

**Guardian Realty Partners LLC v Deepdale Funding
PA LLC**

2022 NY Slip Op 34065(U)

November 28, 2022

Supreme Court, New York County

Docket Number: Index No. 654132/2022

Judge: Lucy Billings

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41
-----x

GUARDIAN REALTY PARTNERS LLC, GUARDIAN
REH L.P., and GUARDIAN REH FEE OWNER
L.P.,

Plaintiffs

Index No. 654132/2022

- against -

PRELIMINARY INJUNCTION
DECISION AND ORDER

DEEPPDALE FUNDING PA LLC,

Defendant
-----x

LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

After a hearing November 14, 2022, and for the reasons more fully explained on the record then, the court grants plaintiffs' motion for a preliminary injunction as follows. C.P.L.R. §§ 6301, 6312(a). The court enjoins defendant, which loaned \$17,000,000.00 to plaintiff Guardian REH Fee Owner L.P., from proceeding with the proposed sale of the membership and equity interests in Guardian REH Fee Owner L.P. belonging to plaintiffs Guardian Realty Partners LLC and Guardian REH L.P., pledged by them as security for the loan. This preliminary injunction is on the conditions that plaintiffs (1) do not encumber or transfer Irvine Distribution Center in Warren, Pennsylvania, without defendant's consent until a further order and (2) by December 2, 2022, deposit \$170,000.00 as security with the Clerk of the

Court. C.P.L.R. § 6312(b). This amount is sufficient to compensate defendant for the reasonable value of losses defendant may sustain from the delay in selling the pledged collateral for the loan, such as expenses related to re-noticing and re-advertising the sale, as well as other possible costs caused by the delay. Colonial Sur. Co. v. Eastland Constr., Inc., 77 A.D.3d 581, 582 (1st Dep't 2010); BIB Constr. Co. v. Fireman's Ins. Co. of Newark, N.J., 214 A.D.2d 521, 523 (1st Dep't 1995).

To be entitled to a preliminary injunction, plaintiffs must show a probability of success on the merits, a danger of irreparable injury absent an injunction, and a balancing of equities in plaintiffs' favor. C.P.L.R. §§ 6301; 6312(a); Avenue A Assoc. LP v. Board of Mgrs, of the Hearth House Condominium, 190 A.D.3d 473, 473 (1st Dep't 2021). For the many reasons articulated in the record, plaintiffs have satisfied these criteria for a preliminary injunction. Regarding plaintiffs' likely success on the merits, plaintiffs have raised serious questions as to defendant's lack of standing to conduct the sale, whether the sale may be based on a default on a separate loan to different borrowers, whether defendant notified plaintiffs of the acceleration of their loan, and whether defendant promoted its sale in a commercially reasonable manner. Regarding the danger of irreparable injury, plaintiffs show the value and uniqueness of the collateral to be sold, the irrevocability of the proposed

sale, and their waiver of damages under their Mortgage Note to defendant and associated loan agreements with defendant, so that an injunction is plaintiffs' only adequate remedy for unlawful acts by defendant arising from the loan. Postponement of the sale will not inflict comparable harm on defendant to tilt the equities in its favor.

II. LIKELIHOOD OF SUCCESS ON THE MERITS

A. Standing to Conduct the Sale

For standing, defendant relies on Aurora Loan Servs., LLC v. Taylor, 25 N.Y.3d 355, 361 (2015), which establishes that either a holder or an assignee of a promissory note maintains standing to foreclose on the collateral for the note. Yet defendant does not claim to hold the Mortgage Note. Aff. of Jeremy Markowitz Ex. K, NYSCEF Doc. 39, §§ 1.4, 5.4. Defendant claims only that it is the servicer of the \$17,000,000.00 mortgage on the Irvine Distribution Center real property in Pennsylvania and holds an "equitable interest" in the loan. Markowitz Aff., NYSCEF Doc. 28, ¶ 10. Defendant does not explain what that interest is or point to an explanation of that interest in defendant's participation or servicing agreements with the assignee and current holder of the loan, Lending Assets LLC. The very document on which defendant relies for its relationship with Lending Assets explicitly disclaims that defendant is "an owner of any portion of the loan." Id. Ex. K § 5.4. Defendant's

status as a servicer does not confer standing. Midland Mtge. Co. v. Imtiaz, 110 A.D.3d 773, 774-75 (2d Dep't 2013). Plaintiffs have shown a likelihood of success on this ground alone.

B. Notice, Advertisement, and Conduct of the Sale

Plaintiffs also show the commercial unreasonableness of the proposed sale under New York Uniform Commercial Code (UCC) § 9-610(b). Neither defendant's notice of the sale nor its advertisement of the sale was designed to attract purchasers. The notice announced that the terms of the sale would not be disclosed until the sale itself. Aff. of Sarah Rosenberg Ex. F, NYSCEF Doc. 7, at 2 ¶ 6. Prospective purchasers, not knowing what terms would be imposed on them if they appeared to bid for the collateral, were unlikely to invest the time and resources to appear in person at the office of defendant's attorney in New York County, to purchase collateral relating to real property in western Pennsylvania. This lack of information might not have been so discouraging had defendant permitted remote appearances by video. In late 2022 it is difficult to perceive how this limitation to in person appearances matched prevailing market standards or the effort an ordinarily diligent secured party would expend to sell its security. Aff. of Alan Tantleff, NYSCEF Doc. 12, ¶ 37. See Shimamoto v. S&F Warehouses, 99 N.Y.2d 165, 176 (2002); Bankers Trust Co. v. Dowler & Co., 47 N.Y.2d 128, 134 (1979).

Although under the agreements associated with the mortgaged Pennsylvania real property plaintiffs waived notice of a default, they remain entitled to written notice of an acceleration of the mortgage debt, which sale of the collateral for the mortgage debt presupposes. Freedom Mtge. Corp. v. Engel, 37 N.Y.3d 1, 22-23 (2021); Kirschenbaum v. Wells Fargo Bank, N.A., 193 A.D.3d 425, 426 (1st Dep't 2021). Defendant insists that its notice of the sale provided plaintiffs notice of the acceleration, but the notice of the sale included no such declaration that defendant has accelerated the mortgage debt. Rosenberg Aff. Ex. F. Notice of the sale alone does not convey that defendant has accelerated the past and future payments due, as opposed to only the past payments due.

The notice also misdescribed the collateral to be sold as 100% of the limited partnership interests in Guardian REH Fee Owner, instead of 100% of the other two plaintiffs' limited and general partnership interests in Guardian REH Fee Owner. Id. Ex. A (Schedule I). This misdescription is significant for prospective purchasers interested in control of the assets purchased, because the misdescription informs prospective purchasers that they will purchase a limited partnership interest in a single property owner rather than two partnerships' limited and general partnership interests in the property owner. Tantleff Aff. ¶¶ 29-30. Nor did the notice identify the default

that entitles defendant to conduct the sale, to assure prospective purchasers that they will not encounter legal impediments to their purchase. Rosenberg Aff. Ex. F.

Defendant did not target its advertisements of the sale to western Pennsylvania through local media, to attract prospective purchasers familiar with the principal asset to be sold, the Irvine Distribution Center, or to the real estate or financing markets through real estate or financial industry publications. Defendant's advertisement of the sale was limited to four days in the New York Times and one day in the eastern and midwestern editions of the Wall Street Journal. The only advertisement presented is from the New York Times, which did not describe Guardian REH Fee Owner's assets at all. Markowitz Aff. Ex. Q. Defendant did not market the collateral or the associated real property in any other way: again, not the effort an ordinarily diligent secured party would expend to sell its security. Shimamoto v. S&F Warehouses, 99 N.Y.2d at 176.

Finally, if anyone appeared for the sale, the prospective purchaser would learn that the sale, involving assets worth \$17,000,000.00 or more, must close within seven days. The very fact that no one even expressed interest in this sale when originally scheduled November 2, 2022, however, is a powerful indicator that the sale was not promoted in a commercially reasonable manner, since no one was informed what assets were for

sale. While none of these factors alone might be enough to demonstrate a commercially unreasonable sale, when considered together they demonstrate a likelihood that plaintiffs will prevail on this claim. E.g., Tantleff Aff. ¶¶ 21, 35. See Bankers Trust Co. v. Dowler & Co., 47 N.Y.2d at 135; Bank Leumi USA v. GM Diamonds, Inc., 149 A.D.3d 662, 662 (1st Dep't 2017).

C. Plaintiffs' Default

Even if defendant or a holder of the Mortgage Note with standing might cure the deficiencies in the sale, plaintiffs raise further serious questions whether they have defaulted. Defendant insists that the agreements by which its affiliate, Deepdale Funding FL LLC, extended a separate loan to plaintiff Guardian Realty Partners, which owns only .01% of Guardian REH Fee Owner, and another nonparty borrower in Florida, secured by real property there, permits the sale of collateral for the Pennsylvania loan. Specifically, the Loan and Security Agreement by which the Florida borrowers pledged collateral to defendant's affiliate defines a "default" to include a default under any agreement "evidencing, governing or securing any indebtedness owing by Borrower or any Affiliate of Borrower to Lender" and "Affiliate" to include any entity controlled by Guardian Realty Partners. Markowitz Aff. Ex. D, NYSCEF Doc. 32, § 8.10.

Accepting defendant's interpretation of this agreement, that Guardian Realty Partners' .01% interest in Guardian REH Fee Owner

means it is controlled by Guardian Realty Partners, however, defendant claims the default on the Florida loan is that Guardian Realty Partners misrepresented the identity of the entity that sold Guardian Realty Partners the Florida property used as security:

an effort to inflate the purchase price of the Pennsylvania Property by approximately \$5,000,000 by engaging in an otherwise unnecessary transaction with corporate names intentionally designed to trick Deepdale into thinking the seller was connected to a publicly traded company.

Markowitz Aff. ¶ 21. Plaintiffs deny that they imparted any such information to defendant or its affiliate. To support this supposition, defendant relies on an inadmissible newspaper article. Id. Ex O, NYSCEF Doc. 43. See People v. Samandarov, 13 N.Y.3d 433, 437 (2009); Rodriguez v. City of New York, 105 A.D.3d 623, 624 (1st Dep't 2013).

Even if the court considers this inadmissible evidence to oppose a preliminary injunction, the evidence does not demonstrate a misrepresentation. The article confirms that BGI Inc., a publicly traded company, sold the Florida property to Guardian REH Fee Owner for \$23,500,000, the information on which defendant's affiliate accepted that property as security. The article further reports that BGI acquired the property for the same price from BLST PA Holdings, which acquired the property from BlueStem Group Inc. for \$18,520,000. Defendant does not claim that the Florida borrowers represented a contrary history

of the property or that they owed any duty to disclose the prior transactions that defendant could have discovered itself. Upon the supposition that one of Guardian Realty Partners' members controlled both BGI and BLST PA Holdings, defendant merely infers that BGI permitted BLST PA Holdings to inflate the price when it sold the property to BGI. Similarly to defendant's failure to explain, by an affidavit or documentary evidence, its "equitable interest" in the Pennsylvania loan, Markowitz Aff. ¶ 10, defendant fails to offer any basis for a belief that Guardian Realty Partners controls the two predecessor owners of the Florida property. Nor does defendant explain why an equally reasonable inference may not be drawn that BLST PA Holdings sought to make a profit through the transactions, which is real estate investors' common principal objective.

In sum, nothing in defendant's evidence of the series of transactions demonstrates Guardian Realty Partners' fraudulent conduct. Moreover, even if the Loan and Security Agreement by which Guardian Realty Partners pledged collateral to defendant's affiliate for the Florida loan permits the sale of collateral for the Pennsylvania loan, the other pledgor of the Pennsylvania collateral, Guardian REH, which owned 99.99% of Guardian REH Fee Owner, never pledged that 99.99% as collateral for the Florida loan.

III. IRREPARABLE INJURY

Although plaintiffs need not demonstrate irreparable injury to obtain a stay of a commercially unreasonable sale under UCC § 9-625(a), plaintiffs demonstrate irreparable injury in any event. They claim the loan agreement associated with the Mortgage Note provides that, if the lender breaches an obligation to act reasonably, the only remedy is injunctive or declaratory relief. Defendant does not dispute this claim, as defendant's own exhibit supports the claim. Markowitz Aff. Ex. H, Mortgage, Assignment of Leases and Rents and Security Agreement, NYSCEF Doc. 36, ¶ 35. While plaintiffs show several ways in which defendant failed to promote the sale of the collateral in a commercially reasonable manner, damages will be unavailable to plaintiffs to compensate them for any injury from this unreasonable conduct. Allowing the sale to proceed will eliminate the only available relief, inflicting irreparable injury to plaintiffs. Vector Media, LLC v. Go New York Tours Inc., 187 A.D.3d 531, 531-32 (1st Dep't 2020). The loss of plaintiffs' ownership in a business and of ongoing business itself also may constitute irreparable injury. Asprea v. Whitehall Interiors NYC, LLC, 206 A.D.3d 402, 403 (1st Dep't 2022); Spivak v. Bertrand, 147 A.D.3d 650, 651 (1st Dep't 2017).

IV. BALANCE OF EQUITIES

Regarding the balance of equities, plaintiffs are in danger of irreparable injury if defendant's proposed sale proceeds, as discussed above, in comparison to the minimal prejudice to defendant if the sale is delayed. Barbes Rest. Inc. v. ASRR Suzer 218, LLC, 140 A.D.3d 430, 432 (1st Dep't 2016). Any injury to defendant would be monetary. Should it prevail in recovering for plaintiffs' default, any judgment is secured by the Pennsylvania property, which defendant has appraised at a value well in excess of the \$17,000,000.00 loan and even in excess of the debt owed for the two loans, in Florida as well as Pennsylvania. C.P.L.R. §§ 6301, 6312(a); Asprea v. Whitehall Interiors NYC, LLC, 206 A.D.3d at 403; Vector Media, LLC v. Go New York Tours Inc., 187 A.D.3d at 532; East Fordham DE LLC v. U.S. Bank N.A., 170 A.D.3d 545, 546 (1st Dep't 2019).

V. SECURITY FOR THE PRELIMINARY INJUNCTION

Finally, when granting a preliminary injunction, the court gauges the amount of the undertaking plaintiffs are to provide according to the potential liability if the preliminary injunction granted later proves to have been unwarranted. C.P.L.R. § 6312(b); Graubard Mollen Horowitz Pomerantz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d 508, 515 (1999); 1414 Holdings, LLC v. BMS-PSO, LLC, 167 A.D.3d 425, 426-27 (1st Dep't 2018); London Paint & Wallpaper Co., Inc. v. Kesselman, 138

A.D.3d 632, 633 (1st Dep't 2016); 1414 Holdings, LLC v. BMS-PSO, LLC, 116 A.D.3d 641, 643-44 (1st Dep't 2014). The court sets the required undertaking for the preliminary injunction at \$170,000.00. C.P.L.R. § 6313(b); Colonial Sur. Co. v. Eastland Constr., Inc., 77 A.D.3d at 582. See East Fordham DE LLC v. U.S. Bank N.A., 170 A.D.3d at 546; 1414 Holdings, LLC v. BMS-PSO, LLC, 167 A.D.3d at 426-27; 1414 Holdings, LLC v. BMS-PSO, LLC, 116 A.D.3d at 643-44); Building Serv. Local 32B-J Pension Fund v. 101 L.P., 115 A.D.3d 469, 473 (1st Dep't 2014). Plaintiffs do not protest that this undertaking will impose a hardship. They shall deposit \$170,000.00 with the Clerk of the Court by December 2, 2022.

VI. INTERVENTION OF PARTIES AND CONTINUATION OF THE PRELIMINARY INJUNCTION

Since defendant does not oppose the intervention of Crest Irvine Inc. and 2856788 Ontario Inc. as plaintiffs in this action, but only opposes their request for a preliminary injunction along with the original plaintiffs' motion, the court grants the motion by these two corporations to intervene.

C.P.L.R. § 1013. All parties shall appear by videoconference December 6, 2022, at 12:00 noon to ascertain whether (1) plaintiffs have repaid their debt to defendant by the Pennsylvania loan's maturity date, December 1, 2022; (2) the

grounds for granting the preliminary injunction continue; and (3) the conditions on which it was granted will remain the same.

DATED: November 28, 2022.



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.