

EAM Land Servs., Inc. v Ideal Mtge. Bankers, Ltd.

2010 NY Slip Op 31425(U)

May 27, 2010

Supreme Court, Nassau County

Docket Number: 025102/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

EAM LAND SERVICES, INC.,

Plaintiff,

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 025102/09

MOTION DATE: April 6, 2010
Motion Sequence # 002, 003, 004,
005

-against-

IDEAL MORTGAGE BANKERS, LTD., d/b/a
LEND AMERICA d/b/a CONSUMER FIRST
LENDING KEY, EAM SETTLEMENT
SERVICES INC., MICHAEL PRIMEAU,
MICHAEL HOWARD ASHLEY, HELENE
DECILLIS, DAWN MANERI, GWEN LUCAS,
DIANA RODRIGUEZ, CAPITAL ONE BANK,
N.A. AND "JOHN DOE #1" through "JOHN
DOE #10", the last ten names being fictitious and
unknown to the plaintiff, if any, having or claiming
an interest in the funds to be restrained,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Order to Show Cause..... XXX
Affirmation in Opposition..... XX
Affirmation in Support..... X
Reply Affirmation XX

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Motion by Ann Marie Steadfast and Doreen Grafnecker to intervene as of right is **granted** to the extent indicated below. Motion by intervenors to modify the order directing turnover and payment dated December 23, 2009 is **denied** with leave to renew upon proper papers. Motion by intervenors to vacate the restraints on the employees' 401k accounts is **granted** to the extent indicated below. Motion by defendant Capital One for a declaration that Standby Letter of Credit No. 30001895 is not subject to the preliminary injunction issued by the court on January 19, 2010 is **denied**.

This action arises from a fraudulent scheme by defendant Ideal Mortgage Bankers doing business as Lend America. Between September 1 and October 31, 2009, Lend America received the proceeds of certain mortgage loans, without paying off the original loans which were intended to be refinanced. Plaintiff EAM Land Services, Inc. is a title insurance company which issued title insurance covering certain of the mortgage transactions.

On December 23, 2009, the court issued an order directing defendant Capital One, and any other party holding assets of defendant Lend America, to turn over the funds to plaintiff's attorney, LaMonica Herbst & Maniscalco, LLP. The order further directed plaintiff's attorney to segregate those funds in a separate attorney's escrow account for the benefit of certain borrowers whose mortgages had not been paid off by Lend America. However, the order provided that the sum of \$300,000 was to be retained in the Lend America payroll account and disbursed to certain former employees of Lend America, upon presentation of payroll checks, and for payroll taxes.

On January 19, 2010, the court issued a preliminary injunction, which, among other relief, restrained Lend America from removing any funds from any account maintained at defendant Capital One, N.A. The preliminary injunction also prohibited Lend America from disposing of or alienating any of its assets. The motion for the preliminary injunction was brought on by an order to show cause dated December 9, 2009, which contained a temporary restraining order.

Proposed intervenors Annmarie Standfast and Doreen Grafenecker are employees of Lend America who seek to intervene as of right pursuant to CPLR § 1012. Intervenors seek to challenge the order of December 23, 2009 to the extent that it prevented Lend America from making required health insurance premium contributions and prevented the employees from accessing their 401k plans. Intervenors submit a proposed complaint which asserts claims against EAM Land Services under the Employee Retirement Income Security Act and

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common law for interference with the employees' welfare and pension benefits (See CPLR § 1014). Plaintiffs purport to assert the complaint on behalf of themselves and all similarly situated employees.

CPLR § 1012(3) provides that upon timely motion, any person shall be permitted to intervene in any action when the action involves "the disposition or distribution of...property and the person may be affected adversely by the judgment." The present action clearly involves the disposition or distribution of Lend America's funds which have been paid into escrow for the benefit of the mortgagors as well as those funds which were retained in the payroll account. Furthermore, proposed intervenors may be affected adversely by the judgment. Accordingly, proposed intervenors' motion to intervene as of right is **granted** to the extent that they may intervene as defendants in the present action. Intervenors' proposed intervention complaint is deemed an answer which asserts a counterclaim against the plaintiff. Plaintiff shall serve its reply to the counterclaim within fifteen days of service of a copy of this order. The court expresses no opinion at this stage whether the counterclaim should be maintained as a class action.

Intervenors seek to modify the court's order of December 23, 2009 to the extent of permitting the release of funds for the payment of various employee benefits. According to counsel for PSS Settlement Services, LLC, which is the plaintiff in a related action brought against defendants Ideal Mortgage Bankers and Lend America, No. 248-10, all of the employee claims have been resolved except a claim for sick leave and vacation time in the amount of \$304,925.13. The court notes that intervenors do not submit any contracts, employment manuals, or payroll records to support their claim for sick leave or vacation benefits. Accordingly, intervenor's motion to modify the order to permit the release of funds is **denied** with leave to renew upon proper papers with respect to sick leave and vacation benefits.

Intervenors seek an order directing nonparty John Hancock Life Insurance to pay the 401k accounts belonging to the Lend America employees to the employees or, in the alternative, modifying the order of December 23, 2009 to the extent of directing LaMonica Herbst & Maniscalco to release \$8,500 to John Hancock Life Insurance for the purpose of paying out the 401k accounts. The court notes that, as an exhibit to the order to show cause seeking payment of employee benefits, intervenors submit a letter from Economic Group Pension Services, Inc. to Ideal Mortgage Bankers. In the letter, which is dated June 24, 2009, Economic Group requests payment in the amount of \$8,500 in order to prepare the necessary documents to terminate the 401k plan. There appearing no opposition to intervenors' motion with respect to the 401k plan, the motion is **granted** to the extent of directing LaMonica

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Herbst & Maniscalco to release to Economic Group Pension Services the sum of \$8,500, provided that Economic Group and John Hancock Life agree to terminate the plan and pay the balances to the employees for that amount of compensation.

Capital One requests a declaration that the preliminary injunction does not prohibit the bank from honoring an irrevocable standby letter of credit which it issued on April 4, 2008. The standby letter of credit was issued upon the application of Ideal Mortgage Bankers in favor of RA 520 Broadhollow Road LLC for an amount not to exceed \$594,340.30. In the letter of credit, Capital One undertakes to promptly honor RA 520's sight drafts drawn on Capital One. The letter of credit was for a term of one year and was to renew automatically unless notice of nonrenewal was given at least 60 days prior to expiration. RA 520 is Lend America's landlord. On December 29, 2009, Capital One paid a draft in the amount of \$151,060.25 which had been submitted by RA 520. On January 21, 2010, Capital One paid another draft which had been submitted by RA 520 in the amount of \$166,780.89. On February 22, 2010, Capital One paid a draft in the amount of \$149,534.44. On March 10, 2010, RA 520 submitted a draft in the amount of \$126,964.72. Defendant Capital One requests a declaration that the standby letter of credit issued in favor of RA 520 is not covered by the preliminary injunction.

“Letters of credit are commercial instruments that provide a seller or lender (the beneficiary) with a guaranteed means of payment from a creditworthy third party (the issuer) in lieu of relying solely on the financial status of a buyer or borrower (the applicant)” (*Nissho Iwai v Korea Bank*, 99 NY2d 115, 119 [2002]). Historically, letters of credit have been used to assure predictability and stability in mercantile transactions by diminishing a seller's risk of nonpayment and a buyer's risk of nondelivery due to insufficient funds. These “commercial” or “documentary” letters of credit are used as a substitute for money in a sales contract; the issuing bank pays the beneficiary upon certification of satisfactory performance in the underlying agreement (Id).

Letters of credit have evolved to serve an additional purpose--to provide security in the event of a default in payment owed under a separate agreement, such as a loan (Id). A letter of credit serving this objective is referred to as a “standby” letter of credit because it is payable only upon proof of the applicant's nonperformance or default (Id at 120). Thus, a commercial letter of credit substitutes as the primary means of payment, while a standby letter of credit is used secondarily after the beneficiary fails to obtain payment from the applicant (Id). A letter of credit of either type must be strictly construed and performed in

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compliance with its stated terms (Id at 121).

UCC § 4-303 provides that “legal process served upon...a payor bank,...comes too late to...[terminate the bank’s right or duty to pay an item] if the...legal process is received...after the bank has...accepted or certified the item....” Thus, a restraining notice served after a bank has accepted a draft drawn on a letter of credit is ineffective (First Commercial Bank v Gotham, 64 NY2d 287 [1985]).

Capital One argues that the funds which it used to pay the drafts did not belong to Ideal Mortgage and the court’s preliminary injunction “inhibits” Capital One’s payment obligations. Nevertheless, service of the preliminary injunction on Capital One suspended its obligation to pay or accept drafts pursuant to the letter of credit. Moreover, the court notes that the instrument was a standby letter of credit which was to be used by RA 520 only after it failed to obtain payment from the tenant.

Accordingly, the court issues a declaration that Letter of Credit No. 30001895 is subject to the preliminary injunction issued on January 19, 2010 and the temporary restraining order. The temporary restraining order was effective as to the draft paid on December 29, 2009, and each subsequent draft, provided that service of the order to show cause upon Capital One was promptly made.

So ordered.

Dated 27 May '10

Stephen A. Buccare
J.S.C.

ENTERED
JUN 03 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE