11 U.S.C. § 105
11 U.S.C. § 362

Linc Acquisition One LLC v. Ed's Muffler's Unlimited, Inc.
Adv.Pro. #02-3255-tmb; Dist.Ct. #02-3255; Appellate No. 03-184-FR
(In re Ed's Muffler's Unlimited, Inc., Case No. 302-36006)

5/21/03 FR Unpub

May 21, 2003 District Ct. Affirming Judge Brown

The bankruptcy court granted Debtor's request for a temporary injunction to prevent Linc, a secured creditor, from foreclosing on real property owned by the Debtor's principal and leased to the Debtor. Linc appealed, arguing that the automatic stay provided for by § 362 does not apply to non-debtor's and that the bankruptcy court's power to enjoin actions against non-debtors under § 105 is limited to situations in which the non-debtors liability is derivative of the debtor. The district court disagreed and affirmed the bankruptcy court, holding that "there is no authority cited by Linc to limit the power of the bankruptcy court under § 105(a) to issue a preliminary injunction prior to confirmation of the plan to primary obligations not derivative of the debtor." .

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re: ED'S MUFFLERS UNLIMITED, INC., Debtor and Debtor-in-Possession.	Bankruptcy Case No. 302-36006-tmb11 Adversary Proceeding No. 02-3255
LINC ACQUISITION ONE LLC, Plaintiff/Appellant, v. ED'S MUFFLERS UNLIMITED, INC., and JAMES E. HICKAM, an individual, Defendants/Appellees.	Civil No. 03-184-FR OPINION AND ORDER

David W. Criswell
Jeffrey C. Gardner
Ball Janik LLP
101 S.W. Main Street, Suite 1100
Portland, Oregon 97204-3219

Attorneys for Plaintiff/Appellant

Daniel G. Hoarfrost
9600 S.W. Barnes Road, Suite 325
Portland, Oregon 97225

Attorney for Defendants/Appellees

FRYE, Judge:

The matter before the court is the appeal from an order of the United States Bankruptcy Court for the District of Oregon entered on September 11, 2002 enjoining the plaintiff/appellant, LINC Acquisition One LLC (LINC), from concluding foreclosure on two trust deeds on real property owned by James E. Hickam.

FACTS

On January 26, 1999, James E. Hickam executed and delivered to U.S. Bank, as holder, a promissory note in the principal amount of $1,275,000 (the First Hickam Note). This note was subsequently amended to reflect a principal balance of $1,271,975 and to extend the maturity date. On that same date, Hickam, as grantor, executed and delivered to U.S. Bank, as beneficiary, a deed of trust to secure payment on the First Hickam Note. This deed of trust attaches to and encumbers real property and improvements located at 18005-18001 S.E. Division Street, Portland, Oregon (the Rockwood Property). This deed of trust was duly recorded in the real property records of Multnomah County, Oregon on January 27, 1999.

On December 10, 1998, Hickam executed and delivered to U.S. Bank, as holder, a promissory note in the principal amount of $400,000 (the Second Hickam Note). This note was subsequently amended to reflect a principal balance of $146,633.18 and to extend the maturity date. On that same date, Hickam, as grantor, executed and delivered to U.S. Bank, as lender and beneficiary, a deed of trust to secure payment on the Second Hickam Note. This deed of trust attaches to and encumbers real property and improvements located at 17855 S.E. McLoughlin Boulevard, Milwaukie, Oregon (the Milwaukie Property). This deed of trust was duly recorded in the real property records of Clackamas County, Oregon on December 29, 1998.

James Hickam is the sole shareholder and officer of Ed's Mufflers Unlimited, Inc. (Ed's Mufflers), the debtor in this proceeding. Ed's Mufflers has guaranteed all existing and

future indebtedness of Hickam to U.S. Bank pursuant to a guaranty dated November 24, 1997. Ed's Mufflers also executed and delivered to U.S. Bank, as holder, a promissory note in the principal amount of $250,000 (the Ed's Mufflers Note). The Ed's Mufflers Note is secured by a lien on corporate assets, including inventory and accounts receivable of Ed's Mufflers. Hickam is the guarantor of the Ed's Muffler Note.

On June 4, 2002, Ed's Mufflers filed a petition for relief under Chapter 11, Title 11 of the United States Code.

LINC is the assignee of U.S. Bank under all of the foregoing notes, trust deeds, and loan documents between Hickam and U.S. Bank and between Ed's Mufflers and U.S. Bank.

Hickam stopped making payments under the First Hickam Note and the Second Hickam Note. As a result, LINC gave and recorded a Notice of Default and Election to Sell under the deed of trust for the Rockwood Property and the deed of trust for the Milwaukie Property. Such notices commenced the statutory non-judicial foreclosure process set forth in ORS 86.753 *et seq*. Foreclosure sales for the Rockwood Property and the Milwaukie Property were scheduled to occur on September 13, 2002.

On August 22, 2002, Ed's Mufflers and Hickam filed a motion for a preliminary injunction against LINC seeking a preliminary injunction staying the non-judicial foreclosure by advertisement and sale of the Rockwood Property and the Milwaukie Property. LINC opposed the motion for a preliminary injunction.

On September 11, 2002, the United States Bankruptcy Court entered an injunction, which, among other things, enjoined LINC through December 6, 2002 from concluding the non-judicial foreclosure by advertisement and sale of the Rockwood Property and the Milwaukie Property. LINC filed a timely notice of appeal of the injunction order. Ed's Mufflers moved to extend the injunction against LINC through February 7, 2003 and has

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filed a proposed plan of reorganization to stay LINC for a year following plan confirmation.

CONTENTIONS OF THE PARTIES

LINC contends that the automatic stay imposed by Section 362 of the Bankruptcy Code applies only to the collection rights and remedies against the debtor Ed's Mufflers and the property of Ed's Mufflers. LINC contends that the stay does not apply to non-debtor parties or their property, such as Hickam. LINC recognizes some equity jurisdiction in certain circumstances to stay collection against non-debtors, but asserts that any such injunction must end upon confirmation of a plan. LINC further contends that such an injunction would not be proper in this case where the non-debtor third party has primary liability to the creditor not derivative of the debtor.

Ed's Mufflers and Hickam contend that the bankruptcy court has the authority to stay a lender from pursuing collection remedies against a non-debtor prior to confirmation of a plan regardless of whether the non-debtor third party has primary liability to the creditor not derivative of the debtor. Ed's Mufflers and Hickam contend that the order of September 11, 2002 does no more than issue a preliminary stay prior to confirmation of a plan and should be affirmed.

RULING OF THE COURT

11 U.S.C. § 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." In In re American Hardwoods, Inc., 885 F.2d 621 (9th Cir. 1989), the United States Court of Appeals for the Ninth Circuit stated that "Section 105 empowers the court to enjoin preliminarily a creditor from continuing an action or enforcing a state court judgment against a nondebtor prior to confirmation of a plan." Id. at 624.

The order issued by the bankruptcy court on September 11, 2002 preliminarily enjoins the collection action against a non-debtor prior to the confirmation of the plan.

There is no authority cited by LINC to limit the power of the bankruptcy court under Section 105(a) to issue a preliminary stay prior to the confirmation of the plan to primary obligations not derivative of the debtor.

The bankruptcy court had the authority under 11 U.S.C. § 105(a) to issue the order dated September 11, 2002. The order is AFFIRMED, and this appeal is DISMISSED.

IT IS SO ORDERED.

DATED this 21st day of MAY 2003.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge