

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

FT. MYERS DEVELOPMENT CO., INC.

CASE NO. 96-61135

Debtor

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FT. MYERS DEVELOPMENT CO., INC.

Plaintiff

vs.

ADV. PRO. NO. 96-70046

FIRST UNION NATIONAL BANK OF  
FLORIDA, et al

Defendants  
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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Ft. Myers Development Co., Inc. ("Debtor") seeks by way  
of an Order to Show Cause granted by this Court on March 21, 1996,

a preliminary injunction in this adversary proceeding enjoining the First Union National Bank of Florida ("FUNB") from transferring twelve condominium units located in Ft. Myers Beach, Florida, pursuant to a judgment of foreclosure and sale entered by the Circuit Court for Lee County, Florida ("Florida State Court") on May 17, 1995.

The Court heard oral argument on the Order to Show Cause at its motion term held in Syracuse, New York on April 2, 1996, and adjourned the hearing to April 16, 1996, to consider the relief requested by Debtor.

#### JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this adversary proceeding pursuant to 28 U.S.C. §§1334(b), 157(a), (b)(1) and (2)(E) and (O).

#### FACTS

On the pleadings submitted by both parties, it appears that on or about August 19, 1987, Lovers Key Development Co., Inc. ("LKD"), Debtor's predecessor in title, executed a note and mortgage to Florida National Bank, FUNB's predecessor, encumbering 80 condominium units which were operated by LKD as a Days Inn Hotel.<sup>1</sup> Sometime between August 1987 and December 1988, LKD sold

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<sup>1</sup> Florida National Bank will be referred to hereafter as FUNB for purposes of this decision.

12 of the 80 condominium units to Utica Trading Corporation ("UTC") without the consent of FUNB.

On or about December 1988, due to the default of LKD on its note, FUNB commenced an action in the Florida State Court to foreclose its mortgage on 78 condominium units, including the 12 units sold to UTC.<sup>2</sup> UTC was named as a defendant in the foreclosure action and in the lis pendens filed in connection therewith.

On October 10, 1989, LKD filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") in the U.S. Bankruptcy Court for the Middle District of Florida ("Florida Bankruptcy Court"), thereby staying the foreclosure action as against LKD. FUNB, however, continued the foreclosure action as against the 12 units sold to UTC and on November 2, 1990, the Florida State Court entered Partial Summary Final Judgment of Foreclosure as against the 12 condominium units. A foreclosure sale of those units was then scheduled for December 27, 1990. However, that sale was stayed when UTC filed its voluntary petition pursuant to Chapter 11 of the Code on December 11, 1990, in the U.S. Bankruptcy Court for the Northern District of New York.

Thereafter, LKD filed and had confirmed, a Third Amended Plan of Reorganization on August 19, 1991. In compliance with that confirmed Plan, LKD's original note and mortgage were modified and LKD in June 1993 executed and delivered to FUNB a second note and

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<sup>2</sup> 2 of the 80 units were subsequently released from FUNB's mortgage.

mortgage modification.

Also, on June 1, 1991, the Trustee appointed in the Chapter 11 case filed by UTC entered into a lease ("Lease") with LKD to lease back to it the 12 condominium units owned by UTC for a period of five (5) years. Said Lease also granted to LKD the option to purchase those units and required it to make all mortgage payments and real property taxes due on the units. The Lease was approved by Order of this Court dated July 31, 1991 and was apparently also approved by an order of the Florida Bankruptcy Court.

Following confirmation of LDK's Third Amended Plan, it again defaulted on the notes and mortgages as modified and FUNB "re-accelerated" its notes on September 7, 1993. In response, LDK filed a second Chapter 11 case in the Middle District of Florida on September 24, 1993. Subsequent to that date, on June 30, 1994, FUNB obtained an order vacating the automatic stay imposed pursuant to Code §362(a) and proceeded with its foreclosure action which was already pending.<sup>3</sup> In that action, FUNB filed an amended complaint and an Amended and Supplemental Lis Pendens.

On July 13, 1994, the Trustee appointed in the UTC Chapter 11 case obtained an Order to Show Cause directing FUNB to show cause why it should not be held in contempt of court for violating the automatic stay by continuing its foreclosure action in the Florida State Court as against the 12 units owned by UTC and

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<sup>3</sup> On October 6, 1994, LDK's second Chapter 11 case was converted to a case pursuant to Chapter 7.

leased to LKD.<sup>4</sup>

In order to resolve the Trustee's Order to Show Cause, FUNB and the Trustee entered into a Stipulation dated September 20, 1994, which permitted FUNB to proceed with its foreclosure action only as against the LKD units to include the appointment of a receiver and that said receiver would honor the Lease between UTC and LKD previously approved by the Bankruptcy Courts "pending the purchase of the Utica Trading Units by FUNB." The Stipulation was approved by Order of this Court dated September 21, 1994 ("Stipulated Order").

On November 30, 1994, however, the Trustee in the UTC Chapter 11 case sold UTC's interest in the 12 condominium units to Wilki Properties ("Wilki"), not to FUNB, for the sum of \$11,000 plus Wilki's assumption and agreement to pay all outstanding real property taxes. Said sale was subject to the mortgage of FUNB and included an assignment of all future lease rights to Wilki emanating from the Lease with LKD as of the date of closing. The Trustee retained all rights emanating from the Lease prior to the date of closing.<sup>5</sup>

Thereafter, FUNB continued its foreclosure in the Florida State Court and on May 17, 1995, a Summary Final Judgment of Foreclosure and Sale as to Count I was granted. Said Judgment appears to affect all parties named in the lis pendens and includes

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<sup>4</sup> With regard to this factual finding, the Court has taken judicial notice of the UTC case docket entry #138.

<sup>5</sup> At some point following the November 30, 1994 Order of this Court, Wilki assigned its interest in the 12 condominium units to the Debtor.

all 78 units, including those purchased by Wilki.<sup>6</sup> On November 2, 1995, a foreclosure sale was held and FNB Properties, Inc. ("FNB"), a wholly owned subsidiary of FUNB, was the successful bidder of all 78 units.<sup>7</sup> It now appears that FNB has contracted to sell all of the units to Sunstream, Inc. ("Sunstream").

#### DISCUSSION

Debtor argues that FUNB misrepresented to this Court and presumably the UTC Trustee that it would honor the lease of the 12 units entered into between UTC and LKD in June of 1991. Debtor is apparently referencing the Stipulation of Settlement entered into between the UTC Trustee and FUNB on September 2, 1994. That Stipulation contains FUNB's agreement that the receiver appointed in its Florida State Court foreclosure action would honor the Lease.

Debtor further contends that it relied on the "viability of the lease and the representations of First Union" in paying the past due real property taxes on the 12 units following its purchase of those units from UTC in December 1994, taxes that would have otherwise primed the FUNB mortgage. (See Affidavit of John

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<sup>6</sup> On or about April 21, 1995, Debtor executed and delivered to FUNB an Agreement whereby FUNB agreed to postpone the foreclosure sale of Debtor's 12 units scheduled for April 28, 1995 if Debtor agreed, inter alia, that in any subsequent bankruptcy proceeding it might file it would consent to an immediate lifting of the automatic stay. At oral argument on April 16, 1996, Debtor's counsel asserted that the Agreement was delivered to FUNB to be held in escrow pending FUNB's cooperation with Debtor in purchasing the units at the eventual foreclosure sale.

<sup>7</sup> It does not appear that FNB is a named defendant in this adversary proceeding.

Wilkinson sworn to March 21, 1996, at ¶7.)

Finally, Debtor points to the confirmation of the Third Amended Plan of LKD by the Florida Bankruptcy Court, which it contends was further amended at a confirmation hearing held in June 1991 to incorporate a "global" stipulation of settlement between LKD and the UTC Trustee. Debtor asserts that based on all of the foregoing "there was definitely not any contemplation by anyone that the Bank would continue its foreclosure after the lease was consummated". ( See Second Supplemental Affidavit of John E. Wilkinson, Jr., sworn to the 10th day of April 1996, at ¶ 7B.)

FUNB asserts that the foreclosure action commenced in the Florida State Court in 1988 appropriately listed UTC as a defendant, as did the lis pendens filed in connection with that action. The foreclosure action was amended but was never discontinued and, thus, Debtor acquired the property from the UTC Trustee, subject to that pending action. That Florida law did not require an amendment to the complaint or the lis pendens to add Debtor as a defendant to cut off its interest in the 12 units. It asserts that when Debtor paid the delinquent real property taxes, it did so at its own risk.

Additionally, FUNB contends that Debtor can show no irreparable harm, since its only hardship is the "dashing of its hope to purchase the property". ( See Response of First Union National Bank filed April 1, 1996, at page 14.) FUNB asserts that the damage FNB, its subsidiary, will suffer far outweighs any harm to Debtor since it is contractually obligated to convey title to all 78 units to Sunstream.

It is well settled law that a party seeking a preliminary injunction must satisfy a stringent test which includes a showing that a reasonable likelihood exists that it will succeed on the merits in its pending action and that if a preliminary injunction is not granted, it will suffer irreparable harm. Additionally, some courts consider whether the applicant will suffer a greater harm than will the party against whom the injunctive relief is sought and that the public interest will not be adversely affected by the granting of the injunctive relief. Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1283 (10th Cir. 1996); Botero-Zea v. United States, 915 F.Supp. 614, 617 (S.D.N.Y. 1996).

This Court is of the opinion that Debtor fails to satisfy the first prong of the test. It is obvious that voluminous factual allegations abound in this dispute which dates back to the commencement of FUNB's foreclosure action in 1988, not all of which are undisputed by the parties.

After sifting through all of the allegations, the Court concludes, at least for purposes of this motion, that Debtor's relief, if it is entitled to any, should have been sought in the Florida State Court and that its voluntary Chapter 11 filing in this Court on March 15, 1996, is nothing more than a belated effort to shift its dispute with FUNB back into a forum where it might gain leverage by invoking the provisions of the Code §362(a) automatic stay.

Debtor asserts essentially that FUNB has chosen to dishonor the terms of the Lease previously approved by this Court in the Chapter 11 bankruptcy proceeding of UTC, its predecessor in

interest of the 12 condominium units which it purchased from the UTC Trustee by virtue of an Order of this Court dated November 30, 1994. There does not appear to be any dispute that Debtor purchased the 12 units and took an assignment of the Lease or that Debtor took title subject to the FUNB mortgage. Finally, there is no dispute that FUNB proceeded with its foreclosure of that mortgage following Debtor's acquisition of the 12 units and the assignment of the Lease.

There is no allegation that Debtor asserted any of the grounds upon which it now relies in the Florida State Court or that, in fact, it even sought to intervene in the foreclosure action. Yet, Debtor now argues to this Court that the foreclosure action was defective because it was never personally served, that by virtue of the confirmation of LKD's Third Amended Plan, the original foreclosure action needed to be recommenced, and that under no circumstance could FUNB cut off its Lease rights in the foreclosure action.<sup>8</sup>

It appears that as a substitute for failing to litigate the foregoing issues in the Florida State Court or litigating and failing to convince that court, Debtor seeks to attack the judgment of foreclosure here by suggesting that it was entered in violation of the stay emanating from the UTC Chapter 11 case and the Stipulated Order. In other words, when Debtor purchased the 12 units from UTC and took an assignment of the Lease, it also purchased the benefits of the stay and Stipulated Order which

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<sup>8</sup> The lack of notice contention, if this Court were to address it, would be less than a compelling argument given the allegation of a common principal in LKD, UTC and the Debtor.

resulted from an alleged violation of that stay enjoyed by UTC.

Such a legal position is not tenable. Code §362(c)(1) provides that a stay of an act against property of the estate continues until such property is no longer property of the estate. See Matter of Reserves Development Corp., 821 F.2d 520, 521 (8th Cir. 1987). Once Debtor acquired title to the 12 units and took the assignment of the Lease, it did so without the protection afforded to the units and the Lease while they remained assets of the UTC bankruptcy estate. Furthermore, it acquired its title and its assignment subject to the rights of FUNB as mortgagee.

This Court further observes that for the purpose of analyzing Debtor's likelihood of success on the merits, Debtor's reliance upon the terms of LKD's confirmed Third Amended Plan is tenuous at best when there is no factual dispute that LKD defaulted, under the terms of that confirmed Plan, on the notes and modified mortgage granted to FUNB, then filed a second Chapter 11 case and subsequently suffered conversion of the latter case to Chapter 7 on October 6, 1994.

Debtor's argument that FUNB's action in the Florida State Court following Debtor's purchase of the 12 units in November 1994 from the UTC Trustee was in violation of the automatic stay is simply without a basis in law. A Chapter 11 debtor does not sell the benefits of the automatic stay nor any court order enjoining violation of same simply because it sells an asset of its estate to a third party. See In re Prairie Trunk Ry., 112 B.R. 924, 930-931 (Bankr. N.D.Ill. 1990). (Court should not judicially expand the classes of protected parties to include third party purchasers.

Code §362 is intended to protect the debtor and pre-petition creditors.)

The remaining contentions of Debtor regarding lack of service, the contractually binding effect of LKD's Third Amended Plan on the parties, and its Lease rights as taking priority over FUNB's right to foreclose could or should have been asserted in the Florida State Court. This Court is bound by principles of full faith and credit and res judicata from looking behind the judgment of the State Court entered on May 17, 1995. ( See Kelleran v. Andrijevic, 825 F.2d 692 (2nd Cir. 1987), cert. denied 484 U.S. 1007, 108 S.Ct. 701, 98 L.Ed.2d 652 (1988).

As to the remaining factors the Court must consider, irreparable harm will not exist where a party can be fully compensated monetarily. Here, should Debtor succeed on the merits, a prospect the Court does not consider likely, the Defendants can be made to respond in money damages.

The final factors also mandate a denial of a preliminary injunction. The foreclosure sale occurred in November of 1995, and FNB, the successful bidder, has since contracted to sell all 78 units to Sunstream. Clearly, the passage of almost a year since the entry of the judgment of foreclosure and the reliance of third parties upon it will result in greater harm to FUNB and those parties if this Court were to now enjoin the sale of the 78 units. The final factor, that of the public interest, appears inapplicable herein.

Based upon all of the foregoing, it is  
ORDERED that Debtor's motion seeking a preliminary  
injunction in this adversary proceeding is hereby denied.

Dated at Utica, New York

this 19th day of April 1996

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge