

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
MAY - 1 2003
BRENDA K. ARSOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (7)

IN RE:

JAMES E. MACDONALD
(SS# 250-84-4822) and
ROSE MARIE MACDONALD
(SS#248-23-7201)

Debtors.

KEVIN CAMPBELL, TRUSTEE

Plaintiff

v.

JAMES E. MACDONALD and
ROSE MARIE MACDONALD

Defendants.

B/K Case No. 01-12799-W

Chapter 7

Adversary Proceeding No. 03-80157

ENTERED

MAY - 1, 2003

S.R.P.

ORDER

This matter came before the Court upon the Motion for Immediate Issuance of Temporary Restraining Order and for Preliminary Injunction (the "Motion") and Complaint filed by Kevin Campbell, the Chapter 7 Trustee, (the "Trustee"), pursuant to Federal Rule of Civil Procedure 65, applicable to this action by Federal Rule of Bankruptcy Procedure 7065. The Court set this matter for a hearing on April 21, 2003; however, upon the request of the parties, the hearing was rescheduled for May 1, 2003 and was held at that time.

It appears from the Motion, Memorandum and Affidavit which have been filed by the Trustee that he is seeking this preliminary injunction to establish: 1) James E. MacDonald and Rose M. MacDonald ("Defendants") are in a Chapter 7 bankruptcy case which remains open; 2) this bankruptcy estate specifically included the real property commonly referred to as 2625 Otranto Road, Charleston County, South Carolina (the "Real Property"), which has not been abandoned by the Trustee; 3) pursuant to 11 U.S.C. §541(a) the surplus funds resulting from the state court foreclosure of the Real Property are property of this bankruptcy estate; and 4) requiring that if the Defendants

receive any of the surplus funds through the state court proceeding, they shall immediately turn over and surrender those funds to the Trustee for distribution through this bankruptcy estate.

It further appears from the Affidavit and pleadings that have been filed by the Trustee that the estate will suffer immediate and irreparable injury, loss or damage if the requested preliminary injunction is not ordered. The Trustee also has asserted that there is a substantial likelihood that he will succeed in establishing that the surplus funds are property of the estate. Further, the Trustee has alleged in his Affidavit that the estate would lose a substantial asset if the surplus funds were given to the Defendants and not turned over to him and that he may be required to pay attorney fees and costs in attempting to collect these funds if they are placed in the hands of the Defendants.

Defendants assert that their bankruptcy attorney advised them verbally that the Real Property was abandoned; however, Defendants offer no evidence, written or otherwise, to indicate the abandonment. The Court's records do not support Defendants' position.

This Court finds that the surplus funds are proceeds from the sale at foreclosure of the Real Property, which is an asset of the estate.¹ See In re Markos Gurnee P'ship, 252 B.R. 712 (Bankr. N.D. Ill. 1997) (finding that simply because relief from the stay had been granted to allow a creditor to complete a foreclosure sale did not deprive the bankruptcy estate of a claim to any sales proceeds in excess of the amount of the creditor's allowed secured claim). Indeed, the lifting of the automatic stay does not constitute abandonment of property by the bankruptcy estate. See Catalano v. Comm'r of Internal Revenue, 279 F.3d 682 (9th Cir. 2002); Nebel v. Richardson (In the Matter of Nebel), 175 B.R. 306 (Bankr. D. Neb. 1994); In re Remington Forest, C/A No. 95-76069, 1996 WL 33340744 (Bankr. D. S.C. Jun. 18, 1996). This Court further finds that the Trustee has demonstrated that there is a likelihood that he will succeed in establishing that the surplus funds are property of the estate and that the estate will suffer immediate and irreparable injury if the requested preliminary injunction is not ordered. This Court further finds that the Defendants would not be harmed by the issuance

¹ This conclusion is not inconsistent with granting relief from the automatic stay to Hutch Holding because these surplus funds are what is remaining after liens encumbering the property have been paid.

of the preliminary injunction. The Court also finds that the issuance of the preliminary injunction will serve the public interest by protecting a potential asset of the estate for the benefit of the creditors of the bankruptcy estate. In balancing the hardships of this case and considering the totality of the circumstances, it appears that a preliminary injunction is warranted until a further ruling can be made by the Court in the adversary proceeding. It is, therefore

ORDERED that the Trustee's request for a preliminary injunction is granted and that the surplus funds from the state court foreclosure sale of the Real Property constitute property of the Chapter 7 bankruptcy estate;

IT IS FURTHER ORDERED that any distribution of surplus funds presently held by the Master in Equity to any party other than the Trustee is enjoined. In the event the Master distributes the surplus or funds to the Trustee, the Trustee shall not invade or distribute those funds until further order of the Court;

IT IS FURTHER ORDERED that should the Defendants receive any of the surplus sale proceeds through the state court proceeding, they shall immediately turn over and surrender those funds to the Trustee; and

IT IS FURTHER ORDERED that this Order shall remain in effect until further Order of this Court.

IT IS SO ORDERED!


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
May 1, 2003.