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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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

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1 FRYE, Judge:

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

6 **FACTS**

7 On January 26, 1999, James E. Hickam executed and delivered to U.S. Bank, as
8 holder, a promissory note in the principal amount of \$1,275,000 (the First Hickam Note).
9 This note was subsequently amended to reflect a principal balance of \$1,271,975 and to
10 extend the maturity date. On that same date, Hickam, as grantor, executed and delivered
11 to U.S. Bank, as beneficiary, a deed of trust to secure payment on the First Hickam Note.
12 This deed of trust attaches to and encumbers real property and improvements located at
13 18005-18001 S.E. Division Street, Portland, Oregon (the Rockwood Property). This deed
14 of trust was duly recorded in the real property records of Multnomah County, Oregon on
15 January 27, 1999.

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

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

1 future indebtedness of Hickam to U.S. Bank pursuant to a guaranty dated November 24,
2 1997. Ed's Mufflers also executed and delivered to U.S. Bank, as holder, a promissory
3 note in the principal amount of \$250,000 (the Ed's Mufflers Note). The Ed's Mufflers
4 Note is secured by a lien on corporate assets, including inventory and accounts receivable
5 of Ed's Mufflers. Hickam is the guarantor of the Ed's Muffler Note.

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

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

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

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

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

26 ///

1 filed a proposed plan of reorganization to stay LINC for a year following plan confirma-
2 tion.

3 **CONTENTIONS OF THE PARTIES**

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

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

18 **RULING OF THE COURT**

19 11 U.S.C. § 105(a) provides that "[t]he court may issue any order, process, or
20 judgment that is necessary or appropriate to carry out the provisions of this title." In
21 In re American Hardwoods, Inc., 885 F.2d 621 (9th Cir. 1989), the United States Court
22 of Appeals for the Ninth Circuit stated that "Section 105 empowers the court to enjoin
23 preliminarily a creditor from continuing an action or enforcing a state court judgment
24 against a nondebtor prior to confirmation of a plan." Id. at 624.

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

