

893 4th Ave. Lofts LLC v 5AIF Nutmeg, LLC
2020 NY Slip Op 32752(U)
August 25, 2020
Supreme Court, Kings County
Docket Number: 511942/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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893 4th AVENUE LOFTS LLC & MICHAEL UHR,

Plaintiffs, Decision and order

- against -

Index No. 511942/20

5AIF NUTMEG, LLC, 5AIF MAPLE 2, LLC,
and 5 ARCH FUNDING CORP.,
-----X
Defendants,

August 25, 2020

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to enjoin the defendant from engaging in a UCC sale of the member and equity interest in 893 4th Avenue Lofts LLC or from taking any action to effectuate such sale. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On December 31, 2018 the parties entered into an agreement whereby the plaintiff borrowed money from the defendants to fund a construction project at property located at 893 4th Avenue in Kings County. The plaintiff Michael Uhr signed a pledge and security agreement which provided the security for the loan would be an interest in the plaintiff entity 893 4th Avenue LLC. The plaintiff fell behind in the payments and secured a loan extension on condition all arrears were satisfied. The Plaintiff paid the arrears of three months, namely, December 2019 and January and February 2020 and on February 27 satisfied all the conditions for the loan modification. However, plaintiff failed to make the March

2020 due a few days later on March 1. Since the failure to make that payment constituted a default the funds of the loan extension were not forwarded and the default remained. It is true that the March payment was ultimately made on March 18, 2020, however, by that time late fees had accrued which were not included. The defendants now seek to exercise their rights and conduct a UCC sale to sell the secured interests perfected in the loan agreement based upon the plaintiff's default. The plaintiff seeks to stay that sale on various grounds, specifically that orders of the Governor of New York as well as the Administrative Judge of the Courts of New York have stayed all such proceedings during the COVID-19 pandemic.

Conclusions of Law

In relevant part, CPLR §6301 allows the court to issue a preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v.

Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593 [2d Dept., 2009]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is the fact the plaintiff was entitled to the loan extension funds.

The loan modification agreement was executed on February 24, 2020 and it required the plaintiff to pay a fee and make the payments due for the prior three months. There is no dispute that such payments were made. The loan modification did not absolve or cure any other defaults or any prospective defaults. Thus, on March 1, 2020 the plaintiff failed to pay an interest payment due and thus a default occurred cancelling the loan modification. The defendant asserts the funds of the modification were first

requested on March 11, 2020 when the default had already occurred. The plaintiff disputes that contention and asserts the request was made prior to March 1. There is no evidence when precisely the request was made. An email dated February 21, 2020 from a member of the defendant that "once the extension is finalized you can start getting the draws right away" (see, Email from Brittany Armstrong, dated February 21, 2020) does not establish a request for funds. In any event, the plaintiff does not dispute the contention the March 1 payment due was not made until March 18. Thus, the plaintiff is really arguing the defendant should have provided the loan modification funds before March 1 so they could have benefitted from those funds before the default of March 1 occurred negating the possibility of receiving such funds. That is an improper basis upon which to demonstrate a likelihood of success on the merits. Thus, the plaintiff has failed to satisfy that it has a likelihood of success on the merits and cannot secure an injunction based upon those facts.

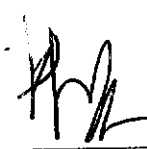
Next, the court will address the argument whether it is commercially reasonable to conduct a UCC during the current COVID-19 situation. Governor Cuomo issued Executive Order 202.28 which as relevant here stated that "there shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such

mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020" (id). In 1248 Assoc. Mezz II LLC v. 12E48 Mezz II LLC, 2020 WL 2569405 [Supreme Court New York County 2020] the court held that executive order does not include UCC sales which are not judicial proceedings. Thus, there is no basis upon which to stay the UCC sales contemplated in this case. Therefore, the motion seeking a preliminary injunction is denied. The UCC sales can take place no sooner than 45 days from the date of this decision.

So ordered.

ENTER:

DATED: August 25, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC