



IT IS ORDERED as set forth below:

Date: July 01, 2008

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:	:	
	:	Chapter 7
RANDALL WAYNE FINNEY and	:	
PATRICIA ELAINE FINNEY,	:	Case No. 05-83587-PWB
	:	
Debtors.	:	
	:	

**ORDER WITH REGARD TO REGISTRY FUNDS AND INTERPLEADER
ACTION IN SUPERIOR COURT OF COBB COUNTY**

This Order considers several issues arising from the foreclosure sale, while this case was pending, of the Debtor's residence after stay relief had been granted that generated surplus proceeds and from an interpleader action that the foreclosing creditor filed, after the case had been closed, in the Superior Court of Cobb County against holders of junior deeds to secure debt and the Debtors. Upon motion of the Trustee asserting that the surplus funds should be the subject of administration in this case, the Court reopened the case.

The Trustee then filed a motion representing that the Superior Court had entered an Order transferring the surplus funds and the interpleader action to this Court and requesting that the funds be paid over to him in accordance with the order granting stay relief that had directed the foreclosing creditor to pay over any surplus proceeds to the trustee. Shortly thereafter, the Clerk of the Superior Court of Cobb County transmitted to the Clerk of this Court funds in the amount of \$ 18,696 and the original papers filed in the interpleader action.

For reasons explained below, the Court will order that the funds remain in the registry of this Court, that the Clerk of this Court return the original papers filed in the interpleader action to the Clerk of the Superior Court of Cobb County because this Court does not have jurisdiction of that civil proceeding, and that the automatic stay of 11 U.S.C. § 362(a) be retroactively annulled so that the Superior Court of Cobb County may exercise its jurisdiction with regard to the issues raised in the interpleader action.

I. Factual Background

The Debtors filed this bankruptcy case on Chapter 13 on October 15, 2005. They scheduled a residence known generally as 2407 Sawmill Road, Marietta, Cobb County, Georgia (the “Property”), subject to the following three deeds to secure debt (referred to as “mortgages”): a first priority deed to secure debt in favor of Countrywide Home Loans; a second priority deed to secure debt in favor of HSBC Mortgage Services, and a third priority deed to secure debt in favor of Ocwen Federal Bank. The schedules reflect that the Debtors desired to surrender this property. [Docket 1, Schedule C].

On the motion of Countrywide Home Loans, Inc. (“Countrywide”) [9], the Court on January 31, 2006, entered an order [23] granting relief from the automatic stay of 11

U.S.C. § 362(a) to permit Countrywide to foreclose on the Property (the “Stay Relief Order”). Like many orders granting relief from the stay to permit the holder of a security deed to foreclose that are routinely entered in this District, the Stay Relief Order contained the following provision:

[U]pon the completion of any foreclosure sale, any funds in excess of the payoff due to [Countrywide] under its Note and Security Deed shall be paid to the Trustee for the benefit of the Estate.

On February 13, 2006, on the motion of Ocwen Loan Servicing, LLC, as Servicer for U.S. Bank, N.A., as Trustee, f/k/a First Trust N.A., as Indenture Trustee for Keystone Asset-Backed Securities, Series 1997-P3 [19] (“Ocwen”), the Court entered an Order granting relief from the automatic stay to permit Ocwen to foreclose. [27].¹ In language similar to that of the Stay Relief Order, this Order stated:

Any proceeds realized from said foreclosure sale, which are in excess of those amounts owed to Movant under the terms of the subject Note and Security Deed, shall be remitted to the Chapter 13 Trustee.

The proofs of claim that Ocwen filed in this case identify the actual holder of this security deed as U.S. Bank, N.A., as Trustee (“U.S. Bank”). [Proof of claims Nos. 4 and 5]. Attached to the proofs of claim are copies of documents reflecting a note and security deed originally in favor of Unicor Funding, Inc., and an assignment to The First National Bank of Keystone.

The Court confirmed the Debtors’ plan on February 8, 2006. [26]. Eleven months later,

¹The Order, presented by counsel for Ocwen without opposition from the Debtors or the Chapter 13 Trustee and routinely entered by the Court, recites that Ocwen contends it has a first priority deed to secure debt on the Property. It appears that this assertion is inaccurate.

on January 31, 2007, the Debtors converted the case to Chapter 7. [55], and Paul H. Anderson, Jr., became the Chapter 7 Trustee (the “Trustee”). The Trustee filed a No Distribution Report on March 29, 2007, and on May 15, 2007, the Court entered an order discharging the Debtors and closing the case. [65].

In the meantime, Countrywide conducted a foreclosure sale on April 4, 2006. The sale to a third party purchaser produced sales proceeds in excess of Countrywide’s debt in the amount of \$ 18,696. At that time, this case was still under Chapter 13. Although the Stay Relief Order provided for Countrywide to pay the surplus funds to the chapter 13 Trustee, it did not. Rather, as explained by counsel for Countrywide at the hearing in this matter on June 24, 2008, counsel for Countrywide attempted to obtain information from the holders of two subordinate deeds to secure debt on the Property so that the surplus funds could be disbursed to them in accordance with their priorities.

According to information in this Court’s records, the two other creditors are HSBC Mortgage Services, listed as the creditor on proof of claim number 2,² and U.S. Bank listed as the creditor on proofs of claim numbers 4 and 5, with Ocwen as servicer, as stated in its motion for relief from stay. At the hearing, however, Countrywide’s counsel reported that the two creditors are Ameribank, Inc., as successor by merger to First National Bank of Keystone (“Ameribank”), and Household Finance Corporation, as successor by merger to Household Financial Services (“HFC”).

²Attached to Proof of Claim No 2 filed by HSBC is a copy of a deed to secure debt in favor of Provident Bank and an assignment of it to Mortgage Electronic Registration Systems, Inc. The proof of claim was apparently filed by a law firm, Miller & Clark, P.C., 19732 MacArthur Blvd., Suite 100, Irvine, California, 92612, as shown on a proof of service attached to the proof of claim.

According to Countrywide's counsel, the subordinate creditors did not respond to efforts to ascertain the amounts they were due so that Countrywide could effect a lawful disbursement of the surplus funds. Thus, Countrywide on December 3, 2007, initiated an interpleader action in the Superior Court of Cobb County, Civil Action No. 07-1-10791-05 (the "Interpleader Action") against Ameribank, HFC, and the Debtors and paid the surplus funds into the registry of the Superior Court. Counsel further reported that the two creditors had been served with process in the Interpleader Action but had not answered.³ The Debtors were also served and filed *pro se* pleadings in the Interpleader Action asserting a right to the surplus funds.

By this time, the Chapter 13 case had been converted to Chapter 7 and closed. After the holders of the junior security deeds failed to answer in the Interpleader Action, Countrywide notified the Trustee of the existence of the funds in the Superior Court's registry. The Trustee moved to reopen this case so that he could collect the surplus funds for the benefit of creditors. [67]. The Court granted the motion by order entered on March 25, 2008. [68].

The story now returns to the Superior Court. On April 7, 2008, the Superior Court entered an Order awarding attorney's fees in the amount of \$3,381.66 to Countrywide and dismissing it from the Interpleader Action. Thereafter, the Trustee was permitted to intervene and sought the return of the attorney's fees and disbursement of the funds in the Superior Court's registry to the Trustee in accordance with the Stay Relief Order. Countrywide responded by requesting that the Superior Court vacate its April 7 Order, dismiss Countrywide without awarding any attorney's fees, and order the disbursement of the registry funds to the Trustee.

³The Court has not reviewed whether Ameribank and HFC were properly served in the Interpleader Action.

No one filed a notice of removal under Rule 9027(a) of the Federal Rules of Bankruptcy Procedure.

On May 12, 2008, the Superior Court entered its Final Transfer Order (the “Transfer Order”) vacating its April 7 Order and transferring the Interpleader Action to this Court for further action along with all funds held in the registry of the Superior Court. In due course, the Clerk of this Court received, and deposited into this Court’s registry, the sum of \$ 18,696, and the original papers filed in the Interpleader Action. The Court has directed the Clerk to file copies of the papers received from the Clerk of the Superior Court of Cobb County in this case.

On May 19, 2008, the Trustee filed in this Court a motion for an order directing the Clerk of this Court to pay over the surplus funds being transferred from the Superior Court. [82]. The Court entered an Order scheduling a hearing on the motion for June 24, 2008 [83], and directed that counsel for Countrywide serve it on “all junior lienholders as required by Bankruptcy Rule 7004, on any attorneys representing junior lienholders in the bankruptcy case, and upon persons signing proofs of claims on behalf of junior lienholders in the bankruptcy case.” Although both HSBC Mortgage Services and Ocwen had filed proofs of claim in this case and although Ocwen had appeared by counsel to obtain relief from stay, counsel for Countrywide did not serve the persons filing the proofs of claim or the motion for relief from stay, apparently because HFC and Ameribank now hold the claims.⁴ Instead, he served Ameribank and HFC by mail in the manner shown in his certificate of service. [85].⁵

⁴Nothing in this Court’s records other than the report of Countrywide at the hearing establishes this.

⁵The Court does not determine the sufficiency of notice to Ameribank or HFC.

II. Discussion

This Court now has the surplus proceeds realized from a foreclosure sale of the Property conducted pursuant to the Stay Relief Order and the original papers filed in the Interpleader Action. The Trustee's motion requests that the Court order the disbursement of the funds to him, but the motion does not address what happens after that and what happens with regard to the Interpleader Action.

The Court begins by elaborating on the provision of the Stay Relief Order that directed Countrywide to pay over any surplus proceeds from foreclosure to the trustee, who at the time of the foreclosure was Mary Ida Townson, the Chapter 13 Trustee. Although the Stay Relief Order by its terms recites that any surplus funds be paid to the trustee "for the benefit of the estate," the Stay Relief Order did not and could not impair the rights of any creditor with a subordinate interest in the Property. So if the Chapter 13 Trustee had timely received the surplus funds in this case from Countrywide, she would have had the responsibility to hold them for the benefit of whoever was entitled to them under applicable law; the surplus funds would not and could not become unencumbered property of the estate merely by virtue of the inclusion in the Stay Relief Order of the provision directing payment of any surplus to the trustee "for the benefit of the estate."

In view of this, a provision such as the one in question must have two necessary consequences. First, the foreclosing creditor's disbursement of the surplus funds to the trustee relieves the foreclosing creditor from any further responsibility to account for them or take action to insure their proper disbursement under applicable law. Second, the trustee by receiving the

funds necessarily must assume the responsibility for their proper disbursement.⁶

The Trustee does not have a different view. He acknowledges that, if he receives the funds, he must assume responsibility for their proper disbursement, including the continuation or initiation of appropriate judicial proceedings for a determination of the rights of potential claimants in the surplus proceeds.

The situation here, then, is that surplus proceeds from the foreclosure sale of the Property exist but who is entitled to those funds has not been established. The Court must first determine what to do with the funds pending further proceedings with regard to their proper disbursement.

The funds paid into the registry of the Superior Court in the Interpleader Action that are now in the registry of this Court are proceeds from the sale of property of the Debtors or of their estate. The District Court (of which this Court is a unit, 28 U.S.C. § 151), in which a bankruptcy case is pending has exclusive jurisdiction of “all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.” 28 U.S.C. § 1334(e)(1). This Court, accordingly, has jurisdiction with regard to the funds and it is appropriate that they remain in the registry of this Court pending judicial determination of who is entitled to them. In this regard, disbursement of the funds to the Trustee would have no substantive consequence,

⁶As an aside, the Court notes that it is not clear why a trustee would want to, or should, undertake the burden of sorting out the proper recipients of surplus funds from a foreclosure unless there is some reasonable basis to believe that the estate’s interests might be affected. Ordinarily, one would not expect the estate to have a significant interest in the foreclosure because, if there were realizable equity in the property being foreclosed, the trustee would presumably oppose stay relief and it would not be granted. A provision in an order for stay relief requiring the foreclosing creditor to report any surplus prior to disbursement and to pay over any surplus proceeds to the extent that they are payable on account of the debtor’s or the estate’s interest in the property would seem to protect any interests of the estate in the outcome of a foreclosure sale without subjecting the trustee to the potential burdens of dealing with surplus proceeds in which the estate has no interest because they are payable to subordinate creditors.

and there is no reason that the Trustee, rather than this Court, have custody of them. Accordingly, the Court will deny the Trustee's request for disbursement of the funds to him so that they remain in this Court's registry.

This leaves the questions of what to do with the original papers filed in the Interpleader Action and how to determine the rights of parties in the surplus proceeds. If all of the parties with a potential interest in the funds are parties to the Interpleader Action, it would seem to be appropriate that the issues be determined in that proceeding.

This Court, however, does not have authority to hear and determine the Interpleader Action for lack of jurisdiction. The District Court has jurisdiction with regard to civil proceedings relating to the determination of rights of persons in the subject funds under 28 U.S.C. § 1334(b). This Court has authority to hear such a proceeding by reference from the District Court under 28 U.S.C. § 157(a) pursuant to L.R. 83.7. Although the Court need not presently determine the issue, it appears that such proceedings would be core proceedings under 28 U.S.C. § 157(b)(2)(K), (M), (N), or (O) such that this Court could also determine such proceedings under 28 U.S.C. § 157(b)(1). Jurisdiction under § 1334(b) is original, but not exclusive. Consequently, the Superior Court of Cobb County also has jurisdiction with regard to disputes concerning these funds, although the automatic stay of § 362(a) could preclude exercise of that jurisdiction in the absence of relief from the stay. The Court will, for reasons set forth below, pretermitt the need for discussion of the effect of the stay on the Interpleader Action by annulling it, to the extent it applied, retroactively to the date of its filing.

Bankruptcy jurisdiction does not exist, however, with regard to the Interpleader Action itself. Although 28 U.S.C. § 1452 permits removal of a civil action, with some exceptions not

material here, such removal must occur at the instance of a party. Rule 9027(a)(3) of the Federal Rules of Bankruptcy Procedure requires that a party desiring to remove a proceeding file a notice of removal within 30 days after receipt of a copy of the initial pleading setting forth the claim or cause of action to be removed or receipt of summons if the initial pleading has been filed with the court but not served with the summons. It is undisputed that no one sought removal of the Interpleader Action and that the time for doing so has expired. The District Court, therefore, does not have jurisdiction of the Interpleader Action and this Court therefore has no authority to hear it. The Court, therefore, will direct the Clerk of this Court to return the original papers to the Clerk of the Superior Court of Cobb County.

Because the Interpleader Action has been pending in the Superior Court and because the Superior Court has concurrent jurisdiction over those issues, it is appropriate for the Superior Court to proceed to adjudicate some or all of those issues to the extent the Superior Court deems it appropriate to do so. The Stay Relief Order may be interpreted to preclude determination of rights to the surplus proceeds in the Superior Court because it directed their disbursement to the bankruptcy trustee. And the automatic stay of 11 U.S.C. § 362(a) may arguably apply to preclude the parties from seeking a determination of rights to the surplus proceeds in the Superior Court.

In the circumstances of this case, neither the automatic stay, nor the provisions of the Stay Relief Order, nor any other principle of bankruptcy law, should operate to nullify any aspect of the Interpleader Action. As far as the Court can tell, every party in the Interpleader Action has either sought relief from the Superior Court in the Interpleader Action or failed to appear. At the times of the entry of the Stay Relief Order, the conduct of the foreclosure sale and, indeed,

the institution of the Interpleader Action, it appears that neither the Debtors nor the bankruptcy estate had any significant interest in the surplus proceeds. Neither the Debtors nor the estate can have any interest in the funds unless and until there is a determination that the creditors do not. Thus, at those times, no bankruptcy purpose existed, or would have been served, by a bankruptcy trustee's involvement in the process of distributing the surplus funds to subordinate creditors. The Court finds no basis to believe that any party has acted or failed to act in reliance on, or because of, the possible applicability of the automatic stay or the provisions of the Stay Relief Order. These circumstances provide cause for the retroactive annulment of the automatic stay of 11 U.S.C. § 362(a) with regard to determination of the rights of any parties to the surplus proceeds and for modification of the Stay Relief Order to permit the Interpleader Action to proceed.

In making the aforesaid determinations, the Court has taken into account the fact that Countrywide violated the Stay Relief Order when it did not pay the funds over to the chapter 13 Trustee. The Court does not condone a violation of its orders. But this violation appears to be the result of oversight, not intentional design. Indeed, Countrywide and its counsel presumably could have avoided a great deal of time and trouble for themselves if they had followed the Stay Relief Order and paid the funds to the chapter 13 Trustee. Given the facts that no one has sought corrective action from this Court, and that, to the contrary, the parties have elected to proceed in the Interpleader Action without removing it, the Court declines to interfere with the progress of that pending action.

The Superior Court's Transfer Order transferred the Interpleader Action to this Court "for further action" "in light of the reopened bankruptcy case." The Court does not by this Order

mean to suggest or imply what the Superior Court may or must do with the Interpleader Action. This Court appreciates the Superior Court's concern that a Bankruptcy Court should determine issues relating to a bankruptcy case, but for reasons set forth above the Superior Court's jurisdiction is concurrent with this Court's and nothing prevents its exercise.

At the same time, this Court does not intend to burden the Superior Court. This Court's inability to exercise jurisdiction of the Interpleader Action itself does not preclude the initiation of an independent adversary proceeding in this Court seeking resolution of the issues. In this regard, bankruptcy purposes for litigation of issues in this Court may exist to the extent that the Trustee disputes the entitlement of Countrywide to attorney's fees on the basis of the Stay Relief Order or contends that the estate, to the exclusion of the Debtors, is entitled to the funds if the subordinate creditors are not. This Court can and will hear and, to the extent permissible, determine any issues that the parties present in a proceeding properly brought before it, subject to the exercise of discretion to defer to the Superior Court for determination of issues that the Superior Court concludes it should appropriately resolve.

The Court thus intends by this Order to recognize that the Superior Court has the right and discretion to determine in the first instance whether the Interpleader Action should proceed in the Superior Court, whether in the exercise of its discretion it should determine issues that may involve bankruptcy law, and whether it should take appropriate action to stay or defer proceedings in the Interpleader Action and direct the parties to bring some or all of the issues before this Court through an appropriate adversary proceeding.

The Court also intends by this Order to make it clear that the parties are responsible for avoiding duplicative proceedings that result in a waste of judicial resources of either the Superior

Court or this Court. Thus, if any of the parties desires that this Court determine any issues relating to the surplus proceeds, it should take action to do so promptly, advise the Superior Court of its action, and seek appropriate direction from the Superior Court as to whether, in view of the filing of an adversary proceeding in this Court, the Superior Court deems it appropriate that the Interpleader Action proceed.

III. Conclusion

Based on, and in accordance with, the foregoing, it is hereby **ORDERED and ADJUDGED** as follows:

1. The Court will retain the surplus proceeds in the registry of this Court.
2. The Clerk is directed to file copies of the original papers submitted by the Clerk of the Superior Court of Cobb County in the records of this case and thereafter to return said papers, together with a copy of this Order, to the Clerk of the Superior Court of Cobb County.

The Clerk is directed to mail copies of this Order to the persons shown on the attached Distribution List.

END OF ORDER

Distribution List

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Two Piedmont Center - Suite 315
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HSBC Mortgage Services
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OCWEN
ATTN: Bankruptcy Department
12650 Ingenuity Drive
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OCWEN
ATTN: Nichelle Jones, Bankruptcy Coordinator
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Ameribank, Inc. as sbm to
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