



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
December 06, 2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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|------------------------------------|---|-------------------------|
| In re: |) | Case No.: 13-14964-MKN |
| |) | Chapter 7 |
| JOSEPH LUM LUNG, JR. and KIRSTEN K |) | |
| LUM LUNG, |) | Date: November 14, 2018 |
| |) | Time: 2:30 p.m. |
| Debtors. |) | |
| |) | |

**ORDER REGARDING MOTION FOR RETROACTIVE RELIEF
FROM AUTOMATIC STAY¹**

On November 14, 2018, the court heard the Motion for Retroactive Relief from Stay brought by KE Aloha Holdings, LLC Series VI and KE Aloha Holdings, LLC (“RAS Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On June 5, 2013, a voluntary Chapter 7 petition (“Petition”) was filed by Joseph Lum Lung, Jr. and Kirsten K. Lum Lung (“Debtors”). (ECF No. 1). The Chapter 7 proceeding was assigned for administration to a panel Chapter 7 trustee, Joseph B. Atkins (“Chapter 7 Trustee”). A verified creditor matrix (“Creditor Matrix”) was included with the petition, listing the names and addresses of the Debtors’ creditors. A notice of the Chapter 7 bankruptcy, as well as a July

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 “FRBP” are to the Federal Rules of Bankruptcy Procedure. All references to “FRE” are to the Federal Rules of Evidence.

1 8, 2013 meeting of creditors was sent to all creditors appearing on the matrix. (ECF No. 7). The
2 notice also included a deadline of September 6, 2013, for any objections to discharge or to
3 dischargeability of debts to be filed.

4 Attached to the Petition were the Debtors' schedule of assets and liabilities ("Schedules")
5 along with their Statement of Financial Affairs. On their Schedule "A," Debtors listed a primary
6 residence located at 86 Magical Mystery Lane in Henderson, Nevada 89074 ("Residence") at a
7 value of \$105,000, with the intention that the Residence would be surrendered. On their
8 Schedule "C," Debtors did not claim the Residence as exempt under the Nevada homestead
9 exemption. On their Schedule "D," Debtors listed "Hsbc/ms" as having a claim in the amount of
10 \$253,084.00 secured by a first mortgage against the Residence. Debtors also listed three
11 separate homeowner associations ("HOA") with claims secured by the Residence: Legacy
12 Village Property Owners ("Legacy"), c/o Colonial Property Management with a claim of
13 \$348.00, Sandstone Community Recreation Area ("Sandstone") c/o Nevada Association Services
14 with a claim of \$1,398.00, and Strawberry Fields HOA ("Strawberry Fields") c/o Nevada
15 Association Services, Inc. with a claim of \$1,941.00. All of the creditors listed on Schedule "D,"
16 including the three HOAs, were included on the Creditor Matrix.²

17 On September 9, 2013, a Chapter 7 discharge was entered (ECF No. 23) inasmuch as the
18 Debtors had completed their meeting of creditors and no interested party filed a complaint
19 objecting to discharge.

20 On November 12, 2013, an order was entered granting the Chapter 7 Trustee's
21 application to employ a real estate agent to market the Residence. (ECF No. 27).

22 On March 24, 2014, a motion for relief from stay and for abandonment was filed by
23 Caliber Home Loans, Inc. ("Caliber"). (ECF No. 28). Caliber alleged that it is the holder of the
24 promissory note secured by the Residence. It alleged that relief from stay should be granted to
25 allow Caliber to pursue a foreclosure of the Residence and that the Residence should be
26

27 ² All three HOAs filed secured proofs of claim in the case. On June 15, 2013, Sandstone
28 filed a claim in the amount of \$4,884.67. On September 1, 2013, Strawberry Fields filed a claim
in the amount of \$2,759.40, and Legacy filed a claim in the amount of \$3,000.21.

1 abandoned by the Chapter 7 Trustee because it is of no benefit to the bankruptcy estate. Notice
2 of the hearing on the RAS Motion was served on the Creditor Matrix. (ECF No. 30).

3 On April 14, 2014, Debtors filed an amended Schedule “F” that added as an unsecured
4 creditor, KE Aloha Holding, LLC (“KE Aloha”), c/o Robert B Noggle, Esq., 376 E. Warm
5 Springs Road, Suite 125, Las Vegas, Nevada 89119. (ECF No. 32). There is no information
6 about the basis for the claim other than “case number A14-694370C” and the amount is listed as
7 “Unknown.”

8 On May 2, 2014, an order was entered granting the Caliber motion for relief from stay
9 and for abandonment of the Residence inasmuch as no objections or opposition was filed by the
10 Debtors or the Chapter 7 Trustee. (ECF No. 35).

11 On November 17, 2014, a final decree was entered (“Final Decree”) closing the Chapter
12 7 case and discharging the Chapter 7 Trustee of any further duties in the case. (ECF No. 44).³

13 On July 17, 2018, KE Aloha filed a motion to reopen the bankruptcy case (“Reopening
14 Motion”). (ECF No. 49). Notice of the Reopening Motion was given electronically to the
15 former Chapter 7 Trustee, the Debtors’ former bankruptcy counsel, the Office of the United
16 States Trustee (“UST”), and counsel for Caliber. (ECF No. 50). Additional notice was provided
17 by first class mail to the Creditor Matrix. (ECF No. 57). Further notice was provided to the
18 Debtors at their current address. (ECF No. 60).

19 On October 4, 2018, an order was entered reopening the case. (ECF No. 61).

20 On October 8, 2018, KE Aloha filed the instant RAS Motion. (ECF No. 62). Electronic
21 notice of the instant RAS Motion as well as the hearing on the RAS Motion, was given to the
22 former Chapter 7 Trustee, the Debtors’ former bankruptcy counsel, the UST, and counsel for
23 Caliber. Additional notice by first class mail was provided to the Debtors at their current
24 address. (ECF No. 64).

25 ³ The Debtors never claimed the Residence as exempt on their Schedule “C.” As a result,
26 the Residence remained property of the estate after their meeting of creditors was concluded and
27 the 30-day deadline to object to exemptions under FRBP 4003(b)(1) elapsed. The order granting
28 Caliber’s motion for relief from stay and for abandonment was entered on May 2, 2014. Until
that date, the Residence was property of the bankruptcy estate and the Sandstone foreclosure sale
on December 20, 2013, was completed with respect to estate property.

1 On October 31, 2018, opposition to the RAS Motion (“Opposition”) was filed by U.S.
2 Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust (“US Bank”). (ECF No. 66).

3 On November 7, 2018, a reply (“Reply”) in support of the RAS Motion was filed by KE
4 Aloha, along with affidavits attesting to service on each of the Debtors. (ECF Nos. 68, 69, 70).

5 DISCUSSION

6 The pertinent facts and law are not in dispute. After the Debtors filed their Petition on
7 June 5, 2013, Sandstone filed a proof of claim in the Debtors’ bankruptcy case on June 15, 2013,
8 and then proceeded to complete a foreclosure sale of the Residence on or about December 20,
9 2013. KE Aloha was the successful bidder at the foreclosure sale, and a foreclosure deed in its
10 favor was recorded on December 23, 2013. Shortly thereafter, KE Aloha commenced a quiet
11 title action (“Quiet Title Action”) in the Eighth Judicial District Court, Clark County, Nevada
12 (“State Court”), denominated Case No. A-14-694370-C.⁴ That action was commenced on
13 January 13, 2014, and the parties include US Bank, Sandstone, the Debtors and others that might
14 assert an interest in the Residence. On June 19, 2018, the State Court entered an order denying
15 various motions for summary judgment brought by the parties in anticipation that “clarification”
16 would be sought from this bankruptcy court prior to a trial of the Quiet Title Action. KE Aloha
17 now seeks a clarification from this bankruptcy court in the form the instant RAS Motion.

18 Under Nevada law, certain portions of HOA assessment liens have priority over
19 residential mortgages. See NRS 116.3116(2)(b). When the homeowner does not satisfy the
20 priority lien, the HOA can foreclose on the residence. The Nevada Supreme Court has
21 concluded that a valid HOA foreclosure sale of residential property extinguishes the lower
22 priority mortgage held by the residential lender. See SFR Inv. Pool 1, LLC v. U.S. Bank, 334
23 P.3d 408, 419 (Nev. 2014). Even though the Debtors had scheduled the value of their Residence
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26 ⁴ The court takes judicial notice under FRE 201 of the papers filed in Quiet Title Action.
27 See U. S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Conde v. Open Door Mktg., LLC, 223 F.
28 Supp. 3d 949, 970 n.9 (N.D. Cal. 2017); Gree 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).

1 at \$105,000 in their Schedule “A,” KE Aloha purchased the real property at the HOA foreclosure
2 sale for \$20,000.

3 In a bankruptcy context, the consequence to the residential lender is extreme: the
4 individual debtor’s personal liability for the loan is discharged by the bankruptcy, see 11 U.S.C.
5 § 727(b), and the lender’s security interest against the residence is extinguished by the
6 foreclosure. See also Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mort.,
7 388 P.3d 970, 973 (Nev. 2017). The residential lender ends up with no enforceable obligation
8 against the borrower because of the discharge injunction, see 11 U.S.C. § 524(a)(1 and 2), and
9 the purchaser at the HOA foreclosure sale ends up with title to the residence unencumbered by
10 the prior mortgage.

11 Unfortunately, Sandstone did not seek or obtain an order from this bankruptcy court
12 granting relief from the automatic stay that arose under Section 362(a) when the Debtors filed
13 their Petition. Sandstone clearly knew of the bankruptcy proceeding because it filed its proof of
14 claim in the case. KE Aloha was not a party in interest, if at all, until the Debtors amended their
15 unsecured creditor schedule on April 14, 2014, well after the foreclosure sale was completed.
16 Thus, it appears that Sandstone willfully violated that automatic stay under Section 362(a)(4)
17 because it had actual knowledge of the bankruptcy case and proceeded with its foreclosure. It
18 also appears that KE Aloha violated the automatic stay under Section 362(a)(3) by obtaining
19 possession and control of the Residence while it was still property of the estate. Absent notice or
20 knowledge of the Debtors’ bankruptcy, however, KE Aloha’s violation of the automatic stay
21 does not appear to have been willful under Section 362(k).

22 The parties do not dispute that an act taken in violation of the automatic stay is *void ab*
23 *initio* in this judicial circuit. See Schwartz v. U. S. (In re Schwartz), 954 F.2d 569, 571 (9th Cir.
24 1992). Thus, a party who purchases an asset owned by a bankruptcy estate in violation of the
25 automatic stay does not obtain valid legal title. See, e.g., 40235 Washington St. Corp. v. Lusardi
26 (In re 40235 Washington St. Corp.), 329 F.3d 1076, 1080 (9th Cir. 2003) (purchase of
27 bankruptcy estate property at county tax sale in violation of automatic stay was without effect).
28 The party who violated the stay, however, may seek an order from the bankruptcy court to annul

1 the automatic stay for cause under Section 362(d)(1). See Schwartz, 954 F.2d at 572-73.⁵
 2 Annulment of the automatic stay “has the effect of retroactively validating acts that otherwise
 3 violate the stay.” Lonestar Sec. & Video, Inc., v. Gurrola (In re Gurrola), 328 B.R. 158, 172
 4 (B.A.P. 9th Cir. 2005). See, e.g., Ceralde v. The Bank of N.Y. Mellon (In re Ceralde), 2013 WL
 5 4007861 (B.A.P. 9th Cir. Aug. 6, 2013) (annulment motion granted in involuntary Chapter 7
 6 case in favor of lender that foreclosed without prior knowledge of involuntary proceeding). See
 7 also, Sundquist v. Bank of Am., N.A. (In re Sundquist), 566 B.R. 563, 685 (Bankr. E.D. Cal.
 8 2017).

9 Whether “cause” exists under Section 362(d)(1) to annul the stay is determined under a
 10 “balancing of the equities” test. See In re Fjeldsted, 293 B.R. 12, 24 (B.A.P. 9th Cir. 2003).

11 The following factors should be considered:

- 12 1. Number of filings;
- 13 2. Whether, in a repeat filing case, the circumstances indicate an intention to
 14 delay and hinder creditors;
- 15 3. A weighing of the extent of prejudice to creditors or third parties if the
 16 stay relief is not made retroactive, including whether harm exists to a bona
 17 fide purchaser;
- 18 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
- 19 1988)(chapter 13 good faith);
- 20 5. Whether creditors knew of stay but nonetheless took action, thus
 21 compounding the problem;
- 22 6. Whether the debtor has complied, and is otherwise complying, with the
 23 Bankruptcy Code and Rules;
- 24 7. The relative ease of restoring parties to the *status quo ante*;
- 25 8. The costs of annulment to debtors and creditors;
- 26 9. How quickly creditors moved for annulment, or how quickly debtors
 27 moved to set aside the sale or violative conduct;
- 28 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;

25 ⁵ The automatic stay under Section 362(a) is not limited to creditors of the debtor but is
 26 “applicable to all entities.” An “entity” under Section 101(15) includes any person, estate, trust,
 27 governmental unit, and the United States trustee.” A “person” under Section 101(41) includes an
 28 “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 KE
 Aloha is a person to which the automatic stay applies, it is a party in interest that may seek relief
 from stay in this bankruptcy case.

1 11. Whether annulment of the stay will cause irreparable injury to the
debtor;

2 12. Whether stay relief will promote judicial economy or other efficiencies.

3 Id. at 25.⁶

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

12 In this instance, the previously categorized debtor factors favor retroactive relief from
13 stay. Debtors do not have a history of repeat bankruptcy filings that might suggest a malign
14 intent to delay or hinder creditors. They obtained their Chapter 7 discharge by complying with
15 the applicable requirements of bankruptcy law, and no party in interest has questioned their good
16 faith. More important, rather than causing irreparable injury to the Debtors, it appears that
17 retroactive relief from stay will prevent the Debtors from losing the benefit of their bankruptcy
18 discharge. If the Sandstone foreclosure sale was void and title did not pass to KE Aloha, then
19 title remains in the Debtors. When they filed their Petition on June 5, 2013, Debtors attested that
20 they intended to surrender the Residence. When Caliber filed its motion for relief from stay and
21 for abandonment on March 24, 2014, it alleged without dispute that the Debtors were in arrears
22 in the amount of \$90,022.80. Because the Debtors apparently have not made any loan payments

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24 ⁶ Factor 5 refers to the Warren decision by the Bankruptcy Appellate Panel for the Ninth
25 Circuit (“BAP”). In that proceeding, the individual debtor sought to discharge a \$40,970
26 embezzlement judgment through a Chapter 13 plan that paid only \$1,000 to his creditors. The
27 embezzlement judgment would have been nondischargeable in Chapter 7 under Section
28 523(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.

1 for more than five years, they would be subject to a renewed foreclosure of the Residence
2 occurring well after they received their Chapter 7 discharge. The post-discharge damage to the
3 Debtors' new credit history is likely to be significant and certainly detrimental to their fresh start
4 through Chapter 7.

5 The non-debtor factors also favor retroactive relief. There is no suggestion in the record
6 that KE Aloha had notice or actual knowledge of the Debtors' bankruptcy or knew that the
7 Sandstone foreclosure sale was in violation of the automatic stay. In fact, the record
8 demonstrates that KE Aloha was never listed in the Debtors' bankruptcy proceeding until nearly
9 four months after the foreclosure sale was completed. Thus, the evidence in the record infers
10 that KE Aloha did not know of the automatic stay, did not take steps to continually violate the
11 stay, and promptly sought retroactive relief from stay after summary judgment on the issue was
12 denied in the Quiet Title Action. Because KE Aloha apparently was a bona fide purchaser of the
13 Residence, its prejudice was greater than that of a lender who would have had an opportunity to
14 satisfy any delinquent HOA assessments to prevent a foreclosure sale. See SFR Inv. Pool 1,
15 LLC v. U.S. Bank, 334 P.3d 408, 414 (Nev. 2014) ("But as a junior lienholder, U.S. Bank could
16 have paid off the SHHOA lien to avert loss of its security...The inequity U.S. Bank decries is
17 thus of its own making...").⁷ While the non-debtor factors do not favor Sandstone, they do
18 support retroactive relief in favor of KE Aloha.

19 The common factors also support retroactive relief from stay. As already discussed, if
20 the foreclosure sale is void, legal title to the Residence never left the Debtors. Restoration of the
21 "status quo ante," however, means not only that legal title to the Residence returns to the
22 Debtors, but that Sandstone would have an unpaid priority assessment lien, the Debtors would be
23 in substantial default on their residential loan, and the lender's deed of trust against the

24 ⁷ Caliber did not file its motion for relief from stay and for abandonment until March 24,
25 2014, which was after the Sandstone foreclosure sale was completed and after the Quiet Title
26 Action was commenced. It is not clear why Caliber did not seek relief from stay before the
27 Sandstone foreclosure sale on November 20, 2013, so that it could foreclose on its deed of trust.
28 It is not clear why Caliber did not satisfy the unpaid assessment lien of \$4,884.67, see note 2,
supra, to prevent the Sandstone foreclosure. In other words, the lender's difficulties now before
this court, and in the Quiet Title Action, appears to be "of its own making."

1 Residence would be restored. Additionally, KE Aloha would have no legal interest in the
2 Residence but should have the \$20,000 it paid at the foreclosure sale.⁸ Even if the \$20,000 paid
3 by KE Aloha is ignored, there will be difficulty restoring the real property records to reflect the
4 state of title to the Residence that existed prior to the November 20, 2013 foreclosure. The other
5 common factors are immaterial.

6 The remaining “neutral factor” also favors retroactive relief. This is a Chapter 7 case
7 reopened for the limited purpose of considering the instant RAS Motion. There are no other
8 proceedings in this bankruptcy court involving the parties to this RAS Motion and no other
9 proceedings in federal court that have been brought to this court’s attention. The Debtors have
10 been given notice of the relief requested by KE Aloha and do not oppose retroactive relief,
11 perhaps because they are parties named in the Quiet Title Action and are aware of the
12 consequences of the legal position taken by US Bank. Moreover, notice of the relief requested
13 by KE Aloha also has been given to the UST which also does not oppose, nor has it taken steps
14 to appoint another Chapter 7 trustee to respond to the RAS Motion. On the other hand, the Quiet
15 Title Action remains before the State Court where other controversies may be litigated between
16 KE Aloha and US Bank, including any remaining issues as to the validity of the Nevada HOA
17 foreclosure statute. See Opposition at 5:18 to 7:25. Judicial economy supports allowing the
18 parties to return to State Court with resolve to those issues.

19 Based on the foregoing, the court finds that the Fjeldsted factors taken as a whole - the
20 debtor, non-debtor, creditor, and neutral factors – favor retroactive relief from stay for cause
21 under Section 362(d)(1). Therefore, the court concludes that the automatic stay in the Debtors’
22 bankruptcy case that arose on June 5, 2013, should be annulled to include all steps necessary
23 after the Petition date to complete the Sandstone foreclosure sale of the Residence.

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27 ⁸ The “status quo ante” is a term of art referring to the conditions that existed before the
28 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).

1 **IT IS THEREFORE ORDERED** that the Motion for Retroactive Relief from Stay
2 brought by KE Aloha Holdings, LLC Series VI and KE Aloha Holdings, LLC, Docket No. 62,
3 be, and the same hereby is, **GRANTED**.

4 **IT IS FURTHER ORDERED** that the automatic stay in the above-captioned proceeding
5 is hereby **ANNULLED** to include all steps taken in connection with the foreclosure sale of the
6 property identified as APN # 178-18-716-005, located at 86 Magical Mystery Lane in
7 Henderson, Nevada 89074, that is reflected in the Foreclosure Deed recorded as Instrument No.
8 201312230000978 in Clark County, Nevada.

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10 Copies sent via CM/ECF ELECTRONIC FILING

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