

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

MCGINN, SMITH & CO., INC.;
MCGINN, SMITH ADVISORS LLC;
MCGINN, SMITH CAPITAL HOLDINGS CORP.;
FIRST ADVISORY INCOME NOTES, LLC;
FIRST EXCELSIOR INCOME NOTES, LLC;
FIRST INDEPENDENT INCOME NOTES, LLC;
THIRD ALBANY INCOME NOTES, LLC;
TIMOTHY M. MCGINN; AND
DAVID L. SMITH,

Defendants and

LYNN A. SMITH,

Relief Defendant.

ATTORNEY AFFIDAVIT

10-CV-457
(GLS/RFT)

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

BENJAMIN W. HILL, being duly sworn, deposes and says that:

1. I am an attorney admitted to practice law in the Courts of the State of New York and in the Northern District of New York and am a member of the law firm of Maynard, O'Connor, Smith & Catalinotto, LLP, attorneys for Proposed Intervenor, CIT Lending Services Corporation and, as such attorney, I am fully familiar with all of the pleadings, proceedings and facts involved in this case.

2. I submit this Affidavit in support of Proposed Intervenor's Motions to Intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)¹ and for a Lift of the Temporary Restraining Order (“TRO”) issued by the Honorable Lawrence Kahn, Senior United States District Judge, to the extent that it prevents Proposed Intervenor from duly pursuing a pending foreclosure action in New York State Supreme Court, Albany County, against, *inter alia*, Defendant Third Albany Income Notes, LLC.

3. On March 10, 2010, Proposed Intervenor CIT Lending Services Corporation initiated a foreclosure proceeding against State Street Hospitality, LLC, 74 State, LLC, George Shannon, Gary D. Smith, Third Albany Income Notes, LLC, and John Doe and Mary Roe, by filing summonses and complaints in New York State Supreme Court, Albany County. Ex. A, Summons and Verified Compl., dated Mar. 10, 2010.

4. Proposed Intervenor is the plaintiff and principal mortgagee in the aforementioned foreclosure action. Ex. B, Promissory Note, dated Dec. 31, 2007 (notarized on Dec. 28, 2007).

5. Defendant Third Albany Income Notes, LLC, is a junior mortgagee on the property at issue in the foreclosure action, with rights subordinate to those of CIT Lending Services Corporation. Ex. C, Mortgage Foreclosure Guarantee, dated Jan. 7, 2010, Schedule B; Ex. D, Subordination Agreement.

6. On March 24, 2010, Defendant Third Albany Income Notes, LLC, was duly served with process in the foreclosure action. Ex. E, Proof of Service, dated Mar. 24, 2010.

¹ The Complaint in this federal action does not make any factual allegations regarding, nor any reference to, the Proposed Intervenor. Therefore, Proposed Intervenor has not included a responsive pleading to the Complaint pursuant to FED. R. CIV. P. 24(c), as it has no interests in this litigation beyond those explained herein regarding the foreclosure action currently pending in state court. It is respectfully submitted that, in this context, the provision of such a responsive pleading would be superfluous. In the event the Court requires such a responsive pleading be filed, Proposed Intervenor requests that it be granted leave to do so.

7. On March 30, 2010, Defendant Third Albany Income Notes, LLC, filed a notice of appearance in the foreclosure action. Ex. F, Notice of Appearance, dated Mar. 30, 2010.

8. Defendant Third Albany Income Notes, LLC, has not filed an answer or any other opposition to Proposed Intervenor's complaint in the foreclosure action, and its time to do so lapsed on April 19, 2010. *See* N.Y.C.P.L.R. § 3012(a).

9. On April 20, 2010, the Honorable Lawrence Kahn, Senior United States District Judge, issued a TRO freezing Defendants' assets in this federal action and enjoining any person or entity from taking "any action without further order of this Court to interfere with the taking[,] control, possession, or management of the [Defendants'] assets, including but not limited to the filing of any lawsuits, liens or encumbrances or bankruptcy cases to impact the property and assets subject to this order." Dkt. No. 5, Order, dated Apr. 20, 2010, at p. 21 (Part XVIII).

10. On or about May 20, 2010, CIT Lending Services Corporation received a copy of the TRO from Allan L. Hill, attorney for the Court-appointed receiver in this federal action.

11. On July 7, 2010, the Honorable David R. Homer, United States Magistrate Judge for the Northern District of New York, issued an Order granting in part Plaintiff's Motion for a Preliminary Injunction in this federal action, maintaining the freeze on Defendants' assets as stipulated in Judge Kahn's TRO. Dkt. No. 86. As such, the continued viability of the TRO has prevented Proposed Intervenor from prosecuting its foreclosure action in state court.

12. Proposed Intervenor has engaged in good faith negotiations with William Brown, Esq., the Court-appointed Receiver in this action, in an attempt to present to the Court a stipulation rather than a motion. However, despite Third Albany Income Notes' secondary and wholly subordinate property interests in the property that is the subject of the state foreclosure action, the Receiver will not stipulate to a lift of the TRO.

13. Therefore, I request permission for Proposed Intervenor to intervene in this federal action for the limited purpose of seeking a lift of the TRO to the extent that it prevents Proposed Intervenor from duly prosecuting its foreclosure action.

15. It is respectfully submitted that, given Proposed Intervenor's superior proprietary interests in the mortgaged property at issue in the foreclosure action, there is no reason why its request for relief from Judge Kahn's TRO should not be granted.

WHEREFORE, Proposed Intervenor respectfully requests that CIT Lending Services Corporation be granted leave to intervene in this action and that the TRO be lifted to the extent that it unduly precludes CIT Lending Services Corporation from prosecuting its foreclosure action in state court.

s/ Benjamin W. Hill

BENJAMIN W. HILL

Sworn to before me this
3rd day of November, 2010.

s/Elizabeth A. Panza

Notary Public - State of New York

01 PA 5040726
Qualified in Albany County
Commission Expires: March 20, 2011