

Nonjudicial Residential Foreclosures

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California law concerning the application of Civil Code section 2923.5 to nonjudicial residential foreclosures continues to develop.

In a recent case, borrowers who were almost \$100,000 behind on their payments stopped a foreclosure sale without posting any bond, because the lender had failed to comply with the requirements of Civil Code section 2923.5, which was enacted to address high residential property foreclosure rates.

In summary, the statute has two requirements for a lender seeking to foreclose on residential real property:

- The statute provides that the lender shall contact the borrower before foreclosing “in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure”
- When the lender records the notice of default to start the foreclosure, the notice must include a declaration stating that the lender contacted the borrower, diligently tried to contact the borrower, or was not required to contact the borrower

In *Bardasian v. Superior Court*, the borrowers sought a preliminary injunction to stop the foreclosure sale of their residential real property. The notice of default included a declaration stating that the borrowers had been contacted as required by the statute. The borrowers, however, claimed that they had not been contacted. The trial court believed the borrowers.

The trial court held that the borrowers had established that the lender did not comply with the statute, and it therefore stopped the foreclosure sale.

Even though the borrowers were almost \$100,000 behind on their payments on the loan, the borrowers were not required to post a bond to stop the sale, because of the trial court’s determination that the lender had not complied with the statute.

The result is that the lender will have to start over, comply with the contact requirements of Civil Code section 2923.5, and then record a new notice of default – all while the borrowers presumably continue not to pay on the loan.

Conclusion. In litigation about a pending residential foreclosure, persuasive demonstration of compliance with Civil Code section 2923.5 may be needed at an early stage in the litigation, in order to avoid the result in *Bardasian*.