United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Franklin Arms Court, Incorporated

Bankruptcy No. 02 B 48106

Adversary Caption: Ft. Myers Historic, L.P. v. Franklin Arms Court, Incorporated

Adversary No. 03 A 00146

Date of Issuance: March 20, 2003

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: Donald A. Tarkington, Esq., Steven J. Ciszewski, Esq., Novack and Macey, 303 West Madison Street, Suite 1500, Chicago, IL 60606

Attorney for Defendant: Bruce E. de'Medici, Esq, Christopher Beck, Esq., Law Offices of Bruce E. de'Medici, 1011 Lake Street, Suite 205, Oak Park, IL 60301

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
FRANKLIN ARMS COURT, INCORPORATED,	)	Chapter 11
	)	Bankruptcy No. 02 B 48106
Debtor.	)	Judge John H. Squires
	)	
	)	
FT. MYERS HISTORIC, L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 03 A 00146
	)	
FRANKLIN ARMS COURT, INCORPORATED,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of Ft. Myers Historic, L.P. ("Ft. Myers") for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056 on the complaint filed by Ft. Myers against Franklin Arms Court, Inc. (the "Debtor") for a declaratory judgment and for a permanent injunction. For the reasons set forth herein, the Court grants the motion.

The Court declares that the Debtor has no economic, equitable or other interest in certain real property located in Ft. Myers, Florida (the "Property'), and Ft. Myers is the true owner of the Property in addition to the rights it possesses as beneficiary under the nominee agreement. Further, the Court declares that all of the beneficial and equitable interests in and to

the Property are not part of the Debtor's bankruptcy estate. Morever, the Court enjoins the Debtor from continuing to assert an interest in the Property and orders the Debtor and/or its principals to take all action necessary to execute documents necessary to convey legal title to the Property to Ft. Myers. In addition, the Court grants Ft. Myers its taxable costs allowable under 28 U.S.C. § 1920 upon filing a bill therefor pursuant to Local Bankruptcy Rule 417(A) within thirty days of the entry of the judgment concurrently entered herewith.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

II. APPLICABLE STANDARDS

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

In 1986, the United States Supreme Court decided a trilogy of cases which encourages the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if

there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327, 331 (7th Cir. 1990). The Seventh Circuit has noted that trial courts must remain sensitive to fact issues where they are actually demonstrated to warrant denial of summary judgment. Opp v. Wheaton, 231 F.3d 1060 (7th Cir. 2000); Szymanski v. Rite-way, 231 F.3d 360 (7th Cir. 2000).

The party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for its motion, identifying those portions of the "pleadings, depositions, answers to interrogatories, and affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Once the motion is supported by a prima facie showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion may not rest upon the mere allegations or denials in its pleadings, rather its response must show that there is a genuine issue for trial. Anderson, 477 U.S. at 248; Celotex, 477 U.S. at 323; Matsushita, 475 U.S. at 587; Patrick v. Jasper County, 901 F.2d 561, 564-566 (7th Cir. 1990). The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If the burden of persuasion at trial would be on the non-moving party, the party moving for summary judgment may satisfy Rule 56's burden of production by either submitting affirmative evidence that negates an essential element of the non-moving party's claim, or by demonstrating that the non-moving party's evidence is insufficient to establish an essential

element of the non-moving party's claim. See Union Nat'l Bank of Marseilles v. Leigh (In re Leigh), 165 B.R. 203, 212-13 (Bankr. N.D. Ill. 1993) (citation omitted).

Summary judgment is appropriate in cases involving the interpretation of contractual documents. Stenograph Corp. v. Fulkerson, 972 F.2d 726, 728 (7th Cir. 1992); Ryan v. Chromalloy Am. Corp., 877 F.2d 598, 602 (7th Cir. 1989). "[S]ummary judgment should be entered only if the pertinent provisions of the contractual documents are unambiguous; it is the lack of ambiguity within the express terms of the contract that forecloses any genuine issues of material fact." Ryan, 877 F.2d at 602 (citation omitted). Construing the language of a contract is a question of law appropriate for summary judgment, unless the contract is ambiguous. Reaver v. Rubloff-Sterling, L.P., 303 Ill. App.3d 578, 581, 708 N.E.2d 559, 561 (3rd Dist.), appeal denied, 184 Ill.2d 573, 714 N.E.2d 533 (1999); Ford v. Dovenmuehle Mortgage, Inc., 273 Ill. App.3d 240, 244, 651 N.E.2d 751, 754 (1st Dist. 1995) (citations omitted).

Local Bankruptcy Rule 402.M of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Illinois, which deals with summary judgment motions, was modeled after LR56.1 of the Local Rules of the United States District Court for the Northern District of Illinois. Hence, the case law construing LR56.1 and its predecessor Local Rule 12(M) applies to Local Bankruptcy Rule 402.M.

Pursuant to Local Bankruptcy Rule 402, a motion for summary judgment imposes special procedural burdens on the parties. Specifically, Rule 402.M requires the moving party to supplement its motion and supporting memorandum with a statement of undisputed material facts ("402.M statement"). The 402.M statement "shall consist of short numbered paragraphs,

including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Id.

Ft. Myers filed a 402.M statement that substantially complies with the requirements of Rule 402.M. It contains numbered paragraphs setting out uncontested facts with specific references to an affidavit and parts of the record. Ft. Myers submitted an affidavit in support of the instant motion from Val Muraoka, the individual responsible for the oversight of the Property on behalf of National Corporate Tax Credit, Inc. VIII and National Corporate Tax Credit, Inc. IX, operating partner of Ft. Myers.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr. R. 402.N(3)(a). Most importantly, "[a]ll material facts set forth in the [402.M] statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party." Local Bankr. R. 402.N(3)(b). The Debtor has complied with this Rule, but has not filed a counter affidavit to rebut or dispute any of the facts contained in the Muraoka affidavit submitted by Ft. Myers. Rather, the Debtor merely argues and concludes, without any supporting evidence, that the nominee agreement and the

subsequent notice of termination merely created an ongoing debtor-creditor relationship and that same created only a "financing relationship" between the parties.

The Debtor filed a statement of additional material facts as well as exhibits thereto. The Debtor states that the creation of Ft. Myers was intended by the parties to be a financing arrangement whereby certain entities would obtain the benefit of utilizing tax credits from the Property. Further, the Debtor states that as of December 1, 1999, the value of the "leased fee interest" in the Property was $5,050,000.00. See Exhibit A to Debtor's Statement of Additional Facts. The Debtor also contends that the amount of Florida Community Bank's secured claim in the Property is approximately $2,876,911.72. See Exhibit C to the Debtor's Statement of Additional Facts. Additionally, the Debtor argues that pursuant to certain terms of a partnership agreement between, inter alia, the Debtor and Ft. Myers, the Debtor was entitled to retain full possession and control over the Property. See Exhibit D to the Debtor's Statement of Additional Facts.

III. FACTS AND BACKGROUND

Based upon Ft. Myers' 402.M statement and the 402.N statement of the Debtor, the Court finds the following facts are undisputed. Ft. Myers is a limited partnership organized under the laws of Illinois, with its principal place of business in Florida. See Affidavit of Val Muraoka at ¶ 3. The operating general partner of Ft. Myers is National Corporate Tax Credit, Inc. VIII and National Corporate Tax Credit, IX (collectively "NCTC"). Id. at ¶s 2 and 4. Both corporations are organized under the laws of California, with their principal place of

business in California. Id. at ¶ 4. The limited partner of Ft. Myers is National Corporate Tax Credit Fund VIII and National Corporate Tax Credit Fund IX (collectively "NCTC Fund"). Id. at ¶ 5. The Debtor is a corporation organized under the laws of Florida, with its principal place of business in Illinois. Id. at ¶ 6.

Pursuant to a nominee agreement dated April 7, 1995 ("Nominee Agreement"), the Debtor holds title to the Property solely as nominee and agent for and on behalf of the beneficiary of the Nominee Agreement. See Exhibit B to the Complaint at p.2 and Tab 1 attached to Muraoka's Affidavit at p. 2. The beneficiary under the Nominee Agreement is "entitled to all of the earnings, avails and proceeds of the Property," and has full management responsibility and control of the sale, rental and exploration of the Property. Id. at pp. 2-3. By amendment to the Nominee Agreement dated July 3, 2000, Ft. Myers was named the beneficiary under the Nominee Agreement (the "Memorandum"). See Exhibit C to the Complaint and Tab 2 attached to Muraoka's Affidavit.

Further, the Debtor reaffirmed its obligations under the Nominee Agreement in the Memorandum which states in relevant part:

> This Memorandum of Nominee Agreement is executed by [the Debtor], . . . acknowledging that it holds legal title to the property legally described in Exhibit A, attached hereto and made a part hereof solely as nominee and agent on behalf of [Ft. Myers], . . . as beneficiary under that certain Nominee Agreement dated as of April 7, 1995.

Id.

Pursuant to paragraph 3 of the Nominee Agreement, Ft. Myers, as beneficiary, may

terminate the Nominee Agreement and require the Debtor, the nominee, to convey title to the Property to Ft. Myers at anytime for any or no reason. See Exhibit B to the Complaint at p. 1 and Tab 1 attached to Muraoka's Affidavit a p. 1. Paragraph 3 of the Nominee Agreement states, in pertinent part:

> The Beneficiary may terminate this Agreement at any time.... In the event of such resignation or termination, the Nominee shall convey legal title to the Property to the Beneficiary or to another party pursuant to the Beneficiary's written directions.

Id.

Pursuant to paragraph 4 of the Nominee Agreement, which sets forth the duties of the nominee, the Debtor is required to execute all documents necessary to convey the Property upon the direction of Ft. Myers. Paragraph 4 states, in pertinent part:

> The Nominee shall hold legal title to the Property solely as nominee and agent on behalf of the Beneficiary. . . . Upon direction from the Beneficiary, the Nominee will execute all documents necessary to convey or encumber the Property and will execute all such notes, . . . deeds . . . or other documents related to the Property as requested by the Beneficiary.

Id.

Pursuant to Paragraphs 3 and 4 of the Nominee Agreement and the Memorandum, Ft. Myers, through its operating general partner, NCTC, notified the Debtor by letter dated November 12, 2002 that it was terminating the Nominee Agreement (the "Notice"). See Exhibit D to the Complaint and Tab 3 attached to Muraoka's Affidavit. Pursuant to the Notice, Ft.

Myers directed the Debtor to convey title to the Property to Ft. Myers. Id. The Debtor, however, despite the above requirements in the Nominee Agreement, failed to execute the warranty deed conveying title of the Property to Ft. Myers. See Affidavit of Muraoka at ¶ 10.

On June 28, 2002, Florida Community Bank (the "Bank"), as the mortgage holder on the construction loan for the development of the Property, filed a foreclosure action against the Debtor and Ft. Myers, in the Circuit Court of Lee County, Florida. See Tab 4 attached to Muraoka's Affidavit. On June 28, 2002, the Bank, formerly known as Hendry County Bank, as the mortgage holder on another construction loan for the Property, filed a foreclosure action against Ft. Myers, in the Circuit Court of Lee County, Florida. Id. The Debtor's refusal to convey title to the Property to Ft. Myers as directed by the Notice has interfered with Ft. Myers' ability to refinance the Property and terminate the foreclosure actions commenced in the Florida court that remain pending against the Property. See Muraoka Affidavit at ¶ 12.

On December 6, 2002, the Debtor filed a Chapter 11 bankruptcy petition. Thereafter, on January 21, 2003, Ft. Myers filed the instant complaint against the Debtor. Pursuant to Count I of the complaint, Ft. Myers seeks a declaratory judgment declaring that the Debtor is required to immediately convey title to the Property to Ft. Myers, and declaring that the Debtor has no economic or other interest in the Property and that the Property does not belong to the Debtor's estate. Ft. Myers also seeks the award of its court costs. Under Count II of the complaint, Ft. Myers asks the Court to grant a preliminary and permanent injunction against the Debtor requiring it to perform its obligations under the Nominee Agreement and execute a warranty deed transferring title of the Property to Ft. Myers. Ft. Myers also seeks the award of

its court costs.

The Debtor admits execution of the Nominee Agreement, but asserts that the document memorialized a "funding" to the Debtor. The Debtor denies it is a mere titleholder to the Property, and that Ft. Myers is entitled to exercise any rights as beneficiary under the Nominee Agreement. In addition, the Debtor denies that its rights to the Property were effectively terminated pre-petition.

IV. DISCUSSION

A. Count I–Declaratory Judgment

Pursuant to Count I of the complaint, Ft. Myers seeks a declaratory judgment declaring that the Debtor is required to immediately convey title to the Property to Ft. Myers, that the Debtor has no economic or other interest in the Property, and that the Property does not belong to the Debtor's estate. The Debtor argues that the Nominee Agreement had no legal effect relative to the rights of the parties in the Property other than to memorialize a transaction by which the Debtor received financing from NCTC in exchange for the utilization of certain tax credits.

Federal courts are empowered to give declaratory judgments by the Declaratory Judgment Act. See 28 U.S.C. § 2201. The Declaratory Judgment Act provides in pertinent part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration,

whether or not further relief is or could be sought.

28 U.S.C. § 2201. The Act does not enlarge the jurisdiction of federal courts nor does it expand substantive rights. Deveraux v. City of Chicago, 14 F.3d 328, 330 (7th Cir. 1994). A court's subject matter jurisdiction must be independent of the declaratory judgment action, and such actions are discretionary even where a court has jurisdiction. Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494 (1942). In order to support a declaratory judgment action, there must be a substantial controversy that is real and immediate between parties with adverse legal interests. Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). There is no precise definition of "case or controversy." Id. However, a court cannot enter a declaratory judgment unless its ruling will provide specific relief that binds the parties or alters the legal relationship between them. Deveraux, 14 F.3d at 331 (citation omitted).

The Court finds that there is an actual case or controversy between Ft. Myers and the Debtor in light of their competing claims to the Property. Hence, the Court, pursuant to 28 U.S.C. § 151, as a unit of the district court, which is a court of the United States, has the authority under § 2201 to issue a declaratory judgment.

Initially, the Court notes that the Nominee Agreement provides that it shall be governed by and construed in accordance with Illinois law. See Exhibit B to the Complaint at ¶ 10 and Tab 1 attached to Muraoka's Affidavit at ¶ 10. Hence, as set forth in the Nominee Agreement, the Court will apply Illinois law to the matter at bar. Contract interpretation, including the question of whether a contract is ambiguous, involves conclusions of law. Bourke v. Dun & Bradstreet Corp., 159 F.3d 1032, 1036 (7th Cir. 1998). Illinois law utilizes a "four corners"

approach in the interpretation of contracts, holding that if the language of a contract appears to admit only one interpretation, the case is over. See AM Int'l Inc. v. Graphic Mgmt. Assocs., Inc., 44 F.3d 572, 576 (7th Cir. 1995) (citing Illinois law). Contracts "'must be construed to give effect to the intention of the parties which, when there is no ambiguity in the terms of the [contract], must be determined from the language of the [contract] alone.'" Bourke, 159 F.3d at 1036 (citing Flora Bank & Trust v. Czyzewski, 222 Ill. App.3d 382, 388, 583 N.E.2d 720, 725 (5th Dist. 1991)). See also In re McCoy, 260 B.R. 863, 868 (Bankr. N.D. Ill. 2001) (court must interpret a contract in accordance with the intentions of the parties). As the Illinois Supreme Court recently stated, "[t]he terms of an agreement, if not ambiguous, should generally be enforced as they appear, . . . and those terms will control the rights of the parties. . . . Moreover, any ambiguity in the terms of a contract must be resolved against the drafter of the disputed provision." Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 479, 693 N.E.2d 358, 368 (1998) (internal citations omitted).

The threshold inquiry under the Illinois "four corners" rule, is whether the contract is ambiguous. The Nominee Agreement explicitly sets forth the rights and duties of the Debtor with respect to the Property. The clear and unambiguous terms of the Nominee Agreement state that the Debtor holds legal title only to the Property and that it holds that title solely as agent for Ft. Myers. In short, the Court does not find any ambiguity in the Nominee Agreement with respect to the Debtor's rights and duties and that it holds legal title only to the Property as agent for Ft. Myers. Hence, "[w]here the contractual provisions are unambiguous, the court will enforce them according to their plain meaning." Lavelle v. Dominick's Finer Foods, Inc., 227

Ill. App.3d 764, 768, 592 N.E.2d 287, 289 (1st Dist. 1992).

Further, pursuant to 11 U.S.C. § 541 of the Bankruptcy Code, property of the bankruptcy estate does not include "any power that the debtor may exercise solely for the benefit of an entity other than the debtor. . . ." See 11 U.S.C. § 541(b)(1). Based upon § 541(b)(1), the Debtor's limited interest in the Property as a mere title-holding nominee falls squarely within this provision and all equitable ownership therein is excluded from its bankruptcy estate. Pursuant to the Nominee Agreement, the only power the Debtor is granted thereunder is to hold legal title to the Property for the beneficiary. The Debtor can take no further action in any respect, unless it is instructed to do so by the beneficiary. Accordingly, the Debtor's nominal legal interest in the Property is all the Debtor had in the Property, and the equitable interests therein held by Ft. Myers under the Nominee Agreement are excluded from the bankruptcy estate.

Moreover, the Court finds that the Debtor has no economic or equitable interest in the Property or right or title to any of the earnings, avails or proceeds of the Property. Ft. Myers, as sole beneficiary, has the absolute right to terminate the Nominee Agreement and direct the nominee to covey title to the Property to Ft. Myers. Ft. Myers terminated the Nominee Agreement pre-petition on November 12, 2002, pursuant to the Notice and directed the Debtor to convey title to the Proeprty to Ft. Myers. The Debtor has failed to comply with this direction.

The Debtor argues, without furnishing the Court any relevant evidence, that the consideration furnished by Ft. Myers was less than the value of the Property and that there was an agreement to "reconvey" the Property to the Debtor after Ft. Myers had "utilized the tax credit." The only documents furnished by the Debtor were portions of a December 16, 1999 letter appraisal of the Property; a copy of the Debtor's Schedule A filed in the bankruptcy case, which summarily values the Property at $4,400,000.00, subject to a secured claim of over $2.8 million; and portions of a limited partnership agreement dated December 30, 1999 for the Ft. Myers limited partnership by and among James Economou and Associates, Ltd. and the Debtor as operating general partner, NCTC as the administrative general partner and NCTC Fund as limited partner in Ft. Myers. The Debtor argues that it need not transfer legal title to the Property to Ft. Myers because the "creation of Ft. Myers was merely a financing arrangement," and Ft. Myers is "only entitled to those rights of an equitable mortgage." Unfortunately, the Debtor's arguments are not supported by any documentary evidence. The Debtor provides no evidence to demonstrate that a loan was made or that the parties intended to create a debtor-creditor relationship or use the Property as security in a debt transaction. Additionally, the Debtor fails to submit any evidence to show that the Nominee Agreement is a part of a financing transaction that should be deemed a mortgage. Further, the Debtor has not come forward with a counter-affidavit to rebut the statements made by Muraoka in his uncontested affidavit. The Court finds that the record is wholly devoid of any facts to demonstrate that the parties intended anything other than what was expressly provided in the Nominee Agreement.

Consequently, the Court grants declaratory judgment in favor of Ft. Myers and against

the Debtor. The Court declares that the Debtor has no equitable, economic or other interest in the Property and that Ft. Myers is the true owner of the Property, in addition to the rights is possesses as beneficiary under the Nominee Agreement. Further, the Court declares that all of the beneficial and equitable interests in and to the Property are not part of the Debtor's bankruptcy estate.

B. Count II–Injunctive Relief

Pursuant to Count II of the complaint, Ft. Myers seeks a preliminary and permanent injunction against the Debtor requiring it to perform its obligations under the Nominee Agreement and execute a warranty deed transferring title of the Property to Ft. Myers. Ft. Myers also seeks the award of its court costs.

A party seeking a preliminary injunction is required to demonstrate a likelihood of success on the merits, that it has no adequate remedy at law, and that it will suffer irreparable harm if the relief is not granted. Prometek Indus., Ltd. v. Equitrac Corp., 300 F.3d 808, 811 (7th Cir. 2002) (citations omitted); Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 895 (7th Cir. 2001). If the moving party can satisfy these conditions, the Court must then consider any irreparable harm an injunction would cause the nonmoving party. Prometek, 300 F.3d at 811 (citation omitted). Finally, the Court must consider any consequences to the public from denying or granting the injunction. Id. (citation omitted). The Court, sitting as a court of equity, then weighs all these factors employing a sliding-scale approach. Id. (citation omitted). The more likely the plaintiff's chance of success on the merits, the less the balance of harms need weigh in its favor. Id. (citation omitted).

The Court finds that Ft. Myers has established all factors necessary for the entry of a permanent injunction in its favor. First, Ft. Myers has the absolute right to terminate the Nominee Agreement and direct a conveyance of the Property at any time with or without reason. Ft. Myers exercised this right in the November 12, 2002 Notice. The Debtor, however, has not conveyed the Property to Ft. Myers as directed by the Notice.

Second, there is no adequate remedy at law if Ft. Myers is prevented from ownership of the Property. If the Debtor is not enjoined from asserting an ownership interest in the Property, and Ft. Myers loses the Property in the state foreclosure proceedings, there would be no adequate remedy at law because the Property is unique. A piece of property is considered unique, and its loss is always an irreparable injury. United Church of the Med. Ctr. v. Medical Ctr. Comm'n, 689 F.2d 693, 701 (7th Cir. 1982). Moreover, there are currently two pending foreclosure actions against the Property and the Bank has filed a motion to modify the stay with respect to the Property in the bankruptcy case. The Court has entered an interim order in the Bank's favor and the final hearing is set for April 17, 2003. Ft. Myers asserts that the Debtor's allegedly improper claims of ownership and its failure to convey the Property to Ft. Myers are impeding Ft. Myers' efforts to refinance the Property and pay the balance owed the Bank. Further, Ft. Myers asserts that if the Property cannot be refinanced, it will be lost in the foreclosure proceedings.

Third, the Court finds that the balance of harms clearly favors entry of injunctive relief. The Debtor is the bare legal titleholder only. It has no equitable or economic interest in the Property and has no right to any earnings, proceeds or avails from the Property as does Ft.

Myers. Thus, the Court finds that the Debtor will suffer no real harm.

Finally, the Court finds that there will be no harm to the public interest if the injunctive relief is granted. Rather, the granting of the injunctive relief will merely enforce compliance with the voluntary and agreed terms of the Nominee Agreement between Ft. Myers and the Debtor.

Accordingly, the Court enjoins the Debtor from continuing to assert any interest in the Property and orders the Debtor and/or its principals to take all action necessary to execute documents necessary to convey legal title to the Property to Ft. Myers.

C. <u>The Award of Court Costs</u>

Ft. Myers seeks the award of its court costs. Pursuant to Federal Rule of Bankruptcy Procedure 7054(b), "[t]he court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provide." Fed. R. Bankr. P. 7054(b). The Court knows of no statute or Bankruptcy Rule that would not provide for the allowance of costs to Ft. Myers. The Court may award a prevailing party taxable costs pursuant to 28 U.S.C. § 1920, which provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts,

> compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920.

The Court has broad discretion to determine whether and to what extent to award costs to prevailing parties. See Barber v. Ruth, 7 F.3d 636, 644 (7th Cir. 1993). There is a strong presumption favoring the award of costs to the prevailing party. Weeks v. Samsung Heavy Indus. Co., Ltd., 126 F.3d 926, 945 (7th Cir. 1997). Allowable costs, however, are limited to the categories in § 1920 and expenses that are not authorized by statute must be borne by the party incurring them. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-45 (1987). The losing party must satisfy a heavy burden when asserting that he should be excused from paying costs and affirmatively establish that the costs either fall outside the parameters of § 1920, were not reasonably necessary to the litigator, or that the losing party is unable to pay. See Muslin v. Frelinghuysen Livestock Managers, Inc., 777 F.2d 1230, 1236 (7th Cir. 1985).

The Court grants Ft. Myers its taxable costs allowable under 28 U.S.C. § 1920 upon filing a bill therefor pursuant to Local Bankruptcy Rule 417(A) within thirty days of the entry of the judgment.

V. CONCLUSION

For the foregoing reasons, the Court grants Ft. Myers' motion for summary judgment.

The Court declares that the Debtor has no economic, equitable or other interest in the Property and Ft. Myers is the true owner of the Property in addition to the rights it possesses as beneficiary under the Nominee Agreement. Further, the Court declares that all of the beneficial and equitable interests in and to the Property are not part of the Debtor's bankruptcy estate. Morever, the Court enjoins the Debtor from continuing to assert an interest in the Property and orders the Debtor and/or its principals to take all action necessary to execute documents necessary to convey legal title to the Property to Ft. Myers. In addition, the Court grants Ft. Myers its taxable costs allowable under 28 U.S.C. § 1920 upon filing a bill therefor pursuant to Local Bankruptcy Rule 417(A) within thirty days of the entry of the judgment concurrently entered herewith.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
FRANKLIN ARMS COURT, INCORPORATED,	)	Chapter 11
	)	Bankruptcy No. 02 B 48106
Debtor.	)	Judge John H. Squires
	)	
FT. MYERS HISTORIC, L.P.,	)	
Plaintiff,	)	
v.	)	Adversary No. 03 A 00146
FRANKLIN ARMS COURT, INCORPORATED,	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion the 20th day of March, 2003, the Court grants the motion of Ft. Myers Historic, L.P. for summary judgment. The Court declares that the Debtor, Franklin Arms Court, Inc. has no economic, equitable or other interest in certain real property located in Ft. Myers, Florida, and Ft. Myers Historic, L.P. is the true owner of the property in addition to the rights it possesses as beneficiary under the nominee agreement. Further, the Court declares that all of the beneficial and equitable interests in and to the property are not part of the Debtor's bankruptcy estate. Morever, the Court enjoins the Debtor from continuing

to assert an interest in the property and orders the Debtor and/or its principals to take all action necessary to execute documents necessary to convey legal title to the property to Ft. Myers Historic, L.P.. In addition, the Court grants Ft. Myers Historic, L.P. its taxable costs allowable under 28 U.S.C. § 1920 upon filing a bill therefor pursuant to Local Bankruptcy Rule 417(A) within thirty days of the entry of the judgment.

ENTERED:

DATE:_____ **_____**

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List