

**Tribeca Lending Corp. v Fersko**

2012 NY Slip Op 30833(U)

March 28, 2012

Sup Ct, New York County

Docket Number: 100946/09

Judge: Joan M. Kenney

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

PRESENT: KENNEY  
Justice

PART 8

TRIBECA LENDING CORP.  
  
RAYMOND S. FENSLER,  
- v -  
ET AL.

INDEX NO. 100946/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 03  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DENIED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION.**

**FILED**

APR 03 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/28/12

JMK  
JOAN M. KENNEY J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK PART: 8  
-----X

TRIBECA LENDING CORP.,

Plaintiff,

Index # 100946/09

-against-

RAYMOND S. FERSKO, MILENA SGARBI FERSKO,  
SEVEN OAKS PARTNERS, L.P., WASHINGTON  
MUTUAL BANK, F.A., NEW YORK CITY PARKING  
VIOLATIONS BUREAU,

DECISION & ORDER

Defendant.

-----X

**Kenney, J., M., J.**

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Papers considered in review of these motions:

**Papers:**  
Order To Show Cause, Affirmation,  
Affidavit, Exhibits,  
Affirmation in Opposition and Exhibits

**Numbered:**  
1-9  
10-16

**FILED**

**APR 03 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**

In this foreclosure action, defendant, Seven Oaks Partners, L.P. (Seven Oaks) and a proposed intervening party 221 East 31<sup>st</sup> Street Holdings, LLC (a wholly owned subsidiary of Seven Oaks), seeks an Order granting a temporary restraining Order and preliminary injunction, pursuant to CPLR 6301 et seq., enjoining plaintiff from conducting a judicial sale of the premises located at 221 East 31<sup>st</sup> Street, New York, NY 10016 (the property), which was scheduled pursuant to a Judgment of foreclosure and sale dated June 16, 2009.

FACTUAL & PROCEDURAL BACKGROUND

The following facts are uncontested. This action was commenced in 2009, to foreclose a consolidated mortgage in the amount of \$2,625,000.00. The mortgagors, the individually named defendants (the Ferskos), defaulted in making their mortgage payments in or about December 1, 2007. Seven Oaks, as a secured creditor of the Ferskos had a subordinate mortgage, and was therefore given notice of the commencement of the instant action with service of the summons and complaint. This Court granted both an Order of Reference, dated March 22, 2010 and a final Judgment of Foreclosure and Sale, dated November 29, 2010. The auction was noticed and scheduled to occur on August 17, 2011. None of the defendants appeared in this action, by motion or answer, until the instant motion was filed and served.<sup>1</sup>

Seven Oaks state that it merely wants to stay the judicial sale of the property "in order to obtain vacant possession of the [p]roperty... [and] ... have an opportunity to adequately market [the property] for 3<sup>rd</sup> party sale in order to maximize the proceeds for a sale." This request is made even though movants clearly acknowledge that their mortgage is legally subordinate to plaintiff's note and mortgage. The sole justification for staying the auction of the property, would be to allow movants to recoup

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<sup>1</sup>Notably, Seven Oaks moves pursuant to CPLR 6301 et seq., rather than CPLR 5015, since vacatur of the default would have been appropriate given the procedural posture of the litigation.

the expenses that were incurred, in attempting to foreclose the second mortgage.

It is undisputed that Seven Oaks obtained an amended foreclosure judgment on its subordinate mortgage in 2010. The original judgment had to be amended because Seven Oaks attempted to negotiate a forbearance agreement with the Ferskos, who were at that time still in possession of the property. Ultimately, the Ferskos defaulted on the forbearance agreement as well.

#### DISCUSSION

CPLR 6301 sets forth the grounds for preliminary injunction and temporary restraining order:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

A party moving for a preliminary injunction must demonstrate

by clear and convincing evidence (*W.T. Grant Co. v Srogi*, 52 NY2d 496 [1981]), (1) a likelihood of success on the merits of the underlying claim; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in its favor (see *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Olympic Tower Condominium v Coccoziello*, 306 AD2d 159 [1<sup>st</sup> Dept 2003], citing, *Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

This Court finds that Seven Oaks has failed to satisfy the three-pronged test for the granting of a preliminary injunction nor has it met the requisite burden of proof. It is significant that Seven Oaks has been unable to show that the irreparable harm is "imminent, not remote or speculative" (citations omitted). Moreover, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (citations omitted). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2<sup>nd</sup> Dept 2010]). Movants cannot justify the position that an aggressive sales marketing plan could/would produce a buyer willing to pay a purchase price that would even begin to satisfy both mortgages. Therefore, the likelihood of success on the merits is very remote.

All arguments or contentions not specifically addressed herein have been considered and determined to be without support.

Consequently, the motion is denied.

Accordingly, it is

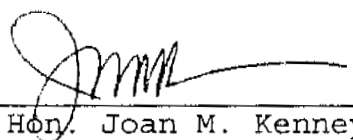
ORDERED that the motion seeking injunctive relief is denied and any prior stay(s) are vacated forthwith; and it is further

ORDERED that plaintiff may schedule an auction at any time after service of Notice of Entry of this Order; and it is further

ORDERED that in the alternative, in the event plaintiff identifies a buyer ready, willing and able to purchase the property for fair market value it may proceed with said transaction in lieu of conducting a judicial sale.

Dated: March 28, 2012

E N T E R:

  
Hon. Joan M. Kenney

**FILED**

APR 03 2012

NEW YORK  
COUNTY CLERK'S OFFICE