

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

ENTERED ON DOCKET  
FEB - 4 2005

IN RE: :  
: CASE NO. 04-97732-JB  
RICHARD KENNETH CAPPS, :  
: :  
: CHAPTER 7  
Debtor. :

ORDER

On December 20, 2004, Debtor filed a motion for leave to sell real estate in which he indicates that he has retained the services of a real estate agent to help him sell the property. The Court docket reflects that Debtor failed to serve anyone with this motion. The Chapter 7 Trustee did file a response, noting that unsecured creditors would not benefit by the sale of this property, for which reason she did not oppose the sale, and that the automatic stay had already been lifted. For the reasons set forth below, Debtor's motion to sell real estate is denied.

Debtor filed his Chapter 7 case *pro se* on October 29, 2004. Debtor is an attorney, but is currently incarcerated. Debtor's schedules reflect that he owns a residence, and the principal unpaid balance and fair market value are listed as \$355,672.04 and \$385,000, respectively. A second claim, secured by the residence, in the amount of \$400,000.00 is also listed. This claim is listed as a nonpossessory, non-purchase money lien in favor of the State of Georgia, but the schedules and statements of financial affairs do not explain its origin or nature. Additionally, Debtor has claimed an exemption of \$10,000.00 in his residence, pursuant to Georgia law.

Once an individual files a Chapter 7 case, all property in which he had an interest becomes property of the estate. 11 U.S.C. § 541; 5 Alan N. Resnick et. al. Collier on Bankruptcy ¶

541.04, at 541-14 (15<sup>th</sup> ed. Rev. 1999) (“Under section 541, once the estate is created, no interests in property of the estate remain in the debtor.”). An exception to this exists for any property which he exempts. 11 U.S.C. § 522. The Chapter 7 Trustee becomes the representative of the estate and has the obligation of collecting and liquidating any assets of the estate for the benefit of creditors. 11 U.S.C. § 704; In re Schiavone, 209 B.R. 751, 754 (Bankr. S.D. Fla. 1997) (“In a Chapter 7 bankruptcy case, the bankruptcy trustee succeeds to all of the debtor’s pre-petition interests in property, even those interests which may be encumbered or restricted.”).

On November 16, 2004, Mortgage Electronic Registration Systems, Inc. (“Mortgage Electronic”), the holder of a first mortgage on Debtor’s residence, filed a motion for relief from stay. The motion was served on Debtor and the Chapter 7 Trustee, neither of which filed a response in opposition to the motion. Mortgage Electronic had alleged in this motion that after accounting for the estimated costs of sale, other liens against the property and Debtor’s exemptions, little or no equity in the property remained for the benefit of the bankruptcy estate. At the hearing on the motion, Mortgage Electronic asserted that the amount actually owed was \$366,292.84, and the order lifting the stay, entered on December 10, 2004, instructed the mortgage holder to pay any excess funds realized from the sale of the property to the Chapter 7 Trustee.

In this instance, Debtor’s motion for leave to sell property and his employment of an agent to sell it indicates a misunderstanding of bankruptcy law. The automatic stay was lifted as to this property on December 10, 2004, and Mortgage Electronic is in the position to pursue its contractual and non-bankruptcy law remedies. Should Mortgage Electronic recover funds from the sale of Debtor’s property in excess of Debtor’s obligation to it and other allowed expenses incurred in the sale, along with Debtor’s exemption, those excess funds will be paid to the Chapter 7 Trustee for distribution. If the

State of Georgia is entitled to the excess funds by virtue of a secured claim on Debtor's residence, the Chapter 7 Trustee will turn over those funds to the state. Moreover, if Mortgage Electronic had not moved for the automatic stay to be lifted, the Chapter 7 Trustee would have had the authority and control over the property, including its sale, not Debtor, subject to her abandoning it. 11 U.S.C. § 554. Accordingly, it is

ORDERED that Debtor's motion for leave to sell estate and his employment of an agent to do so are denied.

IT IS SO ORDERED, this 3<sup>rd</sup> day of February, 2005.

  
JOYCE BIARY  
UNITED STATES BANKRUPTCY JUDGE

## **DISTRIBUTION LIST**

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