UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

QUINTEZ SMITH, JR.	**CASE NO. 09-02318-NPO**
DEBTOR.	**CHAPTER 13**

MEMORANDUM OPINION PARTIALLY RESOLVING
MOTION TO ABANDON COLLATERAL AND ANNUL STAY

On November 23, 2009, this matter came before the Court for a hearing (the "Hearing") on the Motion to Abandon Collateral and Annul Stay (the "Motion to Annul") (Dkt. No. 18), filed by Merchants and Farmers Bank (the "Bank"), the Response to Merchants and Farmers Bank's Motion to Abandon Collateral and Annul Stay (the "Response") (Dkt. No. 25), filed by Quintez Smith, Jr. (the "Debtor"), the Order Extending Stay to the Extent Applicable (the "Order Extending Stay") (Dkt. No. 38)[1], the Memorandum of Law (the "Debtor's Brief") (Dkt. No. 40), and the Memorandum (the "Bank's Brief") (Dkt. No. 41).[2] At the Hearing, Jeff D. Rawlings represented the Bank, and

[1] The Court entered the Order Extending Stay after the Hearing on the Motion to Annul when the Court took the matter under advisement because of the requirements contained in 11 U.S.C. § 362(e). The Order applies only to the extent a stay was in effect at this time of the Hearing.

[2] The Court did not consider a letter brief (Dkt. No. 42), dated December 8, 2009, and filed on behalf of the Debtor because it included recited facts that are not in the record and cannot be ascertained from court documents. Furthermore, the Court did not grant leave to file a rebuttal brief. Since, however, the Court is granting a continuance of the Hearing (*see infra* p. 14), the parties will have an opportunity to place relevant evidence into the record at that time.

Frederick B. Clark represented the Debtor. Having considered the pleadings and briefs, and being fully advised in the premises, this Court finds as follows:[3]

Jurisdiction

This Court has jurisdiction of the subject matter and the parties to this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28. U.S.C. § 157(b)(2)(A), (B), and (G).

Facts

A. First Chapter 13 Case - Case No. 07-04117-EE (the "First Case")

On December 27, 2007, the Debtor initiated a bankruptcy proceeding by filing a voluntary petition with this Court pursuant to chapter 13 of the Bankruptcy Code (the "First Case") (Dkt. No. 1). On Schedule A[4], the Debtor listed an equitable interest in 91 acres of land located in Lexington, Holmes County, Mississippi (the "Property"). He also listed the current value of his interest in the Property at $45,565.00 and the amount of the secured claim in the Property at $32,000.00.[5] On Schedule D, the Debtor further listed the Bank as the secured creditor on the Property.

On January 3, 2008, the Bank filed a Motion to Abandon Collateral and Lift Stay ("First Relief Motion") (Dkt. No. 5). According to the First Relief Motion, Mr. Kenny Smith, Sr. ("Smith, Sr."), the Debtor's father, borrowed money from the Bank on July 8, 2003. The debt was secured by a Deed of Trust on the Property. The Bank's First Relief Motion sought to abandon the collateral

[3] The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 7052.

[4] For the First Case, the Schedules can be found at Dkt. No. 9.

[5] On January 29, 2008, the Bank filed a Proof of Claim (as amended to reflect the correct account number) in the amount of $37,574.90 (Claims Register, 2-2).

pursuant to 11 U.S.C. § 554 and to terminate the 11 U.S.C. § 362[6] automatic stay for cause shown including the Debtor's inability to provide the Bank with adequate protection as required by §§ 361 and 362.

The Debtor filed the Response to Motion to Abandon Collateral and Lift Stay (the "First Response") (Dkt. No. 6), in which he admitted that the Bank had a secured claim in the Property and that he claimed an heirship interest in the Bank's collateral (Dkt. No. 6). The Debtor, however, denied being unable to provide adequate protection for the collateral and requested that the Court deny the First Relief Motion. Id.

The Debtor filed a chapter 13 Plan (the "Plan") (Dkt. No. 10) which provided that he would pay the Bank mortgage payments of $500.00 per month for 60 months beginning in March 2008, and arrearages through February 2008, of $4,871.96 at $81.20 per month for 60 months. On January 28, 2008, the Court heard the First Relief Motion and subsequently denied it on February 11, 2008, in the Order on Motion to Abandon Collateral and Lift Stay (the "Order Denying Relief") (Dkt. No. 18). The Order Denying Relief called for the Debtor to amend the Plan[7] to make the Debtor responsible to pay any and all postpetition property taxes and assessments due as and when due or the Property would be automatically abandoned and the stay terminated without further order of the Court. Id. On February 15, 2008, the parties entered into an Agreed Order (Dkt. No. 21) that the Trustee could submit an order of dismissal to the Court without further notice or hearing by the Court if the Debtor became more than sixty (60) days delinquent in monthly payments under the

[6] Hereinafter, all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code unless otherwise noted.

[7] The Plan was confirmed later as amended on April 10, 2008. (Dkt. No. 24).

Plan. On May 7, 2009, the Court entered the Order Dismissing Case (Dkt. No. 28) after the Debtor became more than sixty (60) days delinquent in making plan payments.

B. Adversary Case - Adversary Proceeding No. 08-00033-EE

On March 5 2008, during the pendency of the First Case, the Bank initiated an adversary proceeding (the "Adversary") against the Debtor by filing a Complaint to Determine Extent, Validity and Priority of Liens (the "Complaint") (Adv. Dkt. No. 1). According to the Complaint, the payoff on the note secured by the Property was $34,074.90, plus fees and expenses incurred by the Bank. The Complaint also stated that the note matured and was payable in full on August 3, 2008. Additionally, the Bank stated that the Debtor alleged that the Deed of Trust is invalid "for reasons unknown to [the] Bank." Complaint, ¶ 5. The Bank, therefore, requested that the Court "determine the extent, validity and priority of its Deed of Trust and declare that it is a valid lien against the subject property. . . ." Id.

On April 9, 2008, the Debtor filed the Answer, Affirmative Defenses and Counterclaim (the "Answer") (Adv. Dkt. No. 4) to the Complaint. In the Answer, the Debtor denied that the Bank had a valid security interest in the Property. The Debtor alleged that the Deed of Trust was invalid because the deed conveying title to the Property to Smith, Sr. was a fraudulent conveyance and did not contain the signature of Elmira Drake Smith ("Mrs. Smith")[8], the owner of the Property.[9] Finally, the Debtor claimed that Mrs. Smith left a Last Will and Testament which supposedly

[8] It appears from statements made in various pleadings including the Answer, that Mrs. Smith is the mother of Smith, Sr. and the Debtor's grandmother.

[9] The Debtor averred that at the time of the alleged conveyance from Mrs. Smith to Smith, Sr., Mrs. Smith was hospitalized in a semi-comatose state and was not capable of physically or mentally conveying the property to Smith, Sr.

disposed of her property to various heirs, and none of the heirs gave the Bank a security interest in the Property. The Debtor also requested that the Court "determine the extent, validity and priority of the Bank's Deed of Trust" on the Property.

At the Pretrial Conference on January 21, 2009, the attorneys for the parties announced to the Court their intention to dismiss the Adversary in order to litigate the property issues in Holmes County. On February 26, 2009, the parties entered the Stipulation of Dismissal (Adv. Dkt. No. 17) after which the Adversary was closed.

C. Second Chapter 13 Case - Case No. 09-02318-NPO (the "Second Case")

The Debtor filed a second voluntary petition pursuant to chapter 13 of the Bankruptcy Code on July 6, 2009 (the "Second Case") (Dkt. No. 1), less than two months after the First Case was dismissed. Again, the Debtor listed an equitable interest in the Property, valued at $45,565.00, and subject to a Deed of Trust securing a $32,000.00 debt with the Bank (Schedules A and D) (Dkt. No. 3).[10]

The Bank conducted a foreclosure sale (the "Foreclosure Sale") of the Property on September 25, 2009. The Bank claims that it did so without knowledge of the Second Case. (Dkt. No. 18). The docket indicates, however, that the Bank was included on the Debtor's creditor matrix (Dkt. No. 2), and that both the Bank and the Bank's attorney appeared to have been given proper notice. (Dkt. Nos. 9 & 10). Five days after the Foreclosure Sale, the Bank filed the Motion to Annul. The

[10] The Debtor filed his Chapter 13 plan ("Second Case Plan") (Dkt. No. 6) the same day as his petition, which stated that he would pay $670 of his government benefit income to the chapter 13 trustee (the "Trustee"). The plan payments include amounts owed on the Property to the Bank. (Dkt. No. 6). The Second Case Plan was amended by an Agreed Order in Lieu of Trustee's Objection to Confirmation to include automatic dismissal if the Debtor became more than sixty (60) days delinquent in making the plan payments. (Dkt. No. 13).

Bank asked the Court to "abandon [the] Bank's collateral pursuant to [] § 554 and annul and terminate the automatic stay of [] §362. . . .". In the Motion to Annul, the Bank urged the Court to annul the stay based on the following assertions: (1) the Debtor's inability to provide the Bank with adequate protection; (2) the Debtor's bad faith serial filing; (3) the Debtor's prior Chapter 13 case was filed on the eve of Bank's foreclosure and was subsequently dismissed for failure to pay under the plan; (4) the Second Case was filed to thwart Bank's legal remedies; and, (5) the Bank conducted the foreclosure sale without knowledge that the Debtor had filed the Second Case. Alternatively, in the Bank's Brief, the Bank requested relief under § 362(c)(3) on the basis that the stay expired on the thirtieth day after the filing of the Second Case because the Debtor failed to file a motion to extend the stay. The Bank, therefore, requested that the Court validate the Foreclosure Sale.

In the Response, the Debtor denied that: (1) he failed to provide adequate protection to the Bank; (2) he is a bad faith serial filer; (3) the Bank lacked knowledge of the Second Case; and, (4) that the automatic stay terminated on the thirtieth day as to the Property. Furthermore, the Debtor argued in the Debtor's Brief that the language of § 362(c)(3) is ambiguous and should be construed in his favor due to congressional intent and "the overall spirit . . . of the bankruptcy law." (Dkt. No. 40). Accordingly, the Debtor requested that the Court deny the Bank's Motion to Annul.

Discussion

Based on the parties' arguments and briefs, this Court finds the following issues controlling:

I. Did the Postpetition Foreclosure Sale Violate the Automatic Stay?

II. Should the Court Annul the Automatic Stay to Validate the Postpetition Foreclosure Sale?

I. Did the Postpetition Foreclosure Sale Violate of the Automatic Stay?

This Court must first consider whether the postpetition Foreclosure Sale violated the automatic stay. Upon the filing of a bankruptcy petition, § 362(a) operates as a stay of "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." § 362(a); *see also* 3 Collier on Bankruptcy, ¶ 362.06 (15th ed. rev. 2005). Generally, § 362(c) governs the terminations of stays in bankruptcy cases. Unless the Court grants relief earlier, the automatic stay of an act against property of the estate expires when the property is no longer property of the estate. *See* § 362(c)(1). Section 362(c)(3), however, sets a specific and early termination date for a debtor who has had a prior case dismissed within the year, also known as a serial filer. *See* § 362(c)(3).[11] Thus, in order to determine whether the Foreclosure Sale violated the automatic stay, the Court must determine whether the automatic stay was in effect at the time of the Foreclosure Sale. To make this determination, the Court must inquire whether the Debtor is a bad faith serial filer.

A. Was the Debtor a Bad Faith Serial Filer?

Section 362(c)(3) states in its entirety:

(c) Except as provided in subsections (d), (e), (f), and (h) of this section--

> (3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint **case of the debtor was pending within the preceding 1-year period but was dismissed**, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)--
>
> > (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any

[11] Section 362(c)(2) is not applicable in this case.

lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) **after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;** and

(C) for purposes of subparagraph (B), **a case is presumptively filed not in good faith** (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors, if--

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) **a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to**--

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) **perform the terms of a plan confirmed by the court**; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter

> 7, 11, or 13 or any other reason to conclude that the later case will be concluded--
>
> > (aa) if a case under chapter 7, with a discharge; or
> >
> > (bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and
>
> (ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

Section 362(c)(3) (emphasis added).

1. Was the Debtor a Serial Filer?

In the Debtor's Brief, the Debtor argues that § 362(c)(3) does not apply to him because he is not a serial filer. He claims that the section is ambiguous and should be interpreted to apply only to someone who filed *and* had a case dismissed within the *same* one year period. This Court does not agree and finds that the language of § 362(c)(3) is unambiguous.

Section 362(c)(3) clearly states that it applies to debtors who have filed a later chapter 13 case when a previous chapter 13 case was "pending within the preceding 1-year period but was dismissed." At least one court has considered the issue of when a case is "pending." In re Moore, 337 B.R. 79, 80 (Bankr. E.D.N.C. 2005). In Moore, the bankruptcy court considered whether a case was "pending" where the clerk of court did not complete the administrative function of closing a case until sometime after the court entered an order of dismissal. Id. The previous case had been dismissed prior to one year before the second filing, but the case remained open after dismissal and was closed during the one-year period prior to the second filing. Id. at 81. To determine whether

§ 362(c)(3) applied, the bankruptcy court referred to the Black's Law Dictionary's definition of "pending," which defines the word as "remaining undecided: awaiting decision." Id. The court noted that the definition suggests that "a case is no longer 'pending' after dismissal; once the case has been dismissed, there is nothing undecided remaining." 3 Collier on Bankruptcy, ¶362.06[3] (15th ed. rev. 2005). The Moore court, therefore, concluded that a case's dismissal date is controlling for purposes of applying § 362(c)(3). Id.

This Court agrees with the Moore analysis and finds that the dismissal date is the controlling date for applying § 362(c)(3). In this case, the Debtor's First Case was dismissed on May 7, 2009. Two months later, on July 6, 2009, he filed the Second Case. Therefore, the Debtor had a chapter 13 case "pending" within the one-year period prior to filing the Second Case. Accordingly, §362(c)(3) applies to the Debtor, and the Debtor is a serial filer.

2. Did the Debtor File the Second Case in Bad Faith?

The Court must determine if the Debtor filed the Second Case "not in good faith" ("bad faith"), because the Court can only extend the automatic stay in a second case if the Debtor filed the second case in good faith. § 362(c)(3)(B) & (C). Pursuant to § 362(c)(3)(C)(i)(II)(cc), a case is presumptively filed in bad faith if the debtor had a previous chapter 13 case dismissed within one year of refiling a chapter 13 case due to the debtor failing to perform the terms of a plan confirmed by the court. This presumption is rebuttable but only by clear and convincing evidence. § 362(c)(3)(C).

Since the Debtor filed the Second Case within one year of the First Case being dismissed for failure to perform the terms of the plan, a rebuttable presumption of bad faith serial filing exists as to the Second Case. *See* § 362(c)(3)(C)(i)(II)(cc). In addition, the Debtor failed to file a motion to

extend the stay under § 362(b)(3)(B) and failed to provide any evidence to rebut the bad faith presumption. Therefore, this Court finds that the Debtor is a bad-faith serial filer pursuant to §362(c)(3)(C).

B. Did the Automatic Stay Terminate on the 30th Day after the Filing of the Later Case?

Having determined that § 362(c)(3) applies to the Debtor, the Court must then consider whether the automatic stay imposed by § 362(a) terminated on "the 30th day after the filing of the later case" (the "30th day"). § 362(c)(3)(A). The Bank argues that the Foreclosure Sale was valid because the automatic stay terminated on the 30th day. A split in authority exists as to this issue arising from the express wording of § 362(c)(3). *See* 3 Collier on Bankruptcy, ¶ 362.06[3] (15th ed. rev. 2005). The statute states that where the Debtor is a serial filer, the stay terminates under this provision "with respect to the debtor." § 362(c)(3)(A). The minority view finds the provision ambiguous and interprets it to mean that the stay terminates with respect to the debtor, property of the debtor, and property of the estate. 3 Collier on Bankruptcy ¶ 362.06[3] n.15d (15th ed. rev. 2005); *see also* In re Jupiter, 344 B.R. 754, 761-62 (Bankr. D.S.C. 2006). The majority of courts hold, however, the statute is unambiguous and that the plain meaning of the statute controls, thereby holding that the stay terminates only with respect to the debtor and debtor's property, but not to property of the estate. 3 Collier on Bankruptcy ¶ 362.06[3] n.15d (15th ed. rev. 2005); *see also* In re Jones, 339 B.R. 360, 365 (Bankr. E.D.N.C. 2006); In re Johnson, 335 B.R. 805, 806 (Bankr. W.D. Tenn. 2006). The majority reasons that the plain reading of §362 as a whole shows that Congress clearly sought to distinguish between actions taken against property of the debtor and actions taken against property of the estate. Jones, 339 B.R. at 364 (citing In re Paschal, 337 B.R. 274 (Bankr.

E.D.N.C. 2006)). The Jones court reasoned that if Congress had intended for the provision to apply to property of the estate, Congress would have included the words "property of the estate" within the provision. Id.

This Court adopts the majority view and holds that where § 362(c)(3) applies, the automatic stay provided by § 362(a) terminates on the 30th day as to actions against the debtor and the debtor's property but continues to operate as to actions taken against property of the estate. In this case, therefore, if the Property became property of the estate at the filing of the Second Case, the automatic stay did not terminate on the 30th day as to the Property, but instead operated to protect it from acts against property of the estate, including foreclosures.

C. Did the Property become Property of the Estate when the Debtor Filed the Second Case?

The Court's next inquiry is whether the Property is property of the estate. Neither the Debtor nor the Bank discussed this issue at the Hearing or in their briefs. The record shows that the Debtor listed the Property as property of the estate on the bankruptcy schedules for both the First Case and Second Case. Property of the estate is defined by § 541 as "all legal or equitable interest of the debtor in property as of the commencement of the case." § 541(a)(1). Here, the Debtor claimed an equitable interest in the Property on Schedule A of the Second Case. While there has been some confusion as to whether the Debtor has a legitimate interest in the Property,[12] the parties have not asked the Court to adjudicate that issue in the Second Case. Nevertheless, since confusion exists as to the Debtor's interest in the Property, the Court finds that the Debtor has at least an "arguable

[12] In the Adversary Case, the Bank requested that the Court adjudicate the Debtor's interest in the Property. The Adversary Case, however, was dismissed by the parties, and that issue was never adjudicated before this Court.

interest" in the Property. Either the plain meaning of § 541(a)(1) or the Debtor's claimed equitable interest in the Property, however arguable, is enough to categorize the Property as property of the estate. In re Chestnut, 422 F.3d 298, 302-04 (5th Cir. 2005) (holding that an arguable property interest is property of the estate). Therefore, pursuant to § 541(a)(1), the Property became property of the estate when the Debtor filed the Second Case on July 6, 2009. Accordingly, the automatic stay was still in effect as to the Property at the time of the foreclosure sale on September 25, 2009. Since the postpetition Foreclosure Sale was an act against property of the estate, the Foreclosure Sale violated the automatic stay.

II. Should the Court Annul the Stay to Validate the Postpetition Foreclosure Sale?

Generally, foreclosure sales in violation of the automatic stay are voidable and capable of discretionary cure. Sikes v. Global Marine, Inc., 881 F.2d 176, 178 (5th Cir. 1989). In limited circumstances, bankruptcy courts are given discretion to grant relief from the automatic stay "by terminating, annulling, modifying, or conditioning" the stay. Id. Bankruptcy courts, therefore, can validate postpetition foreclosure sales by annulling the stay pursuant to § 362(d). *See* § 362(d). This Court has previously held that, "[t]he creditor seeking retroactive relief must first show the presence of circumstances warranting annulment of the stay, and the debtor then bears the ultimate burden of proving that the request for retroactive relief from the stay should be denied." Jackson v. Priority Trs. Srvcs. of Mississippi, LLC (In re Jackson), 392 B.R. 666, 672 (Bankr. S.D. Miss. 2008); *see* § 362(g)(2). "While the Fifth Circuit has not articulated the specific factors that should be considered by a bankruptcy court with respect to an annulment of the stay, other bankruptcy courts have taken into consideration" the following:

> (1) whether the creditor had actual or constructive knowledge of the bankruptcy filing, (2) whether the debtor acted in bad faith or is guilty of some inequitable conduct, such as abusive or repetitive filings, (3) whether grounds would have existed for modification of the stay if a motion had been filed before the violation, (4) whether the debtor has encouraged the creditor to proceed notwithstanding the stay or only asserts the stay when it is unsuccessful in the outcome of an action it allowed to proceed, (5) whether the denial of retroactive relief would result in unnecessary expense to the creditor, and (6) whether the creditor has detrimentally changed its position on the basis of the action taken.

In re Jackson, 392 B.R. at 671-72 (internal citations omitted).

Bankruptcy courts also have considered the irreparable effect of a stay's annulment on the debtor. *See, e.g.* Ford v. Loftin (In re Ford), 296 B.R. 537, 556-57 (Bankr. N.D. Ga. 2003) (where the court found it compelling that if stay was retroactively lifted, a 61 year-old man with physical and mental difficulties would lose his home in which he had resided for 24 years and in which there was significant equity.) Yet, bankruptcy courts must be "[m]indful that such lists are capable of being misconstrued as inviting arithmetic reasoning, [and thus] we emphasize that these items are merely a framework for analysis and not a scorecard. In any given case, one factor may so outweigh the others as to be dispositive." In re Fjeldsted v. Lien (In re Fjeldsted), 293 B.R. 12, 25 (9th Cir. BAP 2003).

At this point, the Court finds that this issue has not been adequately addressed by the parties. Therefore, the parties should be granted the opportunity to be heard on whether the automatic stay should be annulled to validate the Foreclosure Sale based on the factors set forth in Section II, *supra*.

WHEREFORE, PREMISES CONSIDERED, the Court will enter an order continuing the Hearing to April 28, 2010, at 10:00 a.m. The Order Extending Stay continues to be in effect until a final resolution of this matter.

/ s / Neil P. Olack
NEIL P. OLACK
U. S. BANKRUPTCY JUDGE
Dated: March 26, 2010