

**CMB Export Infrastructure Inv. Group 48, LP v  
Motcomb Estates, Ltd.**

2023 NY Slip Op 30600(U)

February 28, 2023

Supreme Court, New York County

Docket Number: Index No. 653821/2022

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. BARRY R. OSTRAGER, PART IAS MOTION 61EFM**

*Justice*

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CMB EXPORT INFRASTRUCTURE INVESTMENT GROUP 48, LP,

INDEX NO. 653821/2022

Plaintiff,

MOTION DATE

- v -

MOTCOMB ESTATES, LTD., REUBEN BROTHERS, LTD., CDCF IV CENTURY MEZZ, LLC, and NCPMB, LLC,

MOTION SEQ. NO. 001; 006

**AMENDED DECISION + ORDER ON MOTIONS**

Defendants.

HON. BARRY R. OSTRAGER

Presently before the Court is plaintiff CMB Export Infrastructure Investment Group 48, LP’s (“CMB”) motion for a preliminary injunction. For the reasons that follow, the motion is granted to the extent of enjoining a U.C.C. foreclosure sale on defendants’ defaulted Senior Mezzanine Loan. The Court will entertain applications to expedite a trial on the merits with respect to the defaulted Senior Mezzanine Loan after there is a ruling by the California Superior Court on the very related action captioned *CMB Export Infrastructure Investment Group 48, LP et al v. Motcomb Estates Ltd*, Case No.225MCV01852 (the “California action”). The injunction in this case is conditioned upon plaintiff posting a \$5 million bond by March 10, 2023 at 12:00 p.m., and does not enjoin defendants from posting a Notice of Sale consistent with the terms outlined in the oral rulings made in the California action by the Hon. Mark H. Epstein in open court on February 10, 2023.

The Court held a preliminary injunction hearing in this case on February 6, 2023. Six witnesses testified at the hearing. The purpose of the hearing was to determine whether, among

other things, the plaintiff, the Junior Mezzanine lender on a multi-billion dollar financing, was fraudulently induced to agree to a Fourth Amendment to an InterCreditor Agreement governing the rights and obligations of the lenders to a multibillion dollar project that is transforming the historic Century Plaza Hotel in Century City, California into an even more upscale hotel with two adjacent towers of condominiums as well as high end retail spaces.

The project was originally financed by a Senior Loan from JPMorgan Chase, a Senior Mezzanine Loan from CDCF IV Century Mezz, LLC (“CDCF”), and a \$450 million Junior Mezzanine Loan from plaintiff. The testimony adduced at the preliminary injunction hearing established a likelihood that, had plaintiff known that CDCF and Reuben Brothers were simultaneously entering into a side letter (or Participation Agreement) prohibiting CDCF from selling any of its interest in the Senior Mezzanine Loan (the “Tranche B” interest) to plaintiff without the approval of Reuben Brothers, plaintiff would never have agreed to the Fourth Amendment to the InterCreditor Agreement allowing Reuben Brothers to acquire at least part of CDCF’s interest in the Senior Mezzanine Loan (“Tranche A”). In the latter connection, the Court found the testimony of CMB’s Patrick Hogan to be credible and compelling. There is documentary evidence that plaintiff sought to purchase an interest in the Senior Mezzanine Loan in order to protect its position as the Junior Mezzanine lender and that Reuben Brother’s counsel advised plaintiff that Reuben Brothers would not approve such a sale. Plaintiff also produced creditable testimony that it agreed to allow Reuben Brothers to upsize the Senior Mezzanine Loan by \$275 million with the expectation that the \$275 million would be utilized to complete the project. Plaintiff adduced credible evidence that more than half of the \$275 million was used to retire debt on the Senior Loan which Reuben Brothers acquired from JP Morgan Chase and to fund protective advances on the project and exorbitant default interest charges for the benefit of

Reuben Brothers. (CDCF also filed an action against the defendants that is the subject of a confidential settlement in which CDCF complained that Reuben Brothers was taking actions to wipe out the Tranche B portion of the Senior Mezzanine Loan which CDCF retained).<sup>1</sup>

Credible testimony was also adduced that the Covid-19 pandemic interrupted the Century Plaza project and there is a prospect that the project may approach positive cash flow in the intermediate future. Thus, the only harm to Reuben Brothers by delaying the U.C.C. foreclosure sale on the Senior Mezzanine Loan is that Reuben Brothers, which retains the Senior Loan, will generate more default interest. This brief summary of the testimony adduced at the preliminary injunction hearing would, without more, entitle plaintiff to a preliminary injunction enjoining the March 1, 2023 U.C.C. foreclosure sale on the Senior Mezzanine Loan. But there is more.

The parties submitted post-hearing briefs on February 17, 2023. The plaintiff's brief disclosed for the first time the existence of the California action in which plaintiff is seeking to obtain a preliminary injunction enjoining a mortgage foreclosure sale on the Senior Loan now owned by Reuben Brothers. Shortly after the preliminary injunction hearing in this case, Judge Epstein of the California Superior Court issued a tentative decision enjoining the mortgage foreclosure sale on the Senior Loan. However, during the course of oral argument consuming approximately 130 pages of transcript, Judge Epstein modified his tentative decision to allow defendants to issue a 30-day Notice of Sale without prejudice to evidence that will be produced at a March 27, 2023 hearing before Judge Epstein following discovery. At one point during the

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<sup>1</sup> In the related and since-settled action CDCF IV Century Mezz v. Motcomb Estates Ltd. et al., (index number 650977/2022), CDCF (the holder of the Tranche B interest in the Senior Mezzanine Loan), sued Motcomb (the holder of the Tranche A interest in the Senior Mezzanine Loan) and Reuben Brothers (the holder of the Senior Loan interests), for breach of contract for Reuben Brothers and Motcomb's failure to commence an enforcement action with respect to the defaulted Senior Mezzanine Loan. CDCF alleged that its interest in the Senior Mezzanine Loan was impaired and steadily devaluing because Reuben Brothers was collecting significant amounts of default interest under the Senior Loan.

oral argument in California Superior Court, the Court mused that perhaps Reuben Brothers was thinking “How do I get the Century Plaza for cheap,” which was an astute observation by a jurist who did not have the benefit of a full evidentiary hearing at which the credibility of witnesses could be assessed. Judge Epstein also observed that it is unclear whether the plaintiff could be compensated by money damages because all the defendants are foreign corporations.

Plaintiff has established a probability of success on the merits of its claim and that the balance of the equities tips decidedly in their favor, as a U.C.C. foreclosure sale at this time would likely extinguish their \$450 million loan. Where a petitioner has demonstrated that their claims have prima facie merit—including the prima facie merit of a claim for fraudulent inducement of a contract—New York courts have issued a preliminary injunction even where the remedy of money damages was potentially available. *See, e.g., Invar International, Inc. v. Zorlu Enerji Electric Uremia Anonim Sirketi*, 86 A.D.3d 404, 405 (1st Dept. 2011) (affirming the issuance of a preliminary injunction enjoining the foreclosure sale of certain property in which petitioners claimed an ownership interest).

Given the uncertain outcome of the California action, the injunction granted herein preserves the status quo pending fuller factual development. Defendants’ assertion that a change in California tax law effective April 1, 2023 would cause the defendants extraordinary economic harm has not been established inasmuch as it is clear from the California proceedings that defendants would most likely be the successful bidder at auction and it is unclear that the change in California tax law would apply to a credit bid. Since the mortgage foreclosure action is pending in California and the subject property is located in California, this Court will defer to the California courts to decide the tax issue.

Finally, while the borrower has taken no position on the present motion because the principal of the borrower is the guarantor of a “springing” bad-boy guarantee, the Court denies plaintiff’s request for the appointment of a receiver at this time.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for a preliminary injunction is granted to the extent of enjoining the UCC foreclosure sale on defendants’ defaulted Senior Mezzanine Loan without prejudice to any ruling by the California Superior Court on the very related action captioned *CMB Export Infrastructure Investment Group 48, LP et al v. Motcomb Estates Ltd*, Case No. 225MCV01852 on the condition that plaintiff post a bond of \$5 million by March 10, 2023 at 12:00 p.m.; and it is further

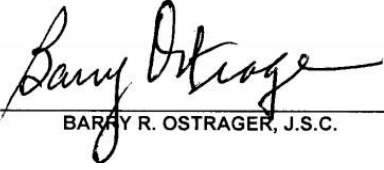
ORDERED that, upon reargument pursuant to the Interim Decision on motion sequence 006, the Court adheres to its prior decision denying plaintiff’s request for a Receiver.

The defendants are directed to answer the Complaint within 10 days. A Preliminary Conference is scheduled for April 11, 2023 at 3:30 p.m. To that end, counsel shall download the Preliminary Conference Order form available on Justice Ostrager’s web page <http://ww2.nycourts.gov/courts/comdiv/ny/newyork.shtml>. Counsel are directed to meet and confer and complete and efile the form by April 3, 2023 with a Note of Issue deadline no later than four months after the date of this Order and interim deadlines agreed to by the parties. A compliance conference date should be selected by counsel for a Tuesday in June 2023.

If the proposed Preliminary Conference Order is acceptable to the Court, the proposed Preliminary Conference Order will be “So Ordered” and no appearance will be necessary on April 11, 2023.

This Amended Decision & Order on Motions is issued to correct a typographical error.

DATED: February 28, 2023

  
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BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE		