UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRIME ALLIANCE BANK, INC.,
a Utah banking corporation;
and SERTANT CAPITAL, LLC,
a Delaware limited liability company,

Plaintiffs

v

THE GREAT LAKES TISSUE COMPANY,
a Michigan corporation,

Defendant.
_____/

Case No. 1:23-cv-10564-LJM-PTM
Hon. Laurie J. Michelson

OPPOSITION TO MOTION FOR POSSESSION

The Court should deny Plaintiffs', Prime Alliance Bank, Inc. ("PAB"), and Sertant Capital, LLC ("Sertant") (collectively, "Lenders") Motion for Possession (the "Motion") because Plaintiffs have failed to demonstrate any of the elements to establish the extraordinary relief that Plaintiffs demand. As shown below, both the Lenders and Defendant The Great Lakes Tissue Company ("GLT") appear to have been deceived by the same bad actor, a former shareholder of GLT that sold off the assets and receivables of GLT without authority, opened up a secret bank account, drained the bank account leaving no trace of where the missing money went, sold the remaining husk of GLT to the existing ownership without disclosing his activities, and then closed the account leaving both the Lenders and GLT holding the bag.

This Court sits in equity and granting the Lenders' Motion is against the interest of equity. GLT needs the subject equipment to run its business. If the Court grants the Lenders' Motion it will result in GLT being forced to close its doors leaving dozens of Michigan workers without a job, and their families without a means of support. On the other hand, if the Court denies the Motion, the worst-case scenario is that the Lenders are not able to collect on their loan and recoup their exorbitant finance charges. Here, the Lenders "purchased" fenced goods

without inquiring whether the supposed "seller" had the proper authority to sell them. Michigan workers should not be forced to suffer for the Lenders indifference. There are also significant factual disputes that must be resolved before the Court can determine who is entitled to possession.

FACTUAL BACKGROUND

The facts in this case are complicated and still being uncovered and more information is being learned every day. The essential facts for the purposes of this Motion, however, are as follows. GLT owns a paper mill (the "Mill") located in Cheboygan, Michigan. (April 14, 2023 Declaration of Donald Swenson (hereinafter, "Swenson Decl."), ¶ 3). The Mill currently employs 42 workers with plans to expand and hire up to 400 workers within the next few years. (*Id.* ¶ 4).

In March of 2022, GLT was sold to an ownership group led by an individual named Kip Boie (*Id.* ¶ 5). Over the next few months, Boie attempted to secretly sell off all of GLT's assets (including the subject equipment as well as future receivables). (*Id.* ¶¶ 7-8, 14-22). Notably, the equipment at issue here *could not be sold* because that equipment was already offered as collateral to secure other corporate obligations. (*Id.* ¶¶ 9-12). For example, the city and state providing money to the mill aand took a security interest in the assets. (*Id.*). The City and State have subordinated those liens to a bank to assist the mill in obtaining financing for upgrades necessary to remain operational. (*Id.*).

Boie set up a two secret bank account in the name of GLT in an apparent effort to keep his fraudulent sales "off the books." (*Id.* ¶ 13). Boie controls these accounts and, to date, the new ownership has been unable to get full access to these accounts in order to do an accounting. (*Id.* ¶ 14). One of the banks is requiring a subpoena to get access to the records. (*Id.* ¶ 15).

As a consequence of his scheme, the "proceeds" of the "sales" never actually reached GLT's corporate accounts or books. (*Id.* ¶ 16). Boie received over one million dollars in this account. (*Id.* ¶ 17). Boie then then sold GLT to the current ownership group without disclosing that GLT supposedly had no assets. (*Id.* ¶18). Boie emptied the bank account at Citizen's

National Bank on January 13th, 2023, the day all the agreement/closing documents were signed by both Boie and the new ownership group. (*Id.* ¶19). The check, that depleted the bank account's balance, was written out to his own company, Trout Lake Enterprises, LLC. (*Id.* ¶ 20). Boie would not let the new ownership group take possession, let alone step foot in the mill, until the funds from the the purchase of GLT were fully available in their bank, the following week. (*Id.* ¶ 21).

There is no evidence thus far that Boie disclosed his transactions to the disinterested shareholders to obtain authority for his purported sales. (*Id.* ¶ 22).

LEGAL STANDARD

The moving party carries the burden of proving that it is entitled to preliminary equitable relief. *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009). Preliminary injunctive relief is an "extraordinary remedy," courts only grant such relief if it is "clearly" warranted. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002).

When considering whether to issue preliminary injunctive relief, a court must balance the following four factors:

(1) whether the movant has a strong likelihood of success on the merits;

(2) whether the movant would suffer irreparable injury absent the injunction;

(3) whether the injunction would cause substantial harm to others; and

(4) whether the public interest would be served by the issuance of an injunction.

Bays v. City of Fairborn, 668 F.3d 814, 818-19 (6th Cir. 2012). No single factor controls, and except that the movant must show a risk of irreparable injury. *See Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 102-03 (6th Cir. 1982) (citing S*ampson v. Murray*, 415 U.S. 61, 88 (1974)). Once irreparable injury is shown, the four factors must be "carefully balanced" by the district court. *Frisch's Rest., Inc. v. Shoney's Inc*., 759 F.2d 12611263 (6th Cir. 1985).

ARGUMENT

A. The Lenders Have Failed to Establish that They Have a Contract with GLT.

The Lenders assert that they are entitled to possession of the equipment because they allegedly purchased the equipment from the GLT. However, as set forth above, GLT received no consideration and therefore the putative contract fails as a matter of law. This is because the individual that the Lenders dealt with lacked the corporate authority to enter the agreements. The Lenders have failed to carry their burden of showing that they "own" the equipment and as a consequence, the Lenders' Motion should be denied.

1. *GLT Received No Consideration for the "Sale" of the Equipment.*

The elements of a valid contract under Michigan law are: 1) parties competent to contract; 2) proper subject matter; 3) consideration; 4) mutual agreement; 5) mutual obligation. *Thomas v. Leja*, 468 N.W.2d 58, 60 (Mich. App. 1990).

Here, GLT received no consideration for its property. The Lenders mistakenly paid the wrong party who pilfered the funds for his own use. Ironically, by failing to properly pay GLT for GLT's property, *the Lenders are in breach of the agreement they purport existed*. If the Lenders seek to enforce the fraudulent bill of sale (and the lease agreement) it must first pay to GLT the amounts owed under the bill of sale. To date, the Lenders have only paid a third-party to the deal, a conman, and have not paid GLT the supposed contracting party. In the absence of consideration, the bill of sale fails as matter of law, and the Court should deny the Lenders' motion for possession.

2. *Boie Lacked Corporate Authority to Engage in a Self-Dealing Transaction and the Lenders Have Failed to Submit Evidence that He Had Apparent Authority.*

Furthermore, the Plaintiff has not established that it is likely to prevail on the merits of its claim. When an officer or director, like Boie, engages in a self dealing transaction, one of the three must be true under Michigan law:

> (a) The transaction was fair to the corporation at the time entered into.
>
> (b) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board, a committee of the board, or the independent director or directors, and the board, committee, or independent director or directors authorized, approved, or ratified the transaction.
>
> (c) The material facts of the transaction and the director's or officer's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction.

MCL Sec. 545a. In this case, the transaction (in which GLT's property was stolen without payment) is unquestionably unfair to GLT. Moreover, GLT's new ownesrship has been unable to identify and evidence that the board or other shareholders were advised of Boie's actions or approved of them. There is nothing in the record showing that GLT---the defendant---ever approved or ratified the sale of equipment and subsequent lease.

Although the Lenders may eventually attempt to establish that Boie had "apparent authority" given his position, there is no evidence before the Court so establishing apparent authority at this time. GLT has genuine and serious questions about what the Lenders knew or should have known about the scope of Boie's authority given the Lenders' apparent lack of internal controls. Moreover, it is not currently known whether Boie was conspiring with an insider working for the Lenders. GLT is entitled to conduct discovery on this issue prior to being put out of business.

3. *Interested Parties With Senior Liens (Including the City of Cheyboygan) Have Not the Been Given Not Be Given Notice and Therefore, Deciding Which Party Has a Right to Possession is Premature.*

The Lenders assert that they are entitled to possession, but there are other third parties that appear to have a senior interest in the subject equipment. As just one important example, the City of Cheboygan provided funding to GLT and took a security interest in the equipment. (aff). The City of Cheboygan, in turn subordinated its interest to [bank] to enable GLT to perform

necessary plant improvements and upgrade allowing GLT to remaining an going concern. Even if the Lenders have a security interest in the equipmemt, both the City of Cheboygan and a bank may have a superior claim of possession. These issues need to still be addressed, an all secured parties should have an opportunity to be heard before the Court issues a ruling on possession.

B. The Lenders Will Not Suffer "Irreparable" Injury in the Absence of the Injunction.

"A party's harm is 'irreparable' when it cannot be adequately compensated by money damages." *See Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 579 (6th Cir. 2002)." (quoted by *TRBR, Inc. v. Gen. Motors* (E.D. Mich. 2022)) This lawsuit is one thing and one thing only---money. To be sure, Prime Alliance **Bank**, Inc. and Sertant **Capital**, LLC, are not seeking possession of the equipment because they need it to operate. They want to property to extract more money. This is not irreparable harm as a matter of law. Preliminary equitable relief is an extrodinary remedy. The Court should not use its extraordinary powers to ensure that lenders of last resort are able to recover their exobinant finance charges.

C. The Injunction Would Cause Substantial Harm to Michigan Workers That Will Lose their Jobs.

If the Court grants the Lenders' Motion, GLT will be forced to cease operations. Put simply, GLT cannot run its business without its equipment. If GLT cannot produce goods, it cannot earn revenue and it will be forced to layoff dozens of workers. Moreover, other creditors (including those asserting a security interest in the property) will be harmed if the Court grants the Lenders' Motion. In addition, there are unknown numbers of loggers, timber companies, truck drivers and others that will suffer without GLT purchasing their goods and services. The Court should not choose to protect the Lenders' exobonant finance charges in the face of such significant and widespread harm.

D. The Public Interest Would Be Harmed If the Court Grants the Motion.

For the reasons set forth in the preceding section, the public interest clearly favors denying the motion at this time. If the Court grants the Lenders' Motion it will force an employer to go out of business, risking depressing the economy of a small Michigan community.

CONCLUSION

For the reasons set forth above, the GLT respectfully requests that this Court deny the Plaintiff's Motion for Possession of Goods Pending Final Judgment.

HILGER HAMMOND

Dated: April 14, 2023

s/ Christopher E. Nyenhuis
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HANSEN REYNOLDS LLC

Dated April 14, 2023

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CERTIFICATE OF SERVICE

On April 14, 2023, I served a copy of Defendant's Opposition to Motion for Possession, on all attorneys and/or parties of record via the CM/ECF electronic filing system.

I declare under the penalty of perjury that the statement above is true to the best of my information, knowledge and belief.

_s/ Christopher E. Nyenhuis_____
Christopher E. Nyenhuis