

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-008390

07/25/2017

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

C P F VASEO ASSOCIATES L L C

TODD A BURGESS

v.

BRUCE W GRAY, et al.

JOHN NEIL STUART

WELLS FARGO BANK
LEVY PROCESSING MAC S3928-021
PO BOX 29779
PHOENIX AZ 85038

MINUTE ENTRY RULING ON APPLICATION FOR PROVISIONAL REMEDIES AND
PRELIMINARY INJUNCTION

Plaintiff CPF Vaseo Associates, LLC (“CPF”) has applied for provisional remedies and a preliminary injunction against Bruce and Barbara Gray. The Court held an evidentiary hearing on July 20, 2017. The Court has considered the evidence.

By way of background, the parties are not strangers to the Court. On February 22, 2017, we had a provisional remedies hearing pursuant to A.R.S. § 12-2410(C). By minute entry dated February 24, 2017, this Court found that CPF established the probable validity of its claims against the Grays. The Court granted a limited writ of attachment against property located at 5340 East San Miguel and a writ of garnishment to Well Fargo. Since that time, CPF has filed a bond in excess of \$34 million. Later, after significant motion practice, the Court allowed CPF to take discovery on the Grays’ assets.

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The essential facts are as follows. Plaintiff is the successor in interest on a \$3.7 million loan made to East of Epicenter LLC. This loan was secured by a deed of trust on certain property. Plaintiff is also the successor in interest on a \$26.5 million loan made to Sonoran Desert Land Investors LLC and Gray Phoenix Desert Ridge II, LLC. This loan was also secured by other property. Mr. Gray personally guaranteed both loans. Ms. Gray personally guaranteed the larger loan. Both loans are unpaid, and the amount owed is greater than \$34 million. East of Epicenter, Sonoran Desert Land Investors and Gray Phoenix Desert Ridge II are all in bankruptcy. CPF brings this action against the Grays based on their guarantees which are unsecured.

The loans rack up interest at a rate of 18%. In addition, the loans have a “late fee” penalty of \$1,500/day and \$10,000/day, respectively.

The Court will address the request for provisional remedies and a preliminary injunction below.

I. APPLICATION FOR PROVISIONAL REMEDIES

Pursuant to A.R.S. § 12-2410(C), the Court’s role is limited to the following issues: 1) the probable validity of CPF’s claims and 2) whether CPF has met the statutory requirements for the provisional remedy sought. Each of these issues will be discussed below.

A. Probable Validity of CPF’s Claims, Including any Defenses and Personal Exemptions

After the earlier provisional remedies hearing, this Court found that CPF “established the probable validity of its claims against the Grays.” Minute Entry 2/24/2017 at 2. At the previous hearing, the Grays argued that CPF breached the covenant of good faith and fair dealing by wrongfully submitting a property appraisal that scotched a deal with Guefen. Based on evidence presented at the February 22, 2017 hearing, the Court was skeptical of this claim. Evidence at the most recent hearing cements this Court’s prior conclusion. Mr. Kulkarni, Guefen’s representative, testified that the only reason Guefen failed to close on the Blue Sky property was that it was unable to find an equity partner. Mr. Kulkarni had not heard of CPF, was unaware of the CPF appraisal and CPF didn’t interfere with the sale.

Testimony that Mr. Gray worked hard to try to close the Guefen deal doesn’t change the analysis. Of course Mr. Gray would work hard to close a deal to sell two-thirds of the Blue Sky property for \$36 million. The issue, however, is not Mr. Gray’s intent or belief. The issue is whether CPF’s bad faith conduct caused Guefen to back out of the deal. Based on the two

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hearings, persuasive evidence indicates that CPF's conduct had nothing to do with Guefen's failure to close on the Blue Sky contract.

The Court finds that, once again, CPF established the probable validity of its claims against the Grays in an amount more than \$34 million. The Court adopts by reference its February 24, 2017 minute entry as supplemented by this Order.

B. Has CPF Met Statutory Requirements?

Defendants argue that plaintiff has not supplied a proper bond because the bond is \$34 million and plaintiff is claiming damages in excess of \$40 million and because the bond is not tailored for the supplemental relief. The Court rejects this argument in part and accepts it in part. The Court in its earlier ruling found that plaintiff had probable validity to a claim for at least \$34 million. The Court finds that CPF has satisfied certain statutory requirements to obtain pre-judgment writs. Even though plaintiff claims damages in excess of \$34 million, plaintiff need not provide a bond greater than that amount provided that CPF doesn't execute on writs above that amount. Evidence establishes that the properties and accounts upon which plaintiff seek writs will not come close to \$34 million. On the other hand, the bond will need to be amended to specifically conform to the statutes for the supplemental relief ordered.

The Court also finds that testimony under oath satisfies the statutory requirement that certain items be alleged under oath. *See* A.R.S. § 12-2404(A). The testimony under oath satisfies this affidavit requirement.¹

1. The Court cannot issue a writ of attachment on the La Jolla Properties unless Arizona annexes San Diego County

Plaintiff seeks a writ of attachment against two properties owned by Mr. Gray's single member entities in La Jolla, California. The first vacation home, the "Camino House," is estimated to be currently worth between \$12.5 million and \$14 million, and has encumbrances of approximately \$6 million. The second home, the "Olivet House," is currently estimated to be worth \$4.25 million and has encumbrances of approximately \$2.5 million. The Court finds that Mr. Gray included these properties as part of his personal financial statement and indicated that he owned the properties. There is no question that he owns the properties pursuant to a single member entity and that the properties have equity. *See* Exhibit 70.

1. The Court interprets the affidavit requirement generously in plaintiff's favor since many of the financial records in this case have been placed under seal with an "attorneys' eyes only" designation.

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But this Court does not have jurisdiction over real estate in California. *See* 1 Clark on Receivers § 318 (3d ed. 1959). In receivership cases, a receiver must apply to the court in the situs state (the state where the real estate is located) for the appointment of an ancillary receiver. *Id.* If plaintiff wants to get a writ of attachment on California properties, plaintiff will need to turn to a California court.

IT IS ORDERED that the application for a writ of attachment against the La Jolla, California properties is denied for lack of jurisdiction.

2. CPF satisfied provisional remedy requirements for attaching the Grays' residence located in Paradise Valley, Arizona

The Grays have nearly \$1 million in equity in their Paradise Valley residence located at 6001 North 51st Place, Paradise Valley, Arizona. The Court finds that this property is identified with sufficient particularity and is supported by testimony under oath. The Court finds that the statutory requirements for the issuance of a writ of attachment have been met for the Paradise Valley property pending, of course, and appropriate amendment to the bond.

IT IS ORDERED that the Court authorizes the issuance of a writ of attachment in an amount not to exceed \$34,251,780.83 against property located at 6001 N. 51st Place, Paradise Valley, Arizona, conditioned upon evidence of a filed bond, and upon compliance with the other procedural requirements of A.R.S § 12-2401 *et seq.*

3. CPF satisfied provisional remedy requirements for some writs of garnishment

The names of the entities from which CPF requested provisional relief are unclear. In fact, the supplemental application doesn't identify a single entity. (The names of the entities are provided in Exhibit 3.) The Court finds insufficient evidence that GTTL Optionee LLC, and Gray Development Group LLC owe Mr. Gray any nonexempt amounts. The Court was not persuaded that Gray Development Group is an active entity and insufficient evidence was presented that GTTL owes Mr. Gray money. However, sworn testimony supports a claim that Mr. Gray is owed approximately \$2.7 million by Gray/Western Development Company. Testimony under oath established that Mr. Gray has transferred money between himself and closely held entities during the pendency of this case. Exhibit T and testimony establishes that NSHE CA BULLS, LLC owes Mr. Gray money on the Camino house.

Contingent upon the appropriate amendment to the bond, the Court grants the provisional relief requested concerning Gray/Western Development Company and NSHE CA BULLS, LLC.

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IT IS ORDERED that the Court authorizes the issuance of a provisional writ of garnishment for nonexempt amounts in an amount not to exceed \$34,251,780.83 to Gray/Western Development Company and NSHE CA BULLS, LLC, conditioned upon the filing of an appropriate application and bond, and upon compliance with the other procedural requirements of A.R.S § 12-1570 *et seq.*

II. APPLICATION FOR PRELIMINARY INJUNCTION

Plaintiff requests that this Court issue a preliminary injunction against the Grays prohibiting the defendants from “selling, transferring, loaning, assigning, alienating, diverting, or encumbering any assets owned by or owing to Defendants Bruce and Barbara Gray during the pendency of this case except as approved by the Court.” Application for Preliminary Injunction at 1:16-20.

Defendants first argue that the application for a preliminary injunction should be dismissed as a matter of law because plaintiff cannot use Rule 65 to circumvent Arizona’s provisional remedy statutes. The Court heard oral argument on this motion and took the matter under advisement. The Court then heard evidence going to the merits of plaintiff’s application for a preliminary injunction. The Court will address both the motion to dismiss and the merits.

A. Motion to Dismiss

The Court agrees with defendants that, in this case, a creditor may not utilize preliminary injunctive relief to obtain a blanket pre-judgment order over all of a debtor’s assets. Both *Cloeter v. Superior Court*, 86 Ariz. 400 (1959) and *Ayer v. General Dynamics Corp.*, 128 Ariz. 324 (App. 1980), provide support for defendants’ position. Those cases stand for the proposition that equitable remedies cannot be used as a substitute for provisional remedies. The fact that plaintiff has obtained a substantial bond does not change the analysis.

The Court also draws upon *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 333 (1999). In that case, the Supreme Court held that a federal district court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents’ contract claim for monetary damages. Although *Grupo* addressed a federal statute and therefore is not directly on point, the Court agrees with *Grupo*’s concerns that injunctions could render state prejudgment remedies a “virtual irrelevance” and would “radically alter” the balance between creditor and debtor rights.

In addition, plaintiff’s request is to make this Court a *de facto* receiver on a pre-judgment claim. Given the extraordinarily contentious relations (*i.e.*, “animosity”) between the parties, the Court believes that the relief requested by plaintiff is at best administratively unworkable and is

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at worst a nightmare that would consume far too much of this Court's time. (The Court finds Mr. Gray persuasive when he testified that, if granted, "We'd spend a lot of time here.")

IT IS ORDERED that defendants' motion to dismiss is granted.

B. The Application on its Merits

The Court recognizes that its ruling on the motion to dismiss renders a discussion of the merits moot. Nevertheless, if the Court addresses the merits of plaintiff's claim, the Court finds that plaintiff failed to establish the factual basis for a preliminary injunction.

An applicant for a preliminary injunction must show: (1) a strong likelihood of succeeding on the merits; (2) the possibility of irreparable injury not remediable by damages if relief is withheld; (3) a balance of the equities in its favor; and (4) that public policy favors granting the relief. *IB Property Holdings, LLC v. Rancho Del Mar Apartments, Ltd. Partnership*, 228 Ariz. 61, 64 – 65, ¶ 9 (App. 2011); *Smith v. Arizona Citizens Commission*, 212 Ariz. 407, 410-11 (2006). This test is flexible based on specific facts and circumstances, and is a sliding scale. *Id.* The Court will address each of these factors.

1. Likelihood of success on the merits

The issue of success on the merits is a close call. To be sure, plaintiff clearly established a strong likelihood of prevailing on the claim that defendants owe plaintiff well in excess of \$34 million. Mr. Gray admits he hasn't paid a dime on the guarantees in question. There also is strong evidence supporting plaintiff's argument that Mr. Gray is round-tripping funds through and between his various entities in an effort to avoid plaintiff's provisional remedy actions. However, the issue of whether the Grays will owe plaintiff any money in excess of the money owed by Mr. Gray's three bankrupt entities is a closer call.²

But even if plaintiff demonstrated a strong likelihood of success, the Court would decline to issue the preliminary injunction due to the lack of irreparable harm, equity and public policy.

2. Irreparable harm

A party seeking an injunction must show a possibility of irreparable injury "not remediable by damages. Monetary damages may provide an adequate remedy at law." *IB Holdings, supra* at 65, ¶ 10.

2. There is a question about whether the \$11,500/day late fee on the two loans will be enforced by the bankruptcy court. If so, the late fees would not be secured by property in the bankruptcy.

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The Court finds that plaintiff failed to demonstrate irreparable harm. CPF's suit against the Grays is for a personal guaranty. The underlying loan is secured by property, and the Court was not persuaded that the amount owed by the Grays is significantly greater than the value of the property. (Judge Wanslee recently valued the 20 acres at \$27 million and plaintiff values Blue Sky at \$22.47 million.) Persuasive evidence provides that the security interest is worth more than \$50 million. Moreover, the Court was not persuaded that the Grays lack the financial wherewithal to pay any amount owed to CPF above and beyond the secured interests in the properties.

In short, the Court looks at the issue of irreparable harm as follows: even if one assumes that a year from now plaintiff will have a judgment against the Grays, a significant portion (if not all) of that judgment would also be secured by property pursuant to the loans to East of Epicenter, Sonoran Desert Land Investors and Gray Phoenix Desert Ridge II. Even if Mr. Gray is moving assets among his wholly owned entities to avoid provisional remedies, the Court was not persuaded by the preponderance of the evidence that Mr. Gray is dissipating assets to the extent he will be unable to pay the future judgment. There was no persuasive evidence that Mr. Gray is moving assets to third parties or to entities he does not control. Plaintiff has not made a claim under the Fraudulent Conveyance Act. Monetary damages provide an adequate remedy at law.

3. Balance of equities

The Court finds that the balance of equities tips in favor of defendants. As previously noted, the instant action is a claim against the Grays based on a guaranty on a loan that is secured by property. The Court finds that the injunction would severely inhibit Mr. and Ms. Gray's ability to do business.

Moreover, plaintiff's past conduct places equity on defendants' side. Plaintiff lost credibility in its hyper-aggressive misuse of this Court's February 24, 2017 order. This Court agrees with the California judge when she stated that plaintiff's position was frivolous. How anyone could argue that a judgment could be placed on defendants' California property based on my February 24, 2017 Order boggles the mind. That order wasn't ambiguous. It stated: "As previously noted, the Court declines to issue a blanket attachment order for properties not identified in the application." The Order didn't mention any California property. Moreover, the minute entry reflects what I said at the hearing when I indicated that I would not issue a blanket attachment. The Court will leave to the California court the issue of sanctions, but misuse of this Court's order places plaintiff on the side opposite angels.

In short, misuse of this Court's prior order causes this Court to question plaintiff's credibility and motives. Equity cuts against an injunction.

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4. Public policy

The Court finds that public policy tilts against the injunction. As previously noted, the relief requested by plaintiff is administratively difficult. (The Court is not going to oversee the negotiations of a “budget” for the Grays.) This Court has neither the time nor the inclination to become involved in reviewing the daily operations of Mr. Gray’s businesses on a pre-judgment basis.

C. Orders

After weighing these factors, the Court finds that plaintiff failed to demonstrate its entitlement to a preliminary injunction.

IT IS ORDERED that plaintiff’s application for a preliminary injunction is denied.