

Katsaros v Lanzilotta
2011 NY Slip Op 32897(U)
October 24, 2011
Sup Ct, Nassau County
Docket Number: 011735-11
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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PAUL KATSAROS,

Plaintiff,

TRIAL/IAS PART: 20

**Index No: 011735-11
Motion Seq. No. 1
Submission Date: 10/4/11**

-against-

**MELISSA LANZILOTTA, JASON HIGGINS,
DUSTIN DENTE, ELIZABETH DENTE,
BRANDON LISI, CLEAR BLUE WATER, LLC,
"JOHN DOE" and "JANE DOE", said names being
unknown, it being the intention of Plaintiff to designate
any person claiming to have any ownership interest in
CLEAR BLUE WATER, LLC,**

Defendants.

-----X

The following papers have been read on this Order to Show Cause:

- Order to Show Cause, Attorney's Affirmation, Affirmation,
Affidavit in Support, Complaint and Exhibits.....X**
- Affidavit in Opposition and Exhibits.....X**
- Reply Affirmation and Exhibits.....X¹**

This matter is before the court on the Order to Show Cause filed by Plaintiff Paul Katsaros ("Katsaros" or "Plaintiff") on August 10, 2011 and submitted on October 4, 2011. For the reasons set forth below, the Court denies the Order to Show Cause and vacates that portion of the temporary restraining order ("TRO") issued by the Court on October 11, 2011 which stayed the foreclosure sale scheduled for October 12, 2011 in a foreclosure action pending in the

¹ Although Plaintiff's counsel did not obtain the Court's permission to submit a reply to the Order to Show Cause, as required, the Court, in its discretion, will consider Plaintiff's reply papers.

Supreme Court of Suffolk County titled *Oyster Bay Management LLC v. Clear Blue Water LLC et. al.*, Suffolk County Index Number 45206-08 pending a hearing and determination of a separate motion before the Court which is scheduled for oral argument before the Court on November 1, 2011 at 10:00 a.m.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order staying foreclosure sales of real property in foreclosure actions pending in Nassau, Suffolk, Kings and Queens Counties. Those actions are: 1) *Samuel I. Glass v. Captain Hulbert House, LLC, Clear Blue Water LLC ["CBW"] et al.*, Nassau County Index Number 24192-09 ("Nassau Foreclosure Action"), 2) *Oyster Bay Management LLC ["OBM"] v. CBW*, Suffolk County Index Number 45206-08, which relates to property located at 53-55 Main Street, Cold Spring Harbor, New York ("Suffolk CSH Foreclosure Action"), 3) *Shaw Funding, L.P. v. Joam LLC*, Kings County Index Number 10812-08 ("Brooklyn Foreclosure Action"), 4) *Lauren Berman v. Captain Hulbert House, LLC, CBW*, Suffolk County Index Number 23883-09 ("Suffolk Foreclosure Action), and 5) *US Bank, N.A. v. Dente*, Queens County Index Number 23701-09 ("Queens Foreclosure Action"). Plaintiff also seeks an Order enjoining Defendants Melissa Lanzilotta ("Lanzilotta"), Jason Higgins ("Higgins"), Dustin Dente ("Dente"), Elizabeth Dente and Brandon Lisi ("Lisi") (collectively "Individual Defendants") from directly or indirectly taking any action to exercise authority on behalf of CBW or claim or dispose of any interest in CBW until a final decision is made in connection with the relief sought in the Complaint.

OBM opposes Plaintiff's application.

B. The Parties' Background

The Complaint alleges that Plaintiff seeks a declaratory judgment as to the current ownership of CBW and, specifically, a judgment declaring Katsaros the 100% owner of CBW and enjoining any other person or entity from claiming an ownership interest in CBW arising prior to the commencement of this action. The Complaint alleges that on or about August 18, 2010, Defendant Lisi,² the managing and sole member of CBW, transferred his entire equity

² As discussed *infra*, Defendants Lisi and Dente were recently convicted of felonies in the County Court of Suffolk County related to their involvement in mortgage fraud.

interest in CBW to Katsaros, in satisfaction of approximately \$100,000 owed by Lisi to Katsaros. CBW subsequently commenced a Chapter 11 bankruptcy proceeding (“Bankruptcy Action”). During the Bankruptcy Action, OMB alleged that Katsaros was not authorized to sign the Bankruptcy Petition based on an alleged 2006 operating agreement (“Operating Agreement”) and 2007 loan application (“Loan Application”) executed by Defendants Lanzilotta and Higgins as alleged members of CBW. Katsaros alleges that the Operating Agreement is not legitimate and was not authorized by CBW or its members. Plaintiff seeks a judicial determination that he is the current and sole owner of CBW, which will enable him to protect his interest in CBW and CBW’s properties, which are its sole assets.

In opposition, counsel for OBM affirms that a stay of the scheduled foreclosure sale in Suffolk County would prejudice OBM. OBM’s counsel also submits that “the murky and criminal background of [CBW] is far more complicated” than presented by Plaintiff (Egan Aff. in Opp. at ¶ 2).

OBM’s counsel affirms that OBM is the current holder of the mortgage and note secured by the property located at 53-55 Main Street, Cold Spring Harbor, New York (“CSH Property”). On July 2, 2007, CBW entered into a contract of sale for the purchase of the CSH Property (Ex. A to Egan Aff. in Opp.) which Lisi, as CBW’s attorney-in-fact, executed. On January 16, 2008, CBW executed a mortgage and promissory note agreement with Washington Mutual Bank (“WaMu”) for the purchase of the CSH Property (*id.* at Ex. B). Lanzilotta signed the mortgage and note as CBW’s managing member, and also executed a personal guaranty. Lanzilotta also completed CBW’s commercial mortgage application (*id.* at Ex. C) which lists Lanzilotta as the managing member and 95% owner of CBW, and Higgins as the owner of the remaining 5%. The application includes a copy of the Operating Agreement. After making a few payments, CBW defaulted on the mortgage and note. JPMorgan Chase Bank (“Chase”), which acquired WaMu, commenced a foreclosure action against CBW and Lanzilotta on December 19, 2008.

In 2009, Dente and Lisi were charged, in state and federal courts, with criminal offenses arising from their participation in a mortgage fraud scheme (“State and Federal Criminal Actions”). In August of 2010, OBM purchased the note and mortgage from Chase, and OBM was substituted as Plaintiff in the Suffolk CSH Foreclosure Action, as reflected by the Order provided (Ex. F to Egan Aff. in Opp.). The court-appointed referee scheduled a foreclosure sale for May 11, 2011. CBW filed an Order to Show Cause in the Suffolk CSH Foreclosure Action seeking to vacate the foreclosure judgment. In an affidavit in support of that Order to Show

Cause, Katsaros claimed to have a 100% ownership interest in CBW. On May 9, 2011, CBW filed a second Order to Show Cause seeking to vacate the judgment and stay the foreclosure sale. The Court denied the stay and refused to sign the order to Show Cause which contains the following notes of the Court: "Insufficient proofs to support stay application, Lack of meritorious defense, Issues waived" (*id.* at Ex. H).

On May 10, 2011, the day before the scheduled foreclosure sale, CBW filed the Bankruptcy Action. OBM moved to dismiss that Action alleging that the filing was in bad faith and that Katsaros lacked authority to file the Action, citing, *inter alia*, the Operating Agreement and Loan Application. OBM's counsel affirms that at an August 1, 2011 conference in the Bankruptcy Action, Plaintiff's counsel argued that Lisi was previously the true owner of CBW and properly transferred his ownership interest to Katsaros, and that the Operating Agreement and Loan Application were fraudulent. OBM's counsel submits that these representations are in contrast to the admissions of Lisi and Guldi in the State Criminal Action. OBM provides a transcript of the guilty pleas of Lisi and Guldi (Exs. L and M to Egan Aff. in Opp.) which includes the following colloquy during the Lisi guilty plea on July 29, 2011 before the Honorable James F. X. Doyle in the County Court of Suffolk County:

THE COURT: The Grand Jury accuses you of Grand Larceny First Degree, defendants, acting in concert, on or about June 16, 2008 in Suffolk County stole certain property; namely, US currency from [WaMu], the value of which exceeded more than one million dollars related to improved real property known as Fifty-Three Fifty-five Main Street, Cold Spring Harbor.

How to you plead to that charge?

THE DEFENDANT [Lisi]: Guilty.

THE COURT: What were your acts in regard to that property?

THE DEFENDANT: Your Honor, there was a second closing that occurred on that building on or about the date in the indictment, and I had helped to negotiate and consummate that closing.

THE COURT: Okay.

Of course, when you were involved in doing that, you understood that the money was going to be diverted to you and the other co-defendants?

THE DEFENDANT: Yes, your Honor.

Ex. L at pp. 10-11.

Guldi made similar admissions during his guilty plea allocation on July 29, 2011 with respect to a charge of Grand Larceny in the First Degree in connection with the CSH Property. The indictment alleged that Guldi, Dente, Lisi and Lanzilotta acted in concert with each other in committing that crime. *See* Ex. M at pp. 12-14.

During a August 1, 2011 proceeding in the Bankruptcy Action, in which CBW is the debtor, the judge presiding over the Bankruptcy Action said the following:

[T]his debtor was born, lived, operated and now will die of fraud. It was created in fraud. It existed in fraud. It's now trying to come back to life with some form of fraud. And it's not happening in this court.

Ex. K at p. 37

On August 4, 2011, the Court in the Bankruptcy Action dismissed that Action, as reflected by the Order provided (Ex. N to Egan Aff. in Opp.).

On October 11, 2011, Plaintiff filed a second Order to Show Cause which included a request for a temporary restraining order. The Court granted the TRO which provides that, until further order of this Court or further order of the Justice presiding over the [Suffolk CSH Foreclosure Action], and pending the hearing and determination of the application, the foreclosure sale scheduled for October 12, 2011 shall be stayed. The TRO also included a provision directing Plaintiff to place the sum of \$100,000 in the Egan Golden escrow account by 3:00 p.m. on October 11, 2011, and further directing that the escrow agent release a sum sufficient to make all monthly payments due on the underlying mortgage.

C. The Parties' Positions

Plaintiff submits that, in light of OBM's raising the issue of the validity of Katsaros' ownership of CBW, Katsaros cannot sell properties on behalf of CBW. Plaintiff contends that a judgment declaring Katsaros the current and sole owner of CBW is necessary so that Katsaros may protect his ownership interest in CBW and attempt to save the Properties from foreclosure, and that an Order staying the Foreclosure Actions is necessary to avoid irreparable harm

OBM opposes Plaintiff's application, submitting that the Court "should not be the next stop on CBW's continuing train of fraud" (Egan Aff. in Opp. at ¶ 15). OBM submits that Lisi, Dente, Guldi and Lanzilotta created and used the corporate form of CBW to commit grand larceny against WaMu after the purchase of the CHS Property, as well as other larcenies related to other properties. OBM notes that CBW, through Katsaros, already attempted, unsuccessfully, to stay the foreclosure of the CSH Suffolk Property. OBM describes Plaintiff's counsel's

application as “utterly meritless and disingenuous” (*id.* at ¶ 18) in light of his failure to alert the Court to Lisi’s fraudulent conduct. OBM submits that, in light of evidence demonstrating that the principals and management of LLC committed larcenies through CBW, the Court should deny Plaintiff’s application for an Order staying the foreclosure of the CSH Suffolk Property.

RULING OF THE COURT

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

The Court denies Plaintiff’s application, based on the Court’s conclusion that Plaintiff has not demonstrated a likelihood of success on the merits. Plaintiff’s Order to Show Cause is premised on Plaintiff’s assertion that he is clearly the sole owner of CBW, and that claims to the contrary are unfounded. The documentation before the Court, however, suggests that determining the owner of CBW is not a simple task, which is made more complicated by the admittedly criminal conduct of Lisi and Guldi. In sum, at this stage, the record before this Court is far from clear regarding Katsaros’ alleged ownership of CBW. This is due, perhaps in large part, to the circumstances under which Katsaros acquired any alleged ownership, which at the very least led him to transact business with a since-convicted former attorney whose own business relationships have resulted in at least one other individual pleading guilty to a felony. Indeed, this Court appears to be far from alone in its views; the Bankruptcy Court similarly observed the fraudulent conduct in which CBW was involved.

Accordingly, the Court denies Plaintiff's Order to Show Cause in its entirety, and vacates that portion of the TRO which stayed the Suffolk CHS Foreclosure Sale. Any further relief regarding any of the foreclosure sales at issue, including the Suffolk sale, may be obtained by appropriate application to the judge presiding over the individual foreclosure action.

All matters not decided herein are hereby denied.

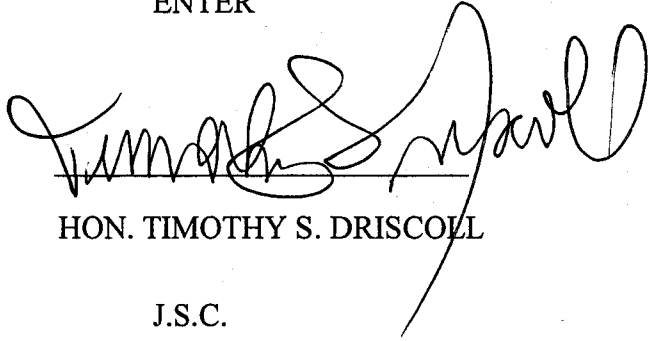
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on November 1, 2011 at 10:00 a.m. for oral argument regarding a separate motion before the Court.

ENTER

DATED: Mineola, NY

October 24, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
OCT 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE