IT IS ORDERED as set forth below:

Date: April 02, 2010

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

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
	:	
AARON KEITH PENN,	:	09-14624-WHD
	:	
	:	
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
DEBTOR.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion to Validate Foreclosure Sale or, in the Alternative, For Relief from or Annulment of Stay Abinitio, filed by Capital Mortgage Corporation, First Financial Funding, Inc., and Prime Equity Lending, Inc. (hereinafter collectively referred to as "Movants"). This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(G), (O); § 1334.

FACTS AND PROCEDURAL HISTORY

On December 31, 2009, Aaron Keith Penn (hereinafter the "Debtor"), filed a voluntary petition under Chapter 13 of the Bankruptcy Code. At that time, the Debtor owned a 100% ownership interest in ADC Trucking, LLC (hereinafter "ADC").[1] ADC, in turn, owned 30.56 acres of real property located at 2547 Locust Grove Road, Griffin, Georgia (hereinafter the "Property"), which the Debtor has listed as an asset on his Schedule A with a value of $250,000. Movants assert a security interest in the Property by virtue of a deed to secure debt executed by ADC in favor of the Movants. The Debtor scheduled the balance owed to the Movants as $125,000. According to an affidavit filed by the Debtor's brother, Robert Penn (hereinafter "Penn"), Penn originally transferred his 50% interest in the Property to ADC via quitclaim deed in 2008 and is also personally liable with the Debtor and ADC on the promissory note. Penn's affidavit indicates that he resides at the Property, while the Debtor's schedules list the Property as his personal residence on his petition.

Movants advertised the Property for a foreclosure sale and completed the foreclosure sale of the Property on January 5, 2010. Being the only bidder, Movants purchased the Property for $157,606.65, an amount sufficient to satisfy the debt owed on the Property. Movants seek validation of the foreclosure sale and argue that the Property was either not subject to the automatic stay because it was not property of the Debtor's bankruptcy estate

[1] The Debtor has failed to disclose his ownership interest in ADC Trucking, LLC on Schedule B.

or, if the Property was subject to the automatic stay, that the Court has the authority to, and should, annul the automatic stay. The Debtor submits that the Property was protected by the automatic stay, as well as the co-debtor stay provided by section 1301 of the Bankruptcy Code, and that the Court should not annul the automatic stay retroactively to validate the sale.

After a hearing held on January 28, 2010, the Court took this matter under advisement. The following constitute the Court's findings of fact and conclusions of law as to whether the automatic stay or the co-debtor stay applied to the Property.

CONCLUSIONS OF LAW

A. *The Automatic Stay*

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). Additionally, the filing of a voluntary petition triggers an automatic stay that prevents an entity from taking "any act to obtain property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The automatic stay comes into effect immediately upon

the commencement of the bankruptcy case and is "good against the world, regardless" of whether a party has notice of the stay or the bankruptcy filing. *In re Peralta*, 317 B.R. 381 (9th Cir. BAP 2004); *see also In re Smith*, 180 B.R. 311 n.17 (Bankr. N.D. Ga. 1995) (Murphy, J.). Actions taken in violation of the automatic stay are void and without effect. *See In re Albany Partners, Ltd.,* 749 F.2d 670, 675 (11th Cir.1984).

In this case, the question is whether the automatic stay applies to a foreclosure sale of property that was not owned by the Debtor, but instead owned by a third party. The Debtor asserts that the Property became property of his bankruptcy estate because the Property is owned by a limited liability company, of which he is the sole owner.

Unless extended by the court in an "unusual situation," the protections afforded by section 362(a)(1) are "'only available to the debtor, not third party defendants or co-defendants.'" *Kreisler v. Goldberg,* 478 F.3d 209, 213 (4th Cir. 2007) (quoting *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 999 (4th Cir.1986)). A separate legal entity that is established to hold property is considered a separate legal entity for that purpose and, should that legal entity desire bankruptcy protection, it must file its own petition. *See id*. at 213-14; *see also In re Sheu*, 2009 WL 1794473 (Bankr. E.D.N.Y. 2009) (refusing to extend the automatic stay in an individual debtor's bankruptcy case to cover a corporation wholly owned by the debtor in order to invalidate the foreclosure sale of the debtor's personal residence, which was owned by the corporation). Similarly, section 362(a)(3) extends only to property of the bankruptcy estate. Pursuant to section 541 of the Code,

property of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1).

The fact that an individual debtor holds an interest in another entity does not give that individual a direct ownership interest in the assets owned by the other entity. *See id.* at 14 ("The fact that a parent corporation has an ownership interest in a subsidiary, however, does not give the parent any direct interest in the assets of the subsidiary."); *see also In re Commercial Mortg. and Finance Co*., 414 B.R. 389 (Bankr. N.D. Ill. 2009) ("As a general rule, property of the estate includes the debtor's stock in a subsidiary, but not the assets of the subsidiary."); *In re Murray,* 147 B.R. 688 (Bankr. E.D. Va. 1992) (denying debtor's motion for enforcement of the automatic stay against and for turnover of property owned by a corporation in which she was the sole shareholder; "the debtor has no present interest in property owned by the various corporate entities").

Here, the Debtor's filing of a petition did not create an automatic stay of actions taken against ADC. Further, the Property is not property of the Debtor's bankruptcy estate. The Debtor chose to place ownership of the Property into a limited liability company. "Having assumed whatever benefits flowed from that decision, [he] cannot now ignore the existence of the LLC in order to escape its disadvantages." *Id*. While it is true that the Debtor could have requested that the Court extend the protection of section 362(a)(3) to cover the Property under the theory that the foreclosure of ADC's interest in the Property would essentially deprive the Debtor and his creditors of the equity in the Property, *see id.* at 214-

15, the Debtor did not make such a request. At this point in time, when the foreclosure has already occurred, it would not be just to determine, after the fact, that the automatic stay should have been extended to cover the Property. The Debtor chose to file a bankruptcy petition for himself, rather than for ADC, and then took no steps to ensure that ADC's interest in the Property could also be protected by the Debtor's bankruptcy filing.

The Debtor's arguments to the contrary and citation to case authority do not persuade the Court otherwise. In his response to the Movants' motion, the Debtor cites the case of *In re Albright,* 291 B.R. 538 (Bankr. D. Colo. 2003), as support for the legal conclusion that property owned by a limited liability company, of which the debtor is the sole owner, becomes property of the individual debtor's bankruptcy estate and, thus, subject to the automatic stay. The Debtor mischaracterizes the holding of the *Albright* case. The issue was not whether the property owned by an LLC was itself property of the individual debtor's estate, but rather whether the trustee of the individual debtor's Chapter 7 bankruptcy estate had the authority to liquidate the LLC's assets because the individual debt was the sole owner and manager of the LLC. The trustee did not assert that he had authority to sell the LLC's assets because they were property of the debtor's bankruptcy estate. Instead, his authority for liquidating the property arose because he had succeeded to the debtor's authority as "the sole member and manager of the LLC" to control the LLC and to "cause the LLC to sell the Real Property and distribute the net sales proceeds to [the] bankruptcy estate." *Albright*, 291 B.R. at 540. The court even recognized this distinction in a footnote,

noting that, rather than using his authority to sell the property of the LLC, the trustee could have instead used his authority over the LLC to dissolve it, distribute the property itself to the individual debtor's bankruptcy estate, and move to sell the property as property of the bankruptcy estate. *Id*. at 540 n.2.

Likewise, the Debtor's citation to *In re Modanlo,* 412 B.R. 715 (Bankr. D. Md. 2006), which cites to the *Albright* decision, is unavailing. In *Modanlo*, the bankruptcy court appointed a trustee in an individual Chapter 11 case. After discovering that the debtor owned 100% of a Delaware single member LLC, which owned 65% of the equity interests and 85% of the voting interests in a Maryland corporation, the trustee filed a voluntary Chapter 11 petition for the LLC and moved for joint administration of the case with that of the individual debtor. The trustee then sought the bankruptcy court's authorization to permit him to act as the manager of the LLC for the purpose of calling a special meeting of the shareholders of the corporation. The Debtor and the corporation opposed such relief, arguing that the trustee was essentially asking the court to force the corporation, or its board of directors, to act, and that the court lacked jurisdiction to do so. The trustee explained that, since the debtor was the sole owner of the LLC, which owned a majority interest in the corporation, the corporation's bylaws specifically allowed the LLC and the trustee, since he had succeeded to the debtor's authority to control the LLC, to request the calling of a special meeting of the corporation's shareholders. The court recognized that the debtor's interest in the corporation (through the LLC) was a potentially valuable asset because the

corporation held an unliquidated judgment, but the court did not hold that the asset owned by the LLC (the 65% ownership interest in the corporation) was itself property of the individual debtor's estate. The court simply found, as did the *Albright* court, that the trustee had succeeded to whatever authority the debtor had to manage and control the LLC. *See id*. at 731 ("Accordingly, the Court finds that the Trustee had the power to place [the LLC] into bankruptcy upon his appointment, and, standing in the shoes of the Debtor and complying with the mandates of the Delaware Act, possesses both the economic and governance rights to participate in the management of [the LLC] that the Debtor himself enjoyed prior to his bankruptcy filing.").

Finally, the Debtor cites to *In re A-Z Electronics, LLC,* 350 B.R. 886 (Bankr. D. Idaho 2006). In that case, an individual debtor filed a Chapter 7 case while owning 100% of a limited liability company. Subsequently, the individual debtor, purporting to act as the managing member of the LLC, caused the LLC to file a voluntary Chapter 11 petition. The court found that the LLC's petition had not been filed properly because the individual debtor's authority to act on behalf of the LLC was vested in the trustee of the individual debtor's Chapter 7 estate at the time the petition was signed. *See id*. at 891 ("On the date the petition herein was filed, [the individual debtor's] interests in Debtor were property of the bankruptcy estate . . . [and,] [a]s such, they were subject to the sole and exclusive authority of the [individual debtor's] trustee, and that trustee was the only one entitled to manage Debtor and decide, inter alia, whether the LLC would or would not file bankruptcy.").

Again, this case recognizes that, once the sole owner of an LLC files a bankruptcy petition, the membership interests themselves become property of the owner's estate, but it does not compel the conclusion that the actual assets of the LLC are property of the owner's estate. Accordingly, the Debtor's argument that the automatic stay applied to protect ADC, a nondebtor, from the Movants' foreclosure must be rejected.

B. *The Co-Debtor Stay*

In a Chapter 13 case, after the filing of a petition, a creditor may not "act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless . . . " one of certain statutory exceptions exists. *See* 11 U.S.C. § 1301(a); *see also In re Morris,* 385 B.R. 823 (E.D. Va. 2008). Such is the case even when the creditor is not aware of the debtor's bankruptcy filing. *See Patti v. Fred Ehrlich, PC,* 304 B.R. 182 (E.D. Pa. 2003). Acts taken in violation of the co-debtor stay are void or voidable unless validated by the retroactive annulment of the co-debtor stay. *See In re Morris,* 385 B.R. 823 (E.D. Va. 2008); *see also In re Harris,* 203 B.R. 46 (Bankr. E.D. Va. 1994).

The automatic stay of actions against the co-debtor does not apply in all situations. For example, section 1301(a) applies only to the collection of a consumer debt. *See* 11 U.S.C. § 1301(a); *see also In re Morris,* 385 B.R. 823 (E.D. Va. 2008). Section 101(8) defines a consumer debt as a "debt incurred by an individual primarily for a personal,

family, or household purpose." *See* 11 U.S.C. § 101(8); *see also Patti v. Fred Ehrlich, PC,* 304 B.R. 182 (E.D. Pa. 2003) (inquiry must be made into why the debt was incurred to determine whether it is a consumer debt); *In re Strausbaugh*, 376 B.R. 631 (Bankr. S.D. Ohio 2007) (when a debt is incurred for more than one purpose, the primary purpose determines its nature). This can include a debt secured by the debtor's principal residence. *See In re Morris,* 385 B.R. 823 (E.D. Va. 2008); *In re Harris,* 203 B.R. 46 (Bankr. E.D. Va. 1994); *In re Bertolami,* 235 B.R. 493 (Bankr. S.D. Fla. 1999). Therefore, it is clear that a debt incurred by a Chapter 13 debtor for a business purpose or for a purpose other than those listed in section 101(8) is not protected by the co-debtor stay. An additional statutory exception to the co-debtor stay applies when the individual became a co-debtor "in the ordinary course of such individual's business." *See* 11 U.S.C.A. § 1301(a)(1). Hence, a commercial surety would not be protected by the stay of action against a co-debtor.

In this case, the Debtor alleges that the co-debtor stay applied to any action taken to collect the Movants' debt from Penn, as he, along with the Debtor, is obligated on the promissory note secured by the Property. There is no question that Penn holds no ownership interest in the Property or in ADC. At this point, the Court has not been presented with sufficient evidence to determine whether the co-debtor stay applied to prevent collection activities with regard to Penn.

Before the Court considers taking additional evidence to determine whether any of the exceptions to the co-debtor stay apply, however, the Court will consider whether, by

conducting a nonjudicial foreclosure of property that is not owned by the co-debtor, a creditor "act[s], or commence[s] or continue[s] any civil action, to collect all or any part of a consumer debt of the debtor." First, a nonjudicial foreclosure sale is not a "civil action." *See In re Everchanged, Inc.,* 230 B.R. 891, 894-95 (Bankr. S.D. Ga.1999) (a nonjudicial foreclosure sale does not violate section 362(a)(1), which prohibits the commencement of continuation of a "judicial, administrative, or other action or proceeding" against the debtor); *see also Ramming v. United States,* 281 F.3d 158, 164 (5th Cir. 2001) ("'[A]n action in its usual legal sense means a lawsuit brought in a court; a formal complaint brought within the jurisdiction of a court of law.'") (quoting Black's Law Dictionary 28 (6th ed.1990) and citing FED. R. CIV. P. 3 (defining "Commencement of Action" as follows: "A civil action is commenced by filing a complaint with the court")). Second, a nonjudicial foreclosure sale of property that is neither "property of the debtor" nor "property of the estate" is not an "act to collect, assess, or recover a claim" against a debtor within the meaning of section 362(a)(6). *See Everchanged,* 230 B.R. at 895 (Bankr. S.D. Ga.1999) ("Thus, while an attempt to collect a deficiency violates the stay, the act of foreclosing against property outside of the bankruptcy estate does not. If the creditor elects not to pursue a deficiency, or if none exists there will never be an in personam action against the Debtor and Section 362(a)(1) and (6) is not implicated."); *see also In re Torrez,* 132 B.R. 924 (Bankr. E.D. Cal. 1991).

Reasoning by analogy, the Court holds that a nonjudicial foreclosure of property that

is not owned by the co-debtor is not an act to collect a consumer debt *from the co-debtor* within the meaning of section 1301(a). While section 1301(a) would prevent the Movants from suing Penn for a deficiency on the debt owed by the Debtor, ADC, and Penn, it did not prevent the Movants from foreclosing on property owned solely by ADC. Because the co-debtor stay would not have applied to stay the foreclosure of the Property, the Court need not determine whether the co-debtor stay applied in this case.

CONCLUSION

Because the Court finds that the Movant's foreclosure sale violated neither the automatic stay nor the co-debtor stay arising in the Debtor's bankruptcy case, the Motion to Validate Foreclosure Sale or, in the Alternative, For Relief from or Annulment of Stay Abinitio, filed by Capital Mortgage Corporation, First Financial Funding, Inc., and Prime Equity Lending, Inc., is **GRANTED**. To the extent that the foreclosure sale was otherwise valid under applicable non-bankruptcy law, it is not invalid under any provision of the Bankruptcy Code.

END OF DOCUMENT