ISRAEL DECLARATION EXHIBIT 4

11 of 33 DOCUMENTS

Encore Credit Corp. d/b/a ECC Encore Credit, Plaintiff, - against - Joseph LaMattina, LaMattina & Associates, Inc., Joseph W. LaForte, James LaForte, Jr., Tina LaForte, James LaForte, Tara LaForte, James LaForte, Tara Gibson, Jaime Lynn Guli, Francis Alfieri and Michael O'Leary, Defendants

CV-05-5442 (CPS)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2006 U.S. Dist. LEXIS 2935

January 18, 2006, Filed

COUNSEL: [*1] Plaintiff: Encore Credit Corp. doing business as ECC Encore Credit represented by Michelle S. Feldman, Lamb v. Barnosky, LLP, Melville, NY.

Defendant: Joseph LaMattina represented by David Gerald Tobias, Stempel Bennett Claman & Hochberg, P.C., New York, New York.

Defendant: Jaime Lynn Guli represented by Christopher Malley, Staten Island, NY.

JUDGES: Christopher P. Sifton, United States District Judge.

OPINION BY: Charles P. Sifton

OPINION

MEMORANDUM OPINION AND ORDER

Sifton, Senior Judge.

Plaintiff Encore Credit Corp. d/b/a ECC Encore Credit ("Encore") commenced this action on November 18, 2005 against defendants Joseph LaMattina ("LaMattina"), LaMattina & Associates, Inc. ("LaMattina & Associates"), Joseph W. LaForte, James LaForte, Jr., Tina LaForte, James LaForte, Tara Gibson, Jaime Lynn Guli ("Guli"), Francis Alfieri and Michael O'Leary (collectively, the "defendants") alleging claims for conversion, unjust enrichment, money had and received, negligence, breach of fiduciary duty, and fraud. According to the complaint and affidavits filed in support of this motion, in July and August 2005, Encore wired $ 1,086,027.94 to an account at Victory State Bank maintained by LaMattina [*2] & Associates in its capacity as a settlement agent in connection with three real estate transactions. However, defendants did not disburse the funds as instructed. Encore alleges that it has been unable to communicate with the defendants, and that the defendants have or will dissipate and/or abscond with the money. On November 18, 2005, plaintiff filed a motion for attachment pursuant to *Rule 64 of the Federal Rules of Civil Procedure* and *§ 6201(3) of the New York Civil Practice Law* and Rules and for a preliminary injunction pursuant to *Rule 65 of the Federal Rules of Civil Procedure* against all defendants. At a hearing held on December 5, 2005, I granted the motion with respect to all defendants except for defendant Guli and granted defendant Guli additional time to respond to the motion. Defendant Guli has now responded, and plaintiff Encore has filed a reply.

Presently before the Court is plaintiff Encore's motion for an order of attachment and preliminary injunction against defendant Guli. For the reasons and upon the findings of fact and conclusions of law set forth below, plaintiff's motion is denied.

BACKGROUND

The following facts are taken from the complaint and plaintiff [*3] Encore and defendant Guli's submissions in connection with this motion. The remaining defendants have failed to respond to the motion.

Plaintiff Encore is a licensed mortgage banker in the business of making loans secured by real property. Encore is a California corporation with its principal place of business in California. Defendant Joseph LaMattina is an attorney licensed in the state of New York, a resident of New York, and a shareholder, officer or director of defendant LaMattina & Associates or is otherwise affiliated with LaMattina and Associates. Defendant LaMattina & Associates is a law firm and a corporation organized and

existing under the laws of the state of New York with its principal place of business in New York. The complaint alleges that the remaining defendants, Joseph W. LaForte, James LaForte, Jr., Tina LaForte, James LaForte, Tara Gibson, Jaime Lynn Guli, Francis Alfieri and Michael O'Leary, are all individuals who reside in New York and, during all relevant times, were shareholders, officers, employees, or agents of LaMattina & Associates. Ms. Guli is a representative of Key Land Services, Inc. ("Key Land"), a title abstract company retained by Encore in connection [*4] with the loans.

At all relevant times, defendants LaMattina and LaMattina & Associates maintained a settlement trust account entitled "LaMattina & Associates, Inc, Joseph LaMattina Settlement Trust Account," (the "Settlement Trust Account") number 004-002648, at Victory State Bank in Staten Island, New York.

In the ordinary course of business, if Encore approves a loan application, a loan closing is scheduled. Encore typically retains outside counsel to represent Encore's interests at the closing, at which time the loan documents, mortgage documents, and other necessary documents are executed, and the funds are disbursed according to instructions issued by Encore to the closing attorney. Upon confirmation of a closing and the scheduled date of disbursement of the settlement funds, Encore wires the funds to the closing attorney's trust account.

In July and August 2005, Encore approved the loan applications of three borrowers: (1) Attilio Guarino, (2) Raul Ivan Guzhambo, and (3) Wayne Smalls. Encore retained defendants Joseph LaMattina and LaMattina & Associates to represent Encore at the closings. The funds for the three closings, $ 1,086,027.94 in total, were wired to the Settlement [*5] Trust Account. However, the funds were not disbursed as set forth in the closing instructions, and the location of the funds are currently unknown to plaintiff. Plaintiff alleges that the LaMattina defendants have orchestrated similar thefts of funds from several other lending institutions, [1] and that the individual defendants (other than Joseph LaMattina) have been arrested and criminally charged in connection with those transactions.

1 Three related cases -- *First Continental Mortgage and Investment Corp. v. LaMattina & Associates, Inc. and Joseph LaMattina*, 05 CV 3901, *Accredited Home Lenders, Inc. v. LaMattina & Associates, Inc. et al.*, 05 CV 4796, and *Credit Suisse First Boston Financial Corporation v. LaMattina & Associates, Inc. et al*, 05 CV 4350 - were filed in this Court. In *First Continental Mortgage*, I issued a Temporary Restraining Order, and the parties stipulated to converting that into a preliminary injunction. In *Credit Suisse First Boston Financial Corporation* (CSFBFC), I granted plaintiff's motion for an order of attachment and preliminary injunction; however, plaintiff has not yet submitted the proposed order. I granted motions for default judgment against LaMattina & Associates in all three cases.

[*6] *DISCUSSION*

Jurisdiction

This Court has jurisdiction pursuant to *28 U.S.C. § 1332(a)* in that the amount in controversy exceeds $ 75,000 and there is diversity between the parties.

Order of Attachment

Plaintiff requests, pursuant to *Rule 64 of the Federal Rules of Civil Procedure* and New York Civil Practice Law and Rule *§ 6201(3)*, an order of attachment against the assets of defendant Guli in an amount sufficient to ensure satisfaction of a judgment of $ 1,086,027.94.

Under *Rule 64*, attachment is available in the manner provided by the law of the state in which the district court is held. See *Fed. R. Civ. P. 64*. New York law requires that plaintiffs seeking attachment must show (1) that there is a cause of action, (2) that there is a probability of success on the merits, (3) that a ground for attachment listed in *C.P.L.R. 6201* exists, and (4) that the amount demanded from defendant exceeds all counterclaims known to plaintiff. *See N.Y.C.P.L.R. 6212(a)*.

Prejudgment attachment is a provisional remedy to secure a debt by preliminary levy upon the property of the debtor in order to conserve that property for eventual execution.

[*7] Because attachment is a harsh remedy, the statute must be strictly construed in favor of those against whom it may be applied. *See Michaels Elec. Supply Corp. v. Trott Elec. Inc., 231 A.D.2d 695, 647 N.Y.S.2d 839 (2d Dept. 1996)*; *P.T. Wanderer Assoc., Inc. v. Talcott Communications, Corp., 111 A.D.2d 55, 489 N.Y.S.2d 179 (1st Dept. 1985)*. Moreover, the granting of prejudgment attachments is discretionary, "'and even when the statutory requisites are met, the order may be denied.'" *Elliott Assocs., L.P. v. Republic of Peru, 948 F. Supp. 1203, 1211 (S.D.N.Y.1996), quoting Filmtrucks, Inc. v. Earls, 635 F. Supp. 1158, 1162 (S.D.N.Y.1986)*.

Cause of Action, Likelihood of Success on Merits, and Amount of Counterclaims

I need not determine at this time whether plaintiff has established a cause of action against defendant Guli, whether plaintiff has a likelihood of success on the merits, and whether the amount demanded from defendant

exceeds all counterclaims known to plaintiff because, for the reasons set forth below, I find that plaintiff has not established grounds for attachment.

Grounds for Attachment

[*8] To establish the relevant grounds for attachment in this case, plaintiff (a) must be seeking a money judgment, and (b) must show that defendant, with intent to defraud creditors or frustrate enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts. *See N.Y.C.P.L.R. 6201*. Plaintiff in this case is seeking a money judgment.

To establish the second ground for attachment, plaintiff must prove two elements: (1) that defendant either is about to or has assigned, disposed of, encumbered, or secreted property, or removed it from the state; and (2) that defendant has acted or will act with the intent to defraud her creditors or to frustrate the enforcement of a judgment that might be rendered in plaintiff's favor. *See Bank Leumi Trust Co. of New York v. Istim, Inc., 892 F. Supp. 478, 482 (S.D.N.Y.1995).*

"Removal, assignment or other disposition of property is not a sufficient ground for attachment; fraudulent intent must be proven, not simply alleged or inferred, and the facts relied upon to prove it must be fully set forth [*9] in the moving affidavits." *Abacus Federal Sav. Bank v. Lim, 8 A.D.3d 12, 778 N.Y.S.2d 145 (1st Dept. 2004).* "Fraud is not lightly inferred, and the moving papers must contain evidentiary facts as opposed to conclusions proving the fraud." *See Anderson v. Malley, 191 App.Div. 573, 181 N.Y.S. 729 (1st Dept. 1920).* Affidavits containing allegations raising a mere suspicion of an intent to defraud are insufficient. *Rosenthal v. Rochester Button Co., 148 A.D.2d 375, 539 N.Y.S.2d 11 (1st Dept. 1989).* It must appear that such fraudulent intent really exists in the defendant's mind. *Eaton Factors Co. v. Double Eagel Corp., 17 A.D.2d 135, 232 N.Y.S.2d 901 (1st Dept. 1962).*

In the present case, plaintiff has not met its burden of proving that defendant Guli had or has fraudulent intent. In fact, as defendant Guli argues in her response to the motion, other than alleging that all of the individual defendants (including defendant Guli) during all relevant times, were shareholders, officers, employees, or agents of LaMattina & Associates (which she denies) and that the individual defendants (including defendant Guli) were criminally [*10] charged and arrested in relation to similar transactions with other lending institutions, plaintiff's moving papers allege facts specific to defendant Guli in only one paragraph. Paragraph 12 of the declaration in support of plaintiff's motion of Alanna Darling ("Darling"), Director of Legal Services for Encore states:

> The title abstract company that was retained by or on behalf of Encore to prepare title reports and obtain policies of title insurance for each of the loans was Key Land Services, Inc., ("Key Land"). In August, 2005, a representative of Encore spoke with defendant Jaime Lynn Guli. Ms. Guli held herself out as a representative of Key Land. She advised Encore, among other things, the Key Land was aware of the problems with these loan closings. Guli stated that L&A had been in business for 40 years and that Key Land had done business with L&A for several years and never had any problems. In truth, Key Land has only been in business since May 20, 2004 and L&A has only been in business since March 19, 2004.

Defendant Guli states that in fact she is an officer of Key Land Title Insurance Company, and that she has no interest in L&A. She notes that Darling's declaration [*11] does not state that the representations made by Guli caused Encore to do anything and that the conversation between Guli and Encore occurred after L&A had already absconded with the funds. Further, defendant Guli notes that plaintiff has not set forth any facts that indicate that Guli has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts.

Plaintiff responds by arguing, "nothing set forth in [defendant's response] is sufficient to overcome Encore's right to an order of attachment and the preliminary injunctive relief that is the subject of the motion before this Court." However, there is no presumptive right to an order of attachment or preliminary injunction, and it is not the defendant's burden to overcome any such presumption. To the contrary, it is plaintiff's burden to establish that the requirements for obtaining an order of attachment are met and, as discussed above, even if plaintiff meets its burden, the order may be denied at the Court's discretion.

Plaintiff relies almost exclusively on a Felony Complaint against the individual defendants, including defendant Guli, for acts that are "strikingly similar" [*12] to those complained of by Encore. However, proof that a defendant committed the underlying, unlawful act is not, by itself, sufficient to establish a ground for attachment. *Executive House Realty v. Hagen, 108 Misc.2d 986, 988, 438 N.Y.S.2d 174 (N.Y.Sup.1981)* ("demonstrating a cause of action for conversion is not a sufficient ground

for attachment"). The Felony Complaint does not allege, much less establish, that defendant Guli will or has assigned, disposed of, encumbered, or secreted property, or removed it from the state with intent to defraud Encore or to frustrate a judgment in this case, a showing of which is required in order to obtain an order of attachment.

Accordingly, plaintiff's motion for attachment is denied. [2]

> 2 Plaintiff also seeks, pursuant to *Rule 64* and *N.Y.C.P.L.R. § 6220* an order requiring defendant Guli to appear immediately and testify as to [1] "the location and/or disposition of the monies improperly withdrawn from the Settlement Trust Account or not used for their intended purpose;" and [2] "the nature, status and actual location of [her] assets...and to bring with [her] to the deposition all documents, books correspondence, records and tax returns maintained in connection with the Funds and/or their assets...."
>
> According to *N.Y.C.P.L.R. § 6220*: "Upon motion of any interested person, at any time after the granting of an order of attachment and prior to final judgment in the action, upon such notice as the court may direct, the court may order disclosure by any person of information regarding any property in which the defendant has an interest, or any debts owing to the defendant."
>
> Because I have denied plaintiff's motion for an order of attachment, this motion is also denied.

[*13] *Preliminary Injunction*

Plaintiff also moves for a preliminary injunction pursuant to *Rule 65 of the Federal Rules of Civil Procedure*, enjoining defendant Guli from, directly or indirectly, transferring, selling, alienating, concealing, converting, liquidating, or otherwise dissipating any of her assets and/or property, wherever located, in an amount up to $ 1,086,027.94 pending resolution of this action.

A preliminary injunction is appropriate if the moving party demonstrates "(a) irreparable harm, and (b) either (1) a likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them fair grounds for litigation and a balance of hardships tipping decidedly in its favor." *Genesee Brewing Co. v. Stroh Brewing Co., 124 F.3d 137, 142 (2d Cir. 1997)*.

The showing of irreparable harm is the "single most important prerequisite for the issuance of a preliminary injunction." *Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2d Cir. 1983)*. Irreparable harm must be shown to be imminent, not remote or speculative, and the injury must be such that it cannot be fully remedied by monetary damages. *See Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989)*. [*14] A preliminary injunction may issue to preserve assets as security for a potential money judgment where the evidence demonstrates that a party intends to frustrate a judgment by making it uncollectible. *See Republic of the Philippines v. Marcos, 806 F.2d 344, 356 (2d Cir.1986)*; *Signal Capital Corporation v. Frank, 895 F. Supp. 62, 64 (S.D.N.Y. 1995)*. Such a demonstration of intent to frustrate a judgment will satisfy the requirement of a showing of irreparable harm. *See in re Feit & Drexler, Inc., 760 F.2d 406, 416 (2d Cir.1985)*; *Signal Capital, 895 F. Supp. at 64*.

As discussed above, plaintiff has not alleged any facts or provided any evidence that defendant Guli intends to frustrate a judgment in this case. I need not determine whether plaintiff has a likelihood of success on the merits of her claims against defendant Guli, because plaintiff has not established irreparable harm, which is required to obtain a preliminary injunction.

Accordingly, plaintiff's application for a preliminary injunction is denied.

CONCLUSION

For the reasons stated above, plaintiff's motion for an order of attachment and preliminary [*15] injunction against defendant Guli is denied.

The Clerk is directed to furnish a filed copy of the within to all parties and to the magistrate judge.

SO ORDERED.

Dated: Brooklyn, New York, January 18, 2006

By: /s/ Charles P. Sifton (electronically signed)
United States District Judge