SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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CHERYL LEFKOVITS,

Plaintiff,

- v -

SIGNATURE BANK,

Defendant.

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INDEX NO. 653991/2019

MOTION DATE 12/17/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 54, 95, 96

were read on this motion to/for PROVISIONAL REMEDY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 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, 88, 92

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion for a preliminary injunction (Mot. Seq. No. 001) is granted only to the extent of enjoining defendant from drawing, without prior court authorization, on the proceeds of the Policy to satisfy outstanding obligations in respect of the loans for which the Policy serves as collateral pending disposition of this action, and is otherwise denied; and it is further

ORDERED that defendant shall serve a copy of this decision and order with notice of entry and proof of service upon the County Clerk; and it is further

ORDERED that, the preliminary injunction is effective, upon the posting by plaintiff of a bond in the amount of one thousand dollars ($1,000) within fourteen (14) days of defendant's service of this decision and order with notice of entry upon plaintiff; and it is further

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that counsel are directed to submit by uploading to NYSCEF and sending by e-mail to IAS Part 59 (59nyef@nycourts.gov) a proposed preliminary conference stipulation to be so-ordered, or order or counter order, using the standard form, which shall include a proposed expedited discovery schedule and date for filing of the note of issue on or before September 29, 2020.

DECISION

Plaintiff Cheryl Lefkovits moves, by order to show cause, for a preliminary injunction (1) directing defendant to release the collateral assignment to it of that certain life insurance policy issued by Hartford Life Insurance Company (Hartford) and assigned policy no. U071716971 (Policy) as to $300,000 in proceeds of the Policy; (2) prohibiting defendant from drawing

on the proceeds of the Policy to satisfy outstanding obligations in respect of the loans for which the Policy serves as collateral pending disposition of this action, without prior court authorization; and (3) granting such other and further relief as the court deems just and proper.

Defendant Signature Bank (Signature) opposes, although it consents to an order not to draw on the Policy proceeds pending the hearing, and plaintiff replies (Motion Seq. No. 001). Plaintiff additionally moves, by order to show cause, for summary judgment pursuant to CPLR 3212, which is opposed by defendant. (Motion Seq. No. 002).

The Complaint

By summons and unverified complaint dated July 12, 2019, plaintiff alleges that defendant "is withholding a $1,600,000 life insurance policy from a widow on the ground that the bank has not finished foreclosing on her deceased husband's two combined professional cooperative apartments (Medical Office), "which together with the policy constituted collateral for two defaulted loans extended by the bank for her husband's professional corporation" (NYSCEF Doc. No. [Doc. No.] 1, complaint ¶ 1).

Plaintiff alleges that, "[a]s a matter of law, the nonjudicial foreclosure was complete when defendant made a credit bid in January 2018, that the outstanding loan balance is

$147,664 plus de minimus interest, and that defendant should have, but failed to, applied the Policy proceeds to the outstanding loan balance and distributed the Policy balance "(roughly 90% of the policy's value)" to plaintiff (id. ¶ 2). Plaintiff further alleges that defendant rejected her repeated requests that it do so, and plaintiff needs to "access the policy proceeds to pay her daily living expenses while she is combatting the after-effects of extensive cancer treatment and may require further surgery" (id).

Plaintiff seeks a declaratory judgment that defendant's "apparent justification for withholding the Policy (that the foreclosure is incomplete) fails as a matter of law and directing that Signature Bank be paid the outstanding loan balance from the policy proceeds and that the balance be turned over to" plaintiff (id. ¶ 3).

Plaintiff alleges that her husband Albert M. Lefkovits, M.D. (Dr. Lefkovits), who passed away in May 2018, operated his medical practice through a professional corporation, Albert M. Lefkovits, M.D., P.C. (PC), and borrowed from defendant $1,500,000 in 2007 (the 2007 loan or note) and $650,000 in 2011 (the 2011 loan or note) (the loans or notes) (id. ¶¶ 6, 8). He guaranteed the loans, which also were secured by his shares and proprietary leases to the Medical Office, which consisted of the combined Apartments 1B and 1C at 1040 Park Avenue, New York

County, and a collateral assignment of the Policy that he owned that was issued by Hartford and named plaintiff as the sole beneficiary (id. ¶ 7).

Plaintiff further alleges that Dr. Lefkovits and the PC defaulted on the loans and guarantees, and, on or about January 3, 2018, defendant "gave notice of its intent to conduct a non-judicial foreclosure auction of the Medical Office on January 23, 2018, at 11:30 a.m. in the Rotunda of the Courthouse located at 60 Centre Street in New York County, through its auctioneer, Mannion Auctions, LLC" (id. ¶¶ 9, 10). The Terms of Sale stated that as of December 6, 2017, the 2007 loan's outstanding obligations totaled $1,869,186.48 and the 2011 loan's outstanding obligations totaled $128,477.67, and that the auction's successful bidder would have to be approved by the cooperative's board of directors (co-op board) to acquire the Medical Office (id. ¶¶ 11, 12).

At the non-judicial foreclosure sale, defendant "credit bid $1,850,000.00 of outstanding obligations under the 2007 loan" (*id.* ¶ 13), and Adam Plotch bid $1,851,000 on behalf of East Fork Capital Equities (East Fork). Following the co-op board's rejection of East Fork, the auctioneer issued a Certificate of Sale and Fact, dated June 1, 2018, which stated that following the rejection, the Medical Office was offered and sold to defendant in consideration of its $1,850,000 credit bid (id. ¶

15). The co-op board approved that transaction on or about December 11, 2018 (id. ¶ 16). The Medical Office was listed for $2,475,000; the listing was pulled from the market on or about June 18, 2019 and was listed again for $2,375,000 on July 3, 2019 (id. ¶¶ 16, 17).

Plaintiff further alleges that her representatives approached defendant on multiple occasions to resolve the dispute amicably, but defendant refused, stating that it is entitled to retain the Policy proceeds pending the Medical Office's sale to a third party (id. ¶ 19). Plaintiff "understands" that it is defendant's position that it is entitled to surcharge the proceeds of the Policy "and the proceeds of any subsequent sale of the Medical Office not only for the 2007 and 2011 loan balances, including the $1,850,000 already credit bid, together with interest, but also for all post-foreclosure costs and expenses incurred, including common charges for the Medical Office (including maintenance of approximately $9,400/ month), through the date of the subsequent sale" (id. ¶ 20).

Plaintiff "disagrees" and asserts "that the Medical Office was disposed of by Signature Bank, under N.Y. U.C.C. [Sections] 9-617(a), and accepted, under 9-622(a), in consideration for its $1,850,000 credit bid, and that as a result outstanding obligations in respect of the 2007 (sic) have been near-fully

satisfied and Signature's Bank's security interests in the Medical Office have been fully discharged" (id. ¶ 21). Plaintiff asserts that defendant "is entitled to, at most, (a) $19,186.48, representing outstanding obligations under the 2007 loan as of December 6, 2017 according to the Terms of Sale less the $1,850,000 credit bid, plus 7.25%/year simple interest thereon from and after said date, plus (b) $128,477.67, representing outstanding obligations under the 2011 loan as of December 6, 2017 accordingly to the Terms of Sale, plus 5.75%/ year simple interest thereon from and after said date" (amounts identified in Paragraph 21 [a]-[b]) (id.).

Plaintiff further alleges that by letter dated June 6, 2019, plaintiff reiterated her request that defendant "release the collateral assignment of the Policy, on terms whereby it would be paid the amounts identified in Paragraphs 21(a)-(b)" (*id.* ¶ 22), but defendant "has failed to respond and unjustifiably continues to deny [plaintiff] access to the Policy" (id. ¶ 23).

