

**Claremont (2007) Realty LLC v River Oaks Capital  
Mgt., Inc.**

2008 NY Slip Op 33194(U)

November 14, 2008

Supreme Court, Nassau County

Docket Number: 12454/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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CLAREMONT (2007) REALTY LLC,

Plaintiff,

-against-

RIVER OAKS CAPITAL MANAGEMENT, INC.,  
DAVID MILLER, Individually and as President of  
River Oaks Capital Management, Inc., THE JAMES  
SCOTT COMPANY, AQUENT, LLC,  
CHRISTOPHER J. MAURER, Esq., as Escrow  
Agent, CAPITAL ONE, N.A. and COMERICA  
BANK,

Defendants.

TRIAL/IAS, PART 4  
NASSAU COUNTY

INDEX No. 12454/08

MOTION DATE: Aug. 15, 2008  
Motion Sequence # 001

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The following papers read on this motion:

Order to Show Cause..... X  
Affirmation/Affidavit in Opposition..... XXX  
Reply Affidavit..... X  
Memorandum of Law..... XX  
Reply Memorandum of Law..... X

This motion, by plaintiff, for an order pursuant to CPLR 6301:

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- A. enjoining and restraining defendants, River Oaks Capital Management, Inc. ("River Oaks"), David Miller, individually and as president of River Oaks ("Miller"), The James Scott Company ("James Scott Co."), Aquent, LLC ("Aquent") and Christopher Maurer, Esq., as Escrow Agent ("Maurer"):
- (i) from utilizing the Irrevocable Standby Letter of Credit No. 30001878, and any amendments thereto (the "Letter of Credit"), issued by Capital One, N.A. and payable through Comerica Bank on the account of plaintiff, Claremont (2007) Realty LLC ("Plaintiff"), for the benefit of James Scott Co. in the amount of \$10,000,000.00, as collateral for a certain term loan agreement entered into by and between River Oaks and Aquent (referred to herein as the "Aquent Loan"); and
  - (ii) from drawing down on or otherwise using or depleting the Letter of Credit in the amount of \$2,999,421.00 or any other amount, since (a) the acquisition, development and construction loan which James Scott Co. agreed to fund to plaintiff (referred to herein as the "James Scott Loan"), in the amount of \$53,500,000.00, has not been funded and there has been no default under such loan by plaintiff and, since (b) the bridge financing loan which River Oaks agreed to fund to plaintiff (referred to herein as the "River Oaks Bridge Loan"), in the amount of \$31,704,355.00, has not been funded and there has been no default under such loan by plaintiff; and
- (B) enjoining and restraining defendants River Oaks, Miller, James Scott Co., Aquent, Maurer, as Escrow Agent, Capital One, N.A. ("Capital One") and Comerica Bank (collectively all defendants are referred to herein as "Defendants"), from:

- (i) disbursing any portion of the proceeds of the Letter of Credit either through Maurer, as Escrow Agent, or directly to any defendant, since the James Scott Loan and the River Oaks Bridge Loan to plaintiff have not been funded and there has been no default under such loans by plaintiff,

is determined as hereinafter set forth.

### FACTS

Plaintiff entered into a contract with a third party for the purchase and sale of certain real property located in Maspeth, New York. Plaintiff obtained a letter of commitment from James Scott Co. in the amount of \$53,500,000.00 to fund the acquisition, development, and construction of the property. As security for the issuance of the loan, plaintiff provided to James Scott Co. collateral of \$10,000,000.00 in the form of a letter of credit issued by Capital One and Payable through Comerica Bank. James Scott Co. failed to timely fund the loan as contracted. Plaintiff was forced to contract with River Oaks to obtain a bridge loan financing for the purpose of facilitating the purchase of the property. River Oaks obtained an assignment of the letter of credit from James Scott Co. and then used the letter of credit as collateral in a separate loan transaction with Aquent, LLC. River Oaks failed to fund the bridge loan as contracted with the Plaintiff. The Plaintiff sent River Oaks a written notice of termination of its relationship and demanded the immediate cancellation and return of the letter of credit. If and when River Oaks defaults on its loan with Aquent, it will trigger plaintiff's letter of credit to be drawn down in the amount of \$2,999,421.00 payable to Aquent.

By the instant action, the plaintiff is seeking a preliminary injunction enjoining and restraining defendants, River Oaks Capital Management, Inc.; David Miller, individually and as president of River Oaks; The James Scott Company; Aquant, LLC; and Christopher Maurer, Esq., as Escrow agent; Capital One; and Comerica Bank from: (a) utilizing the irrevocable standby letter of credit; and (b) from drawing down on or otherwise using or depleting the letter of credit in the amount of \$2,999,421.00 or any other amount.

**PLAINTIFF'S CONTENTIONS**

Plaintiff asserts that its entitled to preliminary injunctive relief because it has a high likelihood of success on the merits of its claim for breach of contract and fraud against both James Scott Co. and River Oaks; that it will suffer irreparable injury absent the granting of a preliminary injunction in the amount of \$2,999,421.00; and that the balance of equities favor the plaintiff. Plaintiff argues that it has a likelihood of success on its claim for breach of contract against both James Scott Co. and River Oaks because defendants never funded the loan amount needed to purchase the property despite plaintiff's compliance with the terms and conditions of the respective contracts. Plaintiff further argues that it has a likelihood of success on its cause of action for fraud because both James Scott Co. and River Oaks fraudulently induced plaintiff to enter into loan contracts by falsely representing that the contracted loan amounts would be readily available when in fact defendants knew these representations to be false. Plaintiff contends that it justifiably relied on defendants' false representations and was injured by incurring additional expenses in pursuing alternative financing along with consequential damages resulting from its inability to close the transaction with third-party sellers.

Plaintiff argues that it will suffer irreparable injury absent the granting of a preliminary injunction because River Oaks is in immediate danger of defaulting on a loan in which it has used plaintiffs' letter of credit as collateral. Plaintiff alleges that River Oaks used the letter of credit as collateral in securing a loan from Aquent without plaintiffs' consent. When and if River Oaks defaults on its loan, such default would give Aquent the right to draw down \$2,999,421.00 from Plaintiffs' letter of credit. Plaintiff further contends that if Aquent is allowed to draw down on the line of credit it will adversely affect plaintiffs' credit and its ability to have sufficient funds to close the transaction to purchase the property.

Plaintiff argues that the balance of equities favors the plaintiff because James Scott Co. and River Oaks have breached the covenant of good faith and fair dealing implicit in every contract by not complying with the loan agreement and keeping plaintiffs' letter of credit.

**DEFENDANTS' CONTENTIONS**

Defendants assert that the court should deny the preliminary injunction because

the plaintiff has not established a likelihood of success on the merits; that plaintiff will not suffer irreparable injury because a monetary judgment will make the plaintiff whole; and that the balance of equities are in favor of Aquent over the plaintiff.

Defendants argue that plaintiff's breach of contract claim does not have a likelihood of success on the merits because it was the plaintiff that defaulted under the terms of the commitment letter by sending an early notice of termination. Defendants further argue that a letter of credit is completely independent of a contract between a purchaser and the beneficiary except in cases where the purchaser of a letter of credit can demonstrate fraud in the transaction or presentment of the letter. The defendants' assert that plaintiffs' fraud claim does not reach the level of active and intentional fraud because the alleged fraud is based on conclusory allegations. Defendants' further assert that Aquent dealt at arm's length and in good faith with both the plaintiff and defendant River Oaks, and therefore Aquent should have a legal right to the proceeds under the letter of credit because plaintiff does not have a likelihood of success on the merits to prove that Aquent was a party to the breach of contract or the fraud claim.

Defendants argue that the plaintiff will not suffer irreparable injury because the plaintiff may be made whole by payment pursuant to a monetary judgment. Defendants further argue that Aquent is a solvent company with sufficient assets to satisfy any possible judgment the plaintiff may recover at trial.

Defendants' assert that the balance of equities are in favor of denying an injunction because plaintiffs' right to the funds under the letter of credit do now outweigh Aquent's right from exercising its contractual right to draw down on the line of credit.

#### **PLAINTIFF'S REPLY**

Plaintiff asserts that the letter of credit was obtained solely to secure the loan amount of \$53,500,000. Plaintiff argues that pursuant to the escrow agreement, the letter of credit can only be liquidated or drawn down by the escrow agent if plaintiff is in default of the property loan. Plaintiff further argues that since it has never received any funding from the defendants' it cannot be in default of the letter of credit. Plaintiff therefore asserts that it has a likelihood of success on the merits because the defendant's breached the loan agreement by not funding the loan.

Plaintiff asserts that it will suffer irreparable injury if the preliminary injunctive

relief is not granted because an award of money damages would be inadequate to compensate it. Plaintiff argues that any attempt to satisfy a monetary judgment against James Scott Co. or River Oaks would be frustrated by the fact that they have so far been insolvent or otherwise unable to fund the property loan as contracted.

Plaintiff asserts that the balance of equities is in favor of granting an injunction. Plaintiff argues that Aquent obtained a second guarantee from River Oaks in the form of a security mortgage on personal property in the amount of \$2,650,000.00 that would be available to Aquent when and if River Oaks defaults on the loan. Plaintiff further argues that the proceeds under the letter of credit represent less than 1% of Aquent's annual sales figure and therefore an injunction would not impair Aquent's operations.

### DECISION

It is well settled that a preliminary injunction will not issue unless the movant demonstrates (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of injunctive relief, and (3) a balance of the equities in the movant's favor (see, Zonghetti v Jeromack, 150 AD2d 561; Koursiaris v Astoria N. Dev., 143 AD2d 639). Moreover, "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (McLaughlin, Piven, Vogel v Nolan & Co., 114 AD2d 165, 172), and which will not be granted absent a showing that there is a clear right to such relief on the undisputed facts presented (see, Zurich Depository Corp. v Gilenson, 121 AD2d 443; County of Orange v Lockey, 111 AD2d 896).

With respect to the first criterion, that there must be a demonstration of a likelihood of success on the merits, this movant /plaintiff has demonstrated that it can ultimately succeed on a breach of contract claim against the defendants. The contract between the parties called for the plaintiff to issue a letter of credit in favor of the defendants as security for a property loan. The defendants' failed to fund the loan by the property closing date. Defendants' failure to fund the loan was a breach of the contract as to the letter of credit that was issued. Plaintiff therefore has demonstrated a likelihood of success on a breach of contract claim against the defendants.

With respect to the second criterion, that there be irreparable injury absent the granting of injunctive relief, this movant/plaintiff has demonstrated that it would suffer irreparable injury absent the granting of this injunction. If Aquent is allowed to draw down on the line of credit it will adversely affect plaintiffs' credit and its ability to have

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sufficient funds to close the transaction to purchase the property for which the letter of credit was issued. An award of money damages would be inadequate to compensate the plaintiff because James Scott Co. and River Oaks have been insolvent or otherwise unable to fund the property loan and to repay the loan from Aquent. Plaintiff therefore has demonstrated that it will suffer irreparable injury absent the granting of this injunctive relief.

With respect to the third criterion, that a balancing of the equities must be demonstrated in the movant's favor, the movant/plaintiff has shown that the balance of equities are in its favor. James Scott Co. and River Oaks breached their contract with the plaintiff by not complying with the loan agreement and keeping plaintiff's letter of credit. Plaintiff satisfied all the conditions of its loan agreement with the defendants, and was not a party to Aquent's loan agreement with River Oaks and did not consent thereto. Aquent has the option of pursuing the personal property that was used as security by River Oaks when and if River Oaks defaults on its loan obligation.

Therefore, for all the above reasons, the plaintiff's request for a preliminary injunction is **granted**.

The Court notes, in passing, a reference to a "cross-motion" relative to an issue of arbitration. The Court further notes that there is no formal notice of cross-motion as required by CPLR 2215. As such the Court will not entertain any such application in this submission.

A Preliminary Conference has been scheduled for February 2, 2009 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated NOV 14 2008

ENTERED Stephen A. Bucarelli  
J.S.C.

NOV 20 2008

MASSAU COUNTY  
COUNTY CLERK'S OFFICE