

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

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,
LYNN A. SMITH, DAVID M. WOJESKI, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY McGINN,

**Case No.: 1:10-CV-457
(GLS/DRH)**

Defendants,

LYNN A. SMITH and NANCY McGINN,

Relief Defendants, and

DAVID M. WOJESKI, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the Decision and Order entered February 1, 2011, amending the preliminary injunction to modify the asset freeze to allow the sale of the Vero Beach property and to appoint the Receiver to oversee the sale; the attached Memorandum of Law in Support of Defendant's/Relief Defendant's Motion to Stay Enforcement of the February 1, 2011 Decision and Order; and upon all prior proceedings and filings herein, Defendant/Relief Defendant Lynn A. Smith will move on Thursday,

March 17, 2011, at 9:30 a.m., or at any other date convenient to the Court, before the Honorable David R. Homer, United States Magistrate Judge, United States District Court for the Northern District of New York, 445 Broadway, Albany, New York, for an order to stay the enforcement pending appeal of the February 1, 2011 Decision and Order; and

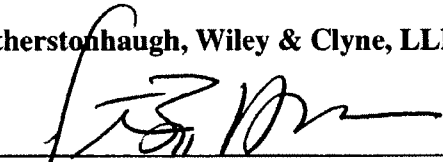
PLEASE TAKE FURTHER NOTICE that pursuant to Local Rule 7.1(b)(2), opposition papers must be filed and served not less than seventeen days prior to the return date.

Dated: February 11, 2011

Respectfully submitted,

Featherstonhaugh, Wiley & Clyne, LLP

By: _____



Stephen B. Hanse, Esq.

Bar Roll No. 514950

Attorneys for Relief Defendant/Defendant,

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LYNN A. SMITH, DAVID M. WOJESKI, Trustee
of the David L. and Lynn A. Smith Irrevocable Trust
U/A 8/04/04, GEOFFREY R. SMITH, LAUREN
T. SMITH, and NANCY MCGINN,

**Case No.: 1:10-CV-457
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Defendants,

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DAVID M. WOJESKI, Trustee of the David L.
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Intervenor.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR STAY OF
ENFORCEMENT PENDING APPEAL OF THE FEBRUARY 1, 2011 DECISION
AND ORDER AMENDING THE INJUNCTION TO MODIFY THE ASSET
FREEZE TO COMPEL THE SALE OF DEFENDANT'S FLORIDA PROPERTY
AND TO APPOINT THE RECEIVER TO OVERSEE THE SALE**

Defendant/Relief Defendant Lynn A. Smith ("Mrs. Smith" or "Movant") respectfully moves this Honorable Court for an entry of an Order temporarily staying the enforcement of this Court's Decision and Order entered February 1, 2011 amending the

preliminary injunction to permit the Court-appointed Receiver, William J. Brown, Esq. (the "Receiver") to have sole authority to effectuate the sale of Defendant/Relief Defendant's property located in Vero Beach, Florida ("Florida property") pending appeal of the Decision and Order, and granting any further relief that to the Court may seem just and proper.

THE URGENCY

This memorandum is filed in support of the motion for a temporary stay of enforcement of the February 1, 2011 Decision and Order, which amended the preliminary injunction to permit the sale of Mrs. Smith's Florida property pursuant to the sole authority of the Receiver.¹ On February 1, 2011, Movant's counsel received notice from the Receiver soliciting names of proposed real estate agents so as to effectuate the sale of the Florida Property pursuant to the February 1, 2011 Decision and Order.

STATEMENT OF FACTS

On April 20, 2010, the Securities and Exchange Commission ("SEC" or "plaintiff") sought and received a temporary restraining order temporarily freezing the assets of the Defendant/Relief Defendant and appointing the Receiver.² In a Memorandum-Decision and Order filed July 7, 2010, the SEC's motion for a preliminary injunction continuing the asset freeze was granted in part and continued the freeze of Defendant/Relief Defendant's Florida property.³ Mrs. Smith remained current on her monthly mortgage payments for the Florida property prior to the asset freeze.⁴ On October 4, 2010, Defendant/Relief Defendant cross-moved this Court for the release of

¹ Dkt. No. 263.

² Dkt. No. 5.

³ Dkt. No. 86.

⁴ February 1, 2011 Decision and Order p. 3

funds for necessary expenses associated with maintaining her Florida residence.⁵ In finding that Mrs. Smith failed to demonstrate the financial need required to grant the release of funds to maintain her Florida residence, on December 2, 2010 this Court denied Movant's October 4, 2010 cross-motion to lift the preliminary injunction to permit her to use assets to maintain the Florida property.⁶ On December 15, 2010, the SEC moved to modify the asset freeze to order the sale of the Florida property before a final judgment was rendered concerning Mrs. Smith, and appoint the Receiver to oversee such proposed sale.⁷ On February 1, 2011, this Court, over the objections of Mrs. Smith,⁸ issued its Decision and Order granting the SEC's motion for an order amending the preliminary injunction to order the sale of the Florida property.⁹ A Court conference was held on February 8, 2011 with the Honorable David R. Homer, United States Magistrate Judge, regarding the issues being presented in this motion.

ARGUMENT

Pursuant to Fed. R. Civ. P. 62(c), this Court has the authority to grant a stay pending appeal. Rule 62(c) provides:

While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.¹⁰

In determining whether to grant a stay pending appeal, courts consider the following factors:

⁵ Dkt. No. 146.

⁶ Dkt. No. 211.

⁷ Dkt. No. 222.

⁸ Dkt. No. 247.

⁹ Dkt. No. 263.

¹⁰ Where there is reason to believe that an appeal will be taken, there is no reason why the Court should not make an order preserving the status quo during the expected appeal. *See* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, §2094.

(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interests that may be affected.

LaRouche v. Kezer, 20 F.3d 68, 72 (2nd Cir. 1994)(internal quotations and citations omitted).

In considering these four factors, the Second Circuit has stated “that the degree to which a factor must be present varies with the strength of the other factors, meaning that “more of one [factor] excuses less of the other.” McCue v. City of New York (in re World Trade Ctr. Disaster Site Litig.), 503 F.3d 167, 170 (2nd Cir. 2007), citing, Thapa v. Gonzales, 460 F.3d 323, 334 (2nd Cir. 2006). In other words, the factors are viewed on a “sliding scale,” and “[t]he necessary ‘level’ or ‘degree’ of possibility of success will vary according to the court’s assessment of the other stay factors.” Thapa v. Gonzales at 334-35, citing, Mohammed v. Reno, 309 F.3d 95, 101 (2nd Cir. 2002). “As the standard makes clear, a grant of injunctive relief pending appeal does not depend solely or even primarily on a consideration of the merits.” LaRouche at 72. To obtain a stay pending appeal, “the movant need not always show a ‘probability of success’ on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.” Id. (internal quotations omitted).

As to the first factor, it is evident that Mrs. Smith will suffer irreparable injury absent a stay. An irreparable harm is a harm for which “a monetary award cannot be adequate.” Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2nd Cir. 1979). To satisfy the irreparable harm requirement, a moving party must show that

absent injunctive relief, it will suffer a harm that cannot be remedied by damages. The movant must also show that the injury is “actual or imminent” and not “remote or speculative.” Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2nd Cir. 2007), citing, Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 114 (2nd Cir. 2005).

Movant respectfully submits that, without injunctive relief, she will suffer actual irreparable harm in that her ownership rights in her Florida property will be eliminated. Real property is by its very nature unique and exclusive and the Receiver’s sale of Mrs. Smith’s Florida property prior to a final judgment will directly impose upon her an actual irreparable harm for which a monetary award cannot be adequate. Notwithstanding that the proceeds will be paid to the Clerk of the Court, it is respectfully submitted that the irreparable injury imposed upon Mrs. Smith as a consequence of this Court’s Decision and Order forcing the sale of her Florida property is more akin to a permanent disgorgement following a final determination of guilt in a securities action and not an interim ancillary relief measure inherent in the equitable authority of the Court.

As to the second factor, it is respectfully submitted that Plaintiff will not suffer substantial injury if the stay is issued. There is neither a ready, willing and able buyer that has agreed to purchase the Florida property, nor has a lender commenced foreclosure proceedings. True, as a result of the asset freeze, and this Court’s denial of Mrs. Smith’s cross-motion to lift the preliminary injunction to permit her to use assets to maintain the Florida property, the Movant is presently unable to pay the carrying costs of her Florida property.¹¹ However, this Court has established a trial ready deadline of September 15,

¹¹ Contrary to this Court’s conclusion that “[n]o changed circumstances have been presented which would merit reconsideration” of the Order denying Mrs. Smith sufficient funds to maintain her Florida property, (See February 1, 2011 Decision and Order at page 7), it is respectfully submitted that the SEC’s motion and this Court’s consequent Decision and Order forcing the sale of her Florida property represent, both

2011, and the Movant's efforts to expedite this stay and appeal and the absence of a ready, willing and able buyer, combined with the timeframe to effectuate a foreclosure in Florida; the ability of the property owner to contest a Florida foreclosure action; and the ability to obtain a deficiency judgment, it is respectfully submitted that a final determination will be rendered concerning Mrs. Smith prior to the conclusion of a foreclosure action. The minimal, additional delay pending appeal will not cause substantial injury, particularly when weighed against the irreparable harm to Mrs. Smith's loss of her real property. Accordingly, it is respectfully submitted that this factor weighs in favor of granting a stay pending appeal.

As to the third factor, for the reasons stated in this Court's Decision and Order amending the preliminary injunction to permit the sale of Mrs. Smith's Florida property pursuant to the sole authority of the Receiver, it can be argued that the Movant may fail to demonstrate a substantial possibility of success on appeal. However, it cannot be said that there is no possibility of success on appeal. This Court cites SEC v. Haligiannis, 608 F. Supp. 2d 444 in support of its February 1, 2011 Decision and Order, however, it is respectfully submitted that Haligiannis is distinguishable from the present matter. In Haligiannis, Angelo Haligiannis was convicted of securities fraud in 2005 and fled the United States prior to his scheduled sentencing date of January 11, 2006. In a parallel civil enforcement action, the Court in Haligiannis granted summary judgment to the SEC on January 16, 2007 and authorized the lender to foreclose on Haligiannis' house. This foreclosure occurred on February 27, 2007 - following both a criminal and civil conviction of Haligiannis. The Haligiannis Court then resolved certain claims subject to

independently and together, significant changed circumstances warranting reconsideration for the provision of such equitable relief.

the surplus funds generated from the foreclosure sale. In this matter, Mrs. Smith's Florida property is not in foreclosure, and a final determination has not been rendered against Mrs. Smith. These critical distinctions between the present matter and Haligiannis, as well as well as other distinguishable matters, raise serious legal questions concerning the rights of the Movant – a woman who will soon have her day in court.

Finally, as it relates to the public interest element, it is respectfully submitted that any finding in the public interest is premature in that such interest will not be determined until a final judgment concerning Mrs. Smith has been rendered in this matter. Consequently, the granting of a stay pending appeal is in the public interest because it will simply preserve the status quo while a higher court considers the merits of Mrs. Smith's claims. See Connecticut Hosp. Assoc. v. O'Neill, 863 F. Supp. 59, 61 (D. Conn. 1994). Moreover, it is crucial to recognize that the February 1, 2011 Decision and Order grants the Plaintiff preliminary relief of a permanent nature that it would not be able to secure should a final determination in this matter be rendered that is in conformity with the SEC's claims for relief against the defendants. Assume arguendo that a final judgment is rendered finding Defendant's McGinn and Smith violated the securities laws as alleged by the SEC in its Amended Complaint.¹² Further assume arguendo that the final judgment is in agreement with Plaintiff's allegation that "[Mrs.] Smith received more than \$1.8 million from Smith and the McGinn Smith Entities during the period of the fraud."¹³ As a consequence of such a final judgment, Mrs. Smith would be required to disgorge approximately \$1.8 million in ill-gotten gains plus interest. The Record in this matter shows that the value of Mrs. Smith's stock account is approximately \$2.1

¹² Dkt. No. 100.

¹³ August 2, 2010 Amended Complaint ¶107. p. 28.

million,¹⁴ and the estimated market value of her Florida property is approximately between \$1.7 and \$1.9 million.¹⁵ In order to satisfy the \$1.8 million judgment, there would be no need for Mrs. Smith to sell her Florida property – she could freely choose to expend her assets in her stock account to satisfy the judgment and retain her home.

Further assume *arguendo* that a final judgment is rendered in which the SEC prevails in its allegation that title to the Florida property was fraudulently transferred to Mrs. Smith by David Smith and Mrs. Smith. Such a final judgment would eliminate Mrs. Smith's sole title to the Florida property and revert it to a tenancy by the entirety as between David Smith and Mrs. Smith. A tenancy by the entirety is a form of real property ownership available only to those who were actually married at the time of conveyance. Levinson v. R&E Prop. Corp., 395 B.R. 554, 558 (E.D.N.Y. 2008)(internal citations omitted). At common law, husband and wife were deemed a single legal entity, and a conveyance of property to both created an indivisible interest so that both parties were deemed seized of the whole. Id. Moreover, a tenancy by the entirety is described as being by the whole and not by the share, meaning each holds the whole or entire interest and lacks the power to alienate an undivided share. Id. As long as the Smith's marriage remains legally intact, both parties continue to be seized of the whole, and the death of one merely results in the defeasance of the deceased spouse's co-extensive interest in the property. Id. A final determination finding that the transfer of title to the Florida property by Mr. Smith and Mrs. Smith to Mrs. Smith was fraudulent would not convert Mr. and Mrs. Smith's interest as tenants by the entirety into a tenancy in common or joint tenancy. Orbach v. Pappa, 482 F. Supp 117, 121 (S.D.N.Y. 1979). Consequently,

¹⁴ Transcript p. 364

¹⁵ February 1, 2011 Decision and Order.

plaintiff would be entitled to relief as against only Mr. Smith's interest in the property held by the entirety. Id. See also, First Nat'l City Bank v. Phoenix Mut. Life Ins. Co., 364 F. Supp. 390, 393 (S.D.N.Y. 1973)(essential to the concept of tenancy by the entirety is the principle that an encumbrance incurred by one tenant may not operate to impair the right of survivorship).

By this motion, Mrs. Smith respectfully requests of this Honorable Court the opportunity to have all of her rights and arguments fully considered before she is subjected to the sale of her Florida property against her will and prior to a final judgment in this matter. Out of respect for Movant's property rights, it is prudent to delay implementation so as to afford her the opportunity to do so.

CONCLUSION

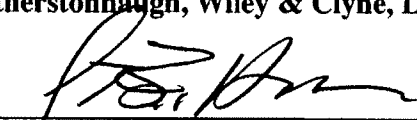
For the reasons stated, it is respectfully requested that this Court grant a stay of enforcement of its February 1, 2011 Decision and Order pending appeal.

Dated: February 11, 2011

Respectfully submitted,

Featherstonhaugh, Wiley & Clyne, LLP

By: _____


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