UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457 (GLS/DRH)

LYNN A. SMITH,

Defendant.

APPEARANCES:

DAVID STOELTING, ESQ.
Attorney for Plaintiff
Room 400
3 World Financial Center
New York, New York 10281

FEATHERSTONHAUGH, WILEY & CLYNE, LLP
Attorney for Defendant
Suite 207
99 Pine Street
Albany, New York 12207

OF COUNSEL:

ANDREW CALAMARI, ESQ.
KEVIN McGRATH, ESQ.
LARA SHALOV MEHRABAN, ESQ.

JAMES D. FEATHERSTONHAUGH, ESQ.
STEPHEN B. HANSE, ESQ.

DAVID R. HOMER
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

A preliminary injunction was previously entered in this case on the motion of plaintiff Securities and Exchange Commission ("SEC") freezing various assets of the defendants pending the outcome of this action for the benefit of allegedly defrauded investors. Dkt. No. 86 ("MDO I"). Included in the asset freeze was a property titled to defendant Lynn A. Smith located at 906 Orchid Point Way, Vero Beach, Florida ("Florida Property"). MDO I at 8, 42; L. Smith Decl. (Dkt. No. 247-1) at ¶ 2. On December 15, 2010, the SEC moved for an order amending the preliminary injunction to permit the sale of the Florida Property,

Lynn Smith opposed the motion, and in a memorandum-decision and order filed February 1, 2011, the motion was granted. Dkt. Nos. 222, 228, 247, 263 ("MDO II"). Familiarity with MDO II is assumed. Lynn Smith filed a notice of appeal and on February 11, 2011, moved this Court for a stay of the MDO pending the appeal. Dkt. Nos. 278, 279. For the reasons which follow, Lynn Smith's motion for a stay pending appeal is denied.[1]

The motion for a stay pending appeal here is governed by Fed. R. Civ. P. 62(c), which provides in pertinent part that ""[w]hile 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." A stay pending appeal under Rule 62(c) "is not a matter of right, even if irreparable injury might result." Nken v. Holder, 129 S. Ct. 1749, 1760 (2009) (citation omitted). Rather, such a motion requires "an exercise of judicial discretion, and [t]he propriety of its issue is dependent upon the circumstances of the particular case." Id. (internal quotation marks and citations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Id. at 1761 (citations omitted).

The exercise of discretion requires a court to balance four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public

[1]On February 16, 2011, counsel for Lynn Smith telephonically requested an expedited decision on her motion for a stay. A review of her motion papers indicated that a decision on her motion could be rendered without the necessity and attendant delay for receipt of opposing papers. Accordingly, the decision on this motion is rendered on an expedited basis.

interest lies.

Nken, 129 S. Ct. at 1760 (internal quotation marks and citations omitted). "[T]he degree to which a factor must be present varies with the strength of the other factors, meaning that more of one excuses less of the other." In re: World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007) (internal quotation marks and citations omitted). The first two factors are the "most critical." Nken, 129 S. Ct. at 1761. A stay should be granted only "when it is necessary to preserve the status quo pending the appeal." Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 565 (2d Cir. 1991). "Maintaining the status quo means that a controversy will still exist once the appeal is heard." 12 Moore's Federal Practice § 62.06[1] (3d ed. 2009).

As to the first factor, Lynn Smith must make a "strong showing that [s]he is likely to succeed on the merits." Nken, 129 S. Ct. at 1761. This requires a demonstration of more than a mere possibility of prevailing on appeal but less than a likelihood. See Safeco Ins. Co. of Am. v. M.E.S., Inc., No. 09-CV-3312 (ARR)(ALC), 2010 WL 5437208, at *7 (E.D.N.Y. Dec. 17, 2010) (citing cases). "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the moving party] will suffer absent the stay. Simply stated, more of one excuses less of the other." Mohammed v. Reno, 309 F.3d 95, 102 (2d Cir. 2002) (internal quotation marks and citation omitted).

Lynn Smith has failed to identify the error or errors she will assert on this appeal other than to argue that a case cited by the Court is distinguishable. See L. Smith Mem. of Law (Dkt. No. 278-1) at 6-7. No basis is presented, therefore, from which a court could reasonably conclude that she is likely to prevail on appeal. Assuming that Lynn Smith

intends to raise two principal arguments asserted in opposition to the SEC's motion – that insufficient bases exists to authorize the sale of the Florida Property and that any sale should be overseen by Lynn Smith, there exists no substantial likelihood that either argument will prevail on appeal. The principal basis for authorizing the sale was the uncontroverted fact that the condition and value of the Florida Property continue to deteriorate through diminishing real property values, the failure to maintain the property, and nonpayment of the mortgage and other obligations on the property. Those deteriorations compel the conclusion that the property must be sold to mitigate the increasing losses of value in the property whether that value is ultimately to be realized by Lynn Smith or the investors. As to whether the sale should be overseen by the Receiver or Lynn Smith, the reasons for selecting the Receiver are set forth in MDO II. In addition, Lynn Smith is inappropriate to act in this matter on behalf of the SEC and investors, who also have an interest in the property at this stage, in light of her self-interest as well as her prior false statements and omissions.[2] Accordingly, Lynn Smith has failed to meet her burden of demonstrating a likelihood of success on this appeal.

As to the second factor, Lynn Smith must establish irreparable harm by "an injury that is neither remote nor speculative, but actual and imminent." Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989) (internal quotation marks and citations omitted). "The injury must be one requiring a remedy of more than mere money damages. A monetary loss will not suffice unless the movant provides evidence of damage that cannot be rectified by financial compensation." Id. (citations omitted). Here,

[2]See MDO I at 9 n.13; Dkt. No. 194 at 20 n.17.

the injury to Lynn Smith, if any, would be solely monetary and would be fully compensated by receipt of the proceeds of the sale of the Florida Property at the conclusion of this action if she prevails. Lynn Smith characterizes the injury, however, as the loss of property rights, not simply monetary loss. There may be circumstances where the sale of a property might rise above mere monetary loss, as, for example, where it leads directly to the loss of a business or constitutes an emotional attachment beyond the financial investment. Here, however, the Florida Property is not Lynn Smith's primary residence or even her primary vacation residence. Rather, it is a third residence utilized by she and her husband in the past for vacations.[3] As a third residential property, then, its sale constitutes at worst a monetary loss completely compensable by the proceeds of the sale. On this factor as well, then, Lynn Smith has failed to meet her burden.

Having failed to meet her burden on the first two most important factors, the Court need not address the final two factors. However, as to those factors, the SEC and the investors would be harmed by the continued diminution of the equity in the Florida Property. If not sold now, the property value will continue to diminish and foreclosure proceedings could ensue. The amount of money which could be realized from the property for the benefit of investors will thus be significantly reduced. This factor also weighs against granting a stay.

Finally, the public interest also lies in favor of denying a stay. If not sold, the Florida Property will remain unoccupied and untended for the duration of this litigation, which now

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[3]Lynn Smith and her husband own a primary residence in Saratoga Springs, New York and she owned a vacation property on Great Sacandaga Lake, New York which was recently acquired by a family trust. See, e.g., MDO at 7-10.

appears likely to extend in the district court for at least 18-24 months before resolution.[4] No payments on the mortgage have been made since April 2010 and it does not appear that any will be made in the foreseeable future. The debt to the bank will thus continue to grow at a rate of approximately $10,000 per month causing additional losses to the bank and depleting funds available from a sale to either investors or Lynn Smith. Thus, the public interest factor weighs decidedly in favor of denying the stay.

Balancing the four factors with particular weight granted to the first two, it appears that all weigh in favor of denying a stay pending appeal. Accordingly, it is hereby

ORDERED that Lynn Smith's motion for a stay of this Court's order filed February 1, 2011 (Dkt. No. 278) is **DENIED**.

DATED: February 18, 2011
Albany, New York

David R. Homer
United States Magistrate Judge

[4]At a pretrial conference on February 17, 2011, the deadline for completion of discovery was extended to December 1, 2011. The parties expect to take approximately fifty depositions. Dispositive motions are anticipated and, if all defendants do not prevail, a lengthy trial will follow.