Benefit St. Partners Realty Operating Partnership, L.P. v Di Hao Zhang

2022 NY Slip Op 34466(U)

January 12, 2023

Supreme Court, New York County

Docket Number: Index No. 653238/2022

Judge: Margaret A. Chan

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: COMMERCIAL DIVISION PART 49M

----------X

BENEFIT STREET PARTNERS REALTY OPERATING PARTNERSHIP, L.P., BSP OF FINANCE, LLC

Plaintiff,

- v -

DI HAO ZHANG, 227 INVESTMENT, INC.,

Defendant.

INDEX NO. 653238/2022

MOTION DATE 09/29/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 22, 23, 24, 25, 26, 28, 29, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49 were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

In this action arising from defendants' alleged participation in hiding and dissipating the proceeds of a fraud allegedly perpetrated by certain non-parties upon plaintiffs, plaintiffs move by order to show cause for (1) a preliminary injunction directing defendants to immediately freeze the amount they received and transfer the funds to plaintiffs' counsel's escrow account, or (2) alternatively, an attachment of a property located at 45 East 22nd Street, Apt 57A, New York, NY 10010 (the Property). Defendants oppose the motion.

Background

In a transaction that occurred in Texas, plaintiffs Benefit Street Partners Realty Operating Partnership, L.P. and BSP OF Finance LLC (plaintiffs), through their affiliate, extended a loan of $149,700,000 (the Loan) to non-party IBF Properties LLC (IBF), which loan was guaranteed by non-party Raheel Bhai (Raheel) (NYSCEF # 2 – complaint, ¶¶ 2, 23-24). Plaintiffs allege that as part of the fraud scheme, on April 19, 2022, the day after plaintiffs loaned $21,906,500 to EPI Commercial Finance LLC (EPI), a company created by Raheel to facilitate the fraud (complaint, ¶¶ 34-37), a nearly identical amount – $21,908,500 – was transferred into a bank account held jointly by Raheel and his parents (together, the Bhais) (*id.*, ¶¶ 35-38).

According to the complaint, unknown to plaintiffs at the time they extended the Loan, Raheel and IBF had falsified more than a hundred documents in applying

for the Loan (*id.*, ¶¶ 2, 30-33). Plaintiffs later became aware of the fraud and confronted Raheel and IBF in a series of phone calls (*id.*, ¶¶ 45-50). Subsequently, plaintiffs entered into a forbearance agreement with Raheel and IBF, in which they stipulated and admitted to the frauds (*id.*).

As a backdrop in the New York action, defendant Di Hao Zhang (Zhang) is a Chinese National and naturalized Canadian citizen residing in New York at the Property (NYSCEF # 22 – Zhang aff, ¶¶ 9, 17). Zhang states that although he has access to the Property, the Property is owned by defendant 227 Investment and he has no ownership interest in either the Property or 227 Investment (*id.*, ¶¶ 13-17). Zhang is a director of defendant 227 Investment, Inc. (227 Investment). Zhang is also heavily involved in the cryptocurrency business (*id.*, ¶ 13).

Plaintiffs next allege that on July 20, 2022, Zhang met with Raheel at a hotel to carry out the concealment of the fraud (*id.*, ¶¶ 51-52). Plaintiffs allege that Zhang was aware of the illegal nature of the activities he was engaged in since he, as captured by the hotel's security cameras, was wearing a disguise at the hotel including wearing a wig, sunglasses, and a hat while indoors (*id.*, ¶¶ 53-57).[1] In the week following the meeting at the hotel, the Bhais made four wire transfers to Zhang's personal bank account in the total amount of at least $4,909,260, which plaintiffs allege to be traceable to the approximately $21.9 million Raheel and IBF fraudulently obtained from plaintiffs (*id.*, ¶¶ 58-63). Days after making the final transfer, the Bhais fled the country. Plaintiffs sued the Bhais and their affiliate companies for fraud in Texas state court (*id.*, ¶¶ 64, 67-78). On September 6, 2022, plaintiffs commenced this action against Zhang and 227 Investment, asserting three causes of action: (1) fraudulent transfer under Debtor and Creditor Law §§ 273 and 274, (2) money had and received, and (3) conversion (*id.*, ¶¶ 80-102).[2]

Defendants respond that Zhang knew nothing about the fraud perpetrated by the Bhais upon plaintiffs at the time of the transactions (NYSCEF # 22, ¶¶ 35-43); instead, he believed that the Bhais were honest and respectable investors who were introduced to him by his business partner and had passed the Know Your Customer

---

[1] Further, in the hearing held on September 29, 2022, plaintiffs presented photos taken in January 2022 of Zhang with short hair, arguing that Zhang lied about not wearing a disguise since his hair could not, in six months, have grown to the length as pictured in the security footage taken in July 2022 (NYSCEF # 38 – tr 7:24-9:18).

[2] On November 1, 2022, plaintiffs filed an amended complaint, adding two causes of action and increasing their prayer for relief (NYSCEF # 31 – amended complaint). Since plaintiffs' motion for injunctive relief was solely based on the likelihood of success on the merits of the three original causes of action, which plaintiffs represented to "have remained substantively the same" in the amended complaint (NYSCEF # 36 – pltfs letter at 2), the court does not consider on this motion the additional facts in the amended complaint that are alleged to support the two additional claims.

background check (*id.*, ¶¶ 30-32). Further, Zhang avers that he agreed to help transfer the Bhais' funds into cryptocurrency in the belief that the Bhais needed the cryptocurrency for a kidnapping involving the Bhais' family member in Pakistan (*id.*, ¶¶ 33-34). Zhang was sympathetic to the Bhais' since he had similar kidnapping experience. Zhang also avers that he did not keep the nearly $5 million funds except for a fixed-percentage transaction fee, since the monies were immediately used to purchase cryptocurrency, which was transferred to the Bhais' digital wallet (*id.*, ¶¶ 37, 44-50, *see also* NYSCEF # 24 – ExB, Zhang's bank records). Additionally, defendants maintain that Zhang transacted with the Bhais solely in his personal capacity and that 227 Investment was not involved in the transactions or financially benefited from them (*id.*, ¶¶ 16-29).

After hearing the parties' oral arguments on September 29, 2022, the court entered an interim order on October 12, keeping the previously granted Temporary Restraining Order in place pending a decision on this motion (NYSCEF # 28). On November 8, plaintiffs filed a post-submission letter requesting the court's permission pursuant to Rule 18 of the Commercial Division Rules to supplement the record of this motion (NYSCEF # 39). Specifically, the documents sought to be supplemented include records of the arrest, indictment, criminal complaint, and an order setting conditions of release in a criminal action against Zhang in the District Court for the Northern District of Texas (NYSCEF #s 41-48). In response, defendants argue that plaintiffs' letter and those documents constitute an improper sur-reply in violation of Rule 18 and should be disregarded (NYSCEF # 49).

Discussion

With regard to plaintiffs' request in their November 8, 2022 letter, the court finds good cause shown and permits plaintiffs to supplement the record pursuant to Rule 18 of the Commercial Division Rules. Plaintiffs have shown that they acted in a diligent manner in obtaining information regarding the criminal action against Zhang and have presented a reasonable excuse as to why the documents were not and could not have been previously submitted with their motion. Further, the documents sought to be supplemented appear to be relevant to assessing defendant Zhang's intent and bad faith, credibility, and risk of fleeing and transferring assets. Thus, those documents are deemed to be validly supplemented *nunc pro tunc* and taken into consideration in determining this motion.

That said, for the reasons stated below, the motion for a preliminary injunction is denied for failure to establish irreparable harm, and the alternative request for an attachment is also denied for failure to establish Zhang's ownership interest in the Property and any identifiable risk of defendants' inability to satisfy the judgment.

A. Preliminary injunction

The remedy of granting a preliminary injunction is a drastic one which should be used sparingly (*Soundview Cinemas, Inc. v AC I Soundview LLC*, 149 AD3d 1121, 1123 [2d Dept 2017]). "A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing.... [It] will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party" (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011], citing *Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

Regarding irreparable injury, plaintiffs concede that the harm here – the nearly $5 million funds Zhang received – could be reduced to monetary damages, but argue that an exception exists "where the monies at issue are identifiable proceeds that are supposed to be held for the party seeking injunctive relief" (NYSCEF # 10 – MOL at 20, citing *AQ Asset Mgt. LLC v Levine*, 111 AD3d 245, 259 [1st Dept 2013] and *Amity Loans, Inc. v Sterling Natl. Bank & Trust Co. of N.Y.*, 177 AD2d 277, 279 [1st Dept 1991]). Plaintiffs argue that the funds at issue are clearly identifiable proceeds of the fraud committed by Raheel and IBF on plaintiffs because the day after Raheel and IBF fraudulently caused plaintiffs to transfer the nearly $22 million to EPI, an almost identical amount was deposited to the Bhais' personal bank account, and later nearly $5 million out of the approximately $22 million was transferred from the Bhais' bank account to Zhang's personal account.

In opposition, defendants contend that Zhang is not in possession of the nearly $5 million sought to be frozen because once he received the monies, he transferred them to purchase cryptocurrency on VirgoCX, a Canadian digital-currency trading platform, and the cryptocurrency was then sent to the Bhais' digital wallet. Defendants further argue that even if Zhang had the monies, the alleged harm is reducible to monetary damages that do not warrant a preliminary injunction. In response to the identifiable-proceeds exception plaintiffs raised, defendants argue that the exception does not apply when, like here, the funds are not specifically segregated or clearly identifiable.

As a general rule, a party seeking merely monetary relief is not entitled to a preliminary injunction since it has an adequate remedy at law (*Amity Loans*, 177 AD2d at 279). However, New York courts have recognized a limited exception to this rule where the monies at issue are identifiable proceeds that should be held for the party seeking injunctive relief (*id.*; *see also AQ Asset*, 111 AD3d at 259).

As defendants correctly point out, this exception applies narrowly only where there is a "specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question" (*Manufacturers Hanover Trust*

Co. v Chemical Bank, 160 AD2d 113, 124 [1st Dept 1990]). In both cases upon which plaintiffs rely -- *AQ Asset Mgt. LLC* and *Amity Loans, Inc.* -- the exception was applied because the monies at issue are "identifiable proceeds that are supposed to be held for the party seeking injunctive relief" (*AQ Asset*, 111 AD3d at 259 [the funds are "clearly identifiable" proceeds of the sale that were held in escrow]; *Amity Loans*, 177 AD2d at 279 [the funds are "specifically and unequivocally assigned and transferred" to be held in trust for the party seeking injunctive relief]).

In contrast, the monies at issue here are not subject to the narrow exception such that would warrant a grant of injunctive relief. The nearly $5 million funds were not specifically segregated to be held in any trust or escrow for plaintiffs; rather, they were sent to Zhang's personal account for purchasing cryptocurrency and were in fact transferred out from Zhang's account into VirgoCX days after his receipt of the monies (*see* NYSCEF # 24 – ExB, Zhang's bank records). Moreover, the monies were not clearly identifiable proceeds since they were comingled multiple times: plaintiffs first sent $21,906,500 million to EPI, the Bhais' personal account then received an almost identical amount (*i.e.*, $21,908,500) on the following day,[3] and then three months later, the Bhais sent, by at least four wire transfers, a total of $4,909,260 to Zhang's personal account.

Thus, even if the nearly $5 million funds could be traced to the loan proceeds fraudulently obtained from plaintiffs, the monies are not clearly identifiable funds that defendants or the non-parties were supposed to return or specifically held for plaintiffs (*Seeking Valhalla Trust v Deane*, 2018 NY Slip Op 31920[U] [Sup Ct, NY County 2018] [drawing a distinction between "funds that can be identified" and "identifiable funds that carry with them some requirement to be treated in a certain manner" and holding that while the latter are subject to the exception, no authority has been shown to support that the former give rise to irreparable harm]; *see also AQ Asset*, 111 AD3d at 259; *ALP, Inc. v Moskowitz*, 2021 WL 840013, *7 [Sup Ct, NY County, Mar. 4, 2021] [preliminary relief granted in part as to monies specifically held in escrow for plaintiff, but not with respect to the other funds that have been dissipated and were not supposed to be held for plaintiff]; *Zhiye Intl., Inc v George Park*, 2010 WL 1169656 [Sup Ct, NY County, Mar. 17, 2010]). Accordingly, since plaintiffs have not demonstrated irreparable injury, their motion for preliminary injunction is denied.

B. Attachment

A plaintiff seeking an order of attachment "must show the probability of its success on the merits of its cause of action, that one or more grounds provided for in CPLR 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff" (*Reed Smith LLP v LEED HR, LLC*, 156

[3] Further, it is not clear from the complaint if it was EPI or someone else that sent the funds of $21,908,500 to the Bhais' personal account (NYSCEF # 2, ¶ 38).

AD3d 420, 420 [1st Dept 2017]) and demonstrate an "identifiable risk that the defendant will not be able to satisfy the judgment" (*ALP*, 2021 WL 840013, *4). "Whether to grant a motion for an order of attachment rests within the discretion of the court" (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 59 [1st Dept 2013]).

Here, plaintiffs alternatively move for an order pursuant to CPLR 6201(3) attaching the Property to ensure their opportunity of meaningful recovery. CPLR 6021(3) provides that an attachment may be granted where "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts" (CPLR 6201[3]).

Plaintiffs assert that defendants knowingly participated in the scheme with Raheel to defraud plaintiffs by assisting Raheel to dispose and secrete the fraudulently obtained loan proceeds. Plaintiffs point to evidence of Zhang wearing a disguise when meeting with Raheel and lying to the court about it, and emphasize Zhang's foreign citizenship and strong ties to China, arguing that it is reasonable to infer that Zhang would dissipate assets and flee abroad as Raheel did. Plaintiffs argue that Zhang's bad faith and fraudulent intent are further backed by the supplemented criminal records. Also, plaintiffs suggest that federal authorities share the same concerns about Zhang's fleeing as they had requested that Zhang's bail be secured by another multimillion-dollar real property owned by the family of Zhang's wife. Further, the lengthy imprisonment Zhang is likely to face and the lien on his wife's property only increase the pressure that he may dissipate the Property plaintiffs seek to attach.

In opposition, defendants contend that Zhang has no ownership interest in the Property or 227 Investment, the company that owns it. Defendants follow that, since plaintiffs fail to show any connection between 227 Investment and the cryptocurrency-related transactions, they are not entitled to an attachment. Further, defendants argue that Zhang was not aware of Raheel's fraud when he engaged in the transactions; instead, Zhang believed that Raheel needed the cryptocurrency for a kidnapping involving Raheel's families. Zhang was sympathetic to Raheel's plight as Zhang and his family also has a kidnapping experience. Additionally, Zhang alleged that he did not wear a disguise since he did have long hair at the time of the transactions and regularly wears sunglasses and hats indoor. Lastly, defendants argue that they are not in possession of any of plaintiffs' monies and are not debtors of plaintiffs, thus could not possibly secrete any money owned to plaintiffs.

Attachment usually will not be granted where there is uncertainty as to the ownership of the property at issue (*see Sidwell & Co., Ltd. v Kamchatimpex*, 166

Misc 2d 639, 644-645 [Sup Ct, NY County 1995] [denying the motion for an attachment as the asset is not attachable, noting that "[t]he plaintiff's right to attach a given item of property is only the same as the defendant's own interest in it"]; *see also AMF Inc. v Algo Distributors, Ltd.*, 48 AD2d 352, 360 [2d Dept 1975] ["an order of attachment will be vacated if the defendant has no interest in the property"]). Here, while the court notes that plaintiff's evidence tended to support plaintiffs' contention that Zhang knew of the fraud, plaintiffs have not shown that the Property they seek to attach is owned by Zhang or that 227 Investment, the owner of the Property, has any relation to the transactions with the Bhais. Further, the conditions of release imposed by the federal court, set forth in an exhibit supplemented by plaintiffs, indicate that Zhang's activities have been largely limited in that he is on home detention and has surrendered his passport, and he is prohibited from opening bank accounts or transferring funds without approval. Further, his wife posted a bond securing a real property owned by her family (NYSCEF # 48 – Ex 8, order setting conditions of release). These conditions, viewed as a whole, suggest that the risk of Zhang's inability to satisfy the judgment and fleeing the country is lowered.

Accordingly, plaintiffs' motion for an attachment of the Property is denied.

Conclusion

In view of the above, it is

ORDERED that the motion of plaintiffs for a preliminary injunction directing defendants to immediately freeze the amount they received and transfer the funds to plaintiffs' counsel's escrow account, or alternatively, an attachment of a property located at 45 East 22nd Street, Apt 57A, New York, NY 10010 is denied; and it is further

ORDERED that the temporary restrictions imposed in the court's temporary restraining order dated September 15, 2022 (NYSCEF # 15) and further maintained pursuant to the court's interim order dated October 12, 2022 (NYSCEF # 28) are lifted.

1/12/2022
DATE

MARGARET A. CHAN, J.S.C.

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