

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 99-32903

JOANNE COWAN GIBBS

Debtor

J. CHRISTOPHER GIBBS

Plaintiff

v.

Adv. Proc. No. 02-3030

HOME FEDERAL BANK, FSB and
ANN MOSTOLLER, TRUSTEE

Defendants

MEMORANDUM ON MOTION FOR PRELIMINARY INJUNCTION

APPEARANCES: McGEHEE & NEWTON, P.C.
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The Plaintiff filed a Complaint on February 6, 2002. He asks the court to interpret and enforce an Order entered September 21, 2001, in the Debtor's Chapter 7 case approving the Trustee's sale to him of two parcels of land. Presently before the court is the Motion for Preliminary Injunction filed on February 6, 2002, through which the Plaintiff seeks to enjoin the Defendant Home Federal Bank, FSB's (Home Federal) foreclosure of one of the subject properties.

An evidentiary hearing was held on February 25, 2002. The Defendant Trustee did not participate.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (K), (N), (O) (West 1993).

I

The Debtor's husband, Leslie Gibbs, died on or about October 22, 1998. The Debtor subsequently filed a Voluntary Chapter 11 Petition on July 14, 1999. On August 14, 2000, the case was converted to Chapter 7 and Ann Mostoller was subsequently appointed trustee. The Plaintiff is the Debtor's son.

Presently at issue are three parcels of property in which the Debtor is alleged to have possessed an interest. The properties will be referred to herein as the Morrison Property, the Bacchus Property,¹ and the Brown Property.

¹ In various documents filed with the court, this property is also referred to as "Baccus" and "Baccuss." The correct spelling is unknown.

On the Debtor's Schedule A, she claimed a 50% interest in the Morrison Property, located in Cumberland Gap, Tennessee. The Morrison Property was encumbered by a Deed of Trust securing a debt owed to Home Federal. Home Federal foreclosed on the Morrison Property on July 17, 2001. A deficiency of \$51,376.07 remained after the foreclosure sale.

The Bacchus Property, located in Cumberland Gap, Tennessee, is also encumbered by a Deed of Trust securing a debt owed to Home Federal. Schedule A to the Debtor's petition lists the Debtor as owner of the Bacchus Property. The Brown Property, located in Middlesboro, Kentucky, is the subject of two mortgages, again securing debts owed to Home Federal. The Brown mortgages, dated March 8, 1996, and May 9, 1997, each contain an identical Section 19 which provides in material part:²

19. Additional Advances. Prior to release of this mortgage, Mortgagee, at its option, may make additional advances to Mortgagor. Such additional advances, with interest thereon, shall be secured by this mortgage unless Mortgagee expressly waives such security

It is unclear whether the Brown Property is included in the Debtor's Schedule A.³

Following the execution of the March 8, 1996 mortgage, Home Federal made advances to the Debtor and her husband under a note dated September 17, 1996, which was also secured by

² The May 9, 1997 mortgage and note refinanced the March 8, 1996 Brown debt.

³ The Debtor scheduled a "Hances Creek" property in Bell County, Kentucky, which may or may not be the Brown Property. Home Federal questions whether the Debtor ever possessed an interest in the Brown Property at all. Additionally, Home Federal argues that neither the Brown Property nor Bacchus Property belong to the Debtor's estate due to purported spendthrift trust provisions contained within the Last Will and Testament of Leslie Gibbs and the Leslie Gibbs Revocable Trust Agreement. The court does not have sufficient evidence before it to determine either of these issues, nor is their determination necessary to the resolution of the present motion.

the Bacchus Property, and a note dated January 30, 1997, which was also secured by the Morrison Property.

On September 21, 2001, the court entered its Order approving the Chapter 7 Trustee's sale of the Brown and Bacchus Properties to the Plaintiff "according to the terms set out in the motion heretofore filed" The referenced motion, the Chapter 7 Trustee's Motion to Approve Compromise (Motion to Approve) filed on July 23, 2001, provided that the Plaintiff would purchase the subject properties "for the total of the payoffs of the two (2) properties at the time of closing plus the sum of \$10,000.00 which would be paid over to the bankruptcy estate." The Motion to Approve stated that the combined payoff amount for the Brown and Bacchus Properties as of June 6, 2001, was \$372,205.11. Importantly, however, the Motion to Approve did not provide that the sale would be for that amount, but rather for "the total of the payoffs of the two (2) properties at the time of closing"

In letters to the Chapter 7 Trustee dated prior to the September 21, 2001 Order, Home Federal objected that the Chapter 7 Trustee's payoff calculations did not include the Morrison deficiency. According to Home Federal, the Brown Property secures the January 30, 1997 Morrison debt as a subsequent advance pursuant to Section 19 of the March 8, 1996 Brown mortgage.

To date, the Brown and Bacchus Properties have not been sold to the Plaintiff due to the parties' disagreement over the Morrison deficiency. The Plaintiff contends that, pursuant to the

September 21, 2001 Order, the \$51,376.07 Morrison shortfall cannot be included in the Brown and Bacchus payoff amounts.

On January 9, 2002, Home Federal filed a Motion for Relief from Stay seeking to foreclose on the Bacchus Property. The Plaintiff's Complaint and Motion for Preliminary Injunction were filed in response.

II

The court may enter preliminary injunctions pursuant to FED. R. CIV. P. 65 and FED. R. BANKR. P. 7065. In exercising its discretion to grant an injunction, the court must consider four factors:

1. Whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits;
2. Whether the plaintiff has shown irreparable injury;
3. Whether the issuance of a preliminary injunction would cause substantial harm to others; and
4. Whether the public interest would be served by issuing a preliminary injunction.

Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 102 (6th Cir. 1982). While the court is to balance these factors, a preliminary injunction may not be entered "without any showing that the plaintiff would suffer irreparable injury without such relief." *Id.* at 102-03. The court abuses its discretion when it "grants a preliminary injunction without making specific findings of irreparable injury to the party seeking the injunction, and such an injunction must be vacated on appeal." *Id.* at 105.

The Plaintiff recites that he will be irreparably harmed if Home Federal is not enjoined from foreclosing on the Bacchus Property. He fails, however, to precisely articulate *how* he will be irreparably harmed. The Plaintiff did testify that he would have difficulty obtaining advance financing to purchase the Bacchus Property at a cash-only foreclosure sale. Presumably, his position is that he would be irreparably harmed by the loss of the opportunity to purchase the land. *See Roghan v. Block*, 590 F. Supp. 150, 152 (W.D. Mich. 1984) (“[S]ince land is considered to be unique, the loss or threatened loss is considered to be irreparable injury.”). Conversely, the Plaintiff would not be irreparably harmed if he merely had to purchase the Bacchus and Brown Properties for a price higher than he originally anticipated. *See Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290-91 (6th Cir. 1987) (“mere economic loss does not constitute irreparable injury”).

The fourth *Friendship Materials* factor, public interest, does not weigh heavily in favor of either party. Regarding the third factor, substantial harm to others, the court notes that Home Federal is steadily losing money because it is not receiving payments on the Bacchus note.

The first factor, the Plaintiff’s likelihood of success on the merits, does not favor the Plaintiff. The September 21, 2001 Order, as it incorporates the Motion to Approve, provides for sale to the Plaintiff “for the total of the payoffs of the [Brown and Bacchus] properties at the time of closing . . .” and does not fix an exact sales price as argued by the Plaintiff.

Further, it appears that the Morrison note, executed after March 8, 1996, is secured by the Brown Property pursuant to Section 19 of the March 8, 1996 Brown mortgage. *See First*

Commonwealth Bank of Prestonburg v. West, 55 S.W.3d 829, 833 (Ky. Ct. App. 2000) (Future advance clauses are valid in Kentucky.). The Plaintiff argues that, because the March 8, 1996 Brown note has been repaid, the corresponding mortgage cannot continue to encumber the Bacchus Property. However, he does not cite, and the court's research has not disclosed, any authority suggesting even a likelihood of success on that issue. See *Bondurant v. Tally's Trustee*, 229 S.W. 377, 378 (Ky. Ct. App. 1921) (Mortgage securing future advances is discharged when all future advances have been repaid.).

Because Home Federal is likely correct in its assertion that the Morrison deficiency must be paid as part of the loan payoff on the Brown Property, the court finds that the *Friendship Materials* factors weigh against the issuance of a preliminary injunction. The Plaintiff's Motion for Preliminary Injunction will accordingly be denied. An appropriate order will be entered.

FILED: February 28, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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Defendants

ORDER

For the reasons stated in the Memorandum on Motion for Preliminary Injunction filed this date, the court directs that the Motion for Preliminary Injunction filed by the Plaintiff on February 6, 2002, is DENIED.

SO ORDERED.

ENTER: February 28, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE