

<b>Starkman v ACG Capital Co., LLC</b>
2022 NY Slip Op 30168(U)
January 19, 2022
Supreme Court, New York County
Docket Number: Index No. 157811/2021
Judge: Verna Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. VERNA L. SAUNDERS, JSC. PART 36**

*Justice*

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**INDEX NO. 157811/2021**

GUY STARKMAN and GES TRADING, LP,  
Plaintiffs,

**MOTION SEQ. NO. 001**

- v -

ACG CAPITAL COMPANY, LLC, MODERN  
ART SERVICES, LLC, PEGASUS CREDIT  
COMPANY, LLC, IAN S. PECK, TERENCE J.  
DORAN, LLC, JOHN DOES 1-10, JANE DOES 1-  
10 and ABC CORPORATIONS 1-10,  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 36

were read on this motion to/for **PRELIMINARY INJUNCTION/RESTRAINING ORDER**

The allegations in the complaint are as follows: On or about December 22, 2015, plaintiffs GES Trading, LP (“GES”), and its member, Guy Starkman (“Starkman”) (collectively “plaintiffs”), entered into a loan and security agreement (“the GES agreement”), among other related agreements, whereby defendants ACG Capital Company, LLC (“ACG”) loaned plaintiffs \$1,000,000.00 in exchange for plaintiffs’ promise to pay the principal amount of the loan, plus interest. Plaintiffs also pledged, as collateral, six (6) pieces of artwork valued at close to the loan amount. The loan agreement was signed by defendant Ian S. Peck, as president of both ACG, the lender, and defendant Modern Art Services, LLC (“MAS”), as manager.

Plaintiffs assert that, upon information and belief, in December 2015, ACG entered into a credit agreement and promissory note with CIT Bank, N.A. (“CIT”), promising to pay CIT \$800,000.00, plus interest (the “ACG loan”). Pursuant to said agreement, ACG assigned to CIT certain rights in the GES loan agreement (“the assignment”). On or about December 22, 2015, plaintiffs signed an Underlying Obligor Consent and Acknowledgment (“the acknowledgment”) with respect to the assignment. On or about October 5, 2018, plaintiffs paid back to ACG \$150,000.00 of the principal amount of the GES loan.

In November 2018, CIT filed suit against ACG and plaintiffs in the Superior Court of California, County of Los Angeles (“California court”), under case number 18STCV05917, claiming that ACG defaulted on the ACG loan and that CIT was thus entitled to possession of the artwork pursuant to the assignment and acknowledgment.

On January 28, 2019, Peck, on behalf of ACG and MAS, allegedly informed plaintiffs that if they tendered payment in the amount of \$857,191.16, their loan obligations would be fully satisfied, and that the artwork would be released. On January 29, 2019, plaintiffs wired

\$857,191.16 to MAS's bank account with the understanding that said payment would be forwarded to CIT in satisfaction of the ACG loan and that the artwork would be released to them. However, despite numerous requests, ACG refused to pay CIT, and, in turn, CIT instructed Atelier 4, the company that operates the storage facility where the artwork is kept, not to release the artwork to plaintiffs.

In the California action, defendants were allegedly enjoined, held in contempt, and sanctioned several times, and, ultimately, their answer was court stricken. On July 29, 2021, the California court entered a default judgment in the amount of \$1,006,621.67 in plaintiffs' favor with respect to their cross-claims against defendants.

According to plaintiffs, in May 2019, counsel for ACG indicated that his client would file for bankruptcy rather than allow a judgment against it. Plaintiffs further contend that "[d]efendants have transferred and will soon transfer further real estate and other assets to John Does 1-10, Jane Does 1-10, and ABC Corporations 1-10, which are family members, friends, business associates, conspirators and/or entities either controlled by or otherwise associated with [d]efendants, for the purpose of hindering, delaying, or otherwise frustrating [p]laintiffs' rights as creditors."

In August 2021, plaintiffs commenced this action seeking, *inter alia*, an order, pursuant to CPLR 5406 an Article IV, Section 5 of the United States Constitution, to domesticate the California judgment entered in default against defendants (first count); a judgment against defendants, pursuant to New York Debtor and Creditor Law §§ 273 & 276, preventing them from effectuating any transfer of assets necessary to satisfy plaintiffs' claims pursuant to the California default judgment and an attachment of the assets transferred or other property of the transferee defendants (second count). Plaintiffs also seek a judgment against [d]efendants in the form of a constructive trust over any and all property — real or personal — transferred by the [t]ransferor [d]efendants to the [t]ransferee [d]efendants, and their agents, past and present, and an order that all chattels be returned to [p]laintiff[s] and that any income, commissions, or other benefits be disgorged and paid to [p]laintiff[s]" (third count). (NYSCEF Doc. No. 1, *summons and verified complaint with exhibits*).

Plaintiffs now move the court, by order to show cause, for (1) a preliminary injunction enjoining defendants, during the pendency of this action, from transferring, encumbering, hypothecating, concealing, or in any way disposing of or otherwise dissipating assets of theirs; and, in the interim, (2) for an order granting it a temporary restraining order ("TRO") enjoining defendants from transferring, encumbering, hypothecating, concealing, or in any way disposing of or otherwise dissipating assets of theirs; and, lastly, for an order directing (3) expedited discovery to be completed within thirty (30) days from the date of this order, including but not limited to issuing subpoenas for the production of documents and for depositions relating to information regarding the nature, whereabouts, and extent of defendants' assets and any transfers thereof. However, this court declined to sign that branch of the application seeking a TRO and expedited discovery, finding that plaintiffs failed to show a basis for irreparable harm to warrant the extraordinary relief requested. (NYSCEF Doc. No. 17, *conformed copy of OSC*).

As to the remaining request before the court, plaintiffs argue that they have satisfied the requirements necessary for a preliminary injunction. First, plaintiffs argue that, insofar as the action seeks to domesticate a judgment that is entitled to full faith and credit, plaintiffs have demonstrated a likelihood of success on the merits. They further claim that “[p]laintiff’s ability to collect on the domesticated California judgment would be irreparably harmed were [d]efendants to transfer, encumber, hypothecate, dispose of or otherwise dissipate assets.” Insofar as defendants have refused to identify and account for the specific funds that are the subject of the California judgment and this action, plaintiffs maintain that the relief herein sought is necessary to ensure that their rights as judgment creditors is preserved. (NYSCEF Doc. No. 4, *memorandum of law in support of motion*).

Defendants oppose the motion. They argue that plaintiffs fail to establish a likelihood of success on the merits because, in contravention with express provisions in the loan agreement that any dispute relating to the loan is subject to the exclusive jurisdiction of the courts of New York, plaintiffs asserted cross-claims against defendants in California which served as the basis for the entering of the default judgment. Therefore, defendants contend that the default judgment is invalid and unenforceable against defendants in New York. Defendants also argue that neither Peck nor Doran were served with process in the California action, belying plaintiffs’ claim that they are entitled to the domestication of the California judgment. Defendants also argue that plaintiff cannot establish irreparable harm since their claims, if valid, can easily be addressed with monetary damages.

Moreover, defendants argue that plaintiffs’ claims under New York Debtor and Creditor Law §§ 273 & 276 also lack merit because the allegations of fraudulent conveyance are conclusory in nature, and plaintiffs fail to “plead with particularity that such speculative transactions rendered [d]efendants insolvent or were done with intent to hinder or delay.” They further contend that the claim seeking to impose a constructive trust is missing facts to establish the element of a confidential and fiduciary relationship between the parties. Additionally, defendants maintain that the balance of the equities favors the denial of the motion insofar as defendants should be allowed to continue to manage their businesses and property normally while they oppose and appeal plaintiffs’ improperly obtained default judgment. Should the court be so inclined to grant the motion, defendants argue that plaintiffs should post a bond of at least \$1 million dollars. (NYSCEF Doc. No. 19, *memorandum of law in opposition*).

Although plaintiffs submitted a reply, such responsive pleadings are not permitted, as of right, in an order to show cause. (*see* CPLR 2214.) Therefore, the court shall not consider the reply papers.

To prevail on a motion for injunctive relief, a movant “is required to make a clear showing of likelihood of ultimate success on the merits, that it will suffer irreparable injury unless the relief sought is granted and that the balancing of the equities lies in its favor.” (*OraSure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348 [1st Dept 2007] [internal quotation marks and citation omitted]; *see Metro. Steel Indus., Inc. v Perini Corp.*, 50 AD3d 321, 322 [1st Dept 2008].)

The motion is denied. This court finds that irreparable harm is not established insofar as plaintiffs have failed to demonstrate that monetary damages is not an adequate remedy. (see *Harris v Patients Med., P.C.*, 169 AD3d 433, 434-435 [1st Dept 2019]; *Sterling Fifth Assoc. v Carpentille Corp.*, 5 AD3d 328, 329 [1st Dept 2004]; *Metro. Med. Group, P. C. v Eaton*, 154 AD2d 252, 253 [1st Dept 1989].) Furthermore, plaintiffs have failed to proffer any proof of imminent harm. As per the complaint, plaintiffs repaid the money due under the loan agreement on January 29, 2019 and, although this court notes that the California court issued a preliminary injunction against defendants on December 13, 2019, in this application, plaintiffs fail to point to any definitive action taken by defendants, or any intent to engage in any such conduct, that would cause irreparable harm. Their sole argument in support of irreparable harm is articulated in their memorandum of law as follows: "it [cannot] be disputed that [p]laintiffs' ability to collect on the domesticated California Judgment would be irreparably harmed were [d]efendants able to transfer, encumber, hypothecate, dispose of or otherwise dissipate their assets. Indeed, [d]efendants have already been found in contempt of the California Court's preliminary injunction by refusing to identify and account for the specific funds that are the subject matter of the California Judgment and this action. Now, [p]laintiffs require every legal enforcement remedy available to them to exert their rights as judgment creditors." The argument is speculative and thus, insufficient to satisfy the extraordinary remedy of injunctive relief. Notably, the pleadings are also speculative as to the potential transfer of assets, including personal and real property, and is premised entirely upon information and belief. Based on the foregoing, this court need not address the remaining elements in support of plaintiffs' application for a preliminary injunction. Moreover, all other requests not addressed herein have been considered and are also denied. Therefore, it is hereby

**ORDERED** that plaintiffs' motion is denied in its entirety; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order, with notice of entry, upon plaintiffs; and it is further

**ORDERED** that the parties are directed to participate in a remote preliminary conference on March 30, 2022, details which shall be provided by the court no later than March 28, 2022.

This constitutes the decision and order of this court.

January 19, 2022

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

REFERENCE

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT