

Suttongate Holdings Ltd. v Laconm Mgt N.V.

2017 NY Slip Op 30568(U)

March 22, 2017

Supreme Court, New York County

Docket Number: 652393/2015

Judge: Charles E. Ramos

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X
SUTTONGATE HOLDINGS LIMITED,

Plaintiff,

Index No. 652393/2015

- against -

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

Defendants.

-----X

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

In motion sequence 010, plaintiff Suttongate Holdings Limited ("Suttongate") moves pursuant to CPLR 6301, for a preliminary injunction directing defendants Laconm Management ("Laconm"), Kashmire Investments ("Kashmire"), Immo Kashmire Development Inc. ("Immo"), Sedna Group LTD. ("Sedna"), Kuiper Group LTD. ("Kuiper"), and Ourista N.V. ("Ourista") (collectively "Defendants"), to establish and register mortgages on certain real property located in St. Maarten as security for a loan in the amount of \$8 million pursuant to loan agreements ("Loan Agreements"). Suttongate also moves pursuant to CPLR 3025(b) for leave to file a second amended complaint, moves pursuant to CPLR 3124 and 3125 to compel and moves for discovery sanctions. At oral argument on January 12, 2017, this Court granted that

portion of this motion for leave to file a second amended complaint ("Second Amended Complaint").

Background

For a full recitation of the facts, please see this Court's decision, dated November 17, 2016 (NYSCEF Doc. No. 246).

The following facts are taken from the Second Amended Complaint and are relevant to the instant motion.

In February 2014, RBC Royal Bank N.V. ("RBC"), as successor in interest to RBTT Bank, N.V. ("RBTT"), owned and held instruments of debt and mortgages executed by Kashmire, Laconm, Ourista, for the purpose of securing certain loans ("the Obligations") (Second Amended Complaint, ¶ 14). As of February 28, 2014, Kashmire, Laconm, and Ourista, were in default under the Obligations, with an outstanding balance of \$11 million (Second Amended Complaint, ¶ 14).

On July 29, 2014, Suttongate, the lender, entered into the Loan Agreement dated March 7, 2014 for the principal amount of \$8 million with Laconm, Kuiper, Sedna, Kashmire Investments, as borrowers (Amended Complaint, ¶24) ("Loan Agreement") ("Suttongate Loan"). Laconm is owned and controlled by defendants Samir Andrawos ("Andrawos") and Virginia Iglesias ("Iglesias"). Andrawos, Kashmire, Ourista, Sedna, and Kuiper, signed the Loan Agreement as guarantors (Powers Aff. ¶ 2, Ex. 1). Kashmire,

Ourista, Sedna and Kuiper are all entities owned by Andrawos and/or Iglesias (Powers Aff. ¶ 2, Ex. 1).

Pursuant to the Loan Agreement, \$7 million of the Suttongate Loan was to be used to acquire the Obligations (Second Amended Complaint, ¶42[a]). The Obligations remained in full force and effect until Laconm paid all principal and interest due to Suttongate up to August 2, 2017, at which time the entire \$8 million was to be repaid (Second Amended Complaint, ¶ 42[c]).

Subsequently, Suttongate paid RBC, and was transferred and assigned all rights and interests under the Obligations (David Aff., Ex. 2).

The remaining \$1 million of the Suttongate Loan was funded through a series of checks and wire transfers to Laconm for the purpose of constructing the Properties, paying closing costs, and obtaining construction permits (Powers Aff., ¶ 4).

The parties to the Loan Agreement agreed to add Kashmire and Laconm to the Loan Agreement as additional borrowers (Second Amended Complaint, ¶ 34). During the execution of the Loan Agreement, Andrawos and Iglesias both designated that Warren Stephen Defienne ("Defienne") was an authorized signatory for Kashmire, Sedna, and Kuiper (Second Amended Complaint, ¶ 29). Simultaneously, Kashmire, Sedna, Kuiper, Laconm, Barbery Group Ltd. ("Barbery"), a Nevis corporation, Pledge Group Holdings, Inc. ("Pledge"), a Nevis corporation, and Waverly Investments

Ltd., a Marshall Islands corporation, entered into an agreement ("Shareholders Agreement"), which outlined the ownership structure of Kashmire, Sedna, Kuiper and Laconm ("the Corporations"). The Shareholders Agreement designates Charyn Powers ("Powers"), an investment advisor to Suttongate, as a director of each of the Corporations' boards with control over their financial affairs (Andrawos Aff., ¶ 35).

Pursuant to the Shareholders Agreement, "all decisions and transactions of the Corporations which are not in the ordinary course of daily business shall require the unanimous vote of all directors" (Andrawos Aff., Ex F, §5). Pursuant to the Shareholders Agreement, Barbery and Pledge each own 25% and Waverly owns 50% of each Corporation (Andrawos Aff., Ex. F).

Section 4 of the Loan Agreement provides that the Suttongate Loan "shall be secured by first mortgages on all the properties" (Powers Aff., Exs. 1, 6, ¶4). The properties consist of twenty-three lots located in St. Maarten that are identified in the Loan Agreement ("Properties") (Powers Aff., Exs. 1, 6, ¶4). Suttongate obtained first mortgages on five lots directly through the assignment of the RBC Loan (Powers Aff., ¶9). On July 29, 2014, these mortgages were delivered to Suttongate.

Suttongate alleges that Defendants failed to deliver first mortgages on the eighteen remaining lots, despite their

contractual obligation to deliver all necessary paperwork so that the mortgages can be recorded (Powers Aff., ¶12).

A review of St. Maarten land registry documents demonstrates that several of the Properties are actually encumbered by other mortgages, such as a mortgage held by CIBC First Carribean Bank ("CIBC"). As such, Suttongate maintains that in order to deliver first mortgages on these Properties, Defendants must first pay off CIBC.

In St. Maarten, the process of securing a mortgage requires the assistance of a civil law notary, who searches the local land registry to find outstanding encumbrances (Bensacon Aff., ¶ 5). Suttongate alleges it has provided the civil law notary with all the necessary documents to effectuate a mortgage, but Defendants have consistently failed to provide the civil law notary with the necessary paperwork (Powers Aff., ¶9).

The Corporations paid interest on the Suttongate Loan through May 2015, at which time they ceased making interest payments. After failing to make interest payments for over a year, Suttongate declared the Corporations in default, and after their failure to cure, Suttongate elected to accelerate and declare the Suttongate Loan immediately due at the default interest rate.

On July 7, 2015, Suttongate commenced this action seeking to enforce the Loan Agreement and recover the amount due thereunder.

On October 15, 2015, Suttongate amended the complaint, asserting claims of breach of contract, fraud, declaration of alter ego, and unjust enrichment (Zaytsev Aff., Ex. 1).

On November 17, 2016, this Court entered a preliminary injunction requiring Defendants to, among other things, place "the rents, issues, profits, and income" generated by the Properties into escrow, pending the resolution of this action (David Aff., Ex. 1, ¶ 12).

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) a balance of the equities in favor of the moving party (*1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]).

Suttongate maintains that it is likely to succeed on the merits of its breach of contract claim that Defendants violated the Loan Agreement by failing to provide Suttongate with first mortgages on eighteen of the twenty-three Properties. Suttongate alleges that despite repeated requests and ample opportunity to secure first mortgages, Defendants have consistently failed to do so. Suttongate references this Court's ruling issued on November 29, 2016, where this Court held that Suttongate was likely to succeed on its breach of contract claim arising out of

Defendants' breach of the Loan Agreement (See NYSCEF Docket No. 246, p. 6).

In opposition to Suttongate's motion, Defendants refer to the Shareholders Agreement, arguing that first mortgages cannot be placed on the eighteen remaining properties without the consent of Barbery, Pledge, and Waverly, who are not parties to this action (See Scher Aff., Ex. H). According to Defendants, the Court cannot direct foreign entities not under this Court's jurisdiction.

Similarly, Defendants maintain that second mortgages cannot be placed on some of the Properties unless CIBC and Nova Scotia Bank, both holders of first mortgages on eight of the remaining eighteen Properties, consent to such action (See Andrawos Aff., ¶ 51). Lastly, Defendants allege that Suttongate's request for injunctive relief is barred by the doctrine of election of remedies, reasoning that Suttongate cannot simultaneously seek a legal remedy and foreclosure of the Properties. Defendants fail to cite to any case law in support of this proposition, which the Court rejects as without merit.

This Court concludes that Defendants breached the terms of the Loan Agreement by failing to secure first mortgages on the Properties. The provisions of the Loan Agreement that require the issuance of first mortgages on the Properties are clear and unambiguous (Adrawos Aff., Ex. G, ¶4). Suttongate has

sufficiently established that Defendants have failed to abide by the relevant portions of the Loan Agreement, despite repeated requests. Thus, Defendants' refusal to secure mortgages warrants the conclusion that Suttongate is likely to succeed on its breach of contract claim.

Suttongate argues that it will suffer irreparable harm from Defendants' failure to secure mortgages on the Properties because, without first mortgages, Defendants are able to sell, transfer, or encumber the Properties as they wish. Suttongate further alleges that an injunction is necessary to preserve the status quo until a hearing on the merits (*Residential Bd. Of Managers of the Columbia Condominium v Alden*, 178 AD2d 121, 122 [1st Dept 1991]).

In addition, Suttongate maintains that a preliminary injunction is necessary to protect Suttongate's bargained-for foreclosure rights. Further, because only a portion of the Properties are secured by mortgages and the Properties contain office space that spans secured and unsecured lots, it is unlikely that any reasonable buyer would purchase the Properties during foreclosure, essentially stripping Plaintiff of its foreclosure rights.

Moreover, Suttongate's purported delay in bringing the instant motion does not preclude a finding of irreparable harm; despite Defendants' argument that Suttongate's failure to bring

this motion for over two years negates a finding of irreparable harm, Suttongate continues to be at risk of losing its bargained-for rights in the "rents, issues, and profits of the Properties" (See Powers Aff., ¶13). As such, the Court finds that Suttongate has made sufficient showing of irreparable harm arising from Defendants' failure to deliver mortgages on the remaining eighteen Properties.

Additionally, Suttongate has demonstrated that money damages are insufficient to compensate for Defendants' failure to deliver mortgages on the remaining Properties, which was a unique bargained-for contractual remedy (*Oracle Real Estate Holdings I LLC v Adrian Holdings Co. I, LLC*, 582 F.Supp.2d 616 [SDNY 2008]).

The balance of the equities requires a court to evaluate the prejudice to each party resulting from a grant or denial of the relief sought (*Barbes Restaurant Inc. v ASRR Suzer 218, LLC, 140 AD3d 430, 432* [1st Dept 2016]).

Suttongate maintains that Defendants' egregious breaches of the Loan Agreement are sufficient to tip the equities in its favor. In contrast, Defendants allege that the balance of equities are in their favor, as they have no intention of transferring or selling the Properties.

In light of Suttongate's bargained for rights, Defendants' mere claim that they have not or do not plan to transfer the Properties is insufficient. Further, an injunction will preserve

the status quo by ensuring that Defendants do not sell, transfer, or encumber the Properties prior to a hearing on the merits (*Olympic Tower Condominium v Coccoziello*, 306 AD2d 159, 160 [1st Dept 2003]).

Defendants have failed to establish that they will suffer hardship merely from being bound by their contractual obligations (*See Somers Assoc. v Corvino*, 156 AD2d 218 [1st Dept 1989]). However, it is evident that Suttongate will be prejudiced absent injunctive relief, as Defendants would be able to encumber or dispose of the Properties as they wish.

This Court is persuaded that the equities tip in Suttongate's favor, and rejects Defendants' argument that any harm experienced by Suttongate is too speculative.

Additionally, Suttongate alleges that sanctions are warranted due to Defendants' failure to produce any documents from Defienne or Sylvain Defienne, both of whom are directors or officers of the Corporations and allegedly are the custodians of Corporations' records (*Zaytsev Aff.* at ¶8, Ex. 10). Suttongate also argues that Defendants have advised it that Iglesias will not appear for a deposition in New York and that Defienne and Sylvain Defienne will not appear for their depositions in any locale. Suttongate also maintains that Defendants' statement that Ms. Adoptie ("Adoptie"), the Director of Laconm, has resigned, was to avoid their discovery obligations.

At oral argument, counsel for Plaintiff recommended that the parties meet and confer with the Court to resolve outstanding discovery issues. With this in mind, this Court will not address the merits of Suttongate's motion for sanctions and to compel in this decision.

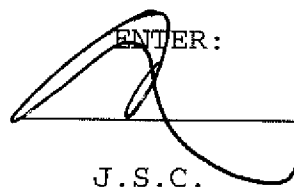
Accordingly, it is

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

ORDERED, that Suttongate's motion for sanctions is denied provided that the parties attempt in good faith to resolve their discovery issues without delay. The parties are directed to meet and confer as to outstanding document requests, exchange available dates for deposition, and shall appear before the Court on April 26th at 10:30 AM; and it is further

ORDERED, that the parties are directed to settle an order in conformity with this decision.

DATED: March 22, 2017

ENTER:

J.S.C.