

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 09-22384-CIV-JORDAN

BANK OF AMERICA, N.A.,)
)
Plaintiff)
)
vs.)
)
COLONIAL BANK, & JOHN DOES 1-10,)
)
Defendants)
)
_____)

**ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER
& SETTING PRELIMINARY INJUNCTION HEARING**

Bank of America’s motion for a temporary restraining order [D.E. 2] is GRANTED.

The complaint, declarations, and exhibits filed by Bank of America indicate that this case involves more than 6,000 mortgages issued by a subsidiary of Bank of America and valued in excess of \$1,000,000,000. After issuing the loans, Bank of America engaged in a series of transactions whereby Colonial Bank would hold the loans in trust while Freddie Mac determined whether or not to purchase each loan. Pursuant to the bailee letters governing the parties’ relationship, Colonial would hold possession of the mortgages and related documents pending Freddie Mac’s review of the loans. As to each loan that was purchased, Colonial would hold the proceeds in a segregated and specifically identified trust account. For each loan that Freddie Mac rejected or refused to purchase, Colonial was obligated to return the mortgage to Bank of America. In no event was Colonial permitted under the agreement to hold the sale proceeds or notes at issue for more than 15 days from the date of the transmittal letter. *See* Transmittal Letter, Declaration of Sumeet Wadhera, Exh. A. According to Bank of America, Colonial currently holds—and has to this point refuses to return—in excess of \$1 billion in sale proceeds from Freddie Mac’s loan purchases, along with all the remaining loans that were rejected for purchase.

Relations between Bank of America and Colonial soured when it came to light in late-July of 2009 that Colonial was not in compliance with the Federal Reserve’s capital requirements and was on the verge of insolvency. *See* Complaint at ¶¶ 18–19. Subsequent revelations indicated that Colonial was the subject of a criminal probe by the Department of Justice, in part due to accounting

irregularities related to its mortgage warehouse lending division. *See* Declaration of Christian Mundigo at ¶ 12. On August 11, 2009, Bank of America sent a letter to Colonial that purported to revoke all outstanding transmittal letters, and demanded the return by 12:00 p.m. on August 12, 2009, of all sale proceeds and loan agreements held by Colonial as custodian for Bank of America. *See* Revocation Letter, Declaration of Tammy Spriggs, Exh. A. When Colonial failed to comply, Bank of America filed this lawsuit, which includes a request for a temporary restraining order enjoining Colonial from liquidating, transferring, or encumbering the assets at issue in this case.

In its motion, Bank of America argues that the circumstances warrant the ex parte injunctive relief sought here. On this record, I agree.

A temporary restraining order will issue where the plaintiff can show: (1) a substantial likelihood of success on the merits; (2) irreparable injury; (3) that the potential harm to the plaintiff outweighs the damage to the enjoined party; and (4) that the injunction would not be adverse to the public interest. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Further, Rule 64 makes available in federal court all remedies relating to the prejudgment seizure of assets provided for by the state in which the court is located. Thus, Florida law relaxes the traditional “irreparable harm” requirement in cases involving civil theft, and instead only requires the movant to make “a showing of immediate danger of significant loss[.]” *See* Fla. Stat. § 812.035(6).

I find that Bank of America has met its burden in this case as to each of the four requirements. As detailed in the motion, Colonial maintains a clear contractual obligation to return to Bank of America more than \$1 billion in assets, but has—to this point—rebuffed requests by Bank of America to remit the full amount owed. Based on these facts, which are corroborated by supporting declarations and documentation, Bank of America has established a substantial likelihood of success on its civil theft claim. *See, e.g., Joseph v. Chanin*, 940 So. 2d 483, 485–87 (Fla. 4th DCA 2006) (holding that a defendant was liable for conversion and civil theft where she knowingly held identifiable funds that—although initially obtained lawfully—did not rightfully belong to her and refused demands to return the assets to the rightful owner); *Escudero v. Hasbun*, 689 So. 2d 1144, 1146–47 (Fla. 3d DCA 1997) (holding that court properly issued emergency injunctive relief seizing money pursuant to § 812.035(6) where a defendant withdrew the money from a jointly-held bank account contrary to a contractual arrangement with his co-owner).

Bank of America has also demonstrated the potential for immediate substantial injury and that the equities involved weigh in favor of the temporary injunctive relief sought. Viewing Colonial's contractual breach in conjunction with the fact that Colonial is on the brink of collapse and is suspected of criminal accounting irregularities, the potential for immediate substantial injury to Bank of America is clear. More importantly though, the injunctive relief sought by Bank of America poses very little threat of harm to Colonial, given that Colonial maintains only a temporary custodial interest in the assets at issue and no right to long-term outright possession. In other words, no real harm can come to Colonial by enjoining it from encumbering or transferring money that does not belong to it in the first place. And to the extent that the interests of the public are implicated in this case, they weigh in favor of requiring Colonial to honor its contractual obligations and avoiding what would amount to a billion-dollar bank heist. I therefore find that Bank of America has met its burden in establishing each of the requirements for a TRO.

In light of the urgency of these proceedings and the obvious benefit of issuing the TRO before its existence is made known to Colonial so to prevent any pre-injunction dissipation of assets, I find that equity favors that I issue this TRO on an ex parte basis and without advance notice to Colonial.

IT IS THEREFORE ORDERED THAT:

Pursuant to Rule 65(c), Bank of America shall post as security a bond in the amount of \$100,000, which is proper to cover the costs and damages sustained by Colonial if it is found to have been wrongfully enjoined by this order. This order will not be effective until proof of this security is filed with the court.

Pending the hearing and determination of the motion for preliminary injunction, Colonial Bank and the John Doe Defendants, and all persons acting under their direction or control, or in concert with them, are hereby enjoined and restrained from selling, pledging, assigning, liquidating, encumbering, transferring, or otherwise disposing of all or any portion of (a) the proceeds paid by Freddie Mac to Colonial Bank, as trustee, custodian, bailee, and agent, for certain mortgage loans and corresponding loan documents owned by Ocala Funding, LLC ("Ocala"), and (b) certain mortgage loans and corresponding loan documents delivered to Colonial Bank, as trustee, custodian,

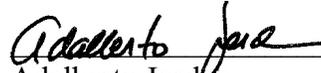
bailee, and agent, which were not purchased by Freddie Mac as set forth on the schedule annexed hereto as Schedule A to the complaint in this action.

A copy of this order, together with all documents filed in this case by Bank of America, shall be served on Colonial Bank, at 201 East Pine Street, Suite 730, Ocala, Florida, 32801, by overnight delivery on or before August 14, 2009, and such service shall be deemed good and sufficient as to this order. Bank of America must still effect service of process of the complaint and summons pursuant to the Federal Rules of Civil Procedure.

Any motion or legal memoranda filed by Colonial Bank in opposition to this order, including any motions to modify or dissolve this order pursuant to Rule 65(b)(4), must be electronically filed on or before August 24, 2009. Any response from Bank of America must be electronically filed on or before August 26, 2009.

I will hear argument on Bank of America's motion for a preliminary injunction at 3:00 p.m. on Friday, August 28, 2009, in Courtroom 10-1 of the United States Courthouse, 400 North Miami Avenue, Miami, Florida.

DONE and ORDERED in chambers in Miami, Florida, this 13th day of August, 2009.


Adalberto Jordan
United States District Judge

Copy to: All counsel of record