

Suttongate Holdings Ltd. v Laconm Mgt. N.V.

2016 NY Slip Op 32341(U)

November 17, 2016

Supreme Court, New York County

Docket Number: 652393/2015

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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SUTTONGATE HOLDINGS LIMITED,

Plaintiff,

Index No. 652393/2015

- against -

LACONM MANAGEMENT N.V., SAMIR ADRAWOS,
VIRGINIA IGLESIAS, KASHMIRE INVESTMENTS,
LTD., IMMO KASHMIRE DEVELOPMENT INC.,
SEDNA GROUP LTD., KUIPER GROUP LTD.,
and OURISTA N.V.

Defendant.

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Hon. C. E. Ramos, J.S.C.:

Plaintiff Suttongate Holdings Limited (Plaintiff) moves, pursuant to CPLR §§ 6301 and 6313, for a preliminary injunction to enjoin Defendants Lacomn Management N.V. (Lacomn), Kashmir Investments, LTD. (Kashmir), Immo Kashmir Development Inc. (Immo), Sedna Group LTD. (Sedna), Kuiper Group LTD. (Kuiper), Ourista N.V. (Ourista) (collectively, the Corporations), Samir Adrawos (Adrawos), and Virginia Iglesias (Iglesias) from taking any action with respect to the rents, issues, and profits of properties identified in the Loan Agreement ("Properties") other than to place them into escrow, with proceeds of the escrow to be used solely for the preservation and maintenance of the Properties, subject to Plaintiff's written consent. Plaintiff also moves to direct Defendants to provide an accounting, within 30 days, of all rents, issues, profits, and other income of the Properties for the period June 1, 2015 through the date of this

Order, to return all monies not spent on expenses of the Properties to the Escrow account, and to produce to Plaintiff within ten days all documents responsive to Plaintiff's Second Request for the Production of Documents.

Background

According to the complaint, Plaintiff is a Gibraltar corporation, involved in financial investments. Defendants Andrawos and Iglesias are sophisticated real estate investors and developers who maintain ownership over the Corporations. On July 29, 2014, Plaintiff, acting as lender, and Lancomn, acting as borrower, entered into a loan agreement (Loan Agreement), for the principal amount of \$8 million to facilitate the Defendants' purchase of the Properties. Andrawos executed a personal guarantee and Kashmire, Orista, and Kuiper, all entities under his control, executed additional guarantees (Suttongate Loan).

As provided in the Loan Agreement, \$7 million of the Suttongate Loan was used to acquire a pre-existing obligation totaling \$9.5 million that RBC Royal Bank N.V. had previously provided to Defendants (RBC Loan). On July 29, 2014, Plaintiff funded the remaining \$1 million of the Suttongate Loan through a series of checks and wire transfers to Defendants, which was to be used exclusively for the construction of the Properties, closing costs, and obtaining construction permits.

Pursuant to the Loan Agreement, upon the full repayment of the Suttongate Loan, Plaintiff agreed to "forgive the repayment

of the remainder of the RBC Loan." The Loan Agreement also provided that Defendants were to repay the Suttongate Loan within three years, including interest payments of \$53,334 per month "to be accrued and paid monthly on the first of each month." The Suttongate Loan was secured by an assignment of rents and profits of approximately twenty lots of real property located in St. Maarten, which were owned or controlled by Defendants.

Defendants paid interest to Plaintiff through May 2015, at which time they ceased making payments of interest. After failing to make interest payments for over a year, Plaintiff declared Defendants in default, and after their failure to cure, Plaintiff elected to accelerate and declare the Suttongate Loan immediately due at the default interest rate. On July 7, 2015, Plaintiff commenced this action seeking to enforce the Loan Agreement and the amounts due thereunder. Plaintiff alleges that it recently learned of a scheme to divert the income generated by the Properties to other entities controlled by Defendants.

Discussion

A party seeking preliminary injunctive relief pursuant to CPLR § 6301 must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities are in her favor (*W.T. Grant Co. v Srogi*, 52 NY2d 498 [1981])). A preliminary injunction is only granted in "unusual situations," where the right to relief

is clearly established (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264-65 [1st Dept 2009]).

A. Likelihood of Success on the Merits

Plaintiff contends that it is likely to succeed on the merits of its breach of contract claim because a valid and enforceable Loan Agreement exists, and Defendants are in breach of numerous provisions of said Loan Agreement by failing to make monthly interest payments, procuring insurance, and by fraudulently diverting the income generated from the Properties to entities under their control. Plaintiffs assert that Defendants, while failing to make interest payments, are fraudulently diverting income from the Properties to shame entities and affiliates controlled by Andrawos (Zaytsev Aff. Ex. 5). Further, Plaintiff argues that any judgment would be rendered ineffectual due to Defendants' conduct.

Conversely, Defendants argue that the expenses related to certain properties are expressly permitted by the Loan Agreement. Additionally, Defendants maintain that they did not default under the Loan Agreement because it is *void ab initio*. Defendants premise their argument on the fact that Mr. David, Plaintiff's attorney, purportedly utilized confidential information to structure the Loan Agreement to Defendants' detriment, without explaining an inherent conflict of interest. According to Defendants, David was obligated to explain his relationship with

Plaintiff prior to advising Defendants to execute the Loan Agreement. However, paragraph 24 of the Loan Agreement provided that both parties "had full opportunity to consult and have this and related agreements reviewed by [their] own independent counsel." Defendants do not allege that they actually retained David or received any written advice from him in relation to the Loan Agreement or any other matters. Thus, it does not appear that Defendants will be successful in their argument that the Loan Agreement would be invalidated under a conflict of interest theory.

The Defendants do not dispute that the Suttongate Loan was fully funded and that they failed to make requisite interest payments under the Loan Agreement, and to this extent, Plaintiff is likely to succeed on its claim for breach of contract.

Plaintiff also contends that Defendants have breached Section 9(2) of the Loan Agreement that requires them to procure insurance for the Properties. The requirement under the Loan Agreement to procure and provide documentation of insurance is clear and unambiguous. Despite Plaintiff's continued requests, Defendants have yet to provide copies of insurance policies and name Plaintiff as an additional insured. As such, Defendants have failed to present evidence that they have procured insurance.

Here, the failure to make interest payments combined with the failure to procure insurance warrants the conclusion that

Plaintiff is likely to succeed in its breach of contract claim. Plaintiff has demonstrated that denial of a preliminary injunction would deprive it of its bargained for rights under the Loan Agreement and its security interest. If Defendants continue to divert rental income, the Corporations will become insolvent, thereby underpinning Plaintiff's security interest and rendering a final judgment uncollectible.

B. Irreparable Injury if Relief is not Granted

Plaintiff alleges that it will suffer irreparable injury beyond monetary damages, as Defendants' actions, particularly with respect to the diversion of income and deprivation of Plaintiff's security interest in the "rents, issues, and profits" of the Properties will lead to the Corporations' demise by rendering a judgment in Plaintiff's favor uncollectible. In contrast, Defendants argue that Plaintiff has an adequate remedy compensable by money damages. Plaintiff further argues that Defendants' failure to maintain and procure adequate insurance, as required by the Loan Agreement, will result in irreparable harm should the Properties be damaged or destroyed.

Here, Plaintiff has a valid security interest in specific funds to which it is due. An injunction directing the funds at issue to be deposited in an escrow account pending a determination of the parties' rights and obligations would preserve the status quo (See *Fieldstone Capital, Inc. v Loeb*

Partners Realty, 105 AD3d 559 [1st Dept 2013]). The purpose of a preliminary injunction is not to determine the parties' ultimate rights but instead to preserve the status quo until a decision is reached on the merits (See *360 West 11th LLC v ACG Credit Co. II, LLC*, 46 AD3d 367 [1st Dept 2007]). Here, entering a preliminary injunction will preserve the status quo in light of multiple competing claims to the funds.

Should the funds be placed in escrow, the proceeds would be used solely for the preservation and maintenance of the Properties, subject to Plaintiff's written consent which cannot be unreasonably withheld, thereby protecting Plaintiff's security interest until the competing claims to the funds can be adjudicated on the merits. Moreover, Plaintiff has effectively demonstrated that money damages are insufficient, as the Corporations may cease to exist thereby making a judgment uncollectible (See *Sirius Satellite Radio, Inc. v Chinatown Apartments, Inc.*, 303 AD2d 261 [1st Dept 1982]).

C. Balance of the equities in favor of moving party

The "balancing of the equities" usually requires that the court look to the relative prejudice to each party accruing from a grant or a denial of the requested relief (*Ma v Lien*, 198 AD2d 186, 186-87 [1st Dept 1993]).

Plaintiff asserts that, without an injunction, it will suffer prejudice because it will not receive the monies that it

is entitled to and are justly due.

Plaintiff further asserts that it would be inequitable to allow the Defendants to circumvent their clear and unambiguous obligations under the Loan Agreement and improper diversion of funds due to Plaintiff. In addition, paragraph 12 of the Loan Agreement provides that Plaintiff has the right to take possession of the Properties to collect an amount by placing the funds in escrow should the Defendants, as borrowers, default on the Loans (Powers Aff. Exs. 1). The Court is persuaded that the equities tip in Plaintiff's favor, and reject Defendants' argument that the requested relief will thwart its ability to make timely payments is unpersuasive. Defendants may seek Plaintiff's consent to pay legitimate expenses, and in the absence of consent, apply to this Court for relief, if so advised.

Defendants have failed to establish that the hardship they will suffer will be greater than the hardship Plaintiff will experience as a result of the denial (*Somers Associates, Inc. v Corvino*, 156 AD2d 218 [1st Dept 1989]).

Conclusion

Under the current circumstances, it is appropriate for the the funds to be placed in escrow to prevent further harm (*See 360 West 11th Street LLC v ACG Credit Co. II, LLC*, 46 AD3d 367 [1st Dept 200]).

D. Motion for Expedited Discovery

The decision of whether to grant expedited discovery is within the discretion of this court (*MSCI Inc. v Jacob*, 120 AD3d 1072, 1075 [1st Dept 2014]). Courts are vested with broad discretion to control its calendar and supervise disclosure to facilitate the resolution of cases (*Alveranga-Duran v New Whitehall Apartments, L.L.C.*, 40 AD3d 287, 289 [1st Dept 2007]).

Plaintiff argues that expedited discovery will be beneficial by allowing Plaintiff to determine whether the amounts being placed into escrow are proper and to ensure that the Properties are being maintained as per the Loan Agreement. In their papers, Defendants do not address this portion of the motion.

ORDERED that Plaintiff's motion for a preliminary injunction is granted; and it is further

ORDERED that the rent, issues, profits, or other income of the Properties be placed into an escrow account, precluding Defendant from using said funds without Plaintiff's reasonable consent, not to be unreasonably withheld; and it is further

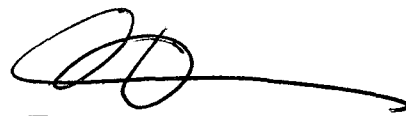
ORDERED that Plaintiff shall post an undertaking of \$50,000.00 within fourteen days from entry of this order granting a preliminary injunction; and it is further

ORDERED that Plaintiff's motion for expedited discovery is granted, to the extent that the parties are directed to appear for a discovery compliance conference on Monday December 5th at

10:30 AM.

DATED: November 17, 2016

ENTER:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

J.S.C.

CHARLES E. RAMOS