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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:)	Case No. 02-21777
)	
TERRY L. FREED and)	Chapter 11
TALETHA L. FREED,)	
Debtors-in-possession.)	Adversary Proceeding No. 02-1448
)	
TERRY L. FREED and)	Judge Arthur I. Harris
TALETHA L. FREED,)	
Plaintiffs,)	
)	
v.)	
)	
FIRST NATIONAL BANK OF)	
PANDORA,)	
Defendant.)	

MEMORANDUM OF OPINION

On October 16, 2002, debtors-in-possession, Terry L. Freed and Taletha L. Freed, filed the above-captioned Chapter 11 proceeding in Toledo, Ohio. The case was transferred to the undersigned judge on the same date. On November 27, 2002, the Freeds filed a motion for a temporary restraining order (TRO), seeking to enjoin the First National Bank of Pandora from selling a helicopter that the bank had repossessed from the Freeds prior to their Chapter 11 filing. For the reasons that follow, the Freeds' motion for a TRO is denied.

BACKGROUND

This matter comes before the Court on the Freeds' motion to enjoin, on a

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temporary basis, the sale of certain collateral in the possession and control of the First National Bank of Pandora, pending a determination of multiple issues of law concerning the interests of the parties in the collateral. The Freeds maintain that the bank is stayed by the provisions of 11 U.S.C. § 362 from selling or disposing of the helicopter without notice and a hearing before this Court.

In a telephone conference with the Court on November 27, 2002, counsel for the Freeds indicated that the bank intended to sell the helicopter to a third party interested in taking the helicopter out of the United States. In the same telephone conference, counsel for the bank indicated that the bank is considering a possible sale of the helicopter for approximately \$427,000. Counsel for the Freeds indicated that the Freeds had been in negotiations with the same prospective purchaser, but with a purchase price in the \$590,000 range. The Freeds' bankruptcy schedules, filed on October 16, 2002, list the current market value of the 1989 helicopter at \$150,000, and list the bank's claim for the helicopter at \$731,546.84, of which \$150,000 is secured. The Freeds maintain that they will be substantially harmed by the disposition of the helicopter without a determination of (1) the extent of their interest in the asset as of the petition date and (2) the commercial reasonableness of the proposed sale. The bank asserts that the Freeds

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have no interest in the helicopter because the bank held legal title as of the petition date.

During the telephone conference on November 27, the Court advised counsel for the Freeds, the bank, and the U.S. Trustee, that the Court would take the motion for a TRO under advisement and invited the parties to submit written briefs; however, as of this date, no further briefs have been provided. In addition, the bank indicated that, absent an order from the Court, it intended to continue to negotiate the sale of the helicopter.

DISCUSSION

TRO Standard

Bankruptcy courts assess four factors in analyzing a request for a TRO:

- (1) whether the plaintiff has a strong likelihood of succeeding on the merits;
- (2) whether the plaintiff will suffer irreparable injury absent the injunction;
- (3) whether issuing the injunction will cause substantial harm to others; and
- (4) whether the public interest will be furthered by the issuance of the injunction.

See Fed. R. Bankr. P. 7065; Fed. R. Civ. P. 65; *Gonzales v. National Board of Medical Examiners*, 225 F.3d 620, 625 (6th Cir. 2000)(citing *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Assn.*, 110 F.3d 318, 322 (6th Cir.

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1997)).

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Likelihood of Success

This Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered by the U.S. District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E), (F), (M), (N), and (O). This matter is also properly filed as an adversary proceeding under Fed. R. Bankr. P. 7001.

The Freeds' adversary complaint contains four claims: (1) a TRO or preliminary injunction enjoining the sale or transfer of the helicopter and a 1964 Piper Comanche airplane without a notice or hearing; (2) a declaratory judgment determining that the bank's sale and disposition of the collateral was not in compliance with Ohio Rev. Code § 1309.601 *et seq.*, and that the bank is barred from pursuing the Freeds from any deficiency under Ohio Rev. Code § 1309.625; (3) a claim for the turnover of the helicopter and airplane under 11 U.S.C. § 542; and (4) the avoidance of a preference under 11 U.S.C. § 547.

Based upon the Court's review of relevant case law, it appears that, even if property has been repossessed prepetition pursuant to a security interest, sale of that property is stayed under 11 U.S.C. § 362(a)(4). *See, e.g., In re Omni Graphics, Inc.*, 119 B.R. 641 (Bankr. E.D. Wis. 1990); *In re Koresko*, 91 B.R. 689,

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700 (Bankr. E.D. Pa. 1988), and cases cited therein; 3 *Collier on Bankruptcy* (15th Ed. Rev.) at ¶ 362.03[6][b].

In general, the nondebtor party seeking to take action against the debtor or its property is well advised to assume that the stay applies and seek relief by appropriate proceedings in the bankruptcy court. Relief may be given through modification of the stay or, when necessary, by vacating the stay completely.

3 *Collier on Bankruptcy* (15th Ed. Rev.) at ¶ 362.03[6][b]. And, while the bank asserts that the Freeds had no legal or equitable interest in the property as of the petition date, applicable bankruptcy and Ohio laws appear to give the Freeds the right to redeem the collateral "at any time before a secured party ... (2) Has disposed of collateral or entered into a contract for its disposition" Ohio Rev. Code § 1309.623 (UCC 9-623). *See also United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). Ohio law also provides various remedies for a secured party's failure to comply with these provisions, including possible injunctive relief, damages, and a bar against any possible deficiency. *See* Ohio Rev. Code §§ 1309.625 - 1309.627 (UCC 9-625 - UCC 9-627).

While it is unclear what damages, if any, the Freeds may suffer as a result of the bank's sale of the helicopter and/or airplane without first obtaining relief from stay, the Court will assume that the Freeds have established a likelihood of success

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on a legal claim that a postpetition sale, absent relief from stay, violates the automatic stay.

As for the Freeds turnover claim under Section 542, even if their right of redemption is not extinguished under applicable bankruptcy and Ohio laws until the collateral is sold by the secured party, the Freeds would still need to demonstrate adequate protection before the collateral could be returned to them under Section 542 of the Bankruptcy Code and *Whiting Pools*. Based upon the statements of counsel on October 18, 2002, the Court believes that there is little likelihood of the Freeds succeeding on this turnover claim.

Finally, the Court also believes that there is little likelihood of success as to the Freeds' preference claim under Section 547 of the Bankruptcy Code. There is nothing to suggest that the bank received more than it would have received under a hypothetical Chapter 7 liquidation had it not obtained title to the helicopter and airplane shortly before the petition date. This is because there is no evidence to suggest that the bank failed to perfect its security interest much earlier when it loaned the Freeds money to purchase the helicopter and airplane.

Irreparable Injury

The Court believes that the Freeds have failed to establish any likelihood of

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irreparable injury. First, there is no evidence that the proposed sale of the helicopter, at a price in excess of the Freeds' own valuation on their schedules, is commercially unreasonable. Second, the Freeds have thus far been unable to demonstrate adequate protection, so there is little likelihood that the sale would interfere with the Freeds' actual redemption and use of the helicopter. Third, Ohio law appears to provide an adequate remedy at law. Given the bank's scheduled claim of over \$700,000, any failure by the bank to comply with the bankruptcy stay or with applicable Ohio law could be compensable in money damages or by barring any deficiency. The Court finds this last factor almost dispositive of the entire TRO motion.

Harm to Others and the Public Interest

The Court finds that both of these factors weigh against granting a TRO. First, the bank and the Freeds could both suffer harm from the loss of a buyer, who is apparently willing to pay a cash figure in excess of the valuation recently placed on the helicopter by the Freeds. Second, the Court is reluctant to second-guess the business judgements of sophisticated parties such as the bank, prospective purchasers, and the debtors-in-possession.

Balancing the Factors

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_____ After considering the arguments of counsel and the papers filed in the adversary proceeding and in the Chapter 11 case, the Court finds that the factors weigh heavily against granting a TRO in this case. The Court notes, in particular, that there appears to be an adequate remedy at law for any violation of the automatic stay or applicable Ohio laws, and that the proposed sale price for the helicopter exceeds the valuation that the Freeds placed on their own schedules. Nothing in this ruling constitutes a final determination on any of the claims in this adversary proceeding.

CONCLUSION

For the foregoing reasons, the Freeds' motion for a temporary restraining order is denied.

IT IS SO ORDERED.

/s/ Arthur I. Harris 12/04/2002
Arthur I. Harris
United States Bankruptcy Judge