UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	:	CASE NUMBER
JUDITH OLSEN,	:	**06-66198-MGD**
Debtor.	:	CHAPTER 13
GRP FINANCIAL SERVICES CORP.,	:	
Movant,	:	
v.	:	**CONTESTED MATTER**
JUDITH OLSEN, Debtor, and MARY IDA TOWNSON, Chapter 13 Trustee,	:	
Respondents.	:	

ORDER GRANTING GRP FINANCIAL SERVICES CORP.'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY AND MOTION TO ANNUL AUTOMATIC STAY AND VALIDATE FORECLOSURE SALE

I. INTRODUCTION

Before the Court is Movant GRP Financial Services Corp.'s Amendment to Emergency Motion for Relief from the Automatic Stay and Motion to Annul Automatic Stay and Validate Foreclosure Sale (Docket No. 21). A hearing in the matter was held before the undersigned on September 26, 2006.[1] At the hearing, Debtor requested the opportunity to brief the issue of whether Debtor's Chapter 13 petition and plan were filed in good faith. John Klotz, counsel for Debtor,[2] timely filed Debtor's Memorandum in Opposition to Motion to Annul Automatic Stay and Validate Foreclosure on October 6,

[1] Movant's Motion to Quash Subpoenas was also heard at the September 26th evidentiary hearing. (Docket No. 47). The Court granted Movant's Motion to Quash on the basis that neither of the subpoenas that Debtor served on Movant, which required Movant to provide certain documents to Debtor at the evidentiary hearing, had been properly executed by an authorized individual or filed with the Court. (Docket No. 51).

[2] Debtor filed her case and proceeded *pro se* prior to the Court's hearing on Movant's Motion. The Court granted Mr. Klotz's Application for Admission Pro Hac Vice on the hearing date, September 26, 2006. (Docket No. 49).

2006. (Docket No. 53). Movant did not file any additional materials. The Motion places two issues before the Court. First, whether cause exists to lift the stay pursuant to 11 U.S.C. § 362(d) as requested by Movant, and second, whether Movant GRP Financial Services Corp. is the proper party to seek this relief. For the reasons set forth herein, the Court concludes that Movant is entitled to the requested relief and **GRANTS** Movant's Motion.

II. PROCEDURAL HISTORY

The loan on Debtor's home, located at 525 Rose Border Drive, Roswell, Georgia 30075, first went into default in September of 2002; it is undisputed that Debtor has not made any payments on this debt since that time. The promissory note and deed to secure debt were ultimately assigned to GRP Financial Services Corp., but two bankruptcy filings and extensive district court litigation prevented Movant from completing a foreclosure sale of the property. The complicated history between the parties warrants a detailed recitation.

A. Debtor's First Chapter 13 Bankruptcy Case

Debtor filed her first Chapter 13 case, Case No. 03-98270-JB, on August 4, 2003. Following the November 18, 2003 hearing on confirmation of Debtor's Chapter 13 Plan (which hearing had been reset from the October 7, 2003 and October 28, 2003 calendars), the Court entered an order indicating that Debtor's case was not funded and directing Debtor to tender $3,474.00 in certified funds to the Trustee on or before December 1, 2003, to avoid dismissal of her case. (03-98270-JB, Docket No. 23). Debtor's case was dismissed on December 8, 2003, prior to the confirmation hearing, pursuant to a status report filed by the Chapter 13 Trustee indicating that Debtor had failed to tender any funds.

During the pendency of this first Chapter 13 case, Debtor filed an adversary proceeding, Adversary No. 03-09338-JB, against Fairbanks Capital Corp. ("Fairbanks")

alleging violations of the Truth in Lending Act, the United States Constitution, state and national bank charters, and usury laws. The gravamen of Debtor's complaint was that Mortgage Portfolio Services, Inc., the original holder of the mortgage and promissory note on Debtor's property, engaged in illegal "lending credit" activities, including forging Debtor's name on a check, thus rendering the promissory note and mortgage held by Fairbanks void. Fairbanks answered Debtor's complaint on November 26, 2003, but the Adversary Proceeding was dismissed on January 8, 2004, due to the dismissal of Debtor's bankruptcy case.

B. Debtor's District Court Case

1. Procedural History of the District Court Case

On February 18, 2004, shortly after the dismissal of Debtor's first Chapter 13 case and adversary proceeding against Fairbanks, Debtor filed a complaint in the United States District Court for the Northern District of Georgia against Fairbanks, DLJ Mortgage Capital, Inc., GRP Financial Services Corp., Mortgage Portfolio Services, Inc., and DOES 1-10 challenging the validity of the loan transaction underlying the promissory note and deed to secure debt on Debtor's residence. (Civil Action No. 1:04-CV-0458). Defendant GRP Financial Services Corp. ("Defendant" or "GRP") answered on March 11, 2004. Pleadings filed by GRP on April 20, 2004, set forth that Debtor took out a loan with a principal balance of $296,000.00 on July 12, 2000; the loan was ultimately assigned to GRP Financial Services, Inc.; GRP Financial Services Corp. was the holder of a legitimate promissory note and deed to secure debt executed by Debtor; and Debtor was in default under the terms of the note and security deed. (1:04-CV-0458, Docket Nos. 4, 5, and 6). Debtor voluntarily dismissed Fairbanks, DLJ Mortgage Capital, Inc., and Mortgage Portfolio Services, Inc., pursuant to Federal Rule of Civil Procedure 41(a)(1)(i) on July 14,

2004, leaving GRP Financial Services Corp. as the sole defendant in the case.[3] (1:04-CV-0458, Docket No. 10).

GRP filed a Motion for Summary Judgment and Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) on August 25, 2004. (1:04-CV-0458, Docket No. 11). GRP's Motion recited that it had initiated foreclosure proceedings on Debtor's property and alleged that the foreclosure prompted Debtor to file her complaint. The Motion indicated that the balance on the subject loan as of the date of the Motion, was $293,222.72, with a contractual arrearage of $67,920.91 and that the loan was due for the September 17, 2002, payment. Debtor filed her response to GRP's Motion for Summary Judgment on September 15, 2004. (1:04-CV-0458, Docket No. 14). Attached to Debtor's 25-page Response were 246 pages of documents that appear to be a continuation of the "Form S-3" registration statement filed with the Securities and Exchange Commission by Household Consumer Loan Corporation II that was incorporated into, and constituted the bulk of, Debtor's Response. Debtor's Response challenged the legality of the transactions through which GRP Financial Services Corp. obtained the subject note and deed to secure debt and indicated that the attached document was direct evidence that Mortgage Portfolio Services was not the owner of receivables sold to Household Mortgage Services (HSBC) and/or GRP Financial Services Corp. Also attached to Debtor's response was a Notice of Removal indicating that if Debtor's request for relief or dismissal was denied, Debtor would remove her case to the Federal Tribal Circuit Court pursuant to Title 25 U.S.C. 3601, the Treaty of 1778, and the Treaty of 1863. (Debtor's Response at 16.)

On December 20, 2004, the District Court denied, without prejudice, GRP's Motion for Summary Judgement and Motion to Dismiss because the motion did not comply with the local rules. (1:04-CV-0458, Docket No. 15). While the District Court's Order was a

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[3] Debtor's voluntary dismissal does not make any reference to originally named defendant "DOES 1-10." However, after the dismissal, Debtor's case proceeded only against GRP and the District Court's orders list only GRP as a defendant.

procedural denial, the Order clarified the parameters of the case by stating "[t]hough the relief Plaintiff seeks is unclear based on the Complaint, the Court infers from Plaintiff's allegations that she is seeking a declaratory judgment finding that Plaintiff is not liable to Defendant for the loan." The Order further gave Defendant twenty days to file an amended motion for summary judgment. GRP did not file an amended motion within that timeframe.

Debtor filed a document that the Court construed as Plaintiff's Motion for Declaratory Judgment on March 4, 2005. (1:04-CV-0458, Docket No. 17). Attached to the motion were approximately 84 pages of documents, which appear to be "affidavits" by Debtor regarding her disputes with the mortgage servicing companies that serviced Debtor's loan that were mailed to officers of those servicing companies, including GRP Financial Services Corp. GRP filed its response to Debtor's Motion for Declaratory Judgment (1:04-CV-0458, Docket No. 21), but the Court's ruling thereon was deferred when the Court entered its March 22, 2005 Order, which granted GRP's request to extend discovery and motion for leave to file its motion for summary judgment out of time (1:04-CV-0458, Docket No. 22). A discovery dispute ensued when Debtor refused to answer questions at a deposition on the basis that Richard Maner, counsel for GRP, had no authority to ask Debtor questions because Mr. Maner and/or GRP had not produced the original promissory note signed by Debtor. *See* Deposition of Judith Olsen (1:04-CV-0458, Docket No. 25). On June 3, 2005, the Court entered an order compelling Debtor to appear at a subsequent deposition and to provide responsive answers to Defendant's questions. The Court denied GRP's request to impose sanctions, in part, based on Debtor's *pro se* status, and the ruling on Debtor's Motion for Declaratory Judgment was again deferred. (1:04-CV-0458, Docket No. 27).

Discovery was again extended when Debtor was unable to attend her second deposition. (1:04-CV-0458, Docket No. 30). A third request to extend discovery was filed by Debtor based on the fact that GRP Financial Services Corp. had recently been purchased

by Wells Fargo Bank, N.A. (1:04-CV-0458, Docket No. 36). GRP timely filed its response indicating that it had responded to all of Debtor's discovery requests and that the acquisition had no effect on GRP's status as the holder of the subject note; the Court denied Debtor's motion to extend discovery in its Order dated September 22, 2005. (1:04-CV-0458, Docket Nos. 37 and 38).

On September 30, 2005, Debtor filed her Motion for Leave to File Supplemental Complaint along with her proposed supplemental complaint, which alleged that GRP was no longer the holder or owner of the note, or the servicer of the loan, due to the sale of GRP to Structured Asset Securities Corp and Debtor subsequently filed her Motion for Oral Argument thereon. (1:04-CV-0458, Docket Nos. 39 and 40).

In its February 13, 2006 Order, the District Court construed GRP's Supplemental Brief in Support of Motion for Summary Judgment and Statement of Material Facts, filed August 17, 2005, as a motion renewing and incorporating GRP's original Motion for Summary Judgment, which had previously been dismissed for failing to include a statement of material facts. (1:04-CV-0458, Docket No. 43). GRP thereafter filed additional documents in support of its Motion for Summary Judgment, including the Affidavit of Kristen Tess, Secretary for GRP, which outlined the transfer of Debtor's loan to GRP. (1:04-CV-0458, Docket No. 49). Debtor then filed a Motion to Strike the affidavit on the basis that the affidavit impermissibly raised issues regarding a Limited Power of Authority given to GRP in connection with the sale and assignment of loans held by GRP. (1:04-CV-0458, Docket No. 52).

2. District Court's Order Establishing GRP Financial Services Corp.'s Authority to Foreclose

On March 27, 2006, the District Court entered an Order granting Debtor's Motion for leave to file Supplemental Complaint *nunc pro tunc*, granting GRP's Motion for Summary Judgment, denying Debtor's Motion for Declaratory Judgment and Motion to Strike, and dismissing Debtor's Motion for Oral Argument as Moot (the "Order"), thereby

resolving all pending motion in the case. (1:04-CV-0458, Docket No. 53).

After a detailed recitation of the facts, the District Court found that Defendant GRP Financial Services Corp. had the authority to foreclose on Debtor's property. The order established that the lawsuit concerned a thirty-year loan made to Debtor by Mortgage Portfolio Services, Inc. on July 12, 2000, in the original principal amount of $296,000.00.[4] Debtor used the loan proceeds to pay off two existing mortgages and property tax debts; the remaining balance of $48,645.46 was wired into Debtor's bank account. Order at 2 (citing the Deposition of James Brown, closing attorney, at 10:4-9 (1:04-CV-0458, Docket No. 34)). The loan was evidenced by a promissory note and a deed to secure debt on Debtor's home at 525 Rose Border Drive, Roswell, Georgia 30075; the security deed provided that the note and deed could be sold without prior notice to the grantor and that the loan servicer could be changed even without a sale of the note. Order at 2 (citing the Security Deed at 7).

On July 17, 2000, Mortgage Portfolio Services, Inc., the original lender, transferred and assigned the subject deed to secure debt and promissory note to Mortgage Electronic Registration Systems, Inc. ("M.E.R.S."), as nominee for Household Finance Corporation. On September 17, 2004, M.E.R.S. assigned the security deed and note to GRP Loan, LLC, an affiliate of Defendant GRP Financial Services Corp., and GRP Financial Services Corp. became the servicer of Debtor's loan. GRP Loan, LLC, transferred the security deed to Wells Fargo Bank, as Indenture Trustee for the GRP/AG Real Estate Asset Trust 2004-1, on September 20, 2004. Order at 3 (citing the Affidavit of Kristen Tess (1:04-CV-0458, Docket No. 49)). On April 1, 2005, Lehman Brothers Holdings, Inc. executed a "Mortgage Loan Sale and Assignment Agreement" that resulted in the sale of a bundle of real estate

[4] It was undisputed that Debtor stopped making payments on the loan in or about September of 2002. The affidavit of Natalie Bowden, President of GRP Financial Services Corp., stated that the principal balance of the loan was $293,222.72 and Debtor was $67,920.91 in arrears as of August 25, 2004. March 27, 2006, Order at 5.

assets to Structured Asset Securities Corporation, including the GRP/AG Real Estate Asset Trust 2004-1. Attached to the sale agreement was a "Reconstituted Servicing Agreement," also dated April 1, 2005, which named Aurora Loan Servicing LLC as "Master Servicer" and Wells Fargo Bank, N.A., as "Servicer." *Id.* The servicing agreement was unclear as to whether Wells Fargo remained the servicer for the GRP/AG Real Estate Asset Trust 2004-1 loans, but a Limited Power of Attorney executed on May 2, 2005, between Wells Fargo and Defendant GRP Financial Services Corp. gave Defendant "full authority and power to execute and deliver on behalf of [Wells Fargo]...[a]ffidavits of debt, notice of default, declaration of default, notices of foreclosure, and all such...instruments as are appropriate to effect any sale, transfer or disposition of real property acquired through foreclosure or otherwise." Order at 4 (citing the Affidavit of Kristen Tess at 10). It was this chain of transfers and assignments upon which the Court based its finding that GRP Financial Services Corp. had authority to foreclose on Debtor's property.

The District Court found no merit in Debtor's argument that the underlying loan was invalid and made a finding that the loan was valid based on the affidavit of GRP Financial Services Corp.'s president, the promissory note and security deed between Debtor and Mortgage Portfolio Services, the copies of checks issued by the closing attorney's escrow account in payment of Debtor's previous mortgage and tax debts, and the documentation of the wire transfer of the balance of the loan into Debtor's bank account filed by Defendant. The District Court also found that the transfers and assignments to GRP Financial Services Corp., which ultimately gave Defendant the authority to foreclose, were valid under Georgia Law as codified in O.C.G.A. §§ 44-14-60 and 44-14-64(a).[5] The District Court based this finding largely on the Affidavit of Kristen Tess, which traced the

[5] O.C.G.A. § 44-14-60 provides that a security deed "pass[es] the title of the property to the grantee until the debt or debts which the conveyance was made to secure shall be fully paid." O.C.G.A. § 44-14-64(a) further provides that deeds to secure debt may be transferred so long as the transfers are in writing, signed by the grantee or last transferee, and witnesses as required for deeds.

transfers and assignments as detailed above, in the face of Debtor's failure to "point the Court to any portion of [the hundreds of pages of Securities and Exchange Commission filings submitted by Debtor] which would establish a genuine issue of material fact with respect to GRP Loan's acquisition of the security deed and Defendant's status as the servicer."

Finally, the District Court held that Georgia law did not require Defendant to produce the "original blue ink [promissory] note" citing O.C.G.A. § 44-14-64(b), which provides that "[t]ransfers of deeds to secure debt may be endorsed upon the original deed or by a separate instrument identifying the transfer and shall be sufficient to transfer the property therein described and the indebtedness therein secured, whether the indebtedness is evidenced by a note or other instrument or is an indebtedness which arises out of the terms or operation of the deed, together with the powers granted without specific mention thereof." Order at 10-11. The District Court found that the security deed and promissory note executed by Debtor were consolidated into one document – a security deed – that was ultimately transferred or assigned to Defendant and that such a conveyance was proper under Georgia law. Order at 11. The Clerk's judgment in favor of GRP for the cost of the action was entered on March 27, 2006. Debtor did not appeal the Court's Order and the case was closed shortly thereafter on April 3, 2006.

C. Debtor's Second Chapter 13 Bankruptcy Case

Approximately two months after the judgment was entered against Debtor in District Court, Debtor filed a "skeletal" petition for relief under Chapter 13 of the Bankruptcy Code on Friday, June 2, 2006. Debtor's house was scheduled for a foreclosure sale on Tuesday, June 6, 2006. On June 5, 2006, Movant GRP Financial Services Corp. filed its Emergency Motion for Relief from the Automatic Stay requesting the Court's authorization to proceed with the scheduled foreclosure sale of Debtor's home. (Docket

No. 4). On June 6, 2006, this Court entered an Interim Order Modifying Automatic Stay allowing Movant to cry out the scheduled foreclosure sale. (Docket No. 13).[6]

On June 21, 2006, Movant filed its Amendment to Emergency Motion for Relief from the Automatic Stay and Motion to Annul Automatic Stay and Validate Foreclosure Sale. (Docket No. 21). On the same day, Movant filed its Objection to Confirmation and Request for Dismissal with Prejudice and Request for In Rem Relief alleging that Debtor filed her Chapter 13 petition and plan for the sole purpose of stopping the scheduled foreclosure sale of her home and not for any valid or rehabilitative purpose. (Docket No. 22). Movant's Motion to Validate Foreclosure was originally scheduled for August 17, 2006, but was rescheduled to September 26, 2006, at Movant's request.

The confirmation hearing on Debtor's Chapter 13 Plan was scheduled for September 6, 2006, and Debtor's Motion for Continuance of Confirmation Hearing, requesting that the confirmation hearing be delayed until after the evidentiary hearing on Movant's Motion to Validate Foreclosure, was denied on August 11, 2006. (Docket No. 39). Movant's Objection to Confirmation was heard by the Court at Debtor's Confirmation Hearing on September 6, 2006. After considering the arguments of the parties, the Court entered an Order of Dismissal Pursuant to 11 U.S.C. § 109(g) on September 18, 2006, rendering Debtor ineligible to file a petition under Title 11 for 180 days. (Docket No. 45). Debtor did not appeal this Order.

III. GRP FINANCIAL SERVICES CORP.'S MOTION TO ANNUL AUTOMATIC STAY AND VALIDATE FORECLOSURE SALE

Movant's Amendment to Emergency Motion for Relief from the Automatic Stay and Motion to Annul Automatic Stay and Validate Foreclosure Sale ("Motion to Validate Foreclosure" or "Motion") was pending at the time Debtor's case was dismissed; the

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[6] Movant cried the foreclosure sale of Debtor's property on June 6, 2006, and was the high bidder, bidding $422,636.66 – the approximate debt on the property. Movant has not recorded its deed in compliance with the Court's Interim Order.

evidentiary hearing on that matter went forward as scheduled on September 26, 2006. Present at the hearing were Richard Maner, counsel for Movant GRP Financial Services Corp., Debtor, and John Klotz, counsel for Debtor. The Motion places two issues before the Court. First, whether cause exists to modify and annul the stay pursuant to 11 U.S.C. § 362(d) as requested by Movant, and second, whether Movant GRP Financial Services Corp. is the proper party to seek this relief.

Throughout the course of this case, Debtor has maintained that she transferred her property to the Pembina Nation Little Shell of North America via a quitclaim deed executed and recorded in the Superior Court of Fulton County on August 20, 2004.[7] Debtor did not disclose any interest in real property on Schedule A, but listed GRP Financial Services Corp. and Conseco Green Tree as "alleged secured creditors," holding secured interests in property located at 525 Rose Border Drive, on Schedule D. (Docket No. 24). The "Explanation of Chapter 13 Filing" attached to Debtor's proposed Chapter 13 plan asserts that the house and land located at 525 Rose Border Drive belong to the Pembina Nation, but that Debtor "also [has] equitable interest in this property." (Docket No. 23). Debtor consistently claims that the Pembina Nation owns the subject property, but Debtor admittedly filed for bankruptcy to invoke the stay and prevent the foreclosure sale.[8] If Debtor's transfer of the property to the Pembina Nation was valid, it is unclear on what basis Debtor claims an equitable interest in the property so as to have invoked the stay with respect to the property upon filing for bankruptcy. However, Movant has not raised this issue and the Court will therefore proceed on the basis that the stay was invoked.

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[7] However, in her Statement of Financial Affairs, Debtor marked "none" in response to question 10(a), regarding transfers of property within two years preceding commencement of the bankruptcy case. (Docket No. 24).

[8] Debtor's "Explanation of Chapter 13 Filing" states, "[t]he reason I filed the Chapter 13 was to keep GRP from committing fraud and exercising a wrongful foreclosure of the house at 525 Rose Border Drive..."

A. The September 26, 2006, Evidentiary Hearing on Movant's Motion for Relief from the Automatic Stay and Motion to Annul Automatic Stay and Validate Foreclosure Sale

1. Movant's Arguments and Presentation of Evidence

Movant contends that Debtor's bankruptcy case was filed in bad faith and not for "any valid, rehabilitative purpose, but for the sole purpose of stopping the pending foreclosure," pointing to Debtor's history of litigation against Movant and Debtor's past and present failure to perform in her Chapter 13 cases, including Debtor's failure to make payments to the Chapter 13 Trustee or post-petition payments to Movant. Movant's Motion at ¶ 7 (Docket No. 21). It is on this basis that Movant contends cause exists to annul the automatic stay.

In support of its motions, Movant called as a witness, Marlene Hahn, Director of Loan Operations for GRP Financial Services Corp. and custodian of the loan documents pertaining to Debtor's loan. On direct examination, Ms. Hahn testified that Debtor's loan was contractually due for the September 17, 2002 payment, that the current balance on the loan was $430,631.30, that the loan was in default, and that Ms. Hahn therefore directed Mr. Maner's office to initiate foreclosure proceedings on the property.[9] Hearing Transcript at 22-25 ("Transcript") (Docket No. 55). On redirect, Ms. Hahn clarified that GRP has received no payments on Debtor's loan since GRP obtained the loan in late 2003 or early 2004. Transcript at 88-89.

2. Debtor's Arguments and Presentation of Evidence

Debtor called Richard Maner, counsel for Movant, as a witness and examined Mr. Maner, who also represented Movant in the prior district court litigation between the

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[9] At the conclusion of Mr. Maner's direct examination, Debtor's counsel extensively cross-examined Ms. Hahn regarding the transfer of Debtor's loan to Movant, various charges documented in Debtor's loan documents, and the validity of those charges. The crux of Mr. Klotz's examination was to challenge the validity of the stated $430,631.30 loan balance. However, the exact amount due under the loan documents is not determinative of the matter before the Court.

parties, regarding the chain of transfers and assignments between Wells Fargo, GRP Financial Services Corporation, and GRP Loan, LLC. During the course of the examination, Mr. Maner acknowledged that the District Court Order established that GRP *Financial Services Corporation* had authority to foreclose on the subject property pursuant to an assignment by Wells Fargo Bank. Mr. Maner further acknowledged that the entity listed as foreclosing on the subject property in the legal advertisement, as attorney in fact for Judith Olsen, is GRP *Loan, LLC*, an entity not discussed in the District Court Order. Mr. Maner did not recall by which document GRP Loan, LLC became the holder of the subject note, but testified that the notice of sale referenced the note as "last transferred to GRP Loan, LLC by assignment to be recorded..." Transcript at 101-105; Movant's Exhibit 8 (Notice of Sale). Mr. Maner conducted the foreclosure sale on Debtor's property and bid on the property on behalf of Movant. Transcript at 110.

Debtor testified that she made payments of approximately $60,000.00 on her loan while the note was held by Household. Transcript at 111. Debtor did not recall whether she made any payments on her mortgage after the note was transferred to Fairbanks, but testified that she made attempts to obtain payoff quotes from GRP and had a lender who was willing to "buy the loan," but that GRP "never responded." Transcript at 114-15. Debtor testified that she did not file bankruptcy with the intention of not paying GRP and that she never denied signing the original note at the July 12, 2000, closing, clarifying that she denied only that photocopies of the note provided to Debtor by Movant bore Debtor's signature because the documents bore only photocopied signatures and not original ink signatures. Transcript at 116. Debtor demanded that Movant produce the original note because she believed that the holder of the original note was the entity entitled to payment. Transcript at 117.

On cross examination, Debtor testified that she had proof of her payments to Household, proof of her requests for payoff quotes to GRP, and proof of the alternate

financing, but did not bring any of those documents to the evidentiary hearing. Transcript at 118. Debtor explained that she executed and recorded a quitclaim deed of the subject property to the Pembina Nation in an effort to put her property "in trust" and to protect it from Movant.[10] Transcript at 119-20. Debtor acknowledged that she did not notify or receive permission from the lender before executing the quitclaim deed, but stated that at the time of the transfer she did not know who held her note and had not been notified of any assignments. Transcript at 120.

Debtor also called Aneurin LaValle as an expert witness in the area of "predatory mortgage servicing." It was represented to the Court that while Mr. LaValle had extensively studied mortgage industry practices for over a decade, he had not published any reports or studies on the topic and had no specific training in the industry. Movant's counsel objected to Mr. LaValle's qualification as an expert witness and Debtor's counsel withdrew Mr. LaValle as a witness when the Court indicated that the evidence presented was not sufficient to qualify Mr. LaValle as an expert in the field. Transcript at 122-31.

Counsel for Debtor urges that Debtor repeatedly attempted to reach a payment agreement with Movant and that Debtor's failure to prosecute two bankruptcy cases should be attributed to her *pro se* status and not to bad faith. Transcript at 133-34. At the hearing, counsel for Debtor requested that he be given the opportunity to file a brief in support of Debtor's position that she has acted in good faith, pointing out that counsel had been retained by Debtor only days before the hearing; the Court granted Debtor's request.

On October 6, 2006, counsel for Debtor filed Debtor's Memorandum in Opposition to Motion to Annul Automatic Stay and Validate Foreclosure ("Memorandum"). (Docket No. 53). Debtor's Memorandum is divided into two parts, the first section focusing on

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[10] The quitclaim deed evidencing the transfer between Debtor and the Pembina Nation, attached to Debtor's proposed Chapter 13 Plan, is a standard quitclaim deed and makes no reference to the creation of a trust or the retention of interest in the property by Debtor.

whether Movant GRP Financial Services Corp. is a "proper party" before the Court and the second section purportedly focusing on Debtor's good faith. Debtor's Memorandum extensively quotes passages from *Maxwell v. Fairbanks Capital Corp. (In re Maxwell)*, 281 B.R. 101 (Bankr. D. Mass. 2002), highlighting the complicating and confusing lending practices that occur in the mortgage lending and servicing industries and detailing some very large fines that have been imposed upon lenders, including Fairbanks, for engaging in these practices. Debtor's Memorandum focuses on the bad faith of the mortgage industry as a whole and fails to set forth any evidence that Debtor acted in good faith in filing her bankruptcy petition and plan, stating only that Debtor has repeatedly contacted Movant to seek an "accommodation" and therefore "it cannot be said that she acted in bad faith to save the equity in her home." Debtor's Memorandum at 9.

IV. STATEMENT OF LAW

"The purpose of Chapter 13 of the Bankruptcy Code is to provide honest debtors an opportunity to stay creditor actions, adjust the debtor-creditor relationship, permit the debtor to propose a plan to pay creditors and rehabilitate the debtor financially." *In re Jones*, 231 B.R. 110, 112 (Bankr. N.D. Ga. 1999) (Cotton, C.J.) (Citing *In re Waldron*, 785 F.2d 936, 939 (11th Cir. 1986). While 11 U.S.C. § 1325(a)(3) provides that a Chapter 13 *plan* must be filed in good faith to be confirmed, there is no code section that specifically requires a Chapter 13 *petition* to be filed in good faith. However, it is well established that a Chapter 13 case may be dismissed for lack of good faith under 11 U.S.C. § 1307(c). *In re Moroney*, 330 B.R. 527, 531 (Bankr. E.D. Va. 2005) (citing *In re Herndon*, 218 B.R. 821, 823-24 (Bankr. E.D. Va. 1998)). *See also, Collier on Bankruptcy* 301.17 (15th Edition Rev. 2006); *In re James*, 1998 WL 34064494 (Bankr. S.D. Ga. 1998) (Davis, J.); *In re Roberts*, 339 B.R. 807 (Bankr. M.D. Ga. 2006) (Walker, J.). Additionally, the automatic stay may be lifted for "cause" pursuant to 11 U.S.C. § 362(d)(1) if the debtor's bankruptcy

petition was filed in bad faith. *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1394 (11th Cir. 1988).

Because the bankruptcy code does not define "good faith" or "bad faith,"courts may consider "any factors which evidence 'an intent to abuse the judicial process and the purposes of the reorganization provisions' or, in particular, factors which evidence that the petition was filed 'to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.'" *Id.* (quoting *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984)). In adopting a "totality of the circumstances" test, the 11th Circuit held that good faith should be analyzed in light of whether the debtor has abused the provisions, purpose, or spirit of the bankruptcy code. *In re Kitchens*, 702 F. 2d 885, 888 (11th Cir. 1983) (citing *Collier on Bankruptcy* 9.20 (14th Edition 1978)). While no one factor is determinative and the list is not exhaustive, courts may consider the following when analyzing a debtor's good faith:

(1) The debtor's income;
(2) the debtor's living expenses, including the expenses of any dependents;
(3) attorney's fees;
(4) the expected duration of debtor's plan;
(5) the debtor's motivations and sincerity in seeking relief under Chapter 13;
(6) the debtor's degree of effort;
(7) the debtor's ability to earn and the likelihood of fluctuation in earnings;
(8) special circumstances (such as inordinate medical expenses);
(9) the frequency with which the debtor has sought relief under the bankruptcy code;
(10) the circumstances under which the debtor contracted her debts and her demonstrated bona fides, or lack thereof, in dealings with creditors;
(11) the trustee's burden in administering the plan;
(12) the substantiality of the debtor's repayments to unsecured creditors;
(13) whether a debt would be nondischargeable in a Chapter 7 proceeding; and
(14) the accuracy of a plan's statement of debts and expenses and whether inaccuracies were an attempt to mislead the court.

See In re Kitchens, 702 F. 2d at 888-89; *In re Gier*, 986 F.2d 1326, 1329 (10th Cir. 1993) (citing *In re Love*, 957 F.2d 1350 (7th Cir. 1992)).[11]

[11] Though the *Kitchens* court analyzed whether a debtor filed a plan in good faith in relation to an objection to confirmation, it has been held that courts should consider the *Kitchens* factors when determining a debtor's good faith the face of a motion to lift the

Pursuant to 11 U.S.C. 362(g), a debtor carries the burden of proving good faith in relation to a motion for relief from stay under § 362(d)(1).[12] To meet her burden, the debtor must prove good faith by a preponderance of the evidence. *In re Bostic*, 1995 WL 17005376 (Bankr. S.D. Ga. 1995) (Dalis, J.).

V. ANALYSIS AND CONCLUSION

A. Cause Exists to Annul the Stay Pursuant to § 362(d)

Debtor has failed to prove, by a preponderance of the evidence, that she filed her petition for relief under Chapter 13 of the Bankruptcy Code in good faith. Based on the totality of the circumstances, this Court finds that Debtor did not file her petition in an effort to reorganize and pay her creditors, but instead filed for bankruptcy with the express purpose of delaying and frustrating the legitimate efforts of secured creditors to enforce their rights, which is evidence of bad faith. *See In re Phoenix Piccadilly, Ltd.*, 849 F.2d at 1394 (quoting *In re Albany Partners, Ltd.*, 749 F.2d at 674). In documents attached to Debtor's proposed Chapter 13 plan, through Debtor's testimony, and in Debtor's Memorandum, Debtor acknowledges that she filed for bankruptcy for the purpose of preventing the foreclosure sale of her home. While this alone does not establish Debtor's bad faith, the absence of any significant effort to effectively reorganize by proposing a

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stay under § 362(d)(1). *See In re Price*, 1992 WL 12004521 (Bankr. S.D. Ga. 1992) (Dalis, J.). Likewise, the factors set forth in *Love* and *Gier*, both cases that analyzed good faith in relation to motions to dismiss under § 1307, have been applied by courts faced with both motions to dismiss and objections to confirmation. *See, e.g., In re Roberts*, 339 B.R. at 812; *In re James*, 1998 WL 34064494 at 3; *In re Price*, 1992 WL 12004521. It follows that all fourteen factors are relevant when determining, under the "totality of the circumstances," a debtor's good faith under §§ 1325, 1307, or 362.

[12] 11 U.S.C. 362(g) provides that "[i]n any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section – (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and (2) the party opposing such relief has the burden of proof on all other issues."

confirmable Chapter 13 plan, making regular payments to the Chapter 13 Trustee, or making post-petition mortgage payments to Movant demonstrates Debtor's lack of good faith.

Apart from mortgages on the subject property, Debtor has $3,957.23 in unsecured debt stemming from a signature loan and $10,726.00 in debt secured by a 2000 Jeep Grand Cherokee, both debts being owed to Delta Community Credit Union. Debtor's Schedules D, E, and F. It appears from the payments listed on Debtor's Statement of Financial Affairs that Debtor is current on her car loan, but it is unclear whether Debtor is current on her signature loan. While the exact amount of arrears Debtor owes on her mortgage is in dispute, it is undisputed that Debtor has not made a single mortgage payment in over 4 years.[13]

Debtor's proposed Chapter 13 plan provides for adequate protection payments on Debtor's vehicle to the Trustee in the amount of $370.91 per month pending confirmation, a dividend to her unsecured creditor of 15%, and estimates the pre-petition mortgage arrearage to be $118,537.42, paying all creditors 5% interest regardless of the contract rates. Debtor's Plan at ¶¶ 6(A)(i), 6(B), and 7; Debtor's "Explanation of Chapter 13 Plan." (Docket No. 23). Debtor proposes to make "variable" monthly payments directly to the Trustee for 60 months, with the plan payments increasing each month for the first 18 months. Debtor attached a spreadsheet to her plan laying out the proposed variable payment schedule indicating that Debtor's first 6 monthly payments will be in the amounts of $100, $200, $350, $550, $850, and $1650. After the first 6 months, Debtor's payments rise above $2000 each month, reaching $7000 per month by month 18. The payments increase to $7500 per month at month 22 and remain at that amount until month 60 when Debtor will make a balloon payment of $69,488.00.

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[13] Debtor's loan had an original principal balance of $296,000.00. According to Movant's records, the outstanding balance on the loan on September 26, 2006, was $430,631.30, and the arrears were approximately $123,258.81.

Debtor's Schedules I and J indicate that Debtor is a self-employed educational consultant and insurance claims adjuster with a monthly income of $2,555.00 and monthly expenses of $2,100.00, leaving Debtor with a net income of $455.00 per month. However, Schedule J does not account for any rent or mortgage payments, indicating "N/A" in the blank intended for such expenses. Debtor's handwritten statement at the bottom of the first page of the plan and her "Explanation of Chapter 13 Plan" indicate that Debtor bases the feasibility of this plan not on her foreseen income, but on her assumed ability to refinance her home and pay off the existing mortgage at month 18, or "worst case scenario" refinance at 60 months to make the $69,488.00 final plan payment. Irrespective of Debtor's ability to refinance her home, given Debtor's scheduled income and expenses, it is unclear how Debtor will be able to make her plan payments and/or her mortgage payments even in the early months of the plan. Additionally, Debtor's proposed plan payments for the first three months are not even large enough to pay the proposed adequate protection payments on Debtor's vehicle.

Upon motion by the Chapter 13 Trustee and Movant, Debtor's case was dismissed, with prejudice, at her September 6, 2006, confirmation hearing. Debtor did not appeal this Order, which in itself was a finding of Debtor's failure to prosecute this case in good faith. (Docket No. 45). In addition to the plan not being confirmable, Debtor was not current on her plan payments, Debtor had failed to make any post-petition mortgage payments, and this was Debtor's second failed Chapter 13 case. Debtor paid a total of only $300.00 to the Chapter 13 Trustee throughout her case, creating a delinquency of $900.00 at the time of dismissal based on Debtor's proposed variable plan payment schedule. Debtor's single payment to the Trustee was made on July 6, 2006, two months before her case was dismissed.

Based on the totality of the circumstances, including Debtor's income and expenses in relation to her plan, proposing to pay off well over $100,000.00 in mortgage arrears,

Debtor's admitted motivation to thwart Movant's attempt to foreclose in light of the District Court's Order establishing Movant's authority to do so, Debtor's failure to file complete and accurate schedules and propose a feasible Chapter 13 plan or even perform under her deficient plan, and the fact that this is Debtor's second Chapter 13 case, the Court concludes that Debtor did not act in good faith in filing her petition for relief under Chapter 13 of the Bankruptcy Code. Cause therefore exists to annul the stay, *nunc pro tunc* to the date Debtor filed her case, pursuant to 11 U.S.C. § 362(d).

B. Movant is Entitled to Relief from the Stay

The second issue before the Court is whether Movant GRP Financial Services Corp. is the party entitled to the above relief. Through principles of res judicata, this Court is bound by the District Court's Order, which establishes GRP Financial Services Corp.'s authority to foreclose on the subject property. Debtor continues to challenge the validity of Movant's interest in the subject property, but the bankruptcy court is bound by the District Court's decision which is a final order from which Debtor took no appeal.

In addition to challenging the precluded issue of whether Movant has a valid interest in the subject property, Debtor argues that Movant is not a "proper party" before the Court. Throughout Debtor's Memorandum, GRP Financial Services Corp. is referred to as "Movant [sic]" with the explanation that "Debtor follows the title Movant with '[sic]' to make a rhetorical point: the identity of the Movant is not at all clear and it is questionable that the actual party seeking the relief was actually named in any of the papers submitted by Movant whose name appears singular but is clearly plural." Debtor's Memorandum at 1. Debtor's argument seems to be that because the notice of sale listed GRP Loan, LLC as the party foreclosing on the property and the document detailing the assignment that gave GRP Loan, LLC the power to foreclose is not in the record, GRP Financial Services Corp. is not the "proper party" to request relief before this Court.

Debtor's argument is, essentially, that the foreclosure sale was conducted by the wrong party and/or in the wrong name. Debtor's argument goes to the validity of the foreclosure sale under state law, which is not an issue before this Court. This Court must only decide whether cause existed to annul the stay at the time of the foreclosure sale, thus validating the foreclosure sale *only to the extent it is valid under state law.* This Court's annulment of the stay means only that the foreclosure sale was not conducted in violation of the stay, thereby allowing Movant to record its deed, and does nothing to prevent Debtor from contesting the validity of the sale or the procedures by which the sale was conducted in state court.

Pursuant to the District Court's Order, GRP Financial Services Corp. had the authority to foreclose on Debtor's property, making Movant the "proper party" to request relief from the stay. Movant is therefore entitled to the relief requested based on this Court's finding that Debtor's lack of good faith is cause to annul the stay. Accordingly, it is

ORDERED that Movant's Motion for Relief from the Automatic Stay and Motion to Annul Automatic Stay and Validate Foreclosure Sale is **GRANTED** to the extent that the automatic stay is annulled, *nunc pro tunc* to the date Debtor filed her petition, and the foreclosure sale of Debtor's property is deemed valid to the extent it is valid under Georgia law.

The Clerk shall serve a copy of this Order upon Debtor, counsel for Debtor, counsel for Movant, Chapter 13 Trustee, and all creditors in the case.

IT IS SO ORDERED this the 8th day of January, 2007.

Mary Grace Diehl
MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE