Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
May 17, 2018

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No. 11-27142-MKN
	)	Chapter 7
DANUTA CHORZEPA and TADEUSZ CHORZEPA,	)	
	)	Date: April 18, 2018
Debtors.	)	Time: 1:30 p.m.

(AMENDED) ORDER ON SFR INVESTMENTS POOL 1, LLC'S MOTION TO RETROACTIVELY ANNUL THE AUTOMATIC STAY[1]

On April 18, 2018, the court heard SFR Investments Pool 1, LLC'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 August 13, 2009, a voluntary Chapter 13 proceeding was commenced by Danuta Chorzepa and Tadeusz Chorzepa ("Debtors"), denominated Case No. 09-24800-MKN ("Chapter 13 Case"). Along with their voluntary Chapter 13 petition, Debtors filed their schedules of assets and liabilities along with their statement of financial affairs. On their real property Schedule "A," Debtors listed their single family residence located at 5928 Gulf Island Avenue,

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the 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. This amendment corrects the month of September to the month of November that appears in the prior order, Docket No. 53, at page 7, lines 17 and 23, and page 8, line 23.

Las Vegas, Nevada 89156 ("Residence"), as having a fair market value of $175,000. On their Schedule "C," Debtors did not claim an exemption in the Residence. On their secured creditor Schedule "D," Debtors listed Countrywide Home Lending as having a first mortgage against the Residence securing a debt in the amount of $220,824. Debtors also listed Bank One/Chase as having a second mortgage against the Residence securing a debt in the amount of $60,218. A creditor matrix was attached to the petition that includes the names and addresses of Countrywide Home Lending and Bank One/Chase.

On December 30, 2010, a request for special notice was filed by BAC Home Loans Servicing, LP, fka Countrywide Home Loans Servicing, LP. (ECF No. 77).

On March 2, 2011, a proof of claim in the secured amount of $220,124.73 was filed by BAC Home Loans Servicing, LP.

On June 10, 2011, an order was entered for conditional dismissal of the case. (ECF No. 86).

On July 5, 2011, an order was entered dismissing the Chapter 13 Case. (ECF No. 89).

On October 31, 2011, Debtors filed a voluntary Chapter 7 petition commencing the above-captioned proceeding ("Chapter 7 Case"), along with their schedules of assets and liabilities ("Schedules") and statement of financial affairs. (ECF No. 1). On their real property Schedule "A," Debtors again listed their Residence as having a fair market value of $175,000. On their secured creditor Schedule "D," Debtors listed Bac Home Loan Servicing, instead of Countrywide Home Lending, as having a first mortgage against the Residence securing a debt in the amount of $220,824. Debtors again listed Bank One/Chase as having a second mortgage against the Residence securing a debt in the amount of $60,218. Heritage Estates HOA, c/o Ideal Community Mgmt, Inc. ("Heritage Estates HOA"), also was listed as having a debt secured by the Residence in the amount of zero dollars. A creditor matrix was attached to the petition that includes the names and addresses of Bac Home Loan Servicing, Bank One/Chase, and Heritage Estates HOA.

On the same date, a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines ("Bankruptcy Notice") was filed advising parties in interest that the case was assigned

to David A. Rosenberg as Chapter 7 trustee ("Chapter 7 Trustee"), that a meeting of creditors would occur on December 2, 2011, that the deadline for filing objections to discharge and dischargeability of debt was January 31, 2012, and that proofs of claim need not be filed until further notice. (ECF No. 7).

On November 3, 2011, a Certificate of Notice was filed attesting that the Bankruptcy Notice was served by first class mail on the creditors set forth on the Mailing Matrix, and also by electronic transmission. (ECF No. 14).

On February 1, 2012, Debtors received their discharge. (ECF No. 19).

On May 9, 2012, the Chapter 7 Trustee issued a notice of assets setting forth a deadline of August 9, 2012, for parties in interest to file a proof of claim. (ECF No. 21). That notice was served on all creditors and parties in interest by first class mail and by electronic transmission. (ECF No. 22).

On August 17, 2012, a request for special notice was filed by U.S. Bank National Association ("US Bank"), as Trustee for the Certificateholders of Harborview Mortgage Loan Trust 2005-08, Mortgage Loan Pass-Through Certificates, Series 2005-08. (ECF No. 23).

On March 15, 2013, the Chapter 7 Trustee filed an ex parte application for authorization to employ a real estate agent to list and sell the Residence. (ECF No. 33). On March 19, 2013, an order was entered approving the ex parte application. (ECF No. 34).

On February 17, 2014, the Chapter 7 Trustee reported that there were no assets in the bankruptcy estate available for distribution to creditors. (ECF No. 36).

On February 18, 2014, a final decree was entered stating that the bankruptcy estate had been fully administered and ordering that the case is closed. (ECF No. 37).

On March 8, 2018, a motion to reopen the Chapter 7 case was filed by SFR Investments Pool 1, LLC ("SFR"). (ECF No. 39).

On March 12, 2018, an order was entered granting the motion. (ECF No. 41). Notice of entry of the order reopening the case was served on the Debtors, the Chapter 7 Trustee, US Bank, Bank of America, the United States Trustee ("UST"), and other parties in interest. (ECF No. 42).

On March 12, 2018, SFR filed the instant Annulment Motion. (ECF No. 43). The motion is supported by the Declaration of Christopher J. Hardin. (ECF No. 45). The motion, supporting declaration and notice of hearing were served on the Debtors, the Chapter 7 Trustee, US Bank, Bank of America, the UST, and other parties in interest. (ECF No. 47).

On April 4, 2018, opposition to the Annulment Motion was filed by US Bank. (ECF No. 50). The opposition is supported by the Declaration of Jamie K. Combs. (ECF No. 51). No opposition or response to the Annulment Motion was filed by the Chapter 7 Trustee[2] or the Debtors.

On April 10, 2018, SFR filed a reply. (ECF No. 52).

DISCUSSION

SFR purchased the Residence at a nonjudicial foreclosure sale held on July 26, 2013. The sale was conducted on behalf of the homeowners association ("HOA") governing the Residence. The HOA foreclosure was initiated by a notice of delinquent assessment lien recorded against the Residence on August 6, 2012.

Under Nevada law, delinquent HOA assessments may prime the liens of prior deed of trust holders in certain circumstances. Under Nevada law, a completed HOA foreclosure sale based on a delinquent assessment lien wipes out the lien held by the first deed of trust holder, i.e., the residential lender. See SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 419 (Nev. 2014). To avoid such a result, the Nevada Supreme Court observed that lenders could stave off HOA foreclosures by simply paying off delinquent assessments or by establishing escrows to reserve portions of borrower payment for HOA assessments. Id. at 414.

In the present case, US Bank and SFR are parties to an action pending in the United

[2] At the hearing, US Bank attempted to introduce evidence that the Chapter 7 Trustee is now affiliated in some way with SFR and has a conflict of interest that would dissuade him from opposing the Annulment Motion. The absence of a response from the Chapter 7 Trustee, however, is immaterial to whether annulment is appropriate in this case. If in fact US Bank has evidence that the Chapter 7 Trustee acted in violation of his fiduciary duties during his tenure as a standing Chapter 7 trustee, it may seek relief with respect to the trustee's bond, seek referral of the matter for investigation by the UST or the United States Attorney, or take other action. Those matters are not before this court.

States District Court for the District of Nevada ("Federal Court") styled as U.S. Bank National Association, etc. v. Heritage Estates Homeowners Association; SFR Investments Pool 1, LLC, and Nevada Association Services, Inc., Case No. 2:16-CV-01385-GMN-CWH ("Federal Action"). The complaint filed by US Bank in that action ("Federal Complaint") is dated June 17, 2016. US Bank seeks to quiet title to the Residence, and challenges the validity of the foreclosure on a variety of theories. For example, US Bank alleges that the foreclosure scheme authorized under NRS 116, et seq., violates the U.S. and Nevada constitutions, see Federal Complaint at ¶¶ 34 through 40, that the foreclosure notices were insufficient, see id. at ¶ 43, that the HOA violated the covenant, conditions and restrictions applicable to the neighborhood, see id. at ¶ 62, and the like. US Bank also alleges in its complaint that the foreclosure sale violated the automatic stay and therefore is void. See id. at ¶¶ 49 through 53, citing Schwartz v. United States (In re Schwartz), 954 F.2d 569 (9th Cir. 1992).

By the instant motion, SFR seeks an order annulling the automatic stay under Section 362(d)(1). Annulment of the automatic stay "has the effect of retroactively validating acts that otherwise violate the stay." Lonestar Sec. & Video, Inc., v. Gurrola (In re Gurrola), 328 B.R. 158, 172 (B.A.P. 9th Cir. 2005). Whether "cause" exists under Section 362(d)(1) to annul the stay is determined under a "balancing of the equities" test. Id. Relevant factors considered in making this determination include the extent of prejudice to the parties involved, including harm to a bona fide purchaser and relative ease of restoring parties to the status quo; the costs of annulment to the debtor and creditors; how quickly the parties moved for annulment; and whether stay relief will promote judicial economy or other efficiencies. See In re Fjeldsted, 293 B.R. 12, 24-25 (B.A.P. 9th Cir. 2003). These factors ("Fjeldsted Factors") simply provide an analytical framework and any one factor may be dispositive in comparison to the others. Id. at 25. Thus, determining whether annulment is proper is made on a case by case basis. See Nat'l Envtl. Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste Corp.), 129 F.3d 1052, 1055 (9th Cir. 1997).

Both SFR and US Bank devote considerable argument to whether consideration of the Fjeldsted Factors warrants retroactive relief from stay in the instant case. See Annulment

Motion at 5:3 to 7:22; Opposition at 12:26 to 17:5; Reply at 11:12 to 13:28.[3] Neither of the parties, however, address the impact of Section 362(c)(3) and the decision in Reswick v. Reswick (In re Reswick), 446 B.R. 362, 373 (B.A.P. 9th Cir. 2011).[4]

Section 362(c) lists the circumstances under which the automatic stay imposed by Section 362(a) remains in effect without relief being requested by a party in interest under Section 362(d). See 11 U.S.C. § 362(c). In particular, Section 362(c)(3)(A) specifies that for joint debtors who had a prior Chapter 13 dismissed within the preceding 1-year period, the automatic stay terminates on the 30th day after the filing of the later case. Under Section

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[3] SFR relies on prior decisions in this district where the bankruptcy court has annulled the automatic stay. See Motion at 8 n.3, citing In re Wayne Alan Haddad and Debra Ann Haddad, Case No. 11-13184-MKN ("Haddad") and In re Dino J. Petrone and Connie L. Petrone, Case No. 09-32084-LED ("Petrone"); Reply at 2 n.2 and 10 citing In re James J. Hunyady and Marleen Hunyady, Case No. 12-17610-MKN ("Hunyady"), and at 12-13, citing In re Robert J. Heaton and Bridgette Heaton, Case No. 12-16153-LED ("Heaton"). Requests to annul the automatic stay have been granted in other cases, see, e.g., In re Lynn C. Burke, Case No. 12-12508-MKN and In re Victor H. Wheatley, Case No. 12-22310-MKN, and denied in other cases, see, e.g., In re Gary Lee Smith and Nancy Margaret Smith, Case No. 14-10601-MKN.

[4] Both parties also dispute their respective standing. SFR challenges US Bank's standing to assert the automatic stay, and US Bank challenges SFR's standing to bring the Annulment Motion. See Reply at 4:23 to 11:2; Opposition at 4:21 to 7:2. From a practical standpoint, SFR's argument is a bit odd because if US Bank did not have standing to raise the issue in the Federal Action, there may not be a case and controversy to be resolved by this bankruptcy court. Moreover, if an act in violation of the automatic stay is void ab initio, the identity of the party raising the violation should not matter. Compare 11 U.S.C. § 362(k)(1) [only an individual injured by a willful violation of the automatic stay shall recover actual damages, including costs and attorney's fees, etc.]. Nonetheless, courts have held in a variety of circumstances that creditors of a bankruptcy estate do not have standing to assert a violation of the automatic stay. See In re Pecan Groves of Arizona, 951 F.2d 242, 245 (9th Cir. 1991). Whether US Bank can simply argue the legal effect of an automatic stay violation in the Federal Action will be up to the Federal Court.

As to SFR's standing to bring the Annulment Motion, Section 362 specifically provides that relief from the automatic stay may be in the form of annulling the stay. 11 U.S.C. § 362(d). The request need only be made by a "party in interest." In this instance, SFR has become a party in interest with a personal stake in the current Chapter 7 proceeding due to US Bank's contention that the HOA sale was void as a violation of the automatic stay. The position taken by US Bank threatens a concrete, palpable, economic injury in fact to SFR. Annulment of the automatic stay clearly is within the zone of interests expressly contemplated by the statute. Under these circumstances, SFR meets all of the requirements for standing before the bankruptcy court. See In re Thorpe Insulation Co., 677 F.3d 869, 884 (9th Cir. 2012).

362(c)(3)(B), the debtors can seek to continue the automatic stay beyond 30 days if they request an extension from the court at a hearing concluded within the 30-day period.

In Reswick, the Bankruptcy Appellate Panel concluded that the automatic stay terminates in its entirety under Section 362(c)(3)(A), i.e., both with respect to the debtor and with respect to property of the estate. The Chapter 13 debtor failed to file a motion under Section 362(c)(3)(B) in his second Chapter 13 proceeding and the automatic stay terminated after the 30th day. 446 B.R. at 364. Because the automatic stay had terminated, the postpetition wage garnishment by the debtor's former wife did not violate the automatic stay with respect to the individual debtor, nor his postpetition wages that otherwise were property of the Chapter 13 estate under Section 1306(a). Id. at 373.

Debtors in the instant proceeding commenced their Chapter 13 Case on August 13, 2009, and it was dismissed without a discharge on July 5, 2011. Less than one year after the dismissal of the Chapter 13 Case, Debtors commenced their Chapter 7 Case on October 31, 2011. Under Section 362(c)(3)(A), the automatic stay in the Chapter 7 Case lasted for 30 days. A simple review of the docket in the Chapter 7 Case reveals that the Debtors never filed a motion requesting an extension of the automatic stay. As a result, the automatic stay elapsed on **November** 30, 2011, as a matter of law.[5]

On August 6, 2012, the HOA initiated the foreclosure process permitted under NRS 116 by recording a notice of delinquent assessment lien. On September 18, 2012, the HOA recorded a notice of default and election to sell under its lien. On March 5, 2013, the HOA recorded its notice of foreclosure sale. On July 26, 2013, SFR purchased the Residence at the HOA foreclosure sale. On August 5, 2013, the foreclosure deed in favor of SFR was recorded. All of these events occurred after **November** 30, 2011, when the automatic stay in the Chapter 7 Case elapsed in its entirety pursuant to Section 362(c)(3)(A). As a result, none of the acts by which SFR obtained title to the Residence were "void ab initio" under long standing automatic stay

[5] SFR cited the Haddad, Petrone, Hunyady, and Heaton cases decided in this district, see note 3, supra, but none of those proceedings involved repeat bankruptcy filers where the automatic stay had elapsed in its entirety under Section 362(c)(3)(A).

jurisprudence in this circuit. Compare Sundquist v. Bank of America, N.A., 566 B.R. 563, 585 (Bankr. E.D. Cal. 2017) (foreclosure by lender during Chapter 13 proceeding was void from the outset, not merely voidable).[6]

Based on the foregoing, the court concludes that annulment of the automatic stay is unnecessary because the automatic stay had elapsed before the initiation and completion of the HOA foreclosure sale to SFR.[7]

IT IS THEREFORE ORDERED that SFR Investments Pool 1, LLC's Motion to Retroactively Annul the Automatic Stay, Docket No. 43, be, and the same hereby is, **DENIED**.

Copies sent to all parties via CM/ECF ELECTRONIC FILING

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[6] The Residence remained property of the bankruptcy estate because the Debtors never claimed it as exempt, and any interest in the Residence was never abandoned at any time prior to the entry of the final decree closing the case on February 18, 2014. See 11 U.S.C. § 554(c) [property not otherwise administered at time of closing is abandoned]. The automatic stay, however, had terminated in its entirety on **November** 30, 2011.

[7] To the extent US Bank alleged in the Federal Complaint that the HOA sale to SFR violated the automatic stay, it apparently was not based on a reasonable investigation of the law, i.e., the Reswick decision, nor fact, i.e., the docket in the Chapter 7 Case. It would be prohibited, of course, from "later advocating" the same erroneous factual and legal contention. See FED.R.CIV. P. 11(b)(2). Rather than issuing, *sua sponte*, an order requiring US Bank to show cause why sanctions should not be entered in connection with its contentions in the instant bankruptcy proceeding, see FED.R.BANKR.P. 9011, the court will simply deny the Annulment Motion.