

IT IS ORDERED as set forth below:



Date: March 16, 2012

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

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

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

IN THE MATTER OF:	:	CASE NUMBER
	:	
PENNY DEBBIE NITTOLO,	:	11-14070-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
DEBTOR.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Relief from Automatic Stay filed by GMAC Mortgage, LLC (hereinafter the "Movant"), as Servicer for Provident Funding Associates, L.P. The Motion is opposed by Penny Debbie Nittolo (hereinafter the "Debtor"). This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(G); § 1334.

FINDINGS OF FACT AND PROCEDURAL HISTORY

Movant acts as the servicer for Provident Funding Associates, L.P. (hereinafter "PFA"), which was the holder of a deed to secure debt on real property known as 1751 Highway 92 S, Fayetteville, Fayette County, Georgia (hereinafter the "Property"). Pursuant to the power of sale contained within the deed to secure debt, PFA conducted a foreclosure sale of the Property on October 5, 2010. PFA recorded its deed under power in the real property records of Fayette County on November 24, 2010. As the highest bidder, Movant purchased the Property for \$285,000.

Debtor had previously filed four voluntary bankruptcy petitions, including a petition filed in 1994, and, more recently, three petitions filed in 2009 and 2010. In Case Number 09-13097-WHD, the Debtor filed a Chapter 13 petition on August 31, 2009. The Debtor voluntarily dismissed that case on September 30, 2009. Approximately two days later, the Debtor filed her second Chapter 13 petition (Case Number 09-13522-WHD) on October 2, 2009. In the second case, PFA filed a motion for relief from the automatic stay with regard to the Property on January 19, 2010, and that motion was granted on April 21, 2010. The Court's order granted PFA permission to exercise its state law rights with regard to the Property. However, the Debtor voluntarily dismissed the second case on May 28, 2010.

On June 1, 2010, the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code (10-12106-WHD). PFA filed a motion for relief from the automatic stay on June 7, 2010, which the Chapter 7 trustee did not oppose, and the Court granted the requested relief by order dated August 23, 2010.

PFA foreclosed on the Property on October 5, 2010. Following the foreclosure, on December 6, 2010, while the Chapter 7 case remained pending, the Debtor filed suit against PFA and others in the Superior Court of Gwinnett County for wrongful foreclosure of the Property. PFA removed that suit to this Court on January 5, 2011 and it was dismissed for want of prosecution on October 31, 2011. The Chapter 7 case itself was later closed without a discharge because the United States Trustee sued the Debtor and obtained an order denying her discharge due to false statements made under oath in connection with her bankruptcy petition. *See* Case Number 10-1057, Docket Number 11.

Less than a month after the Chapter 7 case was closed, the Debtor filed the instant Chapter 11 case. On December 12, 2011, Movant filed the instant motion for relief from the automatic stay, seeking permission to go forward with a "lock-out," previously scheduled with the Fayette County Sheriff's Office for December 12, 2011, which would have allowed PFA to remove the Debtor and her personal property from the Property.

At the hearing held on Movant's motion on January 27, 2012, the Debtor asserted that the Court should deny the motion because, following the foreclosure sale of the Property, Movant accepted rent payments from the Debtor for her continued occupation of the Property and, thereby created a tenancy at will. While Movant disputes the creation of such an interest in the Property, the Court need not resolve that issue. The Court finds, as explained further below, that, under the facts and circumstances of this case, PFA should be entitled to enforce whatever rights it may have.

CONCLUSIONS OF LAW

Upon the filing of a bankruptcy petition all actions against the debtor or property of the debtor's bankruptcy estate are automatically stayed. *See* 11 U.S.C. § 362(a)(1); (a)(3). However, 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). Section 362(d) provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d). The burden of proof on the question of a debtor's lack of equity in property lies with the movant. 11 U.S.C. § 362(g)(1). The burden as to all other issues in connection with a motion for relief from the automatic stay falls on the party opposing the motion. *Id.* § 362(g)(2).

The Debtor asserts that the estate holds a leasehold interest in the Property and that the writ obtained by PFA in connection with its foreclosure sale could not have terminated that leasehold interest because the creation of the tenancy at will occurred only after the

issuance of the writ. Under Georgia law, following the foreclosure sale of a property, the debtor is ordinarily considered a tenant at sufferance. *Bellamy v. F.D.I.C.*, 236 Ga.App. 747, 512 S.E.2d 671 (Ga. App. 1999). However, the actions of the creditor with regard to the holdover tenant can convert a tenancy at sufferance into a tenancy at will. *See Diner One, Inc. v. Bank South, N.A.*, 219 Ga. App. 702, 466 S.E.2d 234 (Ga. App. 1995); O.C.G.A. § 44-7-6 ("Where no time is specified for the termination of a tenancy, the law construes it to be a tenancy at will."). Such conduct can include "[r]eceipt of rent, demand for rent, or anything that indicates the permission of the landlord for the tenant to remain in possession" *Id.* at 703. Once created, a tenancy at will requires sixty days' notice from the landlord to terminate. *See* O.C.G.A. § 44-7-7.

Assuming, without deciding, that the Debtor held an unexpired leasehold interest in the Property at the time she filed her petition, such an interest would have become property of the Debtor's bankruptcy estate. *See* 11 U.S.C. § 541(a)(1). As a debtor-in-possession, she could move to assume it. Assumption would be approved upon a showing that the estate can cure any default, compensate the other party to the lease for its actual losses resulting from such default, and provide adequate assurance of future performance under the lease. *See id.* § 365(b)(1); (d)(2); *In re Stoltz*, 197 F.3d 625, 629 (2d Cir. 1999).

That being said, once assumed, an unexpired lease gives the estate no more rights than the debtor held on the petition date. *See In re Lucre, Inc.*, 339 B.R. 648, 654-55 (Bankr. W.D. Mich. 2006) ("The corollary of the Section 541 'neutral transfer' rule is that

the trustee or debtor-in-possession can have no greater or different rights than the debtor with respect to an executory contract or unexpired lease unless the Bankruptcy Code itself provides those rights."). If, as the Debtor contends, her interest in the Property was a tenancy at will, PFA, as her landlord, had the right to terminate that tenancy at its option by providing sixty days' notice. *Matter of Schewe*, 94 B.R. 938, 950 (Bankr. W.D. Mich. 1989) ("It is uncontroverted that the Debtors' only possessory rights in the mobile home lot result from their status as tenants at will . . . [B]ecause there exists no monetary default, pursuant to M.C.L.A. § 554.134, either the Debtors or the Defendants may terminate the tenancy by giving one month's notice to the other party."). The filing of a bankruptcy petition stays, but does not destroy, that right. *See id.* ("Absent the Debtors' Chapter 13 case, it is unquestioned that the Defendants would be permitted to serve a notice to quit and to undertake proceedings to obtain possession of the mobile home lot. This state law right is not vitiated by the bankruptcy filing except for the delay occasioned by the automatic stay."). In such cases, courts have found the existence of "cause" to permit a landlord relief from the automatic stay to terminate the lease. *See id.* ("The court will not impose a new lease agreement upon the parties. The court therefore holds that when a debtor-lessee and a lessor have entered into a tenancy at will relationship, and the landlord desires to terminate the tenancy under applicable state law, "cause" exists to modify the stay to permit the lessor to exercise its rights.").

Having considered the unique facts surrounding the filing of this case, it is clear to

the Court that permitting the stay to remain in place simply to allow the Debtor to assume whatever leasehold interest she had in the Property would be an improper use of the Bankruptcy Code. Doing so would, in essence, create a contractual arrangement not bargained for by the parties. The parties never had a traditional landlord-tenant relationship. It is clear that the parties intended to allow the Debtor to remain in the Property and to pay a fair rental value for the Property only for so long as the state court litigation remained pending. Upon the resolution of the state court litigation, PFA reasonably expected to recover possession of the Property, and it did not expect to become the Debtor's landlord under a perpetual lease.

Further, the filing of a bankruptcy petition in bad faith can constitute "cause" for lifting the automatic stay. *See In re Dixie Broadcasting, Inc.*, 871 F.2d 1023 (11th Cir.1989). It appears the Debtor filed her petition for no purpose other than continuing to litigate the issues surrounding PFA's foreclosure sale of the Property. That sale occurred over one year before the Debtor filed the instant bankruptcy petition. The Debtor has apparently exhausted every avenue under state law for regaining her ownership interest in the Property and has put forth no cogent legal argument as to how the estate could recover any ownership interest in the Property. The Debtor has been attempting to regain ownership of the Property by litigating with PFA in various forums since at least August 2009, when she filed her first Chapter 13 petition. PFA has responded to her various bankruptcy filings by obtaining relief from the automatic stay on two separate occasions and has finally

completed a foreclosure sale. The Court will not now interfere with the exercise of PFA's state law rights.

CONCLUSION

For the reasons state above, the Motion for Relief from Automatic Stay filed by GMAC Mortgage, LLC, as Servicer for Provident Funding Associates, L.P. is **GRANTED** in part and **DENIED** in part. In accordance with Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure, the instant order shall be stayed for fourteen (14) days after entry.

The Clerk of Court is **DIRECTED** to serve this Order on the Debtor, GMAC Mortgage, LLC, counsel for GMAC Mortgage, LLC, the Debtor, counsel for the Debtor, the United States Trustee, and all creditors.

END OF DOCUMENT