UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

IN RE: HENRY A. PARKS, Debtor,	:	CASE NUMBER: BANKRUPTCY CASE NO. 04-41299-MGD
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR WASHINGTON MUTUAL BANK, F.A., ITS SUCCESSORS OR ASSIGNS, Movant, v. HENRY A. PARKS, and MARY IDA TOWNSON, Trustee, Respondents.	:	CONTESTED MATTER IN PROCEEDINGS UNDER CHAPTER 13 OF THE BANKRUPTCY CODE

ORDER

The above-referenced chapter 13 case is before the Court on a motion filed by Mortgage Electronic Registration Systems, Inc. ("Movant") which seeks Court approval of a foreclosure sale conducted by the Movant on August 3, 2004. Henry A. Parks ("Debtor" or "Respondent") responded with a pleading which requests that the Court set aside the foreclosure sale as having been conducted in violation of the automatic stay. A hearing was held on the matter on January 12, 2005. At the conclusion of the hearing, the Court provided Debtor's counsel ten days to submit a brief in the case.[1] The Court has reviewed the record in the case and the briefs filed by the parties, and for the reasons set forth herein **GRANTS** Movant's motion.

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[1] Counsel for Movant had previously filed a brief on the afternoon of January 11, 2004.

FACTS

There appears to be no material dispute as to the pertinent facts. Debtor filed his Chapter 13 case on March 30, 2004. The Section 341 meeting of creditors was held on April 26, 2004. On April 29, counsel for the Chapter 13 Trustee filed an objection to the confirmation of the plan, citing Debtor's failure to schedule his 1991 Honda Accord in violation of 11 U.S.C. § 521.[2] The confirmation hearing was scheduled for May 26, 2004. Debtor did not amend his schedules or attend the hearing and confirmation was denied and the case was dismissed on May 28, 2004. On June 19, 2004, Melisa Davis, counsel for Debtor, filed a motion to reopen the case, and using the Court's open calendar procedure, self selected a hearing date of July 28, 2004. The certificate of service attached to the motion and the notice of hearing appears to list all of the creditors who were scheduled in the case. Included on the certificate of service was Movant.[3] Movant is a creditor of the Debtor by virtue of the fact that it holds a first priority Security Deed on real property located at 1110 Foster Street, Dalton, Georgia 30721. This is shown to be the Debtor's residence on his chapter 13 petition. Debtor's Schedule A lists the residence with a fair market value of $115,000 and secured debt of $71,893. On May 21, 2004, Movant filed a secured proof of claim listing a total debt of $77,697.56 and pre-petition arrears of $6,462.15.

Ms. Davis states in Debtor's motion requesting that the Court set aside the foreclosure sale, that she received the notice of appearance filed by McCalla Raymer only after she had filed the motion to reopen. She then contacted Ms. Stephens by telephone prior to the July 28, 2004

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[2] 11 U.S.C. § 521 states, in part:
The Debtor shall–
(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

[3] Apparently Debtor served a copy of the motion and the hearing notice on all the creditors listed in the case, although the certificate of service did not list Teresa R. Stephens of the law firm McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC ("McCalla Raymer") who filed a notice of appearance on behalf of Washington Mutual Bank on June 17, 2004.

hearing. Ms. Davis contends that she discussed both the upcoming scheduled hearing on the motion to reopen and the pending foreclosure on Debtor's residence and that she was instructed to fax a copy of the motion and a proposed order. In her brief, Ms. Davis states that she had informed Ms. Stephens that she suffered from an illness that required daily treatment and that she would forward the documents and the order as soon as possible.

No party filed a response to Debtor's motion to reopen the chapter 13 case, and during the calendar call, no appearance was made by any party opposing Debtor's motion. Counsel for Debtor was instructed by the courtroom deputy to submit a "no opposition" order. At no point did Ms. Davis request that the Court hear the matter for the purposes of establishing a record. No hearing was held on the motion to reopen the case and no oral ruling was ever made by the undersigned judge. In the motion requesting the Court to set aside the foreclosure sale, counsel for Debtor indicates that local counsel for both law firms[4] that represented Movant during the pendency of the case were present and neither expressed any opposition to the motion to reopen. The Court is confident that both law firms had attorneys physically present for the calendar call that morning as the calendar was twenty-seven pages long and both law firms had numerous unrelated matters before the Court. The order reopening Debtor's chapter 13 case was entered on the Court docket on September 22, 2004.[5]

On August 3, 2004, a foreclosure sale was conducted on Debtor's residence by Movant through the law firm of Shapiro & Swertfeger. Movant was the highest bidder at the sale and as a result the property was purchased by Movant for $66,129. On September 1, 2004, a deed

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[4] McCalla Raymer was representing Movant in the bankruptcy proceeding and the law firm of Shapiro & Swertfeger served as counsel for Movant regarding the foreclosure proceedings.

[5] The Order which reinstates the case states that the hearing was "set and heard on July 28, 2004." This is not entirely correct as the matter was never actually heard by the undersigned.

under power conveying the property to Movant was recorded in the Whitfield County Superior Court records.

On November 17, 2004, Movant filed its motion to annul the automatic stay and validate the foreclosure sale which was conducted on August 3. Debtor responded with a complaint which seeks to set aside the foreclosure sale as having been conducted in violation of the automatic stay.[6]

ANALYSIS

Upon filing a voluntary petition under the Bankruptcy Code, a debtor receives the benefit of the automatic stay. The stay of an act against property of the estate, such as a foreclosure proceeding on a debtor's residence, continues until such property is no longer property of the estate. *See* 11 U.S.C. § 362(c)(1). When a case is dismissed, property of the estate revests in the entity in which such property was vested immediately before the case commenced, and as a result is no longer considered property of the estate. *See* 11 U.S.C. § 349(b)(3). The automatic stay of an act against a debtor or property of a debtor continues until the case is closed, dismissed, or when a discharge is granted or denied. *See* 11 U.S.C. § 362(c)(2).

When a case is dismissed, the automatic stay is terminated and when a case is reinstated, the automatic stay is also reinstated. "However, reinstating the case does not retroactively reinstate the automatic stay during the period of time the case was dismissed with respect to creditor conduct that occurred between the dismissal and the reinstatement." *In re Searcy*, 313 B.R. 439, 443 (Bankr. W.D.Ark. 2004); *also see In re Hill*, 305 B.R. 100, 104-06 (Bankr. M.D. Fla. 2003). While the Bankruptcy Code permits the court to retroactively grant relief from the

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[6] The response is titled "Complaint by Debtor to Set Aside Foreclosure Sale Made in Violation of the Automatic Stay," but was filed in the main bankruptcy case and not as a separate Adversary Proceeding. The Court has construed the pleading filed by Debtor as a response to Movant's motion which seeks to validate the foreclosure sale.

stay, no authority exists to permit a court to retroactively impose a stay. *Searcy* at 443 and *Hill* at 106.

The 11th Circuit addressed the issue in *In re Lashley*, 825 F.2d 362 (11th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S.Ct. 1051, 98 L.Ed.2d 1013 (1988), *reh'g denied*, 485 U.S. 1016, 108 S.Ct. 1493, 99 L.Ed.2d 720 (1988). In *Lashley*, the debtors filed a petition under chapter 13 on March 20, 1986. The bankruptcy served to automatically stay a pending foreclosure proceeding in a Florida state court. However, on September 22, 1986, the Bankruptcy Court entered an order dismissing the Lashley's case thereby vacating the automatic stay. On September 29, the Florida state court entered an amended final judgment of foreclosure and directed the court clerk to conduct a foreclosure sale on October 22, 1986. On October 1, the Lashleys served a notice of appeal of the order of dismissal, and on October 21, filed a motion with the Bankruptcy Court for a stay pending appeal. However, the Lashleys never requested that the motion be considered an emergency matter or heard on an expedited basis. The foreclosure sale was conducted on October 22, 1986.

On November 28, 1986, the Bankruptcy Court ruled that its dismissal of September 22, 1986, would be stayed for 30 days in order to permit the Lashleys to seek a stay pending appeal in the district court. Meanwhile, the Lashleys moved to modify the Bankruptcy Court's order of November 28 to show the stay was retroactive to the date of dismissal, September 22. This was denied by the Bankruptcy Court. After the district court dismissed the Lashleys' appeal, an appeal was taken to the 11th Circuit. In its decision affirming the district court, the Court specifically addressed the Bankruptcy Court's authority to retroactively impose the automatic stay. "While the Bankruptcy Code grants the bankruptcy court the power to retroactively *grant relief* from a stay, 11 U.S.C. § 362(d); *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984), the court is unaware of any authority that grants the bankruptcy court power to retroactively *impose* a stay." *Id.* at 364 (emphasis in original).

In Debtor's brief, the argument is made that the Bankruptcy Court, as a court of equity

and pursuant to 11 U.S.C. § 105(a), has the power to set aside the foreclosure sale. Many of the facts do appear to be compelling and the consequences to Debtor substantial. The case was originally dismissed because Debtor did not file a simple amendment to his schedules and did not attend his confirmation hearing. The property foreclosed upon is the Debtor's residence and appears to have had value over and above the debt it secured. Finally, the Court does not question the fact that Ms. Davis has an illness that requires daily outpatient treatment at a hospital. Nonetheless, considering the options available to the Debtor, the Court must consider the equitable considerations in favor of Movant. First, Ms. Davis could have requested that a record be made on July 28 and presented the case before the undersigned for an oral ruling. She could have brought a "no opposition" order to the hearing on July 28 and asked that it be presented for signature that day. The Court has consistently been accommodating to parties who require orders on emergency matters entered on the docket on an expedited basis. In emergencies, the Court has been willing and able to sign and enter orders on the very day of a scheduled hearing. Finally, Debtor could have filed an adversary proceeding and requested a temporary restraining order to prevent the foreclosure sale from going forward while the motion to reopen the case was pending. *See Searcy,* 313 B.R. at 443.

In his brief, Debtor distinguishes cases cited by Movant due to the differences regarding either the actual notice of hearing [*Johnson v. Countrywide Home Loans (In re Johnson)*, 1999 Bankr. LEXIS 849 (Bankr W.D.Tenn. July 16, 1999)], or when the hearing was scheduled (*In re Hill* and *In re Searcy*). The Court does not find these distinctions determinative. The Court is obligated to follow 11th Circuit precedent, and according to *Lashley*, this Court does not have the authority to retroactively impose the automatic stay.[7]

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[7] In a footnote in *Lashley*, not central to the holding of the court, the 11th Circuit refers to the equitable power a Bankruptcy Court may have to set aside a foreclosure sale. 825 F.2d at 364 n.1. The case referred to in the opinion is *Krueger v. Great Pacific Money Markets, Inc. (In re Krueger)*, 69 B.R. 845 (Bankr.C.D.Cal. 1987). In *Krueger* the Bankruptcy Court vacated the foreclosure sale due to improper conduct of the foreclosing creditor. The debtors did not

Bankruptcy courts, as units of the United States district courts, are courts of record, taking action "only by an order duly entered." *In re Johnson,* 1999 Bankr. LEXIS 849 at *6 *citing Schmidt v. Esquire, Inc.* 210 F.2d 908, 914 (7th Cir. 1954) cert. denied 348 U.S. 819, 75 S.Ct. 31, 99 L.Ed. 646. "Preparing written orders is of course a necessary part of any judicial determination....The Federal Rules of Bankruptcy Procedure contain requirements that orders should be entered and should be written.... Orders do not become final until they are docketed. The reasons for respecting finality of judgments do not apply to undocketed orders. They cannot be enforced. They cannot be appealed. Hence, judges may change their decisions until they are docketed." *In re Nail*, 195 B.R. 922, 930 (Bankr. N.D.Ala. 1996) (internal citations omitted).

The Court frequently signs "no opposition" orders upon their submission, and in fact did so in this case when the order was eventually submitted for signature. This is a function of the large number of cases assigned to this Court and the plethora of matters set down on any given calendar. As mentioned above, this particular calendar was twenty-seven pages long. The Court cannot operate efficiently if required to orally rule on every unopposed routine matter. Nonetheless, the Court will always entertain matters where the parties request that a record be made. The importance of parties promptly submitting orders is memorialized in the local rules of this Court which require that orders are to be submitted within seven days of the hearing.[8] However, the Court is under no obligation to sign an order merely because there was no opposition at a calendar call. That is why the entry of the written order is so imperative. Accordingly, it is

ORDERED that Movant's motion seeking to annul the automatic stay and validate the

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attend a rescheduled confirmation hearing due to the failure by creditor's counsel to notify counsel for the debtors as instructed by the Court. The Court found it inequitable to allow the creditor to benefit at the debtors' expense despite being the principal cause for the debtors' failure to have their full day in court. *Id* at 850. That is not the situation in the instant case.

[8]See Bankruptcy Local Rules 9013-2 and 9013-3(a).

foreclosure sale conducted on August 3, 2004, is hereby **GRANTED**. Debtor's complaint seeking to set aside the foreclosure sale as having been made in violation of the automatic stay is **DENIED**.

This Order addresses the applicability of the automatic stay as forth in 11 U.S.C. § 362 as it pertains to the foreclosure conducted by Movant on August 3, 2004. Importantly, this Order does not make any determination as to whether Movant's foreclosure sale was otherwise in compliance with applicable non-bankruptcy state law.

The Clerk is directed to serve a copy of this Order on the parties listed on the attached distribution list..

IT IS SO ORDERED.

This the 3rd day of February, 2005.

Mary Grace Diehl

MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

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