

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

IN RE:

**ELOISE GOODWIN,
Debtor.**

**Case No. 99-25902whb
Chapter 13**

**ELOISE GOODWIN,
Plaintiff,**

v.

Adv. Proc. No. 99-0668

**INSOUTH BANK,
NATIONAL ENTERPRISES, INC., and
RHODE ISLAND ACQUISITIONS NO. 1, LLC,
Defendants.**

MEMORANDUM OPINION DENYING COMPLAINT

Appearances by:

**Gene E. Bell, attorney for Debtor/Plaintiff
2600 Poplar Avenue, Suite 210, Memphis, TN 38112**

**John B. Philip, attorney for InSouth Bank
147 Jefferson Avenue, Suite 300, Memphis, TN 38103**

**Elizabeth T. Collins, attorney for Rhode Island Acquisitions No. 1, LLC
40 S. Main Street, 2900 One Commerce Square, Memphis, TN 38103**

The amended complaint of the Debtor/Plaintiff, Eloise Goodwin, was tried on May 23, 2000, after which the Court took it under advisement. Having now fully considered the evidence, the Court enters this Memorandum Opinion, containing its findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052. This is a core proceeding, pursuant to 28 U.S.C. § 157(b)(2)(A) and (G), as the issue concerns the effect of the automatic stay in this case. The parties also consent that this is a core proceeding.

Although a responsive pleading was not filed by the defendant National Enterprises, Inc., there

is no evidence that this defendant was served with the amended complaint. The other defendants appeared through counsel and participated in the trial, at which no evidence was offered concerning National Enterprises.

The issue in this proceeding is whether the § 362(a) automatic stay that was triggered by the debtor's May 18, 1999 filing of this chapter 13 case was violated by the defendant InSouth Bank's July 9, 1999 foreclosure of certain real estate located in DeSoto County, Mississippi. Although there was no order in this chapter 13 case granting relief from the stay to permit the foreclosure sale, the Court finds sufficient proof of the debtor's waiver of the stay. Moreover, the evidence established that cause exists for the Court to annul the stay pursuant to 11 U.S.C. § 362(d).

This debtor's chapter 13 case is related to a chapter 11 case pending before this Court, Wincor, Inc., number 98-36906whb. Wincor's chapter 11 was filed on December 7, 1998. Eloise Goodwin is the spouse of Eugene Goodwin, who has been the President of Wincor, Inc. throughout its existence. Eloise Goodwin has been its secretary for the same period; thus, they are clearly insiders of Wincor, pursuant to 11 U.S.C. § 101(31)(B). This fact is significant in view of the record ownership of the Mississippi property at issue in this proceeding.

Wincor acquired this property, consisting of approximately three acres on Stateline Road, Desoto County, Mississippi, and the property was titled in Wincor's name. Wincor then borrowed money from InSouth Bank, which loan was secured by a deed of trust on this property and an additional twenty acres. At some point in time in 1991, Eloise Goodwin borrowed \$350,000 on her home in Memphis, Tennessee, and loaned that money to Wincor, at which time she took no security or deed of trust for the loan. Years later, she was advised by her attorneys that, due to Wincor's financial and legal difficulties, she should protect her loan; thus, on April 7, 1998, a promissory note for \$250,000 (Exhibit 6) and a deed of trust securing that amount were executed by Wincor, the deed of trust naming Dudley B. Bridgforth as trustee and Eloise P. Goodwin as beneficiary (Exhibit 5). The deed of trust was recorded on May 14, 1998. On October 16, 1998, Mr. Bridgforth, at Eloise Goodwin's direction, conducted a foreclosure sale on the three acres, and a trustee's deed to Mrs. Goodwin as purchaser (Exhibit 7) was executed on October 19, 1998; however, the Desoto County clerk improperly indexed the trustee's deed.

As a result of this indexing error, when InSouth conducted a title search in preparation for its foreclosure of the same property the trustee's deed to Mrs. Goodwin was not discovered. It must be

noted that there is no dispute that InSouth held a valid first mortgage on the property, with Mrs. Goodwin holding a recorded second mortgage. Although her trustee's deed does not state that she held the title subject to InSouth's lien, there is no issue about the validity or priority of InSouth's mortgage. Rather, Mrs. Goodwin takes the position that InSouth's first mortgage foreclosure sale was in violation of the automatic stay in her chapter 13 case and that the result should be a setting aside of the sale and reinstatement of the mortgage. She was unable, however, to offer any proof of how she would satisfy InSouth's delinquent mortgage debt, thus making her request for relief a futile effort.

Mrs. Goodwin's argument that the violation of the automatic stay compels the setting aside of InSouth's foreclosure is defeated by the following facts and inferences established by the evidence:

1. Her chapter 13 bankruptcy schedules did not list InSouth as a creditor, nor did they schedule any interest in this three acre tract.

2. She filed her chapter 13 solely to save her home from foreclosure, and the secured creditors being treated in her confirmed plan are the home mortgage lenders. The confirmed plan does not mention InSouth, which has no interest in her home, and she has not offered any amendment to the plan nor any proof in this trial to demonstrate ability to pay InSouth anything.

3. One of her children, a son, is making all of her plan payments of \$3,000 per month, not including the second mortgage on her home that was recently added to her plan, and she testified that she currently owed that son \$100,000 for these payments. The son was not present to testify as to his ability to pay InSouth.

4. In contrast to the failure to schedule InSouth or this property in the chapter 13, Wincor's chapter 11 scheduled both, and Mrs. Goodwin attended the meeting of creditors in Wincor's case, along with her husband. InSouth filed its motion for relief from the automatic stay in Wincor's case, precipitating prolonged negotiations with Mr. Goodwin about Wincor's efforts to sell the three acre tract and the other tract secured to InSouth. Mrs. Goodwin testified that she knew, at the time of Wincor's bankruptcy filing, that Wincor owed InSouth on a mortgage on some Mississippi property. Both Mr. Goodwin and his son negotiated for the sale of the three acre tract. Mrs. Goodwin continued to be an officer and shareholder in Wincor during this process, and Mr. Goodwin testified that his wife was very knowledgeable about officers' corporate duties. Mr. Goodwin went with his wife to her attorney's office when she filed for chapter 13, just as Mrs. Goodwin went with her husband to Wincor's attorney's office, yet neither apparently mentioned her ownership of the three acre tract to the

respective attorney.

5. Mrs. Goodwin's only testimony about repaying InSouth was that if she had the opportunity to sell the three acre tract, she would hope to make enough to pay InSouth as well as pay down the debt on her home. This falls short of proof on how InSouth would be adequately protected in the event its foreclosure was set aside and the property restored to Mrs. Goodwin's name. Moreover, Mrs. Goodwin offered no proof as to how she would pay any damages to Rhode Island Acquisitions, the innocent purchaser at InSouth's foreclosure sale. Her testimony also ignores the fact that Wincor attempted unsuccessfully to sell this property.

6. At the same time that Mrs. Goodwin took her security in this tract, she also obtained from Wincor a deed on certain California property, and in Wincor's chapter 11 a consent order was entered on November 8, 1999 voiding the "preferential transfer" to her of the California tract (Exhibit 2).¹ In the face of her admission that she was unsecured on her loans to Wincor until these transfers and of the fact that the time to file voidable transfer complaints against her has not expired under 11 U.S.C. § 546(a)(1)(A), it is difficult to contemplate a valid purpose for setting aside InSouth's foreclosure. In that event, the chapter 13 trustee, or a creditor if the trustee refused, would be certain to file a complaint to set aside the voidable April 1998 deed of trust to Mrs. Goodwin and her resulting trustee's deed. In view of the November 8 consent order, a defense against such a complaint would be illogical. Success on such a complaint would then put the property back in Wincor's name, subject only to InSouth's deed of trust. InSouth already has relief from the stay in Wincor's case to foreclose, so it would be wasteful for it to be required to conduct another foreclosure. The circle of futile efforts would thus lead back to the result already in place: InSouth has foreclosed upon its valid first mortgage deed of trust.

7. InSouth in fact noticed Mrs. Goodwin of its intended foreclosure sale, by letter to her home address (Exhibit 1). InSouth did this because it was aware of Mrs. Goodwin's recorded secondary deed of trust. This is the same notice that InSouth would have given had it been aware of her prior foreclosure, which did not cut off InSouth's rights. The letter was mailed to the address where the Goodwins regularly received their mail, and the testimony was that Mrs. Goodwin opened the mail, although she said she had not seen this letter.

In the face of these facts and inferences, the Court concludes that Mrs. Goodwin waived the

¹ Mrs. Goodwin's chapter 13 schedules did list the California property, thus underscoring the effect of her failure to schedule the three acre tract in Mississippi.

benefit of the automatic stay in her chapter 13 case as to InSouth. This Court, in an opinion affirmed by both the United States District Court and the Court of Appeals for the Sixth Circuit, has previously held that in appropriate factual situations equity dictates exceptions from the effect of the automatic stay. *Roseman v. Roseman*, 1993 WL 513899 (6th Cir. Unpublished). Here, Mrs. Goodwin's failure to schedule this property and to list InSouth as a creditor, her insider knowledge of Wincor's debt to InSouth and Wincor's treatment of InSouth in its chapter 11 bankruptcy, and her inability to pay InSouth's debt in her chapter 13 case, which was filed solely to save her home from foreclosure by another creditor, all lead to the conclusion that she waived any automatic stay application as to InSouth. In *Roseman*, the Sixth Circuit acknowledged its published authority that violations of the automatic stay may be voidable rather than void, in appropriate cases. See *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 909-11 (6th Cir. 1993). This is a case demanding a conclusion that InSouth's technical violation of the automatic stay in Mrs. Goodwin's chapter 13 case was not a void act, and the Court will not avoid the foreclosure sale in light of the grounds for excepting that foreclosure from the automatic stay. Moreover, as the Court has observed, the facts justify this Court annulling the stay in this case as to InSouth's foreclosure in order to eliminate any doubts that the foreclosure was properly held and that the resulting sale to Rhode Island Acquisitions was valid. A separate order and judgment, consistent with this opinion, will be entered.

UNITED STATES BANKRUPTCY JUDGE

DATE: _____

In addition to attorneys appearing, copies to be mailed by the Clerk to:

Larry Austin and John Dunlap, attorneys for Wincor, Inc.

George W. Emerson, Chapter 13 Trustee

United States Trustee