

IT IS ORDERED as set forth below:



Date: July 09, 2007

A handwritten signature in black ink, appearing to read "W. H. Drake", is written over a horizontal line.

**W. H. Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBER
	:	
ROBERT O. DAVIS	:	07-10035-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
DEBTOR.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Relief from Automatic Stay filed by CharterBank (hereinafter "Movant") and the Motion to Invalidate Foreclosure Sale and Affirm Bankruptcy Stay filed by Robert Davis (hereinafter the "Debtor"). These matters constitute a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(G)-(H); § 1334.

Movant was the holder of a first mortgage deed to secure debt on real property known as 204 King Street, Lagrange, Georgia (hereinafter the "Property"). In December

2006, Movant obtained an appraisal of the Property that valued the Property at \$27,500. Pursuant to the power of sale contained within the deed to secure debt, Movant conducted a foreclosure sale of the Property on January 2, 2007. As the highest bidder, Movant purchased the Property for \$27,500. Thereafter, Movant executed a Deed Under Power, which was recorded in Troup County on January 3, 2007. The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on January 4, 2007.

On March 23, 2007, Movant filed a motion for relief from the automatic stay to permit it to exercise its state law rights with regard to the Property. On May 24, 2007, the Debtor filed a motion to invalidate the foreclosure and to affirm the existence of a stay with regard to the Property. In the motion, the Debtor asserts that the foreclosure should be set aside because Movant received the Property, which the Debtor scheduled with a value of \$65,000, for \$27,500.

In essence, the Debtor seeks avoidance of the foreclosure on the basis that the transfer constitutes a constructively fraudulent transfer. Pursuant to section 548 of the Bankruptcy Code, the "trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made . . . within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . . received less than a reasonably equivalent value in exchange for such transfer . . . and was insolvent on the date that such transfer was made . . . or became insolvent as a result of such transfer." 11 U.S.C. § 548(a)(1)(B). Additionally, under section 544(b) of the Code, a trustee may avoid a transfer that would

have been avoidable by a creditor in accordance with O.C.G.A. § 18-2-70, *et seq.* This state law provision also requires the trustee to establish that the debtor did not receive the reasonably equivalent value of the property transferred and that the debtor was "engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or . . . [i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." O.C.G.A. § 18-2-74(a)(2).

Relief pursuant to section 548 or 544 must be obtained by way of an adversary proceeding, which requires the filing of a complaint and the issuance of a summons. *See* Fed. R. Bankr. P. 7001(1). Additionally, in a Chapter 13 case, the Code reserves to the Chapter 13 Trustee the power to avoid fraudulent transfers. *See* 11 U.S.C. § 544 ("the trustee . . . may any transfer"); § 548 ("the trustee may avoid any transfer of an interest") (emphasis added). Therefore, Chapter 13 debtors do not have the power to avoid a transfer, pursuant to section 548 or 544. *See Matter of Hamilton*, 125 F.3d 292 (5th Circuit 1997) (Chapter 13 debtor lacked power to avoid a transfer under section 544); *In re Merrifield*, 214 B.R. 362 (Bankr. 8th Cir.1997) ("The Eighth Circuit has determined that the statutory language of § 548 expressly confers avoidance powers exclusively on the trustee."); *In re Davis*, 216 B.R. 898 (Bankr. N.D. Ga.1997) (Massey, J.) ("Section 548 empowers only a trustee to avoid a fraudulent transfer and does not give a Chapter 13 debtor standing to bring

a fraudulent conveyance action.”).¹ For these reasons, the Court finds that the Debtor's motion lacks merit and must be denied.

Section 362(a)(1) of the Code provides that the filing of a bankruptcy petition operates as a stay as to the “commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.” 11 U.S.C. § 362(a)(1). Under certain circumstances, the Court may “grant relief from the stay” by “terminating, annulling, modifying, or conditioning” the stay. 11 U.S.C. § 362(d).

Cause to lift the automatic stay to permit a dispossessory proceeding exists if the debtor's estate holds no interest in property that would enable the debtor to cure and

¹ Setting aside the procedural and standing issues associated with the Debtor's motion, if the Debtor were to properly attempt, by way of an adversary proceeding, to avoid this transaction (to the extent of the exemptible amount of the Property) under section 522(h), or if the Chapter 13 Trustee were to attempt to set aside the foreclosure under sections 544 or 548, case law and statutory authority would pose a significant and most likely insurmountable obstacle to establishing that Movant received less than the reasonably equivalent value for the Property. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) (“We deem, as the law has always deemed, that a fair and proper price, or a reasonably equivalent value,” for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.”); O.C.G.A. § 18-2-73(b) (“For the purposes of paragraph (2) of subsection (a) of Code Section 18- 2-74 and Code Section 18-2-75, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.”).

reinstate a mortgage through a Chapter 13 plan. *Accord Matter of Morgan*, 115 B.R. 399 (Bankr. M.D. Ga. 1990) (granting relief from the stay to permit eviction after concluding that debtor's equity of redemption expired with regard to property); *In re Dillard*, 2007 WL 521888 (Bankr. M.D. Ga. 2007) (refusing to extend the automatic stay with regard to mortgage creditor's dispossessory action after concluding that debtor's equity of redemption had expired prior to bankruptcy filing). Under Georgia law, a debtor's equity of redemption is terminated by a foreclosure sale held prior to the commencement of the debtor's bankruptcy case. *See In re Pearson*, 75 B.R. 254 (Bankr. N.D. Ga. 1985) (citing *Carrington v. Citizens Bank of Waynesboro*, 144 Ga. 52 (1915); *McKinney v. South Boston Savs. Bank*, 156 Ga. App. 114 (1980)).

In this case, the foreclosure sale was final prior to the filing of the Debtor's bankruptcy petition. Movant's bid was accepted as the high bid, and Movant executed and recorded the foreclosure deed prior to the filing of the Debtor's petition. Accordingly, under Georgia law, the Debtor's equity of redemption was terminated, no interest in the Property became property of the Debtor's bankruptcy estate, and cause exists to lift the automatic stay to permit Movant to proceed with a dispossessory action.

For the reasons state above, the Debtor's Motion to Invalidate Foreclosure Sale and Affirm Bankruptcy Stay is hereby **DENIED**. The Motion for Relief from the Automatic Stay file by CharterBank is hereby **GRANTED**. In accordance with Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure, the instant order shall be stayed for ten (10) days

after entry.

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