UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In Re: **APPLE REALTY 2000, INC.,** Debtor.	Case No. 94-30341 Chapter 11
APPLE REALTY 2000, INC., Plaintiff, v. **FIRST UNION MORTGAGE CORPORATION, UNITED SAVINGS BANK, HOME FEDERAL SAVINGS & LOAN ASSOCIATION, GMAC MORTGAGE CORPORATION, CHASE HOME MORTGAGE CORPORATION, ET AL.,** Defendants.	Adversary Proceeding No. 94-3152

JUDGEMENT ENTERED ON AUG 3 1 1994

FILED
U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF N C

AUG 3 1 1994

J. BARON GROSHON
BY: _____
Deputy Clerk

ORDER DENYING REQUEST FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

THIS MATTER is before the court on the debtor's Complaint seeking a temporary restraining order and a preliminary injunction against the defendants taking action against certain third parties. The court, having reviewed the record in this case, the pleadings filed and the brief submitted by the debtor, and having heard the arguments of counsel for the debtor, has concluded that the debtor's request must be denied.

I. The plain language of § 362 provides for automatic stay only for proceedings against the "debtor" or "property of the estate."

The Complaint herein asks this court to grant a temporary restraining order and a preliminary injunction to stay defendants

from either reporting adverse credit information or filing actions against third-party mortgagors. The plain language of 11 U.S.C. § 362 provides for an automatic stay only as to proceedings against the "debtor" or "property of the estate." See Williford v. Armstrong World Industries, Inc., 715 F.2d 124, 126-7 (4th Cir. 1983). The potential actions by defendants identified by the debtor as harmful are not direct actions against either the debtor or any identifiable property of the estate, but are instead actions against third parties unrelated to the debtor. Consequently, 11 U.S.C. § 362 does not apply to stay those actions.

II. Congress extended the stay to non-debtors by the Bankruptcy Code in Chapter 13, but did not do so in Chapter 11.

Congress provided in Chapter 13 for a stay of actions against nondebtor parties under 11 U.S.C. § 1301. Conspicuously, it did not provide for such a stay in Chapter 11. Thus, the request for a preliminary injunction against third parties in a reorganization case is a request for an extraordinary remedy. Credit Alliance Corp. v. Williams, 851 F.2d 119 (4th Cir. 1988).

III. The Fourth Circuit has allowed a stay of actions against third-parties only in extraordinary circumstances.

The Fourth Circuit Court of Appeals has held that there is a narrow exception from the general rule in bankruptcy that only the debtor and property of the estate are entitled to protection from actions by third parties. However, the exception is available only for "extraordinary circumstances." See, e.g., A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir.) cert. denied, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986); Credit Alliance, 851 F.2d 119.

After examining the context of the cases in which the Fourth Circuit has allowed injunctive relief against third parties, this court concludes that the exception is very narrow and is limited to truly unusual circumstances. The Robins and Credit Alliance cases establish two categories of "unusual circumstances" in which an injunction properly may be issued.

A. Where there is such identity of debtor and the third party that the debtor may be said to be the real party in interest and a judgment is in effect a judgment against the debtor.

The first category of situations where an injunction may be merited consists of cases in which there is such identity between the debtor and a third party that the debtor may be said to be the real party in interest in an action against the third party. See Robins, 788 F.2d at 999. In such a situation, a judgment against the third party would in effect be a judgment against the debtor. For example, the court in Robins was dealing with claims against the debtor's insurer for which the insurer was entitled to indemnity claims against the debtor. In this Chapter 11 case, the court is not presented with such identity of the parties. As to the mortgages on the former residences of the debtor's customers, both the debtor and the customers are separately liable for payment of that debt, and the customers, if sued, would have to bring an action against the debtor in order to be reimbursed for any judgment rendered on the debt.

B. Where the action would diminish property of debtor to the detriment of creditors as a whole.

The second category of cases in which an injunction properly may be issued consists of situations where the action proposed to be enjoined, if taken, would diminish the property of the debtor or the estate to the detriment of the creditors as a whole. See Credit Alliance, 851 F.2d 119. In such a case, the action proposed to be enjoined would be prejudicial to the entire bankruptcy scheme, accomplishing an "end run" around bankruptcy priorities and corrupting the orderly collective proceeding contemplated by the Bankruptcy Code. Again, the court is not confronted by such a situation on the facts before it. The reporting of adverse credit information as to the debtor's customers does not affect the property of the debtor or the bankruptcy estate. In addition, any liability which might ultimately fall upon the debtor for the payment of the mortgage claims by the customers constitutes debt for which the debtor is already liable, and thus, does not further diminish property of the debtor because the claim against the estate already exists. The claims by the mortgageholders against the debtor are not contingent debts, but are direct liabilities in existence at the filing of the petition.

IV. The framework for analysis.

The framework for analysis of injunctive relief in the Fourth Circuit is Blackwelder Furn. Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc., 550 F.2d 189 (4th Cir. 1977), under which the hardships to the parties are balanced to determine where the relative burdens lie. Pursuant to Blackwelder, the following four

factors are identified as determining whether a court should grant a preliminary injunction:

1. the likelihood of irreparable harm to the plaintiff if injunctive relief is not granted; versus

2. the likelihood of harm to the defendant if injunctive relief is granted;

3. the likelihood of success on the merits; and

4. the public interest.

Id. at 196. The burden of establishing the four factors to support an injunction is on the movant, which is the plaintiff debtor here. Id. The harm must be shown by clear and convincing evidence and the harm must be shown to be irreparable harm which is actual and immediate. Dan River, Inc. v. Icahn, 701 F.2d 278, 284 (4th Cir. 1983).

Here, the debtor has argued that the potential detriment to its business goodwill and future sales are the sorts of harm which support the issuance of an injunction. The debtor has also asserted that the adverse publicity attendant to suits by mortgageholders against its customers, any consequent actions by the customers against the debtor, and the shifting of time and attention of the debtor's officers to deal with such problems if they arise constitute irreparable harm. Such potential damages are speculative and theoretical at best.

The harm to the defendants, on the other hand, is immediate and actual and the damages may not be capable of being compensated. The sanctity of contractual rights and obligations of parties not in bankruptcy would be destroyed if the injunction were granted.

The requested injunction would enjoin actions against third parties who never dealt with the debtor and who are not in a contractual relationship with the debtor. The defendants herein never dealt with the debtor concerning these mortgages and never dealt with any related party in connection with the original mortgage. The parties with whom the defendants actually contracted, the debtor's customers, later entered into a separate transaction with a party who then became a debtor or who assigned the contract to a third party who became a debtor. At no point did the defendants have any opportunity to protect against those subsequent events. The only protection of the rights of the defendants as against any subsequent transactions are those rights for which the mortgageholders bargained in the original real estate purchases, which are precisely the rights the debtor here is attempting to enjoin.

Furthermore, the requested injunction would be immediately disruptive to the general scheme of commerce to the defendants. It is important to support parties' rights to contractual obligations. Regardless of whether the debtor's customers read the documents they signed or relied upon the past success of the debtor's program, the consequences to those customers were foreseeable to them and to the debtor and not to the defendants herein. Again, the mortgageholders bargained and contracted for the protections available under North Carolina law for mortgageholders, including the right to file an action against all parties liable for the debt which the debtor seeks to enjoin.

In making a decision as to where the relative hardships lie, the quantum of hardship can become a factor; however, the hardship shown by the debtor is not sufficient to satisfy the Blackwelder factor. The speculative and theoretical harm identified by the debtor does not outweigh the actual and immediate harm to the defendants if the injunction is granted. In the absence of establishing that the balance of the hardships tilts in favor of the debtor, the debtor's efforts to date are not a factor in the decision whether to grant a preliminary injunction. While the court acknowledges that the debtor has made significant efforts to date toward the confirmation of a plan of reorganization, such efforts simply do not enter into the balancing test when the balance of relative hardships lies with the defendants.

By contrast, in the Southern Engineering Chapter 11 case, this court enjoined enforcement actions on mechanics liens by creditors of the debtor. The injunction was issued advisedly and on the basis that truly extraordinary circumstances were presented. Without the injunction, the debtor in Southern Engineering would have been stripped of its Constitutional right to a bankruptcy proceeding because the lien creditors would have taken the accounts receivable of the debtor which would have shut off the debtor's cash flow immediately. These creditors would thus have accomplished an end run around the orderly collection and priority scheme of the Bankruptcy Code.

Another difference from the Southern Engineering case is that Southern Engineering was able to make an offer of adequate

protection of the lien creditors' interests in the form of alternative collateral, which has not even been attempted here. The fact that a plan of reorganization has been filed which may be confirmed does not alter the fact that adequate protection has not been offered to these secured creditors.

Because the debtor failed to demonstrate that the balance of hardships was in its favor, the court need not consider the other Blackwelder factors.

For the reasons stated above the court must deny the debtor's request for injunctive relief.

It is therefore **ORDERED** that plaintiff-debtor's request for a temporary restraining order and preliminary injunction against defendants is denied.

This the 26th day of August, 1994.

George R. Hodges
United States Bankruptcy Judge