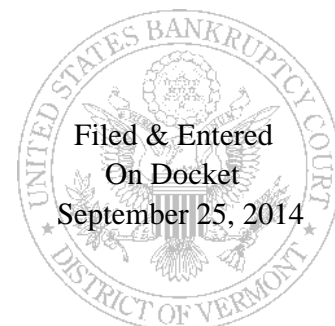


**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**



In re:

**Todd M. Enright
Debtor.**

**Chapter 7 Case
10-10873**

**Robyn L. Enright and
Jill M. Lynne,
Plaintiffs,**

**Adversary Proceeding
14-1010**

vs.

**Todd M. Enright,
Defendant.**

ORDER
GRANTING MOTION TO INTERVENE,
DENYING EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER,
TAKING REQUESTS FOR ATTORNEY'S FEES UNDER ADVISEMENT, AND
DIRECTING CLERK TO MODIFY CAPTION TO ADD DEFENDANT

Todd Enright (the "Debtor" or "Defendant") commenced a Chapter 11 case in June 2010. The case converted to a Chapter 7 on December 9, 2010. Since that time, the case has involved protracted litigation concerning distribution of the Defendant's many assets, owned primarily by his business Middlebury Equity Partners ("MEP"). Much of that litigation has centered around (1) the Defendant's and MEP's obligations to the JMJ Liquidating Fund ("JMJ") and other creditors cooperating with JMJ in the recovery and sale of estate assets (collectively, the Court refers to JMJ and these other creditors as the "Birnberg Entities"), (2) the Defendant's obligations to his ex-wife Robyn Enright, and (3) the priority of these competing interests in estate property.

On September 15, 2014, Ms. Enright and Jill Lynne (the "Plaintiffs") commenced the instant adversary proceeding seeking injunctive relief under 11 U.S.C. §§ 105 and 362(a)(3) (doc. # 1)¹ (the "Complaint"). Specifically, the Plaintiffs requested that the Court prevent the Defendant, MEP, and his agents, as well as all persons acting in concert with them, from taking any action with respect to real property in Greeley, Colorado (the "Longsview Asset"). The Complaint alleges the Defendant was

¹ Unless otherwise noted, citations to the record refer to those filed in the instant adversary proceeding.

working surreptitiously to profit from the sale of a portion of the Longsview Asset, when in fact any net proceeds should be directed to Ms. Enright in satisfaction of court-ordered alimony and child support arising from a Georgia divorce decree.

Also on September 15, 2014, the Plaintiffs filed an emergency motion (doc. # 2) (the "Emergency Motion"), alleging the same facts set forth in the Complaint and requesting (i) entry of an Order "directing the Defendant [to] show good cause why an[] Order should be issued enjoining him, any of his entities, and any other person(s) or entities, from any and all conduct involving the Longsview asset;" (ii) entry of an Order "directing the Defendant [to] show good cause as to why this Court should not issue a temporary or permanent restraining order against the Defendant, his entities, and any other person(s) or entities, from any and all conduct involving the Longsview asset;" (iii) an expedited hearing on the Emergency Motion; and (iv) permission for the Plaintiffs to appear at the hearing on the Emergency Motion by telephone.

On September 16, 2014, the Court entered an Order directing the Defendant and various entities to file responses to the Emergency Motion by 10:00 a.m. on September 22, 2014, and setting a telephonic hearing for September 23, 2014 (doc. # 5). On September 22, 2014, the Plaintiffs, Defendant, Gravel & Shea PC ("Gravel"), and JMJ all filed pleadings in support of their respective positions concerning the Emergency Motion (doc. ## 8, 9, 11, 12). As it was not a party to the instant adversary proceeding, Gravel also filed a motion to intervene (doc. # 10) (the "Motion"). Based on these pleadings, the Court determined that no hearing was necessary and took the matters under advisement.

Before turning to the request for injunctive relief, the Court addresses Gravel's Motion. Therein, Gravel asserts that it is an interested party because it stands to benefit from the sale of the Longsview Asset, based on its participation interest in a loan made from MEP to Longsview Homes, LLC - the entity with equitable ownership rights in the Longsview Asset. Gravel's rights arise from MEP's transfer to it of MEP's interest in the loan. (See Case No. 10-1048, doc. ## 79-3, 88). Based on MEP's transfer of its interests in the loan to Gravel, Gravel stands to benefit from the sale of the Longsview Asset pursuant to the Asset Liquidation Agreement entered into between MEP and the Birnberg Entities (See Main Case No. 10-10873, doc. # 416-1). Because Gravel stands to benefit from the sale of a portion of the Longsview Asset, and the instant adversary proceeding seeks to prevent this sale, the Court finds that Gravel has an interest in the property that is the subject of the instant adversary proceeding, and should be allowed to protect its interest. Accordingly, the Court determines that Gravel is a proper intervenor in the instant adversary proceeding. See Fed.R.Bankr.P. 7024, Fed.R.Civ.P. 24.

On a somewhat similar matter, the Court observes that JMJ was not listed as a defendant on the adversary proceeding cover sheet, nor in the Complaint or Emergency Motion caption. Consequently, it is

also not listed as a defendant on the docket. However, significant portions of the Complaint are dedicated to detailing JMJ's efforts to pursue its interest in the Longsview Asset in Colorado state court.

Additionally, the Complaint requests injunctive relief against "the Defendant and his agents, attorneys and all person acting in concert or participation with him" (doc. # 1 at 12). Thus, for all intents and purposes JMJ is a defendant, it is an error not to designate it as such, and the caption will need to be modified to add JMJ to the adversary proceeding as a party defendant.

The issue raised by the instant adversary proceeding is not new in this case. Rather, it is one that has been revisited several times over the past few years, often at Ms. Enright's initiation. Essentially, the Plaintiffs are once again attempting to challenge the Birnberg Entities' right to secure payment of amounts owed to them, this time by challenging the Debtor's cooperation in liquidating estate assets in an effort to repay these creditors. The Plaintiffs assert that Ms. Enright is entitled to the proceeds of the Longsview Asset based on a September 22, 2011 Georgia divorce decree awarding the same to her.

As set forth in part below, this Court has entered numerous orders demonstrating that such relief is not warranted. For example, the Court has held that Ms. Enright's interests in certain property, including the Longsview Asset, are subordinate to certain creditors' interests, and has entered orders validating the Birnberg Entities' interests and allowing them to satisfy their interest from estate property. Accordingly, efforts to facilitate the sale of estate assets to satisfy creditors' debts – by the Debtor or his agents – are not inappropriate and cannot be the basis for injunctive relief.

This Court initially granted the Birnberg Entities relief from stay as to certain property, including the Longsview Asset, on December 16, 2011 (see Main Case No. 10-10873, doc. # 426). Since that time, Ms. Enright has repeatedly attempted to challenge the Court's determination that the Birnberg Entities could pursue liquidation of this and other estate assets in satisfaction of their debt.

For example, the Plaintiffs later challenged the proof of claim filed by one on the creditors on behalf of the Birnberg Entities (see Main Case No. 10-10873, doc. # 425). The Court overruled the Plaintiffs' objection to claim (see Main Case No. 10-10873, doc. # 445). In doing so, the Court held that the Plaintiffs' position was barred by the doctrine of *res judicata*, as the Debtor's and MEP's debts to the Birnberg Entities had been determined valid by the default judgment entered in adversary proceeding # 11-1007, where the Plaintiffs had had a sufficient opportunity to present their position.

Ms. Enright continues to maintain that she is entitled to proceeds of the Longsview Asset because it was awarded to her by the state court divorce decree. However, as previously recognized by this Court, the state court conveyed this property subject to the Debtor's and MEP's outstanding indebtedness to creditors (see id.). For this reason, this Court's February 29, 2012 order explicitly stated that Ms. Enright's interests

in MEP assets are subordinate to the Birnberg Entities' debt, and directed that she cooperate with them and not interfere with their attempts to collect on their debt from estate assets in the future (see Main Case No. 10-10873, doc. # 450).

Ms. Enright failed to comply with the Court's directive to cooperate with the Birnberg Entities' attempts to liquidate estate assets, causing them to file a motion for contempt (see Main Case No. 10-10873, doc. # 454). On May 16, 2012, the Court ordered Ms. Enright to cooperate with the Birnberg Entities in their liquidation of estate assets, and informed her that her failure to comply with that, or any future, order relating to MEP assets could warrant imposition of attorney's fees or other sanctions (see Main Case No. 10-10873, doc. # 462).

In order to prevail on a request for a preliminary injunction under Rule 65, the movants must establish that: (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. New York Progress and Protection PAC v. Walsh, 733 F.3d 483, 486 (2d Cir. 2013). In light of the voluminous record in the main bankruptcy case, and in prior related adversary proceedings, showing that the Plaintiffs are not entitled to the relief they seek in their Complaint, and the Plaintiffs' failure to articulate any basis for relief that is consistent with this Court's prior rulings on the question, the Plaintiffs have failed to establish a likelihood of success. Further, the Plaintiffs have failed to demonstrate they are likely to suffer irreparable harm from the sale of the Longview Asset. The record indicates there will probably not be sufficient proceeds to satisfy the Birnberg Entities' debt, and thus, there will be nothing left to distribute to other creditors such as Ms. Enright. If, however, there are surplus proceeds, Ms. Enright's interest will be fully protected, as (1) this Court's original lift stay order directed the Birnberg Entities to turn such assets over to the Chapter 7 Trustee (see Main Case No. 10-10873, doc. # 426), and (2) this Court's recent lift stay order directed the Birnberg Entities to file accountings of the sale of any estate property, and they have so complied (see Main Case No. 10-10873, doc. ## 533, 535). Additionally, to the extent the Birnberg Entities' debt is reduced, future assets become more available for satisfaction of Ms. Enright's debt. Thus, notwithstanding the Plaintiffs' claims, it appears this sale may be in their interest, and they have certainly not shown anything to the contrary. Thus, the Court finds the Plaintiffs have failed to establish a right to preliminary injunctive relief.

Moreover, it appears that the Plaintiffs may be precluded from relitigating this issue, given this Court's prior final judgments recognizing the validity and priority of the Birnberg Entities' debt, and the fact that the instant adversary proceeding is really nothing more than the same issue cast in a new light, or at the very least is an issue that could have been raised in prior proceedings. See Adelpia Recovery

Trustee v. HSBC Bank USA (In re Adelpia Recovery Trust), 634 F.3d 678, 694 (2d Cir. 2011) (noting that *res judicata* applies in later litigation where an earlier decision was 1) a final judgment on the merits, 2) by a court of competent jurisdiction, 3) in a case involving the same parties or their privies, and 4) involving the same cause of action, and where those criteria are met, precludes relitigation of issues that were or could have been raised in that action).

Lastly, the Court considers Gravel and JMJ's request for attorney's fees in connection with this adversary proceeding, for having to respond yet again to Ms. Enright's attempts to frustrate their right to liquidate estate assets to collect on their debt. Gravel and JMJ seek such fees based in part on the notice provided by this Court's May 17, 2012 order, which warned Ms. Enright that her failure to comply with that, or any future, order relating to MEP assets could warrant imposition of attorney's fees or other sanctions, (see Main Case No. 10-10873, doc. # 462 at 3), after directing Ms. Enright to "fully cooperate with the Creditors and otherwise not interfere with the Creditors' rights in the [MEP] Assets" (*id.* at 2). The Court finds that this order was sufficient notice to Ms. Enright that attorney's fees could be imposed for bringing the instant action. However, this proceeding is cast in a different light than prior ones, and is based on recent actions of the Defendant. Thus, the Court has not yet determined whether the Plaintiffs are acting vexatiously, or through a good faith belief the Defendant is attempting to thwart Ms. Enright's attempts to collect on the interests awarded to her in the state court divorce decree. Accordingly, the Court will give the Plaintiffs an opportunity to specifically respond to the two parties' requests for attorney's fees and take that issue under advisement.

Accordingly, IT IS HEREBY ORDERED that Gravel's Motion to intervene is GRANTED.

IT IS FURTHER ORDERED that the Plaintiffs' Emergency Motion is DENIED.

IT IS FURTHER ORDERED that the Plaintiffs shall file a response to the JMJ and Gravel requests for attorney's fees by noon on September 30, 2014, and if JMJ or Gravel wishes to file a reply, they shall do so by noon on October 3, 2014.

IT IS FURTHER ORDERED that the Clerk shall modify the caption of this proceeding to add JMJ as a party Defendant.

Burlington, Vermont
September 25, 2014



Colleen A. Brown
United States Bankruptcy Judge