

ENTERED ON DOCKET
MAY 04 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: : CASE NO. 04-94266-JB
: :
TAMMY DENISE CALLOWAY : CHAPTER 13
: :
Debtor. : :

ORDER

This Chapter 13 case came before the Court on April 25, 2006, on debtor's *pro se* motion titled as a motion to reimpose the automatic stay, filed on March 24, 2006. (#34) Appearances were made by debtor, debtor's former counsel, Willie G. Davis, Jr., George Shaw from the Chapter 13 Trustee's office, Matthew A. Schuh and David C. Whitridge, counsel for Aurora Loan Services, Inc. ("Aurora Loan"), and Richard Siegel, counsel for Midland Mortgage Co. ("Midland Mortgage"). After reviewing and considering both the record in this case as well as the fact that Midland Mortgage has foreclosed on the property at issue and evicted debtor from the property, a reimposition of the automatic stay is not of any utility at this time. However, a statement of what has taken place with respect to the automatic stay may be helpful as the parties sort out what actions can or should be taken.

Debtor filed this Chapter 13 case through counsel Willie George Davis, Jr. on May 28, 2004. Debtor's Schedule A listed real property located at 7233 Woodcreek Way, Douglasville, Georgia (the "Property"). Debtor's Schedule D listed Aurora Loan as a secured creditor with a claim of \$119,089.00 secured by the Property. A Plan was confirmed in the case on August 17, 2004.

On October 18, 2004, the law firm of Morris, Schneider & Prior, LLC filed a motion for relief from the automatic stay on behalf of Mortgage Electronic Registration Services, Inc. ("MERS") (#15). Although the motion does not so state, it appears from the April 25, 2006 hearing that the holder of the note and deed to secure debt was Aurora, and MERS was the loan servicer. Counsel scheduled a hearing on MERS's motion for November 9, 2004. Matthew Schuh appeared for MERS, but neither the debtor nor debtor's counsel appeared. On November 30, 2004, the Court entered an Order granting MERS's motion as unopposed. (#17)

On December 13, 2004, debtor through counsel filed a motion to reconsider the Order lifting the stay, stating that he had not been served with MERS's motion for relief. (#19). On January 11, 2005, a hearing was held on the debtor's motion for reconsideration. The debtor, the Chapter 13 Trustee, and David Whitridge, counsel for MERS, all appeared, but Mr. Davis was not present, having previously filed a notice of conflict letter with the Court. Mr. Whitridge and the Chapter 13 Trustee both announced on the record that they did not oppose the debtor's motion to reimpose the stay. The Court directed Mr. Whitridge to confer with Mr. Davis and prepare an order, since the parties were all in agreement that the stay should remain in effect. Counsel never submitted an order, and on January 28, 2005, debtor through Mr. Davis filed a motion to reimpose the stay, stating that the debtor was current on her post-petition mortgage payments prior to the filing of the motion for relief from the stay by MERS. (#24). At the scheduled hearing on debtor's motion to reimpose the stay on March 1, 2005, Messrs. Whitridge and Davis announced that the matter was settled by consent and that they would

submit a consent order reimposing the stay. Again, counsel failed to prepare and submit to the Court any consent order as announced.

On June 20, 2005, Aurora Loan filed a notice with the Court that the claim had been assigned and transferred from Aurora Loan to Midland Mortgage.

The next item on the docket of this case is a paper filed by the debtor *pro se* on February 27, 2006, titled as a motion to reimpose the stay. In that motion, debtor requests a stay of an eviction and alleges that she provided mortgage payments in the form of cashier's checks in the amount of \$4,189.90 to her attorney Mr. Davis, but that he failed to send the funds to the mortgage company. She alleges that the mortgage company foreclosed on the Property and she sets forth her efforts to contact the law firm which handled the foreclosure. The Court set a hearing on debtor's motion for March 7, 2006, at which appearances were made by David Whitridge on behalf of Aurora Loan, Michelle Hart of the law firm McCalla, Raymer, Padrick, Cobb, Nichols & Clark on behalf of Midland Mortgage, the Chapter 13 Trustee, James H. Bone, and Mr. Davis. At the hearing, Ms. Hart stated that Midland Mortgage conducted a foreclosure of the Property on January 3, 2006, and that the debtor had been evicted from the Property on February 28, 2006. Debtor was not present at the March 7, 2006 hearing, but it appeared that she would not have received the hearing notice due to the eviction.

At the March 7, 2006 hearing, Mr. Davis admitted that he was holding \$4,189.90 of debtor's funds that had not been remitted to Aurora or Midland. On March 17, 2006, the Court entered an Order requiring Mr. Davis to locate the debtor, to return the \$4,189.90 to the debtor promptly, and to provide the Court with a proper address for the debtor. In the meantime, on March 20, 2006, debtor filed a letter terminating Mr. Davis as her counsel, and on March 24,

2006, the debtor filed the instant motion *pro se* which she titled motion to reimpose the automatic stay. A hearing was set for April 25, 2006. On April 11, 2006, Mr. Davis filed a pleading with proof that he had returned the \$4,189.90 to the debtor on or about April 5, 2006.

At the April 25, 2006 hearing, counsel for the Chapter 13 Trustee announced that debtor had paid her plan now in full and that the plan provided for a 100% dividend to unsecured creditors. Mr. Siegel stated that his law firm conducted the foreclosure sale on behalf of Midland Mortgage, because the debtor had failed to make all of her post-petition mortgage payments. According to Mr. Siegel, he and Midland Mortgage had no knowledge that counsel for Aurora Loan had consented to a reimposition of the stay, and there was nothing on the docket indicating that the stay had been reimposed. Mr. Whitridge stated that although he had announced no-opposition to debtor's motion to reimpose, no orders had ever been submitted to the Court, because counsel had been unable to agree on specific terms.

Neither counsel for Aurora Loan nor Midland Mortgage were able to answer with any certainty how much debtor owed in post-petition payments at the time of the January, 2006 foreclosure. According to the debtor, Aurora Loan stopped accepting her mortgage payments in early 2005. She contacted Mr. Davis who suggested that she remit the payments to him so that he could resolve the issue. Debtor stated that she did not hear back from Mr. Davis and had no idea there was a problem until she received notice of a foreclosure. Debtor stated that she could provide proof that she had paid all her post petition mortgage payments and that the foreclosure resulted from her attorney failing to make the payments to the lender. Debtor further argued that although Mr. Davis had recently returned \$4,189.90 to her, he was still

holding another \$2,200.00 in payments that she had given him to forward to the mortgage company.

After allowing the parties some time to discuss the facts and examine the documents debtor had in Court with respect to her payment history, the parties announced that approximately nineteen (19) mortgage payments had come due between the time the case was filed and the foreclosure was conducted by Midland Mortgage. The debtor had a payment history which she had received from Aurora Loan and in reviewing that history, along with the papers in the debtor's possession, it appeared that she had been given credit for having made eight (8) of the 19 post-petition payments. It is undisputed that debtor's counsel Mr. Davis was holding some \$6,400.00 in payments provided by the debtor. Mr. Davis indicated that he had difficulty knowing exactly where to send the payments and that he and his client did not agree with Aurora Loan as to the amounts owed. Nonetheless, if the debtor tendered the \$6,400.00 which she previously paid to Mr. Davis, that would amount to approximately six (6) additional payments, leaving only five (5) of the nineteen (19) payments. Debtor indicated that she had proof of these five payments having been made, but that since she had been evicted, her records were in storage, and she was not certain if she would be able to easily access her records. Midland Mortgage's counsel stated that he would entertain receiving proof of these five payments having been made, and he also announced that while Midland Mortgage had conveyed the Property back to the Department of Housing and Urban Development ("HUD"), HUD had not yet resold the Property to a third party. In view of the debtor's contention that she made or can make all the post-petition payments and in view of the fact that counsel had failed to submit the announced consent orders to the Court reimposing the stay, counsel for both Aurora Loan

and Midland Mortgage are encouraged to work with the debtor and Mr. Davis to see whether debtor's concerns can be addressed without further litigation. This Order is entered without prejudice to the debtor's rights to pursue whatever claims she may have, if any, against any parties through an adversary proceeding or civil action. Finally, debtor's former counsel, Mr. Davis, is ordered to promptly return the additional \$2,200.00 to the debtor and to file a statement evidencing the return of these funds within ten (10) days of the entry of this Order.

IT IS SO ORDERED, this 3rd day of May, 2006.



JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

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Date: May 3, 2006