

Obtaining Atty Fees From Calif. Mortgagees Just Got Easier

By Jason Scott and Ian Rambarran (March 25, 2019, 5:15 PM EDT)

California's Fifth Appellate District recently published its decision in *Hardie v. Nationstar Mortgage LLC*,^[1] swinging the attorneys' fees pendulum even farther in favor of borrowers, sending a strong signal to lenders and servicers working in California to think twice and think fast before going to sale. Now, lenders and servicers are subject to claims of attorneys' fees should a borrower obtain a temporary restraining order, or TRO, enjoining a foreclosure sale. This is a shift in the law, which previously held that fees were recoverable at the preliminary injunction phase.

The impact of this ruling now forces lenders and servicers to retain counsel and litigate a claim within a shortened notice period of no less than 24 hours' notice — otherwise they could be liable for the attorneys' fees incurred by the borrower to bring the TRO.

In California, there are three ways to get a court to stop an event from happening — a TRO, a preliminary injunction and permanent injunction. The TRO is the fastest way to stop an event and can be obtained on 24 hours' notice. This can prove difficult for any company to address because it often takes days before an agent for service of process can transmit the relevant information, and then even longer before a litigation department is aware of the pleading or court hearing. Because of the lack of notice, the hearing on a TRO can and does occur without any defendant present, which makes it much easier for plaintiffs to get. This also means that a TRO is temporary in nature, and will dissolve unless further action is taken.

Unlike the TRO, a preliminary injunction is typically obtained with 16 court days' notice, which gives everyone more time to gather the facts, formulate arguments and present both sides to the court.

The last type of injunction in California is a permanent injunction, which is issued at the end of the case when everyone has had a fair shake in presenting their version of events.

The *Hardie v. Nationstar Mortgage LLC* case addresses the impact of getting a TRO in a claim related to the Homeowners' Bill of Rights statutes. In *Hardie v. Nationstar Mortgage LLC*, borrowers Lana and Scott Hardie sued Nationstar Mortgage LLC et al. alleging violations of the Homeowners' Bill of Rights — Civil Code sections 2923.55, 2923.6, Business & Professions Code section 17200, and declaratory relief under Civil Code section 2924.12.



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On June 5, 2017, the Hardies filed and served their complaint. Three days later, on June 8, 2017, they filed an ex parte application for a TRO to enjoin a foreclosure sale set for June 13. The hearing was set for the day before the sale. Though the lender defendants received notice of the hearing, they did not oppose the ex parte application, nor did they appear at the hearing.

At the June 12 hearing, the court issued its tentative ruling granting the application but denying the attorneys' fees request, indicating that attorneys' fees were only recoverable pursuant to Civil Code section 2924.12 following a preliminary injunction. The court's initial position was in line with a 2015 opinion in California called *Monterossa v. Superior Court*.^[2] In *Monterossa*, a TRO was issued, but the court went further and held a full evidentiary hearing to determine whether a preliminary injunction should be issued.

Ultimately, the *Monterossa* court said fees were available to the borrower after the borrowers showed they were likely to succeed on the merits at the preliminary injunction hearing. However, the *Monterossa* court did not contemplate whether fees were available at the TRO phase.

The Hardie case changed that determination, almost in an unintentional way. After a brief discussion on the record with the court, the Hardies concurred that the request for attorneys' fees was premature and the matter was submitted. The court indicated it was granting the TRO and that it would sign the proposed order. In conflict with the discussion on the record, however, the finalized order directed defendants to pay attorneys' fees in the amount of \$3,500 pursuant to Civil Code section 2924.12.

Nationstar appealed and contended that Section 2924.12 does not permit an award of attorneys' fees at the TRO stage, and alternatively that the Hardies' request for fees within the application for TRO was procedurally defective because the request should have been brought by a separate motion. While the appellate court remanded on the grounds that the fees motion was procedurally defective and should have brought up in a separate motion, the appellate court also concluded that Section 2924.12 permits an award of attorneys' fees at the TRO stage.

In upholding the trial court's order, the appellate court noted that Section 2924.12(h) provides:

A court may award a prevailing borrower reasonable attorneys' fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or was awarded damages pursuant to this section.

The appellate court also looked to the well-settled rules of statutory construction, the legislative history and intent of Section 2924.12, and the reasoning in *Monterossa v. Superior Court*, and concluded that:

[T]he plain statutory language is dispositive of this appeal. The statute permits attorneys' fees to a borrower that has prevailed in obtaining "injunctive relief." The Hardies prevailed in obtaining a TRO, which indisputably is a form of injunctive relief. The statute does not distinguish between temporary, preliminary, and permanent injunctive relief. Thus, under the statute's plain language, attorneys' fees are authorized.

In reviewing the ruling, the court may have been swayed by the possibility that injunctive relief, albeit temporary, and the possibility of attorneys' fees could be the only "leverage" that the borrower could use to have a lender or servicer address the borrower's concerns. If the lender or servicer corrects the issue at hand, the borrower's case would be rendered moot.

The appellate court rejected Nationstar's logical arguments and actual distinctions between a TRO and preliminary injunction. Nationstar argued that a TRO may be issued with little notice and does not require a full evidentiary hearing or an evaluation of the merits. Further, a TRO automatically dissolves and does not require a bond. While the court acknowledged those arguments, it noted that while "these differences may pose sound policy reasons for prohibiting attorneys' fees on a TRO application, such determinations are reserved to the Legislature." However, the court did note that the borrower's need for a TRO may be eliminated should the issue about which the borrower complains be corrected.

The decision in *Hardie* requires defendants to quickly analyze the likelihood that a borrower will prevail on an application for TRO, as the failure to recognize deficiencies in the foreclosure procedures may subject defendants to attorneys' fees at the earliest stages of litigation. While the *Hardie* court recognized that the decision to award attorneys' fees is discretionary and that a noticed motion is required, it may be prudent for lenders and servicers to (1) cancel any pending trustee's sale to eliminate the risk altogether or (2) postpone the sale for a period of time to reduce the exigency factor that is the foundation for a TRO. Doing so would allow sufficient time to thoroughly ensure compliance with all statutory requirements, and give everyone a bit of breathing room before going to sale.

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[1] *Hardie v Nationstar Mortgage LLC* (2019) DJDAR 1669

[2] *Monterossa v. Superior Court*, 237 Cal.App.4th 747 (2015)