

<b>YL Sheffield LLC v Wells Fargo Bank, N.A.</b>
2009 NY Slip Op 33443(U)
July 29, 2009
Supreme Court, New York County
Docket Number: 601782/2009
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED  
Justice

PART 60

YL Sheffield LLC, et al.,

Plaintiffs,

- v -

Wells Fargo Bank, N.A., et al.,

Defendants.

**E-FILE**

INDEX NO.	<u>601782/2009</u>
MOTION DATE	_____
MOTION SEQ. NO.	<u>003</u>
MOTION CAL. NO.	_____

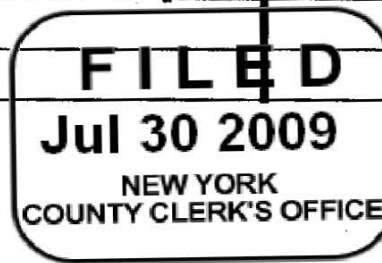
The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_



Cross-Motion:  Yes  No

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

In accordance with the proceedings of July 8, 2009 and upon the papers submitted, Plaintiffs' motion, seeking, *inter alia*, a preliminary injunction and expedited discovery, is denied. A preliminary injunction is granted at the court's discretion upon a showing of (1) likelihood of success on the merits; (2) the potential for irreparable harm; and (3) a balance of the equities in favor of the moving party. *Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 862, 552 NYS2d 918, 918 (1990). It is well-established that a preliminary injunction is a "drastic remedy" and Plaintiffs here have not carried the "particularly high" burden necessary to demonstrate that such a drastic remedy is appropriate in this case. *Koultukis v. Phillips*, 285 AD2d 433, 435, 728 NYS2d 440, 440 (1st Dep't 2001) ("drastic remedy"); *Council of the City of New York v. Giuliani*, 248 AD2d 1, 4, 679 NYS2d 14, 16 (1st Dep't 1998), leave to appeal dismissed in part, denied in part, 92 NY2d 938, 680 NYS2d 902 (1998) ("particularly high" burden).

Specifically, Plaintiffs have not shown either that the sale they seek to enjoin will result in irreparable harm to them or that they are likely to succeed on the merits of their claims. Plaintiffs' argument that the forbearance agreements are invalid is unpersuasive. The

consequence of those agreements was that the foreclosure on the Current First Mezzanine Loan and subsequent sale of the collateral underlying that loan were delayed. Plaintiffs' current motion seeks to further delay the foreclosure sale. Thus, the delay resulting from the forbearance agreements, which Plaintiffs now claim to be invalid, can hardly be characterized as harmful to Plaintiffs. Furthermore, the alleged invalidity of the forbearance agreements which delayed the foreclosure sale cannot provide a basis for now delaying what is indisputably a bona fide sale.

Likewise, YL Sheffield LLC and SH 57<sup>th</sup> LLC (the individual Plaintiffs) are not members of the 322 West 57<sup>th</sup> Owner LLC (the LLC entity), whose membership interests secure the loan. Thus, the individual Plaintiffs cannot allege that they stand to lose any property interest upon the sale of that entity, much less establish that they are likely to succeed on the merits of their claim that they stand to lose such an interest. To the extent that the individual Plaintiffs argue that the property interest at stake is, in fact, theirs by way of their relationship to the LLC entity through intermediary entities, that relationship is too attenuated to permit finding an ownership interest on the part of the individual Plaintiffs that they are likely to succeed in protecting.

However, the LLC entity, which is a derivative plaintiff (and for purposes of this motion I will assume that the derivative claim is proper), does have a direct property interest at stake here. Nevertheless, the LLC is no more likely than the individual Plaintiffs to succeed on the merits of its claims because, even assuming that the LLC entity indeed has a property interest implicated by the foreclosure, the sale is legitimate and the LLC entity has not alleged otherwise. Thus, the consequences of the sale for the LLC entity, whether undesirable to that entity, do not entitle the LLC entity to any relief. My decision in *Casita, LP v. Maplewood Equity Partners (Offshore), Ltd.*, which Plaintiffs cite in their brief, is distinguishable on its face and so does not support Plaintiffs' argument here.

I am not suggesting that Plaintiffs – individual and derivative – may or may not be injured from the sale of the membership interests in the LLC entity as collateral underlying the note. But, as discussed below, this potential injury is compensable by money damages. Plaintiffs have not alleged – in the Complaint or in their brief in support of this motion –

either that the Current First Mezzanine Loan is invalid or that it is not in default. Plaintiffs' counsel's position at oral argument that I should infer such an allegation from paragraph 76 of the Complaint, which contains a chart demonstrating the allegedly unauthorized "reshuffling" of the loan is unconvincing and I make no such inference here. Thus, Plaintiffs have not raised a reason for me to prevent or delay the foreclosure of that loan and the consequent sale of its collateral.

Defendants' legitimate exercise by of their remedies upon default – in this case, foreclosure – cannot constitute irreparable harm to Plaintiffs. See *Pacific Elec. Wire & Cable Co. v. Set Top Int'l Inc.*, 2004 U.S. Dist. Lexis 3400 (S.D.N.Y. Jan. 20, 2004) (characterizing attempts to block foreclosure as "stalling the market"); *Thorndock v. Kinderhill Corp.*, 702 F. Supp. 468, 471-72 (S.D.N.Y. 1988) (refusing to enjoin Article 9 foreclosure of partnership interests pledged as security for loans, holding that Plaintiff would not suffer irreparable harm because they could seek money damages if underlying claims were successful). In this case, there is no dispute that the Current First Mezzanine Loan is valid, in default, and subject to foreclosure. That foreclosure then cannot, as a matter of law, cause irreparable harm to Plaintiffs. Additionally, the legitimacy of Defendants' exercise of these remedies makes it unlikely that Plaintiffs will succeed on the merits of their claims.

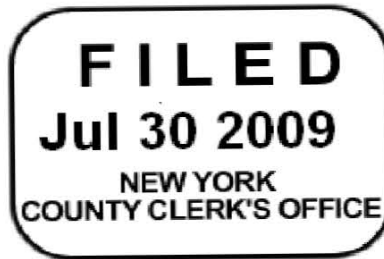
While Plaintiffs may or may not be able to establish that certain of the forbearance agreements are invalid, as discussed above, the validity of those agreements – the challenge to which is at the heart of Plaintiffs' case – is not relevant to the issue before me now, because the sole consequence of those agreements is that the foreclosure was delayed. Those agreements did not determine whether the loan would mature without payment and thus be subject to foreclosure, whatever the timing.

Indeed, whatever harm may come from the sale, if any, is of the sort that can be remedied with money damages, as the complaint amply demonstrates. Plaintiffs seek damages – in total, a large amount – on virtually every claim. This strongly undermines their argument that a preliminary injunction is warranted, because the damages that Plaintiff seek would be insufficient to remedy the harm that has and will befall Plaintiffs. In fact, it appears clear that the foreclosure sale is merely an intervening event, precipitated by the allegedly

wrongful actions that Plaintiffs describe in the Complaint, the gravamen of which is the claims for money damages suffered as a result of breach of fiduciary duty, breach of contract, and conversion. If Plaintiffs succeed on these claims, the damages granted will remedy any harm Plaintiffs have suffered.

Finally, in light of my decision to deny Plaintiffs' request for a preliminary injunction, the effect of which will be to allow the sale to go forward, there is no principled reason for me to grant the expedited discovery they seek and I decline to order it.

Accordingly, Plaintiffs' motion seeking, inter alia, a preliminary injunction is DENIED.



Dated: 7/29/09

**HON. BERNARD J. FRIED**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE