

**Samcom 48 (DE) LLC v 37-10 114th St. ML Funding,
LLC**

2022 NY Slip Op 35039(U)

April 29, 2022

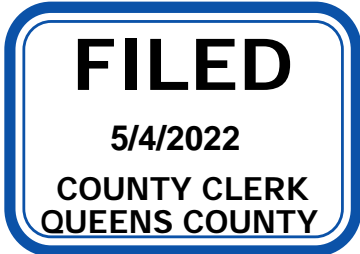
Supreme Court, Queens County

Docket Number: Index No. 723742/2021

Judge: Joseph Risi

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI
A. J. S.C.

IA Part 3

SAMCOM 48 (DE) LLC, CHATUS MEZZ (DE) LLC,
AI YUN CHEN, and WENDY CHAU,

Index Number 723742/2021

Motion

Dates: November 9, 2021
and January 18, 2022

Plaintiffs,

-against-

37-10 114TH STREET ML FUNDING, LLC,

Motion Sequences: #1 and #3

Defendant.

DECISION/ORDER

On the following EF numbered papers plaintiffs (sequence #1) seek an order 1) restraining and enjoining the defendant from taking any action as a member of SAMCOM 48 (DE) LLC; 2) restraining and enjoining the defendant from representing to any person that it is a member of SAMCOM 48 (DE) LLC; 3) declaring that any auction held to sell the membership interests of SAMCOM 48 (DE) LLC breached the Pledge and Security Agreement; and 4) reinstating CHATUS MEZZ (DE) LLC as members of SAMCOM 48 (DE) LLC.

On the following EF numbered papers read on this motion (sequence #3) by defendant, seeking an order dismissing plaintiffs' complaint pursuant to CPLR §3211(a)(1) and (a)(7) based on documentary evidence and for failure to state a claim; and on the cross motion of plaintiffs for leave to amend the complaint pursuant to CPLR §3025(b).

Table with 2 columns: Sequence #, Papers Numbered. Includes entries for Sequence #1 (Order to Show Cause, Memo in Opposition, Reply) and Sequence #3 (Notice of Motion, Notice of Cross Motion, Memos in Opp).

Upon the foregoing papers, it is ordered that the Order to Show Cause, motion and cross motion are consolidated for determination as follows:

On October 31, 2018, plaintiff Chatus Mezz (DE) LLC, ("Chatus Mezz") executed a Mezzanine Loan Agreement ("Loan") with defendant 37-10 114th Street ML Funding, LLC ("ML Funding"), in the sum of \$6 million. The Loan was secured by a pledge of the borrower's

membership interests in SAMCOM 48 (DE) LLC, a Delaware limited liability company (“SAMCOM”), which in turn owns the real property commonly known as Holiday Inn LaGuardia Airport and located at 37-10 114th Street, Corona, NY 11368. Plaintiffs Ai Yun Chen (“Chen”) and Wendy Chau (“Chau”) are members of Chatus Mezz. On that same date, Chatus Mezz also entered into a certain Pledge and Security Agreement (the “Pledge Agreement”) for the benefit of defendant, pursuant to which, Chatus Mezz, as owner of one hundred percent (100%) of the membership interests in SAMCOM (the “Membership Interests”), pledged such Membership Interests to defendants as collateral for the Loan.

The Pledge Agreement provided, in section 9, that, in the event of a default, the defendant may exercise “all rights and remedies” of a secured party under the Uniform Commercial Code, (UCC) including the option to purchase or otherwise dispose of the pledged collateral in public or private sale. Such sale could be held at the office of the lender or other location in its discretion. Section 10 of the Pledge Agreement specifically set forth certain procedures for a private sale, including requiring that any auction be held in front of the New York Supreme Court.

Plaintiffs defaulted on the loan in or about May 2020. Defendant maintains that on August 24, 2020 and September 29, 2020, plaintiffs were notified in writing of the default. On March 26, 2021, defendant notified Chatus Mezz in writing that pursuant to Section 9-611 of the UCC as in effect in New York, defendant would be conducting a public auction on June 7, 2021, at which time the Membership Interests would be “sold to the highest bidder.” Chen and Chau acknowledge receipt of this notice.¹

Defendant maintains that prior to the sale, it retained a broker to conduct extensive marketing and advertising, including publication for seven days in the New York Times and adverts in other industry publications. Defendant procured an auctioneer to conduct the sale at a public auction held on-line in the offices of defendants’ counsel. Defendant was the winning bidder for \$500,000. Defendant maintains that plaintiffs had the ability to attend the sale, to submit a bid or to repay the loan up to the day of the sale, and did not do so. In this action, plaintiffs maintain that the sale was a ‘windfall’ for defendants where the hotel property and fixtures were appraised for \$55 million.

Plaintiffs commenced this action seeking injunctive relief and, in effect, the unwinding of the sale. Defendants have moved to dismiss, and plaintiffs have cross-moved for leave to amend the complaint to add claims for monetary damages.

Initially, upon signing the Order to Show Cause on October 25, 2021, the court granted the injunctive relief sought by plaintiffs. However, upon hearing arguments, this Court issued an order dated December 6, 2021, stating that “the temporary restraining order restraining and ordering defendant, its attorneys and agents from acting in any manner or representing itself as a member of SAMCOM 48 (DE) LLC, by order dated October 25, 2021, is hereby lifted.” Said order remains in effect.

In the complaint, plaintiffs allege three causes of action including: declaratory relief that defendants must seek foreclosure relief pursuant to RPAPL Article 13; for injunctive relief; and for breach of contract in that defendants did not comply with the sale provisions of section 10 of the

¹ Defendant acknowledges that the names of the Chatus Mezz and SAMCOM were inadvertently transposed in such notice.

Pledge Agreement. In the proposed amended complaint, plaintiffs seek damages on the basis that the sale was not ‘commercially reasonable’ and seek surplus funds.

In its opposition, and in its motion to dismiss the first cause of action, defendant maintains that it was free to seek relief pursuant to the sales provisions of the UCC as set forth in Article 9, and that it was not bound to proceed pursuant to Article 13 of the RPAPL. Defendant is correct that the auction procedures were not a foreclosure of real property even though the premises upon which the hotel is situated are affected by the auction sale. As the Court of Appeals noted in *Hotel 71 Mezz Lender, LLC v Falor* (14 NY3d 303 [2010]), a mezzanine loan, as in this case, is secured “not by the real property itself, but by stock or some ownership interest in the company that owns the real property.” This view was recognized by the court in *893 4th Ave, Lofts LLC & Michael UHR v SAIF Nutmeg, LLC*, 2020 WL 6940968 [Sup. Ct NY County 2020], wherein the court rejected the premise that a sale that affects land must be conducted as a foreclosure, stating that “there is really no authority supporting the arguments that ownership in an entity that owns property is considered an interest in real property.” (*Id.*, at 3-4, citing *Hotel 71 Mezz Lender, LLC v Falor*). As the court reasoned, “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 UCC.” (*Id.*, at 4 [citations omitted]).

In addition, as opposed to mortgages, mezzanine loans are by their definition, different. “A mezzanine loan is used to secure supplemental funding, and, unlike a traditional mortgage, the mezzanine loan is secured by an interest in the company, such as a developer, responsible for the real estate project. Mezzanine loans have the advantage of allowing a speedier seizure of collateral, in the event of default, because the interest granted to the lender in the personal property of the real estate developer can generally be obtained faster than real property can be obtained through a foreclosure proceeding.” (*NY Prac Series, Comm. Litigation in New York State Courts*, §145:35). Here, there is no question that the loan in question was not a mortgage, and that defendant sought only to foreclose upon its ownership interests in the entity that owns the property. Indeed, as defendant maintains, plaintiffs cite no authority that defendant was required to foreclose pursuant to the RPLAPL. Accordingly, the first cause of action cannot stand.

In addressing the second cause of action, defendant correctly maintains that an injunction is not a cause of action in and of itself, but is a remedy granted when the movant established the merits of a substantive cause of action. (CPLR §6312[a]; *Weinreb v 37 Apts. Corp.* 97 AD3d 54 [1st Dept 2012]). An injunction cannot stand alone, a plaintiff must allege some underlying wrong by the defendant in the complaint. (*Id.*) Moreover, an injunction is granted only when a plaintiff can establish that it has no other adequate remedy. The question of the remedy of damages, to be discussed *infra*, negates granting injunctive relief. (*Mar v Liquid Mgmt. Partners*, 62 AD3d 762 [2nd Dept 2009]). Accordingly, the court will not grant injunctive relief.

Plaintiffs allege breach of contract in their third cause of action that the defendant breached the Pledge Agreement by not proceeding under section 10 thereof. Plaintiffs maintain that the sale must be voided insofar as, *inter alia*, it did not occur in front of the New York Supreme Court, but rather was conducted virtually from defendant’s counsels’ office. A plain reading of section 10 shows that it pertains to “private sales.” There is no question that the sale was in fact public, leaving defendants free to pursue the auction sale under section 9 of the Pledge Agreement, which permitted defendant to pursue all remedies under the UCC. As such, the third cause of action is without merit.

It follows that defendant's motion sequence No. 3 is granted to the extent that plaintiff's first three causes of action cannot be sustained and must be dismissed. The action itself, however, is not dismissed.

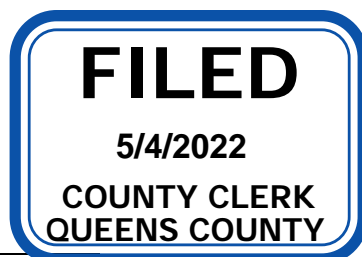
Turning to plaintiffs' cross motion for leave to amend the complaint, plaintiffs submit a proposed amended complaint wherein they seek leave to add a fourth and a fifth cause of action seeking damages and surplus monies. While defendant is correct that plaintiffs cannot, post-sale, 'unwind' said sale, in the new causes of action, plaintiffs seek damages stemming from the argument that the auction sale was not conducted in a 'commercially reasonable' matter. (*See, Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder, LLC*, 174 AD3d 150 [1st Dept 2019]). These claims are not futile, as defendant maintains, inasmuch as plaintiffs do not seek relief under the RPAPL, but now seek relief provided pursuant to the UCC.2 Leave to amend a complaint is to be freely granted. (CPLR §3025[b]). On a motion to dismiss, the court is to afford the complaint the "presumption of truth," (*Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder, LLC*, at 164), and examine the proposed amended pleading to determine not whether a cause of action is pleaded, but if a cause of action exists. (*See, Leon v Martinez*, 84 NY2d 83 [2004]).


In a sale conducted pursuant to Article 9 of the UCC, the creditor bears the burden of proof that the sale was 'commercially reasonable.' (*M & T Bank v Sailor*, 131 AD3d 1017 [2nd Dept 2015]; *Ford Motor Credit Co v Racewell Const.*, 24 AD3d 500 [2nd Dept 2005]). Courts have recognized the question of commercial reasonableness is "fact intensive." (*Coxall v Clover Comm. Corp.*, 4 Misc 3d 654 [Civil Ct., Kings County 2004], citing *Federal Deposit Inc. Co., v Forte*, 144 AD2d 627 [2nd Dept 1988]). Plaintiffs attach as an exhibit to their proposed amended complaint a professional appraisal in support of their claim that the hotel property is valued at \$55 million. Defendants dispute this valuation, alleging that the property is otherwise heavy financially encumbered. While, as defendant maintains, the threshold to establish a claim of commercial unreasonableness is high, (*see, DeRosa v Chase Manhattan Mtge.*, 10 AD3d 317 [1st Dept 2004]), a debtor may yet establish damages resulting from a commercially unreasonable sale as well as seek surplus proceeds. (*Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder, LLC*, 174 AD3d 150). The interpretation of what is "commercially reasonable" is generally an issue of fact exist that cannot be determined at this stage of the proceedings. (*See, id.* at 165).

Accordingly, plaintiffs' cross motion to amend the complaint is granted. Defendant is deemed served and shall have 30 days from the date of this order, with notice of Entry, to interpose an answer.

This is the decision and Order of the Court.

Date: April 29, 2022




 HON. JOSEPH RISI, A.J.S.C.

² The cross motion to file an amended pleading does not abate the motion to dismiss. The party moving for dismissal has the option to apply its motion to the new pleading, which defendant has done here. (*Sage Realty Corp. v Proskauer Rose, LLP*, 251 AD2d 35 [1st Dept 1998]; and *see, Melendez v Bernstein*, 29 AD3d 872 [2nd Dept 2006 [cross motion to amend complaint granted while original causes of action were dismissed]).