

NO. D-1 -GV-08-000050

THE STATE OF TEXAS, § IN THE DISTRICT COURT
Plaintiff,
V. § TRAVIS COUNTY, TEXAS
WEBB COUNTY TITLE
& ABSTRACT COMPANY, INC.,
Defendant. § 201st JUDICIAL DISTRICT

**OBJECTION TO FINDINGS OF SPECIAL MASTER
REGARDING MEMORANDUM RECOMMENDATION (International Bank of
Commerce Motion for Relief from Automatic Stay)
PURSUANT TO TEX. R. CIV. P. 171
AND NOTICE OF HEARING**

TO THE HONORABLE TRAVIS COUNTY DISTRICT JUDGE:

NOW COMES THE INTERNATIONAL BANK OF COMMERCE, ("IBC"), to file this Objection to Findings of Special Master Regarding Memorandum Recommendation (International Bank of Commerce Motion for Relief from Automatic Stay), (the "Special Master Recommendation") Pursuant to Tex. R. Civ. P. 171, and Notice of Hearing, (the "Objection") and would show as follows:

I. INTRODUCTION

1.1 On the 20th day of July 2009, came on for consideration the Motion for Relief from Automatic Stay Pursuant to TEX. INS. CODE § 443.008(f), (the "Motion") filed by IBC on June 9, 2009. Appearing in response to the Motion were Cantilo & Bennett, L.L.P., in its capacity as Special Deputy Receiver, (the "SDR") for Webb County Title & Abstract, ("Webb"), and Mitchell Williams Long Burnett, counsel for Texas Title Insurance Guaranty Association's ("TTIGA"). Following the submission of testimony and evidence, the Special Master directed the parties to serve post-trial briefs, including a summation of facts and

evidence presented at the hearing.

1.2 The Special Master Recommendation in relation to the Motion was rendered on October 15, 2009. A true and correct copy of the Special Master Recommendation is attached hereto and incorporated herein as Exhibit 1.

1.3 IBC is a secured creditor evidenced by a promissory note in the original principal amount of \$1,010,869.64, dated December 6, 2006 and secured by a deed of trust lien on a building in Laredo, Texas, (the "Property"), owned by Webb – which is currently under the control of the SDR and subject to the automatic stay issued within these proceedings.

1.4 A party who timely and formally objects to a master ruling is entitled to a *de novo* hearing before a judge or jury. *Mann v. Mann*, 607 S.W. 2d 243 (Tex. 1980); *AIU Ins. Co. v. Mehaffy*, 942 S.W.2d 796,836 (Tex. App. – Beaumont 1997, *orig. proceeding*); *Martin v. Martin*, 797 S.W. 2d 347,350 (Tex. App. – Texarkana 1990, *no writ*).

1.5 Pursuant to the Order of Reference, entered in this cause on April 10, 2008, any party who objects to the Special Master's Recommendation, shall file an objection within ten (10) days of the submission, and set a hearing before the District Judge, providing a copy of any objection with notice of hearing to the Special Master and all interested parties. (See Order of Reference dated April 10, 2008, p. 7, ¶ d.).

II. OBJECTION

2.1 Pursuant to Tex. R. Civ. P. 171, IBC hereby makes the following objections to the findings and conclusions of the Special Master as set forth within the Special Master Recommendation, and requests a trial *de novo*. In particular, IBC objects to the following findings and conclusions:

i. Special Master Recommendation, Page 2, ¶ 2 – that Tex. Ins. Code § 443.008(h) provides standards for relief from the stay. – Under Texas Ins. Code § 443.008(h)(1), relief from stay may be granted for “cause” as described by Subsection (i). The Special Master found that “IBC does not come within the descriptions of ‘cause’ set forth in Subsection (i).” IBC objects to the Special Master’s findings that IBC does not come within the descriptions of “cause” for the following reasons:

a. The Special Master limited the basis for “cause” to those matters specifically enumerated within Tex. Ins. Code § 443.008(h)(1). The definition of “cause” within Subsection (i) is not restricted to limitations relating to cancelled bonds, rather subsection (i) specifically provides that “underlying **cause includes** . . .”, not “cause is” or “is limited to”. . . Thus the parameters of “cause” are not restricted to specific examples cited within the subsection, but rather include samples, and incorporate unstated factors, any of which may constitute “cause”. The Special Master Recommendation limited “cause” to specific instances set forth within the statute and failed to consider IBC’s evidence establishing “cause”. The Special Master used an overly restrictive interpretation of the statute, which is not confined by those limited parameters. IBC asserts that “cause” exists since IBC’s interest as a secured creditor, possessing a first lien on the Property – a building in Laredo, Texas, which is not being adequately protected. IBC contends that its vested rights as a first lien creditor are not being protected, since:

1. The receivership was created in January 2008. In almost one and one-half years, the Receiver has not attempted to list the Property, market the Property, or otherwise develop a marketing plan to sell the Property – instead, the Property wastes away while the Receiver manipulates monthly rent checks and utilizes the Property without compensation to IBC;
2. The Receiver collects monthly rents of \$4,750, without accounting for or application to IBC. Rather, the Receiver is expending IBC's collateral on a regular basis, allegedly for maintaining the Property and/or paying employee costs;
3. The Receiver has not accounted for the rents and has not sought permission for use of rents that are secured by IBC liens;
4. The Receiver has not paid ad valorem taxes on the Property;
5. The Receiver has not paid the claim of IBC, nor prior to the hearing on the Motion, did the Receiver object to the claim of IBC;
6. IBC's secured claim accrues interest at the rate of \$166.35 per day or approximately \$60,717.75 per annum. From the date of the inception of the receivership through the date of IBC's filing its Motion – June 9, 2009 – the following sums accrued and are owed to IBC, post-receivership:
 - i. Accrued Interest - \$117,610;
 - ii. Late Charges - \$13,875;

- iii. Taxes, penalties, and interest - \$114,714.87;
- iv. Attorneys' fees - \$32,453.

7. The total indebtedness owed to IBC as of June 9, 2009 – the date of filing IBC's Motion - is \$1,276,743, an increase of approximately \$172,000 from the date of the receivership. In addition, the rents being consumed by the Receiver, for which IBC is not receiving an accounting amount to \$4,750 per month, or \$85,500 from the inception of the receivership through the date of filing of IBC's Motion. Thus, the direct financial losses and impact upon IBC from the inception of the receivership amount to approximately \$300,000 in losses and impairing the secured rights of IBC, through the date of filing IBC's Motion in June 2009, all due to the continued exercise of control over the secured collateral by the Receiver. IBC's loss accrual continues to be incurred at the rate of \$166.35 per day in interest alone and thus compounding losses of IBC of approximately \$19,920, just from the date of the IBC Motion until the time of the Special Master's Recommendation.

- ii. IBC objects to those findings within the Special Master Recommendation that "cause" is insufficient for relief from the automatic stay.
 - a. IBC objects to the findings that "cause" does not exist since IBC's rights as a secured creditor, are superior to those rights of the Receiver. It is uncontroverted that IBC has a secured lien against the

building owned by Webb Title. IBC's lien is evidenced by a Deed of Trust. Case law establishes that a receiver destroys no prior vested rights and possesses no authority to determine the rights between parties by reason of existing contracts. *Chase Manhattan Bank & Bank One v. Michael Boles, Receiver*, 52 S.W. 3d 871 (Tex. App. – Waco 2001); *citing First S. Props. v. Vallone*, 533 S.W. 2d 339,343 (Tex. 1976); *Ex parte Britton*, 127 Tex. 85, 92 S.W. 2d 224 (1936); *Huffmeyer v. Mann, Receiver*, 49 S.W. 3d 554 (Tex. App. – Corpus Christi 2001). IBC's lienholder rights constitute a prior claim above all costs and expenses in the administration and operation of the receivership. *Chase Manhattan* at 880. In *Chase Manhattan*, the Court expressly ruled:

“The enforcement of a third party's liens or other rights [is] merely suspended until the enforcement is approved by the court having custody of the property.”

Chase Manhattan at 880, *citing First S. Props.* at 343; *Huffmeyer* at 560.

Thus IBC objects to the Special Master Recommendation that “cause” does not exist since:

1. The rights of the Receiver do not destroy prior vested rights of a lienholder having preexisting deed of trust lien in the property;
Chase Manhattan at 880;
2. The receivership is subject to the vested rights of the lienholder;
Chase Manhattan at 880;

3. Lienholder interest in property held in receivership have priority over costs and expenses incurred in the administration and operation of the receivership; *Chase Manhattan* at 880;
4. Failure to grant relief from the stay, where there is no equity, constitutes an abuse of discretion. *Chase Manhattan* at 880.

iii. IBC Objects to the Special Master Recommendation Regarding Lack of Equity.

IBC objects to the findings and conclusions of the Special Master as set forth on p. 2, ¶ 3, and his analysis of a “lack of equity”. The Special Master compares the fair market value of the building, represented by the appraisal of \$1,260,000, versus the debt of IBC as of the date of the receivership in January 2008 in the amount of \$1,104,597.06 and determined that IBC did not meet its burden of proof. In making his conclusion on “equity”, the Special Master ignored IBC’s superior lien rights, including IBC’s rights to interest, costs, and expenses, and failing to consider additional charges, fees, expenses, and interest of IBC, between the dates of the receivership through the date of filing the IBC Motion, resulted in increased IBC debt to \$1,276,743. The Special Master improperly concluded that “a lack of equity” of only \$17,000 was insufficient. IBC objects since:

- a. The appraiser’s conclusions were based on fair market value – not distressed sale;
- b. The debt of IBC referenced within the Special Master Recommendation, focused upon the date of the receivership in January 2008, not the date of the hearing on IBC’s Motion in July 2009. In January 2008, when the

January 2008, when the receivership was created, IBC debt was \$1,104,597.06, as of June 9, 2009 – the date of the IBC Motion – the IBC debt was \$1,276,743. One month later, when the matter was heard, the debt increased by an additional \$5,156.85 – not including fees. By the time the Special Master Recommendation was entered, approximately three months later, IBC debt increased by another \$15,470.55 – now approximating \$1,292,218.53. Thus the “lack of equity” has now grown to \$32,218.55 – using interest calculations alone – and assuming a fair market value – not a distressed price sale;

- c. The Special Master failed to consider carrying costs, marketing costs, and closing costs, which would reduce the net sales proceeds by approximately six to eight percent (6% - 8%) or between \$75,000 and \$100,000 – thereby increasing the “lack of equity” by another \$75,000 - \$100,000;
 - d. The Special Master failed to consider accrual of taxes and/or additional costs associated with any attempt to market and sell the Property within which additional fees, interest, and expenses of IBC would accrue.
 - e. The Special Master failed to consider the fact that in all likelihood, the Property would not sell in the usual and customary manner, rather it would sell as a distressed property, thereby further increasing the “lack of equity” by hundreds of thousands of dollars.
- iv. IBC objects to the findings of the Special Master contained within Special Master Recommendation p. 3, ¶ 4 – Special Status of IBC as a Secured

Creditor. While the Special Master noted:

- a. IBC is a secured creditor with substantial rights in the building, which has sat for almost two years with no meaningful action taken by the estate;
- b. IBC is being denied access to its collateral without cause and without compensation, resulting in a direct financial hardship on IBC for lost rents, lost interest, and loss of a return of capital that would be available following the exercise of IBC's rights under the Deed of Trust;
- c. IBC's claim has not been acted upon by the Receiver;
- d. The Property is only fifty percent (50%) occupied, and the Receiver is utilizing rents subject to IBC's claim.

The Special Master did not consider such factors to constitute sufficient "cause" for relief from the automatic stay. IBC objects pointing out that the Special Master Recommendation is not supported by the evidence, rather the evidence and law recognize IBC's lien rights as superior, prior, and vested rights, which have priority over the interests of the Receiver – justifying relief from the stay.

- v. IBC further objects to the Special Master Recommendation, Re-setting a Hearing on the Motion for January 25, 2010. IBC objects to the extent that the re-set hearing – more than 90 days later – will result in additional, increased, and irreparable harm to IBC, caused by the continued accrual of interest, fees, taxes, and expenses for which there is no source or compensation – and property deterioration.

PRAYER

WHEREFORE, PREMISES CONSIDERED, IBC respectfully submits these objections, request that the Court grant the objections of IBC and make further findings and conclusions, providing for relief from the automatic stay and providing unto IBC such other relief at law and in equity to which IBC may be justly entitled.

Respectfully submitted,

MARTIN & DROUGHT, P.C.
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/s/Michael G. Colvard

By: _____

MICHAEL G. COLVARD
State Bar No. 04629200

**ATTORNEYS FOR THE
INTERNATIONAL BANK OF COMMERCE**

NOTICE OF HEARING

Please take notice that a hearing has been set on this Objection for the 12th day of November 2009 at 2:00 p.m. before the Travis County District Court, at Travis County Courthouse, 1000 Guadalupe, Austin, TX 78701.

/s/Michael G. Colvard
MICHAEL G. COLVARD

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was forwarded via E-Mail, where an email address is indicated and via United States Mail, First Class, postage prepaid to the parties on the attached Service List on October 22, 2009.

/s/Michael G. Colvard
MICHAEL G. COLVARD