

Richards v 2077 5th Ave. LLC
2009 NY Slip Op 33066(U)
December 23, 2009
Supreme Court, New York County
Docket Number: 115049/09
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

~~PART~~ **IA PART 16**

Carole Richards

- v -

2077 5th Avenue J.C.

INDEX NO. 115049/5
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by Plaintiff for a

preliminary injunction and the action as a whole are determined in accordance with the accompanying memorandum decision. The Clerk is directed to enter judgment dismissing the action with prejudice but without costs or disbursements.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
DEC 30 2009
NEW YORK COUNTY CLERK'S OFFICE

Dated: DEC 23 2009

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X

CAROLE RICHARDS,

Plaintiff,

Index No. 115049/09

- against -

Motion Seq. No. 001

2077 5TH Avenue LLC

Defendant.

-----X

SCHLESINGER, J:

On October 28, 2009, at plaintiff's request, I signed an order temporarily restraining defendant from auctioning or selling the property in question, here defined as

"All right, title and interest of Carole Richards ... in and to her membership/ownership interest in C. Richard Development Inc., ... together with all of the other 'Pledged Collateral', as such term is defined in that certain Pledge and Security Agreement by Carole Richards for the benefit of Secon I LLC, dated May 31, 2006, the benefit of which Pledge and Security Agreement was assigned to 2077 5th Avenue LLC (the defendant here) by that certain Assignment and Assumption Agreement between Secon I LLC and 2077 5th Avenue LLC dated as of August 26, 2009.

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

The auction had been scheduled for October 30, 2009, I believed the supporting papers were sufficient to stay the sale. We then had oral argument and with the consent of defense counsel, plaintiff was allowed to submit Reply papers.

In the moving papers, Ms. Richards does acknowledge obtaining a loan on or about May 31, 2006 from Secon I LLC to her company C. Richard Development, Inc. (the "Mezzanine" Loan). As collateral for this loan, which was used to pay a portion of the

acquisition cost of the land to build a 12 unit condominium known as 2077 Fifth Avenue, Ms. Richards pledged her stock in C. Richards Development. The amount now due to Secon, whose interest was assigned to 2077 5th Avenue LLC on August 26, 2009, constituting both principal and interest is \$1,232,000.

Ms. Richard believed at the time she moved before this Court, that defendant had not proceeded in a commercially reasonable manner in the arranging for the sale and also that if the sale occurred it would prejudice her rights to resolve related foreclosure action by 54 LLC (Index #116084/08) which was then scheduled for a settlement conference for December 2, 2009.¹

In opposition to plaintiff's request for a permanent restraint on defendants sale of its securities, counsel points out that 1) it perfected its security interest in the Mezzanine loan soon after it was made, on June 22, 2006 with a UCC financing statement filing, 2) that the maturity date of the loan was June 1, 2009, 3) that the plaintiff and her company C. Richards Development have paid no principal or interest on the loan, 4) that § 7.2 of the loan gives the lender the option, upon default of the borrower, the option of foreclosing on the pledged collateral, 5) sent a default letter of July 13, 2009 to the plaintiff, which was not disputed, 6) points out that consistent with (5), no where in the moving papers does Ms. Richards claim the debt under the Mezzanine loan is not due or defendant's right to protect its interests by disposing of the Pledged Interests and (7) that the defendant did proceed in a commercially reasonable way and published three advertisements in the two weeks before the auction in two publications.

¹On that date a long conference, attended by the principals and their counsel, did occur but it produced no settlement.

Finally, in response to plaintiff's suggestion that the assignment of Secon's loan to defendant 2077 5th Avenue LLC, an entity allegedly affiliated with the mortgagee of the property, 54 LLC, is somehow a nefarious plot to prejudice her interests, counsel acknowledges that there is an affiliation but says that is irrelevant. He points out that Setanta, the general contractor has a mechanic's lien on the premises for \$1,171,920, that its affiliate Secon has the Mezzanine Loan, now in default for \$1,232,000 and that each of these debts is separate from the other. Similarly the Mezzanine debt is a separate transaction from the mortgage.

He requests that the restraint be lifted and his client be allowed to carry on with the auction.

In Reply, via an affidavit of December 1, 2009, Ms. Richards discusses again the promise of refinancing by 54 LLC. Her counsel argues that she has done enough to show collusion between the lenders which should support a construction of the restraint.

I don't agree. The assignment of the loan to an affiliate of the mortgagee is not really relevant to the rights of the lender or its assignee. The fact remains, there was a loan, independent of the mortgage which is in default. That lender should be able to assert its rights pursuant to the U.C.C. I also note that on a separate decision of December 21, 2009, I granted 54 LLC summary judgment on its foreclosure action. That loan, is primary to the Mezzanine loan and carries with it a mortgage on the property. Therefore, if defendant 2077 5th Avenue LLC scheduled its sale of the shares to affect the other action, it has not.

I am lifting my previous restraint but I do believe that defendant should republicize the auction. While this incurs additional costs, I find it would help in maximizing the sale

price.

This Court further finds that plaintiff is not entitled to any of the relief requested in her Verified Complaint. As the request for a permanent injunction relies on the same arguments as those made in support of the motion for a preliminary injunction, that request is denied for the reasons stated above. Similarly, this Court finds that the request for compensatory and punitive damages is without merit for reasons stated above and in the December 21, 2009 decision in the related case *54, LLC v. East 128th Street, LLC, et al.*, Index No. 116084/08.

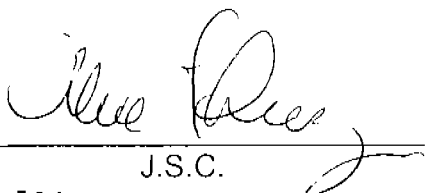
Accordingly, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is denied on the condition that defendants republicize the auction; and it is further

ORDERED that the action is dismissed with prejudice but without costs and disbursements. The Clerk shall enter judgment accordingly.

Dated: December 23, 2009

DEC 23 2009



J.S.C.
ALICE SCHLESINGER

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