

CLEVELAND MUNICIPAL COURT  
HOUSING DIVISION  
CUYAHOGA COUNTY, OHIO

JUDGMENT ENTRY RECEIVED  
FOR JOURNALIZATION

MAY 21 2009

C.H.R.P.

DATE: May 21, 2009 EARLE B. TURNER, CLERK

Plaintiff(s)

-VS-

CASE NO.: 08-CVH-31391

WELLS FARGO BANK NA, et al.

Defendant(s)

JUDGMENT ENTRY and ORDER

{¶1.} CHRP seeks to expand the temporary restraining order previously issued by this Court to apply to "all of Wells Fargo's existing Cleveland REO property" and "any new Cleveland properties entering Wells Fargo's REO inventory in the future."

{¶2.} This case was filed in December 2008. CHRP initially sought and was granted, ex parte, a temporary restraining order forbidding Wells Fargo from transferring any of the twelve specific properties that were the subject of the first and second claims of CHRP's complaint. By agreement of the parties, that restraint has remained in effect. CHRP now seeks to expand the order, to cover all of the properties owned by Wells Fargo, including those added to Wells Fargo's inventory in the future.

{¶3.} The Court notes at the outset that this case has been set for hearing on plaintiff's request for preliminary injunction on May 27, 2009. The terms of any temporary restraining order issued may remain in effect for no more than twenty-eight days. Civ. R 65.

{¶4.} CHRP argues that it is entitled to a Temporary Restraining Order because since the filing of this action in December 2008, Wells Fargo, according to CHRP, has "*continued and expanded its practice of "dumping" REO properties which are 'public nuisances' as defined by R.C. 3767.41 without having first abated those nuisance conditions by making the necessary repairs or by demolition and without regarding to the buyer's ability or desire to abate those conditions (emphasis in original).*"

The Factual Basis for CHRP's Request

{¶5.} CHRP's motion rests factually upon the affidavits of Frank Ford and Michael Schramm.

{¶6.} Mr. Ford is CHRP's Executive Director. In his affidavit, Mr. Ford describes the process used by CHRP to collect data regarding the condition of properties owned by Wells Fargo in the City of Cleveland. Briefly, CHRP, through Mr. Schramm, used the CWRU NEO CANDO database to compile a list of properties owned by Wells Fargo as of April 24, 2009 ("current inventory"), and a second list of properties sold by Wells Fargo during the period from December 15, 2008 and April 24, 2009 ("prior inventory"). Mr. Ford used that list to assign individuals to conduct inspections of the properties. According to Mr. Ford, of the seventy-eight current inventory and forty-eight properties of the prior inventory were inspected. The inspections were conducted by Mr. Ford and his team between May 2, 2009 and May 4, 2009. He reports the results of the inspections in his affidavit.

{¶7.} Based upon the inspections, Mr. Ford determined that one-half of the inspected properties in the prior inventory had one or more of the following conditions: open, vandalized, and vacant; overgrown with grass, weeds, and foliage; littered with garbage; or had obvious structural damage or other significant defects. Twenty of the properties were open to casual entry.

{¶8.} With respect to the current inventory, based upon the inspections, Mr. Ford determined that approximately thirty-four of the seventy-eight properties inspected were: open, vandalized, and vacant; overgrown with grass, weeds, and foliage; littered with garbage; or had obvious structural damage or other significant defects. Twenty four of the properties were open to casual entry.

{¶9.} Wells Fargo responds to the factual allegations and resultant determinations in four basic points.

{¶10.} First, Wells Fargo argues that, with respect to the original properties, the allegations in CHRP's complaint are "conclusory," and that the City issued notices of violation of City code for only three of the eleven original properties. Further, Wells Fargo points out, CHRP "does not identify any notices of violations that had been issued to Wells Fargo" with regard to any of the properties over which CHRP seeks to expand coverage of the temporary restraining order.

{¶11.} This argument is not persuasive. Plaintiff's complaint is not required to set forth CHRP's allegations regarding the condition of the properties in great detail; it must contain only a short and plain statement of the claim showing that CHRP is entitled to relief, and a demand for judgment for the relief to which it claims to be entitled. Civ.R. 8(A). CHRP is required only to set out the facts with sufficient specificity to put Wells Fargo on notice of the bases of CHRP's complaint, which it did. Nor is greater specificity required in CHRP's motion; a motion for temporary restraining order need only allege immediate and irreparable injury, loss or damage. Civ.R. 65(A); *In re Estate of Georskey* (July 20, 2001), 11<sup>th</sup> Dist. No. 2000-G-2299. The motion, too, is sufficiently specific to put Wells Fargo on notice.

{¶12.} That the City did not issue violation notices on properties is not probative of the condition of those properties. The City, with its limited resources, does not utilize a comprehensive inspection system; it does not inspect every property in the City of Cleveland every year, or even on a regular basis. There is nothing to indicate that City inspectors, prior to the filing of this action, viewed the Wells Fargo properties. The lack of a notice of violation is not a referendum on the compliance of these properties with City codes.

{¶13.} Second, Wells Fargo argues that CHRP's allegation that twenty-four of the prior inventory properties inspected have one or more nuisance conditions is misleading. Some of those properties, Wells Fargo argues, have overgrown yards or litter problems. Those issues, according to Wells Fargo, logically cannot be placed at Wells Fargo's door, as the properties transferred from Wells Fargo as many as four and one half months before the inspections. This argument has merit; issues like high grass and weeds cannot with certainty be said to have existed during Wells Fargo's ownership of the properties. The condition of the properties post-sale does seem to indicate as well, however, that sale did not bring about the abatement of nuisance conditions.

{¶14.} Third, Wells Fargo asserts that it does not hold legal title to six of the twenty-eight current inventory properties identified by CHRP. If this be true, the Court should not properly consider the condition of those properties in ruling on the motion to expand the temporary restraining order. The Court is not persuaded, however, that this fact alone calls into question the entire inspection process conducted by CHRP; it may be representative solely of the speed with which properties enter and exit REO inventories, and when the deeds were recorded.

{¶15.} Fourth, Wells Fargo argues implicitly that the numbers cited by Mr. Ford are unremarkable. Wells Fargo notes that in one-half of the prior inventory properties inspected by CHRP, no problems were found. Further, it argues, in forty-four of the seventy-eight current inventory properties inspected, no problems were found. The proper weight to be given the number of unaffected properties and the number of defective properties shall be determined by the Court.

{¶16.} The Court is persuaded that CHRP, through the affidavits attached to its motion, has demonstrated that a significant number of the properties held by Wells Fargo are open, vacant, vandalized, or in a condition that otherwise poses a threat to the health and safety of the members of the surrounding community. The number of properties in this defective condition cannot be ascertained with complete certainty, due to the ever-changing nature of Wells Fargo's inventory, and the properties themselves. Notably, Wells Fargo itself does not dispute that at least a third of the current inventory properties are in this condition; the Court concludes in light of the condition of the prior inventory and the affidavit of Frank Ford that the percentage likely is even higher.

## The Standard for a Temporary Restraining Order

{¶17.} A temporary restraining order is an injunctive form of relief intended to prevent the applicant from suffering immediate and irreparable harm. Civ.R. 65(A). In determining whether to grant a temporary restraining order, a trial court must consider whether the movant has a strong or substantial likelihood of success on the merits of his underlying claim, whether the movant will be irreparably harmed if the order is not granted, what injury to others will be caused by the granting of the motion, and whether the public interest will be served by the granting of the motion. *Coleman v. Wilkinson*, 147 Ohio App.3d 357, 2002-Ohio-2021, 770 N.E.2d 637, citing *Corbett v. Ohio Bldg. Auth.* (1993), 86 Ohio App.3d 44, 49, 619 N.E.2d 1145.

{¶18.} A temporary restraining order is an extraordinary remedy; the granting of a temporary restraining order rests within the sound discretion of the trial court. *Mike Lapine, Inc. v. Cleveland Business Show, Inc.* (March 27, 1986), 8<sup>th</sup> Dist. No. 50028, citing *Perkins v. Village of Quaker City, et al.* (1956), 165 Ohio St. 120. The plaintiff must demonstrate before the Court grants a temporary restraining order: 1. The irreparable harm to plaintiff absent the TRO. 2. Balance of harm to plaintiff and injury to defendant and others. 3. The public interest would be served by issuing the TRO. 4. The substantial likelihood plaintiff will prevail on the merits. *Id.*, citing *District 2, Marine Engineers Beneficial Ass'n., Associated Maritime Officers, AFL-CIO v. Adams* (1977), 447 F.Supp. 72; *Ohio Contractors Ass'n. v. Economic Development Administration* (1977), 452 F.Supp. 1013, *aff'd* 580 F.2d 213.

### Factor 1: Irreparable Harm

{¶19.} CHRP is a neighborhood based, non-profit corporation with a goal of improving housing within the City of Cleveland. That goal is frustrated by the actions allegedly taken by the defendant Wells Fargo. The maintenance of properties in open, vacant, vandalized condition directly increases the work to be performed by CHRP in achieving its goal. The decrease in property values caused by open, vacant properties may make it difficult or impossible for CHRP to secure financing for its activities, including the prosecution of nuisance abatement actions, other than this one, filed under R.C. 3767.41.

### Factor 2: Balance of Harm to Plaintiff and Injury to Defendant and Others

{¶20.} Wells Fargo faces potential injury if the Court grants the requested TRO. CHRP is seeking to limit the ability of Wells Fargo to transfer properties from its inventory. The transfer of the properties brings revenue to Wells Fargo. Prohibiting Wells Fargo from transferring properties also increases the expenses Wells Fargo must bear in securing, maintaining and repairing those properties.

{¶21.} The exact dollar amount of the potential harm to Wells Fargo cannot be calculated. The revenue from potential sales is not certain, as no one can be sure if Wells Fargo would be able or inclined to divest itself of properties during the

period of this temporary restraining order; two-week or one-month sales figures for Wells Fargo have not been provided. Nor is the cost of repair and maintenance easily ascertainable, as each property has differing needs. Wells Fargo has not offered an estimate of these potential costs. The information before the Court does suggest that approximately one hundred eight Wells Fargo properties were sold in the past six months.

#### Factor 3: The Public Interest in the TRO

{¶22.} The public has a strong interest in the maintenance of properties in a safe condition, whether the members of the public are occupying the properties or living near them. Open, vacant, and vandalized properties present a safety hazard, a fire risk, and a venue for criminal activity. Emergency responders have a strong interest in the elimination of open, vacant properties as well; these structures can create life-threatening situations for police and firefighters who respond to criminal activity therein. The public has a pecuniary interest in the maintenance of properties also; vacant, vandalized properties lead to the decline of neighborhoods and a reduction in property values. In addition, municipalities are forced to provide services (e.g., grass cutting, yard cleaning, demolition) to neglected properties and the taxpayers must bear this financial burden.

{¶23.} CHRP, however, does not request an order requiring Wells Fargo to remedy the defective conditions of its properties; instead, CHRP requests an order forbidding Wells Fargo from transferring the properties while this action is pending, to prevent the properties from being “churned,” which, CHRP argues, is likely to cause the properties to remain in their current condition.

{¶24.} It is more difficult to assess the public’s interest in preventing the transfer of the properties. However, the Court believes, based upon the thousands of cases heard by it each year, that the rapid transfer of properties in disrepair by lenders leads more often than not to the continued deterioration of the properties. This belief is supported by the inspection results relied upon by CHRP – the transfer of properties from the Wells Fargo inventory has not resulted in the abatement of nuisance conditions therein. The rapid transfer of properties, often in bulk, also frustrates comprehensive enforcement of the City codes, as the time required for the updating of public records, issuance of notice, and prosecution often permits individuals holding even large numbers of properties in violation of City code to evade scrutiny of those properties.

#### Factor 4: The Substantial Likelihood Plaintiff will Prevail on the Merits

{¶25.} Whether CHRP can prevail on the merits cannot be determined at this time. CHRP’s claims survived Wells Fargo’s motion for partial judgment on the pleadings; however, the standard for surviving such a motion is not high.

{¶26.} The Court will determine, after a full hearing on this matter, whether CHRP can establish that Wells Fargo’s conduct creates a public nuisance, and whether CHRP has standing to raise that claim. At this point, however, it appears

that CHRP has some likelihood of success in establishing that the ownership of properties in the City that are open, vacant and vandalized constitutes a public nuisance. As to CHRP's standing, as the Court explained in its decision denying Wells Fargo's motion for judgment on the pleadings, CHRP has a reasonable likelihood of demonstrating at trial that its activities, include seeking and securing receiverships of properties in the City of Cleveland, including obtaining financing for nuisance abatement in receivership actions, may be negatively impacted by the decline in property values caused by vacant, vandalized properties. CHRP may be able to show other special injury as well.

{¶27.} Wells Fargo argues that CHRP cannot succeed on the merits because it attempts to enjoin activity permitted by law – the transfer of properties acquired at foreclosure sale. Wells Fargo also argues, accurately, that Cleveland has no point of sale inspection. This, Wells Fargo seems to imply, permits it to acquire title to and resell properties regardless of their condition. This is inaccurate. The ownership of property in a condition that violates City code is *not*, except in limited circumstances at the time of purchase, permitted by law. And, there is a compelling argument, based upon the condition of the prior inventory properties, that the sale of the properties by Wells Fargo does perpetuate a public nuisance.

#### Balancing the Factors:

{¶28.} The Court must review and attempt to balance these four factors when determining whether to grant a temporary restraining order.

{¶29.} The Court cannot be certain whether CHRP will be able to establish standing to prosecute this action, or prevail on its third cause of action, which, as a practical matter, is the basis for its request for a temporary restraining order. And, the granting of a temporary restraining order certainly will cause some practical inconvenience and arguable monetary damage to Wells Fargo. However, the factor entitled to the greatest weight in this balancing process is the potential harm to the public should Wells Fargo not be restrained.

{¶30.} CHRP has established to the satisfaction of the Court at this point in the process that a significant number of properties held by Wells Fargo are neglected by Wells Fargo, and stand open, vacant, vandalized, a hazard to the public and to emergency responders. If not restrained, the properties will likely become bases for criminal activity, and contribute to the decline of the neighborhoods in which they are located -- a process this Court has witnessed in the thousands of cases it reviews each year. The transfer of these properties without their defective condition being addressed likely will permit them to elude examination and code enforcement. Should the Court not restrain their transfer, Wells Fargo's practices as alleged in this litigation also likely would evade review.

{¶31.} The Court is persuaded that the public's interest in maintaining the status quo of ownership of the properties until CHRP's request for preliminary injunctive relief is heard outweighs the interest of Wells Fargo in being able to transfer the properties it currently holds. Weighing the factors set forth above

leads the Court to conclude that a temporary restraining order should be granted; the conveyance by Wells Fargo of the properties in its inventory in the City of Cleveland prior to a full hearing in this case would result in irreparable harm to CHRP and the public.

Bond:

{¶32.} No temporary restraining order is operative until the party obtaining it gives a bond in an amount fixed by the Court to secure the party enjoined the damages he may sustain, if it is finally decided that the injunction should not have been granted. Civ.R. 65(C). Wells Fargo asks the Court to require CHRP to post a “substantial bond.” It states that the purchase price for the 20 properties specifically identified in its motion is \$312,000; the total purchase price of the 192 properties CHRP seeks to restrain is \$3,993,000. The Court notes that Wells Fargo indicates that these are the “purchase price” and not the *value* of the properties. And, with respect to the bond issue, CHRP urges the Court to permit it to proceed with only the previous bond in place.

{¶33.} CHRP alleges that Wells Fargo, in the six months from December 2008 through May 2009, sold approximately one hundred eight properties. This amounts to a sale rate of approximately eighteen properties per month. At the previously-ordered rate of \$1000 per property, this would require \$18,000 to be posted as security. CHRP already has posted security for \$11,000 upon the granting of the initial TRO; therefore, it must post an additional \$7000 as security for this TRO.

{¶34.} It is therefore ordered that Defendant Wells Fargo and all persons acting in concert therewith shall refrain from conveying any interest in any of the properties it owns as of the date of this order, or comes to own, in the City of Cleveland, unless that property can be shown to be fully compliant with City code, which determination shall be made in the manner set forth in paragraph 35, below. This order applies to all properties owned by Wells Fargo, whether title is held in the name of Wells Fargo Bank NA, whether held in its own interest, as trustee, or in any other capacity.

{¶35.} Should Wells Fargo seek to transfer a property, it may file a motion with this Court identifying the property with specificity, by address, permanent parcel number, and legal description. The motion should be accompanied by photographs of the front and rear of that property. The motion should identify as well the interested purchaser. Any motion filed by Wells Fargo must be served upon opposing counsel via electronic mail contemporaneously with filing. Upon receipt of the motion, the Court will schedule a hearing within two business days, at which time the issue before the Court will be whether the property is in compliance with City code. Should Wells Fargo so establish, the Court shall grant an exemption from the TRO for that property, and issue an order permitting its transfer.

{136.} This order expires fourteen (14) days after entry unless within such time the order for good cause shown is extended, or unless Wells Fargo consents that it may be extended for a longer period of time.

{137.} CHRP's request for Preliminary Injunction is set for hearing before this Court on **May 27, 2009**, at **1:00 p.m.** in Courtroom 13B.

{138.} This Order shall be effective upon the posting by CHRP of additional security of \$8000 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

{139.} Copies of this Order shall be sent to counsel for the parties by electronic mail and regular U.S. mail on the date of journalization of this Order.

Dated: May 21, 2009

  
JUDGE RAYMOND L. PIANKA