SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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EMIGRANT BUSINESS CREDIT CORPORATION,

Plaintiff,

- v -

JOHN ARTHUR HANRATTY, EBURY STREET CAPITAL, LLC, EBURY FUND 1, LP, EBURY FUND 2, LP, EBURY 1EMI LLC, EBURY 2EMI LLC, EB 1EMIALA LLC, EB 2EMIALA LLC, EB 1EMIFL, LLC, EB 2EMIFL, LLC, EB 1EMIIN, LLC, EB 2EMIIN, LLC, EB 1EMIMD, LLC, EB 2EMIMD, LLC, EB 1EMINJ, LLC, EB 2EMINJ, LLC, EB 1EMINY, LLC, EB 2EMINY, LLC, EB 1EMISC, LLC, EB 2EMISC, LLC, RE 1EMI LLC, RE 2EMI LLC, EB 1EMIDC, LLC, ARQUE TAX RECEIVABLE FUND (MARYLAND), LLC, EBURY FUND 1FL, LLC, EBURY FUND 2FL, LLC, EBURY FUND 1NJ, LLC, EBURY FUND 2NJ, LLC, RED CLOVER 1, LLC, EBURY RE LLC, and XYZ CORPS.

Defendants.

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INDEX NO. 158207/2022

MOTION DATE 10/18/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

In this action, plaintiff lender Emigrant Business Credit Corporation alleges causes of action for breach of contract, fraudulent inducement, and fraudulent transfer against defendants. In its attempt to recover the amounts it loaned to defendants Ebury 1EMI LLC and Ebury 2EMI LLC (respectively, 1EMI and 2EMI and, together, the Borrowers), plaintiff seeks an order, which, in short, would enjoin defendants from (1) transferring their general assets (with an ordinary and necessary business expense carveout), (2) depositing certain proceeds into escrow, and (3) requiring defendants to give plaintiff twenty-four hours' notice prior to defendants' transfer of assets exceeding $50,000.[1] Defendants oppose the motion.

[1] The court granted a temporary restraining order as to the latter two items by order filed on October 19, 2022 (NYSCEF # 23).

BACKGROUND

Plaintiff Extends Financing to Defendants

Plaintiff is a New York-based specialty finance company (NYSCEF # 1 – Complaint, ¶ 5). Defendant John Hanratty is the manager of defendant Ebury Street Capital, LLC (ESC), the manager or general partner of all the other corporate defendants (collectively with ESC, the Ebury Entities) (*id.*, ¶'s 8-9). Plaintiff claims that "ESC and each of the Ebury Companies is an alter ego of Hanratty and of one another with respect to the transactions with respect to the transactions described in this Complaint." (*id.*, ¶ 18).

On March 9, 2017, plaintiff extended credit facilities to Borrowers 1EMI and 2EMI in amounts totaling $10,000,000 and $5,000,000, respectively, with 1EMI's facility later increased to $15,000,000 (*id.*, ¶ 33). Hanratty and various Ebury Entities issued guaranties in connection with the credit facilities (*id.*, ¶'s 15, 37, 39).

The funds were to be used to finance the purchase of tax lien certificates that municipalities place on properties when an owner fails to pay municipal taxes (*id.*, ¶'s 32; 22). Certain investors purchase tax lien certificates from municipalities to profit from the interest rate chargeable on the certificate and to enable ownership of the underlying real estate through foreclosure (*id.*, ¶ 25).

Plaintiff explains that the credit facilities were structured to allow the Borrowers to draw down revolving lines of credit against the value of a pool of eligible assets serving as collateral (*id.*, ¶'s 27; 34). The total amount the Borrowers could draw down equals the advance rate, which ranged from 70% to 85%, multiplied by the amount of eligible collateral (*id.*, ¶'s 28; 34). Any tax lien certificate that defendants purchased using the credit facilities, and its proceeds, served as the collateral (*id.*, ¶ 34).

Plaintiff alleges that "[d]efendants misappropriated advances to the credit facilities as well as EBCC's collateral to pay tens of millions of dollars in distributions to company insiders – including Defendant John Hanrraty – as well as other investors" (*id.* ¶ 1). Also, the Borrowers failed to repay the principal and interest for the credit facilities when they came due on November 10, 2021, which default has continued even after plaintiff sent a default notice on November 29, 2021 (*id.*, ¶ 38). Plaintiff alleges that the outstanding amounts exceed $21.8 million (*id.*, ¶ 38).

Allegations of Fraud

For its fraud claim, plaintiff alleges as follows: Hanratty consistently claimed that plaintiff was secured by collateral worth more than the outstanding amounts (*id.*, ¶ 43). For example, one of plaintiff's employees conveyed concerns to Hanratty about the 2019 financial audits, which valued the tax lien investments at around $17.2 million, being less than the approximately $18 million outstanding balance owed at the time (*id.*, ¶ 47). Hanratty responded that plaintiff was actually secured by $32 million in tax lien collateral, plus additional collateral amounts (*id.*, ¶ 47).

Hanratty's claims of overcollateralization were intentionally false, and Hanratty even bragged about his ability to mislead plaintiff's employee (*id.*, ¶'s 47-49).

The credit facilities required the Borrowers to deliver the tax lien certificates they purchased to a designated third-party custodian, which the parties agreed would be MTAG Services, LLC (the Custodian) (*id.*, ¶'s 50; 52). In March of 2021, plaintiff discovered that certain of the collateral was not held by the Custodian (*id.*, ¶ 55). Plaintiff alleges that Hanratty subsequently misled plaintiff about the custodial status of the collateral. To wit, defendant shared a spreadsheet purporting to be from the Custodian and indicated that as of August 31, 2021, the Custodian had 6,782 tax lien certificates (*id.*, ¶ 55-57). The Custodian has since confirmed to plaintiff that as of that date, it only had custody of 518 tax lien certificates worth a fraction of the amount the spreadsheet had indicated (*id.*, ¶ 57). Hanratty admitted he was self-servicing almost 90% of the collateral (*id.*, ¶ 58).

Additional allegations of fraud include that Hanratty improperly inflated the value of certain liens, altered origination dates for hundreds of certificates, and misrepresented that certain advances would be used to finance purchases of tax lien certificates when they were instead used for investor distributions and settlements (*id.*, ¶'s 63; 68; 69-81). Further, defendants were required to deposit proceeds from sales of tax lien certificates into plaintiff's lockbox account, but not only did defendants fail to do so, Hanratty also falsely represented that he owned the liens and that they were increasing in value (*id.*, ¶'s 94-96). And, because proceeds of tax lien certificates are treated as collateral, this means any owned real property that resulted from a foreclosure on a tax lien should also have been included as collateral. But defendants have been effecting transfers without receipt of fair consideration, so to prevent plaintiff from receiving sale proceeds (*id.*, ¶'s 97-100).

DISCUSSION

"The provisional remedy of a preliminary injunction in New York civil actions is governed by CPLR 6301" (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 544 [2000]), which provides in relevant parts:

> 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. . . .

(CPLR 6301).

The "remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (*McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co.*, 114 AD2d 165, 172 [2d Dept 1986]). "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 West Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011], citing *Doe v Axelrod*, 73 NY2d 748 [1988]).

Whether to grant a preliminary injunction is "committed to the sound discretion of the motion court" (*Harris v Patients Med., P.C.*, 169 AD3d 433, 434 [1st Dept 2019]). The existence of triable issues of fact does not require the denial of a preliminary injunction when the movant meets its burden of establishing that the three prerequisites for injunctive relief have been met (*Bell & Co, P.C. v Rosen*, 114 AD3d 411, 411 [1st Dept 2014]; CPLR 6312 [c]). "The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*1650 Realty Assocs., LLC v Golden Touch Mgmt., Inc.*, 101 AD3d 1016, 1018 [2d Dept 2012]).

Likelihood of Ultimate Success on the Merits

Plaintiff argues that it is likely to succeed on the merits (NYSCEF # 4 – MOL at 6-12; NYSCEF # 28 – Reply at 1-4). The first basis plaintiff puts forward is its claim for breach of contract. "To establish a breach of contract claim, the plaintiffs must allege the specific terms of the agreement, the consideration, the plaintiffs' performance, and the defendants' breach of the agreement" (*Sylmark Holdings Ltd. v Silicone Zone Int'l Ltd.*, 5 Misc 3d 285, 295 [Sup Ct, NY County 2004]). Plaintiff argues that this has been met because the Borrowers promised to repay all principal and interest outstanding at the maturity date – November 10, 2021 – but failed to do so (NYSCEF # 4 at 7). Plaintiff adds that Hanratty and other defendants are liable for the amounts the Borrowers owe on account of the guaranties (*id.* at 7).

Defendants argue that it is "not clear" that the outstanding credit line balance breaches the contracts as the parties were actively negotiating repayment between the maturity date and September 2022 and that defendants accepted plaintiff's repayment terms just prior to commencing this action (NYSCEF # 27 – Opp at 19; # 24 – Hanratty aff, ¶ 57). However, defendants' representation here is unsupported and insufficient for a denial of a preliminary injunction (*Bell*, 114 AD3d at 411).

Defendants argue that because plaintiff relies on "Conclusory, Hearsay, and 'Information and Belief' Allegations" to support its breach of contract claim, plaintiffs cannot show that it has a likelihood of success. Defendants' argument is unavailing as plaintiff's allegations and supporting affidavit (NYSCEF # 5) is sufficient to establish likelihood of success on the merits for the present purposes. As such, the court need not, and does not, reach the parties' arguments as to the sufficiency of plaintiff's other causes of action (*see e.g. Petry v Gillon*, 199 AD3d 1277, 1279 [3d Dept 2021] ["to obtain a preliminary injunction, plaintiffs needed to

demonstrate a likelihood of success on the merits on at least one of their claims"]). In sum, plaintiff has presented a prima facie case supporting the likelihood of success on the merits, which defendants have failed to rebut for this motion.

Irreparable Injury

Plaintiff asserts that it has established irreparable injury on two independent bases: defendants' insolvency and the monies at issue being identifiable proceeds of plaintiff's collateral. The court considers the insolvency issue first.[2]

A "general creditor has no legally recognized interest in or right to interfere with the use of the unencumbered property of a debtor prior to obtaining judgment. . . Therefore, . . . the acts of the debtor in disposing of assets will not have 'produce[d] [cognizable] injury to the plaintiff' and thus will not support a temporary injunction" (*Credit Agricole,* 94 NY2d at 549 [quoting CPLR 6301]). In a money action, a plaintiff "often fears that [the defendant] will secrete property during the action's pendency and thus make a money judgment uncollectable. [Plaintiff's] remedy there, if [plaintiff] can establish such conduct by [defendant] convincingly, is an order of attachment under CPLR 6201 [3], not an injunction under Article 63." (*Id.* at 548 quoting Siegel, NY Prac § 327 at 498 [3d ed]).

Nonetheless, a secured creditor does have a legally recognized interest in preventing dissipation of encumbered property prior to obtaining judgment (*see e.g. Winchester Glob. Tr. Co. v Donovan*, 58 AD3d 833, 834 [2d Dept 2009] [holding that injunctive relief was properly granted as the uncontrolled disposition of assets "would threaten to render ineffectual any judgment which the plaintiff might obtain" in an action by a secured party to set aside allegedly fraudulent conveyances made "in derogation of the plaintiff's perfected security interest"]; *Goldman Sachs Bank USA v Schreiber*, 2022 WL 60650 at *3 [Sup Ct, NY County 2022] [granting preliminary injunction enjoining the transfer of assets where plaintiff, a secured creditor, sought to prevent a dissipation of collateral, and the sale of such assets in direct contravention of agreements would cause irreparable harm by taking away the value of the collateral]).

Here, in his affidavit, plaintiff's Senior Vice President, Scott Weiss, states that defendants "executed Security Agreements pledging all of the Borrowers' and Guarantors' present and future assets as security for the Credit Facilities" (NYSCEF #'s 5 – Weiss Aff, ¶ 11; 9 – the Security Agreements). Weiss avers that defendants have sold at least 90 properties and have listed another 88 properties that were purportedly part of plaintiff's collateral, for a total of approximately, respectively, $4.1 and $4.8 million (NYSCEF # 5, ¶ 25). Plaintiff argues this

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[2] As a threshold matter, the court is not convinced by defendants' argument that plaintiff's "own delay in asserting its purported rights" vitiates against finding imminent, irreparable harm (NYSCEF # 21 at 2). Even if, *arguendo*, plaintiff did cause delay in seeking the present relief, "[m]ere delay, without the necessary elements creating an equitable estoppel, does not preclude the grant of an injunction" (*New York Real Est. Inst., Inc. v Edelman*, 42 AD3d 321, 322 [1st Dept 2007]).

supports its allegation that defendants have a history of fraudulently transferring assets to place them beyond plaintiff's reach (NYSCEF # 4 at 14). Hanratty confirms that plaintiff has "filed UCC-1 Statements perfecting its security interests in the Ebury Entities' liens" (NYSCEF # 24 – Hanratty Aff, ¶ 45).

As for evidence of defendants' insolvency, plaintiff identifies that defendants have failed to repay the outstanding debt of more than $21 million which has been pending for almost a year, and that defendants' own independent auditor expressed substantial doubts about defendants' ability to continue as a going concern (NYSCEF # 28 at 7). Without addressing either of plaintiff's contentions, defendants assert that plaintiff "musters no facts to suggest that [defendants] are insolvent," referring generally to the complaint (NYSCEF # 27 at 23). In their memorandum of law, defendants note that defendants have testified that their current assets exceed plaintiff's "maximum possible relief by approximately $4 million" (*id.* at 23). Defendants do not indicate where such testimony may be found.

The court finds that plaintiff has sufficiently established for the present purposes that plaintiff is a secured creditor whose collateral risks further dissipation by insolvent defendants. Under New York law, this finding is sufficient to warrant issuing the preliminary injunction plaintiff seeks (*Winchester*, 58 AD3d 833; *see also Goodstein v Enbar*, 2017 WL 1032545 at *5 [Sup Ct, NY County 2017] [noting that "it is self-evident that if a party renders itself insolvent for the purpose of evading judgment, the plaintiff will not be fully compensated by a monetary award"]).

Defendants' reliance on *Credit Agricole* is inapposite as it involves claims of a general, unsecured creditor. Defendants' reliance on *Dinner Club Corp. v Hamlet on Olde Oyster Bay Homeowners Ass'n, Inc.* is similarly unavailing (21 AD3d 777 [1st Dept 2005]) [noting that "a *general creditor* has no cognizable interest in or right to interfere with the use of the unencumbered property of a debtor until the creditor obtains a judgment"] [emphasis added]).[3] Defendants' reliance on *Zodkevitch v Feibush* and related cases for the idea that irreparable injury does not exist if money damages can redress plaintiff's harm is without merit here given the insolvency exception plaintiff identifies (49 AD3d 424, 425 [1st Dept 2008]).

Citing *Laco X-Ray Sys., Inc. v Fingerhut*, 88 AD2d 425 [2d Dept 1982]) defendants wrongly assert that CPLR 6301 only authorizes a preliminary injunction if plaintiff "clearly proves that the defendant (1) has engaged or imminently will be engaging (2) in fraudulent or otherwise wrongful behavior, (3) in order to cause its own insolvency" (NYSCEF # 27 at 21). CPLR 6301 does not mention fraudulent or

[3] Defendants also cite the United States Supreme Court case *Grupo Mexicano de Desarrollo S.A. v All. Bond Fund, Inc.*, 527 US 308 [1999]). Defendants fail to explain the applicability of this federal court case, which, even if it were, for argument's sake, applicable, would also be unavailing. *Grupo Mexicano* "distinguished the situation attendant to general unsecured creditors from that involving a creditor asserting some interest in or on the property" (*Bank of Am., N.A. v Won Sam Yi*, 294 F Supp 3d 62, 77 [WD NY 2018]).

wrongful behavior, and *Laco*, analyzing the appropriateness of an attachment under Article 62 of the CPLR, does not once mention CPLR 6301.

Finally, defendants posit that insolvency is an insufficient basis to satisfy the irreparable injury requirement (citing *Rosenthal v Rochester Button Co.*, 148 AD2d 375 [1st Dept 1989]). *Rosenthal* is inapposite, however, as the *Rosenthal* court was not persuaded that the defendant was "in financial distress and likely to be unable to pay any judgment in the future" (*id.* at 377).

Balance of Equities

The court next considers the third part of the showing plaintiff must make to support a preliminary injunction. "To obtain an injunction, the plaintiff [must] show that the irreparable injury to be sustained is more burdensome to [such plaintiff] than the harm that would be caused to the defendant through the imposition of the injunction" (*Lombard v Station Square Inn Apartments Corp.*, 94 AD3d 717, 721-22 [2d Dept 2012]). Plaintiff argues that "[a]bsent injunctive relief, there is a substantial likelihood that [plaintiff] will not be able to collect on its security interests or recover in this proceeding" whereas there would be "minimal harm to Defendants from an injunction" (NYSCEF # 4 at 15-16).

Defendants respond that plaintiff "would be just fine" if the court denies the injunction as plaintiff could still recover significant sums if defendants file for bankruptcy because of plaintiff's perfected security interests (NYSCEF # 27 at 26). Defendants continue that even if plaintiff collected nothing, plaintiff "remains part of a 172-year old bank with total assets of $5.61 billion" such that the money judgment plaintiff seeks is worth just 0.00388% of plaintiff's net assets.

Defendants' argument falls flat, and the court finds that the balance of equities favors plaintiff (*see e.g. Felix v Brand Serv. Grp. LLC*, 101 AD3d 1724, 1726 [4th Dept 2012] [finding balance of equities supported applicant where even if defendants may be delayed in using the restrained funds, nonetheless without the injunction "plaintiffs may never be able to recover the money, if disbursed"]; *Goldman Sachs Bank USA*, 2022 WL 60650 at *2 [finding balance of equities favored lender where there were loan defaults by the debtor]).

Undertaking

Defendants assert that if the injunction issues, the court should order plaintiff to post a $30 million undertaking to reflect defendants' "possible damages" including the "possible . . . total loss of [defendants'] assets" (NYSCEF 27 at 27-28). Plaintiff requests that the court "set a nominal undertaking in the amount of $1 or in no event greater than $10,000 because Defendants have failed to demonstrate that they will suffer any damages or costs by reason of the injunction" (NYSCEF # 28 at 10).

CPLR 6312 [b] provides that "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to

an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction. . . ." The amount must be "rationally related to defendants' potential damages if the preliminary injunction later proves to have been unwarranted" (*Madison/Fifth Assocs. LLC v 1841-1843 Ocean Parkway, LLC*, 50 AD3d 533, 534 [1st Dept 2008]). Speculative damages are not considered (*Visual Equities Inc. v Sotheby's,* Inc., 199 AD2d 59, 59 [1st Dept 1993]).

The court finds that an undertaking of $2.1 million is rationally related to defendants' potential damages (*see e.g. Zonghetti v Jeromack*, 150 AD2d 561, 563 [2d Dept 1989] [in granting injunction prohibiting the defendants from transferring or dissipating any of their assets, where $740,000 was allegedly converted, undertaking properly set at $100,000]).

CONCLUSION

In view of the above, it is

ORDERED that the motion of plaintiff Emigrant Business Credit Corporation (Emigrant) for a preliminary injunction against the above-captioned defendants is granted; and it is further

ORDERED that defendants and their successors, assigns, agents, employees, officers, attorneys, and all other persons acting in concert or participation with any of them (Related Persons), are temporarily restrained and enjoined from transferring, mortgaging, selling, converting, concealing, dissipating, disbursing, spending, withdrawing, disposing of, assigning, permitting the transfer of any of their assets, aside from ordinary and necessary disbursements related to the defendants' tax lien or real estate businesses or living expenses; and it is further

ORDERED that defendants and their Related Persons, to the extent that any tax lien certificate or real estate property resulting from the foreclosure on a tax lien certificate is or has been sold on or after October 19, 2022, are temporarily restrained and enjoined to deposit any proceeds from such sale, aside from ordinary and necessary disbursements related to the defendants' tax lien or real estate businesses, into an escrow account, to be established by the parties; and it is further

ORDERED, that defendants and their Related Persons must notify Emigrant at least twenty-four (24) hours in advance of transferring, mortgaging, selling, converting, concealing, dissipating, disbursing, spending, withdrawing, disposing of,

assigning, or permitting the transfer of any assets in an amount exceeding $50,000; and it is further

ORDERED that pursuant to CPLR 6312 (b) Emigrant shall post an undertaking in the sum of $2,100,000 by December 19, 2022; and it is further

ORDERED that a preliminary conference shall be held on December 5, 2022, at 2:30 p.m. or at such other time that the parties shall set with the court's law clerk; and it is further

ORDERED that defendants shall share with plaintiff in advance of the conference documentary evidence supporting its calculations as to the amounts subject to escrow.

11/29/2022
DATE

MARGARET CHAN, J.S.C.

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