UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-60907-CIV-MORENO

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants.
_____/

RECEIVER JONATHAN E. PERLMAN'S RESPONSE IN OPPOSITION TO AMANDA FINLEY'S EXPEDITED MOTION TO REQUIRE THE RECEIVER TO CONTINUE TO HOLD IN TRUST $107,500 OR ALTERNATIVELY, MOTION FOR A STAY PENDING APPEAL [ECF NO. 455]

Jonathan E. Perlman, as Permanent Receiver, (the "Receiver") submits this Response in Opposition to Amanda Finley's ("Finley") Expedited Motion to Require the Receiver to Continue to Hold in Trust $107,500 or Alternatively, Motion for a Stay Pending Appeal ("Motion to Hold Funds or to Stay") [ECF No. 455].

INTRODUCTION

Through her "expedited" motion, Finley asks this Court to stay its Order denying her claim for equitable lien until the Court rules on her Motion for Reconsideration, and, thereafter, pending appeal. Because the Court has denied Finley's Motion for Reconsideration, her first request is moot and otherwise improper. [ECF No. 458]. Similarly, because she has not filed an appeal, her alternative request to stay pending appeal is premature.

Moreover, even if Finley were to file a notice of appeal, the Court should still deny her Motion to Stay because she cannot satisfy the requirements for a Court to grant such relief. First,

Finley has not shown a likelihood of success on the merits. This Court has already denied her claim for an equitable lien based upon multiple independent reasons—twice. Second, the harm victims will suffer if the $107,500 continues to be held up far outweighs any harm to Finley—who has already enjoyed the benefit of the funds and who, as this Court found, would enjoy a windfall if her claim for equitable lien were to stand. Likewise, the public interest and the weight of the equities clearly favor denial of a stay because the money, destined to redress victimized consumers, should not be held up.

The parties have briefed this matter extensively before the Magistrate Court and this Court. Accordingly, the Receiver incorporates by reference, as if fully stated herein, the arguments and factual background in the following prior briefings: ECF Nos. 413, 425, 426, 430, and 431.

LEGAL STANDARD

When ruling on a motion for stay pending appeal courts consider: "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *FTC v. IAB Mktg. Assocs., LP*, 972 F. Supp. 2d 1307, 1311 (S.D. Fla. 2013) (internal citations omitted). The first factor is the most important, but courts also consider the weight of the equities. *Id*.

ARGUMENT

1. Finley's Expedited Motion to Hold Funds must be denied as moot and improper.

Finley's motion requested that the Receiver be required to hold the $107,500 in trust pending the Court's resolution of her Motion for Reconsideration. [ECF No. 455 at 1]. On February

24, 2020, the Court denied Finley's Motion for Reconsideration [ECF No. 458], making the request moot.

Moreover, the Motion to Hold Funds pending appeal is improper. The Receiver is unaware of any authority that would warrant granting such a request. Notably absent from Finley's pleadings is the fact that the Receiver *voluntarily* agreed to hold the funds in a trust account pending a ruling on her motion for equitable lien because Finley's actions were jeopardizing the pending sale of the property. Further, it is against public interest to continue to hold up these funds, which are destined to return to consumers. The Court entered a final order on Finley's motion for equitable lien and denied her Motion for Reconsideration. Finley waited two weeks to file her "expedited" motion, and in that time, in accord with prior Court orders, the Receiver moved the funds from an escrow account into the Receivership's general operating fund for eventual distribution to the victims of Defendant Marcus' fraud. *See* [ECF Nos. 174, 231, 293].

2. Finley's secondary Motion to Stay Pending Appeal must be denied as premature, and should also be denied on the merits.

Finley alternatively moves this Court for an order staying the case pending appeal. As an initial matter, it is unclear what relief a "stay" would provide Finley. There is no active litigation against her that would warrant a stay pending an appeal, even if she files one. Regardless, the Court should deny Finley's Motion to Stay as premature since she has not appealed this Court's order denying her motion for equitable lien.

In addition, even if Finley files a notice of appeal, the Motion to Stay should still be denied because she has not shown that she is likely to succeed on the merits. Indeed, the Court has already found Finley's arguments unpersuasive. *See* [ECF Nos. 451 & 458]. Finley does not present any newly discovered evidence nor any relevant cases that demonstrate she is likely to succeed—she merely reargues previous theories, that the Court has already rejected. Although Finley claims that

a 2015 broker agreement [ECF No. 455, Ex. B] ("Broker Agreement") is "critical new" evidence that she was entitled to the funds the Broker rebated to lower the purchase price—that notion has been implicitly rejected as well. [ECF No. 558]. The Broker Agreement was readily available to Finley long before she began litigating her claim and is, therefore, not newly discovered.[1] Moreover, the Broker Agreement was not even in effect at the time of the transaction. The term of the Broker Agreement was 1 year from the effective date of February 3, 2015. [ECF No. 455 at Ex. B]. However, the residential contract for sale of the property was executed on June 17, 2016, and the HUD reflecting the disbursement of funds was dated July 7, 2016, both four to five months after the Broker Agreement terminated.

Further, the Court denied Finley's request for an equitable lien on multiple independent grounds. While the Court noted that Finley failed to provide any evidence supporting *her* entitlement to the funds instead of the Broker,[2] it also conclusively held that Finley was "not the proper party to assert the claim, and *even if she was*, Florida law precludes her from doing so." [ECF No. 451 at 5]. The Court found that Finley, as a sales associate, under no circumstances may bring an action to recover a sales commission or compensation in connection with a real estate brokerage transaction except as against her employer. *See* Fla. Stat. § 475.42(1)(d).

The fact that Florida law precludes Finley from seeking such relief based on her purported commission is likewise just one of the many independent reasons the Court rejected her claim for an equitable lien. The Court also conclusively determined that by rebating the commission, Finley "had no reasonable expectation based on the terms of the deal that she would be repaid that money;

[1] Finley admits that it was not until the Court denied her Motion for Equitable Lien that she decided to contact her former broker and request a copy of the Broker Agreement, which they promptly sent her. Finley's only explanation for the belated request is simple—she (a lawyer) didn't think she needed it. [ECF No. 455 at 5]. Finley not only failed to provide evidence of a valid broker agreement. She also relied upon a prenuptial agreement that she never put before the Court.

[2] Aside from the fact that the contract provided by Finley was invalid at the time of the transaction, it does not provide evidence that "she was the real party crediting the commission toward the purchase of the home." [ECF No. 451 at 5].

"[a]llowing her to collect the $107,500 now is akin to giving her a windfall;" she "obtained the benefit of that bargain when the purchase price was rebated;" the Receivership "has an equitable interest in the property, because all the cash proceeds used to purchase the property are traceable to stolen consumer funds;" the Receivership property was sold at a $1,250,000 loss; and the transaction "was intertwined with the fraudulent monies and therefore . . . Finley's interest, if any, would [not] take priority over the Receiver's." [ECF No. 451 at 5].

The Court also rejected Finley's argument that the funds were "separately earned." In so rejecting, the Court cited to the undisputed record evidence provided by the Receiver's forensic accountant showing "that the monies for the all-cash purchase of the home are all traceable to stolen consumer funds." *Id.* Finally, the Court noted, "the HUD…reflects that no cash was provided by the seller at closing;" instead, all funds were provided by the buyer. *Id.*

Finley has also failed to demonstrate that she will be irreparably harmed absent a stay. In reality, the victims of Defendant Marcus' massive fraud—through which Finley enjoyed benefits for years—will suffer the most harm if the funds continue to be held up. Both the public interest and weight of the equities clearly favor denial of a stay where the funds could otherwise be in the process of redress to the victimized consumers in accordance with the Court's final orders. *See IAB Mktg. Assocs.*, 972 F. Supp. 2d at 1113 ("Staying the case would likely prolong the Receivership and delay recovery for injured consumers."); *FTC v. Leshin*, 2010 U.S. Dist. LEXIS 153700, *5 (S.D. Fla. Feb. 25, 2010) (denying stay and noting the "value to the public of the timely enforcement of the Court's orders," which were entered to "enforce the law and protect consumers"); *FTC v. Capital Choice Consumer Credit, Inc.*, 2004 U.S. Dist. LEXIS 31476, *27 (S.D. Fla. May 4, 2004) ("the public interest lies . . . with the victims of defendants' fraud").

Ultimately, Finley has wholly failed to meet her burden under the requisite factors for consideration of a motion to stay pending appeal. Accordingly, the Court must deny Finley's Motion to Stay.

3. Finley has not met the necessary requirements for a ruling on an "expedited" basis.

Pursuant to Local Rule 7.1(d)(2) "[a] filer whose time-sensitive motion does not qualify as an emergency motion but who nonetheless requires an expedited ruling by a date certain may file an expedited motion." The motion **"must** set forth in detail **the date by which an expedited ruling is needed** and the reason the ruling is needed by the stated date." S.D. Fla. L.R. 7.1(d)(2) (emphasis added). Finley's Motion to Hold Funds or to Stay fails to meet this standard. The Motion does not set forth a date by which a ruling is required because no such date exists.

CONCLUSION

Consumers unknowingly purchased the multi-million dollar waterfront property for the benefit of Finley and Marcus. Finley enjoyed the benefits of these misappropriated funds. The property has been liquidated and victims have already lost $1,250,000 while Finley continues to attempt to be paid in full on her purported commission. Such a result flies in the face of equity and applicable law. Finley's Motion to Hold Funds is moot and improper. Similarly, Finley's Motion to Stay is premature and improper. No appeal is pending, and the delay of disbursement of consumer funds will continue to harm the victims of Defendant Marcus' fraud. Even if an appeal is filed, Finley has not shown a likelihood of success on the merits. Accordingly, Finley's Motion to Hold Funds and to Stay should be denied.

Respectfully submitted on February 27, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record and entities in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Gregory M. Garno
Gregory M. Garno, Esq.