In her first and only cause of action, plaintiff alleges that a "justiciable controversy exists under CPLR 3001 as to whether Signature Bank's actions near-fully satisfied obligations in respect of the 2007 loan and fully discharged Signature Bank's security interests in the Medical Office" (id. ¶ 25). She "submits that they did, and that as a result

Signature Bank is prohibited from surcharging the Policy for that portion of the 2007 loan satisfied by the credit bid, and for any post-foreclosure interest thereon or post-foreclosure charges (e.g. maintenance)" (id.).

Plaintiff asserts that "[j]udgment should be made and entered declaring [plaintiff's] position correct, prohibiting Signature Bank from surcharging the Policy for the foregoing, and requiring that Signature Bank release the collateral assignment of the Policy except as to the amounts identified in Paragraphs 21(a)-(b), in full and complete disposition of this matter" (id. ¶ 26).

The Answer

In its verified answer dated August 6, 2019, defendant denies certain allegations, admits certain allegations, and refers to the documents referenced in the complaint for a complete statement of applicable terms and conditions (Doc. No. 37, answer.) Defendant also asserts 20 affirmative defenses, including: failure to state a cause of action (id. ¶ 27); failure to join a necessary party, Hartford, "the insurance carrier and entity presently in possession of the life insurance proceeds at issue in this lawsuit (id. ¶ 28); and, plaintiff's lack of standing (id. ¶ 29). It asserts additional affirmative defenses that, to the extent the complaint seeks any relief: on behalf of Dr. Lefkovits's Estate, the Estate's executor or

representative has not be joined as a party as required; in connection with any wrongdoing by defendant to the purported detriment of Dr. Lefkovits before his passing and/or to his Estate, all such claims and/or defenses have been waived" (id. ¶¶ 30, 31).

Defendant's affirmative defenses additionally include that the complaint is barred, in whole or part, because at all times defendant: (1) "acted in good faith and has not violated any statutes and/or common law obligations owed to plaintiff" (id. ¶ 32); (2) "acted in a commercially reasonable manner in connection with the facts and transactions which are the subject of the complaint, including, but not limited to, in adherence with any applicable standards under New York's Uniform Commercial Code" (id. ¶ 33); and (3) "acted in full conformity with all applicable statutes and common laws" (id. ¶ 34). Defendant also alleges that its actions "were authorized under the relevant loan documents, including the assignment of the life insurance policy, and moreover, New York's Uniform Commercial Code" (id. ¶ 35). It also asserts, as affirmative defenses: (1) that plaintiff's damages, if any, "were caused by plaintiff, third-parties and/or events that were beyond defendant's control" (id. ¶ 39); (2) that the complaint "improperly seeks relief to prevent Signature and/or other creditors receiving proceeds from the subject collateral in

violation of law, procedural requirements and creditor priority" (id. ¶ 41); (3) laches, unclean hands, and waiver (id. ¶ 43); and (4) that defendant "did not violate any duty owed to plaintiff, to the extent any such duties exist" (id. ¶ 45).

The Preliminary Injunction Motion (Seq. No. 001)

Plaintiff argues that she meets all three factors for the granting of preliminary injunctive relief: a likelihood of success on the merits, irreparable injury if the preliminary relief is not granted, and a balancing of the equities in her favor.

In support of her motion, she submits: her affidavit (Doc. No. 3, Affidavit of Cheryl Lefkovits [Lefkovits Aff.]), with various exhibits; her counsel's affirmation (Doc. No. 12, Affirmation of Jeffrey Chubak [Chubak Aff]) with various exhibits; and a memorandum of law. The following exhibits are attached to the Lefkovits Aff.: the 2007 and 2011 notes or loans (Doc. Nos. 4 and 5, Exs.1 and 2); the Policy and Assignment of Life Insurance Policy as Collateral (Doc. Nos. 6 and 7, Exs. 3 and 4); the Terms of Sale, Auctioneer Bid Sheet, an Amended Certificate of Sale and Fact (Doc. Nos. 8, 9 and 10, Exs. 5, 6 and 7); and a letter from plaintiff's counsel to defendant's counsel, dated June 6, 2019 (Doc. No. 11, Ex. 8). There are two exhibits attached to the Chubak Aff: The Certificate of Sale and Fact in Rapillo v CitiMortgage, Inc., 2018 WL 1175127 (ED NY

Mar. 5, 2018, 15-CV-5976[KAM/RML}) (Doc. No. 13, Ex. A), and the affirmation of defendant's Vice President, dated November 1, 2017, identified in the Chubak Aff as defendant's "declaration in support of its motion for relief from the automatic stay with respect to the Medical Office, filed in Albert Lefkovits's chapter 11 case, and Exhibit M thereto (its appraisal)" (Chubak Aff ¶ 3) (Doc. Nos. 13 and 14, Exs. A and B).

As to the factor of a likelihood of success on the merits, plaintiff notes that, as provided by UCC 9-610 (a), defendant, as the secured party, was authorized to dispose of the Medical Office which served as the collateral, including by selling it, upon debtor's default. Plaintiff argues that here, defendant's disposition of the collateral and defendant's acceptance of the collateral, which she asserts were pursuant to UCC Sections 9-617 (a) and 9-622 (a), had the same effect that it did in Rapillo v CitiMortgage, Inc., 2018 WL 1175127. Plaintiff asserts that in Rapillo, the court "held" that the defendant's "acceptance of a cooperative apartment in consideration for its credit bid of its mortgage loan constituted a transfer for value, under section 9-617(a), which resulted in a disposition under that section", and (2) the "auctioneer's Certificate of Sale and Fact [sic] valid evidence of the transfer" (Doc. No.15, Memorandum of Law in Support of Motion for Preliminary Relief [moving memo], at 4). Plaintiff argues that the Certificate of

Sale and Fact in the instant case "is substantially similar to that in Rapillo, and accordingly likewise resulted in a disposition" (id.). She argues that "[a]t a minimum, there can be no dispute Signature Bank or its assignee accepted the Medical Office in consideration for the $1,850,000 credit bill, under section 9-622(a)" (id. at 4).

Plaintiff avers that "[t]wo conclusions necessarily follow from the foregoing" (id. at 4). First, that "defendant "has no right to surcharge proceeds of the Policy for interest on the full amount of the 2007 loan through the date a subsequent sale of the Medical Office closes, because the credit bid near-fully discharged the outstanding balance of the 2007 loan" (id. at 4). Second, that defendant "has no right to surcharge proceeds of the Policy for post-disposition/acceptance foreclosure costs and expenses incurred in respect of the Medical Office, including maintenance, because the Medical Office was transferred to the bank and its security interests were discharged on disposition/acceptance of the Medical Office, pursuant to [UCC] sections 9-617(a) and 9-622(a)" (id. at 4-5).

Plaintiff argues that defendant's "disposition and acceptance of the Medical Office in consideration for the $1,850,000 credit bill reduced outstanding obligation to, at most" the amounts set forth in the Terms of Sale, $19,186,48 plus 7.25%/year simple interest from December 6, 2017 on the

2007 loan, and $128,477.67, plus 5.75%/year simple interest thereon from such date on the 2011 loan (*id.* at 5). She argues that "[g]iven that Signature Bank's right to draw on the proceeds of the Policy is capped at the foregoing amounts, the proceeds of the policy should be divided between" plaintiff and defendant "accordingly" (id.). She asserts that defendant "should not be permitted to tie up the Policy any longer", and "[p]ending that determination, $300,000 in proceeds of the Policy should be distributed to" plaintiff (id.).

As to the factor of irreparable harm, plaintiff states that she is a "70-year old widow who was diagnosed with triple negative breast cancer since July 2018," which "she has battled aggressively, undergoing lengthy chemotherapy, followed by surgery and then extensive additional surgery," and in May 2019, she was diagnosed with "skin cancer, requiring additional surgery" (id. at 5). Her treatments continue and she may need further surgery. "She needs access to the proceeds of the Policy to support her daily living expenses," as social security is her sole source of income and her "monthly rent obligations exceed her monthly income" (id.). She has turned on multiple occasions to relatives for financial support, and absent the requested relief she will need to continue to do so.

With respect to the factor of the balancing of equities lying in her favor, she argues that defendant "will not be

harmed by the requested preliminary relief, which if granted would reduce available Policy proceeds from over $1,660,000 to over 1,360,000," noting that the Policy provides that the insurance company will pay at least 3-½% per year interest from date of death to the date payment is made, and asserting that over $60,000 in interest has accrued (id. at 6, and n. 2 at 6). Plaintiff asserts that there will be more than sufficient collateral and an equity cushion, as defendant is asking $2,375,000 for the Medical Office, and in her husband's Chapter 11 bankruptcy proceedings defendant declared that the Medical Office was worth at least $2,800,000.

As to that part of the motion seeking a stay preventing defendant from drawing on the Policy, plaintiff asserts such relief is needed to maintain the status quo, and, absent such relief, defendant "could potentially frustrate" plaintiff's "rights by simply drawing the full amount of the proceeds of the policy" (id. at 6).

In opposition to the motion, defendant submits an affirmation from its counsel (Doc. No. 20, Affirmation of Philip J. Campisi, Jr., Esq. [the Campisi Aff]), and an affidavit from Robert G. Levin, a Vice President of Special Assets for defendant (Doc. No. 21 [the Levin Aff.]), with accompanying exhibits. These exhibits include: the 2007 and 2011 notes or loans (Doc. Nos. 22 and 25, Exs. A & D); the Security Agreements

for the 2007 note between defendant and Dr. Lefkowitz, with respect to the collateral of the proprietary leases and shares to Cooperative Apartments #1B and #1C (Doc. No. 23, Ex. B [the security agreements]); the continuing individual guaranty of Dr. Lefkovits (Doc. No 24, Ex. C); the 2011 Assignment of Life Insurance Policy as Collateral, executed by Dr. Lefkovits and plaintiff (Doc. No. 26, Ex. E [Assignment]); Order to Show Cause with Temporary Restraining Order, dated August 2, 2016 (Doc. No. 27, Ex. F); Order Granting Relief From Automatic Stay Pursuant to 11 U.S.C. Sections 362 (d) (1) and (2) (Doc. No. 30, Ex. I); Notice of Disposition of Collateral and Notice of Public Auction, dated December 19, 2017 (Doc. No. 31, Ex. J); Terms of Sale (Doc. No. 12, Ex. K); Judgment and Lien Search (Doc. No. 34, Ex. M).

Defendant asserts that it "has made every effort since as far back as 2011 to work" with Dr. Lefkovits, "his lucrative medical practice," and his family, including plaintiff, and "the implication that Signature has acted in bad faith or in a predatory manner is completely false" (Levin Aff. at 2, ¶ 3). Despite Dr. Lefkovits having earned a seven-figure income for many years, he "refused to pay his debts" to defendant and "apparently, to many other creditors including the government," resulting in millions of dollars of liens against him at the time of his passing (id. at 2, ¶ 4).

Dr. Lefkovits defaulted on his payment obligations and as early as January 2013, defendant was forced to engage outside counsel, and in good faith chose at that time not to accelerate the indebtedness (id. at 4, ¶ 13). As of November 2015, the loans' defaults were not cured, and, despite proposing and orally agreeing to a payment plan, Dr. Lefkovits failed to counter-sign the letter and failed to make the promised payments (*id.* at 5, ¶ 14). In late December 2015/early 2016, defendant received copies of the cooperative's 10 days' notice to cure letters seeking a total of $28,469.84 in unpaid rent (id. at 5, ¶ 15). Since early 2016, defendant has been forced to pay that outstanding amount as well as the ongoing maintenance and common charges, totaling hundreds of thousands of dollars, to protect the Medical Office "from being foreclosed upon by the landlord cooperative board" (id. at 2, ¶ 4).

Due to Dr. Lefkovits' failure to make the loan and maintenance payments, defendant accelerated the debt. Defendant "has spent substantial sums in attorneys' fees in connection with defeating a prior state court action to stop a UCC auction sale of the Medical Office," "obtaining stay relief from a frivolous bankruptcy proceeding and in connection with attempts to enter into forbearance agreements, and to collect on its debt, including by trying to sell" the Medical Office (id.).

Defendant asserts that plaintiff commenced this action despite defendant possessing every right to use the Policy's proceeds against the loans' indebtedness, as the proceeds are secured collateral on the loans. Plaintiff also commenced the action despite: defendant not being in possession of the Policy proceeds; plaintiff not naming Hartford as a necessary party; plaintiff knowing that the stock certificates had not yet been transferred to defendant,[1] or the Medical Office sold to a third - party; and plaintiff admitting in her papers "that there will likely be a deficiency when such a sale does occur" (id. ¶ 5). Defendant additionally argues that plaintiff is incorrect in her contention that the debt owed to defendant was "cut-off and capped as of December 2017," and defendant has the right to collect as part of the deficiency additional accrued interest, maintenance payments, other "protective advances and expenses, and attorneys' fees" (id.).

Defendant asserts that it has been making diligent efforts to sell the Medical Office to a third-party but has not been able to consummate a sale for a number of reasons, and "lost at least two potential purchasers due, in large part, to various

[1] The court notes that the Co-op Board did not transfer the proprietary leases and the appurtenant shares until approximately one year after its December 2018 approval of the transfer to Signature. Signature received the proprietary leases and appurtenant shares on December 23, 2019 (NYSCEF Doc. No. 95, Supplemental Affidavit of Philip J. Campisi, Jr., Esq., ¶ 4, submitted without opposition).

actions of Dr. Lefkovits and his family" (id. at 7, ¶ 27). Dr. Lefkovits and then his family permitted another medical doctor to run his own medical office out of the Medical Office, without seeking or obtaining defendant's consent, and potential purchasers advised defendant they would not go forward until the occupant was removed. Dr. Lefkovits failed to pay millions of dollars he and/or the PC owed for federal, state and local taxes, liens were placed, and potential purchasers view the liens as a cloud on defendant's title and are not willing to conclude the sale. The family has not appointed an executor for Dr. Lefkovits's estate and the state proceeding to enjoin the auction sale has not been discontinued.

Defendant argues that plaintiff's motion should be denied because she improperly seeks to mandate that defendant release $300,000 of the proceeds for her to use now, although: (1) she has not made the requisite showing of extraordinary circumstances warranting the granting of a mandatory injunction; (2) such relief does not maintain the status quo; (3) the payment of such proceeds is a component of the ultimate relief she seeks; (4) defendant is not in possession of the Policy proceeds; and (5) the Hartford, which is in possession of the Policy proceeds, is a necessary party but has not been named or provided with notice. Defendant further argues that the executed loan documents, security agreements, and assignments

"all expressly provide" it with the "right to draw down on the life insurance proceeds" (Campisi Aff at 3, ¶ 6). It also has not received any cash proceeds within the meaning of Article 9 of the UCC, and, therefore, it "is not required to apply any purported noncash 'value' of, or bid for, the collateral to the indebtedness" (Campisi Aff at 3, ¶ 6).

Additionally, defendant argues that there are four independent reasons why plaintiff is unlikely to succeed on the merits. First, defendant is not in possession of the proceeds and thus cannot release them to plaintiff, as Hartford previously advised defendant that it requires the death certificate, which defendant does not have, and plaintiff failed to name or notice Hartford, although it is a necessary party. Similarly, the executor or other representative of the Estate and other creditors have not been named. Additionally, contrary to plaintiff's contention, the amount indicated on the Terms of Sale is simply the Loan amounts as of the date it was prepared and does not cut off defendant from the continued interest and expenses, including attorneys' fees, that defendant is entitled to under the various loan and related documents.

Second, plaintiff seeks to deprive defendant of its rights pursuant to the Assignment that she agreed to and executed (see Assignment, ¶ A). The Assignment provides that defendant had "[t]he sole right to collect from the Insurer the net proceeds

of the Policy when it becomes a claim by loss, death or maturity" (*id.* ¶ B [1]). Additionally, the Assignment provided that "(t)he exercise of any right, option, privilege or power given herein to the Assignee [defendant] shall be at the option of the Assignee" (*id.* ¶ H), and that "[t]he Assignee may take or release other security . . . or may apply to the Liabilities in such order as the Assignee shall determine the proceeds of the Policy hereby assigned or any amount received on account of the Policy by the exercise of any right permitted under this assignment, without resorting or regard to other security" (id. ¶ I). Defendant also argues that the action lacks merit because plaintiff concedes that the auction of the Medical Office did not yield sufficient value to compensate the defendant for the loans' total debt, and therefore the Policy continues to secure the indebtedness.

Third, and contrary to plaintiff's assertion, the indebtedness that is secured by the Policy did not cease to accrue on December 6, 2017, or when the public auction occurred, or even to date as the Medical Office has not been sold. The loan documents provide that in addition to the principal and interest, the indebtedness includes the cost and expenses of collecting the debt, including attorneys' fees and maintenance charges. The 2007 Note provides that: "If the Note Holder [Signature] has required me [Dr. Lefkovits] to pay immediately

in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by law. Those expenses include, for example, reasonable attorneys' fees" (2007 Note, ¶ 6 [E]). Similarly, the Security Agreement provides that Signature has the "right to make payments for me [Dr. Lefkovits] or to take any action needed to comply with the terms of my Proprietary Lease or to protect or defend your [Signature's] security. If you make any payments or incur any expenses in taking such action, including your attorneys' fees equal to 20% of the amount due you, I will repay you with interest at the maximum legal rate, at your request. All of these payments and expenses will be part of my total debt to you and may be paid from the proceeds of the sale of the Security" (Security Agreement, at 6).

Defendant argues that plaintiff failed to cite UCC provisions, other legal authorities, or a contractual basis, in support of her argument that after the date of the auction the defendant is prohibited from recovering its additional costs and expenses incurred in collecting the debt. Contrary to plaintiff's argument that under UCC Section 9-622 (a) defendant accepted the collateral of the Medical Office in satisfaction of the debt, an acceptance did not occur here, as the specific procedures set forth in the UCC by which a secured party accepts

collateral in full or partial satisfaction of a debt were not followed. Plaintiff did not present evidence that the debtor Dr. Lefkovits sent a proposal to the secured party, Signature, for acceptance and that Signature consented to the acceptance in an authenticated record, or that Signature sent such a proposal to Dr. Lefkovits which he then accepted (see UCC Section 9-620 [b]). Indeed, Dr. Lefkovits and the PC commenced the prior state action and then bankruptcy proceedings in an effort to prevent the defendant from selling the Medical Office.

Additionally, the UCC provisions cited by plaintiff fail to address the critical issue of when and how the auction proceeds will be applied to the debt. Contrary to plaintiff's contention, in Rapillo (*2018 WL 1175127*), the "federal district court did not consider any issues relating to the timing of the application of sale proceeds to the indebtedness," and "merely held that a secured party who had credit bid on the cooperative security interests had standing to evict the debtor from the apartment" (Campisi Aff at 12, n. 4).

Further, defendant argues that plaintiff ignores UCC Section 9-615 and the terms of the loan documents, "both of which indicate that Signature is not obligated to apply any purported 'value' it received from the auction to the balance as of yet" (id. at 12, ¶ 36). UCC Section 9-615(a) expressly addresses the application of proceeds from a collateral's

disposition. It makes a critical distinction between the treatment of "Cash proceeds," defined as "money, checks, deposit accounts, or the like" (UCC Section 9-102 [a] [9])), and "Noncash proceeds," defined as "proceeds other than cash proceeds" (id. Section 9-102 [a] [58]). UCC Section 9-615 (c) provides that a secured party must "apply or pay over" cash proceeds and sets forth the payments' priority (the priority of payment can also be varied by the parties' agreement). "[W]ith respect to noncash proceeds, UCC Section 9-615(a) specifically provides that '[a] secured party need not apply or pay over for application noncash proceeds of disposition under Section 9-610 unless the failure to do so would be commercially unreasonable" (Campisi Aff at 12-13, ¶ 38, citing UCC Section 9-615 [c]) (emphasis and underlining omitted). Additionally, UCC Section 9-615 (d) provides that the obligor is liable for any deficiency and that the deficiency cannot be calculated until "after making the payments and applications required by subsection (a) [dealing with cash proceeds] and permitted by subsection (c) [which deals with noncash proceeds]" (id. at 12, ¶ 38).

Defendant argues that here the auction resulted in noncash proceeds, specifically the credit bid, and defendant will apply the noncash proceeds when it has converted the noncash proceeds to cash proceeds upon the sale of the Medical Office to a third-party. Defendant acquired the Medical Office not for investment

purposes but as a consequence of an unsuccessful auction sale to a third-party, and it is not commercially unreasonable for defendant to wait until it has realized cash proceeds to pay down the debt and then calculate the deficiency.

Fourth, the Terms of Sale did not serve to limit the total amount of the debt, it only indicated the indebtedness under the loans as of the date the document was prepared. The Terms of Sale for the 2007 loan provided that there remains an unpaid principal balance of $1,290,071.19, accrued interest of $210,273.54, "plus attorneys' fees, court costs, protective advances and other expenses incurred that are recoverable pursuant to the terms of the Note, the Security Agreements, the Guaranty, and/or applicable law of at least $368,841.75, plus such additional interest, late charges, attorneys' fees, court costs, protective advances and other expenses incurred and to be incurred that are also recoverable" (Terms of Sale, at 2). Moreover, the Terms of Sale did not amend or modify the obligor's obligations under the loan documents.

As to the element of irreparable injury, defendant argues that any injury plaintiff contends she may suffer if she does not obtain $300,000 "is compensable in money damages, which is all the relief that Plaintiff is effectively seeking in this action and by this application in any event" (Campisi Aff at 16, ¶ 51).

Defendant argues that the balance of equities lies in its favor, not plaintiff's. While plaintiff's "medical condition is unfortunate," defendant's rights should not "be compromised as a result" (id. at 16, ¶ 52). In 2011 defendant demanded the Policy's assignment "precisely to secure the loans in the event of a default" (id. ¶ 53), and since that time Dr. Lefkovits and the PC refused to honor their debts, defaulted in the payment of maintenance, failed to pay federal, state and local taxes, and were subject to over $1.6 million in recorded judgment liens. Defendant has paid maintenance on the Medical Office since 2016 and continues to do so and has incurred attorneys' fees defending itself against Dr. Lefkovits's state court and bankruptcy proceedings and now in this action. Additionally, with the permission of Dr. Lefkovits and thereafter the Lefkovits family, including plaintiff, an occupant used the Medical Office as a medical practice, no monies were paid to defendant, and defendant was forced to incur additional legal fees to remove the occupant. Defendant argues that while plaintiff asks that the court's "exercise its equitable powers to order Signature to turn over a portion of the Policy's proceeds, she does not come into the court with clean hands" (id. at 17, ¶ 55).

In the event the mandatory injunction is granted and defendant is required to release $300,000 to plaintiff for her

use, plaintiff should be required to post a bond in the amount of $1.3 million, the estimate approximate value of the Policy.

Plaintiff replies in her memorandum of law that she commenced this action and motion "after having been stonewalled by" defendant "about an appropriate division of the" Policy proceeds (Doc No. 54, Reply Memorandum of Law in Further Support of Plaintiff's Motion for Preliminary Relief, at 1). She argues that she has demonstrated the likelihood of success on the merits, irreparable harm, and a balance of equities lying in her favor, and that her circumstances merit the positive relief requested.

Plaintiff argues that, as set forth more fully in her summary judgment motion (Mot. Seq. 002), defendant is incorrect that the credit bid constituted noncash proceeds and that it is not obligated to apply the credit bid to outstanding debt. Rather, the credit bid constituted cash proceeds and as such it near-fully satisfied the outstanding debt and defendant is prohibited from surcharging the Policy proceeds for post-disposition interest on the Note's satisfied portion and other post-disposition charges such as maintenance and attorneys' fees. Plaintiff acknowledges that the notes and Security Agreements "permit Signature Bank to surcharge for maintenance, additional sale-related expenses, or attorneys' fees incurred in enforcing the Notes or protecting its collateral (the

Apartments)" (Reply Memo, at 2). Plaintiff counters, however, that "the right to surcharge for the foregoing was cut off when Signature Bank 'disposed of' and "purchased" the Apartments pursuant to U.C.C. Sections 9-610 and 9-617 (a), upon the issuance of a Certificate of Sale and Fact by Signature Banks' auctioneer on June 1, 2018," and Signature is thereby precluded "from surcharging proceeds of the Policy to the extent paid or incurred after said date" (Reply Memo, at 2-3).

Plaintiff argues that defendant's contention that irreparable injury is lacking because she is effectively only seeking money damages is "false" (id. at 3), as in her complaint she seeks declaratory relief. That "declaratory relief would enable precise determination as to" the parties' "respective share" of the Policy's proceeds, and "[s]uch relief is not a substitute for damages against Signature Bank" (id.). She is not seeking to deprive defendant of access to the Policy's proceeds or to punish it for depriving her of access to the Policy proceeds for over a year since the disposition date. "She merely seeks declaratory relief that would serve to prohibit Signature Bank from drawing on proceeds as to which it has no legal entitlement to begin with, and for the proceeds to be distributed" to plaintiff (id.).

Next, plaintiff asserts that defendant's contention that equities lie in its favor because plaintiff does not come to

court with clean hands is "false" (id. at 4). Rather, the equities weigh heavily in plaintiff's favor, as she "is 71 years old (and would be entitled to a trial preference under CPLR 3403[a][4]), and recently widowed, was diagnosed with two forms of cancer in the past year, and has undergone lengthy radiation therapy and still requires further procedures" (id.). She owns no marital assets, and social security, which is her only source of income, is insufficient to pay her rent. Her inability to access the Policy's proceeds "has left her essentially destitute," and relying on relatives for financial assistance (id.).

Plaintiff argues that the court should not require the substantial bond requested by defendant. The amount of the undertaking is a matter of the court's discretion, it is defendant who bears the burden of establishing the damages it will sustain if the preliminary injunction is granted, and the undertaking should be rationally related to potential damages that will result if it is ultimately determined that the injunctive relief was not warranted. Here, defendant is adequately protected given the size of the Policy, and in light of plaintiff's age, health and financial condition, the court should require only a de minimus undertaking.

Lastly, plaintiff argues that defendant is incorrect in its contention that the motion seeks ultimate relief, as such a

motion would seek more than $300,000. Defendant also is incorrect in arguing that the motion should be denied as "it seeks positive preliminary relief" (id. at 6). This is the rare case where plaintiff has clearly established her right to the requested relief "and her situation is urgent on account of her health, age, and financial condition" (id. at 7).

Legal Standard

"The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion" of the court (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]). "A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing" (1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18, 23 [1st Dept 2011], citing Margolies v Encounter, Inc., 42 NY2d 475, 479 [1977]). "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (Nobu Next Door, LLC, 4 NY3d at 840, citing CPLR 6301 and Doe v Axelrod, 73 NY2d 748, 750 [1988]). The "ordinary purpose" of the relief of a preliminary injunction "is to maintain the status quo and to prevent any conduct which might impair the ability of the court to render final judgment" (St. Paul Fire & Marine Ins. Co. v

York Claims Service, Inc., 308 AD2d 347, 349 [1st Dept 2003] [citations omitted]).

"Moreover, a mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted only in unusual situations, where the granting of the relief is essential to maintain the *status quo* pending trial of the action" (Second on Second Café, Inc. v Hing Sing Trading, Inc., 66 AD3d 255, 264 [1st Dept 2009] [internal quotation marks and citations omitted]). "A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite" (*St. Paul Fire & Marine Ins. Co.*, 308 AD2d at 349 [internal quotation marks and citation omitted]). "[C]ourts are generally reluctant to grant mandatory preliminary injunctions, and such relief will be granted only where the right [thereto] is clearly established" (Second on Second Café, Inc., 66 AD3d 255 at 265 [internal quotation marks and citations omitted]).

Discussion

The court first turns to that part of plaintiff's motion seeking a mandatory preliminary injunction directing defendant to release to her $300,000 of the Policy proceeds. The court has carefully considered the circumstances and factors, and

while sympathetic to plaintiff's financial condition, health challenges and recent widowhood, finds that plaintiff has failed to meet her burden for such relief. Plaintiff has not demonstrated her clear entitlement to the relief she seeks, and "[t]he circumstances presented in this case are not of such an extraordinary nature so as to warrant mandatory relief" (Rosa Hair Stylists, Inc. v Jaber Food Corp. d/b/a Trade Fair, 218 AD2d 793, 794 [2d Dept 1995]).

First, the requested relief seeks to change and upset the status quo, not maintain it. The status quo is that plaintiff is not in possession of these monies. It also is not disputed that defendant is not in possession of any portion of the Policy's proceeds, and that Hartford, a non-party, continues to possess the proceeds and it presently cannot be determined when Hartford will pay the Policy proceeds to defendant.

Additionally, while plaintiff has made the court cognizant of the difficulties she faces and how this relief will serve to redress a portion of her burden, and the court understands her frustration in the apparent delay and how her receiving these monies now will assist her plight, plaintiff has not shown why she is entitled to the court ordering defendant, in essence, to advance plaintiff $300,000 because it is anticipated that Hartford will eventually pay defendant the Policy proceeds and defendant can then reimburse itself for the advance from the

proceeds. Moreover, while plaintiff eloquently conveys her immediate need for the money, as defendant does not now possess the Policy proceeds and therefore can take no immediate action with respect to the proceeds, any alleged imminent harm does not result from defendant's action or non-action.

Similarly, plaintiff has not demonstrated in these papers that failing to grant the mandatory preliminary injunction would result in conduct that might impair the court's ability to render final judgment. Plaintiff has not identified, much less shown, what conduct defendant would undertake that might impair the court's ability, should plaintiff succeed in her action, to issue the requested declaratory relief. Moreover, to the extent applicable, if at all, plaintiff has not demonstrated or even alleged that defendant will secrete the Policy proceeds, have insufficient assets, or otherwise be rendered judgment proof so as to frustrate the declaratory judgment.

The court additionally notes that while the instant action is in the form of declaratory relief, part of the declaratory relief she seeks is "directing that Signature Bank be paid the outstanding loan balance from the policy proceeds and that the balance be turned over to" plaintiff (complaint, ¶ 3). Thus, and contrary to plaintiff's contention, part of the ultimate relief is that defendant pay plaintiff, from the Policy proceeds, the surplus (the amount of which is disputed) of the

indebtedness due under the notes and loan documents. By seeking the mandatory preliminary injunction, plaintiff is, in essence, seeking an expedited route to obtain some form of her ultimate relief, that is, $300,000. That the ultimate relief she seeks is payment of the Policy proceeds is further apparent from her summary judgment motion (Mot. Seq. No. 002). There, she asserts that "the remaining unsatisfied amount of [Dr. Lefkovits's] obligations to Signature Bank is only a small fraction of the proceeds of the Policy" and she "is thus entitled to declaratory relief establishing her entitlement to immediate payment of the balance of the Policy, which will amount to the lion's share of the $1,600,000" (Doc. No.51, Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, at 1).

Additionally, in determining whether to grant the mandatory injunctive relief, the court weighs the factors of whether plaintiff has shown a likelihood of success on the merits, irreparable injury, and that a balance of the equities lie in her favor.

"To establish a likelihood of success on the merits, [a] prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner's claims should be left to a full hearing on the merits" (Barbes Rest. Inc. v Asrr Suzer 218, LLC, 140 AD3d 430, 431 [1st Dept. 2016] [internal quotation marks and citations omitted]). "While 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, 86 AD3d at 23 [internal quotation marks and citations omitted]).

The court finds that plaintiff has not sufficiently demonstrated a likelihood of success on the merits so as to be awarded the mandatory injunctive relief, as "[t]he record reveals many unresolved issues, and therefore it cannot be determined whether there is a likelihood that the plaintiff will succeed on the merits" (Rosa Hair Stylists, Inc., 218 AD2d at 794.

Moreover, certain of plaintiff's arguments are not sufficiently supported and appear, at this stage, to be incorrect on the law. For example, plaintiff relies on UCC Section 9-622 and argues that an acceptance occurred when the Medical Office was disposed of and sold at the non-judicial foreclosure and when defendant's credit bid was accepted. To support her assertion, plaintiff appears to rely only on a partial reading of UCC Section 9-622. This section, however, is not read in isolation and must be read with Sections 9-620 and

9-621 to determine if the conditions set forth therein were complied with and an acceptance occurred. Contrary to plaintiff's arguments, under the undisputed factual circumstances, an acceptance, as that term is defined in the UCC, did not take place here.

UCC Sections 9-620 through 622 set forth the mechanism by which an acceptance occurs. The official comment to UCC 9-620 states: "**Overview.** "This section and the two sections following deal with strict foreclosure, a procedure by which the secured party acquires the debtor's interest in the collateral without the need for a sale or other disposition under Section 9-610" (McKinney's Uniform Commercial Code Section 9-620). "Subsection (a) [of Section 9-620] sets forth the conditions necessary to an effective acceptance (formerly, retention) of collateral in full or partial satisfaction of the secured obligation" (id.). Here, there was no proposal, there was no consent, a strict foreclosure did not occur, and the secured party sold the Medical Office at a non-judicial foreclosure. An acceptance, as that term is defined by the UCC, did not occur.

Similarly, plaintiff's reliance on Rapillo v CitiMortgage, Inc. (2018 WL 1175127) is misplaced. In Rapillo, the facts and legal issues before that court are not those before this court.

Moreover, contrary to plaintiff's arguments, this court concurs with defendant that the Terms of Sale did not limit the

amount of debt. Such Terms only indicated the indebtedness under the loans as of the December 2017 date the document was prepared. They further set forth the additional categories of monies due: "plus attorneys' fees, court costs, protective advances and other expenses incurred that are recoverable pursuant to the terms of the Note, the Security Agreements, the Guaranty, and/or applicable law," plus such additional interest, late charges, attorneys' fees, court costs, protective advances and other expenses incurred and to be incurred that are also recoverable" (Terms of Sale, at 2). Moreover, the Terms of Sale did not amend or modify the obligor's obligations under the loan documents.

As to plaintiff's remaining arguments, at this juncture the court finds it unnecessary to proceed further in its analysis of whether plaintiff has demonstrated a likelihood of success on the merits.

Turning to the factor of irreparable injury, "[i]rreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient. Conversely, [e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (DiFabio v Omnipoint Communications, Inc., 66 AD3d 635, 636-637 (2d Dept 2009] [internal quotation marks and citations omitted]). A movant fails to establish the element of irreparable harm when the

"alleged damages are compensable in money damages and capable of calculation" (Trump on the Ocean, LLC v Ash, 81 AD3d 713, 716 [2d Dept 2011]). "Moreover, the irreparable harm must be shown by the moving party to be imminent, not remote or speculative" (Golden v Steam Heat, Inc., 216 AD2d 440, 442 (1st Dept 1995).

In identifying her irreparable injury, plaintiff described her current health and financial situation and her possible need for further surgery; she stated that "[s]he needs access to the proceeds of the Policy to support her daily living expenses," and that absent her requested relief, she will need to continue to turn on multiple occasions to her relatives for financial support [moving memo at 5). While asserting her unfortunate circumstances and her need for monies, however, she has not sufficiently identified in her papers the nature of the imminent harm that will result, absent the injunction, that is not compensable by money damages capable of calculation. Moreover, the Policy proceeds are not in defendant's possession, and thus plaintiff has not shown that the harm is imminent.

As to balancing the equities, it must be shown that "the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction" (McLaughlin, Piven, Vogel v Nolan & Co., 114 AD2d 165, 174 [2d Dept 1986] [internal quotation marks and citation omitted]). Here, plaintiff has not

sufficiently demonstrated irreparable injury in the event the mandatory injunction does not issue, and thus the court finds that this factor, within the context of the requested mandatory injunction, does not currently lie in plaintiff's favor.

For the foregoing reasons, the court must deny that part of plaintiff's motion seeking an order directing defendant to now pay her $300,000 from the Policy proceeds.

The court now turns to that part of the motion seeking an order prohibiting defendant from drawing on the Policy's proceeds to satisfy outstanding obligations in respect of the loans for which the Policy serves as collateral pending disposition of this action, without prior court authorization. The court notes that this injunction is not a mandatory one and while plaintiff must still show her entitlement to the requested relief, the showing is not as stringent and the court's balancing of the factors leads to a different result. To avoid any unnecessary motion practice should Hartford release the monies to defendant, the court now considers plaintiff's request.

Once defendant possesses the proceeds, the function of the injunction is to maintain the status quo. In considering the likelihood of success on the merits, and while noting that factual and legal issues remain, the court finds that it is likely that a portion of the Policy proceeds will not be needed

to pay off the loans, that a surplus will likely result, and that defendant likely will be obligated to pay the surplus amount to plaintiff. By so noting, the court does not opine on the ultimate success of the instant action, and whether it will in its discretion consider and grant the requested declaratory relief or some form of declaratory relief.

In considering irreparable injury, the court notes plaintiff's difficulties and the likely additional stress and uncertainties that would result if this branch of the requested injunctive relief is not granted. In considering if the balance of equities lie in plaintiff's favor, the court notes that Dr. Lefkovits failed to meet his financial obligations to defendant, and delayed and instituted numerous proceedings in apparent efforts to hamper defendant in its legal efforts to pursue the remedies previously agreed to by Dr. Lefkovits as provided in the loan documents. There has been no showing, however, that plaintiff did so. Moreover, defendant did not demonstrate that plaintiff participated in permitting a medical professional to use the Medical Office without defendant's consent and without payment to defendant. While plaintiff did assign her life insurance proceeds to defendant to secure the 2011 loan and agree to the Assignment's terms, and without commenting on the need for and timing of the action and the amount of any such surplus, it does not appear that such assignment foreclosed

plaintiff from seeking, if a surplus results, that part of the Policy proceeds be paid to her. The burden upon plaintiff should she not obtain an injunction prohibiting defendant from drawing upon the proceeds is greater than the burden upon defendant, pending the action's disposition, to not draw upon the proceeds without prior court authorization.

Therefore, the court shall grant that part of plaintiff's motion seeking an order prohibiting defendant from drawing on the Policy proceeds to satisfy outstanding obligations in respect of the loans for which the Policy serves as collateral pending disposition of this action, without prior court authorization.

CPLR 6321 (b) requires that the court fix an undertaking in an amount sufficient to compensate defendant should the court determine that the preliminary injunction was improvidently granted. Here, it appears that the damages to defendant would be nominal. The court shall set the bond in the amount of $1,000.

The Summary Judgment Motion (Mot. Seq. No. 002)
Legal Standard

The "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d

320, 324 [1986]). "Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez, 68 NY2d at 324, citing Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (Forrest v Jewish Guild for the Blind, 3 NY3d 295, 315 [2004]). "On a summary judgment motion, facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Const. Corp., 18 NY3d 499, 503 [2012], quoting Ortiz v Varsity Holdings, LLC, 18 NY3d 335, 339 [2011]). The role of the court in determining the "drastic remedy" of summary judgment is "issue - finding," not "issue - determination" (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957] [internal quotation marks and citation omitted]).

Plaintiff's Moving Papers

In support of her motion for summary judgment, plaintiff submits her counsel's affirmation with exhibits, her affidavit

with exhibits, and a memorandum of law. She argues that she is "entitled to declaratory relief establishing her entitlement to immediate payment of the balance of the Policy, which will amount to the lion's sale of the $1,600,000-money she desperately needs as a widow fighting cancer, with no other material asserts or source of income save social security payments" (Doc. No. 51, Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment [SJ Moving Memo] at 1-2). She asserts that "[t]he relevant facts are essentially undisputed, and the governing law is clear. Summary judgment granting Cheryl the declaratory relief she requests is thus appropriate" (id. at 2).

Plaintiff argues that Signature's credit bid constituted "cash proceeds" and its "refusal to apply the $1,850,000 in proceeds as of the June 2018 sale date is, among other things, being used as a pretext to claim that interest is continuing to accrue as if the $1,8500,000 had not already been paid and received" (*id.* at 3). Plaintiff further argues that "Signature Bank cannot claim that there was no 'disposition' of the collateral when it elected to purchase for itself in June 2018 via the foreclosure auction," and while it "apparently hopes to resell the Apartments to a third-party buyer at some indefinite time in the future that does not keep the June 2018 sale from

qualifying as a disposition," and Signature must apply the cash proceeds to reduce the amounts owed by Dr. Lefkovits (id.).

Plaintiff contends that Signature chose not to reopen the auction following the Co-op Board's lack of approval of the sale to East Fork and, instead chose to accept the next highest bid, its own, resulting in the auctioneer's issuance of the Certificate of Sale and Fact dated June 1, 2018. Plaintiff argues that while Signature maintains that it took the Medical Office with the intent to sell it to a third-party and not to hold it as a long term investment, the documents signed by Dr. Lefkovits, the PC and plaintiff did not obligate them to assist Signature in marketing the Medical Office or obligate them "to cover any of the ongoing carrying costs (such as maintenance and insurance) of the Apartments after Signature Bank's designee purchased them as of June 1, 2018" (id. at 8).[2]

Plaintiff seeks summary judgment in her favor on three "relevant legal issues" (bolding and capitalization omitted) (*id.* at 9). The first issue is "whether Signature Bank already disposed of the Apartments" (bolding and initial capitalization omitted). Plaintiff argues that the Medical Office was

[2] The court notes that the Co-op Board did not approve the Medical Office's transfer to Signature until December, 2018 (see Chubak Aff Ex 9), and, as noted, did not transfer the proprietary leases and the appurtenant shares until approximately one year later, which Signature received on December 23, 2019 (NYSCEF Doc. No. 95, Supplemental Affidavit of Philip J. Campisi, Jr., Esq., ¶ 4, submitted without opposition).

"disposed" off, "within the meaning of U.C.C. Section 9-610(a), upon the auctioneer's issuance of the Certificate of Sale and Fact, dated June 1, 2018," citing Rapillo, 2018 WL 1175127. Plaintiff notes that defendant argues that a disposition did not so occur, and "[t]hus, to the extent Signature Bank disputes it in its opposition to this motion, declaratory judgment should be made and entered that Signature Bank disposed of the Apartments on June 1, 2018, the date the Certificate of Sale and Fact was issued by the auctioneer" (id. at 11).

Next, plaintiff identifies the second issue as "[w]hether the credit bid constitutes 'cash proceeds' which Signature Bank was required to apply to pay down the outstanding debt" (bolding and initial capitalization omitted). Plaintiff argues that pursuant to the UCC the credit bid constituted cash proceeds, not noncash proceeds, noting the phrase "or the like" in the cash proceeds definition. Therefore, Signature was obligated to apply the amount to the 2007 notes' outstanding debt. Pointing to UCC Section 9-102, Comment 13.e, which provides that the phrase "and the like" covers property that is functionally equivalent to "money", she asserts that "courts have uniformly held that a credit bid is the functional equivalent of cash," and in support cites several cases with the selected language quoted in parenthesis (id. at 12).

Plaintiff therefore requests that: "[a] declaratory judgment should be made and entered that Signature Bank's $1,850,000 credit bid constitutes 'cash proceeds' of the disposition, and Signature Bank was thus required to apply it to the amounts outstanding under the 2007 note" (id. at 15). Additionally, she requests that "Signature Bank should also be directed, to the extent it has not fully done so in its opposition to this motion and is not deemed to have thereby waived the right to do so, to document all amounts incurred prior to June 1, 2018 that it claims to be included to under the 2007 Note that were not included in the December 2017 Notice of Disposition or the January 2018 Terms of Sale" (id.)

Plaintiff identifies the third issue as "whether Signature Bank is entitled to recover post disposition maintenance, attorneys' fees, or additional sale-related expenses" (bolding and initial capitalization omitted) (id. at 16). Plaintiff argues that, contrary to defendant's contentions, the Notes and Security Agreements do not give it the right to recover post-disposition maintenance, attorneys' fees, and the additional sale related expenses through the date of the Medical Office's sale to a third-party. She asserts that "[i]t is axiomatic that once the Apartments have been so 'transferred' pursuant to U.C.C. Section 9-617(a)(1) or 'purchased' pursuant to U.C.C. 9-610(c), Signature Bank has no contractual right to recover

maintenance advanced to protect its former collateral or additional sale-related expenses" (id. at 16). Plaintiff requests that "[a] declaratory judgment should be made and entered that Signature Bank has no right to recover post-disposition maintenance paid, attorneys' fees, or additional sale-related expenses paid or incurred, under the Notes or Security Agreements" (id. at 17).

Plaintiff asserts that defendant's answer is full "of grab-bag generic boiler plate defenses, many of which have no obvious bearing to the facts of this case and none of which we anticipate it will be able to support with actual evidence" (id. at 18). Plaintiff specifically addresses only two of defendant's 20 affirmative defenses. As to the affirmative defense of failure to join the insurer as a necessary party, she asserts that the insurer need not be named to afford complete relief, as this action seeks only declaratory judgment on issues determining the allocation of Policy proceeds between plaintiff and defendant, and not the undisputed amount of the insurance. Plaintiff further asserts that defendant's argument that it has been unable to secure payment because it lacks a copy of Dr. Lefkovits' death certificate "and seeks to blame Cheryl for that lack" "is neither here nor there," as defendant has "thus far agreed to refrain from unilaterally seeking payment from the Insurer" and plaintiff "is perfectly willing to cooperate" with

defendant in taking whatever steps are necessary to secure full payment from the Insurer once the parties' respective entitlements" to the Policy proceeds "have been adjudicated and/or agreed to" (id. N. 10 at 18-19).

Plaintiff also addresses defendant's affirmative defense that her cause of action is barred by her own misconduct. First, plaintiff asserts that defendant "casts blame" on plaintiff that she has not turned over payments received from another doctor who worked in the Medical Office, and, as defendant has not asserted a counterclaim, this assertion "at most appears to be a potential set-off defense, in an amount unlikely to exceed a de minimis percentage of the" Policy proceeds that defendant "is wrongfully obstructing Cheryl from receiving" (id. at 19). She further asserts that this is not "a viable set-off defense," as plaintiff did not receive any rent from this doctor, defendant advised by email dated April 17, 2019 that there was no need to have the family involved, and plaintiff had no contractual or legal duty to defendant.

In her conclusion, plaintiff asserts that "[a] declaratory judgment should be made and entered that: (1) Signature Bank disposed of the Apartments on June 1, 2018, the date of the Certificate of Sale and Fact issued by the auctioneer; (2) Signature Bank's credit bid constitutes 'cash proceeds' of the disposition, and Signature bank was thus required to apply

$1,850,000 to pay down the outstanding debt under the 2007 Note on the disposition date, and should be required to document the debt outstanding as of that date so that the exact amount of remaining unpaid principal under the 2007 Note on which interest has continued to accrue after June 1, 2018 can be calculated; and (3) Signature Bank has no right to recover post-disposition maintenance paid, attorneys' fees, or additional sale-related expenses paid or incurred, under the Notes or Security Agreements; and granting such other and further relief as this court deems just and proper" (id. at 21). Plaintiff then asserts that "[t]hese declarations should collectively enable precise determination as to the parties' respective shares of the proceeds of the Policy, and will thus allow those proceeds to then be paid out appropriately by the Insurer at which point this dispute will be fully resolved" (id.).

Discussion

The court must deny plaintiff's motion for summary judgment, as the declaratory relief sought therein is not the declaratory relief sought in the complaint. Moreover, plaintiff has failed to meet her prima facie burden of tendering prima facie evidence to demonstrate the absence of any material issues of fact and her entitlement to judgment as a matter of law, and therefore her motion shall deny her motion without review of defendant's opposing papers.

First, the court denies the motion as plaintiff does not seek summary judgment on her cause of action as asserted in her complaint. Rather, she improperly seeks that the court grant her summary judgment in the form of the declaratory judgments sought only in her motion. Similarly, while in her complaint plaintiff did not seek an accounting or a declaratory judgment directing that defendant document the debt outstanding as of June 1, 2018, she seeks such additional relief in her summary judgment motion. She also asserts in her summary judgment motion that she is entitled to declaratory relief establishing her entitlement to immediate payment of the balance of the Policy proceeds, which varies from the declaratory judgment language sought in the complaint, "requiring that Signature Bank release the collateral assignment of the Policy except as to the amounts identified at Paragraphs 21(a)-(b) [the amounts listed in the December 6, 2017, Terms of Sale] " (complaint ¶ 26). Generally, and here, relief not requested in the complaint is not available on a motion for summary judgment on that complaint.

Similarly, while not acknowledging that she is doing so, she asserts in the instant motion allegations that are different from those asserted in her complaint, resulting in a request for declaratory relief that is different, if not contradictory, to that requested in her complaint. In her complaint, she alleges that December 6, 2017, the date of the Terms of Sale, is the

cut-off date for the calculation of principal and interest on the remaining outstanding debt and that defendant cannot, under the loan documents, recover its costs and expenses, including maintenance and attorneys' fees, incurred after such date. Her requested declaratory relief in her complaint are premised on these allegations. In her preliminary injunction motion papers, she asserts that the date of the auction is the operative date and defendant cannot recover any costs and expenses subsequent to that date. However, in her summary judgment motion, she asserts that June 1, 2018, the date of the Certificate of Sale and Fact, is the operative date, and the declaratory relief she now seeks in the instant motion is premised on this new date.

For the foregoing reasons, plaintiff has not demonstrated entitlement to the relief sought.

In any event, plaintiff has failed to meet her burden of proof. She has not demonstrated, by evidentiary proof, the absence of issues of material fact. For example, as to defendant's defenses and affirmative defenses, other than specifically discussing two of the 20 affirmative defenses set forth in the answer, plaintiff merely asserts in a conclusory manner that the answer contains boiler plate defenses that are not applicable and that she anticipates that defendant will not be able to support the defenses with actual evidence. Plaintiff, thereby, conflates the burden on a summary judgment

motion, attempting to shift it upon the opposing party. It is her burden, as movant, to establish the absence of an issue of fact and her entitlement to judgment dismissing the defenses as a matter of law, which she has failed to do.

As to one of the two affirmative defenses that she does address, the failure to join the insurer as a necessary party, plaintiff has failed to meet her prima facie burden that this defense should be dismissed. It is not disputed that the insurer, which has not released the Policy proceeds to defendant, possesses the funds. Without ruling on the ultimate merits of this defense, plaintiff has not shown how the relief she seeks in her complaint, that of directing the defendant to release to her the collateral assignment of the Policy except as to the amounts identified as owing, can occur since the defendant does not possess the Policy proceeds. Further, the court notes that, within the body of the complaint, plaintiff appears to be seeking relief as against the non-party insurer, as plaintiff seeks declaratory judgment "directing that Signature Bank be paid the outstanding loan balance from the policy proceeds and that the balance be turned over to Cheryl" (complaint, ¶ 3). The court additionally notes that the Assignment directs payment to defendant and plaintiff has failed to demonstrate in these papers why the terms of the Assignment, as well as the other loan documents, are not controlling here.

Nor, in her papers has plaintiff demonstrated that defendant's credit bid constituted cash proceeds as that term is defined and used in the UCC. Plaintiff has not shown that the UCC term "cash proceeds" encompasses a credit bid as the definitional term "and the like" includes a credit bid. The court is also unpersuaded by the cases cited by plaintiff, as those cases involved different fact circumstances and questions of law.[3]

8/27/2020
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[3] Particularly under the circumstances of this case, the court strongly encourages the parties to resume negotiations with (or without) the assistance of a court sponsored mediator, following up on the negotiations that concluded unsuccessfully on July 2, 2020, and to make renewed efforts to expeditiously resolve their dispute.