

**HH Cincinnati Textile L.P. v Acres Capital Servicing  
LLC**

2018 NY Slip Op 31263(U)

June 19, 2018

Supreme Court, New York County

Docket Number: 652871/2018

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  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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HH CINCINNATI TEXTILE L.P., HH KC MARK TWAIN, L.P., HH  
MARK TWAIN LP, HUDSON KC REAL ESTATE MANAGER  
LLC, ANDREW GREENBAUM, STEVEN MICHAEL

Plaintiff,

- v -

ACRES CAPITAL SERVICING LLC, DW COMMERCIAL  
FINANCE, LLC,

Defendant.

INDEX NO. 652871/2018

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 12, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this application to/for Preliminary Injunction

HON. BARRY R. OSTRAGER:

This is an action for declaratory and injunctive relief to prevent Defendants Acres Capital Servicing LLC (the “Agent”) and DW Commercial Finance, LLC (the “Lender”) from exercising their purported right to sell certain partnership interests in Plaintiffs HH Cincinnati Textile L.P. and HH KC Mark Twain, L.P. (together, the “Borrowers”).

On June 8, 2018, this Court granted a temporary restraining order restraining Defendants from proceeding with the proposed sale, scheduled to occur on June 12, 2018, until argument on Plaintiffs’ motion for a preliminary injunction could be heard. On June 19, 2018, the Court heard oral argument on Plaintiffs’ motion for a preliminary injunction and that motion is denied for the reasons stated *infra*.

## Background

This case arises from two real estate redevelopment projects in Kansas City and Cincinnati. In 2016, Borrowers and Lender entered into a loan agreement in the principal amount of \$20,300,000. The loan was secured, in large part, by two forms of collateral: a mortgage on the underlying real property, and a pledge by Defendants HH Mark Twain LP and Hudson KC Real Estate Manager LLC (together, the “Pledgors”) of their equity interests in the Borrowers. The loan and pledge agreements provide that, upon default, Lender may foreclose upon the collateral.

It is undisputed that the loan matured on August 29, 2017, and that Borrowers have failed to pay the loan and are thus in default. Following the issuance of a notice of default, Lenders initiated a marketing campaign, in connection with a potential UCC foreclosure sale, for the sale of the equity interests in the Borrowers, pledged as collateral by the Pledgors.

Borrowers contend that the Lender, through a combination of the various agreements, has “clogged” the Borrowers’ equitable right to pay and discharge the mortgage debt before a foreclosure because of the Lender’s purported right to sell their secured interests in the owners of the same real property. Thus, Plaintiffs argue, the Lender cannot exercise a right that would dispose of the property interests under the pledge agreement through a UCC sale, because this would “clog” the Borrowers’ equitable right to pay and discharge the mortgage and reclaim the property before a foreclosure. Therefore, Plaintiffs seek a preliminary injunction enjoining the UCC sale.

## Legal Standard

“It is well settled that in order to be entitled to a preliminary injunction, a movant must clearly demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable injury

absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor." *St. Paul Fire & Marine Ins. Co. v. York Claims Serv., Inc.*, 308 A.D.2d 347, 348 (1st Dep't 2003). "Where monetary damages provide adequate compensation, a preliminary injunction will not issue[.]" *Thornock v. Kinderhill Corp.*, 702 F. Supp. 468, 471 (S.D.N.Y. 1988).

Here, any loss to the Plaintiffs' real estate investment is compensable by money damages. "Since [plaintiffs'] interest in the real estate is commercial, and the harm [they] fear[] is the loss of [their] investment, as opposed to loss of [their] home or a unique piece of property in which [they have] an unquantifiable interest, they can be compensated by damages and therefore cannot demonstrate irreparable harm." *Broadway 500 W. Monroe Mezz II LLC v. Transwestern Mezzanine Realty Partners II, LLC*, 80 A.D.3d 483, 915 (1st Dep't 2011) (internal quotations and citations omitted). "Defendants' legitimate exercise [] of their remedies upon default—in this case, foreclosure—cannot constitute irreparable harm to Plaintiffs.... In this case there is no dispute that the [loan] is valid, in default, and subject to foreclosure. That foreclosure then cannot, as a matter of law, cause irreparable harm to Plaintiffs." *YL Sheffield LLC v. Wells Fargo Bank, N.A.*, 2009 WL 6408598 (Sup. Ct. N.Y. Cty. July 29, 2009) (Fried, J.S.C.).

To the extent Plaintiffs argue that the potential loss of certain tax credits constitutes irreparable harm, that is simply not the case because lost "tax benefits, however difficult to compute they may be, are clearly compensable with money damages." *Sterling Fifth Assocs. v. Carpentille Corp.*, 5 A.D.3d 328, 329 (1st Dep't 2004).

Further, Plaintiffs' equitable right of redemption has not been, as they assert, "clogged" by the operative agreements. Plaintiffs, at this very moment, retain a right of redemption under UCC § 9-623, which provides that redemption may occur at any time before a secured party

disposes of the collateral at a foreclosure sale. Thus, the UCC provides a right of redemption if Plaintiffs can fulfill their obligations under the applicable agreements. Additionally, there is nothing to prevent Plaintiffs from taking part in the bidding process at the UCC sale.

For the reasons stated *supra*, Plaintiffs have failed to demonstrate that they will be irreparably harmed absent a grant of their motion for a preliminary injunction.

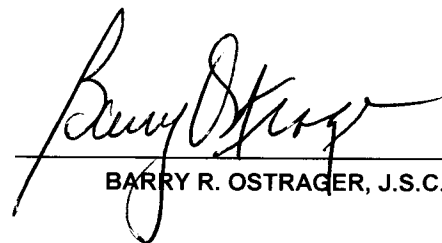
Accordingly, it is hereby

ORDERED that Plaintiffs' motion for a preliminary injunction is denied.

ORDERED that that part of the June 8, 2018 temporary restraining order enjoining the consummation of the Proposed UCC Sales is extended until June 20, 2018 at 2 p.m.

ORDERED that the parties shall appear for a preliminary conference on July 24, 2018 at 9:30 a.m.

6/19/2018  
DATE

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
DO NOT POST

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE