Ascentium Capital LLC v Northern Capital Assoc. XIII, L.P.

Supreme Court of New York, New York County
April 25, 2014, Decided
Index No. 650481/12

Reporter: 2014 N.Y. Misc. LEXIS 1962; 2014 NY Slip Op 31091(U)

[1]** ASCENTIUM CAPITAL LLC, Plaintiff, -against- NORTHERN CAPITAL ASSOCIATES XIII, L.P. and NORTHERN LEASING SYSTEMS, INC., Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

Core Terms

pool, lease, ache, northern, deposit, irreparable, injunction, preliminary injunction, lease payment, aff, monetary damages, misappropriate, security interest, enjoin, seller, revenue stream, satisfaction, contractual, collateral, partial, divert, debit

Judges: **[*1]** O.P. Sherwood, J.S.C.

Opinion by: O.P. Sherwood

Opinion

SHERWOOD, J.:

This is a breach of contract action in which plaintiff Ascentium Capital LLC contends that defendants Northern Capital Associates XIII, L.P. (Northern Capital) and Northern Leasing Systems, Inc. (Northern Leasing), who acted as plaintiff's servicer with respect to certain equipment lease agreements, breached their obligations under the agreements to pay plaintiff the amount of a payment deficiency, and to repurchase the pools of leases. On August 23, 2013, this court granted plaintiff's motion for summary judgment. Plaintiff contends that beginning in 2014, after the motion was granted, defendants began to divert the lease payments that were made by the Obligors on plaintiff's contracts by instructing the ACH Bank to credit the debited amounted to a bank account other than the ACH account. Plaintiff contends that it is the owner of the leases and is legally entitled to the payments, and that the express contractual language in the parties' servicing agreements mandates that the funds be deposited into the ACH Account. Plaintiff further contends that defendants have also refused to provide the information that is required to be reported **[*2]** to plaintiff in the monthly servicer reports.

Plaintiff now moves, pursuant to *CPLR 6301*, for an order preliminarily enjoining defendants from: (1) instructing nonparty First Premier Bank to deposit the revenue from (i) the **[**2]** pool of 4,460 commercial equipment leases purchased in accordance with the Lease Purchase Agreement No. 2 between the parties dated October 5, 2006, and (ii) the pool of 4,880 commercial equipment leases purchased in accordance with the Master Purchase Agreement between the parties dated November 21, 2006, into a bank account other than Account No. XXXXXX6845 at First Premier Bank; and (2) ordering defendants to immediately provide all information required to be included in the monthly servicer reports during the pendency of this action. Plaintiff also moves, pursuant to *22 NYCRR § 130-1.1*, for an order imposing sanctions on defendants and their attorneys as a result of their allegedly frivolous conduct.

For the reasons set forth below, plaintiff's motion for a preliminary injunction is granted, but the motion for sanctions is denied.

FACTS

On October 5, 2006, Northern Capital, as seller, Northern Leasing, as originator/servicer, and plaintiff's predecessor in interest, **[*3]** New World Equipment Funding, LLC (New World), as purchaser, entered into Lease Purchase Agreement No. 2 (as amended, the October Agreement), relating to a specified pool of 4,460 commercial equipment leases (Pool No. 2) (*see* aff of Kenneth M. Paston, exhibit 3).

On November 21, 2006, Northern Capital, as seller, Northern Leasing, as originator/servicer, and New World as purchaser, entered into the Master Purchase Agreement (as amended, the November Agreement), relating to a specific pool of 4,880 commercial equipment leases (Pool No. 3) (*see id.,* exhibit 6).

On June 19, 2006, Northern Capital as seller, Northern Leasing as originator/servicer and plaintiff's predecessor in interest, Main Street Bank, as purchaser entered into the Purchase and **[**3]** Sale Agreement (the 2009 Agreement) (the October Agreement, the November Agreement and the 2009 Agreement are referred to, collectively, as the Agreements) (*see id.,* exhibit 9).

Each of the Agreements relates to the sale of a pool of commercial equipment leases — comprising thousands of leases for lost-cost items of business equipment, including credit/debit card terminals — by Northern Capital, and the agreement by Northern Leasing to service that **[*4]** pool on behalf of plaintiff according to the terms thereof. Through each Agreement, plaintiff purchased the underlying leases and is entitled to the accompanying revenue stream (*see* Agreements, § 3). Accordingly, each of the Agreements includes an amortization schedule setting forth the monthly lease payments payable to plaintiff from the Pools.

One of Northern Leasing's obligations as servicer is to collect the amounts payable under the commercial equipment leases in the Pools (*see id.,* § 4.1). Most of the leases in the Pools are paid through an automated clearing house (ACH) system (Paston aff, ¶6). Pursuant to the Agreements, the amounts payable are debited from each Obligor's account through the ACH system and credited to a discrete and separate ACH account under plaintiff's control (*id.,* ¶ 7). Northern Leasing periodically instructs the ACH Bank to debit certain amounts from the individual Obligor's accounts corresponding to the amount due from those individual Obligors during that period, and to deposit the aggregate amount into a designated bank account (*id.,* ¶ 8). Pursuant to the Agreements, these amounts must be deposited into the ACH Account (*see* Agreements, § 4.2).

In the **[*5]** event that the revenue collected under the individual leases is insufficient to pay the amounts due plaintiff under the amortization schedules, then a shortfall (known as a Payment Deficiency) occurs (*id.,* § 4.11). In the event of a Payment Deficiency, the Agreements provide **[**4]** that defendants shall "Pay to [plaintiff] the amount of such payment deficiency" (*id.*). If the Payment Deficiency is not paid by defendants, "such amount remaining unpaid shall be carried over to the next Due Period and such amount shall be added to and considered a Payment Deficiency for the next Due Period and shall be carried over into all subsequent future Due Periods until paid in full (Payment Deficiency Shortfall)" (*id.*).

Plaintiff has additional security for this obligation in the form of certain collateral. Accordingly, the Agreements provide that:

> In connection with such purchase, to secure the obligations of Seller hereunder, Seller grants to [plaintiff] a first priority, perfected security interest and to (i) the Reserves; (ii) all Equipment (or Seller's interest therein) which is from time to time subject to any Contract, together with all replacements, substitutions, accessions, additions, alterations **[*6]** and repairs incorporated therein or affixed thereto; (iii) any security interest of Seller in such Equipment; and (iv) all proceeds thereof (collectively, the 'Collateral')

(*id.,* § 3). On October 2, 2006 and November 22, 2006, plaintiff's predecessor filed UCC financing statements covering the Collateral (*see* Paston aff, exhibits 5, 8).

Defendants are also required to deliver monthly servicer reports to plaintiffs, detailing the relevant information concerning the Pools (*see* Agreements, § 4.9.1).

The servicer reports prepared by defendants first reflected a Payment Deficiency for Pool No. 2 in September 2010, and for Pool No. 3 in February 2011 (Paston aff, ¶¶ 11-12). However, defendants refused to pay plaintiff the amount of the Payment Deficiencies (*id.,* ¶¶ 14-15). To date, defendants have not paid any amounts under section 4.11 to repay the Payment Deficiencies (*id.,* ¶¶ 14-15).

Plaintiff commenced this action on February 21, 2012. On April 11, 2013, plaintiff moved for summary judgment, and on May 17, 2013, defendants cross-moved for summary **[**5]** judgment. In their papers, defendants argued that they had not breached the Agreements because plaintiff "continues to receive payments generated **[*7]** by the collateral," which would eventually reduce the obligations (aff of Stephen G. Rinehart, exhibit 2 at 8). On August 22, 2013, this court held oral argument on the cross motions for summary judgment. During oral argument, defendants' counsel again represented that "payments still come in, even to this date," so that plaintiff continued to receive lease payments under the Contracts (Rinehart aff, ¶ 12).

On August 23, 2013, the court granted plaintiff's motion. In its decision, this court interpreted the relevant contractual language, and found that defendants must pay the amounts due, holding that:

> Section 4.11 of the Agreements state unambiguously that 'in the event the funds in the Reserves are not sufficient to pay the then Payment Deficiency, the Originator shall . . . pay to Buyer the amount of such Payment Deficiency. . .' (emphasis added). The 'notwithstanding' language in the same section cannot be read to give defendants the option to defer making payment in the event the funds in the Reserves are insufficient. So long as the aggregate Payment Deficiency remains below ten percent (10%), defendants

> are obligated to make up for the deficiency. The 'notwithstanding' sentence **[*8]** applies only when the amounts owed exceed ten percent (*see* *Chimart Assocs. v Paul, 66 NY2d 570, 489 N.E.2d 231, 498 N.Y.S.2d 344 [1986]*).

This court also found that defendants breached their obligation to repurchase the Pools:

> As to defendants' repurchase obligation under § 4.17, the 'and assuming that Buyer is not then suffering a Payment Deficiency Shortfall' clause is not a condition precedent to the obligation of defendants to repurchase all of the contracts. In any event, on this record, the existence of an alleged Payment Deficiency Shortfall results from defendants' breach of § 4.11 and cannot serve as a shield to avoid their obligation under § 4.17.

(August 23, 2013 decision).

On November 21, 2013, judgment was entered against defendants in the amount of $1,720,340 (*see* Rinehart aff, exhibit 7). On December 6, 2013, defendants appealed the decision **[**6]** and order (*id.,* ¶ 18; *see* exhibit 8). Defendants' appeal is necessarily premised upon their representations in this court that plaintiff would continue to receive the lease payments under the Contracts (*id.,* ¶ 18).

On November 19, 2013, plaintiff moved by order to show cause for a preliminary injunction, enjoining defendants from diverting the revenue from a fourth pool **[*9]** of commercial equipment leases (not at issue in the instant action), which amounts secured defendants' obligations under the Agreements, including those related to Pool No. 2 and Pool No. 3 (*id.,* ¶ 29). At the November 21, 2013 hearing, defendants argued that there was no irreparable harm to plaintiff by defendants' diversion because plaintiff was still receiving the amounts due under the Contracts for Pool No. 2 and Pool No. 3 (Rinehart aff, exhibit 10 at 11-12 [″There are still funds coming in on the two other pools (Pools 2 and 3). That's why there is no irreparable harm″]). Plaintiff withdrew the order to show at the close of the hearing (*id.,* ¶ 32).

On December 30, 2013, defendants moved by order to show cause for an order directing plaintiff to execute and file a partial satisfaction in a specific amount, releasing part of the judgment in the instant action, because the obligation had been reduced by incoming lease payments (*id.,* ¶ 33). On January 2, 2014, plaintiff executed and filed a partial satisfaction for the amount that it could confirm had been satisfied (*id.,* ¶ 37).

Following entry of the partial satisfaction, the parties discussed the preparation of additional partial **[*10]** satisfactions to account for the ongoing payments under the Contracts in Pool No. 2 and Pool No. 3 (*id.,* ¶ 38). At defendants' request, plaintiff prepared and filed another partial satisfaction on February 3, 2014 to reflect the most recent servicer report for the period December 2013 (*id.,* ¶ 39). Plaintiff contends that it was not aware at the time that defendants **[**7]** had already started to divert the Pool No. 2 and Pool No. 3 lease payments.

On January 3, 2014, Northern Leasing submitted ACH instructions to the ACH Bank, directing the bank to deposit the revenue from the underlying commercial equipment leases in the Pools into an account other than the ACH Account (Paston aff, ¶ 22). There have been no deposits into the ACH Account related to either Pool No. 2 or Pool No. 3 since that time (*id.,* ¶ 19). In the January 2014 servicer report, defendants also purport to make a $29,103 adjustment to the manual receivables balance to reverse the January 2 and January 3 collections related to Pool No. 2 and Pool No. 3, which were properly deposited into the ACH Account (*id.,* ¶ 21).

Plaintiff contends that, since defendants have refused to provide the information required to be included in the **[*11]** January 2014 servicer report, it cannot determine the exact amount appropriated. Plaintiff contends that, however, based on the amount of deposits into the ACH Account over the preceding months, it can approximate the amount, which is believed to be approximately $50,000 per month (*id.,* ¶¶ 20-21; *see* exhibit 15). Plaintiff contends that it believes that defendants intend to continue submitting ACH instructions to the ACH Bank, directing the bank to deposit future revenue from the Pools into an account other than the ACH Account (*id.,* ¶ 24).

On February 26, 2014, plaintiff sent a letter to defendants, demanding that they: (1) return all amounts collected under the Contracts from January 2, 2014 through the present; (2) redirect all future amounts payable under the Contract to the ACH Account; (3) forward a complete servicer report for January 2014, detailing all information required to be therein; and (4) ensure that all future servicer reports contain the mandated information (*id.,* ¶ 43; *see* exhibit 12). Defendants have not responded to the demand.

[8]** ***DISCUSSION***

Jurisdiction

In opposition to the motion, defendants contend that, as a threshold matter, this court lacks jurisdiction to grant **[*12]** the relief plaintiff seeks, because a final monetary judgment has been entered in this action, and is the subject

of a pending appeal in the First Department. According to defendants, the IAS court has ″no jurisdiction to entertain applications for additional relief after entry of final judgment″ (*Little Prince Prods., Ltd. v Scoullar, 258 AD2d 331, 332, 685 N.Y.S.2d 442 [1st Dept 1999]*). Defendants further argue that, pursuant to *CPLR 5519 (a)*, enforcement of the judgment is stayed because defendants have filed a bond. Thus, defendants argue, this court lacks jurisdiction because the relief plaintiff seeks is essentially an order vacating or modifying the statutory stay of enforcement, and only the appellate division may vacate, limit or modify the stay.

This argument lacks merit. New York courts have held that ″a case, for general purposes, remains within the jurisdiction of the trial court while it is appealed and that, ***except for matters pertinent to the appeal,*** all other applications must be made to the trial court because 'the case is regarded as still pending in the court of original jurisdiction'″ (*Ruben v American & Foreign Ins. Co., 185 AD2d 63, 67-68, 592 N.Y.S.2d 167 [4th Dept 1992]* [citation omitted] [emphasis **[*13]** added]; *see also Kleinman v Metropolitan Life Ins. Co., 298 NY 217, 218, 81 N.E.2d 818 [1948]* [″with the exception of matters relating to the appeal itself and motions required by statute to be made here . . . the action is regarded for all other purposes as still pending in the court of original jurisdiction″] [internal citations omitted]; *Matter of Rospigliosi v Abbate*, 31 AD3d 648, 650, 819 N.Y.S.2d 285 [2d Dept 2006] [even after an appeal is perfected, the court ″generally retains the power to entertain and decide motions″]). **[**9]** Accordingly, it is clear that preliminary injunctions unrelated to the pending appeal or to the judgment may be brought before the trial court.

The subject matter of this motion is not, as defendants contend, related to the appeal or defendants' payments under the judgment, but rather, to defendants' diversion of the Obligors' lease payments to plaintiffs. Plaintiff's entitlement to the Obligors' lease payments under their Contracts with plaintiff is not dependent on the outcome of the appeal. Indeed, defendants must return the misappropriated assets whether or not they prevail on the appeal. Accordingly, jurisdiction in this court is proper.

Preliminary Injunction

A party who seeks a preliminary **[*14]** injunction must show (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor (*CPLR 6301*; *Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840, 833 N.E.2d 191, 800 N.Y.S.2d 48 [2005]*; *1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18, 23, 924 N.Y.S.2d 35 [1st Dept 2011]*). Here, plaintiff has established that it is likely to succeed on the merits as to its claim that defendants have misappropriated its assets. In addition, it is clear that plaintiff will sustain irreparable injury if a preliminary injunction is not issued, and that the equities are in plaintiff's favor. Accordingly, plaintiff has demonstrated that it is entitled to a preliminary injunction.

1. ***Likelihood of Success on the Merits***

A plaintiff establishes a likelihood of success on the merits when he makes a prima facie showing of a right to relief (*see4th Ave. Realty Holding Corp. v Pappas, 254 AD2d 250, 250, 678 N.Y.S.2d 529 [2d Dept 1998]*). ″A prima facie showing of a reasonable probability of success is sufficient; actual **[**10]** proof of the petitioner's claim should be left to a full hearing on the merits″ (*Weissman v Kubasek, 112 AD2d 1086, 1086, 493 N.Y.S.2d 63 [2d Dept 1985]*; **[*15]** *accord* Demartini v Chatham Green, Inc., 169 AD2d 689, 690, 565 N.Y.S.2d 712 [1st Dept 1991] [preliminary injunctive relief warranted even though no conclusive evidence]). Here, plaintiff has established the likelihood of success on the merits of its claim.

A written agreement that is clear and complete on its face ″must be enforced according to the plain meaning of its terms″ (*Samuel v Druckman & Sinel, LLP, 12 NY3d 205, 210, 906 N.E.2d 1042, 879 N.Y.S.2d 10 [2009]* [internal quotation omitted]). Extrinsic evidence may be considered to discern the parties' intent only if the contract is ambiguous, and the intention of the parties cannot be gathered from the instrument itself (*Greenfield v Philles Records, 98 NY2d 562, 569, 780 N.E.2d 166, 750 N.Y.S.2d 565 [2002]*).

Under the unambiguous language set forth in the Agreements, plaintiff owns the leases in the Pools, and is entitled to the related revenue stream. Plaintiff also holds a perfected security interest in the Equipment, and all the proceeds thereto. The Agreements specify that the amounts payable under the Contracts must be debited from each Obligor's account through the ACH system and credited to the ACH Account (Agreements, § 4.2). To the extent that any funds are collected outside the ACH System, those amounts **[*16]** must be deposited into the ACH Account within two business days (*id.*). Moreover, defendants are required to deliver servicer reports to plaintiff, detailing the relevant information concerning the Pools (*id.*, ¶ 4.9.1). These requirements are clear on the face of the Agreements.

Notwithstanding plaintiff's ownership of the leases and security interest in the Equipment, defendants redirected the revenue stream such that the ACH payments have been diverted from the ACH account. Defendants have also refused to comply with their obligation to **[**11]** provide servicer reports. In their opposition papers, defendants

admit that they have no intention of returning plaintiff's property (*see* opposition mem at 9, 10, 14, 16). Defendants do not indicate why they believe they have to right to keep those collections — they simply state that they will not return them and that the court lacks jurisdiction to require such return. Yet, there is no conceivable argument that would entitle defendants to those funds — plaintiff is the owner of the leases and is legally entitled to the payments. The servicing agreement expressly mandates that the funds be deposited into the ACH Account. Defendants' misappropriation **[*17]** occurs in the context of this ongoing litigation, in which defendants have consistently urged the court that they have not breached the Agreements because plaintiff was still receiving these ongoing payments from its leases. Defendants have filed an appeal from the judgment of this issue that is premised on the same arguments. Defendants' misappropriation belies their many representations to the court and to plaintiff that the lease revenues from Pool Nos. 2 and 3 would continue to be deposited into the ACH Account as required by the Agreements.

Accordingly, based on the clear contractual language and defendants' lack of any cognizable right to the funds, plaintiff is likely to succeed on the merits.

2. ***Irreparable Injury***

″'The mere existence . . . of a remedy at law is not in itself sufficient ground for refusing relief in equity by injunction . . . . To deprive a plaintiff of the aid of equity by injunction it must also appear that the remedy at law is plain and adequate; in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity'″ (*Lesron Junior v Feinberg, 13 AD2d 90, 93, 213 N.Y.S.2d 602 [1st Dept 1961]* [citation **[*18]** omitted]). The theoretical availability of monetary damages will not prevent equitable relief in the form of an **[**12]** injunction when the underlying circumstances demonstrate that the legal remedy is not adequate (*see Robjudi Corp. v Quality Controlled Prods., 111 AD2d 156, 157, 488 N.Y.S.2d 787 [2d Dept 1985]*) [holding that plaintiff-owner would be irreparably harmed by defendant's conversion of plaintiff's good because monetary damages would be inadequate ″[g]iven the underlying realities of th[e] particular situation″]; *see also Board of Mgrs. of 235 E. 22nd St. Condominium v Lavy Corp., 233 AD2d 158, 161, 649 N.Y.S.2d 668 [1st Dept 1996]*; [monetary damages inadequate due to potential loss of superior claim to the security]; *Pando v Fernandez, 124 AD2d 495, 496, 508 N.Y.S.2d 8 [1st Dept 1986]* [monetary damages inadequate due to danger of dissipation]).

Contrary to defendants' arguments that plaintiff has only a monetary interest in the outcome of its claim, plaintiff has established irreparable injury due to the possibility of the loss of its secured claim.

In *Board of Mgrs. of 235 E. 22nd St. Condominium (233 AD2d at 161)*, the plaintiff sought to recover monetary damages from the defendants based upon unpaid common charges, and sought **[*19]** to enjoin the sale of certain real estate that would have extinguished its security interest in the property, leaving it with only unsecured claims against the defendants. The First Department held that ″even though a plenary action seeking monetary damages against both defendants herein and the ultimate purchaser may be available to plaintiff in the event the property is transferred, the extinguishing of plaintiff's lien, which is plaintiff's only security for the past due common charges, clearly constitutes harm warranting injunctive relief and tips the balance of the equities in plaintiff's favor.″ (*id.*).

Here, plaintiff owns the leases in the Pools and is entitled to the related monthly lease payments by the Obligors. Plaintiff also holds a first priority, perfected security interest in and to **[**13]** the Collateral, securing defendants' performance of their obligations under the Agreements, including defendants' obligations under sections 4.11 and 4.17. Accordingly, under the parties' contractual relationship, plaintiff's exposure to defendants is secured. However, defendants are continuing to violate the terms of the Agreements, and are actively converting plaintiff's assets and destroying **[*20]** the security. Each future diversion of revenue from the Pools will irreparably harm plaintiff, as plaintiff will lose an asset in hand for an unsecured claim against defendants. The destruction of plaintiff's bargained-for security has irreparably harmed plaintiff.

Defendants' argument that plaintiff has not established irreparable harm because the judgment is secured by an appeal bond does not withstand scrutiny. In their opposition papers, defendants admit that they have no intention of returning plaintiff's property if they prevail on appeal. Accordingly, if defendants prevail on appeal, the bond would be cancelled and plaintiff would be left with an unsecured claim against defendants, thus losing the benefit of its security. The damage caused by this potential loss of security cannot be quantified in monetary terms, and the loss of security constitutes irreparable harm (*see Board of Mgrs. of 235 E. 22nd St. Condominium, 233 AD2d at 161* [monetary damages inadequate due to potential loss of a superior claim to the security]; *see also Stewart Title Ins. Co. v Liberty Title Agency, LLC, 2009 NY Slip Op 31170[U], 2009 NY Misc LEXIS 5749, * 6-7 [Sup Ct, NY County 2009]* [enjoining defendants' **[*21]** misappropriation of escrowed funds]).

Defendants are also required to deliver servicer reports to plaintiff, detailing the relevant information concerning the

Pools. Without this information, it is not possible for plaintiff to monitor the collections on the leases comprising Pool No. 2 or Pool No. 3. Accordingly, plaintiff cannot discern the full extent of defendants' misappropriation or confirm that they have not taken **[**14]** further steps to destroy plaintiff's assets and/or security. Thus, plaintiff has been harmed by defendants' refusal to provide the required information, and this injury is not compensable with monetary damages.

3. ***Balancing of the Equities***

As to the equities of the issue, plaintiff seeks to enforce the contract terms by which defendants agreed to abide, and equity favors that holding defendants to their obligations (*see* Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 203, 651 N.Y.S.2d 504 [1st Dept 1996] [holding that the balance of equities favored the plaintiff since the contractual obligation was freely bargained for and resulted from extensive negotiations in which the defendant had been represented by counsel]).

It would be inequitable for defendants to refuse to pay their **[*22]** obligations under the Agreements while diverting plaintiff's funds for their own benefit. Defendants purport to act as the servicer of plaintiff's contracts, but they have misappropriated the rents due to plaintiff and have actively converted plaintiff's asserts. Accordingly, the balance of equities tips in plaintiff's favor as the preliminary injunction will preserve plaintiff's property and its bargained-for security (*see*Board of Mgrs. of 235 E. 22nd St. Condominium, 233 AD2d at 161 [finding that preventing the destruction of the plaintiff's security interest tipped the equities in the plaintiff's favor]).

The court rejects defendants' argument that the equities tip in their favor because denial of the motion would preserve the status quo (opposition mem at 13-14 [″[t]he status quo is that Defendants have paid the judgment by obtaining the Bond, and the status quo will not be maintained if Defendants are ordered to pay twice]). As previously stated, this motion does not seek to compel defendants to pay the judgment, but rather, to enjoin defendants' **[**15]** misappropriation of plaintiff's assets.

4. ***Appropriate Undertaking***

It is well settled that determining the size of undertaking posted **[*23]** pursuant to CPLR 6312 (b) is within the sound discretion of the trial court (*see* Cooperstown Capital, LLC v Patton, 60 AD3d 1251, 1253, 876 N.Y.S.2d 186 [3d Dept 2009]). The bond must be ″rationally related″ to the potential damages that defendants would incur if the preliminary injunction proves to be unwarranted (Ithilean Realty Corp. v 180 Ludlow Dev. LLC, 80 AD3d 455, 455, 915 N.Y.S.2d 63 [1st Dept 2011] [limiting the undertaking to $10,000]). Moreover, it must be adequately supported by evidence (7th Sense v Liu, 220 AD2d 215, 217, 631 N.Y.S.2d 835 [1st Dept 1995] [affirming Supreme Court's denial of defendants' motion to increase the undertaking from $10,000 because defendants only proffered conclusory and unsupported testimony]; Republic of Lebanon v Sotheby's, 167 AD2d 142, 145, 561 N.Y.S.2d 566 [1st Dept 1990] [finding the amount of the undertaking inappropriate because it was based ″upon speculation without any appropriate support″]).

Here, plaintiff purchased the leases underlying the Pools and is entitled to the accompanying revenue stream. Defendants have no legal claim to these amounts. Moreover, since the restoration of the revenue stream will reduce defendants' outstanding obligations as those amounts are applied toward the judgment, defendants **[*24]** cannot claim to be harmed by an injunction. Accordingly, the undertaking will be set in the amount of $10,000.

Sanctions

Plaintiff's motion for sanctions is denied. The imposition of sanctions is not appropriate here, as there is no indication that defendants' position is completely frivolous and without merit (*see* Benishai v Benishai, 83 AD3d 420, 920 N.Y.S.2d 84 [1st Dept 2011]; Matter of L&M Bus Corp. v New York **[**16]** City Dept. of Educ., 83 AD3d 432, 433, 920 N.Y.S.2d 331 [1st Dept 2011]).

The court has considered the remaining arguments, and finds them to be without merit. Accordingly,

Due deliberation having been had, and it appearing that a cause of action exists in favor of plaintiff and against defendants, and that plaintiff is entitled to a preliminary injunction on the ground that defendants threaten or are about to do, or are doing or procuring or suffering to be done, an act in violation of plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision, it is

ORDERED that the undertaking is fixed in the sum of $10,000, conditioned that plaintiff, Ascentium Capital LLC, if it is finally determined that it was not entitled to an injunction, **[*25]** will pay to defendants all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendants Northern Capital Associates XIII, L.P. and Northern Leasing Systems, Inc., and their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of

defendants, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendants, any of the following acts:

> Instructing nonparty First Premier Bank to deposit the revenue from (1) the pool of 4,460 commercial equipment leases purchased in accordance with the Lease Purchase Agreement No. 2 between the parties dated October 5, 2006 and (2) the pool of 4,880 commercial equipment leases purchased in accordance with the Master Purchase Agreement between the parties dated November 21, 2006, into a bank account other than Account No. XXXXXX6845 at First Premier Bank;

[17]** and it is further

ORDERED that defendants are directed, within five days after service of a copy of this order with notice of entry, to provide **[*26]** to plaintiff all information required to be included in the monthly servicer reports that it has not provided to plaintiff since January 2014, as required by § 4.9.1 of the Lease Purchase Agreement No. 2 between the parties dated October 5, 2006 and the Master Purchase Agreement between the parties dated November 21, 2006, and are further directed to provide such information to plaintiff each month thereafter during the pendency of this action.

Dated: April 25, 2014

ENTER:

/s/ O.P. Sherwood

J.S.C.