SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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LINCOLN STREET MEZZ II, LLC,

Plaintiff, Decision and order

- against - Index No. 530492/2021

ONE LINCOLN MEZZ 2 LLC,

Defendant, December 8, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved by order to show cause seeking to enjoin the defendant from engaging in a UCC sale of the member and equity interest in One Lincoln Mezz II LLC or from taking any action to effectuate such sale. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint, the property in this case, the State Street Financial Center in Boston, Massachusetts is owned by non-party Fortis Property Group LLC through its affiliates. Currently, there are four loans on the property, a mortgage loan administered by Morgan Stanley Mortgage Capital Holdings LLC in the amount of $535,000,000 and three subordinate mezzanine loans. The lender of the first mezzanine loan in the amount of $125,000,000 is CPPIB Credit Investments II Inc. The lender of the second mezzanine loan in the amount of $125,000,000 is the defendant who acquired the loan on June 24, 2021. The third mezzanine lender in the amount of $100,000,000 is KTB CRE Debt

Fund No. 7, A Korean Investment Trust.

Although the plaintiff had been negotiating with others to refinance the loans and secured refinancing for a majority of the outstanding debt the plaintiff defaulted on the loan on November 10, 2021. The following day the defendant sent a notice pursuant to Article 9 of the Uniform Commercial Code for the sale of collateral, namely the one hundred percent equity interest in defendant corporation pursuant to a Pledge and Security Agreement executed when the defendant purchased the loan on June 24. The sale has been scheduled for December 20, 2021. It should be noted the third mezzanine lender, KTB has scheduled a UCC foreclosure sale for December 21, 2021. The plaintiff has now moved seeking to stay the foreclosure sale noticed by the defendant. The defendant opposes the motion.

Conclusions of Law

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action... where the plaintiff has demanded and would be entitled to a judgement 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). A 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 Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d 690, 890 NY2d 593 [2d Dept., 2009]). Further, each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

The plaintiff argues it has established a likelihood of success on the merits by demonstrating the defendant failed to satisfy §9-627(b) of the Uniform Commercial Code. That provision requires that the "disposition of the collateral" must be "made in a commercially reasonable manner" whereby it is done "in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition" (id). The plaintiff provides three reasons why the proposed foreclosure sale date of December 20, 2021 is not commercially reasonable. First, the defendants present an affidavit from Alan Tantleff, an expert in commercial real estate who asserts the sale notice is not commercially reasonable for four reasons. Mr. Tantleff contends that "the timeline mandated in the Terms of Sale is convoluted and confusing" the "timeline is complicated by the Christmas and New Year's Eve holidays as the Scheduled Sale is being conducted at a time when many qualified bidders are likely to be on vacation; no value-maximizing seller would choose

this date as such timing will certainly minimize attendance and chill bidding" the "timeframe between the Notice of Sale and the Scheduled Sale is too short to allow for the necessary diligence of a very significant and complex asset" and that "by scheduling the Scheduled Sale within one day of the Third Mezz Scheduled Sale, the Secured Party has created the opportunity for confusion, which will ultimately chill bidding" (see, Affidavit of Alan Tantleff, ¶ 26). The second reason offered why the sale is commercially unreasonable, and addressed by Mr. Tantleff, is the defendant is seeking to "rush" the sale to take place one day prior to KTB's scheduled sale. There is no basis for this accelerated schedule, argues the plaintiff, since in any event KTB is subordinate to the defendant's loan. The third reason offered, also raised by Mr. Tantleff, is that the sale is scheduled to take place right before and indeed during the holiday season and this provides insufficient time for potential buyers to obtain the necessary financing. An examination of these reasons is now necessary.

In New York a disposition of collateral is commercially reasonable if made "in the usual matter on any recognized market...at the price current in any recognized market at the time of the disposition...or otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition" (see, NY UCC

§9-627(b). Further, pursuant to NY UCC §9-610(b) "every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable" (id). Therefore, in Bankers Trust Company v. J.V. Dowler Company Inc., 47 NY2d 128, 417 NYS2d 47 [1979] the court explained that since the statute does not provide further particularization about commercial reasonableness, therefore, accepted business practices must be a guide when evaluating such reasonableness. Thus, "customs and usages that actually govern the members of a business calling day-in and day-out not only provide a creditor with standards that are well recognized, but tend to reflect a practical wisdom born of accumulated experience" (id). The court further offered two reasons inherent in the mechanisms noted, either to achieve the highest possible price or to insure proper procedures are employed. However, prior to the sale the only considerations that must be examined are whether the procedures were proper.

