



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

4th Street East Investors, Inc.,

Debtor(s).

Case No.: 2:12-bk-17951-NB

CHAPTER 11

MEMORANDUM DECISION GRANTING *IN REM* RELIEF FROM THE AUTOMATIC STAY

Date: June 26, 2012

Time: 10:00 AM

Courtroom: 1545

A hearing was held at the above-referenced time and place on the motion of Ocean II, LLC (the "Movant") for relief from the automatic stay (dkt. 95) (the "Motion") and other papers filed in relation thereto (dkt. 116 and 127). Appearances were as noted on the record.

Based on (i) the foregoing papers, (ii) the bankruptcy schedules ("Schedules") and Statement Of Financial Affairs ("SOFA") (dkt. 1) filed by the above captioned debtor(s) ("Debtor"), (iii) the proof of service included in the Motion papers showing service on the owner/borrower listed in the loan documents (the "Owner"), and (iv) the other documents and records in this case and the arguments and evidence presented at the hearing, I make the following findings of fact and conclusions of law.

1 **A. Findings of Fact**

2 This case matches the profile of certain other cases that have come before the
3 Court:

4 (1) In violation of the loan documents, an interest in the subject property
5 purportedly was transferred to Debtor.

6 (2) Movant has presented sufficient evidence, including the following, to establish
7 that the purported transfer was part of a “scheme” to delay or hinder Movant’s remedies
8 against the property by implicating the automatic stay of 11 U.S.C. § 362(a) in Debtor’s
9 bankruptcy case:

10 (a) The grant deed reflects that the purported transfer was for little or no
11 consideration.

12 (b) The purported transfer occurred, or it was made known to Movant, at a
13 time when Movant was seeking to pursue its remedies against the
14 property.

15 (c) No evidence or argument was presented that would establish any
16 legitimate purpose for such a purported transfer.

17 (3) Movant has *not* established that Debtor was part of such scheme¹ because
18 on the present record:

19 (a) There is evidence that the purported transfer occurred *after* Debtor’s
20 bankruptcy petition was filed (if the transfer had occurred *before* the
21 petition date then that would imply advance coordination between the
22 transferor and Debtor).

23 (b) There is no evidence of any other connection between Debtor and (i) the
24 property, (ii) any transferor of the property (a “Transferor”), or (iii) any
25 obligor under the movant’s loan documents (e.g., there is no indication
26 that Debtor was acquainted with a Transferor or obligor or resided at the
27 property).

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¹ I make no finding regarding that issue one way or the other.

1 (c) There is insufficient *other* evidence to support a finding of an intent by
2 Debtor, in filing the bankruptcy petition, to hinder, delay or defraud
3 creditors, such as blank or otherwise substantially defective bankruptcy
4 schedules, or the debtor's failure to attend the meeting of creditors under
5 11 U.S.C. § 341(a).

6 (d) Based on the foregoing, this case is consistent with the pattern in so-
7 called "hijacked" or "dumping" cases – *i.e.*, cases in which a transferor of
8 property, acting *without* the debtor's participation or acquiescence, seeks
9 to implicate the automatic stay for the transferor's *own* benefit by
10 purporting to transfer property into a random bankruptcy estate, or by
11 back-dating or falsifying a grant deed to make it appear that such a
12 transfer has occurred.

13 (4) If Movant intended to seek a specific finding of this Court that Debtor was part
14 of the scheme, the Motion papers and the facts and circumstances described above did
15 not sufficiently notify Debtor of that possibility, and therefore Debtor had insufficient
16 notice of any reason to oppose the Motion.

17 **B. Conclusions of Law**

18 Based on the foregoing facts, although it is *not* appropriate to find that Debtor
19 participated in the scheme, it *is* appropriate to grant relief of the type set forth in 11
20 U.S.C. §362(d)(4) ("*in rem*" relief), for the following reasons.

21 (1) Relief is appropriate under 11 U.S.C. § 364(d)(4) because, *as of the time*
22 *when the scheme was implemented*, the debtor's "filing of the petition was part of a
23 scheme [*by Transferor*] to delay, hinder, or defraud creditors" (11 U.S.C. § 362(d)(4)).
24 In other words, I interpret the term "was" as descriptive of the type of scheme (a scheme
25 that involves the fact that filing the petition created an automatic stay), rather than as a
26 temporal limitation intended by Congress to exclude schemes that are implemented
27 post-petition. *Compare In re Scarborough*, 461 F.3d 406, 411 (3d Cir. 2006)
28 (interpreting the word "is" in 11 U.S.C. § 1322(b)(2) as descriptive, not temporal); *In re*

1 *Abdelgadir*, 455 B.R. 896, 902-03 (9th Cir. BAP 2011) (same, under 11 U.S.C.
2 § 1123(b)(5)).

3 (2) Alternatively, the same *in rem* relief is warranted on two alternative grounds:
4 the Court's inherent authority, or the plain meaning of 11 U.S.C. § 105(a).

5 (a) I respectfully disagree with decisions that, in my view, appear to narrow
6 § 105(a) almost out of existence and to deny any authority to prevent
7 such abuse. *See, e.g., In re Johnson*, 346 B.R. 190 (9th Cir. BAP 2006).
8 In departing from *Johnson*, I follow authority holding that decisions of the
9 Bankruptcy Appellate Panel are not strictly binding (although they are
10 often persuasive). *See, e.g., In re Rinard*, 451 B.R. 12, 20-21 (Bankr.
11 CD Cal. 2011), *disagreed with on other grounds, In re Hernandez* (Case
12 No. 2:11-bk-53730-NB, dkt. 40). Both the Court's inherent authority and
13 the plain meaning of 11 U.S.C. § 105(a) authorize the Court "to take
14 appropriate action in order to prevent abuse of the bankruptcy process."
15 *In re Fernandez*, 212 B.R. 361, 372 (Bankr. CD Cal. 1997), *aff'd on other*
16 *grounds*, 227 B.R. 174 (9th Cir. BAP 1998). *See also, e.g., In re*
17 *Henderson*, 395 B.R. 893, 901-02 (Bankr. D.S.C. 2008) (*in rem* relief not
18 limited to § 362(d)(4)).

19 (b) I also respectfully disagree that an adversary proceeding is required in
20 order to grant *in rem* relief as described in this decision. *See In re Van*
21 *Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009). It is not apparent why more
22 elaborate procedures should be required under the Court's inherent
23 authority or 11 U.S.C. § 105(a) than would be required to grant the same
24 type of *in rem* relief as under § 362(d)(4).

25 (3) To the extent, if any, that Movant seeks any other extraordinary relief, such as
26 relief against third parties *without* any notice ("Extraordinary Relief"), Movant has not
27 provided sufficient legal authority or factual basis for such relief.

28 (4) Movant has established sufficient cause to waive the 14 day stay under Fed.

1 R. Bankr. P. 4001(a)(3).

2 **C. Conclusion**

3 A separate order will be issued, concurrent with this Memorandum Decision,
4 granting Movant relief from the automatic stay of 11 U.S.C. §362(a), including *in rem*
5 relief as described above.

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26 DATED: June 29, 2012

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United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*): **MEMORANDUM DECISION GRANTING IN REM RELIEF FROM THE AUTOMATIC STAY** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner stated below:

1. **SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** – Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of (*date*) **6/29/12**, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

- Marvin B Adviento generalmail@alvaradoca.com
- Brielyn S Atwater bknotice@mccarthyholthus.com, bknotice@mccarthyholthus.com
- Gregory J Babcock gbabcock@abbeylaw.com
- Richard J Bauer rbauer@mileslegal.com
- Bradley S Beherns efcacb@piteduncan.com
- Russell Clementson russell.clementson@usdoj.gov
- Mark Domeyer mdomeyer@mileslegal.com
- Fahim Farivar ffarivar@margulies-law.com
- Todd S Garan efcacb@piteduncan.com
- Barry S Glaser bglaser@swjlaw.com
- Arnold L Graff efcacb@piteduncan.com
- Joe M Lozano notice@NBSDefaultServices.com
- Craig G Margulies cmargulies@margulies-law.com
- Scott H Noskin snoskin@mbnlawyers.com, krose@mbnlawyers.com;amcdow@mbnlawyers.com
- Martin W. Phillips marty.phillips@att.net
- Kelly M Raftery bknotice@mccarthyholthus.com, kraftery@mccarthyholthus.com
- Russell H Rapoport rrapoport@prllplaw.com, lgillis@prllplaw.com
- Daniel I Singer bankruptcy@zievelaw.com
- United States Trustee (LA) ustpreion16.la.ecf@usdoj.gov
- Darlene C Vigil cdcaecf@bdfgroup.com

Service information continued on attached page

2. **SERVED BY THE COURT VIA UNITED STATES MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

Debtor:

4th Street East Investors, Inc.
Attn: Kim Holmes
42034 3rd Street E
Lancaster, CA 93535

Service information continued on attached page

3. **TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

Service information continued on attached page