

DCCA, LLC v Cohen
2020 NY Slip Op 30544(U)
February 25, 2020
Supreme Court, New York County
Docket Number: 650845/2020
Judge: Andrew Borrok
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

DCCA, LLC,

Plaintiff,

- v -

CHARLES COHEN, COHEN BROTHERS REALTY CORP.,
ANDERSON HILL ROAD CAPITAL LLC, ANDERSON HILL
ROAD LOAN LLC

Defendant.

-----X

INDEX NO. 650845/2020

MOTION DATE 02/10/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents and for the reasons set forth on the record (2/24/2020 and 2/25/2020), the plaintiff's motion for a preliminary injunction is granted as set forth below, and the defendants' cross-motion to consolidate and/or transfer venue to Westchester County is denied.

RELEVANT FACTUAL BACKGROUND

DCAA, LLC (**DCAA**) is the owner of the Doral Arrowwood Hotel and Resort (**Arrowwood**) located in Rye, New York. The Arrowwood is a 373-room hotel, with more than 70,000 square feet of meeting space, a 9-hole golf course and driving range, a sport center, five tennis courts, squash and basketball courts, a restaurant, a pub, a café, and both indoor and outdoor swimming pools. DCAA acquired the Arrowwood in 1986 and self-managed the property for nearly thirty

years thereafter. In 2005, DCAA refinanced its mortgage through a \$75,000,000 Commercial Mortgage Backed Security (**CMBS**) transaction (the **Loan**). The Loan is secured by the Arrowood property and the Loan was administered at all relevant times by a “special servicer,” CWCapital Asset Management LLC (**CW Capital**). Among its other rights, CW Capital had the right to determine whether DCAA was in default of the Loan. The Loan was held in trust by US Bank.

In 2015, DCCA hired an outside management company to run Arrowood. At the same time, DCCA extended the term of the Loan from the original maturity date of February 2015 to February 2020 and allegedly made a substantial cash investment of \$11 million through 2019 to pay the new managers and upgrade the property. The Complaint alleges that DCCA was current on all its financial obligations, including Loan payments, as of March 2019.

Nonetheless, DCAA claims that in March 2019, CW Capital caused US Bank, as trustee, to file an action (the **Westchester Action**) in Westchester County Supreme Court to foreclose on the Loan and appoint a receiver for Arrowood. DCAA disputes that there was any actionable default prior to the filing of the Westchester Action. In fact, DCAA alleges that it offered to buy the Loan for more than \$40 million the day before the Westchester Action was filed, which is allegedly several times more than what the Loan was later sold for. There is currently a pending motion to dismiss, *sub judice*, in the Westchester Action.

However, the Complaint alleges that the receivership and the disruption of Arrowood’s business which resulted from the filing of the Westchester Action has caused a rapid decline in

Arrowwood's financial position. Accordingly, following the institution of the Westchester Action, DCAA sought to find an equity partner and reached out to Charles Cohen as a potential "White Knight." Mr. Cohen allegedly represented that he was interested in partnering with DCCA to jointly own and operate Arrowwood and told DCCA that he had an ongoing business relationship with CW Capital's parent entity, Fortress Investment Group (**Fortress**), that he claimed would help in getting CW Capital to respond to DCCA's offer to buy the Loan, which, at this point, had been raised to \$42 million and which had not received a response from CW Capital.

As part of their negotiations, Cohen Brothers Realty Corporation (**Cohen Bros. Realty**), Mr. Cohen's company, signed a Confidentiality Letter agreement (the **NDA**) dated October 16, 2019, pursuant to which DCCA agreed to furnish to Cohen Bros. Realty certain otherwise not publicly available proprietary information about the Arrowwood property in exchange for Cohen Bros. Realty agreeing to keep such information confidential (NYSCEF Doc. No. 3, ¶ 1). The NDA was executed by David Fogel, the Senior Vice President of Cohen Bros. Realty, on its behalf, and by Lloyd Heller on behalf of DCAA (*id.*).

Paragraph 1 of the NDA states:

All information, communications and data received by, or on behalf of, Recipient from, or on behalf of, Company, whether provided to Recipient by written, oral, electronic or other means, in connection with the Doral Arrowwood Conference Center & Hotel, having a street address of Anderson Hill Road, Rye Brook, New York (the "Property") shall be accepted and treated by Recipient as proprietary and confidential information of Company (all of the foregoing, collectively, "Proprietary Information"). All materials, tests, audits, surveys, reports, studies, analyses, the results of any and all evaluations, inspections, testing and investigations conducted by, or on behalf of, Recipient in connection with the Property, and all reports, notes and other work product of Recipient relating thereto and any other written material and/or electronic data containing or

reflecting any Proprietary Information (collectively "Recipient Information"; Proprietary Information and Recipient Information, collectively, "Information") shall also be kept confidential by Recipient and any agent of Recipient shall be governed by this agreement. Recipient hereby covenants and agrees not to use or disclose any Information in any manner other than as expressly permitted hereby. It is also understood that the contents of any conversation or discussion concerning Information will likewise be treated as confidential and proprietary, as if it had been formally transmitted.

(NYSCEF Doc. No. 14, ¶ 1).

Among other restrictions, the NDA provides that:

Recipient hereby acknowledges and agrees that it shall not (and it shall cause its affiliates, subsidiaries, and any principal, officer, director or employee of any of the foregoing, and any agent acting on behalf of any of the foregoing, to not) communicate with, contact, or attempt to communicate with or contact, *any lender* of the Company in connection with the Property.

(*id.*, ¶ 4 [emphasis added]).

As further discussed below, the NDA also provides for certain equitable relief, including injunction and specific performance “in the event any breach or threatened breach of this Agreement is alleged” (*id.*, ¶ 5).

Additionally, Paragraph 8 of the NDA provides:

[ADJUST] venue for any action arising out of that agreement “shall be brought in any federal or state court of competent jurisdiction located in the County, City and State of New York” (*id.*, ¶ 8).

Finally, pursuant to paragraph 10 of the NDA:

The provisions of this Agreement (a) shall survive the termination of any discussions or negotiations, if any, between Company and Recipient with respect to the Property, and (b) shall be binding upon *Recipient and its successors and assigns and their respective employees, principals, shareholders, agents, representatives, officers and directors.*

(*id.*, ¶ 10).

According to the Complaint, within days of signing the NDA, Cohen Bros. Realty entered into a “clandestine negotiation” with CW Capital to purchase the Loan behind DCCA’s back (Compl., ¶ 26). In doing so, DCAA alleges that Cohen Bros. Realty and Mr. Cohen not only breached the NDA by dealing directly with Arrowwood’s lender, but also used DCCA’s confidential information, which they obtained pursuant to the NDA about Arrowwood’s deteriorating financial condition, to drive down the purchase price of the Loan.

After purchasing the Loan through an entity called Anderson Hill Road Capital, LLC (**Anderson Hill**), Mr. Cohen allegedly offered to continue negotiations with DCAA, but only if DCAA agreed to a “Pre-Negotiation Agreement,” pursuant to which DCCA would release all claims against Cohen, including those for breach of the NDA, among other waivers of DCAA's rights and claims. When DCAA declined to waive its claims, Mr. Cohen, as the beneficial owner of the Loan, allegedly cut off all funding to Arrowwood on December 24, 2019. On January 12, 2020, Arrowwood shut down all operations for lack of funding.

The Complaint asserts five causes of action: (1) injunction, (2) breach of contract, (3) breach of the covenant of good faith and fair dealing, (4) fraud, and (5) constructive trust.

DCAA now brings a motion by order to show cause for a preliminary injunction enjoining the defendants from exercising any of their rights under the Loan, including foreclosure (NYSCEF Doc. No. 39). On February 11, 2020, the court issued a TRO in connection with the motion for a preliminary injunction which ordered that pending the hearing on this application, the defendants “shall be and hereby are restrained from asserting any rights to foreclose the mortgage on the Arrowwood property that is the security for the Loan” (*id.*, p. 2; NYSCEF Doc. No. 91).

At the TRO hearing, the court gave permission for defendants to cross-move to consolidate this action with the Westchester Action and to transfer venue to Westchester County, which cross motion defendants filed.

DISCUSSION

I. Venue in New York County is Proper

In seeking to change venue, the defendants rely on CPLR 602(a), which provides that:

(a) When actions involving a common involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

A motion to consolidate pursuant to CPLR 602(a) rests in the sound discretion of the trial court. Generally, where actions have been commenced in different counties are consolidated, venue should be placed in the county where the first action was commenced, unless special circumstances are present, which decision is also addressed to the sound discretion of the trial court (*Mattia v Food Emporium, Inc.*, 259 AD2d 527 [2d Dept 1999]).

Pursuant to CPLR 501, “[s]ubject to the provisions of subdivision two of section 510, a written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial.” As a general rule, a contract’s “forum selection clause is *prima facie* valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court” (*Puleo v Shore View Ctr. for Rehab. & Health Care*, 132 AD3d 651, 652 [2d Dept 2015] [quotation and citation omitted]; *Bhonlay v Raquette Lake Camps, Inc.*, 120 AD3d 1015 [1st Dept 2014]). In other words, a strong showing is required to set aside an agreement’s forum selection clause (*Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836, 936 [2d Dept 2009]). The general policy in the State of New York is to enforce forum selection provisions as “they provide certainty and predictability in the resolution of disputes” (*Brooke Group Ltd. v JCH Syndicate 488*, 87 NY2d 530, 532 [1996]). Here, the NDA’s forum selection clause clearly places venue in New York County (NYSCEF Doc. No. 14).

The defendants do not (and cannot) allege that enforcing the NDA’s forum selection clause is “unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or ... that a trial in the selected forum would be so gravely difficult that [the defendants] would, for all practical purposes, be deprived of [their] day in court” (*Puleo*, 132 AD3d at 652). Rather, to avoid the NDA’s clear forum selection clause, they rely on CPLR 507, which requires that the “place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the

subject of the action is situated.” The argument is unavailing. This is a breach of contract action which seeks to impose a constructive trust as its ultimate remedy and CPLR 507 simply does not mandate venue in Westchester (*see Carlton Group, Ltd. v Property Mkts. Group, Inc.*, 134 AD3d 1018, 1019 [2d Dept 2015]).

In any event, it is CPLR 501 that governs a court’s enforcement of a forum selection clause (*NCCMI Inc. v Bersin Props., LLC*, 2015 WL 3577822, citing *A.C.E. Elevator Co., Inc. v VJB Construction Corp.*, 192 Misc2d 258 [Sup Ct Kings Cnty 2002]). Per its terms, CPLR 501 is subject *only* to CPLR 510(2): to wit, “[s]ubject to the provisions of subdivision two of section 510, a written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial” (emphasis added). CPLR 510 (2) is not applicable here as it simply permits a change of venue when “there is reason to believe that an impartial trial cannot be had in the proper county.”

As discussed in *NCCMI* and in *A.C.E. Elevator, supra*, CPLR 503 (a), the statute governing transitory causes of action speaks in identical mandatory language as CPLR 507, providing that the trial of such an action “*shall* be in the county in which one of the parties resided when it was commenced” ([emphasis added], *compare with* CPLR 507 [“place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property *shall* be in the county in which any part of the subject of the action is situated”]). It is well-settled, however, that contractual forum selection clauses will be enforced to place venue in the contractually designated venue even when none of the parties reside in that county when the action is commenced, thus overriding the seemingly mandatory language of CPLR 503(a) (*e.g.*,

Premium Risk Group, Inc. v Legion Ins. Co., 294 AD2d 345, 346 [2d Dept 2002]). The same result is compelled here. As Justice Sherwood noted in *NCCMI*, CPLR 501 is **not** subordinate to CPLR 510(1), which holds a trial may be moved if “the county designated for that purpose is not a proper county” (2015 WL 3577822, *2). “Accordingly, if the suit is brought in a location pursuant to a forum selection clause, it may be held in an **improper** county, which is consistent with the *A.C.E. Elevator* court’s decision that a contractual forum selection clause trumps the venue provision in section 507,” and the legislature’s intent, pursuant to CPLR 501, to defer to the parties’ agreement for cases brought under both CPLR 503 and 507 appears to be the same (*id.*). Here, the parties bargained for and entered into a contract that clearly intended venue to be placed in New York County. The court will not rewrite the parties’ agreement.

To the extent that a court **may** exercise its discretion to change venue in some circumstances notwithstanding a contractual forum selection provision (*River Bank Am. v Daniel Equities Corp.*, 205 AD2d 476 [1st Dept 1994]), the court declines to exercise such discretion here.

In *Ferolito v Vultaggio*, the First Department affirmed a New York County trial court’s transfer of venue to Nassau County where the trial court conferred with the Justice presiding over the related action pending in Nassau County and, upon such consultation, exercised its discretion to consolidate and transfer venue to Nassau County even though New York County had the first filed action (115 AD3d 541 [1st Dept 2014]). The court explained that, “most critically ... upon consultation with the potentially receiving Justice, the motion court determined that the consolidated matters could be most efficiently handled and tried in Nassau County” (*id.* at 542). As discussed on the record at oral argument, the court, in an abundance of caution, reached out to

Justice Gretchen Walsh, J.S.C., who is presiding over the Westchester Action, by telephone to discuss this matter. Justice Walsh indicated that she was aware of the case in front of this court and although she “did not object” to this action being transferred to her in Westchester County, she unequivocally stated that venue transfer was not necessary (*cf., Ferolito, supra*).

Justice Walsh’s assessment is further supported by the letter dated February 6, 2020 filed by counsel for Anderson Hill in the Westchester Action, wherein counsel states that even if DCCA’s claims in this action are assumed as true, they have “nothing to do with [the Westchester] case” (NYSCEF Doc. No. 95). Now, for the defendants to come to this court and argue that this case is so related that the contractual agreed upon provision fixing venue should be disregarded is simply disingenuous. Accordingly, the motion to change venue is denied.

II. A Preliminary Injunction is Warranted to Preserve the Status Quo

To obtain a preliminary injunction, the movant must demonstrate by clear and convincing evidence the following three elements: (1) a likelihood of the ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balance of equities in its favor (*Invesco Institutional (N.A.), Inc. v Deutsche Inv. Mgmt. Ams., Inc.*, 74 AD3d 696, 697 [1st Dept 2010]). With respect to the likelihood of success on the merits, “[w]hile the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action, a party seeking the drastic remedy of a preliminary injunction must nevertheless establish a clear right to that relief under the law and the undisputed facts upon the moving papers” (*1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18 [1st Dept 2011] [internal citations and quotations omitted]). Moreover,

with respect to the irreparable injury element, the existence of an adequate legal remedy, i.e., money damages capable of calculation, will bar issuance of a preliminary injunction (*Credit Index LLC v Riskwise Intl. LLC*, 282 AD2d 246, 247 ([1st Dept 2001]). An irreparable injury also cannot be either remote or speculative but must be actual and imminent (*Khan v State Univ. of New York Health Science Ctr. at Brooklyn*, 271 AD2d 656 [2d Dept 2000]).

With respect to likelihood of success on the merits, DCAA argues that it will be successful in this action because the defendants clearly breached the NDA by (i) communicating with DCAA's lender in violation of paragraph 4 and by misusing proprietary information in violation of paragraph 1 of the NDA.

The defendants first argue that they did not breach the NDA because Anderson Capital acquired the Note from a bondholder and not from a "lender" whereas the NDA only prohibits communications with "any lender" of DCCA (NYSCEF Doc. No. 14, ¶ 4). The term "lender" is not defined in the NDA. The defendants however claim that a "lender" would only be a bank or other entity that loaned money to DCCA, or, perhaps, the entity that represented the bank that loaned DCCA money (i.e., the special servicer, CW Capital) and not its predecessor-in-interest because its predecessor-in-interest is not a "lender in the ordinary sense of the word" (Def. Memo., p. 10, NYSCEF Doc. No. 89). The argument fails. Anderson Capital acquired the Loan from DW Partners, which was a bondholder that owned a CMBS security that was collateralized, in part, by the Loan. The defendants allege that they communicated only with DW Partners about the acquisition of the Loan, which DW Partners acquired and then sold to Anderson Capital, and, thus, argue that they simply did not breach the terms of the NDA (*id.*). The

argument is hollow. The NDA refers to “*any* lender” and does not on its plain meaning support the limited definition that the defendants urge this court to accept. To read the term as narrowly as the defendants propose would simply defy logic and circumvent the clear, plain purpose of the provision preventing Cohen Bros. Realty from communicating with any entity in control of DCCA’s loan.

The defendants next argue that the NDA is not binding because, among other things, it was never signed by Anderson Hill and that it cannot be binding on Anderson Hill because it was not even in existence at the time of the NDA’s execution. Paragraph 4 of the NDA, however, makes clear that the prohibition on communications with “any lender” applies to any “*affiliates*, subsidiaries, and any principal, officer, director or employee of any of the foregoing and any agent acting on behalf of any of the foregoing” (NYSCEF Doc. No. 14, ¶ 4 [emphasis added]). To the extent that paragraph 10 is more limited and does not mention affiliates, that only affects the scope of whether Anderson Hill may be bound by the preliminary injunction, and not whether the court may issue the injunction on Cohen Bros. Realty and Mr. Cohen. To be sure, paragraph 10, unlike paragraph 4, does not include affiliates in its recitation as to *who* the agreement shall be binding on:

The provisions of this Agreement (a) shall survive the termination of any discussions or negotiations, if any, between Company and Recipient with respect to the Property, and (b) shall be binding upon *Recipient and its successors and assigns and their respective employees, principals, shareholders, agents, representatives, officers and directors.*

(*id.*, ¶ 10).

Although DCCA argues that Anderson Hill is Mr. Cohen, none of the papers submitted in support of the motion support enjoining Anderson Hill based on the NDA or based on piercing

the corporate veil of Anderson Hill or otherwise at this time. Therefore, if an injunction is appropriate based on the current submissions to the court it must be limited to the express language of the agreement – i.e., Cohen Bros. Realty and its “successors and assigns and their respective employees, principals, shareholders, agents, representatives, officers and directors.”

Finally, the defendants also argue that the NDA is not binding at all because a signed copy was not returned to them until January of 2020 and, therefore, the NDA was not in effect at the time that the Loan was purchased by Anderson Hill. This argument also fails. As an initial matter, there is no provision in the NDA that a signed copy must be returned in order for the NDA to be accepted and take effect. It is of no moment that the NDA has on the signature page “Accepted and Agreed” at the bottom of the signature page. As is customary in the industry, the NDA was sent out by DCCA and signed on behalf of Cohen Bros. Realty and now DCCA is seeking to enforce the DCCA against the party who both signed and delivered the NDA.

The defendants however argue that when Mr. Fogel signed the NDA and returned it, he indicated in his email that he added a provision that New York law governed, he shortened the time period of the NDA from three years to two years and also provided that coverage for any agents of “CBRC” to be governed by the terms of this agreement. This the defendants argue constituted a material change to NDA and therefore was a counter offer requiring a countersignature to the NDA which Mr. Fogel requested. There is no dispute that Mr. Fogel signed the NDA on behalf of Cohen Bros. Realty on October 16, 2019 (NYSCEF Doc. No. 44). Lloyd Heller attests that he signed the returned NDA on the same day, October 16th, when he received Mr. Fogel’s email. Although there is factual dispute as to when Mr. Heller returned the agreement, there is simply

no factual dispute about when the NDA took effect. The evidence in the record clearly establishes that DCCA accepted the NDA “counter-offer” by performance by following receipt of the executed NDA, immediately turning over the non-public proprietary documents which were the subject of the NDA, engaging in discussions concerning sensitive financial information about Arrowwood, jointly going to their lender to negotiate a buyout, and drafting other transaction documents such as a Letter of Intent, which, although not ultimately consummated, would have been the next step in progressing the parties’ business relationship. There is no question under these circumstances that DCCA has met its burden that a contract was in existence at the time of the alleged breach.

Simply put, DCCA has presented a signed copy of the NDA dated as of October 16, 2019, which contains a provision prohibiting any affiliate, subsidiary, agent or principal of Cohen Bros. Realty from communicating with any lender of DCCA along with evidence that such affiliate, subsidiary, agent or principal did communicate with DCCA’s lender because the Loan was, in fact, purchased by the affiliate, i.e., Anderson Hill. This is sufficient to establish DCCA’s likelihood of success on the merits in this action for purposes of a preliminary injunction.

Turning to the irreparable harm element, significantly, paragraph 5 of the NDA provides:

Recipient also acknowledges ***that money damages may be incalculable and would be an insufficient remedy for any breach of this Agreement, which breach may cause irreparable harm to Company***. Accordingly, Recipient agrees that in the event any breach or threatened breach of this Agreement is alleged, in addition to any other remedy at law or in equity Company may have, ***Company shall be entitled, without requirement of posting a bond or other security, to equitable relief, including injunctive relief and specific performance***.

(NYSCEF Doc. No. 14, ¶ 5 [emphasis added]).

The defendants argue that there is no potential harm to DCCA from Anderson Capital's acquisition of the Loan and even if there were, such harm could be remedied by monetary damages, which the Complaint seeks. The court disagrees. First, as noted, the NDA itself recognizes the fact that money damages in this case "may be incalculable and would be an insufficient remedy for any breach of this Agreement" (*id.*). To the extent that the NDA uses the word "may" instead of "shall," the NDA is also clear that money damages "**would be an insufficient remedy** for any breach" and "in the event any breach ... of this Agreement is alleged, ... Company **shall be ... entitled to equitable relief, including injunctive relief and specific performance**" (*id.* [emphasis added]).

Putting that aside, the irreparable harm alleged here is foreclosure of a **unique** real property that has been in the same family for over 30 years and that has become an important part of the Westchester community for these many decades. This is not simply a fungible commercial property interest as the defendants argue (*cf. Broadway 500 W. Monroe Mezz II LLC v Transwestern Mezzanine Realty Partners II, LLC*, 80 AD3d 483, 484 [1st Dept] [finding no irreparable injury where plaintiffs feared loss of investment in commercial real estate interest and not loss of "a unique piece of property in which [they have] an unquantifiable interest"]).

Finally, turning to the balancing of the equities, implementing an injunction here would simply preserve the status quo whereas denying the injunction would potentially leave DCCA in an irreparable position (*see Icy Splash Food & Bev., Inc. v Henckel*, 14 AD3d 595, 595 [2005]). Therefore, the balance of the equities favors DCCA.

While generally an undertaking must be fixed prior to the grant of any injunction (CPLR 6312), here, such undertaking has been expressly waived by paragraph 5 of the NDA (*Private One of NY, LLC v JMRL Sales & Serv., Inc.*, 21 Misc3d 1106[A], *12 [Kings Cnty Sup Ct 2008] [Demarest, J.]; *Eric Woods, LLC v Schrade*, 45 Misc3d 1206[A] [Albany Cnty Sup Ct 2014]). The court declines to impose such a requirement where the parties – both sophisticated and represented by able counsel – chose to expressly waive “the posting of a bond or other security” (NYSCEF Doc. NO. 14, ¶ 8).

For the avoidance of doubt, to the extent that the defendants’ cross-motion, discussed *infra*, also seeks a general dismissal, the court did not grant permission for the defendants to move to dismiss on the cross motion and, in any event, it would not be appropriate to decide such motion without giving DCAA a full opportunity to respond (*see* CPLR 2214). Counsel may bring its motion to dismiss as a separate motion.

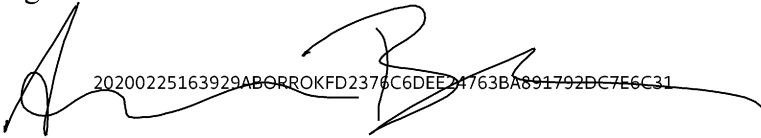
Accordingly, it appearing to this Court that a cause of action exists in favor of the plaintiff and against the defendants and that the plaintiff is entitled to a preliminary injunction on the ground that the defendants threaten or are about to do, or are doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision [the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff, as set forth in the aforesaid decision], it is

ORDERED that defendants Charles S. Cohen and Cohen Brothers Realty Corp, and their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of said defendants, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, the following acts:

Asserting any rights to foreclose on the mortgage on the Arrowwood property that is security for that Loan

And it is further,

ORDERED that defendants' cross motion to change venue is denied.


20200225163929ABORROKFD2376C6DEE24763BA891792DC7E6C31

2/25/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE