

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE & TIME: November 19, 2003
JUDGE : LOREN E. McMASTER
RECORDER : NONE

DEPT. NO: 53
CLERK : T. WEST
BAILIFF : L. STEWART

C3AS02608 CLGE GARDENS PRESER COMM ET AL VS. EUGENE BURGER MGT CORP ET
MOTION FILED BY: BECK, DANIEL B.

ATTORNEYS PRESENT:

FELDMAN, VALERIE
TAWATAO, MONA
KING, BILL
BECK, DANIEL

ATTORNEY FOR PLAINTIFF
ATTORNEY FOR PLAINTIFF
ATTORNEY FOR DEFENDANT
ATTORNEY FOR DEFENDANT

NATURE OF PROCEEDING: Motion For Reconsideration

TENTATIVE RULING

Defendants' motion for reconsideration is granted. Having reconsidered the matter in light of the authorities cited, the motion to dissolve the injunction is denied.

The decision in Forest Park II v Hadley 336 F.3d 724 (8th Cir 2003) is new law but it is not binding on this court. Forest Park addressed a Minnesota statute requiring one year notice that appears similar to California's notice provision. The court found that the preemption provisions of Section 4122 preclude Minnesota from requiring a lengthier notice than that required by the Federal law.

Section 4122 states "No State...may enforce any law...that restricts or inhibits the prepayment of any mortgage,...is inconsistent with any provision of this subchapter or... in its applicability to low income housing is limited only to eligible low-income housing for which the owner has prepaid the mortgage...."

This court has determined that the state law is a law of general applicability and applies to housing other than that for which the owner has prepaid the mortgage. The court also determined that the preemption provisions of section 4122 do not mandate that the State of California not enforce its statutes. The State notice requirements do not prohibit or restrict prepayment of the mortgage. They require a 12-month notice of intent to prepay. Thus it is possible to comply with both the Federal and State notice requirements. Furthermore, the intent of Congress was to build on existing state laws. With respect to notice requirements, the federal requirements may be said to build on state law.

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The court does not find Forest Park persuasive. Therefore its analysis reaches a different result. Although the court in Topa Equities Ltd. v City of Los Angeles 342 F.3d 1065 (9th Cir.2003) referred to Forest Park with approval, the issue before the court in Topa was not the same as that presented here.

This minute order is effective immediately. No formal order is required, the tentative ruling being sufficient notice.

COURT RULING

This matter argued by counsel and submitted.

This matter taken under submission.

RULING ON SUBMITTED MATTER

Having taken the matter under submission, the court affirms the ruling with the following modifications.

The court finds that Government Code Sections 65863.10 and 65863.11 are not statutes of general applicability and apply only to housing receiving Federal assistance. However, the court also finds that defendants' mortgage is not subject to LIHPRHA and LIHPRHA's preemption provisions are not applicable.

The court is not bound to follow the decisions of the U.S. Court of Appeals for the Eighth Circuit (Forest Park), the U.S. Court of Appeals Ninth Circuit (Topa), or the decision of the United States District Court Eastern District Court of California (Kenneth Arms). The court is free to apply its own analysis and interpretation of the Low Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA) and the Housing Opportunity Program Extension Act (HOPE). In doing so the court has considered the above referenced cases as well as other authorities submitted by the parties.

It is undisputed that defendant's mortgage is insured under Section 235 of the National Housing Act. LIHPRHA, enacted in 1990, contains a

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preemption clause that specifically applies to prepayment of such mortgages. It is undisputed that defendant was eligible to participate in LIHPRHA. It did not do so. In 1996 Congress passed HOPE. HOPE did not repeal LIHPRHA. Congress also mandated that HUD suspend further processing of preservation applications which did not have Approved Plans of Action (i.e. LIHPRHA eligible properties). The Quality Housing and Work Responsibility Act of 1998 is the culmination of a series of enactments that have removed funding from LIHPRHA. Although LIHPRHA continues to apply to properties participating prior to 1996, in effect the heart of LIHPRHA has been eviscerated. Nonetheless, LIHPRHA must continue in existence because there are properties whose owners presented Plans of Action prior to 1996 and who must follow the prepayment provisions of LIHPRHA. It does not follow that its preemption provision should be applied to HOPE.

The presumption is against preemption unless it can be shown that it is the clear and manifest purpose of Congress to preempt state authority. *Cipollone v Liggett Group, Inc.* (1992) 112 S.Ct. 2608, 2617. If Congress had intended HOPE to preempt state notice requirements, it could have included a preemption provision in the act or specifically referenced those of LIHPRHA. It did not do so. The fact that LIHPRHA was not repealed does not compel the conclusion that its preemption provision apply to mortgages governed by HOPE.

There are two prepayment schemes in existence; LIHPRHA for properties participating prior to 1996 and HOPE for properties opting to prepay after 1996. Prepayment under LIHPRHA is no longer available to parties such as defendant. If defendant had submitted a plan of action under LIHPRHA prior to 1996, its prepayment plan would be governed by LIHPRHA including the preemption provision of that Act. When defendant opted to prepay its mortgage in 2003, it had to do so under Section 219 or HOPE, as it was not participating in LIHPRHA. HOPE has no preemption provision and the notice requirements of Government Code Sections 65863.10 and 65863.11 are not preempted and they are applicable.

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DECLARATION OF MAILING

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California. T. WEST
Dated: January 9, 2004

T. West, Deputy Clerk

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