

I.

SUMMARY OF ARGUMENT

The Court should enter a Temporary Restraining Order and Preliminary Injunction prohibiting from advertising, proceeding with or taking any other action with regard to attempt to foreclose on certain Deeds of Trust executed by (the " ") on lands located in Counties, Mississippi. Injunctive relief is necessary to maintain the status quo until the issue of whether the promissory notes which the deeds of trust secure are due and payable or whether Whitney has agreed to forbear collection of the notes.

The issue of whether the notes are due and payable or whether has agreed to forbear collection of the notes is currently the subject of two legal proceedings between and the - one on appeal to the United States Court of Appeals for the Circuit from the United States District Court for the District of Mississippi and the other presently before the United States District Court for the District of . However, neither court has ruled whether or not is entitled to demand the immediate payment of the amount claimed to be due from the and these foreclosure proceedings are an attempt by to obtain prejudgment seizure and attachment of the ' property and to otherwise unfairly gain an advantage over the prior to a determination of the parties' respective rights in the two federal court cases.

Mississippi courts have long held that land is peculiar in nature and foreclosures of the ' property in Counties, Mississippi, will result in immediate and substantial irreparable harm, damages and losses to the . The do not have an adequate remedy at law. Moreover, attempt to foreclose on the ' property prior to a determination of liability constitutes an attempt to obtain a prejudgment seizure and attachment in violation of the due process provisions of the Mississippi Constitution. Courts have also long recognized that

the violation of a person's constitutional right constitutes irreparable harm for which there is no adequate remedy at law.

The should be required to post only a minimal security bond upon the issuance of injunction relief. Rule 65(c) of the Mississippi Rules of Civil Procedure provides that while security must be given upon the issuance of a temporary restraining order or preliminary injunction, the amount of such security is at the discretion of the court. In a case such as this, where the creditor is oversecured and where the collateral is real property which is appreciating, rather than depreciating, in value, only a minimal security bond is necessary because as a practical matter the damages which may be incurred or suffered by should it be found to have been wrongfully enjoined or restrained would be insignificant.

I.

FACTUAL BACKGROUND

For over years, the have been in the business of acquiring, developing, investing in, and selling properties and other assets which include mineral interests, oil and gas leases, oil and gas wells, real estate and timberland. The nature of this business is speculative and requires long-term loans, long-term financing, and long-term forbearance from a lending institution which is willing to loan money long-term on and for speculative properties and to await the development or sale of the properties to be paid.

The began doing business with in . The relied on 's assurances that would provide the with long-term loans, financing, and, most importantly, the necessary forbearance which the would need over a long period of time in order to acquire, develop, and sell properties at the most optimum prices available. Since , the have been one of the substantial customers of . has provided the with long-term loans, financing, and the necessary forbearance for the ' acquisition,

development, investment, and sale of various properties. Pursuant to written and verbal agreements, including modifications and amendments of notes, and the long-standing course of dealing between the parties, _____, *e.g.*, has loaned money to the _____, has advanced monies to the _____ in anticipation of sale, has encouraged the _____ to acquire properties, has paid debts owed by the _____ and has rolled the payments into the _____' account, and has paid down the _____' account with proceeds received from time to time from the _____' income producing properties and the _____' periodic sales of properties. _____ has repeatedly waived the strict enforcement of the default provisions of the written agreements between them and the _____ have relied to their detriment on these agreements. For example, the _____ are presently involved in a sale of approximately _____ acres of _____ in _____ on which _____ holds a second mortgage. The _____ have at all times kept _____ fully apprised of the _____' efforts to sell the _____ and of the proposed sale, with the agreement and understanding that the _____ will use a portion of the sale proceeds to bring current the accrued interest on the _____' debt to the Bank. This course of dealing between the _____ and the _____ has been followed since _____.

The relationship between the _____ and _____ has been a long-standing fiduciary relationship of mutual trust and confidence for the mutual benefit and profit of both the _____ and _____. _____ has exercised a degree of control and influence over the _____' business activities. The _____ and _____ have both benefitted from the relationship. Since _____, the _____ have paid over \$ _____ in interest and \$ _____ in principal in connection with loans made by _____ to the _____.

The _____ have secured _____ with various mortgages, deeds of trust, and security interests in properties located in _____, _____, and _____ Counties, Mississippi. These properties include

mineral interests, real estate, oil and gas leases, oil and gas wells, and timberlands. The value of these properties more than secures the ' debt to .

Although the are not in default, , in breach of its agreements with the and its fiduciary duties and its duties of good faith and fair dealing, has demanded that the immediately pay the Bank \$ in claimed principal and interest. On , , the filed suit in the United States District Court for the District of Mississippi against for various claims including, breach of contract and a declaratory judgement that the indebtedness to is not due (the "Mississippi case"). A copy of the complaint filed by the in the Mississippi case is attached to the Verified Complaint filed herein as Exhibit "B" and incorporated by reference. Subsequently, sued the in the United States District Court for the District of for recovery of the amount claimed to be due (the " case"). A copy of the complaint filed by in the case is attached to the Verified Complaint filed herein as Exhibit "C" and incorporated by reference. The Mississippi case is presently on appeal to the United States Court of Appeals for the Circuit. The case is still active in the district court. Neither the court in the Mississippi case nor the court in the case has ruled as to whether or not is entitled to demand the immediate payment of the amount claimed to be due.

's demand for immediate payment is a breach of the agreements between the and for to provide the with long-term loans, financing, and the necessary forbearance while the , e.g., develop and sell various properties, so as to apply the proceeds received to reduce the ' debt to . is estopped to deny, dispute, renege on or breach its agreements with the and from demanding or receiving the immediate payment of the ' outstanding account, an account which is fully secured by

various deeds of trust, mortgages and security interests and has waived strict enforcement of the default provisions of the written agreements between them.

As a portion of the security for their indebtedness to the _____, the _____ on _____, executed a certain Land Deed of Trust to _____, Trustee, for the benefit of _____, which is recorded in Book _____, Pages _____, Record of Mortgages and Deeds of Trust on Land, _____ County, Mississippi, _____ Judicial District and in Book _____, Pages _____, Record of Mortgages and Deeds of Trust on Land, _____ County, Mississippi. By instrument dated _____, _____, _____, as owner and holder of the said Land Deed of Trust substituted _____, as Substituted Trustee, in place of and in lieu of _____, which instrument is recorded in Substituted Trustee Book _____, Pages _____, on file in the office of the Chancery Clerk of _____ County, Mississippi, _____ Judicial District, and in Substituted Trustee Book _____, Pages _____, on file in the office of the Chancery Clerk of _____ County, Mississippi.

On _____, _____, _____ commenced foreclosure of said Land Deed of Trust by posting a "Substituted Trustee's Notice of Sale" on the main bulletin board at the _____ County Courthouse in _____, Mississippi, and by commencing publication of said "Substituted Trustee's Notice of Sale" in _____. The "Substituted Trustee's Notice of Sale" was published by said newspapers on _____, 20 _____. A copy of the "Substituted Trustee's Notice of Sale" is attached to the Verified Complaint filed herein as Exhibit "A" and incorporated by reference.

II.

ARGUMENT

The _____ Are Entitled to Injunctive Relief to Prevent Irreparable Harm and Maintain the Status Quo Pending a Decision on the Issue of Whether the _____' Indebtedness to _____ Is Immediately Due and Payable

The _____ are entitled to entry of a Temporary Restraining Order and Preliminary Injunction against _____, _____, enjoining and prohibiting said Defendants from advertising and taking any other actions in an attempt to foreclose on the Deed of Trust executed by the _____ on lands located in _____ Counties, Mississippi as security for their indebtedness to _____. Such injunctive relief is necessary to maintain the status quo pending resolution of the question of whether the promissory notes which the deeds of trust secure are due and payable.

As the court noted in *Rochelle v. State*, 75 So.2d 268 (Miss. 1954):

The true object and purpose of an interlocutory injunction is to hold and preserve in status quo the subject matter upon which the decree is to operate until the court is able to finally adjudicate the rights and duties of the parties. Griffith Miss. Chancery Practice (2d ed. 1950), Secs. 442, 443.

Rochelle, 75 So.2 at 270. When granting a temporary restraining order or preliminary injunction, the status quo which courts try to preserve has been almost uniformly defined as the "last uncontested status which preceded the pending controversy." *Miss. Power & Light v. United Gas Pipeline*, 609 F. Supp. 333 (D.C. Miss. 1985). In the present case, the status quo can only be maintained by a preliminary injunction which prohibits any further efforts by the Defendants to foreclose on the _____' properties in _____ Counties, Mississippi.

The issuance of temporary restraining orders and preliminary injunctions are governed by Rule 65 of the Mississippi Rules of Civil Procedure. Under Rule 65, the circumstances in which a preliminary injunction may be granted are not described, but are a matter of the trial court's discretion, to be exercised in conformity with traditional equity practices. See *Moore v. Sanders*, 558 So.2d 1383, 1385 (Miss. 1990). In the present case, equity requires that the Defendants be prohibited from proceeding with foreclosure.

Under Mississippi jurisprudence, irreparable injury is the only finding a court must make before it may issue a TRO or preliminary injunction. If the status quo is not maintained, the _____ will

undoubtedly suffer irreparable harm for which they have no adequate remedy at law. However, in order for a remedy at law to be deemed adequate, the remedy must be as effectual and speedy as the remedy and equity. *Rockett v. Finley*, 184 So. 78, 80 (Miss. 1938). As the court stated in *Moss v. Jourdan*, 92 So. 689 (Miss. 1922):

The term "irreparable" has acquired in the law of injunctions a meaning which, perhaps, is not quite in keeping with the derivation of the word or its literal signification. There are injuries incapable of being repaired which a court of equity does not regard as irreparable. And, on the other hand, there are injuries that may be repaired which it will, nevertheless, treat as irreparable, if the person inflicting or threatening them be insolvent or unable to respond in damages. As ordinarily used, the term means that which cannot be repaired, restored or adequately compensated for in money, or whether compensation cannot be safely measured.

Moss, 92 So. at 690, quoting R.C.L. pp. 346-47. Hence, the essential features of an "irreparable" injury are:

- (1) That the injury is an act which is a serious change of, or is destructive to, the property it affects either physically or in the character in which it has been held and enjoyed. (2) That the property must have some peculiar quality or use such that its pecuniary value, as estimated by a jury, will not fairly recompensate the owner for its loss.

Hood v. Foster, 13 So.2d 652, 654 (Miss. 1943).

However, where the subject matter of the injunctive relief is real property, the courts have recognized that "land is *per se* property of peculiar value, and will be protected by injunction without reference to its quality, use or value." *Id.* It appears that courts have made land a subject for protection by injunction for the same reasons that land is a subject for specific performance without reference to its quality, use or value in cases of contracts. *Moss*, 92 So., at 691, quoting, 5 *Pomeroy's Equity* § 495.

In addition, 's institution of these foreclosure proceedings on the ' properties in Counties, Mississippi is an effort by to obtain prejudgment seizure and attachment

of the _____ property and to otherwise unfairly gain an advantage over the _____ prior to a determination of their rights by the Federal Courts, in violation of the _____ right to due process under Section 14 of the Mississippi Constitution. If the Defendants are not prohibited from foreclosing, the _____ will suffer substantial and irreparable damages and losses as a result of a violation of their state constitutional rights.

The Mississippi courts have long recognized that a preliminary injunction or temporary restraining order is appropriate in situations similar to the case at hand. For example, in *Barcroft v. Armstrong*, 21 So.2d 817 (Miss. 1945), Armstrong brought an action to enjoin foreclosure of his deed of trust in favor of the Allied Trust Company, Ltd. The defendants were P. B. Barcroft, individually and as trustee in the deed of trust, C. F. Williams, an agent of the defendant, Alliance Trust Company, Ltd., who was beneficiary, and two newspapers, *The Natchez Democrat* Printing and Publishing Company, Inc. and *The Woodville Republican*. Armstrong raised a number of claims in its suit, including the allegation that the balance due was less than that claimed by the mortgagee or beneficiary; that the balance was to be computed in the light of an alleged agreement with the mortgagee to reduce the interest rate to six percent (6%); that the attempted foreclosure was premature; that the foreclosure was for an excessive amount; and contemplated foreclosure of lands not properly a part of the security. *Id.*, at 818. Upon the filing of the suit, the court immediately issued a preliminary injunction restraining any advertisement or other proceeding toward foreclosure until a final hearing could be held by the Chancellor to fix the rights between the parties. *Id.*

Like the plaintiff in Barcroft, the _____ are entitled to injunctive relief to prevent and enjoin the Defendants from advertising or taking any other proceedings regarding foreclosure of the property in _____ Counties, Mississippi. Until an adjudication in one of the federal court cases that the _____ indebtedness to _____ is immediately due and payable, _____ is not entitled to

foreclose. Allowing the Defendants to proceed with foreclosure will undeniably result in irreparable harm to the . Equity requires that a TRO and preliminary injunction be issued.

III.

ONLY A MINIMAL SECURITY BOND SHOULD BE REQUIRED FROM THE

Upon the issuance of a temporary restraining order or preliminary injunction in this matter, the should only be required to provide a minimal security bond. While Rule 65(c) under the Mississippi Rules of Civil Procedure provides that security must be given upon the issuance of a temporary restraining order or preliminary injunction, the amount of such security is at the discretion of the Court. *International A.B.S. & O.I. v. H. L. Byrd Building Service, Inc.*, 284 So.2d 301, 304 (Miss. 1973). A Chancellor's decision regarding the amount of security required will not be disturbed on appeal except upon an abuse of discretion. *Broom v. Hattiesburg Building & Trades Council*, 206 So.2d 184 (Miss. 1967).

In the present case, the collateral which the have pledged to as security in its indebtedness, exceeds the amount of their debt to and is therefore oversecured. Moreover, the security is real property which continues to appreciate, rather than depreciate in value. In such a situation, it is clear that a minimal security bond should be required. Any damages which might incur or suffer as a result of a preliminary injunction or temporary restraining order, should it be determined that such injunctive relieve was wrongfully issued, would be insignificant. In this situation, the should only be required to post a minimal security bond.

IV.

CONCLUSION

The Court should enter a Temporary Restraining Order and Preliminary Injunction prohibiting from advertising, proceeding with or taking any other action with regard to and

attempt to foreclose on certain Deeds of Trust executed by _____ on lands located in _____ Counties, Mississippi. Injunctive relief is necessary to maintain the status quo until the issue of whether the promissory notes which the deeds of trust secure are due and payable or whether _____ has agreed to forbear collection of the notes.

The issue of whether the notes are due and payable or whether _____ has agreed to forbear collection of the notes is currently the subject of two legal proceedings between _____ and the _____. Neither court has ruled that _____ is entitled to demand the immediate payment of the amount claimed to be due from the _____ and these foreclosure proceedings are an attempt by _____ to obtain prejudgment seizure and attachment of the _____ ' property and to otherwise unfairly gain an advantage over the _____ prior to a determination of the parties' respective rights in the two federal court cases.

Mississippi courts have long held that land is peculiar in nature and _____ 's foreclosures of the _____ ' property in _____ Counties, Mississippi, will result in immediate and substantial irreparable harm, damages and losses to the _____. Moreover, _____ 's attempt to foreclose on the _____ ' property prior to a determination of liability constitutes an attempt to obtain a prejudgment seizure and attachment in violation of the due process provisions of the Mississippi Constitution. The _____ do not have an adequate remedy at law.

The _____ should be required to post only a minimal security bond upon the issuance of injunction relief. Rule 65(c) of the Mississippi Rules of Civil Procedure provides that while security must be given upon the issuance of a temporary restraining order or preliminary injunction, the amount of such security is at the discretion of the court. In a case such as this, where the creditor is oversecured and where the collateral is real property which is appreciating, rather than depreciating, in value, only a minimal security bond is necessary because as a

practical matter the damages which may be incurred or suffered by should it be found to
have been wrongfully enjoined or restrained would be insignificant.

THIS, the day of , 20 .

Respectfully submitted,

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