

<b>893 4th Ave. Lofts LLC v 5AIF Nutmeg, LLC</b>
2020 NY Slip Op 33902(U)
November 25, 2020
Supreme Court, Kings County
Docket Number: 511942/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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893 4<sup>th</sup> AVENUE LOFTS LLC & MICHAEL UHR,  
Plaintiffs, Decision and order

- against - Index No. 511942/20

5AIF NUTMEG, LLC, 5AIF MAPLE 2, LLC,  
and 5 ARCH FUNDING CORP.,  
Defendants, November 25, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved by order to show cause seeking to enjoin the defendant from engaging in a UCC sale of the member and equity interest in 893 4<sup>th</sup> Avenue Lofts LLC or from taking any action to effectuate such sale. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order on December 31, 2018 the parties entered into an agreement whereby the plaintiff borrowed money from the defendants to fund a construction project at property located at 893 4<sup>th</sup> Avenue in Kings County. The plaintiff Michael Uhr signed a pledge and security agreement which provided the security for the loan would be an interest in the plaintiff entity 893 4<sup>th</sup> Avenue LLC. The plaintiff fell behind in the payments and secured a loan extension on condition all arrears were satisfied. The Plaintiff paid the arrears of three months, namely, December 2019 and January and February 2020 and on February 27 satisfied all the conditions for the loan modification. However, plaintiff failed to make the

March 2020 payment due a few days later on March 1. Since the failure to make that payment constituted a default the funds of the loan extension were not forwarded and the default remained.

The court already denied a motion seeking an injunction stopping the sale and the plaintiff has now filed another request. The plaintiff argues that since the sale affects land and is really about land, the sale must be conducted pursuant to a foreclosure of land and not via the UCC. Thus, the plaintiff argues such UCC sale violates UCC §9-604. That provision states that where a security agreement covers both real property and personal property then any foreclosure for the real property must be commenced pursuant to the Real Property Law. Specifically, the plaintiff argues that "since the security agreement involves real property, the Defendant/Lender must foreclose pursuant to Article 13 of the Real Property and Proceedings Law. By going through the backdoor of UCC Article 9, the Defendant/Lender circumvents the rights, procedural safeguards and due process afforded by the front door of RPAPL Article 13" (see, Affirmation in Support of Emergency Order to Show Cause, ¶ 19). The defendant opposes the motion arguing the security agreement does not involve real property since by its very terms the agreement only involves shares of the entity that owns the property and not the property itself.

There is really no authority supporting the argument that ownership in an entity that owns property is considered an interest

in real property. In Hotel 71 Mezz Lender LLC v. Falor, 14 NY3d 303, 900 NYS2d 698 [2010] the court noted that loans similar to the loan in this case "is secured not by the real property itself, but by stock of or some ownership interest in the company that owns the real property" (id at Footnote 1). Likewise, "in the context of loans that are secured by the personal property of a debtor, such as the stock of a development company that enters into a mezzanine loan agreement, New York's Uniform Commercial Code (U.C.C.) offers a mechanism for foreclosing on the personal property. Unlike mortgages that are secured by real estate, loans secured by personal property that grant the lender a perfected security interest can generally be foreclosed under Article 9 of the U.C.C." (see, *The New York Practice Series-Commercial Litigation in New York State Courts- Commercial Real Estate* §145:39 Uniform Commercial Code proceedings to foreclose loans by Robert Haig [October 2020 Update]). These sources clearly demonstrate that foreclosing upon an interest in an entity that owns property does not implicate the real property itself to the extent the U.C.C. does not allow the foreclosure. The case cited by plaintiff in support of their position, Checkspring Bank v. L& E Donuts Inc., 2011 Misc. LEXIS 5991 [Supreme Court Queens County 2011] does not hold that security agreements in an entity is really a security interest in property itself. That case merely held that pursuant to U.C.C. §9-604 any real property could not be foreclosed pursuant

to the U.C.C. and had to be foreclosed pursuant to the Real Property Law.

The plaintiff further argues that "the UCC non judicial foreclosure sale scheduled by the Defendants circumvents the many aforementioned laws passed to safeguard the integrity of the judicial foreclosure process and flies in the face of the public policy precepts to protect homeowners" (see, Affirmation in Support of Emergency Order to Show Cause, ¶ 22). However, the safeguards enacted to protect homeowners is inapt in this case where the plaintiff is not a homeowner of the property in question. Likewise the repeal of Article 14 of the Real Property Law does not mean the foreclosure here is improper since the foreclosure clearly is not one of real property.

The plaintiff further argues the foreclosure is really about real property because the plaintiff executed a pledge which allows the defendant to foreclose the mortgage itself. Thus, although the pledge itself specifically only concerns membership interests in the entity "the Amended and Restated Mortgage Note, the Building Loan Note, and the Pledge and Security Agreement are collectively referred to as the "Loan Agreement" because they were all required by the Defendants to be simultaneously executed by the Plaintiffs" (see, Plaintiff's Reply Memorandum, page 6). However, the defendants are not foreclosing on the property itself at all and only seek to foreclose upon the ownership interests of the entity

that owns the property. The plaintiff has failed to present any cogent basis why such U.C.C. foreclosure must comply with the requirements necessary for real property.


The plaintiff further argues that a U.C.C. sale will necessary confer ownership of the real property upon someone else other than plaintiff Uhr. That truism does not alter the posture of the foreclosure sale to one of real property. Indeed, that argument is in conflict with Hotel 71 Mezz Lender LLC v. Falor (supra).

Therefore, since the foreclosure in this case is not a foreclosure of real property the plaintiff cannot demonstrate a likelihood of success on the merits. Consequently, the motion seeking an injunction is denied and the defendant may re-schedule the foreclosure sale.

So ordered.

ENTER:

Dated: November 25, 2020  
Brooklyn, N.Y.

  
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Hon. Leon Ruchelsman  
JSC