

Arena Ltd. SPV v Chalets LLC

2024 NY Slip Op 31952(U)

June 4, 2024

Supreme Court, New York County

Docket Number: Index No. 655311/2023

Judge: Suzanne J. Adams

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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. SUZANNE J. ADAMS PART 39M

Justice

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INDEX NO. 655311/2023

ARENA LIMITED SPV, LLC, SPARKS CHALETS FUNDING, LLC,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CHALETS LLC, FACTORY HOUSING GROUP, LLC, INTERNATIONAL HOUSING CONCEPTS, INC., TIMOTHY A. WILKENS, THE WILKENS 2019 IRREVOCABLE TRUST

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 264

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

Upon the foregoing documents, and oral argument before the court on November 29, 2023, it is ordered that plaintiffs' motion is granted. In October 2021 and June 2022, plaintiffs, as lender and junior lender, agreed to loan monies toward the development of a residential real estate project in Nevada, and advanced approximately \$2.3 million sums to be used for the construction of manufactured houses which, inter alia, were to serve as collateral for plaintiffs' loans. Defendant The Chalets LLC (the "Borrower") is alleged to own the real property that is the site of the project. Defendant The Wilkens 2019 Irrevocable Trust (the "Trust") owns the Borrower, together with several non-parties. Defendant Timothy A. Wilkens ("Wilkens") is a trustee of the Trust and is alleged to manage and control the Borrower as well as defendants Factory Housing Group, LLC (the "Dealer") and International Housing Concepts, Inc. (the "Manufacturer"). Plaintiff

commenced this action in October 2023 asserting causes of action for, *inter alia*, fraud and breach of contract, and alleging in sum that Wilkens induced plaintiffs to make loans to the Borrower by means of various lies and misrepresentations, and that even if the loans are not void, the Borrower has breached certain of the loan documents. In November 2023, plaintiffs brought the instant motion by order to show cause for a preliminary injunction enjoining Borrower and anyone acting on Borrower's behalf from using, distributing, etc., plaintiff's collateral, including any building materials and the like held by the Manufacturer, and ordering that plaintiff's collateral be made available for plaintiffs to move to a secure location and the cash or cash equivalents of the collateral be transferred to a bank account directed by plaintiffs. Defendants Borrower and Wilkens oppose the motion. The order of this court dated November 9, 2023, granted a TRO ordering said relief, which has remained in effect pending a determination of the instant motion.

Entitlement to a preliminary injunction under CPLR § 6301 is established by a showing of: “(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor.” *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). The purpose of a preliminary injunction is to maintain the *status quo* pending a trial. See *Terrell v. Terrell*, 279 A.D.2d 301, 304 (1st Dep't 2001); *Sau Thi Ma v. Xuan T. Lien*, 198 A.D.2d 186, 187 (1st Dep't 1993).

The record before this court contains ample evidence that justifies the issuance of a preliminary injunction. First, plaintiffs are likely to succeed on the merits of their claims. In short, they have proffered documentation that, at the very least, they advanced approximately \$2.3 million to the Borrower; that they relied on documentation that purported to show that the \$2.3 million, considered a down payment, was paid to the Dealer, who credited the monies to the Manufacturer for the purpose of manufacturing homes for the development and which was to also

constitute a form of collateral on plaintiffs' loans; and that the purported forwarding of monies and/or credit to the Manufacturer was contradicted by further communication from the Manufacturer that it received only \$66,000. The balance of the monies appears to be unaccounted for. Defendants in opposing the motion fail to persuasively refute these contentions and do not document the whereabouts of the balance of the disputed funds other than by a screen shot attached to defendants' counsel's opposing affirmation, written in Spanish, that is intended to show that the monies are in an account controlled by the Dealer at a bank in Panama. Second, the prospect of irreparable injury to plaintiffs is apparent from the fact that the monies at issue were to be used to purchase materials, etc., to construct manufactured houses, which were to serve as collateral and security for plaintiffs under the loan agreements. As such, a finding of irreparable harm is warranted. *Genger v. Genger*, 2010 NY Slip Op. 33929 (Sup. Ct. N.Y. County July 2, 2010). Finally, the balance of the equities lies with plaintiffs; defendants have not stated the nature of any harm they would suffer if an injunction was put in place.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that defendants The Chalets LLC ("Borrower"), Factory Housing Group, LLC ("Dealer"), and Timothy A. Wilkens ("Guarantor", and collectively the "Borrower Defendants") are enjoined from using, distributing, dissipating, removing, transferring, pledging, or otherwise disposing of any of Plaintiffs' collateral, including any materials, components, and parts of manufactured homes being held by International Housing Concepts, Inc. ("Manufacturer") for the benefit of plaintiffs and all remaining amounts of the down payment of \$2,333,396.00 transferred or represented to have been transferred by Borrower to Dealer to Manufacturer in accordance with the Amended and Restated Construction Loan Agreement dated June 30, 2022 (the "Loan

Agreement”) and related assignments of interests for the benefit of Plaintiffs (collectively, “Plaintiffs’ Collateral”); and it is further

ORDERED that anyone acting or purporting to act on behalf of Borrower Defendants or anyone who has notice of this Order are enjoined from using, distributing, dissipating, removing, transferring, pledging, or otherwise disposing of any of Plaintiffs’ Collateral; and it is further

ORDERED that all of Plaintiffs’ Collateral shall be made available for plaintiffs to move to a secure location and, to the extent that any portion of Plaintiffs’ Collateral remains in cash or cash equivalents, such funds are to be transferred to a bank account directed by plaintiffs; and it is further

ORDERED that the undertaking is fixed in the sum of \$5,000.00 conditioned that plaintiffs, if it is finally determined that they were not entitled to an injunction, will pay to the defendants all damages and costs which may be sustained by reason of this injunction.

This constitutes the decision and order of the court.

SA

<u>6/4/2024</u> DATE					<u>SUZANNE J. ADAMS, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE