

NO. D-1-GV-08-001478

STATE OF TEXAS,	§	IN THE DISTRICT COURT OF
Plaintiff	§	
	§	
v.	§	
	§	
Guardian Fidelity Title Company, Ltd.,	§	TRAVIS COUNTY, TEXAS
Guardian Fidelity Title Company CLR, LLP,	§	
Guardian Fidelity Title Company NWR, LLP,	§	
Guardian Fidelity Title Company KTB, Ltd.,	§	
Guardian Fidelity Title Company SB, Ltd.,	§	419th JUDICIAL DISTRICT
Guardian Fidelity Title Company DFT, Ltd.,	§	
Defendants	§	

SPECIAL DEPUTY RECEIVER’S RESPONSE IN OPPOSITION TO THE MOTION TO LIFT STAY; FOR ORDER DETERMINING STATUS OF THIRD PARTY CLAIMS AND FUNDS; AND FOR INJUNCTIVE RELIEF [SOUTHERN TITLE INSURANCE COMPANY]

TO THE HONORABLE JUDGE OF SAID COURT:

Cantilo & Bennett, L.L.P., Special Deputy Receiver (“SDR”) of Guardian Fidelity Title Company, Ltd., Guardian Fidelity Title Company CLR, LLP, Guardian Fidelity Title Company NWR, LLP, Guardian Fidelity Title Company KTB, Ltd., Guardian Fidelity Title Company SB, Ltd., Guardian Fidelity Title Company DFT, Ltd. (collectively, “Guardian Fidelity”), files this *Response in Opposition to the Motion to Lift Stay; for Order Determining Status of Third Party Claims and Funds; and for Injunctive Relief [Southern Title Insurance Company]* and in support thereof would respectfully show the Court as follows:

I. INTRODUCTION AND SUMMARY

1.1 The SDR objects to the motion of Southern Title Insurance Company (“Southern”), and urges that it be denied. Southern seeks extraordinary relief from the Court at the very beginning of this receivership. It requests that the Court modify the Permanent Injunction barring actions

against the receivership in violation of the Insurer Receivership Act, and it seeks relief from the statutory automatic stay. Legally, Southern fails to meet the express statutory requirements of the Insurer Receivership Act, TEX. INS. CODE ANN. Ch. 443 for the relief it seeks. Factually, Southern does not meet the very high burden of proof imposed by the Texas Legislature that it present “**clear and convincing evidence**” on the merits of its motion. In addition, Southern seeks a judicial declaration regarding the status of certain funds and injunctive relief against the SDR and Receiver. The SDR objects to Southern’s efforts to mix its motion to lift the stay with requests for other relief. The SDR further objects to the injunctive relief pursuant to TRCP 682. Finally, Southern’s claims to certain escrow funds should be denied in order to prevent preferential treatment of one creditor¹.

II. BACKGROUND

2.1 Guardian Fidelity was placed in receivership in this proceeding on July 11, 2008. The Court entered a Permanent Injunction and Order Appointing Permanent Receiver on July 11, 2008 appointing the Texas Commissioner of Insurance as Permanent Receiver. The Receiver designated Cantilo & Bennett, L.L.P., as SDR of Guardian Fidelity effective as of September 15, 2008.

2.2 On or about October 6, 2008, Southern filed its Motion, requesting that this Court lift the Permanent Injunction and the Automatic Stay to allow Southern to pursue its claims against Guardian Fidelity, to the extent that such claims are covered by insurance.

2.3 The subject matter of Southern’s Motion has been referred to the Special Master appointed in this proceeding in accordance with Paragraph III of the Order of Reference to Master entered on August 22, 2008.

¹ On October 27, 2008, the Special Master presiding over this receivership estate recommended the denial of a lift stay motion, seeking similar relief, in *The State of Texas v Webb County Title & Abstract Company*, Cause No. D-1-GV-08-0000050, pending in the 201st District Court of Travis County, Texas.

2.4 The Receiver designated Cantilo & Bennett, L.L.P., as SDR of Guardian Fidelity, effective as of September 15, 2008. The SDR has not had sufficient time to begin the process of marshalling the assets of the estate. It has not even been required to file Statements of Assets and Liabilities until December 15, 2008. The SDR is still in the process of gathering records and evaluating potential claims against responsible parties. Likewise, it is still considering whether additional claims exist against the insurance policy cited by Southern in its motion. It is simply premature to consider the relief sought by Southern.

III. STATUTORY AUTHORITY FOR STAY

3.1 TEX. INS. CODE §443.008(c) provides that the commencement of a delinquency proceeding operates as a stay of the commencement or continuation of any action or proceeding against the insurer, with certain exceptions. Southern has not alleged that any of these exceptions exist, and concedes that the automatic stay prevents it from prosecuting the Lawsuit.

3.2 TEX. INS. CODE §443.008 (h) allows a “party in interest,” as defined in TEX. INS. CODE §443.004, to request relief from the stay. However, Southern is not entitled to the relief it seeks under the plain terms of the Insurer Receivership Act. The statute provides for very limited relief from these vitally important protections. In order to obtain relief from the stay, Southern must comply with the statutory requirements, as follows:

§ 443.008. Injunctions and Orders

.....

(h) On request of a party in interest and after notice and any hearing the receivership court determines is appropriate, the receivership court may grant relief from the stay of Subsection (c) or (d), such as by terminating, annulling, modifying, or conditioning the stay:

(1) for cause as described by Subsection (i); or

(2) with respect to a stay of an act against property under Subsection (c) if:

(A) the insurer does not have equity in the property; and

(B) the property is not necessary to an effective rehabilitation plan.

(i) For purposes of Subsection (h), “cause” includes the receiver canceling a policy, surety bond, or surety undertaking if the creditor is entitled, by contract or by law, to require the insured or the principal to have a policy, surety bond, or surety undertaking and the insured or the principal fails to obtain a replacement policy, surety bond, or surety undertaking not later than the later of:

(1) the 30th day after the date the receiver cancels the policy, surety bond, or surety undertaking; or

(2) the time permitted by contract or law.

3.3 Southern fails both tests under subsection (h). It has not demonstrated “cause” as defined in subsection (i). This provision is simply not applicable to this situation. Southern is not seeking relief with “respect to a stay of an act against property.” This is not an effort to foreclose a lien on real property or other tangible asset.

3.4 Furthermore, Southern bears a heavy burden to establish relief from the stay. TEX. INS. CODE ANN. 443.008(j) provides that “[i]n any hearing under Subsection (h), the party seeking relief from the stay has the burden of proof on each issue, which must be established by clear and convincing evidence. [Emphasis added.]” Southern cannot meet this very high standard of proof in the face of the SDR’s verified response. The Texas Legislature expressly intended to make the burden of proof heavy on this type of relief.

3.5 Here, lifting the stay imposes enormous burdens upon the estate. The SDR’s evidence is uncontested on this issue. While there is no reported case law under the Insurer Receivership Act applying the “clear and convincing” evidence standard, there are numerous Texas cases applying the standard in different contexts. The Texas Supreme Court recently considered the “clear and convincing” standard in *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, ___ S.W.3d ___, 2008 WL 3991190 (August 29, 2008, Tex. Sup. Ct.):

On appellate review, we do not disregard undisputed evidence that does not support the jury's finding because doing so could skew the analysis of whether there is clear and convincing evidence. *Diamond Shamrock Ref. Co.*, 168 S.W.3d at 170 (quoting *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex.2002)). In this case, the record fails to show the required clear and convincing evidence of a state of mind so indifferent to peril as to elevate the hospital's conduct from negligence to gross negligence.

In another example, in an election contest, the Waco Court of Appeals held:

An election contestant's burden is a heavy one, and the declared results of an election will be upheld in all cases except where there is and convincing evidence [footnote omitted] of an erroneous result. *Olsen*, 24 S.W.3d at 610. The clear and convincing standard requires more proof than the preponderance of the evidence standard in ordinary civil cases. *Id.* That standard is the degree of proof that will produce in the mind of the trier of fact a “firm belief or conviction” as to the truth of the allegations sought to be proved. *Id.* See *Willet v. Cole*, 249 S.W.3d 585 (Tex. App.—Waco, 2008, no writ).

3.6 Southern argues, in a footnote (p.3), that bankruptcy case law is applicable to its motion. The United States Bankruptcy Code does not govern this proceeding, and bankruptcy case law is only instructive in situations where the Insurer Receivership Act emulates the Bankruptcy Code. The Insurer Receivership Act deliberately does not mirror the United States Bankruptcy Code in this respect. The standard for relief from the automatic stay is significantly different.

IV. PERMANENT INJUNCTION

4.1 TEX. INS. CODE §443.008 provides that the Receivership Court may issue any order, process, or judgment, including stays, injunctions, or other orders, as necessary or appropriate to carry out the provisions of the Insurer Receivership Act. Pursuant to this authority, this Court entered the *Permanent Injunction and Order Appointing Permanent Receiver* on July 11, 2008, which enjoins any party from “[m]aking any claim, charge or offset, or commencing or prosecuting any action, appeal, or arbitration, including administrative proceedings, or obtaining any preference, judgment, attachment, garnishment, or other lien, or making any levy against Defendant, Defendant’s Property or any part thereof, or against the Liquidator, except as permitted by TEX. INS.

CODE Chapter 443, Subchapter F.”

4.2 Southern does not even mention the Permanent Injunction, which bars it from initiating litigation against the SDR. Pursuant to TEX. INS. CODE § 443.055(b), the Permanent Injunction constitutes a final judgment. Southern has not requested any relief from this final judgment.

V. APPLICATION OF STAY AND PERMANENT INJUNCTION

5.1 The matter presented by Southern’s motions illustrates why the Texas Legislature provided for a stay and injunctive relief in an insurance receivership. Southern contends that the existence of a policy of insurance covering Guardian Fidelity creates sufficient cause for relief from the stay and the injunction. The SDR does not contest that the policy of insurance referenced by Southern exists. However, Southern provides no evidence that the receivership estate does not also have a claim under the policy. In the event that the receivership estate makes a recovery under the policy, the proceeds would be assets of the estate, available to all creditors. It is simply premature to allow one creditor to sue the estate in a distant forum in order to make a potentially preferable recovery.

5.2 Southern’s motion also ignores the costs that would be imposed on the receivership estate, which the estate can ill afford. Southern fails to discuss how the SDR would pay for monitoring a lawsuit against the estate and recovering electronic data. Even if the insurance company pays for defense counsel, (and there is no guarantee or evidence that it will do so), the SDR must still confer with counsel, respond to discovery requests and handle matters not covered by the policy. Lifting the stay (assuming the Permanent Injunction is likewise lifted) requires the estate to spend money (which it clearly does not have) for the benefit of one, very solvent alleged creditor, Southern. Significantly, Southern does not provide any documentation from the insurance carrier in

question. There is no mention of coverage defenses or any other matter that may impair the insurance company's defense of the underlying case.

5.3 Southern needs to file its proof of claim like every other creditor of this estate. The SDR will file a motion to set a claims filing deadline and approve the handling of claims in the near future. Once entered, Southern can file its claim and be treated equally with all the other creditors of the estate.

VI. OPPOSITION TO INJUNCTIVE RELIEF

6.1 Southern seeks injunctive relief against the SDR and Receiver regarding certain electronic data referred to as the "Soft Pro Data" *See Motion*, p. 5. Unfortunately, and as known to but not mentioned by Southern, the Soft Pro Data is not in the possession, custody or control of the SDR or Receiver. The SDR is currently reviewing whether and, if so how, to recover the information, which is believed to be held by third parties. Southern seeks to usurp the SDR's statutory rights to exercise its business judgment regarding estate activity. Significantly, Southern does not offer to pay the cost to the estate of any effort to recover the data.

6.2 Procedurally, Southern's request for injunctive relief should be denied for its failure to comply with TRCP 682 which requires that such pleadings be verified.

VII. ESCROW FUNDS

7.1 Southern seeks a declaratory judgment that certain funds, which may be in the SDR's possession, belong to Southern. The SDR generally denies Southern's claims. The SDR objects to Southern's efforts to present requests for multifarious relief in a single pleading and, accordingly, specially excepts to Paragraph VI of Southern's motion and all other references to declaratory relief relating to the "Sanchez" funds. The SDR further pleads that it is still in the

process of determining the status of funds, whether escrowed or otherwise. Southern's demand is premature at best.

VIII. NOTICE

7.1 This Response has been served on the attorney for Southern, and the entire service list for this proceeding in the manner shown on the Certificate of Service.

IX. OFFER OF PROOF

8.1 Cantilo & Bennett, L.L.P., as Special Deputy Receiver, through its authorized representative, Michael Marcin, submits its certificate pursuant to §443.017(b) verifying the statements in this pleading.

X. CONCLUSION

9.1 In conclusion, the SDR urges the Court to deny Southern's motion. It has failed to prove sufficient "cause" to justify modifying the permanent injunction and lifting the automatic stay. The SDR's brief tenure merits a breathing space in order to efficiently marshal the assets of the estate for the benefit of all creditors, not simply Southern.

PRAYER

WHEREFORE PREMISES CONSIDERED, Cantilo & Bennett, L.L.P., Special Deputy Receiver of Guardian Fidelity, respectfully requests this Court to deny Southern's motion, and grant such further relief to which it may show itself to be justly entitled.

