

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

FILED

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JOHN W. OXENDINE, Industrial Loan
Commissioner, and THURBERT E. BAKER, Attorney General for the State of Georgia,
CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

Plaintiffs,

v.

CIVIL ACTION FILE
NUMBER 04CV11446-1

RICHARD D. CLAY II, ANGELA CLAY,
BRENT WEST, JOHN SPENCE,
AMERICAN CASH ADVANCE, INC.,
EZ CREDIT, INC., FAST CASH TIL PAYDAY, INC.,
GREAT AMERICAN CASH ADVANCE, INC.,
GREAT AMERICAN CREDIT, INC.,
INTEGRATED FINANCIAL CONCEPTS, INC.,
MONEY TIL PAYDAY, INC., USA PAYDAY ADVANCE, INC.,
USA PAYDAY CASH ADVANCE CENTER #8, INC.,
USA PAYDAY CASH ADVANCE CENTER #9, INC.,
USA PAYDAY CASH ADVANCE CENTER #10, INC.,
USA PAYDAY CASH ADVANCE CENTER #11, INC.,
USA PAYDAY CASH ADVANCE CENTER #12, INC.,
USA PAYDAY CASH ADVANCE CENTER #13, INC.,
USA PAYDAY CASH ADVANCE CENTER #14, INC.,
DEUSA ADVANCES, INC., GRUSA CENTERS, INC.,
HLUSA ADVANCES, INC., LAUSA PAYDAYS, INC.,
LNUSA PAYDAY CENTER, INC., MHUSA ADVANCES, INC.,
RDUSA ADVANCES, INC., UCUSA PAYDAY, INC.,
WDUSA CENTERS, INC., KDUSA PAYDAY, INC.,

Defendants.

ORDER

This action, filed pursuant to the Georgia Industrial Loan Act, O.C.G.A. § 7-3-1 *et seq.*, and Georgia's payday lending statute, O.C.G.A. § 16-17-1 *et seq.*, came before the court on the plaintiffs' contested motion for supersedeas bond and injunction. Upon due consideration of all matters of

record as well as oral argument presented, and for reasons that follow, the court *denies* the motion to the extent the plaintiffs pray for a supersedeas bond but *grants* the motion to the extent the plaintiffs pray for an injunction, as outlined in this order *infra*.

1. Plaintiffs' motion for supersedeas bond.

In their instant motion, the plaintiffs move the court pursuant to O.C.G.A. § 5-6-46 to require the defendants to post a supersedeas bond commensurate with the plaintiffs' claims against the defendants for a civil penalty equal to three times the amount of interest or charges to their customers, pursuant to O.C.G.A. § 16-17-4, citing *In Re the Estate of Zeigler*, 273 Ga. App. 265 (2005). In response, the defendants argue O.C.G.A. § 5-6-46 does not authorize the court to require a supersedeas bond from the defendants because the order appealed from grants the plaintiffs' motion for summary judgment as to the defendants' liability only, not as to the amount of damages, relying on *Barge v. St. Paul Fire &c*, 245 Ga. App. 112 (2000).

O.C.G.A. § 5-6-46(a) authorizes the grant of "a supersedeas bond *'when the judgment determines the disposition of the property in controversy* as in real actions, trover, and actions to foreclose mortgages and other security instruments . . . [T]he amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest,

and damages for delay.” (Emphasis added.) *Cloud v. Ga. Cent. Credit Union*, 214 Ga. App. 594, 597(5) (1994), cited in *In Re Estate of Zeigler*, *supra*, fn 7. *Cloud*, however, is factually distinguishable from the case at bar. In *Cloud*, the appellants, as former owners of certain real property, initially filed their claims against their appellee-creditor (among others) based on the foreclosure sale of the property which secured their debts owed to the appellee-creditor. As former property owners, they challenged the legality of the foreclosure sale on appeal as well as the later ejection of these appellants from the property they refused to leave after it had been sold to the appellee-creditor pursuant to the foreclosure. The trial court ordered a writ of possession against the former property owners, which the latter appealed, and then granted the appellee-creditor’s request for supersedeas bond. That is, the judgment issued by the trial court, while not for money damages, “determined the propriety of the disposition of the property in controversy...” so that the grant of a supersedeas bond was authorized under subsection (a) of O.C.G.A. § 5-6-46. See, *Cloud v. Ga. Cent. Credit Union*, *supra* at 597(5).

Similarly, the *Zeigler* case is factually distinguishable from the one *sub judice*. In *Zeigler*, the probate court removed the appellant as executrix of the decedent’s estate which included, as the estate’s main asset, a three-bedroom home which had been sold for a sum certain but for which the

then-executrix, despite her fiduciary position, had failed to obtain an appraisal prior to selling it. In addition, she allowed personal property, including a van, household goods and jewelry, to be removed from the estate to an "undisclosed location". Moreover, she was found not only to have failed responsibly to take control of the assets of the estate but to have commingled estate funds with her personal funds. Again, the probate court's decision to remove the appellant as executrix of the estate at least implicitly "determine[ed] the disposition of the property in controversy", i.e., decedent Zeigler's estate, making the probate court's order that the (former) executrix post a supersedeas bond appropriate. See, *In Re Estate of Zeigler*, *supra*, at 271(2).

In *Barge v. St. Paul Fire &c*, *supra*, the trial court affirmed an arbitration award against the appellant and ordered the appellant to post a supersedeas bond to preserve the supersedeas effect of their main appeal. Despite the trial court's confirmation of the underlying arbitration award, no written monetary judgment had been entered on this award. The appellate court vacated the bond order, finding that under the language of O.C.G.A. § 5-6-46(a), which provides "conditioned for the satisfaction of the judgment in full if the appeal is unsuccessful, and where the judgment is for the recovery of money not otherwise secured, to fix the amount of the bond as will cover the whole amount of the judgment remaining unsatisfied, costs on the

appeal, interest, and damages for delay”, the “entry of a money judgment is an implied prerequisite to requiring a supersedeas bond in cases like this (i.e., cases involving only an award of money and involving no injunctive or other equitable relief.” (Citations and punctuation omitted.) *Barge v. St. Paul Fire &c., supra*, at 116(2). In *Barge*, the confirmation order was not a “certain and definite money judgment upon which an execution could operate” (because the arbitration award was not attached to the court’s order confirming the award) so that the trial court was deprived of the power to order a supersedeas bond. *Id.*

In the case at bar, the plaintiffs pray not only for money damages in their complaint, as amended, but also for an order enjoining the defendants from making loans “under any guise” as well as for an order “compelling closure, as nuisances, of the various places of business through which the defendants operate their payday loan businesses.” However, the judgment appealed from merely fixes liability in the defendants, *without* indicating the amount or even the type of damages to which the plaintiffs may be entitled. That is to say that although the case *sub judice* is not a case “involving only an award of money and no injunctive or other equitable relief”, the judgment appealed from nevertheless does not “determine the disposition of the property in controversy as in real actions, trover, and actions to foreclose mortgages and other security instruments”, depriving the court of the

authority to require a supersedeas bond from the defendants. *Barge v. St. Paul Fire &c.*, *supra*, at 116(2)); O.C.G.A. § 5-6-46(a). Therefore, the court *denies* the plaintiffs' request for a supersedeas bond.

2. Plaintiffs' request for injunction.

The court is, however, authorized to preserve the status quo by enjoining the defendants from transferring assets and destroying records.

"An interlocutory injunction is a device to keep the parties in order to prevent one from hurting the other whilst their respective rights are under adjudication. There must be some vital necessity for the injunction so that one of the parties will not be damaged and left without adequate remedy. Trial courts enjoy broad discretion in deciding whether an interlocutory injunction should be imposed, though the power to do so 'shall be prudently and cautiously exercised... .' O.C.G.A. § 9-5-8. In determining whether to issue an interlocutory injunction, the trial court must balance the conveniences of the parties pending final adjudication. An interlocutory injunction may be issued to maintain the status quo if, after balancing the relative equities of the parties, it appears the equities favor the party seeking the injunction." (Citations and punctuation omitted.) *Bernocchi v. Forcucci*, 279 Ga. 460 (2005). "The trial court's exercise of its discretion will not be disturbed by an appellate court "unless a manifest abuse of that discretion is shown [or] unless there was no evidence on which to base the ruling." *Id.*

(a) Defendants' business records.

With regard to their business records, the defendants argue an injunction ordering the defendants to retain the records at issue is unnecessary as deposition testimony excerpts cited by the plaintiffs "clearly state that there is a daily back-up of the records and that the paper records are scanned into computers and retained." (See, defendants' response brief, p. 4.) The court finds that if the defendants' policy is indeed as indicated in their response brief, it will not work a hardship or even an inconvenience if the defendants are ordered by the court not to destroy but to retain any and all records of the defendants whereas it would be difficult for the plaintiffs to prove the amount of damages (purportedly illegal interest) without such records.

As it appears the equities favor the parties seeking the injunction, i.e., the plaintiffs, the court, in the exercise of its discretion, hereby *grants* the plaintiffs' request for an injunction and *orders* all of the defendants to retain any and all past, current and future records pertaining to any aspect of the instant action, including, but not limited to, files, computer back-ups, documents, reports, summaries, lists, accounts information, tax filings, corporate filings and back records, dating from October 2002 (date of Industrial Loan Commissioner's order, attached to complaint), until further order of this court.

(b) Defendants' assets.

With regard to their business and personal assets, the defendants argue the effect of granting the plaintiffs their request for injunctive relief would amount to freezing the assets of their businesses and prevent the defendants from continuing to operate while they attempt to vindicate themselves on appeal. The defendants do not deny, however, that defendant Richard Clay is the sole owner of all corporate defendants, that Mr. Clay testified under oath he deeded his residence at 1166 Citadel Drive in Atlanta, Georgia by quitclaim to a Texas corporation "under the advisement of counsel" for "protection of assets", and that the transaction took place weeks *after* the defendants were sued for what the court has determined to have been unlawful loan activities, although the defendants allege they "had already started the process to transfer the ownership of the house".

In light of these facts and circumstances, which persuade the court it is not unlikely the defendants will transfer additional assets in the future absent court order prohibiting such transfer, and in consideration of the defendants' liability for potentially significant damages, it appears the equities favor the parties seeking the injunction, i.e., the plaintiffs. Therefore, the court, in the exercise of its discretion, hereby *grants* the plaintiffs' request for an injunction and *enjoins* the defendants from transferring any assets, except those necessary in the ordinary course of

business, commencing with the date of the instant order until further order
of this court.

SO ORDERED, this 12 day of April, 2006.



Robert J. Castellani, Judge
Superior Court of DeKalb County

cc: ✓Thurbert E. Baker, Esq.
✓Amy C. M. Burns, Esq.
David G. Crockett, Esq.
John S. Dwyre, Esq.