

1. BRETT v. TBF INVESTMENTS, LLC, ET AL., 23CV2106**Order to Show Cause Re: Preliminary Injunction**

On December 1, 2023, plaintiff applied for a temporary restraining order to prevent the sale of the real property commonly known as 1151 Fallen Leaf Road, South Lake Tahoe, California (the “Property”), by nonjudicial foreclosure. Plaintiff’s application also sought the issuance of an order to show cause why a preliminary injunction should not issue enjoining defendants from conducting a foreclosure sale of the Property during the pendency of the litigation. On December 12, 2023, the court entered a temporary restraining order and issued an order to show cause regarding a preliminary injunction, which is now pending before the court.

1. Factual Background

On October 28, 2021, Hudson Brett (“Hudson”)¹ signed a promissory note for \$2,630,000 secured by the Property. (Compl., ¶ 16.) The note is held in percentage shares to each of the following three defendants: 59 percent to defendant TBF Investments, LLC (\$1,551,700), 30 percent to 2182 Rheem, LLC (\$789,000), and 11 percent to Marli Investments, LLC (\$289,300). (*Ibid.*)

Hudson was supposed to start making direct payments on this loan on December 1, 2022. However, Hudson failed to make his first payment and died on January 2, 2023, at the age of 78.

On August 10, 2023, defendants recorded a Notice of Default and Foreclosure based on \$43,742.20 past due. (Compl., ¶ 21.) On November 13, 2023, defendants recorded a Notice of Trustee’s Sale to take place on December 13, 2023. (Compl., ¶ 22.)

On November 30, 2023, Mastaneh Brett (“plaintiff”) brought the instant action against defendants as executor for Hudson’s estate and as an individual. The Complaint alleges that Hudson struggled with alcohol addiction and mental illness for many years

¹ The court will refer to the Brett parties by first name. The court intends no disrespect.

before his death. (Compl., ¶¶ 1, 11, 25.) Also, Hudson allegedly lived on a fixed income of about \$1,280 per month in Social Security benefits. (Compl., ¶ 18.) According to plaintiff, defendants “knew or should have known that Hudson would be unable to repay the promissory note and knew that Hudson lacked the capacity to understand the consequences of his action, yet still caused Hudson to enter the promissory note for \$2.6 Million and required it be secured by a \$4.5 Million property for the sole purpose of obtaining the property through non-judicial foreclosure.” (Compl., ¶ 37.)

Defendants allege that Hudson refinanced the Property numerous times in the last 10 to 12 years (Granskog Decl., ¶ 2) and that he understood the details of the loan he obtained from defendants. (O’Hare Decl., ¶ 8.)

2. Requests for Judicial Notice

Defendants have requested the court to take judicial notice of the following documents: (1) a deed of trust executed by Hudson in the amount of \$1,150,000 in favor of Woodland Hills Mortgage, which was recorded as document number 2019-0017452 in the Official Records of El Dorado County; (2) a deed of trust executed by Hudson in the amount of \$2,350,000 in favor of TJM Real Estate Investment, which was recorded as document number 2020-0059037 in the Official Records of El Dorado County; (3) a deed of trust executed by Hudson in the amount of \$2,630,000 in favor of defendants TBF Investments, LLC, 2182 Rheem, LLC, and Marli Investments, LLC, which was recorded as document number 2021-0068435 in the Official Records of El Dorado County; (4) a notice of default recorded on March 1, 2023, as document number 2023-0005773 in the Official Records of El Dorado County; (5) a notice of default recorded on August 10, 2023, as document number 2023-0022407 in the Official Records of El Dorado County; (6) a listing of the docket entries and activity in the case entitled “In the Matter of the Fallen Leaf Trust,” Monterey County case number 23PRP000469; (7) a declaration of Raymond Erlach, and the exhibits attached thereto, filed on November 30, 2023, in Monterey

County case number 23PR000469; and (8) a notice of trustee's sale, recorded as document number 2023-0032263 in the Official Records of El Dorado County.

Plaintiff objects to Request for Judicial Notice No. 7 on the grounds that it contains self-serving statements from Mr. Erlach (Reply at 8:6–26), as well as privileged attorney-client communications in an exhibit that is a “confidential” letter from Mr. Erlach to Hudson and Mastaneh. (Reply at 9:1–10.) Plaintiff argues that Hudson and Mastaneh, who were Mr. Erlach's clients, hold the privilege over this communication.

Pursuant to Evidence Code section 452, subdivision (d), the court grants Request for Judicial Notice Nos. 1 through 5, and 8; and denies Request for Judicial Notice Nos. 6 and 7.

3. Standard of Review

“When ruling on a motion for preliminary injunction, ‘trial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued. [Citations.]’ [Citations.]” (*Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (2011) 193 Cal.App.4th 168, 174.) “The trial court’s determination must be guided by a ‘mix’ of the potential-merit and interim-harm facts; the greater the plaintiff’s showing on one, the less must be shown on the other to support an injunction. [Citation.]” (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.)

A challenge to a preliminary injunction “may trigger any or all of three standards of appellate review. Insofar as the court’s ruling rests on evaluating and weighing [substantive factors]—the preponderance of likely injury and the likelihood of success—it is said to be vested in the discretion of the trial court, whose ruling will not be disturbed on appeal unless an abuse of discretion is made to appear. [Citation.] Insofar as the trial court’s ruling depends on determination of the applicable principles of law, however, it is

subject to independent appellate review. [Citations.] And insofar as the court resolved disputed issues of fact, its findings are reviewed under the substantial evidence standard, i.e., they will be sustained unless shown to lack substantial evidentiary support.” (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 408.)

4. Discussion

“As its name suggests, a preliminary injunction is an order that is sought by a plaintiff prior to a full adjudication of the merits of its claim. [Citation.]” (*White v. Davis, supra*, 30 Cal.4th at p. 554.) The purpose of such an order is to preserve the status quo pending a determination on the merits of the action. (*Id.*, at p. 553; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.)

“To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits.” (*White v. Davis, supra*, 30 Cal.4th at p. 554.) While the mere possibility of harm to the plaintiffs is insufficient to justify a preliminary injunction, the plaintiff is “not required to wait until they have suffered actual harm before they apply for an injunction, but may seek injunctive relief against the threatened infringement of their rights.” (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292.)

If the threshold requirement of irreparable injury is established, then the court must examine two interrelated factors: (1) the likelihood that the moving party will ultimately prevail on the merits, and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction. (*Butt v. State of California, supra*, 4 Cal.4th at pp. 677–678.)

Here, the evidence shows that as a result of Hudson’s default on defendants’ promissory note, defendants seek to sell the Property through nonjudicial foreclosure. (RFJN No. 8.) This would cause Hudson’s estate to lose the Property and lower the value of Hudson’s estate by nearly \$2 million. As such, the court finds that plaintiff has established the threshold requirement of irreparable injury.

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4.1. Likelihood of Success on the Merits

Plaintiff has asserted five causes of action against defendants. The first two causes of action are styled as invalidity of contract due to lack of capacity, undue influence, and duress. Plaintiff's Complaint also asserts causes of action for financial elder abuse, in violation of Welfare and Institutions Code section 15610.30, breach of the implied covenant of good faith and fair dealing, and declaratory relief.

4.1.1. Invalidity of Contract Claims

"Under Civil Code section 3412 '[a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.' To prevail on a claim to cancel an instrument, a plaintiff must prove (1) the instrument is void or voidable due to, for example, fraud; and (2) there is a reasonable apprehension of serious injury including pecuniary loss or the prejudicial alteration of one's position. [Citation.]" (*U.S. Bank National Assn. v. Naifeh* (2016) 1 Cal.App.5th 767, 778.)

Plaintiff alleges that Hudson suffered from alcoholism and mental illness between October 2021 (when the parties entered into the loan agreement) and his death on January 2, 2023, and that as a result of his illness, Hudson was unaware of the consequences of his actions. (Compl. ¶ 25.) Additionally, plaintiff alleges, "[d]efendants were aware or should have been aware of Hudson's position and (lack of) ability to repay the note and took advantage of Hudson's diminished capacity by causing him to enter the loan agreement for the purpose of foreclosing on the property." (Compl., ¶ 31.)

One of the fundamental elements of a valid contract is that each of the contracting parties must be capable of contracting within the meaning of California law. (Civ. Code, § 1550, subd. (1).) Pursuant to Civil Code section 1556, "[a]ll persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights." (Civ. Code, § 1556.) "A determination that a person is of unsound mind or lacks

the capacity...to contract...shall be supported by evidence of a deficit in," e.g., information processing or thought processes, but such a deficit "may be considered only if the deficit...significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question." (Prob. Code, § 811, subd. (a)–(b).) In other words, a person is of unsound mind or lacks the capacity to contract only when he or she is not able to understand the nature and effect of the transaction. (See, e.g., *Guidici v. Guidici* (1935) 2 Cal.2d 947, 501 [in a case where plaintiff claimed that "at the time of signing said deed he was in such a state of mind, due to long and excessive drinking of intoxicating liquor, that he did not know what he was doing and that he had no recollection of signing the deed," stating that evidence "was sufficient to support the finding of the trial court that the plaintiff at the time of the execution of said deed was mentally incapable, due to the protracted and excessive drinking of alcoholic liquors, of understanding the nature of his act in the signing and execution of said deed"]; *Hellman Commercial Trust & Sav. Bank v. Alden* (1929) 206 Cal. 592 [indicating that " '[t]he mental incapacity to avoid...a contract must amount to an inability to understand the nature of the contract and to appreciate its probable consequences' "]; *Smalley v. Baker* (1968) 262 Cal.App.2d 824, 832 [stating that, "[i]n California, as in many states, a party is entitled to rescission of a contract if, when he entered into the contract, he was not mentally competent to deal with the subject before him with a full understanding of his rights, the test being, in each instance, whether he understood the nature, purpose and effect of what he did"].)

Regarding undue influence, such exists when one takes "an unfair advantage of another's weakness of mind" or "a grossly oppressive and unfair advantage of another's necessities or distress." (Civ. Code, § 1575.) Factors to consider in assessing undue influence include the following: (1) discussion of the transaction at an unusual or inappropriate time; (2) consummation of the transaction in an unusual place; (3) insistent demand that the business be finished at once; (4) extreme emphasis on untoward

consequences of delay; (5) the use of multiple persuaders by the dominant side against a single servient party; (6) absence of third-party advisers to the servient party; and (7) statements that there is no time to consult financial advisers or attorneys. (*Odorizzi v. Bloomfield Sch. Dist.* (1966) 246 Cal.App.2d 123, 133.)

Based on the current allegations, there appears to be at least a reasonable possibility that plaintiff will ultimately prevail on the merits of these claims. Hudson's alleged drinking and mental illness (albeit undefined) could have potentially rendered him incapable of contracting. If that were the case, then there is also a reasonable apprehension of serious injury because Hudson's estate risks losing the Property to nonjudicial foreclosure.

4.1.2. Financial Elder Abuse Claim

Financial abuse of an elder is defined by statute: " 'Financial abuse' of an elder or dependent adult occurs when a person or entity does any of the following: [¶] (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. [¶] (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. [¶] (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70." (Welf. & Inst. Code, § 15610.30, subd. (a).) Of course, " ' "[c]ausation' is an essential element of a tort action. Defendants are not liable unless their conduct ... was a 'legal cause' of plaintiff's injury." ' "

(*Beebe v. Wonderful Pistachios & Almonds LLC* (2023) 92 Cal.App.5th 351, 369.)

The Complaint alleges that defendants "knew or should have known that Hudson would default on the loan and caused and/or intended to take, appropriate, obtain, and/or deprive Hudson of his property for a wrongful use or with the intent to defraud,

or by undue influence, including the intent to gain a windfall through nonjudicial foreclosure.” (Compl., ¶ 35.)

Defendants argue that they had no direct contact with Hudson and were merely lenders. (Opp. at 10:16.)

The court agrees that defendants were merely lenders. They were not in charge of determining how Hudson would repay the loan that he entered. But for Hudson’s default on the loan, there would be no foreclosure. Therefore, plaintiff has not shown a reasonable probability of success on the merits of this claim.

4.1.3. Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

The cause of action for breach of implied covenant of good faith and fair dealing is based on the principle that every contract contains an implied covenant of good faith and fair dealing providing that no party to the contract will do anything that would deprive another party of the benefits of the contract. (*Miller Marital Deduction Trust v. Zurich American Ins. Co.* (2019) 41 Cal.App.5th 247, 254.) Plaintiff’s Complaint alleges that defendants knew or should have known that Hudson would be unable to repay the promissory note and knew that Hudson lacked the capacity to understand the consequences of his action. (Compl., ¶ 37.) The court finds that these allegations do not constitute a breach of the implied covenant of good faith and fair dealing. There is no allegation that defendants did anything that would deprive Hudson of the benefits of the contract. At most, defendants were hoping that Hudson would default on the loan. Therefore, the court finds there is no reasonable possibility of succeeding on the merits of this claim.

4.1.4. Declaratory Relief Claim

The Complaint seeks a declaration that the promissory note is unenforceable on the grounds that (1) Hudson could not secure the promissory note with the Property where

he did not own the Property (Compl., ¶ 41); and (2) Hudson lacked the legal capacity to enter into the agreement. (*Id.* at ¶ 42.)

The parties do not address the likelihood of success on the merits with respect to the allegation that Hudson could not secure the promissory note with the Property where he did not own the Property. However, as previously discussed, the court finds there is at least a reasonable possibility that plaintiff will ultimately prevail on the claim that Hudson lacked the legal capacity to enter into the agreement.

4.2. Relative Interim Harm

The second factor that must be considered in determining whether to grant a preliminary injunction is “the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief.” (*White v. Davis, supra*, 30 Cal.4th at p. 554.) In other words, “the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued.” (*IT Corp. v. County of Imperial*, 35 Cal.3d at pp. 69–70.) “The ultimate goal of this balancing process is ‘to minimize the harm which an erroneous interim decision may cause.’” (*Anderson v. County of Santa Barbara* (2023) 94 Cal.App.5th 544, 577, quoting *IT Corp.*, at p. 73.)

Plaintiff asserts that Hudson’s estate will lose almost \$2 million in value should the nonjudicial foreclosure proceed to sale, reasoning that the Property had a willing buyer for \$4.5 million and the promissory note is for \$2.6 million. Defendants, on the other hand, argue that injunctive relief is not proper where only money is involved. The rationale is that there is no threat of irreparable harm because monetary losses are compensable in damages. In response, plaintiff points out, “Where land, or any estate therein, is the subject matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established.” (Reply at 3:21–24 (quoting *Stockton v. Newman* (1957) 148 Cal.App.2d 558, 564.) The court agrees with

plaintiff. The Property at issue is a multi-million-dollar residence that has been in the Brett family for some time.

Defendants also argue that the harm to them outweighs any potential harm to plaintiff. Specifically, defendants argue that because the Property is not properly insured, they could suffer a loss of potentially \$1 million or more should something happen to the house on the Property (e.g., a fire).

The court finds that the interim harm that the plaintiff is likely to sustain if the injunction were denied is greater than defendants will suffer if the injunction is granted.

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 1:30 P.M., TUESDAY, JANUARY 2, 2024, IN DEPARTMENT FOUR.