Respectfully submitted,

By: /Christopher Fuller/

Christopher Fuller
Texas Bar No. 07515500
4612 Ridge Oak Drive, Austin, Texas 78731
Tel. (512)470-9544
Fax (512)374-0957
cfuller@fullerlaw.org
Attorney for Cantilo & Bennett, L.L.P.,
Special Deputy Receiver of Guardian Fidelity Title
Co., Ltd., *et al.*

And

By: /Jo Ann Howard/

Jo Ann Howard
Texas Bar No. 10072310
Jo Ann Howard & Associates, P.C.
P.O. Box 160130, Austin, Texas 78716
Tel. (512)791-0911
Fax (512)329-6612
iamanrd3@aol.com
Attorney for Cantilo & Bennett, L.L.P.,
Special Deputy Receiver of Guardian Fidelity Title
Co., Ltd., *et al.*

CERTIFICATE OF SERVICE

I certify that on November 17, 2008, a true and correct copy of this Response was served pursuant to the Order of Reference, the Texas Rules of Civil Procedure, and TEX. INS. CODE §443.007.

/Jo Ann Howard/

Jo Ann Howard
Texas Bar No. 10072310

Tom Collins, Special Master
c/o Ms. Jean Sustaita
P.O. Box 149104
Mail Code 305-1D
Austin, TX 78701
Jean.Sustaita@tdi.state.tx.us

Burnie Burner
Texas Title Insurance Guaranty Association
Mitchell, Williams, Selig, Gates & Woodyard,
PLLC
P.O. Box 2212
106 E. Sixth Street, Suite 300
Austin, TX 78768-2212
bburner@mwsqw.com

Bruce McCandless III
Texas Title Insurance Guaranty Association
Mitchell, Williams, Selig, Gates & Woodyard,
PLLC
P.O. Box 2212
106 E. Sixth Street, Suite 300
Austin, TX 78768-2212
bmccandless@mwsqw.com

Robert A. Kouts
Attorney for Southern Title Insurance Co.
Scheinthal & Kouts, LLP
4635 Southwest Fwy., Ste. 720
Houston TX 77027
Tel (713)871-8040
Fax (713)871-8642
rkouts@sk-llp.com

Brian D. Womac
Attorney for Keppel Houston Group, LLC
Womac & Associates
Two Memorial City Plaza
820 Gessner, Suite 1540
Houston, TX 77024
Tel (713)751-9200
Fax (751)-0808

Joshua Godbey
Assistant Attorney General
Financial Litigation Division
P.O. Box 12548
Austin, TX 78711-2548
Fax (512)477-2348
joshua.godbey@oag.state.tx.us

William T. Green
11 Greenway Plaza, Ste. 2820
Houston, TX 77046
Fax (713)961-0883

Mark D. Humphrey, Houston Area President
Prosperity Bank
100 Medical Center Blvd.
Webster, TX 77598
Fax (281)338-1885

Ron Opper
Opper & Gambrell, PLLC
8582 Katy Freeway, Ste. 200
Houston, TX 77024
Tel (713)468-6111
Fax (713)468-6101

Gerald S. Siegmeyer
Siegmeyer, Oshman & Bissinger, LLP
2777 Allen Parkway, Tenth Floor
Houston, TX 77019
Fax (713)524-4102
gsiegmyer@bizlawhouston.com

William H. Rearick
Vice President/Lending Officer
Moody National Bank of Friendswood
408 West Parkwood
Friendswood, TX 77546
Tel (281)992-7776 x.6690
wrearick@moodybank.com

David M. Scott
Zimmerman, Axelrad, Meyer, Stern & Wise, PC
3040 Post Oak Blvd., Ste. 1300
Houston, TX 77056-6560
Tel (713)552-1234
Fax (713)963-0859
dscott@zimmerlaw.com

Michael J. Smith
Chernosky, Smith, Ressler & Smith, PLLC
4646 Wild Indigo, Ste. 110
Houston, TX 77027
Tel (713)800-8608
Fax (713)800-8609
msmith@csrlaw.com

Ryan Colburn, President
Regions Bank Houston
5005 Woodway, Ste. 350
Houston, TX 77056

Kenneth Green
Snow Fogel Spence, LLP
2929 Allen Parkway, Ste. 4100
Houston, TX 77019
Tel (713)335-4830
Fax (713)335-4930
kennethgreen@snowfogel.com

Peter A. Nolan
Winstead PC
401 Congress Ave., Suite 2100
Austin, TX 78701
Tel (512)370-2800
Fax (512)370-2850
pnolan@winstead.com

Gary Zausmer
Winstead PC
401 Congress Ave., Suite 2100
Austin, TX 78701
Tel (512)370-2800
Fax (512)370-2850
gzausmer@winstead.com

Texas Workforce Commission
Regulatory Enforcement Division
101 E. 15th Street
Austin, TX 78778-0001

Internal Revenue Service
Special Procedures Branch
P.O. Box 250
300 East 8th St., Ste. 352, Mail Stop 5022A
Austin, TX 78701

Angel Garrett
Texas Department of Insurance
Financial/Rehabilitation & Liquidation
Oversight Division
333 Guadalupe, Mail Code 305-1D
Austin, TX 78701
Angel.Garrett@tdi.state.tx.us

Rachel Giani
Texas Department of Insurance
Financial/Rehabilitation & Liquidation
Oversight Division
333 Guadalupe Mail, Code 305-1D
Austin, TX 78701
Rachel.Giani@tdi.state.tx.us

Leanne Layne
Texas Department of Insurance
Financial/Rehabilitation & Liquidation
Oversight Division
333 Guadalupe, Mail Code 305-1D
Austin, TX 78701
Leanne.Layne@tdi.state.tx.us

John Walker
Texas Department of Insurance
Financial/Rehabilitation & Liquidation Oversight Division
333 Guadalupe, Mail Code 305-1D
Austin, TX 78701
John.Walker@tdi.state.tx.us

Jemmie Russell
Texas Department of Insurance
Financial/Rehabilitation & Liquidation Oversight Division
333 Guadalupe, Mail Code 305-1D
Austin, TX 78701
Jemmie.Russell@tdi.state.tx.us

Michael Marcin
Cantilo & Bennett, L.L.P.
Special Deputy Receiver
11401 Century Oaks Terrace, Ste. 300
Austin, TX 78758
mpmarcin@cb-firm.com

Susan E. Salch
Cantilo & Bennett, L.L.P.
Special Deputy Receiver
11401 Century Oaks Terrace, Ste. 300
Austin, TX 78758
sesalch@cb-firm.com

Christopher Fuller
Fuller Law Group
4612 Ridge Oak Drive
Austin, TX 78731
cfuller@fullerlaw.org

Jo Ann Howard
Jo Ann Howard & Associates, PC
P.O. Box 160130
Austin, TX 78716
iamanrd3@aol.com

**SPECIAL DEPUTY RECEIVER'S CERTIFICATION PURSUANT TO TEX. INS.CODE ANN.
§443.017(b)
AFFIDAVIT OF MICHAEL MARCIN**

State of Texas

County of Travis

BEFORE ME, the undersigned authority appeared Michael Marcin, who after being by me duly sworn, stated the following under oath:

1. "My name is Michael Marcin. I am competent to make this affidavit. The statements of fact set forth herein are true and correct, and are within my personal knowledge.

2. "I am a partner in Cantilo & Bennett, L.L.P., Special Deputy Receiver ("SDR") of Guardian Fidelity Title Company, Ltd., Guardian Fidelity Title Company CLR, LLP, Guardian Fidelity Title Company NWR, LLP, Guardian Fidelity Title Company KTB, Ltd., Guardian Fidelity Title Company SB, Ltd., Guardian Fidelity Title Company DFT, Ltd. ("Guardian Fidelity"). I am duly authorized to make this Certification and Affidavit on behalf of the SDR.

3. I certify that the exhibits, books, accounts, records, papers, correspondence, and/or other records and documents referred to or attached hereto were produced pursuant to TEX. INS. CODE ANN. §443.017, are either true and correct copies of records of the insurer and were received from the custody of the insurer or found among its effects or were created by and filed with the Receiver's office in connection with the receivership of this delinquent insurer, and are held by the Special Deputy Receiver in her official capacity.

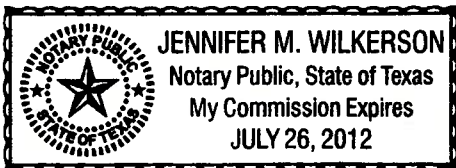
4. "I further state that I have read the statements contained in the attached Response and that they are true and correct based on my personal knowledge, my review of estate records and my consultation with my staff and sub-contractors.

5. "Further affiant sayeth not."

By: _____

Michael Marcin

SUBSCRIBED AND SWORN TO BEFORE ME on November 17, 2008, by Michael Marcin, on behalf of Cantilo & Bennett, L.L.P., Special Deputy Receiver of Guardian Fidelity Title Company, Ltd., Guardian Fidelity Title Company CLR, LLP, Guardian Fidelity Title Company NWR, LLP, Guardian Fidelity Title Company KTB, Ltd., Guardian Fidelity Title Company SB, Ltd., Guardian Fidelity Title Company DFT, Ltd. in receivership.



Notary Public