

ENTERED ON DOCKET  
MAR 27 2006

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE: ) CHAPTER 13  
 )  
ALLISON MICHELLE PERRY ) CASE NO. 03-66133-MHM  
 )  
Debtor )

**ORDER GRANTING DEBTOR'S MOTION TO SET ASIDE FORECLOSURE**

This case is before the court on Debtor's motion to set aside Respondent's foreclosure sale of Debtor's real property. Following hearing, the parties were accorded the opportunity to file letter briefs on the issues. For the reasons set forth below, Debtor's motion will be granted.

The facts are undisputed. Debtor's Chapter 13 case was dismissed by order entered July 25, 2005, because Debtor's plan payments to the Chapter 13 Trustee were delinquent. Those payments were delinquent because the company subject to the Employer Deduction Order in this case had deducted the payments from Debtor's payroll check but had failed to remit the payments to the Chapter 13 Trustee. Notice of the dismissal was sent to all creditors.

On August 4, 2005, Debtor filed a motion to vacate the dismissal order. That motion was calendared for hearing by Debtor's attorney for August 25, 2005. The motion and the notice of hearing were served upon all creditors, including Respondent.

Respondent failed to file a written objection to the motion<sup>1</sup> and failed to appear at the hearing or otherwise object. In accordance with the custom and practice in this district, at the call of the calendar, Debtor's attorney announced no opposition to the motion. The courtroom deputy clerk so marked her calendar and, in accordance with custom and practice, Debtor's attorney was expected to prepare and submit a proposed order granting the motion as unopposed. BLR 9013-2(a) provides:

All proposed orders (including findings of fact and conclusions of law or other rulings orally announced by the Bankruptcy Judge and orders submitted following the call of a matter at a scheduled hearing as to which there is no opposition) shall: (1) be prepared in writing and signed by the attorney for the prevailing party, unless the Bankruptcy Court directs otherwise; (2) include the scheduled hearing date, if applicable; and (3) be submitted to the Bankruptcy Judge within seven days from the date of pronouncement or scheduled hearing, if applicable. A copy shall be provided to each party. An attorney's signature as preparer of a proposed order constitutes a certification that the contents of the proposed order accurately reflect the Bankruptcy Judge's oral ruling or the proceedings at the call of the matter, as applicable.

Debtor's attorney prepared the order and forwarded it to the Chapter 13 Trustee for review and signature. The Chapter 13 Trustee forwarded the order to the chambers of the undersigned August 30 or 31, 2005. On September 6, 2005, the foreclosure sale of Debtor's property occurred.<sup>2</sup> Respondent bought the property at the foreclosure sale. On September 7, 2005, the order vacating the dismissal was signed and was entered September 8, 2005.

---

<sup>1</sup> Pursuant to Bankruptcy Rule 9014, no such written objection was required.

<sup>2</sup> During the period between the dismissal of Debtor's case and the hearing on vacating that dismissal, Respondent advertised the property for foreclosure sale, in accordance with Georgia law.

## DISCUSSION

Probably the most important protection afforded to debtors under the Bankruptcy Code, and the provision that generates the most litigation, is the automatic stay of 11 U.S.C. §362(a). The automatic stay arises upon the filing of a voluntary petition under the Bankruptcy Code and operates to stay certain enumerated actions by creditors against the debtor or the debtor's property. The stay of actions against the debtor's property continues during the pendency of the case unless the creditor obtains relief from the stay, as provided for in §362(d), or until the property is no longer property of the estate. 11 U.S.C. §362(c). The stay terminates immediately upon dismissal of the bankruptcy case. *In re Hill*, 305 B.R. 100 (Bankr. M.D. Fla. 2003).

The timely filing of a motion under Bankruptcy Rules 9023 or 9024 to vacate the dismissal of a bankruptcy cases does not operate to stay the effects of a dismissal order. *Hill*, 305 B.R. 100; *In re Rivera*, 280 B.R. 699 (Bankr. S.D. Ala. 2001). An order vacating a dismissal does not reimpose the automatic stay retroactively to the date of dismissal. *Hill*, 305 B.R. 100.

Debtor has cited the case of *In re Nail*, 195 B.R. 922 (Bankr. N.D. Ala. 1996), in support of her request to set aside the foreclosure sale. In *Nail*, the debtor's case had been dismissed and a motion to vacate the dismissal had been filed. A hearing on the motion to vacate the dismissal was held and at that hearing the court granted the motion. Before a written order could be entered, however, the creditor conducted a foreclosure sale of the

debtor's real property. Upon a motion by the creditor to confirm the foreclosure sale, the court held that the order vacating the dismissal, and reimposing the automatic stay, was effective when entered orally at the hearing, and thus the foreclosure sale was void because it violated the automatic stay. The court also concluded that even if the sale was not void, it would be set aside for equitable reasons. The court noted, and it is of some significance, that, on the day of the hearing following the court's ruling, the courtroom deputy made a computer entry of the ruling and a paper copy of that computer entry was placed in the case file.

The facts in *Nail* are readily distinguishable from the facts in the instant case. In this case, no hearing was actually held and the court made no oral ruling on the record. Thus, no public record existed regarding the results of the hearing until a written order was entered. Additionally, an announcement of no opposition does not compel the court to enter an order granting the motion. *Mortgage Electronic Registration Systems, Inc. V. Parks*, Case No. 04-41299-MGD (Bankr. N.D. Ga., February 4, 2005). Barring a lack of subject matter jurisdiction or a request for relief demonstrably at odds with the Bankruptcy Code or other non-bankruptcy law, neither of which is present in the instant case, unopposed motions are granted. Nevertheless, the absence of an actual oral ruling by the court precludes application of the holding in *Nail* to the instant case.

In the instant case, because the delayed entry of the order vacating the dismissal of Debtor's case was occasioned by the court, and not by any fault of Debtor or Debtor's

attorney, it is appropriate to issue the order *nunc pro tunc* to a date prior to the foreclosure sale of Debtor's property. Issuance of an order *nunc pro tunc* is an equitable remedy within the inherent power of the bankruptcy court. *In re Southern Diversified Properties, Inc.*, 110 B.R. 992 (Bankr. N.D. Ga. 1990) (J. Cotton). A *nunc pro tunc* order is appropriate when delay has arisen from an act of the court. *Gray v. Briguardello*, 68 U.S. 627 (1863).

In the instant case, the equities favor Debtor's request for *nunc pro tunc* relief and to set aside the foreclosure sale. The dismissal of Debtor's case was the result of the failure of Debtor's employer to properly remit her Chapter 13 plan payments to the Chapter 13 Trustee. As of the date of Debtor's motion to set aside the foreclosure sale, Debtor had tendered the due and owing mortgage payments and fees to Respondent. The delay in entering the order vacating the prior dismissal was caused by the press of business and holiday absences in chambers. The hearing was scheduled and the proposed order was presented by Debtor's attorney in ample time to allow for entry of the order before the foreclosure date of September 6, 2005. The entry of *nunc pro tunc* relief will result in voiding the foreclosure sale conducted by Respondent, but the property was purchased by Respondent and Respondent will be adequately compensated by the payment by Debtor of the fees associated with the foreclosure sale; thus, Respondent will not be harmed by the relief requested by Debtor. Accordingly, it is hereby

**ORDERED** that the order vacating dismissal of Debtor's case is deemed entered *nunc pro tunc* to September 2, 2005. As a consequence, the foreclosure sale of Debtor's property conducted September 6, 2005, is set aside.

**The Clerk, U.S. Bankruptcy Court, is directed to serve** a copy of this order upon Debtor, Debtor's attorney, the Chapter 13 Trustee, and all creditors and parties in interest.

IT IS SO ORDERED, this the 27<sup>th</sup> day of March, 2006.



---

MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE