

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA**

**IN RE: Kenneth Karl Buhler
Debra Nicosia Buhler**

CASE NO. 05-15365

**Kenneth Karl Buhler
Debra Nicosia Buhler
(Plaintiffs)**

**ADVERSARY PROCEEDING
NO. _____**

VERSUS

State Bank and Trust Company

ADVERSARY PROCEEDING

Now into court through undersigned counsel comes the captioned debtors who move this Honorable Court for relief and allege as follows:

1.

The debtors filed a voluntary pro se chapter 13 case on December 6, 2005. Undersigned counsel has entered the case on behalf of the debtors and a motion to convert their case to a case under chapter 11 is pending for hearing as is a motion to convert this case to a case under chapter 7 filed by the creditor, State Bank.

2.

As of the date of filing of the debtors' individual bankruptcy case, State Bank, a creditor of the debtors and their businesses, had seized the assets located in the debtors' home and the assets located at their leased business location. About three months prior to the bank's seizure of movable assets, the Buhlers sold their commercial building and used those proceeds to pay about \$500,000 to State Bank. After application of that payment the total balance owed the bank on remaining three notes would have been about \$500,000.

3.

The assets that were seized by State Bank *from the debtors' home* were sold at sheriff sale on 12/7/05, the day after their personal bankruptcy was filed on 12/6/05. The assets that were seized *from their business location* have not yet gone to a sheriff's sale. That sale was delayed as result of consignment claimants and an involuntary bankruptcy filed by investors in one of the debtors' businesses, Antique Investment Group, LLC. (hereafter "AIG"). Despite notice of filing of the personal bankruptcy the bank proceeded with the sheriff sale of the assets seized from the debtors' homestead without stay relief. Some of the assets sold at that sale were property of this estate.

**ACTION PURSUANT 11 USC §506 FOR DETERMINATION OF
SECURED STATUS OF STATE BANK**

4.

The extent to which the claim of State Bank is secured or unsecured has not been judicially determined and the bank has not filed proofs of claim in either the captioned bankruptcy case or the AIG bankruptcy case. As of March 2006 the state court foreclosure suit record does not reflect any of the proceedings that have occurred during December 2005 or thereafter, except for one Mennonite Affidavit filed December 8th the day after the December 7th sheriff sale of the assets seized from the debtors' residence. But for the reference in that affidavit it is not determinable from the record that a sale even occurred, much less what the results and terms of that sale were. One Writ of Seizure and Sale was issued to all the named defendants for a sale without appraisal in July 2005. No service returns are reflected in the state court foreclosure record to date from the writ issued July 13, 2005. A copy of the sheriff's records has been requested by undersigned counsel in order to obtain further information with regard to the

December 7th Buhler sale.

5.

Because the writ was issued for sale without appraisal there will be no sheriff's appraisal in the record. In connection with a motion for stay relief in the two bankruptcy cases with regard to the assets that were seized from the business location an "appraisal letter" was attached as an exhibit thereto. During the hearing on it stay motions in the captioned case and AIG case, counsel for State Bank referred to that exhibit and suggested that it reflected the value of the assets the bank alleged to belong to AIG. The value indicated on that exhibit was \$310,000.00. However, that exhibit describes that as the value of *all of the assets seized*, those from the debtors' home *and* those from the debtors' business. The debtors' response to those stay motion filed in both bankruptcy cases reflected that the inventory value at cost for the assets seized from the business location, as shown from the last inventory printed and available to the debtors, was about \$700,000 in comparison to the \$75,000 value asserted by the bank's appraisal letter (part of the \$310,000) for the assets seized from the business location. It was not reasonable for the bank to seize assets in excess of debt and attempt to sell them without appraisal, without the type of auction and advertising appropriate to bring a reasonable price for antiques, and expect to never have to account for the value of the assets.

6.

In order to determine the amount and extent of the State Bank's secured and unsecured claims an appraisal must be made of the assets that were seized. Therefore an inventory and appraisal of the property seized from both locations is sought in connection with this adversary proceeding and the captioned bankruptcy case. More items were seized form the two locations than were reflected in the inventory lists that the bank had obtained from the debtors when these

loans were originally made. Until an inventory and appraisal is conducted of everything that was seized equity has not been served in this case and a determination of the extent of the claims of State Bank cannot be determined.

7.

In order to determine the balance on the bank's debts since the filing of its foreclosure action discovery will be necessary to obtain an accounting of the balances on all unpaid notes as of the filing of the bankruptcy case. In its stay relief motion the bank has indicated that it bid in the assets at the December 7th sale for costs of \$3,000.00. The debtor appeared on December 7th in order to bid at the sale and was told it was already concluded. According to counsel for the bank the assets sold that date are still in the possession and control of the bank, but have been moved to an out of state storage location. It is presumed that the assets are planned to be sold. The bank has requested an injunction in state court against the debtors as a result of the disagreement that occurred the day of the creditors' meeting between counsel for the bank and the pro se debtors. The debtors had indicated they would consent to the injunction request, until the bank insisted that the injunction also prevent them from bidding to repurchase the items seized from their home and even from having an agent on their behalf from bidding on the assets. If ever there was cause for relief from a court of equity this case reflects such. It does not appear that a contemporaneous inventory was even taken on site when the assets were being seized from the debtors' home and businesses. Thereafter the debtors were precluded from the process conducted by the bank to allow consignment holders access to the assets to claim their items. Further, the assets seized from the business location were initially stored by the bank at a location that was also conducting its own business with no indication of separate securing of the assets seized from the debtors and their businesses. There are still items, such as antique lighting

fixtures and the phone system which cost \$20,000, that were simply left by the bank at the debtors' former business location being used by some other business at that time.

8.

It is therefore requested that this Honorable Court allow the inventory of items seized and thereafter conduct a valuation hearing to determine the value of the assets seized. Then it will be possible to determine the extent and amount of the bank's total secured and unsecured claims, and such other relief as is necessary and equitable in connection with this case and proceeding.

ACTION FOR DECLARATORY RELIEF AS TO PROPERTY OF ESTATE

9.

The bank has alleged that they had a security interest against all the assets including *future assets of all of the defendants* named in the foreclosure suit. In an *in globo* foreclosure sale on cross collateralized debts a determination of the ownership of movables as between the multiple defendants was not relevant. However, in a bankruptcy case it matters in order to determine the scope of the automatic stay, the property of the estate, even which estate, these are determinative of significant jurisdictional issues. Therefore, it appears to be necessary to request a determination of the ownership interest of the bankruptcy estate as to the assets that were seized at the debtors' home and their business location. The debtors know that some of their personal property was located on site at the business location and that not all of the assets at the business location were owned by just one entity.

10.

The inventory program they used to tract the assets were contemporaneously coded using

vendor codes in the program to indicate the origination of the assets. A copy of that vendor code key and the inventory of assets have been provided in response to the AIG stay motion and with the AIG schedules. Although that inventory is useful, it is not complete, prior to seizure of the debtors' records and computers, the debtors were, of course, working on many projects in various stages of intake, sale, inventory, and data entry. Having been out of possession of their records and computers since July 2005 all they could do was print what had been entered into the computer as of that prior time. There were many small items acquired from bulk estate purchases that would not have been on the inventory at any given day of these businesses.

11.

However, these individual debtors were put out of business by the bank's seizure and suffered a loss of income for the past six months and therefore lack the resources to battle all the fronts put up by the bank. Therefore, the debtors have determined, as indicated previously in their stay relief responses, that they will not try to regain the assets that were seized from their business location. Those assets have value and the bank's claims can be reduced from that value. The value needs determination, but it should be used to reduce the bank's balance. Instead the debtors have determined to focus their limited resources on a plan to pay the bank from and for the assets that were seized from their home.

STAY VIOLATION PURSUANT TO 11 U.S.C. SECTION 362

12.

Some assets that were property of this estate were sold at the sheriff sale on December 7th the day after this bankruptcy case and despite notice to the bank and the sheriff's office of the bankruptcy filing violated the stay. There was no judicial determination by this bankruptcy court

or by the state court as to the ownership of the assets being sold and the scope of the automatic stay's protection of those assets. Apparently the sheriff office proceeded with the sale despite the bankruptcy notice because (1) the sheriff office should not be liable for the bank's violation of federal bankruptcy law and (2) the bank apparently submitted a letter stating that the assets it seized were represented by the debtors to be business assets, relying on a document referencing the inventory of the businesses, Ken Buhler Auctioneers, Inc. and/or Design Warehouse, Inc. as of January 24, 2003. Presentation of a January 2003 inventory is not responsive to a stay relief question three years later of what was actually seized and to whom did it belong. Apparently there was no video or physical inventory made contemporaneously with the seizure by the bank of the assets from the debtors' home or business location. It is requested that the bank be sanctioned for its violation of the automatic stay provided in bankruptcy. More recently the bank has taken the normal approach to ask for a judicial determination of stay relief in both cases as to the assets seized from the business location, rather than the take what we can get away with approach it utilized December 7, 2005. The bank knew when it filed its foreclosure action that the ownership interests between the multiple obligors on its cross collateralized notes had not been determined. The bank's motion to dissolve the stay obtained by the Louisiana Auctioneers Board on behalf of consignors repeatedly pleads that the items on the exhibit inventories "belong to one or more of defendants". The defendants in that suit are Antique Investment Group, LLC, Ken Buhler Auctioneers, Inc., 14th Street Antique Warehouse, LLC, Kenneth K. Buhler, and Deborah Nicosia Buhler. The exhibit "A" of the foreclosure action are represented by the bank to be the items seized from the debtors' home as opposed to exhibit "B" of the foreclosure, represented by the bank to be the items seized from the debtors' business location. The bank stopped the sheriff sale of exhibit "B" on October 12, 2005 as a result of the involuntary

bankruptcy filing on October 11, 2005 by creditors of AIG. Neither of these exhibits, "A" or "B" appear to be contemporaneous inventories of the seizures, they are an accumulation of inventory printouts from the debtors dated in 2001, 2003, and January 2004. During the seizure it appeared to the debtors that the bank had hired staff from the debtors' accounting firm to assist with the seizure of assets because they recognized a staff member. That accounting firm had assisted the debtors with prior inventories in past years.

AVOIDANCE ACTION PURSUANT TO 11 U.S.C. SECTION 522(f)

13.

About half of the items that were seized from the debtors home have been their personal household furnishings for many years. The fact that an item is declared by the creditor in its loan documents not be an avoidable non purchase money security interest over an exempt household item is not conclusive for purposes of Section 522(f).

14.

Further, the fact that the debtors maintain a written inventory of their household furnishings is not determinative of whether the items are in fact business inventory or exempt household goods.

15.

Although the applicable state law analysis for exemption of household goods may be awkward and vague, it seems to indicate that the table you sit at to eat your cornflakes every morning is exempt whether or not it is an antique table.

16.

This complaint seeks to set aside the sale that occurred on December 7, 2005. The debtor claims that some of the items seized are exempt assets. The debtors bankruptcy schedules included the last inventory list the debtors could obtain. There were more items seized from the home than were reflected on the list. The debtors' schedules also listed a few more items that were seized by the bank but that were not on the prior inventory, but they continue to try to reconstruct from memory what additional items were seized. There were armloads of small items taken from the home. It has been impossible for the debtors to recall everything that was located in all the drawers and cabinets that were searched during the seizure in order to determine what is missing. For example, glassware and china from the kitchen that belonged to Ms. Buhler before their marriage was taken, her daughter's jewelry box and jewelry were taken from her bedroom, as well as items taken from their young son's bedroom. The bank's position has been that it does not matter if the item was on the original inventory list made a part of their security instrument because they had a security interest on everything including things acquired after execution of the security agreement. That approach is not conclusive of whether an item is a business or personal asset or whether it is an exempt asset or whether it was within the scope of their security agreement as a matter of law.

17.

The debtors request this Honorable Court avoid the security interest of State Bank to the extent it includes the exempt items still located in the debtors' home and to the extent it includes the items seized from the debtors home which were exempt as of the date of seizure.

ACTIONS PURSUANT TO 11 U.S.C. SECTION 549 AND 550

18.

The sheriff sale conducted December 7, 2005 sold some items that were owned by the Buhlers individually. Property owned by the Buhlers are property of this estate. That sale proceeded though it was not authorized by this Honorable Court or pursuant to applicable bankruptcy law. A sale in violation of the automatic stay is not valid. The debtors seek to avoid the sale therefore pursuant to Section 549 and recover the property pursuant to Section 550. The fact that the bank claims it has a mortgage on all of the furnishings in debtors' home does not give the bank any authorization to proceed to sheriff sale during a bankruptcy case. The bank's determination to sell during bankruptcy based on its interpretation that every item brought into the debtors' home before and since the granting of the bank's security interest over "All Inventory, Accounts, Equipment, General Intangibles and Fixtures" means every item of personal property it seized resulted in a violation of the automatic stay.

**ACTIONS PURSUANT TO 11 U.S.C. SECTION 548 AND 550,
LA R.S. 10:9-627, AND LA C.C. ART. 2037**

19.

To the extent this Court determines that some of the assets sold on December 7, 2005 were assets of the debtors' businesses then the sale as to those items should be avoided. The sale was without appraisal and conducted contrary to the UCC standards. The sale was conducted of an extensive personal collection of valuables, antiques, furnishings, and decorative items accumulated over twenty years by a professional auctioneer and antiques dealer. A commercially reasonable sale of this collection would have been conducted by a professional antiques auction

company with advertising in the market publications for property of this type. Such was not the case, the state court foreclosure was not advertised in conformity with reasonable commercial practices among dealers in the type of property. To date the state court foreclosure record does not contain the record of any advertisement, however, according to the sheriff's office there was an ad run in the Baton Rouge newspaper legal news. Even the description in the ad was inadequate. The Buhlers as owners, members, and shareholders therefore challenge the adequacy of the sale conducted herein and request relief therefrom. They were rendered insolvent by the actions of State Bank on December 7, 2005. The sale was without appraisal. The assets were acquired by the bank for no value. The sale was conducted in a manner that was not commercially reasonable under applicable law. It is requested that the sale be avoided.

ADEQUATE PROTECTION PURSUANT TO 11 U.S.C. SECTION 361

20.

The counsel for the bank has suggested that it is entitled to adequate protection payments for the remaining assets it did not seize and that were left behind in the debtors' home. It is premature to allow the bank such relief. The bank has not filed a proof of claim and the extent of the secured claim has not been determined. The value of the assets it seized at cost exceeded the value of the debt it was owed as of the seizure. Under applicable bankruptcy law the value at cost is not determinative, a valuation of assets in bankruptcy is made at the price for which the item could be sold, a value that creditors have described as retail. At retail value the bank was fully secured by its collateral despite its allegation of having incurred \$200,000 in foreclosure fees and costs. During the year proceeding bankruptcy the bank has obtained in excess of \$1.5 million in assets when it was owed about \$1 million. There was a voluntary sale by the debtors of

their commercial building and a \$500,000 payment to State Bank from those proceeds. It has not even been determined whether this Honorable Court will allow the bank any claim in this case. It could have been satisfied from the value its received to date.

In conclusion the captioned debtors seek relief as requested herein from this Honorable Court.

Respectfully submitted
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