

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

_____| |
IN RE: CASE NO. 05-64667
Duval of Georgia, Inc.,
Debtor. CHAPTER 11
JUDGE MASSEY

_____| |
Duval of Georgia, Inc.,
Plaintiff,
v. ADVERSARY NO. 05-6255
Merrill Lynch Business Financial Services Inc.,
Defendant.

ORDER DENYING MOTION FOR EXPEDITED HEARING ON COMPLAINT

In its complaint against Defendant Merrill Lynch Business Financial Services, Inc., Debtor Duval of Georgia, Inc. seeks injunctive relief to prevent Defendant from conducting a foreclosure sale on real property that Debtor leases from its principal. Debtor contends that Defendant's efforts to conduct a foreclosure sale "violates the automatic stay as it seeks to directly impact estate property and to collect Debtor's debt to it." Debtor also contends that its principal is trying to sell the property and negotiate a lease of part of the space so that Debtor can downsize and that foreclosure on the property would effectively destroy Debtor's business.

Plaintiff has yet to file a certificate of service of a summons and the complaint but moves for an "expedited hearing on the complaint." The motion is not couched in the language one

normally associates with requests for injunctive relief and does not mention the applicable procedural rule.

The theory that Defendant is violating the automatic stay by foreclosing on property of a guarantor because that act is an attempt to collect the debt owed by the Debtor is false. As a general rule,

[i]t is well-established that stays pursuant to § 362(a) are limited to debtors and do not encompass non-bankrupt co-defendants. *See, e.g., Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1329-30 (10th Cir.1984); *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 126-27 (4th Cir.1983); *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1196-97 (6th Cir.1983); *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 544 (5th Cir.1983); *Austin v. Unarco Indus., Inc.*, 705 F.2d 1, 4-5 (1st Cir.), cert. denied, 463 U.S. 1247, 104 S.Ct. 34, 77 L.Ed.2d 1454 (1983); *Pitts v. Unarco Indus., Inc.*, 698 F.2d 313, 314 (7th Cir.1983) (per curiam).

Teachers Ins. and Annuity Ass'n of America v. Butler, 803 F.2d 61, 65 (2nd Cir. 1986). But a few courts have extended the automatic stay in extraordinary circumstances. *See, e.g., A.H. Robins Inc. v. Piccinin*, 788 F.2d 994, 999-1001 (4th Cir.), cert. denied, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986). Section 105 of the Bankruptcy Code is not a license for bankruptcy judges to create rights not provided in the Bankruptcy Code.

To seek a hearing on the complaint is to seek a trial on the merits. Although a court may under Civil Rule 65 combine a motion for a preliminary injunction with a trial on the merits, the motion fails to articulate a theory that would warrant that course of action.

In essence, the relief Plaintiff wants and should have asked for in more precise language is an extension of the reach of the automatic stay to its principal. That sort of relief is hard to get. Debtor's principal has an out, which is to file her own bankruptcy case. It is understandable that she would not want to do so, but she may have no choice if she wants to stop the foreclosure.

If, as Plaintiff contends, Defendant is adequately protected in the sense that its claim could be paid in full with postponement of a forced sale for a few months, the Court would not look sympathetically at an effort to collect from the guarantor at the price of destroying the Plaintiff. But paragraph 7 of the complaint seems to indicate that the value of the building is less than the amount of Defendant's claim. The complaint does not allege facts about the value of other collateral, if any. It is unclear whether Plaintiff's principal has a sale in mind that is less than fair market value in exchange for a lease of a portion of the premises. If so, the Court would not be inclined to stop the foreclosure (assuming for the sake of argument that it had the power to do so) unless a genuine effort were being made to market the property unconditionally so as to obtain the highest price.

Plaintiff's president and its counsel should read carefully Rule 65 of the Federal Rules of Civil Procedure made applicable by Bankruptcy Rule 7065 and in particular paragraph (c). If Plaintiff files a motion for a temporary restraining order and/or preliminary injunction, it may set an evidentiary hearing on such a motion for June 28, 2005 at 3:00 p.m.

Accordingly, it is

ORDERED that Plaintiff's motion to set an expedited hearing on its complaint is DENIED without prejudice to its filing a motion for a temporary restraining order and preliminary injunction.

Dated: June 22, 2005.


JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE