

1 VENTURA, CALIFORNIA; MONDAY, APRIL 6, 2009

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5 THE COURT: Nicoletti versus Metrocities
6 Mortgage.

7 MR. BRUTOCAO: Nicholas Brutocao appearing
8 for the defendant Taylor, Bean and Whitaker.

9 MR. KRAUSE: Steve Krause for plaintiff
10 George Nicoletti.

11 MR. NICOLETTI: George Nicoletti, your
12 Honor. I'm counsel associated with Steve Krause and
13 also the plaintiff.

14 THE COURT: The Court's tentative ruling is
15 to overrule the demurrer to the complaint.

16 Does the defendant wish to be heard?

17 MR. BRUTOCAO: Yes, your Honor. On the
18 matter of the injunctive relief pertaining directly
19 to the declaratory relief and how this issue stands
20 in terms of the code section reference 2923 --

21 THE COURT: .5.

22 MR. BRUTOCAO: Yes, there's no declaratory
23 relief that can exist with this code section. This
24 is a threshold issue that's really a legal one. And
25 then there's no source or authority in the code as
26 the plaintiff has argued it pertains to the
27 situations.

28 THE COURT: well --

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1 MR. BRUTOCAO: The plain reading is clear
2 that that's not what the purpose of this code section
3 was established for. It was merely done -- the code
4 section 2922.6, which plaintiff refers to, was
5 enacted as a safe harbor for the servicer against
6 their investor in the event that they would like --

7 THE COURT: Well, this interpretation of
8 2923.5 is still in case law limbo, in that there's no
9 appellate authority as to the interpretation of this
10 particular Civil Code Section 2923.5.

11 And the Court's conclusion at this time is
12 that this section does require a lending institution
13 to exercise a good faith attempt to avoid
14 foreclosure. And whether or not the defendant
15 engaged in such a good faith effort really involves a
16 factual issue that can't be determined at the
17 pleading stage.

18 So, therefore, it's the Court's conclusion
19 that while this issue needs to be addressed from a
20 factual standpoint, and ultimately we will need
21 appellate authority for guidance in the trial court,
22 at this juncture the Court will overrule the demurrer
23 and --

24 MR. NICOLETTI: Your Honor, if I may,
25 section 2923.5 sets out the guideline to the notice
26 of default at the notice of sale.

27 MR. BRUTOCAO: Those statutorily were
28 adhered to in this case. The only issue regarding

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1 the intent of this act, legislation is the question
2 if 2923.6. And it's very clear from that section in
3 that it's set out in the very first section 2823.6,
4 section A, that the intent is to help servicers when
5 dealing with a potential lawsuit by their investors,
6 not that it would create a private action for the
7 borrower.

8 Then going back again to 2923.5, that just
9 sets out the requirement of what needs to be
10 contained in the notice of default and the notice of
11 sale, and those were adhered to in this case.

12 THE COURT: All right. Plaintiff wish to be
13 heard?

14 MR. NICOLETTI: Yes, your Honor. The
15 allegations are such that they're factual allegations
16 in the complaint. Number 12A through J, they're all
17 factual allegations to oppose that declaration and to
18 oppose the way that that declaration was made, in
19 both the notice of default, as well as the notice of
20 trustee sale. Basically, it's a factual case, your
21 Honor. And it's basically a case that we don't have
22 any guidance, you're correct, from the appellate
23 court at this time. We'd like to have some guidance,
24 and that's the reason we're here, frankly, on this
25 case.

26 MR. BRUTOCAO: Your Honor, with all due
27 respect to the plaintiff, as it's set out in 2923.5,
28 what it precisely required by the legislation was

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1 contained in all the necessary documents. The only
2 question which plaintiff can make in terms of what's
3 been their interpretation, again, the 2923.6. Just
4 by reading that section, you can see that in and of
5 itself it applies by the way it's set up to the
6 interaction of servicers and their investors.

7 There's nothing -- the fact that now
8 borrowers have the ability to mandate that all
9 servicers and money institutions are now required to
10 enter into contracts for loan modifications.

11 THE COURT: well, at this juncture in this
12 case the Court holds that section 2923.6 was the
13 legislature's attempt to deal with a collapsing
14 mortgage industry, and also to stabilize the market.

15 And the Court's ruling is to overrule the
16 demurrer. Require the defendant to file an answer on
17 or before April 27, 2009. And at this juncture with
18 regard to the defendant's request to set aside the
19 Lis Pendens, that request is denied without
20 prejudice.

21 Plaintiff to give notice.

22 MR. NICOLETTI: Yes, we will, your Honor. I
23 was wondering, your Honor, with regard to our request
24 for costs on making the demurrer, we have a letter in
25 Exhibit C that we tried to eliminate the demurrer
26 process with counsel. And we told the counsel,
27 Mr. Malcolm, who was on this case previously to
28 Mr. Moncoto(Phonetic), that it would be expensive to

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1 oppose this demurrer.

2 we've done a lot of research on it. I
3 actually have the legislative intent service from
4 woodland that has done the legislative intent on this
5 statute, because we intend to pursue it. And we've
6 spent quite a lot of money in this opposition where
7 we would have liked to have just gone ahead with our
8 case instead of meeting this.

9 we did warn counsel that not only while we
10 did -- we warned him of costs because we stated that
11 we would appeal -- or we would amend our complaint if
12 defense counsel would like us to amend our complaint
13 to the point that it would overcome any demurrer on
14 their side. So we offered to take this demurrer off
15 calendar and we offered that we wouldn't have to
16 appear in front of this Court, and waste the court's
17 time nor waste our own time on this.

18 THE COURT: well, the Court finds there's a
19 legitimate and unsettled points of law that needs --
20 or will need to be addressed by the appellate
21 authority. And at this juncture the Court is not
22 going to, in effect, award sanctions against the
23 defendant for proceeding with the demurrer. Whether
24 or not you, the plaintiff, may want to amend your
25 complaint to more -- to a more focused area for
26 ultimate appellate decisions so that you can, quote,
27 take your best shot, closed quote. It's up to you
28 and the defendant to work out.

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1 But at this point I'm overruling the
2 demurrer. I'm making the order with regard to filing

3 an answer on or before April 27th. And at this
4 juncture that's all that I'm prepared to do.
5 MR. NICOLETTI: Thank you, your Honor.
6 MR. KRAUSE: Thank you, your Honor.
7 THE COURT: All right.
8 MR. BRUTOCAO: Thank you, your Honor.
9 THE COURT: Thank you.
10 (Proceedings concluded.)
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vs.)	No. 56-2008-00333790
)	CU-OR-VTA
METROCITIES MORTGAGE,)	
)	
Defendant.)	
)	

I, LISA LEMUS, CSR #11484, Certified Shorthand Reporter of the state of California, for the County of Ventura, do hereby certify that the foregoing pages 1 through 6 are a full, true and correct transcript of the proceedings had in the above-entitled case on April 6, 2009.

Dated at Ventura, California, this 9th day of April 2009.

LISA LEMUS, CSR #11484
Official Reporter

*Please Note: Copies of this transcript are not certified and do not conform with the provisions of Government Code Section 69954(d) unless they bear the original signature of Lisa Lemus.