

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 23, 2017

Elisabeth A. Shumaker
Clerk of Court

JANE WILNER; TRUDO LETSCHERT;
ROBERT RUDNICK; RUSSELL
SCHMEISER,

Plaintiffs - Appellants,

v.

BEHRINGER HARVARD
CORDILLERA, LLC; BEHRINGER
HARVARD HOLDINGS, LLC; ROBERT
M. BEHRINGER; MICHAEL D. COHEN,

Defendants - Appellees.

No. 17-1065
(D.C. No. 1:16-CV-02999-RBJ)
(D. Colo.)

CSMN INVESTMENTS, LCC; CCG
MANAGEMENT, LLC,

Intervenors.

ORDER

Before **TYMKOVICH**, Chief Judge, and **MORITZ**, Circuit Judge.

Appellants have filed an emergency motion for stay pending appeal, seeking an order to enjoin the closing of the real estate contract to sell the Cordillera Lodge & Spa (the Lodge) by the Appellees, several Behringer Harvard entities, to Intervenors, CSMN Investments, LLC and CCG Management, LLC. Ruling from the bench, the district court denied Appellants' motion for a preliminary injunction on Friday, February 16, after a

hearing. The court said it would issue a written order, but Appellants filed their notice of appeal and emergency stay motion first, and to date the district court has not yet entered a written ruling.

In deciding whether to exercise our discretion to grant a stay, we consider “(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 issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted).

Appellants have not made the necessary showing to warrant entry of a stay. First, they have not demonstrated a likelihood of success on the merits. Although Appellants asserted five claims for relief, they do not articulate any argument as to why they are likely to succeed on four claims, focusing only on their promissory estoppel claim. As to that claim, they allege that Appellee Behringer Harvard Cordillera, LLC made certain promises and representations in 2009 to the Cordillera Property Owners Association (CPOA) to induce it to approve amendments to the Cordillera’s planned unit development (PUD) regulations. They argue Appellees would be in breach of those promises if they sell the Lodge to CCG, who plans to close the Lodge, convert it to an addiction treatment facility, and exclude Cordillera property owners, including Plaintiffs, from using the Lodge facilities. But the alleged representations were made to the CPOA, not the Appellants. Further, Appellants concede in their stay motion that recorded covenants governing their property expressly permit the Lodge owner to close the Lodge

and terminate any and all use rights by Cordillera property owners. Thus, it is doubtful that Appellants could prevail on their promissory estoppel claim. *See Cherokee Metro. Dist. v. Simpson*, 148 P.3d 142, 151 (Colo. 2006) (articulating elements of Colorado promissory estoppel claim).

Second, it is well established that economic loss is usually insufficient to constitute irreparable harm. *See Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). But Appellants do not demonstrate in their stay motion that any harm caused by the closing of the sale contract to CCG could not be compensated by monetary damages.

We therefore deny Appellants' emergency motion for stay pending appeal.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk