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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 95-14780
)
ROBERT FINCH,) Adversary Proceeding No. 96-1164
)
Debtor.) Chapter 11
)
) Judge Pat E. Morgenstern-Clarren
COMMERCE EXCHANGE BANK,)
)
Plaintiff,)
)
v.) **MEMORANDUM OF OPINION**
)
ROBERT FINCH, et al.,)
)
Defendants.)

In re:) Case No. 95-14778
)
MELVIN FINCH and) Adversary Proceeding No. 96-1165
BARBARA FINCH,)
)
Debtors.) Chapter 11
)
) Judge Pat E. Morgenstern-Clarren
COMMERCE EXCHANGE BANK,)
)
Plaintiff,)
)
v.) **MEMORANDUM OF OPINION**
)
ROBERT FINCH, et al.,)
)
Defendants.)

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In re:)	Case No. 95-14779
)	
JOSEPH WILLIAMS and)	Adversary Proceeding No. 96-1162
ELSIE WILLIAMS,)	
)	Chapter 11
Debtors.)	
)	
)	Judge Pat E. Morgenstern-Clarren
COMMERCE EXCHANGE BANK,)	
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OF OPINION</u>
)	
ROBERT FINCH, et al.,)	
)	
Defendants.)	

These three adversary proceedings involve the same parties, fact patterns, and pleadings. In each, Plaintiff Commerce Exchange Bank (“Commerce”) requests summary judgment on its Complaint and on Defendants-Debtors’ Counterclaims. (Adv. Pro. #96-1164 Docket 36; Adv. Pro. #96-1165 Docket 36; and Adv. Pro. #96-1162 Docket 33). Debtors are the only parties opposing this request. Additionally, Debtors filed a Motion for Partial Summary Judgment in each adversary proceeding requesting judgment on the issues of marshaling and the propriety of an award to Commerce of fees and costs under 11 U.S.C. § 506(b). (Adv. Pro. #96-1164 Docket 37; Adv. Pro. #96-1165 Docket 37; and Adv. Pro. #96-1162 Docket 34). Commerce and Debtors filed reply briefs opposing the mutual requests for summary judgment. (Adv. Pro. #96-1164 Docket 42, 43, 44, 45; Adv. Pro. #96-1165 Docket 42, 43, 44, 45; and Adv. Pro. #96-1162 Docket 39, 40, 41, 42).

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The relevant facts are, for the most part, not disputed. Neither movant has specifically identified a genuine issue of material fact which it believes requires that the issues presented in these motions be tried. These findings and conclusions are based on the record as a whole.

JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2),(A),(K) and (O).

FACTS

A. **Background**

This dispute has its genesis in a loan transaction in which Commerce loaned money to M&R Mechanical Contractors, Inc. (“M&R”). M&R is a closely held corporation owned by Robert Finch, Melvin Finch, and Joseph Williams. M&R signed a Variable Rate Promissory Note dated September 30, 1991 (the “Note”) and pledged a lien against certain of its personal property as security for this debt. Debtors admit that they guaranteed the obligation. (Adv. Pro. #96-1164 Docket 23; Adv. Pro. #96-1165 Docket 24; Adv. Pro. #96-1162 Docket 22). Their guarantees were secured by mortgages against their interest in real estate located on Leuer Avenue, Cleveland, Ohio (the “Property”), their residences, and other real property. Debtors in each of the pending Chapter 11 cases own an undivided one-third interest in the Property. Debtors admit the authenticity of the Note, guarantees, and mortgages. (Adv. Pro. #96-1164 Docket 23; Adv. Pro. #96-1165 Docket 24; Adv. Pro. #96-1162 Docket 22; Affidavits of Joseph Williams, Melvin Finch and Robert Finch, attached to Debtors’ Motions for Partial Summary Judgment).

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On June 29, 1994, M&R filed for protection under Chapter 11 of the Bankruptcy Code. (United States Bankruptcy Court, Northern District of Ohio, Case No. 94-12734). An Agreed Order entered in the M&R case granted Commerce, as a secured creditor, adequate protection and required post-petition payments. Commerce received payments under the terms of that Order. On October 5, 1995, the Court granted M&R's motion to dismiss the case.

B. Procedural History of These Adversary Proceedings

On October 27, 1995, Robert Finch, Melvin and Barbara Finch (jointly), and Joseph and Elsie Williams (jointly) (collectively "Debtors") filed the captioned Chapter 11 proceedings. On May 8, 1996, Commerce filed these adversary proceedings to determine the validity, priority, and extent of liens and interests in the Property. Commerce named each of the Debtors as defendants, together with various other parties believed to hold an interest in the Property.

The Complaints allege that Commerce holds a claim based on the Note, that Debtors guaranteed the Note, that the obligations are secured by mortgages given by Debtors on the Property, and that the Note is in default. Commerce alleges further that the proceeds from the sale of the Property will be sufficient to pay Commerce in full, after satisfying all prior claims. Commerce requests, among other relief, that the validity, priority and amount of its secured claim be determined and that it be paid in full from the proceeds of sale of the Property.

Debtors filed Second Amended Answers and Counterclaims.¹ The Counterclaims seek to invoke the doctrine of marshaling to compel Commerce to satisfy its claims from collateral other

¹ Debtors' requests for leave to amend their Answers for a third time and to add a counterclaim for the purpose of asserting new defenses and claims with respect to this liability were denied. (Adv. Pro. #96-1164 Docket 50, Adv. Pro. #96-1165 Docket 50, Adv. Pro. #96-1162 Docket 47).

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than the Property. They also request that certain payments made to Commerce by M&R be credited and/or returned.

The parties entered into an Agreed Order under which Debtors were authorized to sell the Property to E.Z. Building Components Corp. for \$630,000, with the liens and interests of all parties to be transferred to the fund generated by the sale. (Case No. 95-14478 Docket 25; Case No. 95-14779 Docket 25; Case No. 95-14480 Docket 28). Months later, the sale still has not closed.

In addition to Debtors, these defendants filed Answers:

1. Society National Bank (“Society”) filed Answers asserting a first mortgage in the Property and an outstanding balance of \$319,630.05, plus interest from May 14, 1996 and any sums which may be awarded under 11 U.S.C. § 506(b). (Adv. Pro. #96-1164 Docket 2; Adv. Pro. #96-1165 Docket 2; and Adv. Pro. #96-1162 Docket 2). Society conceded at a pretrial that its loan documents do not provide a basis for an award of fees and costs under 11 U.S.C. § 506(b). The Agreed Order authorizing sale of the Property also authorizes distribution of funds from the sale to Society on its first mortgage, as its first lien and balance are not disputed.

2. The United States, on behalf of the Internal Revenue Service (“IRS”), filed Answers in two of the cases stating that it does not have an interest in the Property with respect to the Debtors’ tax liability. (Adv. Pro. #96-1165 Docket 12; Adv. Pro. #96-1164 Docket 12). The IRS was dismissed from those Adversary Proceedings. (Adv. Pro. #96-1164 Docket 20; Adv. Pro. #96-1165 Docket #21). In the third case, that of Joseph and Elsie Williams, the IRS asserts a secured claim with respect to the Property for those Debtors’ tax liability in the amount of \$99,976.02. (Adv. Pro. #96-1162 Docket 12).

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3. The State of Ohio, Department of Taxation and Ohio Bureau of Workers' Compensation ("Ohio") filed Answers claiming an interest in the Property by virtue of various tax liens. (Adv. Pro. #96-1165 Docket 6, 7; Adv. Pro. #96-1164 Docket 7, 8; Adv. Pro. #96-1162 Docket 7,8). Commerce's mortgage on the Property is prior to the liens of IRS and Ohio.

All other defendants have been dismissed either through default judgments or orders of dismissal. (Adv. Pro. #96-1164 Docket 20, 24; Adv. Pro. #96-1165 Docket 21, 25; Adv. Pro. #96-1162 Docket 19, 23).

Despite the fact that Francis E. Gaul, the Treasurer for Cuyahoga County, Ohio is not named as a defendant, both sides agree that he has a claim in the Property for some amount which has priority over Commerce's claim.

C. Commerce's Claim

Commerce is currently owed \$171,373.17 plus interest from May 7, 1996 under the terms of the Note. This balance includes the following:

Principal balance	\$151,493.29
Late fees	100.00
Interest through 5-7-96	16,371.13
Attorney fees and costs incurred in M&R Chapter 11	3,908.75
Attorney fees incurred in foreclosure proceedings	500.00

(Adv. Pro. #96-1162, Docket 33 Attachment; Adv. Pro.# 96-1164 Docket 36 Attachment; Adv. Pro. #96-1165 36 Attachment; Attachment is the Affidavit of William Yaster, Vice-President of Commerce). All payments received by or on behalf of M&R have been credited and no further credits are due. Id. Debtors do not dispute Commerce's over-secured status with respect to the Property. They dispute this balance only insofar as it includes attorney fees and costs.

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D. Relationship Between the Adversary Proceedings and the Proposed Plans of Reorganization.

Debtors' First Counterclaims assert that the debt owed to Commerce is secured by property other than the Property. They ask the Court to marshal their assets and require Commerce to satisfy its claims from those other assets so that the proceeds from the sale of the Property can be used to pay the claims of the taxing authorities. This request is, however, inconsistent with the Debtors' proposed plans of reorganization. The motions for summary judgment and their resolution are inextricably related to plan confirmation in the main bankruptcy cases, Nos. 95-14780, 95-14778 and 95-14779. In fact, Debtors raise as an affirmative defense in their Second Amended Answers that the plans provide for Commerce's claim. As a result, it is appropriate in analyzing this issue to consider the terms of the proposed amended plans of reorganization.

The proposed plans provide that Commerce will receive a total of \$75,000 from the sale proceeds in the three cases and that the remainder of its secured claim will be paid in monthly installments over 60 months. The funds to make these monthly payments are to be generated from Debtors' postpetition earnings and real estate rental income. The secured claims of Society, Ohio, IRS, and Francis E. Gaul, Treasurer are to be paid from the proceeds of sale of the Property. (Case No. 95-14778 Docket 38; Case No. 95-14779 Docket 38; Case No. 95-14780 Docket 40).

After a lengthy process, Debtors' Disclosure Statements were approved; however, at the final pretrial held in the adversary proceedings, the parties agreed that the confirmation hearings should not go forward until the adversary proceeding summary judgment issues are resolved

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because the marshaling issue with respect to the Commerce claim is the same in both. (Adv. Pro. #96-1164 Docket 48; Adv. Pro. #96-1165 Docket 48; Adv. Pro. #96-1162 Docket 45).

DISCUSSION

I.

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c), made applicable to these proceedings by Bankruptcy Rule 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden then is on the nonmoving party to show the existence of a material fact which must be tried. *Id.* The nonmoving party must oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves” *See Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Insurance Co. v. American Engineering Co.*, 33 F.3d 727, 730 (6th Cir. 1994).

II.

FIRST COUNTERCLAIMS

Debtors’ First Counterclaims request marshaling of assets to require Commerce to satisfy its secured claim from collateral other than the Property. Commerce and Debtors each request summary judgment on this issue. Additionally, Debtors request an order requiring Commerce to

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pursue and exhaust its remedies against M & R before Commerce is permitted to share in the proceeds of sale of the Property. Commerce also requests summary judgment on this issue.

A. Marshaling

Debtors request marshaling for the benefit of IRS and Ohio. The proposed plans of reorganization provide that the junior lien interests of Ohio and IRS will be satisfied from the proceeds of sale of the Property. Commerce, which has a superior lien interest in the Property, is to be paid only \$75,000 from the proceeds of sale, with the balance of its secured claim to be paid over five years. Debtors have not made any proposal to liquidate the other collateral by which Commerce is secured. Neither have they presented any evidence as to the value of such other collateral. Therefore, while Debtors' First Counterclaims allude to the satisfaction of Commerce's secured claim from other collateral, what is actually being proposed is the deferred payment of Commerce's secured claim. Commerce challenges Debtors' standing to request marshaling; alternatively, it argues that marshaling of assets is unavailable in these circumstances and would prejudice its rights.

Debtors cite 11 U.S.C. § 544(a) as the basis for their marshaling request. Their proposed application of this section is not, however, well defined. 11 U.S.C. § 544(a)(1) grants a trustee² the status of a hypothetical lien creditor as of the date the petition is filed. Several courts have concluded that this status empowers a trustee to request the remedy of marshaling. See, for example, *In re Borges*, 184 B.R. 874, 877 (Bankr. D. Conn. 1995). See generally, Moses Lachman, *Marshaling Assets in Bankruptcy: Recent Innovations in the Doctrine*, 6 Cardozo L.

² A debtor in possession has all of the rights, functions and duties of a trustee under 11 U.S.C. § 1107(a).

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Rev. 671 (1985). The theoretical availability of marshaling in these circumstances need not be decided, however, because Debtors' request does not provide a basis for its application in any event.

“[M]arshaling . . . is founded . . . in equity, being designed to promote fair dealing and justice. Its purpose is to prevent the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security.” *Meyer v. United States*, 375 U.S. 233,237 (1963). The parties agree that Ohio law governs this issue. Ohio law recognizes that:

Marshaling is an equitable remedy under common law. The remedy is based on the equitable principle that where there are two creditors who have interests in the same property of a common debtor, and the senior creditor has more than one source of funds belonging to the common debtor to satisfy the senior creditor's liens or interests, the senior creditor must seek to satisfy his liens or interests in such a way that the junior creditor, who has more limited source of funds of the common debtor out of which to satisfy his liens or interests, will not be prejudiced. However, this equitable remedy will not be available if it would delay, inconvenience, or prejudice the senior creditor or cause the senior creditor to seek a personal remedy to satisfy his lien or interest. For example, this remedy has not been given where the fund available has an uncertain value or would involve the creditor in litigation.

(Citations omitted). *Toledo Blank, Inc. v. Pioneer Steel Service Co., Inc.*, 98 Ohio App. 3d 109, 114, 648 N.E.2d 1, 4 (1994). Both funds in which the senior creditor has an interest must belong to the debtor for marshaling to be available. *Parker v. Wheeler*, 47 Ohio App. 301, 191 N.E. 798 (1933). A party seeking to invoke this doctrine must, therefore, show that (1) there are two creditors of the same debtor;³ (2) there are two funds belonging to the debtor from which the senior creditor can satisfy its claim, while the junior creditor only has access to one of the funds; and (3) the senior creditor will not be prejudiced by requiring marshaling.

³ The facts of this case do not require the Court to decide whether both creditors must be secured.

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Marshaling does not apply to the facts presented in these cases. Courts will only use this equitable power if the exercise of that power will not delay, prejudice or inconvenience the senior creditor. The primary flaw in the Debtors' proposed marshaling is that it prejudices the senior secured interest of Commerce. Debtors are not proposing that Commerce be satisfied from another fund in which it has an interest. Instead, Debtors want to sell the Property, which is Commerce's security, and pay junior creditors from the proceeds while requiring Commerce to wait five years for full satisfaction of its secured debt. Not only do Debtors want to require Commerce to wait years, but they also propose to deprive Commerce of its interest in the cash on hand to be generated from selling the Property and substitute Debtors' future income as the payment source. Debtors suggest that "any delay in repayment of Defendants' obligations to [Commerce] is more than offset by the orderly reorganization of Defendants' debts and the more balanced repayment of creditors." (Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 6, Adv. Pro. 96-1165 Docket 43; Adv. Pro. 96-1164 Docket 43; Adv. Pro. 96-1162 Docket 40). The Court finds that the facts are otherwise. This proposal clearly delays, prejudices and inconveniences Commerce, as a result of which marshaling is not available.

Debtors' alternative attempt to require Commerce to satisfy its claim from collateral belonging to M&R also falls outside of the doctrine. Marshaling is only available where a senior creditor is to be satisfied out of a second fund belonging to the debtor. The parties agree that Commerce has a security interest in some assets of M&R. M&R, however, is a corporate entity distinct from the individual Debtors in these cases. The assets of M&R are not, therefore, the assets of the Debtors. Because the property sought to be marshaled does not belong to Debtors, the doctrine does not apply.

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B. Guarantees

The First Counterclaims also assert M&R is the primary obligor on the Commerce debt, with Debtors' liability being secondary. From this, Debtors conclude that Commerce should be required to pursue collection against M&R before collecting on the guarantees. Debtors did not respond to and did not oppose Commerce's request for summary judgment on this issue.

The "Commercial Continuing Guaranty" executed by Debtors, which guarantees the performance of M&R, contains these terms:

2. GUARANTY. Guarantor hereby unconditionally guarantees the prompt and full payment and performance of Borrower's [M&R] present and future, joint and/or several, direct and indirect, absolute and contingent, express and implied, indebtedness, liabilities, obligations and covenants (cumulatively "Obligations") to Lender.

UNLIMITED. Guarantor's Obligations under this Guaranty shall be unlimited and shall include, all present or future written agreements between Borrower and Lender (whether executed for the same or different purposes), together with all interest and all of Lender's expenses and costs incurred in connection with the Obligations, including any amendments, extensions, modifications, renewals, replacements or substitutions thereto.

3. ABSOLUTE AND UNCONDITIONAL NATURE OF GUARANTY. Guarantor's Obligations under this Guaranty are absolute and continuing and shall not be affected or impaired if Lender amends, renews, extends, compromises, exchanges, fails to exercise, impairs or releases any of the obligations belonging to the Borrower, Co-guarantor or third party or any of Lender's rights against any Borrower, Co-guarantor, third party or collateral. In addition, Guarantor's obligations under this Guaranty shall not be affected or impaired by the death, incompetency, termination, dissolution, insolvency, business cessation, or other financial deterioration of any Borrower, Guarantor, or third party.

4. DIRECT AND UNCONDITIONAL NATURE OF GUARANTY. Guarantor's Obligations under this Guaranty are direct and unconditional and may be enforced without requiring the Lender to exercise, enforce, or exhaust any right or remedy against any Borrower, Co-guarantor, third party, or collateral.

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(Adv. Pro. #96-1164 Docket 1, Complaint Exh. D; Adv. Pro. #96-1165 Docket 1, Complaint Exh. D; Adv. Pro. #96-1162 Docket 1 Exh. D). Guaranty agreements are interpreted as contracts. This Guaranty is unconditional on its face and does not require Commerce to proceed first against M & R. See *Stone v. National City Bank*, 106 Ohio App. 3d 212, 665 N.E.2d 746 (Ohio Ct. App. 1995). There is, therefore, no basis for requiring Commerce to exhaust its remedies against M & R before proceeding against Debtors.

There are no genuine issues of material fact raised by the First Counterclaims and Commerce is entitled to judgment as a matter of law with respect to them. Summary judgment will, therefore, be entered in favor of Commerce on the First Counterclaims.

III.

SECOND COUNTERCLAIMS

In the Second Counterclaims, Debtors ask that adequate protection payments made by M&R to Commerce during its Chapter 11 proceedings be credited as interest payments in these Chapter 11 cases. They also seek the return of any excessive payments. In its motion for summary judgment on these Counterclaims, Commerce claims that the adequate protection payments were made pursuant to a valid order of this Court and that Debtors have not stated any legal basis for the recovery of the funds. Debtors did not respond to this request for summary judgment or challenge this statement of the facts.

Debtors have not explained why affirmative relief is available in these proceedings based on actions taken in a separate (non-consolidated) case. Leaving that aside, it is undisputed that the adequate protection payments were made pursuant to court order. Moreover, the Affidavit of William Yaster (Commerce's Vice President) states that all amounts received on the M&R debt

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have been credited against Debtors' liability. (Adv. Pro. #96-1162, Docket 33 Attachment; Adv. Pro.# 96-1164 Docket 36 Attachment; Adv. Pro. #96-1165 36 Attachment). Debtors have not identified a legal or factual basis for their requests regarding these payments. Consequently, the Court finds that there are no genuine issues of material fact with respect to the Second Counterclaims and Commerce is entitled to judgment as a matter of law. Summary judgment will, therefore, be granted in Commerce's favor on the Second Counterclaims.

IV.

COMPLAINTS

The Complaints request determination of the validity, priority, and amount of the various defendants' interests in the Property. Additionally, they ask that the escrow agent for the sale of the Property be required to (a) pay Commerce's claim for principal and interest in full from the proceeds; and (b) establish an escrow account for the payment of its fees and costs pursuant to 11 U.S.C. § 506(b). Commerce has moved for summary judgment on the Complaints. Debtors have requested summary judgment on the 11 U.S.C. § 506(b) issue and oppose Commerce's request for summary judgment. The request for summary judgment on the Complaints and on the 11 U.S.C. § 506(b) issue is premature and is, therefore, denied, as discussed below.

A. 11 U.S.C. § 506(b)

Each Complaint contains a request that sale proceeds be ordered held in an escrow account pending a determination on Commerce's request for allowance of fees and costs under 11 U.S.C. § 506(b). Commerce states that it intends to request fees and costs, although no such motion has been filed to date. Debtors oppose the request for an escrow account and argue that Commerce is not entitled to fees and costs under 11 U.S.C. § 506(b). The parties have

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alternatively argued the merits of an allowance of fees and costs under 11 U.S.C. § 506(b) and have asserted the prematurity of the other's request for summary judgment.

11 U.S.C. § 506(b) provides that:

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

Commerce's request for an escrow account with respect to the proceeds of sale is made in the context of a sale of the Property and plan confirmation. The Property has not yet been sold and Commerce has not filed a request for the allowance of fees and costs. A determination regarding the availability, propriety, and amount of an award under 11 U.S.C. § 506(b) would, therefore, be premature. Additionally, Commerce has not provided a legal or a factual basis for the request to establish an escrow account to protect its fees and expenses. Summary judgment is, therefore, denied on the issue of fees in this context and requiring the escrow at this juncture.

B. Determination of the Validity, Priority and Amount of Interests in the Property

Commerce has moved for summary judgment on its Complaints to determine the validity, priority and extent of liens and interests of the parties in the Property, and an order that its claim for interest and principal be paid in full from the proceeds of sale. Debtors argue that the balance which Commerce asserts of \$171,373.17 includes \$4,408.75 in attorney fees which are not provided for in the parties' agreements.

There are insufficient facts from which to determine the interests and priority of the IRS and Ohio. Also, while the parties agree that the County Treasurer has an interest in the Property which is prior to that of Commerce, he has not been named as a defendant. Finally, it is not

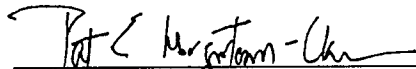
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possible to determine the amount that will be available to pay these creditors unless and until the sale of the Property takes place. There is, therefore, no factual basis for granting summary judgment on the Complaints.

CONCLUSION

Commerce's Motions for Summary Judgment as they relate to the First Counterclaims and the Second Counterclaims are granted. Commerce's Motions for Summary Judgment as they relate to the Complaints are denied. Debtors' Motions for Partial Summary are denied. A separate Judgment in accordance with this decision will be entered in each of these three Adversary Proceedings.

Date: 20 March 1997



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Ronald Henderson, Esq.
Stephen Hobt, Esq.
Phyllis Ulrich, Esq.
Donza Poole, Esq.
Amy Leizman, Esq.
Trish Lazich, Esq.

By: Joyce L. Gordon, Secretary

Date: 3/20/97

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UNITED STATES BANKRUPTCY COURT
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EASTERN DIVISION

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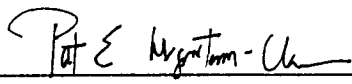
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In re:)	Case No. 95-14780	NORTHERN DISTRICT OF OHIO
)		CLEVELAND
ROBERT FINCH,)	Adversary Proceeding No. 96-1164	
)		
Debtor.)	Chapter 11	
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)	Judge Pat E. Morgenstern-Clarren	
COMMERCE EXCHANGE BANK,)		
)		
Plaintiff,)		
)		
v.)	ORDER	
)		
ROBERT FINCH, et al.,)		
)		
Defendants.)		

Defendant-Debtor Robert Finch has filed Motions for Stay of Proceedings in this case both with this Court and with the Bankruptcy Appellate Panel. (Docket 62, 63). The Court entered an Order requiring clarification regarding Debtor's intentions with respect to these duplicative requests. Debtor's Notice filed May 2, 1997 indicates his intention to have the Bankruptcy Appellate Panel consider his request for a stay of proceedings in the first instance. The Motion for Stay filed with this Court is, therefore, denied as moot.

IT IS SO ORDERED.

Date: 5 May 1997


Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by telecopy on: Ronald Henderson, Esq.
Stephen Hobt, Esq.
Phyllis Ulrich, Esq.
Donza Poole, Esq.
Amy Leizman, Esq.
Trish Lazich, Esq.
Saul Eisen, Esq.

By: Joyce L. Gordon, Secretary
Date: 5/5/97