction is an extraordinary remedy which a court should grant only when the movant clearly carries the burden of persuasion as to each of the four prerequisites. Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003).

"The likelihood of success on the merits is generally considered the most important of the four factors." Furman v. Cenlar FSB, No. 1:14-CV-3253-AT, 2015 WL 11622463, at *1 (N.D. Ga. Aug. 26, 2015) (citation and quotation omitted); see also Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986) ("Ordinarily the first factor is the most important."). The purpose of a preliminary injunction is to maintain the status quo until the court can enter a final decision on the merits of the case. Bloedorn v. Grube, 631 F.3d 1218, 1229 (11th Cir. 2011).

III. ANALYSIS

A. Likelihood of Success on the Merits

Among other arguments, Kumi contends that Defendants failed to timely and properly communicate with her as required by TILA. Pl.'s Mot. at 14-15. The Court finds that Kumi has demonstrated a likelihood of success on the merits as to

one or more violations of the TILA. First, TILA requires Defendants to transmit certain information to the person or entity obligated on the mortgage loan:

> The creditor, assignee, or servicer with respect to any residential mortgage loan shall transmit to the obligor, for each billing cycle, a statement setting forth each of the following items, to the extent applicable, in a conspicuous and prominent manner:
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> (A) The amount of the principal obligation under the mortgage.
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> (B) The current interest rate in effect for the loan.
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> (C) The date on which the interest rate may next reset or adjust.
>
> (D) The amount of any prepayment fee to be charged, if any.
>
> (E) A description of any late payment fees.
>
> (F) A telephone number and electronic mail address that may be used by the obligor to obtain information regarding the mortgage.
>
> (G) The names, addresses, telephone numbers, and Internet addresses of counseling agencies or programs reasonably available to the consumer that have been certified or approved and made publicly available by the Secretary of Housing and Urban Development or a State housing finance authority (as defined in section 1441a-1 of Title 12).
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> (H) Such other information as the Board[2] may prescribe in regulations.

15 U.S.C. § 1638(f)(1). Additionally, 12 C.F.R. § 1026.41(a)(2) requires:

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[2] The reference to "Board," although contained in the statute, is probably meant to refer to the Bureau of Consumer Financial Protection. See 15 U.S.C. § 1638(f)(1)(H) n.2 & 15 U.S.C. § 1602(b).

> Periodic statements. A servicer of a transaction subject to this section shall provide the consumer, for each billing cycle, a periodic statement meeting the requirements of paragraphs (b), (c), and (d) of this section. If a mortgage loan has a billing cycle shorter than a period of 31 days (for example, a bi-weekly billing cycle), a periodic statement covering an entire month may be used. For the purposes of this section, servicer includes the creditor, assignee, or servicer, as applicable. A creditor or assignee that does not currently own the mortgage loan or the mortgage servicing rights is not subject to the requirement in this section to provide a periodic statement.

12 C.F.R. § 1026.41(a)(2).

It appears from the record currently before the Court that Defendants failed to transmit all of the information required in 15 U.S.C. § 1638(f)(1) and 12 C.F.R. § 1026.41(a)(2) to Kumi in May, June, or July of 2021. Compl. ¶¶ 25, 53, 54. It was not until the middle of August that Defendants sent the first monthly mortgage statement—which was after the loan had been referred to foreclosure counsel. Id. Both in their written response and during the motion hearing, Defendants admitted their failure to comply with TILA's periodic statement requirement. See Defs.' Resp. at 8-10 (Defendants conceding that they "were unable to gather all documents necessary to refute Plaintiff's claims that the Defendants, and their predecessor servicers – one or more of which are now defunct – failed to comply with the requirements of TILA. . . ." and that they "cannot refute Plaintiff's averments that the prior servicers failed to deliver those monthly statements," later referring to the TILA requirements as "perceived technicalities.").

Additionally, the Court finds that it appears that UAM did not comply with the requirements for the substance of its disclosure. 12 C.F.R. § 1026.39(d) states, in pertinent part:

> ***Content of required disclosures***. The disclosures required by this section shall identify the mortgage loan that was sold, assigned or otherwise transferred, and state the following, except that the information required by paragraph (d)(5) of this section shall be stated only for a mortgage loan that is a closed-end consumer credit transaction secured by a dwelling or real property other than a reverse mortgage transaction subject to § 1026.33 of this part:
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> > (4) Where transfer of ownership of the debt to the covered person is or may be recorded in public records, or, alternatively, that the transfer of ownership has not been recorded in public records at the time the disclosure is provided.

12 C.F.R. § 1026.39(d)(4). UAM's disclosure failed to address whether the transfer of the ownership had been recorded, nor did it include information detailing where it was recorded. See Compl. ¶¶ 16, 19, 49, 53, 72(a); Welcome Letter from UAM to Mary Kumi (June 11, 2021) [Doc. 6 at 63-65]. Consequently, Kumi has shown a substantial likelihood of success as to, at a minimum, the TILA allegations contained in her Complaint.

B. Irreparable Injury

Kumi is a 63-year-old homeowner who purchased her home sixteen years ago. Compl. ¶¶ 7-8. Under Eleventh Circuit law, "irreparable injury is suffered

when one is wrongfully ejected from [her] home." Johnson v. Dep't of Agriculture, 734 F.2d 774, 789 (11th Cir. 1984). "The real property interest holds a special place in our legal system as in our society, especially in cases involving the potential loss of that most important, tangible piece of emotional and physical stability—the home." Stubbs v. Bank of Am., 844 F. Supp. 2d 1267, 1269 (N.D. Ga. 2012). For that reason, the Court finds that this factor weighs in favor of granting injunctive relief.

C. Balance of Harms

Next, the Court must determine if Kumi's irreparable harm outweighs any harm to Defendants. Defendants argue that if they are permitted to "cry the foreclosure sale but are prohibited from recording the Deed Under Power of Sale pending further order of the Court, the status quo is preserved pending further determination by the Court." Defs.' Resp. at 11. Defendants' argument fails to address the equities at issue; namely, whether the harm Kumi suffers from being evicted from her home of sixteen years outweighs any harm Defendants may suffer in postponing a foreclosure by several months. The Court finds that the harm Kumi may suffer from being ejected from a residence that she has resided in for sixteen years substantially outweighs any harm Defendants may suffer in

postponing a foreclosure relating to a loan they succeeded to only several months ago. This factor weighs heavily in favor of granting Kumi injunctive relief.

D. Public Interest

Finally, Defendants argue that the public interest factor weighs in its favor because they "have properly sought the sums demanded, as provided by contract and in conformity with applicable law." Defs.' Resp. at 11. However, Kumi has remained current on her payments from the time of the loan's first modification in 2013. Pl.'s Mot. at 4. Because of Defendants' failure to comply with TILA's disclosure requirements, not to mention the alleged lack of communications from the prior servicing entity of her second mortgage, Kumi failed to learn of the amount she would have to pay on an expedited basis in order to keep her home. When mortgage servicing companies fail to provide proper and timely disclosures to consumers, harm can come to homeowners. This factor also weighs in Kumi's favor.

IV. CONCLUSION

For the above reasons, it is hereby **ORDERED** that Plaintiff Mary Kumi's Motion for Preliminary Injunction [Doc. 3] is **GRANTED**.[3] Defendants United

[3] Plaintiff's Motion for Temporary Restraining Order [Doc. 3] is **DENIED AS MOOT**.

Asset Management, LLC and FCI Lender Services, Inc. are **PRELIMINARILY ENJOINED** from proceeding with the foreclosure sale on Plaintiff's home at 4839 Lily Stem Drive, Auburn, Georgia, 30011, on December 7, 2021, and until further order of the Court.[4]

The Clerk is **DIRECTED** to refer this case to a Magistrate Judge to hear and determine any pretrial matters pending before the Court and to conduct hearings and submit reports and recommendations to the full extent allowed by 28 U.S.C. §§ 636(b)(l)(A) and (B), as this case alleges an attempted wrongful foreclosure, and violations of TILA and the FDCPA. See Standing Order 18-01.

IT IS SO ORDERED this 7th day of December, 2021.

Mark H. Cohen

MARK H. COHEN
United States District Judge

[4] In their response, Defendant requested the Court to require Kumi to post a security bond. Defs.' Resp. at 11-12. However, at the motion hearing, Defendants' counsel conceded that, given the equity in the home, no security bond need be provided. The Court agrees. See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Servs., LLC, 425 F.3d 964, 971 (11th Cir. 2005) (quotation omitted) (providing that "it is well-established that the amount of security required by [Rule 65(c)] is a matter within the discretion of the trial court . . .[, and] the court may elect to require no security at all." Here, the Court concludes "[t]here is no evidence that security is required, and the Court will require none." Majority Forward v. Ben Hill Cnty. Bd. of Elections, 512 F. Supp. 3d 1354, 1375 (M.D. Ga. 2021).