Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
June 10, 2019

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No.: 10-26698-MKN
	)	Chapter 7
JUSTIN DAVID WARD and	)	
AUTUMN BETH WARD,	)	
	)	Date: June 5, 2019
Debtors.	)	Time: 2:30 p.m.
	)	

ORDER ON PARADISE HARBOUR PLACE TRUST AND VENDANGE PLACE TRUST'S MOTION TO RETROACTIVELY ANNUL THE AUTOMATIC STAY[1]

On June 5, 2019, the court heard Paradise Harbor Place Trust and Vendange Place Trust's Motion to Retroactively Annul the Automatic Stay ("Annulment Motion"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On September 1, 2010, Justice David Ward and Autumn Beth Ward ("Debtors") filed a voluntary, joint Chapter 7 petition ("Petition"), along with their schedules of assets and liabilities ("Schedules"), statement of financial affairs ("SOFA"), and Chapter 7 individual debtor's statement of intention ("Statement of Intention"). (ECF No. 1). On the Petition, Debtors listed

[1] In this Order, all references to "ECF No." are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "NRS" are to provisions of the Nevada Revised Statutes. All references to "FRE" are to the Federal Rules of Evidence.

their residence as 2601 Vendange Place, Henderson, Nevada 89044 ("Residence"). The case was assigned for administration to Joseph B. Atkins as Chapter 7 bankruptcy trustee ("Trustee").

On their Schedule "A", Debtors listed the Residence as having a value of $266,000. On their Schedule "C", Debtors did not claim an exemption in the Residence. On their Schedule "D," Debtors listed the Residence as being subject to liens in favor of Bank of America Home Loans ("BOA"), the City of Henderson, and Madeira Canyon, c/o Associated Professional Services.[2] On their Statement of Intention, Debtors reiterated that the Residence is subject to liens identified on Schedule "D" and that the Residence will be surrendered.

On the same date the Petition was filed, a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, and Deadlines ("Bankruptcy Notice") was filed and served on all parties in interest. (ECF No. 7).

On September 4, 2010, a Certificate of Notice was filed attesting that the Bankruptcy Notice was sent by first class mail and by electronic transmission to various parties. (ECF No. 9). BOA and Madeira HOA are included on the certificate, but not the Movants.

On December 7, 2010, Debtors received their Chapter 7 discharge ("Discharge Order"). (ECF No. 20).

On December 9, 2010, a Certificate of Notice was filed attesting that the Discharge Order was sent by first class mail and by electronic transmission to various parties. (ECF No. 21). BOA and Madeira HOA are included on the certificate, but not the Movants.

On September 1, 2011, Debtors filed a notice that they had changed their address to 1502 W. Horseshoe Bend in Rochester Hills, Michigan. (ECF No. 33).

On January 27, 2012, the Trustee filed a notice of his final report and request for compensation ("TFR"), and of the deadline for filing objections. (ECF No. 36).

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[2] Madeira Canyon is a homeowners association ("HOA") encompassing the area in which the Residence is situated. Hereafter, the Madeira Canyon homeowners association will be referred to as "Madeira HOA."

1 On February 1, 2012, a Certificate of Notice was filed attesting that the TFR was sent by
2 first class mail and by electronic transmission to various parties. (ECF No. 37). BOA and
3 Madeira HOA are included on the certificate, but not the Movants.
4 On February 28, 2012, an order was entered approving the final report. (ECF No. 39).
5 On May 22, 2012, a final decree was entered discharging the Trustee from any further
6 duties and closing the case.[3] (ECF No. 41).
7 On April 30, 2019, an order was entered granting an ex parte request to reopen the
8 bankruptcy case. (ECF No. 44).
9 On May 1, 2019, the instant Annulment Motion[4] was filed by Paradise Harbor Place
10 Trust ("Paradise Harbor") and Vendange Place Trust ("Vendange Place") [collectively
11 "Movants"]. (ECF No. 46).
12 On May 22, 2019, opposition was filed on behalf of BOA ("Opposition") accompanied
13 by the Declaration of Jamie Combs ("Combs Declaration").[5] (ECF Nos. 50 and 51).[6]
14 On May 31, 2019, Movants filed a reply ("Reply").[7] (ECF No. 53).
15 **THE PRESENT DISPUTE**
16 During the Chapter 7 case, Madeira HOA recorded a notice of delinquent assessment lien
17 with respect to the Residence. Thereafter, it recorded a notice of default and election to sell the
18 Residence. It then recorded a notice of sale. Madeira HOA took these actions without obtaining
19
20 [3] On January 6, 2015, the Trustee passed away.
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22 [4] Attached to the Annulment Motion are copies of two documents marked as Exhibit "1" and "2." BOA does not object to the court's consideration of the exhibits.
23
24 [5] Attached to the Combs Declaration are copies of various documents marked as Exhibits "A" through "Z." Movants have raised no objections to the court's consideration of the exhibits.
25
26 [6] On May 24, 2019, a request for special notice was filed by the law firm of Tiffany & Bosco, P.A., as attorneys for BOA, even though the Opposition was filed on behalf of BOA by a different law firm. (ECF No. 52).
27
28 [7] Attached to the Reply are copies of various documents marked as Exhibits "1" through "7." The first two exhibits appear to be identical to those attached to the Annulment Motion. BOA has raised no objections to the court's consideration of these exhibits.

relief from stay from the bankruptcy court and while the Residence was still property of the bankruptcy estate.

After the Chapter 7 case was closed, Madeira HOA completed its foreclosure sale. The Residence was purchased at the foreclosure sale by Vendange Place. A trustee's deed upon sale was recorded in the county records. Thereafter, the Residence was transferred to Paradise Harbor. A grant deed was recorded in the county records.

On March 2, 2016, BOA commenced a civil action in the United States District Court for the District of Nevada ("USDC") against Madeira HOA, Vendange Place, Paradise Harbor, and Nevada Association Services, denominated Case No. 16-cv-00444-APG-NJK ("Federal Case").[8] BOA's complaint ("Complaint") is framed as four separate causes of action, the first of which seeks quiet title and declaratory relief as to the ownership of the Residence ("Quiet Title Claim"), while the third seeks a determination that the foreclosure sale was wrongful ("Wrongful Foreclosure Claim"). The Quiet Title Claim asserts numerous grounds contesting the validity of the HOA foreclosure, only one of which involves the above-captioned bankruptcy proceeding. BOA argues that the HOA Foreclosure is void as a matter of law because it was commenced in violation of the automatic stay. The Wrongful Foreclosure Claim asserts numerous grounds challenging the foreclosure, including that BOA was never given adequate notice of the HOA Foreclosure proceeding.

On August 18, 2016, the USDC entered an order denying without prejudice Madeira HOA's motion to dismiss. The order also temporarily stayed further proceedings in the action pending the outcome of various appellate proceedings involving the Ninth Circuit's divided opinion in Bourne Valley Court Trust v. Wells Fargo Bank, N.A., 832 F.3d 1159 (2016).

On September 21, 2018, the USDC entered an order lifting the stay of the civil action in light of certain rulings entered in connection with the Bourne Valley proceeding.

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[8] The court takes judicial notice under FRE 201 of the documents filed in the Federal Case. Compare U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Conde v. Open Door Mktg., LLC, 223 F. Supp. 3d 949, 970 n.9 (N.D. Cal. 2017); Green v. Williams, 2012 WL 3962458, at *1 n.1 (D. Nev. Sept. 7, 2012); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015).

On December 4, 2018, the USDC entered a scheduling order setting various deadlines for further proceedings, including the submission of a joint pretrial order no later than April 12, 2019.

On March 13, 2019, in accordance with the scheduling order, various motions for summary judgment were filed.

On May 1, 2019, the instant Annulment Motion was filed before this bankruptcy court, after which the briefing on the summary judgment motions was completed in the USDC.

DISCUSSION

The automatic stay arises only upon the filing of a bankruptcy petition and is applicable to "all entities." 11 U.S.C. § 362(a). The automatic stay applies, *inter alia*, to any act to "obtain possession of 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 also applies to any act to "enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4). The stay of acts against property of the estate continues until the property is no longer property of the bankruptcy estate. See 11 U.S.C. § 362(c)(1). Property of the 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).

When the Debtors filed their Chapter 7 bankruptcy petition, the Residence was property of the bankruptcy estate protected by the automatic stay. The relevant timeline for the instant dispute is as follows:

- September 1, 2010 - Debtors filed their Chapter 7 Petition.
- December 7, 2010 - Debtors received their Chapter 7 discharge.
- February 14, 2011 - Madeira HOA recorded a notice of delinquent assessment lien ("NODAL") (Combs Ex. "F").
- April 6, 2011 - Madeira HOA recorded a notice of default and election to sell ("NOD") (Combs Ex. "H").

- April 16, 2012 – Madeira HOA recorded a notice of foreclosure sale ("NOS") (Combs Ex. "J").[9]
- May 22, 2012 - Chapter 7 case was closed.
- June 8, 2012 – Foreclosure sale was completed ("HOA Foreclosure").
- June 19, 2012 – Foreclosure deed was recorded in favor of Vendange Place. (Combs Ex. "M").[10]
- July 26, 2012 – Residence was deeded to Paradise Harbor. (Combs Ex. "N").

There is no dispute that the Residence was property of the bankruptcy estate until the case was closed and at no time did Madeira HOA seek or obtain relief from the automatic stay to enforce its assessment lien. As a matter of law, the recording of the NODAL, NOD and NOS were *void ab initio*, see Schwartz v. U. S. (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992), and the foreclosure sale was a nullity. See, e.g., 40235 Washington St. Corp. v. Lusardi (In re 40235 Washington St. Corp.), 329 F.3d 1076, 1080 (9th Cir. 2003) (purchase of bankruptcy estate property at county tax sale in violation of automatic stay was without effect). It appears that Madeira HOA willfully violated the automatic stay under Section 362(a)(4) because it received notice of the bankruptcy case and nonetheless proceeded with its foreclosure.[11]

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[9] According to the NOS, the total amount of the delinquent assessment and reasonable estimated costs, expenses, and advances at the time of the initial publication of the notice of sale was $3,752.72.

[10] According to the foreclosure deed, Vendange Place acquired the Residence for a bid in the amount of $6,350.00. Less than two months after being deeded the Residence, Paradise Harbor filed a voluntary Chapter 11 proceeding that was shortly dismissed. (Combs Ex. "S"). During the Chapter 11 proceeding, Paradise Harbor represented at the Residence had a value of $190,000. (Combs Ex. "Q" and "R").

[11] The HOA involved in the present dispute is only one of many such entities that have initiated foreclosure sales in violation of the automatic stay, which in turn have spawned costly litigation between former lenders and subsequent owners of residential real property. See, e.g., In re Doris Barrett, Case No. 08-13570-MKN, Order Regarding Second Amended Motion for Determination that HOA Foreclosure Sale Violated the Automatic Stay, and Counter-Motion to Retroactively Annul the Stay, Docket No. 255 (Bankr.D.Nev. Mar. 25, 2019); In re Lum Lung, 2018 WL 6980928, at *6 (Bankr. D.Nev. Dec. 6, 2018) (granting purchaser's motion to annul automatic stay to validate homeowners association foreclosure sale); In re Leeds, 589 B.R. 186, 195- 204 (Bankr. D.Nev. 2018) (denying purchaser's motion to annul automatic stay where

1 Under Nevada law, certain portions of HOA assessment liens have priority over
2 residential mortgages. See NRS 116.3116(2)(b). When the homeowner does not satisfy the
3 priority lien, the HOA can enforce the priority assessment lien by foreclosing on the residence.
4 The Nevada Supreme Court has concluded that a valid HOA foreclosure sale of residential
5 property extinguishes the lower priority mortgage held by the residential lender. See SFR Inv.
6 Pool 1, LLC v. U.S. Bank, 334 P.3d 408, 419 (Nev. 2014).[12] In a bankruptcy context, the
7 consequence to the residential lender is extreme: the individual debtor's personal liability for the
8 loan is discharged by the bankruptcy, see 11 U.S.C. § 727(b), and the lender's security interest
9 against the residence is extinguished by the foreclosure. See also Saticoy Bay LLC Series 350
10 Durango 104 v. Wells Fargo Home Mort., 388 P.3d 970, 973 (Nev. 2017). The residential lender
11 ends up with no enforceable obligation against the borrower because of the discharge injunction,
12 see 11 U.S.C. § 524(a)(1 and 2), and the purchaser at the HOA foreclosure sale ends up with title
13
14

15 purchaser at homeowners association foreclosure sale was a client of the Chapter 7 trustee); In re
16 Lynn C. Burke, Case No. 12-12508-MKN, Order on Ex Parte Motion to Reopen Bankruptcy Case for the Purpose of Retroactively Annulling the Automatic Stay, Docket No. 45 (Bankr.
17 D.Nev. Apr. 15, 2016) (granting purchaser's motion to annul automatic stay to validate HOA foreclosure sale); In re Victor H. Wheatley, Case No. 12-22310-MKN, Order on Motion for
18 Relief from Stay re: 1304 Rawhide Street Las Vegas, Nevada, Docket No. 85 (Bankr. D.Nev.
19 July 31, 2015) (granting homeowners association motion, joined by purchaser, to annul automatic stay to validate sale); In re Wayne Alan Haddad and Debra Ann Haddad, Case No. 11-
20 13184-MKN, Order on Ex Parte Motion to Reopen Bankruptcy Case for the Purpose of
21 Retroactively Annulling the Automatic Stay, Docket No. 36 (Bankr. D.Nev. May 19, 2015) (granting purchaser's motion to annul automatic stay to validate homeowners association
22 foreclosure sale and overruling objection by debtors as to the impact of reopening on their credit history). Under Section 362(k)(1), an individual injured by a willful violation of the automatic
23 stay is entitled to recover actual damages, including attorney's fees, as well as punitive damages
24 in appropriate circumstances. As yet, the court is not aware of any instance where an individual injured as a result of a violation of the automatic stay by an HOA has sought and/or obtained
25 damages from an HOA under Section 362(k)(1). But see In re Leeds, 589 B.R. at 204 n.30.

26 [12] The residential lender can prevent an HOA foreclosure sale from being completed by
27 making an unconditional tender of payment of the priority portion of the HOA assessment lien before the foreclosure sale is held. See Bank of America, N.A. v. SFR Investments Pool 1, LLC,
28 427 P.3d 113, 117-18 (Nev. 2018).

1 to the residence unencumbered by the prior mortgage by paying a fraction of the fair market
2 value of the residence.
3 Also, as mentioned above, the Quiet Title Claim now alleged in the Federal Case seeks a
4 declaration that the HOA Foreclosure was void for several reasons, including: (1) that the
5 underlying Nevada foreclosure statute is unconstitutional,[13] and (2) that the HOA Foreclosure
6 was conducted in violation of the automatic stay. While the summary judgment motions are
7 pending before the USDC in the Federal Case, Movants have brought this Annulment Motion
8 before the bankruptcy court to address the automatic stay aspect of the Quiet Title Claim.
9 Where the automatic stay has been violated, a party in interest may seek an order from
10 the bankruptcy court to annul the automatic stay for "cause" under Section 362(d)(1). See
11 Schwartz, 954 F.2d at 572-73.[14] Annulment of the automatic stay "has the effect of retroactively
12 validating acts that otherwise violate the stay." Lonestar Sec. & Video, Inc., v. Gurrola (In re
13 Gurrola), 328 B.R. 158, 172 (B.A.P. 9th Cir. 2005). See, e.g., Ceralde v. The Bank of N.Y.
14 Mellon (In re Ceralde), 2013 WL 4007861 (B.A.P. 9th Cir. Aug. 6, 2013) (annulment motion
15 granted in involuntary Chapter 7 case in favor of lender that foreclosed without prior knowledge
16
17 [13] The constitutionality of the Nevada foreclosure statute applicable to homeowners
18 associations has been addressed in both state and federal courts in Nevada. In Bank of America,
N.A. v. Arlington West Twilight Homeowners Association, 920 F.3d 620 (9th Cir. 2019), the
19 Ninth Circuit recently reversed the USDC and upheld the constitutionality of the statute based on
20 the Nevada Supreme Court's decision in Bank of America, N.A. v. SFR Investments Pool 1,
LLC. On remand, the USDC granted summary judgment in favor of the lender because there
21 was no genuine dispute that the lender had unconditionally tendered the superpriority portion of
22 the homeowner association's assessment lien before the foreclosure sale was held. See Bank of
America, N.A. v. Arlington West Twilight Homeowners Association, 2019 WL 2250265, at * 5
23 (D.Nev. May 24, 2019).

24 [14] The automatic stay under Section 362(a) is not limited to creditors of the debtor but is
25 "applicable to all entities." An "entity" under Section 101(15) includes any person, estate, trust,
governmental unit, and the United States trustee." A "person" under Section 101(41) includes an
26 "individual, partnership, and corporation." Relief from stay under Section 362(d) also is not
limited to creditors of the debtor but may be sought by any "party in interest." Because
27 Vendange Place and Paradise Harbor are persons and therefore are parties in interest to which
the automatic stay apples, they are permitted under Section 362(d) to seek relief from stay in this
28 bankruptcy case.

of involuntary proceeding). See also, Sundquist v. Bank of Am., N.A. (In re Sundquist), 566 B.R. 563, 685 (Bankr. E.D. Cal. 2017).

In this case, neither BOA nor the Movants are parties to the Chapter 7 proceedings that the automatic stay is designed to protect, i.e., the Debtors and their assigned bankruptcy trustee. In this circuit, however, a party asserting an ownership interest in property of a bankruptcy estate does have standing as a party in interest to seek annulment of the automatic stay. See In re McKay, 2019 WL 642834, at *6 (Bankr. D. Idaho Feb. 14, 2019), citing Cruz v. Stein Strauss Trust # 1361, PDQ Invs., LLC (In re Cruz), 516 B.R. 594, 602 (B.A.P. 9th Cir. 2014); In re Lum Lung, 2018 WL 6980928, at *3 n.5. By contrast, in this circuit, a creditor of a bankruptcy estate does not have standing to object to annulment of the automatic stay. See In re Leeds, 589 B.R. at 198-200, citing Tilley v. Vucurevich (In re Pecan Groves of Arizona), 951 F.2d 242 (9th Cir. 1991).[15] BOA therefore has no standing to respond to the Annulment Motion and this bankruptcy court is not required to consider BOA's objections to the requested relief. Nonetheless, the court separately considers if the retroactive relief requested is appropriate based on the facts presented.

Whether "cause" exists under Section 362(d)(1) to annul the stay is determined under a "balancing of the equities" test. See In re Fjeldsted, 293 B.R. 12, 24 (B.A.P. 9th Cir. 2003). The following factors should be considered:

> 1. Number of filings;
> 2. Whether, in a repeat filing case, the circumstances indicate an intention to delay and hinder creditors;
> 3. A weighing of the extent of prejudice to creditors or third parties if the stay relief is not made retroactive, including whether harm exists to a bona fide purchaser;

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[15] Although this bankruptcy court has expressed a different view that the automatic stay also protects creditors, see In re Leeds, 589 B.R. at 200 n.22, the Ninth Circuit recently reiterated its view in Pecan Groves that the only parties with standing to object to retroactive relief from stay are the debtor and the bankruptcy trustee. See U.S. Bank, N.A. v. SFR Investments Pool 1, LLC (In re Petrone), 2019 WL 911869, at *1-2 (9th Cir. Feb. 22, 2019). This court is, of course, bound by the views of the Ninth Circuit.

4. The Debtor's overall good faith (totality of circumstances test): *cf. Fid. & Cas. Co. of N.Y. v. Warren (In re Warren),* 89 B.R. 87, 93 (9th Cir. BAP 1988)(chapter 13 good faith);
5. Whether creditors knew of stay but nonetheless took action, thus compounding the problem;
6. Whether the debtor has complied, and is otherwise complying, with the Bankruptcy Code and Rules;
7. The relative ease of restoring parties to the *status quo ante;*
8. The costs of annulment to debtors and creditors;
9. How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violative conduct;
10. Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief;
11. Whether annulment of the stay will cause irreparable injury to the debtor;
12. Whether stay relief will promote judicial economy or other efficiencies.

Id. at 25.[16]

Five of these factors (1, 2, 4, 6, and 11) focus solely on the debtor ("debtor factors"); three of these factors (3, 5, and 10) focus solely on non-debtors ("non-debtor factors"); three of these factors (7, 8, and 9) focus on both the debtor and non-debtor parties ("common factors"); and one factor (12) looks to judicial interests ("neutral factor"). All twelve factors ("Fjeldsted Factors") simply provide an analytical framework and any one factor may be dispositive in comparison to the others. Id. Thus, determining whether annulment is proper is made on a case by case basis. See Nat'l Envt'l. Waste Corp. v. City of Riverside (In re Nat'l Envt'l. Waste Corp.), 129 F.3d 1052, 1055 (9th Cir. 1997).[17]

[16] Factor 5 refers to the Warren decision by the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP"). In that proceeding, the individual debtor sought to discharge a $40,970 embezzlement judgment through a Chapter 13 plan that paid only $1,000 to his creditors. The embezzlement judgment would have been nondischargeable in Chapter 7 under Section 523(a)(6), but was not excepted from the so-called "super-discharge" in Chapter 13 under then-Section 1328(c). 89 B.R. at 93. The BAP determined that a finding of the debtor's good faith in proposing a plan under Section 1325(a)(3) should take into consideration the amount of the proposed payment to creditors and the presence of a debt that would be nondischargeable in Chapter 7. Id. at 95.

[17] The parties to the instant dispute correctly refer to the Fjeldsted Factors, see Annulment Motion at 4:19 to 7:15, Opposition at 14:6 to 18:5, and Reply at 10:8 to 13:26, but, of course, reach opposite conclusions.

1 In this instance, the previously categorized debtor factors favor retroactive relief from
2 stay. Debtors do not have a history of repeat bankruptcy filings that might suggest a malign
3 intent to delay or hinder creditors. Debtors obtained their Chapter 7 discharge by complying
4 with the applicable requirements of bankruptcy law, and no party in interest has questioned their
5 good faith. More important, rather than causing irreparable injury to the Debtors, it appears that
6 retroactive relief from stay will prevent them from losing the benefit of their bankruptcy
7 discharge. If the HOA Foreclosure sale was void and title to the Residence did not pass to
8 Vendange Place, then title remains in the Debtors' names and in their bankruptcy estate. When
9 they filed their bankruptcy petition, neither sought to reside in the Residence and they did not
10 claim it as their homestead. Both Debtors stated their intention to surrender the Residence.
11 Because the Debtors have made no payments on the underlying obligation for approximately a
12 decade, they would be subject to a renewed foreclosure of the Residence occurring well after
13 they received their Chapter 7 discharge. The post-discharge damage to the Debtors' new credit
14 history is likely to be significant and certainly detrimental to their fresh start through Chapter 7.
15 The non-debtor factors also favor retroactive relief. There is no suggestion in the record
16 that the Movants had notice or actual knowledge of the bankruptcy case, or knew that the HOA
17 Foreclosure sale was in violation of the automatic stay. In fact, the record demonstrates that
18 Vendange Place was never listed as a creditor or interested party in the bankruptcy proceedings
19 at any time. Thus, the evidence in the record infers that Vendange Place did not know of the
20 automatic stay and did not take steps to continually violate the stay. Moreover, both Movants
21 sought retroactive relief from stay soon after BOA resumed prosecution of the Federal Case
22 where it asserted the protection of the automatic stay. Because Vendange Place apparently was a
23 bona fide purchaser of the Residence, the prejudice to its successor in interest was greater than
24 that of a lender who would have had an opportunity to tender payment of any delinquent HOA
25 assessments to prevent a foreclosure sale. See discussion at note 12, supra. See also SFR Inv.
26 Pool 1, LLC v. U.S. Bank, 334 P.3d 408, 414 (Nev. 2014) ("But as a junior lienholder, U.S.
27 Bank could have paid off the SHHOA lien to avert loss of its security…The inequity U.S. Bank
28

decries is thus of its own making…”).[18] While the non-debtor factors do not favor Madeira HOA, they do support retroactive relief in favor of the Movants.[19]

The common factors also support retroactive relief from stay. As already discussed, if the foreclosure sale is void, legal title to the Residence never left the Debtors' bankruptcy estate. Restoration of the "status quo ante," however, means not only that legal title to the Residence remains in the Debtors, but that Madeira HOA would have an unpaid priority assessment lien, the Debtors would be in substantial default on the loan, and BOA's deed of trust against the Residence would be restored.[20] Additionally, Paradise Harbor would have no legal interest in the Residence and Vendange Place would be out the $6,350 that it paid at the foreclosure sale. Even if the $6,350 paid by Vendange Place is ignored, there will be difficulty restoring the real property records to reflect the state of title to the Residence that existed prior to the June 8, 2012 foreclosure. The other common factors are immaterial.

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[18] BOA asserts that the HOA Foreclosure was conducted without giving proper notice, see Opposition at 14:10-23, which also is alleged in the Wrongful Foreclosure Claim that is being litigated before the USDC in the Federal Case. See discussion at 4, supra. Whether the assertion will be resolved through the summary judgment motions pending in that proceeding is unknown. For purposes of this Annulment Motion, however, the court determines only whether retroactive relief from stay is warranted. Like all relief from stay motions seeking permission to conduct foreclosures outside of bankruptcy, the court does not address whether the foreclosure itself is properly conducted under applicable non-bankruptcy law.

[19] The windfall obtained by Vendange Place in this case, see note 10, supra, should not be lost on anyone to this dispute. That windfall, however, is the result of the Nevada statutory scheme that provides extraordinary tools for HOAs to collect assessments required to protect and serve common community needs. Residential lenders can protect their interests, however, by pursuing remedies under their deeds of trust, or, by unconditionally tendering payment of any delinquent assessments to the HOA. See, e.g., Bank of America, N.A. v. Thomas Jessup, LLC Series VII, 435 P.3d 1217 (Nev. 2019) (HOA statement of rejection of super priority tender, if attempted, operated to cure any default).

[20] The "status quo ante" is a term of art referring to the conditions that existed before the challenged action took place. See, e.g., Czyzewski v. Jevic Holding Corp., 137 S.Ct. 973, 985-86 (2017) (structured Chapter 11 dismissal did not restore status quo ante, but distributed debtor's assets in violation of bankruptcy priority scheme).

The remaining "neutral factor" also favors retroactive relief. This is a Chapter 7 case that was reopened for the limited purpose of allowing the Annulment Motion to be pursued. There are no other pertinent proceedings in this bankruptcy court involving the parties to this matter and the Federal Case is currently pending before the USDC. Debtors have been given notice of the retroactive relief from stay requested by the Movants and have not filed or presented any opposition to such relief. Moreover, notice of the relief requested by the Movants also has been given to the UST which also does not oppose, nor has the UST taken steps to appoint another Chapter 7 trustee to respond to the Annulment Motion. On the other hand, the Federal Case remains before the USDC where other controversies may be litigated between the Movants and BOA, including any remaining issues as to the validity of the Nevada HOA foreclosure statute. Judicial economy supports allowing the parties to return to the USDC to resolve those issues, if any.

Based on the foregoing, the court finds that the Fjeldsted factors taken as a whole - the debtor, non-debtor, creditor, and neutral factors – favor retroactive relief from stay for cause under Section 362(d)(1). The court concludes that the automatic stay that arose on September 1, 2010, should be annulled to include all steps necessary after the commencement date to complete the HOA Foreclosure sale of the Residence.[21]

IT IS THEREFORE ORDERED that Paradise Harbor Place Trust and Vendange Place Trust's Motion to Retroactively Annul the Automatic Stay, Docket No. 26, be, and the same hereby is, **GRANTED**, effective February 14, 2011.

IT IS FURTHER ORDERED that the clerk of the court shall re-closed the above-captioned bankruptcy case on June 28, 2019.

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[21] In its written opposition, and at oral argument, BOA suggested that the court could somehow annul the automatic stay so that the HOA Foreclosure applied only to the non-priority portion of the assessment lien. See Opposition at 18:6-8. Such relief would bypass the effect of the Nevada HOA foreclosure statute, and would make the Movants' title to the Residence subject to BOA's previous note and deed of trust. While that solution might avoid some of the ramifications to the Debtors, it would be the equivalent of a legal windfall to BOA. This suggestion is both startlingly self-serving and an apparent effort to render moot much of the litigation that BOA itself initiated in its Federal Case.

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:

Law Offices of Michael F. Bohn, Esq., Ltd.
Michael F. Bohn, Esq.
Nikoll Nikci, Esq.
2260 Corporate Circle, Suite 480
Henderson, NV 89074
Attorney for Movants Paradise Harbor Place Trust
and Vendange Place Trust

Akerman LLP
Ariel E. Stern, Esq.
Jamie K. Combs, Esq.
1635 Village Center Circle, Suite 200
Las Vegas, NV 89134
Attorneys for Bank of America, N.A.

J. William Ebert, Esq.
Karen Kao, Esq.
9900 Covington Cross Drive, Suite 120
Las Vegas, NV 89144
Attorneys for Madeira Canyon Homeowners Association

Justin David Ward
Autumn Beth Ward
1502 W. Horseshoe Bend
Rochester Hills, Michigan 48306
Debtors

Office of the United States Trustee
300 S. Las Vegas Blvd., Suite 4300
Las Vegas, NV 89101

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