

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED

03 DEC -2 PM 1:36

In re:

Case No. 03-11098

U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

PACIFIC FINANCIAL  
SERVICES OF AMERICA, INC.,

Chapter 11

Judge Pat E. Morgenstern-Clarren

Debtor.

---

PACIFIC FINANCIAL  
SERVICES OF AMERICA, INC.,

Adversary Proceeding No. 03-1451

Plaintiff,

**MEMORANDUM OF OPINION**

v.

ALBERT GIBEL, et al.,

Defendants.

The debtor filed this adversary proceeding on October 30, 2003 naming 28 defendants. The debtor has only requested that a summons be issued to one defendant, Albert Gibel. (Docket 6). On November 26, 2003, the debtor filed a motion for an expedited hearing on its motion to enjoin defendants from entering certain real estate in Deerfield, Ohio or engaging in deleterious conduct with reference to that property. (Docket 7). The court granted the motion and set the expedited hearing for December 1, 2003.<sup>1</sup>

The debtor and three defendants appeared at the hearing: Huntington National Bank,

---

<sup>1</sup> At the hearing, the debtor's counsel represented that he had complied with the court's instructions to serve notice of the expedited hearing on all parties.

**THIS OPINION IS NOT INTENDED  
FOR PUBLICATION**

Albert Gibel, and George Gibel, in his capacity as a defendant and also as counsel to Albert Gibel. The debtor's counsel clarified that the debtor seeks a temporary restraining order and preliminary injunctive relief "restraining any party to this proceeding from entering the premises located at 8850 [sic] St. Rte. 224, Deerfield, Ohio, without the express direction and/or authorization from David Simon, [chapter 11] Trustee, and further, prohibiting any party to this Adversary Proceeding from entering the premises and engaging in any further acts to destroy and/or raze any building located on the premises; [or] to remove any items of personal property from the premises." (Docket 2).

The complaint concerns real estate located at 8550 St. Rte. 224, Deerfield, Ohio that had been owned by the debtor (the Property). The debtor alleges that in 1999 it transferred the Property to Gerald Fuerst, Clerk, Cuyahoga County Court of Common Pleas, as security for a bond related to a lawsuit then-pending in the state court. The complaint alleges further that in 2002 George Gibel caused Clerk Fuerst to convey the deed to George Gibel, who may then have issued a quit claim deed to IWARR, Inc. The complaint asks for a determination that the Property is property of the bankruptcy estate, that a constructive trust be imposed directing that Clerk Fuerst hold the Property in trust for the debtor, for a determination that the transfer of the Property from the debtor to Clerk Fuerst was a fraudulent conveyance, and finally for a finding that certain defendants violated the bankruptcy code's automatic stay provisions (11 U.S.C. § 362), converted or interfered with the debtor's property, wrongfully evicted a tenant, and maliciously destroyed buildings on the Property. The complaint does not explain why the debtor is an appropriate plaintiff given the appointment of a chapter 11 trustee for this estate.

FACTS

The debtor presented three witnesses at the hearing: Ada Briden, Damian Borod, and Joseph Pesec. Albert Gibel presented his case through cross-examination.

Ada Briden is not an employee of the debtor and she had no knowledge of events relevant to the issue raised in the TRO motion. She testified that she worked at one time for Midwest Fireworks Mfg. Co., Inc. II which had offices on the Property. In January 2003-almost a year ago-she observed that some buildings on the Property were damaged or destroyed. She did not know who did the damage. At some point, she looked through papers that had been removed from the Property and put into storage and found them to be incomplete records.

Joseph Pesec is the sole shareholder of IWARR, Inc. According to Pesec, IWARR acquired the Property from Albert Gibel with "\$40,000.00 changing hands". He discovered later that another deed had been filed purporting to transfer the Property from IWARR back to Albert Gibel, but he claimed that his signature was forged on this latest deed. At some point, he wrote to Laurence Lomaz (the debtor's principal) and told him that Albert Gibel had said that he was going to tear down the buildings on the Property. Pesec has not, however, been in close contact with Gibel in the last 8-10 weeks because "Albert needs money and he's not going to give him any more." There was no additional testimony as to why Pesec has been giving money to Albert Gibel.

Damian Borod testified that he has no involvement with IWARR, Inc. Despite this, in February 2003, he helped Joseph Pesec remove some papers from the front office building on the Property. He did not see any building being damaged at that time. When he went back in April 2003, part of a building had been taken off.

**THE POSITIONS OF THE PARTIES**

The debtor argues that it has standing to raise these issues under bankruptcy code § 1109. *See* 11 U.S.C. § 1109. The debtor acknowledged that it has not made demand on the trustee to pursue any of these issues. The debtor contends that the evidence established that Albert Gibel destroyed some of the buildings on the Property early on; that Gibel fraudulently conveyed the Property back to himself; and that he intends to destroy more buildings. The debtor contends that injunctive relief is appropriate because “someone should be in control of access to the premises.”

Albert Gibel counters that ownership of the Property has yet to be determined and the bankruptcy estate may not have any interest in the Property; there was no proof that the deed transferring the Property from IWARR back to him is fraudulent; there is no imminent harm to the debtor because the only testimony related to actions taken months ago; there was no evidence that Albert Gibel was the one who damaged the Property; and any damage is monetary and therefore not irreparable as required for preliminary injunctive relief.

**DISCUSSION**

A request for a temporary restraining order and preliminary injunctive relief requires the court to balance these factors: (1) whether the movant is likely to succeed on the merits; (2) whether the movant has shown irreparable harm; (3) whether the potential injury that might be suffered by the party to be enjoined is outweighed by the potential harm which will be suffered by the movant if the motion is not granted; and (4) whether the public interest will be served by issuing preliminary injunctive relief. *See Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6<sup>th</sup> Cir. 1996). *See also* FED. R. BANKR. P. 7065.

**Whether the movant is likely to succeed on the merits**

To succeed on the merits, the debtor will have to prove that (a) it has standing to pursue this matter in its own name; and (b) it is entitled to have the 1999 Property transfer that it made to Clerk Fuerst set aside.<sup>2</sup> There was little or no evidence presented at the hearing to show that this transfer should be set aside. This factor does not favor granting injunctive relief, even if the debtor has standing to bring this adversary proceeding.<sup>3</sup>

**Whether the movant has shown irreparable harm**

The harm that the debtor seeks to prevent is the possible destruction of unidentified buildings on the Property.<sup>4</sup> First, there was no evidence as to what buildings, if any, remain intact on the Property. Second, there was little or no convincing evidence that Albert Gibel or anyone else has a present intention to destroy any building that may still be standing. The court notes that Albert Gibel was in the courtroom, but was not called as a witness. Third, as a general rule, irreparable harm is not established where damages would adequately compensate a movant for the harm suffered. *See Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F. 3d 1373, 1382 (6<sup>th</sup> Cir. 1995). There was no testimony that there is anything unique or unusual about any existing buildings such that their potential destruction could not be compensated for by

---

<sup>2</sup> This discussion is limited to what the debtor will have to prove on the count relating to the Property's ownership. The other causes of action asking for damages for conversion, improper eviction, and the like are not the subject of this motion.

<sup>3</sup> The debtor relies on 11 U.S.C. § 1109 which states that the debtor has the "right to be heard on any issue". The right to be heard is not necessarily the same as having standing to bring a cause of action. The court is not, however, making any finding with respect to standing at this time.

<sup>4</sup> Some of the buildings contained fireworks which were removed from the Property under earlier court orders. Presumably, the buildings are now empty.

money damages. In fact, the pictures introduced into evidence suggest that the buildings that used to be on the Property are trailers and/or temporary warehouse-type structures. Additionally, Pesec's testimony suggested that some or all of the buildings have been condemned. The debtor argued that any destruction of a building would be irreparable because Albert Gibel does not have the wherewithal to pay a damage award. There was no testimony to support that statement. This factor does not favor granting injunctive relief.

**Whether the other parties will suffer significant harm if the injunction is granted and whether any such potential harm is outweighed by the harm the debtor will suffer if relief is not granted**

The testimony did not really address this factor. It does not, therefore, weigh either in favor of or against granting relief.

**Whether the public interest will be served**

Again, the testimony did not focus on this factor. The debtor did suggest that "someone should be in charge of access to the Property," which the court interprets as an appeal to the public interest factor. If, after all parties have had a chance to be heard, this real estate is found to be property of the estate, then the chapter 11 trustee is the person who will control the Property. If it is not property of the estate, then the legal owner will fill that role. The public interest will not be served by making this ownership decision based on inconclusive and incomplete evidence on limited notice to parties who have not even been served with notice that a lawsuit has been commenced against them. This factor does not weigh in favor of granting injunctive relief.

**CONCLUSION**


After balancing the relevant considerations, the court finds that a temporary restraining

order and preliminary injunctive relief should not be entered. A separate order will be entered reflecting this decision.

\* \* \* \*

It is worth noting that the debtor's motion states that if an injunction is not issued, "representatives and/or authorized agents of the debtor will, in all likelihood, be required to engage in confrontational conduct with other parties asserting ownership interest in the subject premises, to prevent said parties from engaging in acts of vandalism and/or destruction of the buildings located on the subject premises." This statement may or may not be linked to the debtor's argument (not established through the evidence) that Albert Gibel has been on the Property with an automatic weapon. This is not the Wild West in the 1800s; the court expects all parties to follow the rule of law and present their disputes for resolution through the courts. A pretrial has been set for January 15, 2004 at 10:30 a.m. where the parties will have the opportunity to argue their positions. (Docket 4). In the meantime, self-help on the part of any party is not indicated or justified, nor will it be tolerated. A word to the wise will, hopefully, be sufficient on this point.

Date: 2 Dec 2003

  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by telecopy on: Morris Laatsch, Esq.  
James Ehrman, Esq.  
Robert Cyperski, Esq.  
George Gibel, Esq.  
David Simon, trustee

By: Dreg Nunn

Date: 12/2/03

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED

03 DEC -2 PM 1:36

U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re:

Case No. 03-11098

PACIFIC FINANCIAL  
SERVICES OF AMERICA, INC.,

Chapter 11

Debtor.

Judge Pat E. Morgenstern-Clarren

PACIFIC FINANCIAL  
SERVICES OF AMERICA, INC.,

Adversary Proceeding No. 03-1451

Plaintiff,

**ORDER**

v.

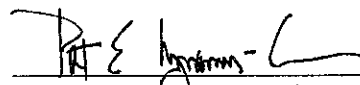
ALBERT GIBEL, et al.,

Defendants.

For the reasons stated in the memorandum of opinion filed this same date, the plaintiff-debtor's motion for a temporary restraining order and to enjoin defendants is denied. (Docket 2).

IT IS SO ORDERED.

Date: 12/2/03

  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by telecopy on: Morris Laatsch, Esq.  
James Ehrman, Esq.  
Robert Cyperski, Esq.  
George Gibel, Esq.  
David Simon, trustee

By: Dorey Nunn

Date: 12/2/03