

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

JUDE CAPITAL, LLC, a Michigan limited liability company,

Plaintiff,

vs.

Case No. 2013-3480-CK

CHOULAGH INVESTMENTS, INC., a Michigan Corporation, ARTHUR CHOULAGH, an Individual, BASIL CHOULAGH, an individual, TP INVESTMENTS, LLC, a Michigan limited liability company, THE HUNTINGTON NATIONAL BANK and STATE OF MICHIGAN ,

Defendants.

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OPINION AND ORDER

Plaintiff has filed a verified motion for possession pending final judgment. Defendants Choulagh Investments and Basil Choulagh (“Defendants”) have filed a response and request that the motion be denied. Defendant TP Investments, LLC has also filed a response opposing the motion.

On or about August 17, 2010, Defendant Basil Choulagh (“Borrower”) allegedly executed a Secure Note (“Note”) in favor of Ronie Karana (“Lender”) in the amount of \$200,000.00. As security for the Note, Borrower’s company, Defendant Choulagh Investments, Inc. allegedly granted Lender, through an August 17, 2010 Security Agreement (“Security Agreement”), a lien on and security interest in all of its personal property including accounts receivable, machinery, inventory, accounts, equipment and general intangibles (collectively, the “Collateral”). On May 31, 2013, the Note and Security Agreement were assigned by Lender to

Plaintiff. However, it is undisputed that Defendant TP Investments, LLC is the holder of a first priority lien on the Collateral, *inter alia*.

Borrower has allegedly defaulted on its obligations to Plaintiff under the Note. On June 6, 2013, Plaintiff sent Defendants a letter advising them of the defaults. On August 29, 2013, Plaintiff filed its complaint in this matter. On December 16, 2013, Plaintiff filed its instant motion for possession pending final judgment.

In support of its motion, Plaintiff asserts that under the Security Agreement it is entitled to possession of the Collateral and to have Defendants assemble the Collateral for their use. Plaintiff contends that it needs the Collateral pending final judgment due to its fear that the Collateral will be damaged, destroyed, concealed, disposed of or substantially impaired. In support of its position, Plaintiff contends that Defendants have failed to pay several creditors and have failed to pay the property taxes owed.

MCR 3.105(E) governs motions for possession pending final judgment. MCR 3.105(E) provides:

- (1) Motion for Possession Pending Final Judgment. After the complaint is filed, the plaintiff may file a verified motion requesting possession pending final judgment. The motion must
  - a. Describe the property to be seized, and
  - b. State sufficient facts to show that the property will be damaged, destroyed, concealed, disposed of, or used as to substantially impair its value, before final judgment unless the property is taken into custody by court order.

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- (3)(b) At the hearing [on the motion], each party may present proofs. To obtain possession before judgment, the plaintiff must establish
  - (i) That the plaintiff's right to possession is probably valid; and

- (ii) That the property will be damaged, destroyed, concealed, disposed of, or used so as to substantially impair its value, before trial.

On December 23, 2013, a hearing was held in connection with the instant motion, at which time Plaintiff was given an opportunity to satisfy its burden under the court rule. While Plaintiff has maintained that the Collateral is in danger of being damaged and/or diminished, the only evidence it submitted is proof that there are outstanding property taxes owed on Defendant Choulagh Investments, Inc.'s real property. The Court is satisfied that the fact that Defendant has outstanding debts is not sufficient to meet the burden of establishing that the property **will be** damaged, destroyed, concealed, disposed of, or used so as to substantially impair its value. While Plaintiff has asserted that the Collateral may be diminished, it has certainly not established that it in fact will be, which is the standard set forth by the court rule. Accordingly, the Court is convinced that Plaintiff has failed to satisfy its burden and that its motion must be denied.

*Conclusion*

For the reasons set forth above, Plaintiff's motion for possession pending final judgment is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: January 8, 2014

JCF/sr

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