Mr. Tantleff argues that scheduling the sale the day before the third mezzanine lender's proposed sale date creates confusion which could chill bidding. This is true because "a potential bidder may incorrectly assume several things such as: i) that the notice of the Scheduled Sale is simply a re-noticing of the Third Mezz Scheduled Sale; ii) that the Third Mezz Scheduled Sale was moved to a day earlier; iii) that its participation in the Third

Mezz Scheduled Sale would automatically register it as a participant in the Scheduled Sale; or iv) the total disregard of the notice. There could be confusion as to the dates by which bidders need to register or post deposits as a precursor to bidding. Unfortunately, such opportunity for confusion could erroneously lead a potential bidder to be excluded from participation in the Scheduled Sale and a deleterious effect on the auction" (see, Affidavit of Alan Tantleff, ¶ 62). In truth, it is difficult to imagine a sophisticated bidder, and only a sophisticated bidder would be interested in such an expensive property, could make such elementary and easily verifiable mistakes. The fears offered and assumptions raised that could confuse a bidder are not likely to exist given the magnitude and scope of the loans under consideration. Only extremely well funded and well counseled bidders have the wherewithal to participate in these bids. Such individuals are unlikely to be confused by the issues raised by Mr. Tantleff. There is surely no likelihood of such mistakes sufficient to argue the notices served were improper as a matter of law.

Concerning the argument the date of the hearing occurs during the holiday season, there are cases that hold service during the holiday season raises questions whether the notice was commercially reasonable. In Commercial Credit Group Inc., v. Barber, 682 SE2d 760, 199 N.C.App 731 [Court of Appeals of North

Carolina, 1999] the court held that scheduling an auction two days after Christmas and providing notices a mere two days beforehand was not commercially reasonable. However, the court specifically noted the collateral in that case was a "highly specialized and expensive piece of inoperable machinery" that had a "narrow commercial use" and the notices therefore did not "enhance competitive bidding" (id). Further, in Highland CDO Opportunity Master Fund LP v. Citibank N.A., 2016 WL 1267781 [S.D.N.Y. 2016] a party introduced an expert affidavit that opined that bids due on December 31 was commercially unreasonable because on the last day of the year "'most broker-dealers and investors are only partially staffed,' '[m]any or most of the senior personnel take the day off, and typically a skeleton crew is in place to conduct any minor business that may come up'; moreover, 'most buy-side (investment) firms close their books well before Christmas, year after year' and thus 'most potential bidders for an auction held on the last day of the year would not have been able to participate'" (id). The court held this raised questions of fact whether the notice was commercially reasonable.

In this case, however, the notices were publicized on November 11, 2021, well before any holiday season. The mere fact the actual sale is a few days before a holiday and might interfere with an overarching and extended holiday season does not mean the sale is commercially unreasonable as a matter of

law. Thus, detailed information about vacation habits, flight availability and reduced work hours do not have any bearing on notices sent in early November. To argue otherwise would virtually eliminate most of the year as appropriate for scheduling a sale, after all, holidays and vacations are always approaching and can interfere with a steady and uninterrupted work flow. That is precisely why the few courts that have found such unreasonable notice dates as noted above, were instances where the dates were literally within a day or two of a holiday, objectively commercially unreasonable dates. Lastly, the agreement between the parties does not dictate certain periods of time where the scheduling of any foreclose sale may not occur. Surely, in this case there is no likelihood of success that such schedule is unreasonable as a matter of law.

Furthermore, the mere fact the defendant has scheduled the sale a day before the third mezzanine lender KTB does not mean the schedule is commercially unreasonable. Indeed, the plaintiff has failed to demonstrate the precise unreasonableness of the schedule. Other than assertions of confusion which, as noted, the court finds unpersuasive, Mr. Tantleff proffers that he is "not aware of a legitimate commercial reason for such scheduling" (see, Affidavit of Alan Tantleff, ¶ 61). Whether there is a legitimate commercial reason for scheduling the sale a day before KTB's does not mean such schedule is commercially unreasonable as

a matter of law or that there is a likelihood such schedule is commercially unreasonable.

Even if the plaintiff could establish a likelihood of success, the plaintiff would also be required to demonstrate a irreparable harm. In order to satisfy the second prong of irreparable harm it must be demonstrated that monetary damages are insufficient (DiFabio v. Omnipoint Communications Inc., 66 AD3d 635, 887 NYS2d 168 [2d Dept., 2009]). The plaintiff presents two reasons why the harm they could suffer is not merely monetary. First, they assert the agreement provides that where the lender has acted unreasonably then the "borrower's sole remedy shall be limited to commencing an action seeking injunctive relief or declaratory judgment" (see, Amended and Restated Second Mezzanine Loan Agreement, §11.12) rendering any monetary award unavailable. However, that provision necessarily requires a finding the defendant acted "unreasonably" (id). The plaintiff does not explain the unreasonable "claim or adjudication" (id) that would permit injunctive relief except to note that the injunction is permitted "to halt the unlawful conduct" (see, Affirmation in Support, page 10). Indeed, in the complaint the plaintiff elides this requirement by simply asserting that it "has no other effective remedy besides an injunction to protect its rights because it cannot recover money damages from Defendant" (see, Complaint, ¶ 34). In Omni

Berkshire Corporation v. Wells Fargo Bank, N.A., 2003 WL 1900822 [S.D.N.Y. 2003] upon which the plaintiff relies, the borrower, Omni, sued and sought an injunction preventing the defendant Wells Fargo from purchasing terrorism insurance and then charging the plaintiff for the premiums. The agreement in that case contained a provision similar to §11.12 in this case which foreclosed any action for monetary damages and only allowed injunctive relief. The court granted the injunction holding that "even though the threatened injury—the cost of premiums—is one that ordinarily would be fully compensable by money damages, §10.12 of the Agreement appears to preclude Omni from suing Wells Fargo for money damages. Section 10.12 provides that where a claim is made that the Lender or its agents acted 'unreasonably,' neither Lender nor any of its agents is liable for money damages and Omni's 'sole' remedy is to seek injunctive or declaratory relief. As one of the principal issues presented is whether Wells Fargo's request that Omni obtain terrorism insurance is reasonable, it would appear that Omni would not be able to recover the cost of premiums as damages if it turns out, upon a trial on the merits, that it is not required to obtain terrorism insurance. Hence, Omni will suffer irreparable harm" (id).

In this case there is no allegation or claim the defendant acted unreasonably, a necessary precondition to avail itself of injunctive relief. To the extent the unreasonable conduct is the

notice date of the foreclosure sale, it has already been determined that was not unreasonable. Moreover, arguing that an irreparable injury exists because there is a likelihood of success on merits on the very grounds that gives rise to the irreparable injury impermissibly conflates these two prongs of the preliminary injunction standard (Floyd v. City of New York, 959 F.Supp2d 691 [S.D.N.Y. 2013]). Therefore, the agreement itself does not provide any basis that any money damages is insufficient.

Next, the plaintiff argues it must be entitled to injunctive relief because the foreclosure sale will result in a loss of property which cannot be replaced with any money damages. However, the plaintiff does not own the real property. The plaintiff owns one hundred percent of the shares of a corporation that indirectly owns the property. There are no cases that hold that ownership interests in such an entity is the equivalent of an ownership interest in real property sufficient to render the interest unique and thereby entitle the party to injunctive relief. On the contrary, the authority a mezzanine loan does not confer any ownership in real property abounds. Thus, "in the real estate industry a mezzanine financing refers to a loan secured principally by the borrower's equity in other entities. Unlike conventional mortgage financing where the borrower owns real estate, a mezzanine borrower doesn't directly own any real

property nor does it operate any business—it acts merely as a sort of holding company. A mezzanine borrower typically only owns equity in a family of other subsidiaries, and these other subsidiaries actually own the underlying real property. Therefore, the value of the mezzanine borrower's collateral is derived solely from its indirect ownership of the underlying real property" (see, Andrew Berman, *Once a Mortgage, Always a Mortgage"—The Use (and Misuse of) Mezzanine Loans and Preferred Equity Investments*, 11 Stan. J.L. Bus. & Fin. 76, 79, 106-107, 114 [Autumn 2005]). Further, in Hotel 71 Mezz Lender LLC v. Falor, 14 NY3d 303, 900 NYS2d 698 [2010] the court noted that such loans are "secured not by the real property itself, but by stock of or some ownership interest in the company that owns the real property" (id at Footnote 1). Again, in Gaia House Mezz LLC v. State Street Bank and Trust Company, 720 F3d 84 [2d Cir. 2013] in footnote 1 the court explained that "a mezzanine loan is junior loan secured by a pledge of equity interests in a particular company" (id). In William Rothschild, *Mezzanine Loans: The Lesser of Two Evils?*, 31 No. 5 Prac. Real Est. Law. 55 [September 2015] the author explains that "the mezzanine borrower is typically a single asset entity, whose sole asset is its ownership interest in the mortgage borrower. The mezzanine loan is secured by a pledge in favor of the mezzanine lender of the mezzanine borrower's equity interests in the mortgage borrower.

The mezzanine loan is not secured by a lien on the real property, an assignment of leases and rents or any other asset which is collateral for the mortgage loan" (id). Therefore, there is no basis for the plaintiff to argue that it maintains an interest in property that is unique that cannot consequently be compensated in money damages.

The plaintiff further argues that "the plaintiff ultimately owns the State Street Owner, the entity that owns and operates the State Street Financial Center. If the Foreclosure happens as planned, plaintiff will immediately lose its valuable control and management rights over all the State Street Financial Center operations, which in and of itself constitutes irreparable harm. Plaintiff's loss of control over operations of the Property will also eliminate its ability to control public perception of the State Street Financial Center name" (see, Affirmation in Support, page 13). That argument, however, is the same argument already raised, namely that the plaintiff maintains an ownership interest in the real property sufficient to confer irreparable harm. As noted, the plaintiff maintains no such interest. The interest the plaintiff maintains was negotiated between the parties and the plaintiff was fully aware of the limits, parameters and benefits of a mezzanine loan. No such irreparable harm can result if the foreclosure auction takes place.

Therefore, based on the foregoing, the motion seeking an

injunction staying the foreclosure sale is denied.

So ordered.

ENTER:

Dated: December 8, 2021
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC