



**IT IS ORDERED** as set forth below:

**Date: June 8, 2012**

*C. Ray Mullins*

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**C. Ray Mullins**  
**U.S. Bankruptcy Court Judge**

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

IN RE:

HINSON MANAGEMENT GROUP, INC.,

Debtor.

CASE NO. 12-58962-CRM

CHAPTER 11

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**ORDER**

**THIS MATTER** is before the Court on Estate Recoveries, LLC's Motion for Comfort Order (the "Motion") (Doc. No. 16). Debtor filed for relief under chapter 11 of the Bankruptcy Code on April 3, 2012. On May 4, 2012, Estate Recoveries, LLC ("ERL") filed the Motion, seeking confirmation that the automatic stay did not impact its completed foreclosure sale. The precise issue before the Court is whether a foreclosure sale that occurred nineteen minutes before the Debtor filed bankruptcy terminated the Debtor's equitable right of redemption. The Court finds that it did.

## **I. FACTS**

Debtor owns property in East Point, Georgia, which it leases to The Peggy Ann Martin Hinson Foundation, Inc. for the operation of Romar Academy, an independent elementary school. In June 2011, Debtor borrowed money from ERL to pay outstanding property taxes. On June 6, 2011, Debtor and ERL executed a short-term promissory note and deed for the principal amount of \$125,000.00. The terms provided that the entire balance and interest would be due on February 6, 2012. Debtor defaulted when it failed to make the required balloon payment. ERL then exercised its right to foreclose.

ERL advertised the property for foreclosure sale on April 3, 2012. On April 3, 2012, at 10:10 a.m., ERL received a high bid and sold the property to an independent third party. At the sale, Bruce Banks, the principal and sole equity holder of ERL, received a bank check in the amount of \$60,000 and \$75,000 in cash. On April 3, 2012, at 10:29 a.m., Debtor filed its chapter 11 petition.

On May 22, 2012, Debtor filed an Objection and, on May 23, 2012, Debtor filed an Amended and Restated Objection. On May 24, 2012, ERL filed a Reply in Support of the Motion. On May 24, 2012, the Court held a hearing on the Motion. A representative of the Debtor, Debtor's counsel, Bruce Banks of ERL, and ERL's counsel appeared at the hearing. After arguments from counsel, the Court announced that it would grant the Motion. For the reasons set forth below, the Court finds that the Debtor's equity of redemption expired before it filed its bankruptcy petition and, therefore, the Debtor had no interest in the subject property when it filed bankruptcy.

## **II. DISCUSSION**

Pursuant to section 541 of the Bankruptcy Code, upon the filing of a voluntary petition, an estate is created which is comprised of "all legal or equitable interest of the debtor in property." 11 U.S.C. § 541. State law controls whether or to what extent a debtor has a legal or equitable interest

in property at the commencement of a bankruptcy case. *See Butner v. United States*, 440 U.S. 48, 55 (1979). If a debtor files for bankruptcy protection while he or she still has a right to redeem the property, then that right to redeem becomes property of the debtor's estate. *See Commercial Fed. Mortg. Corp. v. Smith*, 85 F.3d 1555, 1558 (11th Cir. 1996).

“Whether a debtor's equitable right of redemption is terminated by a foreclosure sale is a question of state law.” *Howard v. Citizens Bank of Cochran (In re Howard)*, 351 B.R. 251, 255 (Bankr. M.D. Ga. 2006) (citations omitted). Under Georgia law, a valid foreclosure divests all of the debtor's rights and title in the property; thus a foreclosure sale held prior to the commencement of the debtor's bankruptcy case terminates the debtor's equity of redemption. *Pearson v. Fleet Fin. Center, Inc. (In re Pearson)*, 75 B.R. 254, 255 (Bankr. N.D. Ga. 1985) (citing *Carrington v. Citizens Bank of Waynesboro*, 85 S.E. 1027 (Ga. 1915); *McKinney v. South Boston Sav. Bank*, 274 S.E.2d 34 (Ga. App. 1980)). It is thus critical to determine when a foreclosure sale is complete.

An older decision by the Court of Appeals for the Fifth Circuit, *Fed. Deposit Ins. Corp. v. Dye*, 642 F.2d 837 (5th Cir. 1981),<sup>1</sup> found that, under Georgia law, something beyond a bid is necessary to consummate a sale. The court explained: “Georgia law treats the high bid at a foreclosure sale as forming a contract: the bidder contracts with the debtor to purchase the property at the bid price. Until the deed is transferred the sale itself has not occurred; there is only a contract to buy and sell. . . . By analogy, we conclude that to constitute a foreclosure sale . . . the proceeds of the sale must have been transferred from the bidder to the creditor.” *Dye*, 642 F.2d at 843 (citations omitted). In *Dye*, the foreclosing creditor was also the high bidder. The court concluded that, “Where the bidder and creditor are the same entity, there must be an objective standard to determine

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<sup>1</sup> Fifth Circuit decisions rendered prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

when or if the transfer has occurred . . . where the deeds have not been delivered nor have the notes been marked paid in full, it is clear that the proceeds of the sale have not been transferred.” *Id.*

Cases since *Dye* have agreed that there must be an objective standard to determine when a foreclosure sale is complete, but have found that a high bid is sufficient. The majority of recent cases have concluded that, under Georgia law, a debtor’s equity of redemption expires when the high bid is received at the foreclosure sale. *See Pearson*, 75 B.R. at 255. Indeed, “[t]he Bankruptcy Courts for the Northern District of Georgia and the Southern District of Georgia have held that a debtor’s equity of redemption terminates upon sale to the highest bidder on the date the foreclosure sale is held even though the foreclosure deed is not recorded until after the debtor filed for bankruptcy relief.” *Williams v. SunTrust Bank (In re Williams)*, Adv. No. 08-5026, 2008 Bankr. LEXIS 3163, at \*14 (Bankr. M.D. Ga. Sept. 4, 2008); *see also In re Dillard*, Case No. 06-30939, 2007 Bankr. LEXIS 394 (Bankr. M.D. Ga. Feb. 7, 2007). These courts have concluded that “the high bid is an appropriate and an objective standard under state law for determining when the foreclosure is final.” *Williams*, 2008 Bankr. LEXIS 3163, at \*15. Consequently, even if there is no evidence that the defendant made any payment on its bid, the debtor’s rights, title and equity of redemption terminate when a high bid is made. *Id.*

Here, the Debtor’s equity of redemption expired when the high bid was received at the foreclosure sale. The foreclosure sale occurred at 10:10 a.m. and the Debtor filed bankruptcy at 10:29 a.m. Not only was a bid made and accepted prior to filing, but consideration was exchanged. At the sale, Bruce Banks, principal for ERL, received a bank check in the amount of \$60,000 and \$75,000 in cash. Thus, prior to Debtor filing for bankruptcy relief, ERL received a high bid and payment on the bid. That a deed was not executed or recorded before the Debtor filed its bankruptcy petition does not change the fact that the foreclosure sale was complete under Georgia law.

Furthermore, this case involves an independent third party purchaser. Several of the cases that have considered when a debtor's equity of redemption expires have addressed circumstances in which the buyer and seller at the foreclosure sale are the same, or at least a related, party. That is not the case here. In this case, ERL sold the property at a foreclosure sale to a third party purchaser. At the hearing on May 24, 2012, ERL's principal Bruce Banks testified that he is the sole equity holder of ERL. He stated that the buyer at the foreclosure sale was not related to ERL - he was not an officer or director of ERL nor had he ever been. Immediately after the foreclosure sale, Mr. Banks received a bank check in the amount of \$60,000 and \$75,000 in cash.<sup>2</sup> This demonstrates that there was a third party purchaser and reinforces the conclusion that the foreclosure sale was complete before the Debtor filed its bankruptcy petition.

Finally, the Court finds that confirming the sale is in the interest of finality. ERL advertised the property for sale and Debtor had both notice and an opportunity to respond to the foreclosure ads. Debtor did not respond and the foreclosure sale was conducted. In *In re Builes*, Case No. 11-56714, 2011 Bankr. LEXIS 3330 (Bankr. N.D. Ga. July 8, 2011), the lender conducted a foreclosure sale at which it was the high bidder. The same day, after the foreclosure sale, the debtors filed a chapter 7 bankruptcy petition. The Court found that it would be inequitable and unjust to require the lender to repeat its foreclosure sale. *Id.* The Court finds the same to be true here. Debtor had the opportunity to file a bankruptcy petition before the sale occurred but did not. The sale occurred and the Court must respect the finality of the sale.

For the reasons stated above, the Court finds that the Debtor's equity of redemption expired

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<sup>2</sup>At the hearing, Debtor's counsel voiced concern about the sufficiency of the foreclosure sale price. Debtor valued the property at \$1,930,300.00 in its bankruptcy schedules; the property sold for \$135,000.00. While the property may have sold for significantly less than its appraised value, the Supreme Court of the United States has held in the foreclosure of real property, "reasonably equivalent value" is the actual price paid at a regularly conducted foreclosure sale. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 536 (1994).

before it filed its bankruptcy petition. Accordingly,

**IT IS ORDERED** that the Motion be and is hereby **GRANTED**.

The Clerk's Office is directed to serve a copy of this Order upon Debtor, Debtor's Counsel, ERL, ERL's counsel, and the United States Trustee.

**END OF DOCUMENT**