SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x

THE PANDOLFI ORGANIZATION, INC., ROBERT PANDOLFI, and MARIA PANDOLFI,

Plaintiffs,

- against -

CAPITAL STACK FUND II LLC, ANNA MOLISSI, DRAMATICA CONSULTING LTD., GUARANTEED HOME MORTGAGE COMPANY, INC., and ROBERT LIS,

Defendants.

----------x

TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 002846-12
Motion Seq. No. 1
Submission Date: 3/20/12

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

Order to Show Cause, Affidavits in Support and Exhibits.....x
Emergency Affirmation.....x
Memorandum of Law in Support.....x
Affidavit of K. Wasserman.....x
Affirmation in Opposition and Exhibits.....x
Defendant's Memorandum of Law in Opposition.....x
Correspondence dated March 22, 2012 and Affirmation of J. Kolm and Exhibit.....x

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiffs The Pandolfi Organization, Inc. ("Corporation"), Robert Pandolfi ("Robert") and Marie Pandolfi ("Marie") ("Plaintiffs") on March 6, 2012 and submitted on March 20, 2012. For the reasons set forth below, the Court denies Plaintiffs' Order to Show Cause in its entirety and

vacates the temporary restraining order ("TRO") issued by the Court on March 6, 2012.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order enjoining and restraining Defendants Capital Stack Fund II LLC ("Capital"), Anna Molisse ("Molisse"), Dramatica Consulting Ltd. ("Dramatica"), Guaranteed Home Mortgage Company, Inc. ("Guaranteed") and Robert Lis ("Lis") ("Defendants"), their officers, directors, employees, servants, agents, predecessors, successors, assigns, representatives, or persons under the dominion and control of any or all of the foregoing, or acting in concert with any and all of the foregoing, during the pendency of this action, from 1) instituting a proceeding to foreclose upon the properties ("Properties") located at 5403 37th Avenue, Woodside, New York 01193 ("Commercial Property") and/or 22 Addison Lane, Greenvale, New York 11548 ("Residential Property"); and/or 2) conducting a public sale of the shares ("Shares") of Pandolfi Organization in furtherance of and/or pursuant to any alleged security documents.

On March 6, 2012, the Court issued a temporary restraining order ("TRO") which directed that, pending the hearing and determination of this motion, Defendants, their officers, directors, employees, servants, agents, predecessors, successors, assigns, attorneys or persons acting under the dominion and control of any or all of the foregoing are enjoined and restrained from taking any action to foreclose upon the Residential Property.

Capital opposes Plaintiffs' application.

B. The Parties' History

The Verified Complaint ("Complaint") alleges that this action arises out of "a fraud perpetrated upon the Plaintiffs in connection with a private finance transaction in which funds were allegedly provided to and/or for the benefit of the Plaintiffs in or about July, 2009" (Compl. at ¶ 13). The Complaint alleges specifically as follows:

Robert was a Fifty Percent (50%) shareholder in the Corporation. In or about June of 2009, Lis approached Robert regarding borrowing money against the equity he possessed in the Commercial and Residential Properties. Lis advised Robert that he knew a mortgage broker/loan originator who could locate a money lender willing to lend money to the Corporation in

exchange for a mortgage on the Properties. The mortgage broker to whom Lis referred was Molisse, an owner, agent and/or employee of Dramatica and/or Guaranteed. Plaintiffs allege that Molisse acted as "the sole conduit between the Plaintiffs and Defendant Capital in connection with the Defendants' effort to fraudulently extract the equity that the Plaintiffs possessed in the Properties" (Compl. at ¶ 16).

Plaintiffs allege that, allegedly in furtherance of the fraud, a closing ("Closing") took place on July 7, 2009 at the office of Capital's counsel. Prior to the Closing, Molisse arranged for attorney Harry Kaufman ("Kaufman") to represent Plaintiffs at the Closing, and Robert first met Kaufman at the Closing. At the Closing, at the direction of Kaufman and Molisse, Robert executed loan documents ("Loan Documents"), including but not limited to a mortgage and security agreement. At the Closing, Robert acted as the borrower.

At or shortly before the Closing, the net loan proceeds ("Proceeds") were provided to Lis and/or business entities controlled by Lis. After the Closing, Lis, through his business entities, remitted all required monthly mortgage payments to Capital in connection with the financing obtained at the Closing.

In or about November of 2011, Robert learned that monthly mortgage payments were no longer being remitted to Capital and contacted Kaufman regarding a notice of default that Robert received from Capital's counsel. Kaufman advised Robert that he had executed not only a mortgage with respect to the Properties, but had also pledged the stock ("Stock") of the Corporation, the sole asset of which is the Commercial Property, as further collateral to Capital. Shortly thereafter, Robert learned that Molisse and Lis had prepared allegedly false and fraudulent documentation in connection with their efforts to secure the loan ("Loan") against Plaintiffs' Properties. In addition, Molisse advised Robert that she was not only a broker/loan originator in connection with the Loan, but also a principal and/or investor in Capital, having invested $300,000 of the $1,125,000.00 Loan amount. Capital recently advised Plaintiffs of a scheduled sale of the Stock on March 7, 2012, which Plaintiffs submit will result in the loss of their ownership in the Commercial Property.

The Complaint contains eleven (11) causes of action: 1) fraud/fraud in the inducement, 2) negligent misrepresentation, 3) promissory estoppel, 4) breach of the agreement among the

parties that the only security securing the Loan was a mortgage against the Properties, that the Proceeds would be "utilized in a reasonable and prudent business manner" (Compl. at ¶ 55) and that the Loan was an arms length transaction, 5) breach of fiduciary duties, 6) breach of covenant of good faith and fair dealing, 7) unjust enrichment, 8) conversion, based on Defendants' refusal to return monies to Plaintiff or relinquish any claim to the Properties, 9) deceptive practices in violation of General Business Law § 349, 10) a request for injunctive relief restraining actions by the Defendants that would interfere with Plaintiffs' ownership of the Properties and Stock; and 11) a request for costs and fees incurred in this action.

In support of Plaintiffs' application, Robert affirms the truth of the allegations in the Complaint. He also affirms, *inter alia*, that 1) Lis represented himself to be a financial advisor and introduced Robert to Molisse; 2) Molisse represented herself to be a mortgage broker/loan originator affiliated with Dramatica and Guaranteed; 3) Molisse advised Robert that she had access to a private lender who would fund investments with Lis; 4) Molisse and Lis convinced Rober to proceed with the Loan; 5) in furtherance of the Loan, Robert provided Lis with the Corporation's tax returns which reflected the Corporation's financial condition and the fact that Robert and his brother were equal shareholders; 6) prior to his dealings with Lis and Molisse, Robert was not interested in mortgaging the Commercial Property or using the Residential Property as security for the Loan; 7) Kaufman advised Robert at the Closing that the documents he was being asked to sign were standard loan documents; 8) after he received the default notices from Capital (Ex. A to Robert Aff. in Supp.), Robert contacted Molisse who advised Robert, for the first time, that she had invested $300,000 into the $1,180,000 Loan proceeds, and that Robert had pledged his Shares as collateral; 9) Robert had "no idea" (Compl. at ¶ 23) that he had guaranteed the Residential Property and pledged the Stock as part of the Loan transaction; 10) Robert would never have jeopardized his brother's interest in the Commercial Property, particularly because rents received from that Property are their sole means of support; and 11) Robert never prepared or signed the stock certificate that Capital maintains he signed ("Purported Certificate") (*id.* at Ex. B).

Edward Pandolfi ("Edward"), Robert's brother, affirms that since 1990, he and Robert have each been 50% shareholders of the Corporation. Edward affirms that he 1) never pledged

his Stock to Capital or any other entity; 2) never executed a mortgage in favor of Capital; and 3) never benefitted from any financing with Capital. Edward affirms that his ownership interest in the Corporation is his only means of support, and submits that Capital does not have the right to sell his Shares.

M. Evan Metalios, Esq. ("Metalios") affirms that he is an attorney who was retained by Robert and Edward in 1990 to prepare and submit the required documentation to create the Corporation. The Corporation is a Subchapter S corporation which, from its inception, has had 200 no par value shares of stock issued, owned equally by Robert and Edward. The Corporate books and records have been maintained in Metalios' office since 1990.

Metalios viewed a scanned email image of the Purported Certificate, noted as Certificate Number 1, which inaccurately purports to vest 100% of the Corporation in Robert. In addition, the year of copyright on the Purported Certificate is inconsistent with its stated execution date. Metalios submits that the Purported Certificate is a "clear fabrication and misrepresentation of the actual and original Certificate Number 1 which I maintain in my possession" (Metalios Aff. in Supp. at ¶ 6). Finally, Metalios affirms that the official stock transfer ledger of the Corporation, of which he has maintained possession, makes no reference to the purported issuance of stock as stated in the Purported Certificate.

Robert H. Weiner ("Weiner") affirms that he is a licensed public accountant who has been preparing the Corporation's tax returns since April of 1990. He confirms that the Corporation was formed in April of 1990, is a closely held Subchapter S corporation, and has always had 200 hundred no par value shares of stock issued, with Robert and Edward each owning 100 no par value shares. The Corporation's tax returns have always reflected this stock distribution.

In opposition, Kenneth Wasserman ("Wasserman"), the Managing Member of Capital, affirms that Capital made the secured commercial Loan to the Corporation in the amount of $1,180,000 on July 7, 2009. Robert, the President, Secretary and sole shareholder of the Corporation, represented that the Loan proceeds were being used to purchase automobile parts that the Corporation planned to sell in the retail market. Wasserman submits that it now appears that "Plaintiffs used this money to make some kind of high stakes, fictitious or superficial

investment instead" (Wasserman Aff. in Opp. at ¶ 1).

Wasserman affirms that he had numerous discussions with Robert about the terms of the Loan, and that Robert understood that he was putting up 100% of the Corporation's Stock, as well as the Residential and Commercial Properties, as collateral for the Loan. Plaintiffs have not made any payments on the Loan since October 7, 2011 and are $70,000 in default. Since November of 2011, Wasserman has attempted to discuss with Robert the resolution of Plaintiffs' default, but Robert was unwilling to discuss the matter and told Wasserman that Capital would just have to wait for his payment. Wasserman also asked Capital's counsel to communicate with Plaintiffs to discuss a solution, and counsel sent several letters to Plaintiffs who ignored those communications.

In light of Plaintiffs' default, and unwillingness to discuss a resolution, Capital took the necessary steps to notice the sale of the Stock pledged by Robert in his capacity as President and sole shareholder of the Corporation. The sale was scheduled for, and proceeded on, March 7, 2012 and, on that date, Capital purchased 100% of the Shares of such Stock pursuant to its rights and remedies under the Loan documents. Capital also intends to pursue its rights to foreclose on the Commercial and Residential Properties.

Wasserman affirms that it was not until January 24, 2012 that Robert mentioned the alleged fraud as set forth in the Complaint. Prior to that date, Robert always represented that he was the sole shareholder of the Corporation, and he signed and notarized agreements and documents at the Closing that represented to Capital that he was the sole and exclusive shareholder of the Corporation. Moreover, Plaintiffs never mentioned Defendant Lis in connection with the Loan, and Capital first learned of Lis' alleged involvement upon reading the instant application. Wasserman avers that Robert previously referred Capital to a man named "Robert" when a payment check had bounced or was late, and intimated that "Robert" was Plaintiffs' accountant. Capital was never led to believe that Lis was involved with the Loan transaction, or received any Loan Proceeds, and neither Capital nor Wasserman has any relationship with Lis.

Wasserman affirms, further, that Molisse was presented to Capital as the broker on the Loan. Molisse did not contribute $300,000 towards the Loan, and is not a principal or member of Capital. All of the Loan Proceeds were contributed to Capital by its members. In addition, there is no relationship between Wasserman/Capital, and Dramatica and Guaranteed.

Wasserman affirms that the Loan proceeds and payments were sent to, and received by, third parties, and provides the specifics of those distributions.

Wasserman suggests that it is not Plaintiffs, but Capital, who have been victimized. Capital recently learned that Robert exaggerated the amount of rental income that he and Edward were receiving from the Commercial Property, and Capital relied on those representations in agreeing to make the Loan.

Wasserman submits that Capital would suffer great financial hardship if the Court grants Plaintiffs' application. Capital is comprised of a group of investors who funded the Loan from their own money, and their investment will be jeopardized if they lose the ability to pursue their remedies under the Loan documents. Wasserman notes that Capital made extensive efforts to discuss a resolution with Plaintiffs who were unreceptive to those efforts.

Counsel for Capital ("Capital's Counsel") affirms that Robert, at the Closing, executed a Pledge Agreement and exhibits (Ex. 1 to Gallagher Aff. in Supp.) in which he represented that he was the sole, 100% shareholder of the Corporation. Capital's counsel submits that the documents signed by Robert, reflecting his 100% ownership, were "not buried in lengthy documents filled with legalese" (*id.* at ¶ 4), but rather were 1-2 page documents with 1-2 paragraphs on which Robert's representation regarding his Stock ownership was clearly set forth.

Capital's Counsel further affirms that Capital provided the Corporation with several notices of default (Ex. 2 to Gallagher Aff. in Supp.), all of which were ignored by Plaintiffs. Following Capital's publication of the notice of sale of the Shares on February 7, 2012, Capital's Counsel was contacted by Plaintiffs' counsel who engaged in communications with Capital that "amounted to nothing more than tactical delays" (*id.* at ¶ 10). By way of example, Plaintiffs' counsel asked Capital to provide 1) proof that the Loan proceeds were disbursed to the Corporation or at its direction, and 2) information regarding the amount of rent that the Corporation represented to Capital was being collected from the tenants at the Commercial Property. Capital provided the requested information, and consented to Plaintiffs' request for a postponement of the Stock sale on the condition that the Corporation make one monthly Loan payment, provide a plan of repayment or refinancing, and agree to pay for the costs of republication of the Sale, or waive notice defects. Capital received no response from Plaintiffs or their counsel.

Capital's Counsel affirms that he was advised by Plaintiffs' counsel on March 6, 2012

that Plaintiffs intended to appeal the Court's decision to issue a limited TRO. On March 7, 2012, the Appellate Division denied Plaintiffs' appeal (*see* Ex. 7 to Gallagher Aff. in Opp.) and Capital proceeded with the Sale. Capital, the highest and only bidder at the sale, is now the sole owner of 100% of the Shares of Stock of the Corporation. Capital's Counsel submits that the sale was lawful and in compliance with the terms of the Pledge Agreement and the Uniform Commercial Code.

Capital's Counsel notes that the Loan Agreement (Ex. 8 to Gallagher Aff. in Opp.) explicitly states that the Corporation, as borrower, grants a mortgage in the amount of $1,180,000 in favor of Capital, as lender, on the Mortgaged Property as collateral for the Loan. Capital's Counsel also notes that 1) the Loan Agreement defines the terms "Mortgage," "Mortgaged Property" and "Event of "Default;" 2) the Loan Agreement explicitly states that the Mortgaged Property will serve as the collateral on the Loan; 3) the Corporation executed a Mortgage, Assignment of Rents and Security Agreement ("Commercial Mortgage Agreement") (*id.* at Ex. 9) which states that the Loan is secured by a mortgage on the Commercial Property; 4) Robert and Maria executed a Mortgage, Assignment of Rents and Security Agreement ("Residential Mortgage Agreement") and Guaranty (*id.* at Exs. 10 and 11) which reflect that the Loan is secured by the Residential Property; and 5) the Guaranty included documentation reflecting that Robert acted on Maria's behalf pursuant to a Durable Power of Attorney signed by Maria on July 7, 2009 (*id.* at Ex. 11).

Plaintiffs have provided Affidavits of Service reflecting their service of the Order to Show Cause and supporting papers on Defendants Guaranteed, Dramatica, Molisse and Lis. Those Defendants have submitted no opposition or other response to Plaintiffs' Order to Show Cause.

Following the initial submission of this Order to Show Cause, Capital hand-delivered to the Court a letter from Capital's Counsel dated March 22, 2012 and accompanying Affirmation of Julie Kolm ("Kolm") Seeking Leave to Submit Newly Discovered Evidence in Further Opposition to Plaintiffs' Order to Show Cause. Kolm, counsel for Capital, affirms that she just received a copy of a Corporate Resolution dated February 5, 2009, signed and notarized by Robert and Edward (Ex. A to Kolm Aff.). This Corporate Resolution states that "Edward Pandolfi will retire all shares of The Pandolfi Organization," that Robert will become the sole shareholder of the Corporation, and that the proposed changes will go into effect as of

February 5, 2009. Kolm affirms that she first learned of this Corporate Resolution in speaking with a title company on March 20, 2012 regarding this action, and that the document was not in the files of Capital's Counsel. In its cover letter to the Court, Capital's Counsel submits that this document "further confirms [Robert's] representation to [Capital] and the title company that he was the sole shareholder of [the Corporation] at the time of the closing of the loan transaction."

C. The Parties' Positions

Plaintiffs submit that they have demonstrated their right to the requested injunctive relief by establishing 1) a likelihood of success on the merits through the Affidavits in Support which demonstrate, *inter alia*, that Robert was not the sole shareholder of the Corporation, did not prepare or execute the Purported Certificate and, therefore, did not pledge Edward's interest in the Corporation, 2) irreparable injury to Robert and Edward, the sole shareholders of the Corporation, if the sale of the Stock proceeds, and 3) a balancing of the equities in favor of Plaintiffs, in light of the fact that Plaintiffs' interest in the Shares and Properties will be adversely affected, and Defendants will not suffer significant hardship, if the Court grants the requested injunctive relief.

Capital opposes Plaintiffs' application submitting, first, that Plaintiffs have not demonstrated a likelihood of success on the merits as to Capital. Capital notes that Plaintiffs were represented by counsel when they executed the Loan documents which clearly reflect that the collateral securing the Loan consists of the Stock in the Corporation and mortgages on the Commercial and Residential Properties. Moreover, the Loan Documents set forth Capital's remedies in the event of a default, which include Capital's right to sell the Stock, and foreclose on the Commercial and Residential Properties. In addition, Capital affirms that Robert represented to Capital that the documentation he provided to Capital in connection with the Loan was accurate, and that documentation clearly reflects that Robert was the sole, 100% owner of the Corporation. Capital submits that it was not until the filing of this Order to Show Cause that Capital first learned of Edward's interest in the Corporation. Robert made no mention of Edward's interest during the many months that the Corporation was in default on the Loan, and did not respond to Capital's attempts to discuss a resolution of Plaintiffs' default.

On March 22, 2012, Capital's Counsel provided the Court with a Corporate Resolution dated February 5, 2009, signed by Robert and Edward, which reflects that Edward retired all of his shares to Robert on that date, which was six months before the Closing. Capital submits that

this Resolution is further evidence that, as of the date of the Closing, Robert was the sole shareholder of the Corporation and significantly weakens Plaintiffs' claims that Robert was unaware of the representations contained in the Loan documents he signed regarding his ownership in the Corporation.

Capital submits, further, that Plaintiffs cannot demonstrate that they will suffer irreparable injury without the requested relief as Capital is pursuing remedies clearly authorized by the Loan Documents, which Plaintiffs signed. Capital contends that the Court should not delay Capital's enforcement of its rights based on the "speculative allegations" in the Complaint (Capital Memo. of Law at pp. 8-9). Finally, Capital argues that a balancing of the equities favors Capital which is seeking remedies specifically authorized under the Loan Documents, and on which Capital relied in making the Loan.

RULING OF THE COURT

A. Preliminary Injunction Standards

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).

B. Application of these Principles to the Instant Action

The Court denies Plaintiffs' Order to Show Cause in its entirety based on the Court's conclusion that Plaintiffs have not demonstrated a likelihood of success on the merits. Plaintiffs' Complaint is premised on their claim that Robert was duped into signing the Loan documents, and relied to his detriment on the assurances of Lis and Molisse. The February 5, 2009

Corporate Resolution, however, supports the conclusion that Robert in fact owned 100% of the Stock in the Corporation, and significantly weakens Robert's claim that he signed the Loan documents without knowledge of their content. Moreover, Capital has produced the Loan Documents which clearly reflect that 1) Robert represented to Capital that he was the sole shareholder of the Corporation; 2) the Loan was secured by shares in the Corporation and mortgages on the Residential and Commercial Properties; 3) the Loan documents authorize Capital to sell the Shares and foreclose on those Properties in the event of a default; and 4) Plaintiffs are in default of their Loan obligations. Moreover, while Robert has affirmed that he relied exclusively on Lis and Molisse in agreeing to execute the Loan documents, Capital has provided documentation, and affirmations, supporting its claim that Plaintiffs made no mention of the alleged fraud for months after they were notified of their default. Under these circumstances, Plaintiffs have not established a likelihood of success on the merits. The Court therefore denies Plaintiffs' Order to Show Cause in its entirety, and vacates the TRO.

All matters not decided herein are hereby denied.

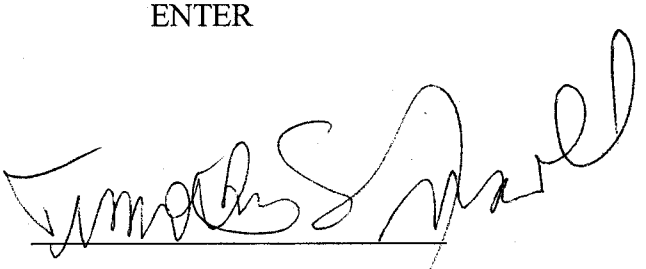
This constitutes the decision and order of the Court.

The Court directs counsel for all parties to appear before the Court for a Preliminary Conference on April 24, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY

March 23, 2012



HON. TIMOTHY S. DRISCOLL

J.S.C.