



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
March 04, 2020

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:) Case No.: 19-18100-MKN
) Chapter 13
ANTONIO MARTINEZ)
aka ANTONIO MARTINEZ RUIZ,) Date: February 12, 2020
) Time: 1:30 p.m.
Debtor.)

**ORDER ON RG INSURANCE'S MOTION TO RETROACTIVELY
ANNUL THE AUTOMATIC STAY¹**

On February 12, 2020, the court heard RG Insurance'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 December 26, 2019, a "skeleton" Chapter 13 petition was filed by Antonio Martinez ("Debtor"), along with only some of his schedules of assets and liabilities ("Schedules"). (ECF No. 1). Among other information, omitted from the initial filing were the Debtor's Schedule "E/F" (unsecured creditors), Schedule "I" (income), and Schedule "J" (expenses) nor his statement of financial affairs ("SOFA"). The case was assigned for administration to panel Chapter 13 trustee, Kathleen Leavitt ("Trustee"). On his property Schedule "A/B," Debtor listed a fee simple interest in a single-family residence located at 65 Lo Vista Place, Las Vegas, NV 89110-0000 ("Residence"). In that property Schedule "A/B," Debtor attests that the Residence

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.

1 has a current value of \$115,663.00. On his secured creditor Schedule “D,” Debtor listed BSI
2 Financial Services (“BSI”) as having a claim secured by a deed of trust against the Residence.

3 On January 2, 2020, Debtor filed a motion to extend the automatic stay under Section
4 362(c)(3)(B) that included a request for sanctions under Section 362(k) (“Extension Motion”).
5 (ECF No. 11). Attached as Exhibit “1” to the Extension Motion is the Debtor’s affidavit in
6 support of the requested relief (“Debtor Affidavit”).

7 On January 3, 2020, an order was entered shortening time so that the Extension Motion
8 could be heard on January 15, 2020. (ECF No. 14).

9 On January 11, 2020, opposition to the Extension Motion was filed on behalf of RG
10 Insurance (“RGI”). (ECF No. 16). In addition, RGI filed the instant Annulment Motion. (ECF
11 No. 17).

12 On January 15, 2020, RGI noticed its Annulment Motion to be heard on February 12,
13 2020. (ECF No. 27).

14 On January 21, 2020, the clerk of the court issued a notice of incomplete filing indicating
15 that the Debtor had not yet filed his Schedule “E/F” (unsecured creditors),² Schedule “T”
16 (income), and Schedule “J” (expenses) nor his statement of financial affairs (“SOFA”). (ECF
17 No. 31).³

18 On January 30, 2020, Debtor filed his opposition to the Annulment Motion
19 (“Opposition”). (ECF No. 33).

20 On February 3, 2020, an order was entered granting the Extension Motion that was heard
21 on January 15, 2020 (“Extension Order”). (ECF No. 35). The order granted an extension of the
22 automatic stay but no other relief set forth in the motion.
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25 ² In his previous Chapter 13 proceeding, Case No. 19-10410, Debtor attached an
26 unsecured creditor Schedule “E/F” that listed no priority unsecured claims and no nonpriority
27 unsecured claims.

28 ³ It appears that the Debtor did file his Schedule “T” and Schedule “J” on January 14,
2020 (ECF No. 22), as well as his SOFA on the same date. (ECF No. 20). The docket does not
reflect, however, that the Debtor has ever filed his unsecured creditor Schedule “E/F.”

On February 6, 2020, RGI filed a reply in support of the Annulment Motion. (ECF No. 39)

On February 7, 2020, RGI filed an amended reply in support of the Annulment Motion (“RGI Reply”). (ECF No. 42). On the same date, a joinder in the Annulment Motion was filed on behalf of Wilmington Savings Fund Society FSB (“Wilmington”), as Owner Trustee of the Residential Credit Opportunities Trust V-E (“Wilmington Joinder”). (ECF No. 40).

On February 11, 2020, Debtor filed a supplement to his opposition to the Annulment Motion (“Supp. Opposition”). (ECF No. 43).

DISCUSSION⁴

The automatic stay arose when the Debtor filed his voluntary Chapter 13 petition on December 26, 2019. 11 U.S.C. § 362(a). Debtor previously commenced multiple Chapter 13 proceedings but only one of those proceedings, Case No. 19-10410-MKN, was dismissed within one year of the current case. As a result, the automatic stay that arose on December 26, 2019, was limited to 30 days under Section 362(c)(3)⁵ unless the Debtor sought and obtained an extension under Section 362(c)(3)(B). Debtor timely filed his Extension Motion on January 2,

⁴ Section 521(i) provides that a Chapter 13 proceeding is automatically dismissed on the 46th day if the Debtor fails to file all of the information required by Section 521(a)(1) within 45 days after the petition date. Section 521(a)(1)(A) requires the debtor to file a list of creditors. While the Debtor filed his secured creditor Schedule “D” in this case, he did not file an unsecured creditor Schedule “E/F” as he did in the prior Chapter 13 proceeding. Because the Debtor commenced the current Chapter 13 proceeding on December 26, 2019, he had until February 10, 2020, to file all of the information required by Section 521(a)(1) in order to avoid automatic dismissal under Section 521(i).

⁵ Section 362(c)(4) refers to two or more prior cases dismissed within one year. If that situation exists, the automatic stay does not arise at all and the debtor or other interested party must seek to have the stay imposed under Section 362(c)(4)(B). Debtor in this case had another Chapter 13 proceeding, Case No. 18-10577, that was dismissed on December 20, 2018. That dismissal occurred more than one year prior to the filing of the current case. Thus, even if Case No. 18-10577 remained open within one year of the filing of the current case, that dismissal occurred beyond one year and Section 362(c)(4) does not apply.

2020, and the hearing was concluded on January 15, 2020, as required by Section 362(c)(3)(B). The motion was granted at the hearing and the Extension Order was entered on February 3, 2020.

When the automatic stay arose on December 26, 2019, it enjoined, *inter alia*, any act to enforce a lien against property of the estate. 11 U.S.C. §362(a)(3). Because the Debtor was on legal title to the Residence when the Chapter 13 was commenced, it is property of the bankruptcy estate. 11 U.S.C. §541(a)(1). When the foreclosure sale of the Residence occurred on December 27, 2019, the sale violated the automatic stay.⁶

It is well established that acts in violation of the automatic stay are void ab initio and have no force or effect. See Schwartz v. U.S. (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992). Foreclosure sales conducted in violation of the automatic stay are 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 estate property at county tax sale in violation of the automatic stay was without effect). Because the stay arises “automatically” upon the filing of a bankruptcy petition, it applies regardless of whether a party has actual knowledge or even notice that the bankruptcy petition was filed. See generally 3 COLLIER ON BANKRUPTCY, ¶ 362.02 (Richard Levin and Henry J. Sommer, eds., 16th ed. 2019). Thus, it is of no legal consequence that RGI was unaware of the Debtor’s bankruptcy when it attended the foreclosure sale on December 27, 2019: the title it obtained is void. RGI’s professed lack of knowledge may be relevant to whether sanctions are warranted for a willful violation under Section 362(k)(1), but that is not before the court at this time.

Where the automatic stay has been violated, a party in interest may seek an order from the bankruptcy court to annul the automatic stay for “cause” under Section 362(d)(1). See

⁶ On February 4, 2020, an assignment of deed of trust was recorded in favor of Wilmington. See Exhibit “1” to Wilmington Joinder. The assignment was dated January 3, 2020. It is not clear why an assignment would occur for a deed of trust that was foreclosed on December 27, 2019. See Supp. Opposition at 2:9-10.

Schwartz, 954 F.2d at 572-73.⁷ 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). See, e.g., Ceralde v. The Bank of N.Y. Mellon (In re Ceralde), 2013 WL 4007861 (B.A.P. 9th Cir. Aug. 6, 2013) (annulment motion granted in involuntary Chapter 7 case in favor of lender that foreclosed without prior knowledge 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, RGI is not a party to the Chapter 13 proceeding that the automatic stay is designed to protect, i.e., the Debtor and the 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 (Bankr. D.Nev. Dec. 6, 2018). 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. 186, 198-200 (Bankr. D.Nev. 2018), citing Tilley v. Vucurevich (In re Pecan Groves of Arizona), 951 F.2d 242 (9th Cir. 1991).⁸ In this instance, Wilmington supports annulment of the automatic stay and the Trustee has not filed opposition. No creditor or other party in interest has objected to the

⁷ The automatic stay under Section 362(a) is not limited to creditors of the debtor but is “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 “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 RGI is a person and therefore a party in interest to which the automatic stay applies, it is permitted under Section 362(d) to seek relief from stay in this bankruptcy case.

⁸ 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 has 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), 754 Fed.Appx. 590, at *1-2 (9th Cir. Feb. 22, 2019). This court is, of course, bound by the views of the Ninth Circuit.

Annulment Motion. 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;
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 25.⁹

⁹ 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.

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).¹⁰

In this instance, the previously categorized debtor factors favor retroactive relief from stay. Debtor has a history of repeat bankruptcy filings that suggest an intent to delay or hinder creditors. Since May 9, 2016, Debtor has commenced five previous Chapter 13 proceedings and none of them has resulted in a confirmed Chapter 13 plan and, of course, no Chapter 13 discharge. Case No. 16-12565 was filed in pro se and dismissed without a Chapter 13 plan ever being filed. Case No. 16-14498 was filed with counsel and dismissed without a Chapter 13 plan ever being confirmed. Case No. 16-16880 was filed with counsel and dismissed after the Debtor was unable to reach an agreement with BSI through the Mortgage Modification Mediation Program (“MMM Program”),¹¹ after BSI’s successor-in-interest obtained relief from stay, and again without confirmation of a Chapter 13 plan. Case No. 18-10577 was filed with counsel and the case was dismissed after BSI’s successor-in-interest again obtained relief from stay, and again without confirmation of a Chapter 13 plan. Case No. 19-10410 was filed with counsel and dismissed after the Debtor participated without success in the MMM Program,¹² and again without confirmation of a Chapter 13 plan.

¹⁰ The parties to the instant dispute correctly refer to the Fjeldsted Factors, see Annulment Motion at 4:5 to 7:9, Opposition at 2:12 to 3:15, and Reply at 3:11 to 4:11, but, of course, reach opposite conclusions.

¹¹ On August 28, 2017, the mediator reported only that the parties agreed to continue to work outside of the MMM Program.

¹² On October 16, 2019, the mediator reported that the parties did not reach an agreement.

1 As previously discussed, annulment of the automatic stay has the effect of “retroactively
2 validating” the foreclosure sale. In this proceeding, Debtor attests in his property Schedule
3 “A/B” that he had no equity in the Residence. There is no dispute that the Residence is the
4 Debtor’s principal residence and modification of the lender’s rights would be prohibited under
5 Section 1322(b)(2). Absent an agreement with the lender to modify the terms of the loan, Debtor
6 could cure any prepetition arrearages under Section 1322(b)(5) but would be required to make
7 regular payments on the loan. Debtor failed to confirm a Chapter 13 plan in five prior
8 proceedings, the last of which was dismissed as recently as November 12, 2019. On this record,
9 relief from stay under Section 362(d)(2) otherwise would be warranted. Thus, any irreparable
10 injury to the Debtor has its genesis in his inability to confirm a Chapter 13 plan rather than
11 annulment of the automatic stay. The other debtor factors are immaterial.

12 The non-debtor factors also favor retroactive relief. There is no suggestion in the record
13 that RGI had notice or actual knowledge of the bankruptcy case or knew that the foreclosure sale
14 was in violation of the automatic stay. In fact, the record demonstrates that RGI was never listed
15 as a creditor or interested party in the bankruptcy proceedings at any time. Thus, the evidence in
16 the record infers that RGI did not know of the automatic stay and did not take steps to
17 continually violate the stay. Moreover, RGI sought retroactive relief from stay soon after the
18 Debtor filed his Extension Motion in which he also sought to impose sanctions on RGI for
19 willfully violating the automatic stay. Because RGI apparently was a bona fide purchaser of the
20 Residence, the prejudice to it is greater than that of a creditor whose predecessor-in-interest was
21 listed in the Debtor’s schedules and on the creditor mailing matrix. While the non-debtor factors
22 do not favor Wilmington, they do support retroactive relief in favor of RGI.¹³

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25 ¹³ According to the Trustee’s Deed Upon Sale, RGI purchased the Residence by paying
26 \$139,301.00 of an unpaid debt of \$164,786.00. See Exhibit “1” to Annulment Motion. Debtor
27 scheduled the Residence as having a value of \$115,663.00 when he filed the current Chapter 13
28 case. By the Debtor’s own estimate, RGI apparently paid significantly more than the Residence
was worth. Based on this record, it does not appear that RGI received a windfall through
purchasing the Residence at the foreclosure sale.

1 The common factors also support retroactive relief from stay. As already discussed, if
2 the foreclosure sale is void, legal title to the Residence never left the Debtor's bankruptcy estate.
3 Restoration of the "status quo ante," however, means not only that legal title to the Residence
4 remains in the Debtor, but that BSI or its successor-in-interest has a substantial claim secured by
5 the property, the Debtor would remain in substantial default on the loan, and the deed of trust
6 against the Residence would be restored.¹⁴ Additionally, RGI would have no legal interest in the
7 Residence and the amount paid at the foreclosure sale would be subject to a restitution claim
8 between RGI and the lender. The other common factors are immaterial.

9 The remaining "neutral factor" also favors retroactive relief. This is the sixth Chapter 13
10 proceeding commenced by the Debtor after five prior unsuccessful attempts. Although the
11 Debtor has been represented by seasoned counsel in the last four prior attempts, none of those
12 efforts have resulted in a confirmed Chapter 13 plan despite two attempts at resolution with the
13 Debtor's residential lender through the MMM Program. Debtor now alleges that the lender did
14 not participate in those attempts in good faith, see Debtor Affidavit at ¶4, yet he desires to enter
15 into the MMM Program for a third time. Id. at ¶10. Although the two prior mediation results
16 were reported by the assigned mediator more than two months before the latest Chapter 13 was
17 filed, see notes 11 and 12, supra, there were no previous suggestion by the Debtor that the lender
18 did not participate in good faith. Instead, Debtor's most recent allegation seems to confirm a
19 pattern of repeated efforts to overcome repeated failures to confirm a Chapter 13 plan. Nothing
20 prevents the Debtor from timely commencing an action in state court challenging the foreclosure
21 sale on grounds, if any, other than a violation of the automatic stay. Under these circumstances,
22 annulment of the automatic stay promotes judicial economy.

23 Based on the foregoing, the court finds that the Fjeldsted factors taken as a whole - the
24 debtor, non-debtor, creditor, and neutral factors – favor retroactive relief from stay. The court
25 concludes that the automatic stay that arose on December 26, 2019, should be annulled to

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27 ¹⁴ 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 include all steps necessary after the commencement date to complete the lender's foreclosure
2 sale of the Residence.

3 **IT IS THEREFORE ORDERED** that RG Insurance's Motion to Retroactively Annul
4 the Automatic Stay, Docket No. 17, be, and the same hereby is, **GRANTED**.

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6 Copies sent via CM/ECF ELECTRONIC FILING

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