SO ORDERED,

Judge Jamie A. Wilson
United States Bankruptcy Judge
Date Signed: August 18, 2023

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

FIRST FIDELITY TRUST SERVICES, INC., **CASE NO. 22-02666-JAW**

DEBTOR. **CHAPTER 11**

ORDER GRANTING: (A) AMENDED MOTION FOR LIMITED RELIEF FROM ORDER OF DISMISSAL AND FINAL DECREE/ORDER CLOSING CASE AND (B) MOTION FOR (1) RELIEF FROM THE AUTOMATIC STAY *NUNC PRO TUNC* AND ABANDONMENT OF PROPERTY OF THE ESTATE, OR, ALTERNATIVELY, (2) ADEQUATE PROTECTION

This matter came before the Court for hearing on July 24, 2023 (the "Hearing") on the Amended Motion for Limited Relief from Order of Dismissal and Final Decree/Order Closing Case (the "Relief Motion") (Dkt. #102) filed by Shelter Cove Condominium Association, Inc. (the "Condo Association") and Thomas J. Risalvato ("Risalvato"), the court-appointed receiver for the Condo Association (the "Receiver"); the Motion for (1) Relief from the Automatic Stay *Nunc Pro Tunc* and Abandonment of Property of the Estate, or, Alternatively, (2) Adequate Protection (the "Stay Motion") (Dkt. #80) filed by the Condo Association and the Receiver; the Response to Motion for (1) Relief from the Automatic Stay Nunc Pro Tunc and Abandonment of Property of the Estate, or, Alternatively, (2) Adequate Protection (the "Response") (Dkt. #117) filed by the debtor, First Fidelity Trust Services, Inc. (the "Debtor"); the Reply in Support of Motion for (1) Relief from the Automatic Stay *Nunc Pro Tunc* and Abandonment of Property of the Estate, or,

Alternatively, (2) Adequate Protection (the "Reply") (Dkt. #130) filed by the Condo Association and the Receiver; and the Rebuttal to Shelter Cove's Reply in Support of Motion for (1) Relief from the Automatic Stay Nunc Pro Tunc and Abandonment of Property of the Estate, or, Alternatively, (2) Adequate Protection (the "Rebuttal") (Dkt. #131) filed by the Debtor in the above-referenced bankruptcy case. At the Hearing, the Condo Association and the Receiver were represented by Timothy J. Anzenberger, and Terris C. Harris and Herb Irvin appeared on behalf of the Debtor. The Condo Association introduced fourteen exhibits into evidence and presented the testimony of one witness, Justin I. Remol. No representative of the Debtor appeared, and counsel for the Debtor did not introduce any exhibits or present any witnesses.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (G),and (O). Notice of the Hearing was proper under the circumstances.

Facts[1]

The Condo Association seeks retroactive relief from the automatic stay to validate a public auction that took place nine days after the Debtor filed bankruptcy. (Dkt. #80 at 12). The Condo Association was the highest bidder at the public auction of the Debtor's condominium unit (the "Condo") at Shelter Cove, A Condominium ("Shelter Cove") located in Escambia County, Florida. (Hr'g at 10:21 (July 24, 2023)).[2] Shelter Cove is managed by the Condo Association, a nonprofit

[1] These proposed findings of fact and conclusions of law constitute the Court's findings of fact and conclusions of law pursuant to Federal Rules of Bankruptcy Procedure 9014(c) and 7052. To the extent any of the following findings of facts are determined to be conclusions of law, they are adopted, and shall be construed and deemed, conclusions of law. To the extent any of the following conclusions of law are determined to be findings of fact, they are adopted, and shall be construed and deemed, as findings of fact.
[2] The Hearing was not transcribed. Citations to the record are to the timestamp of the audio recording.

corporation organized under Florida law. (Ex. 2 at 1-2). All owners of condominium units at Shelter Cove, including the Debtor, are members of the Condo Association. (Ex. 2 at 9).

The Debtor is a corporation owned by Telford Edwin Cheshire ("Ed Cheshire"), with its principal place of business in Ridgeland, Mississippi. (Dkt. #117 at 1). The Debtor has owned the Condo only since 2019, but Ed Cheshire, either directly or indirectly, has owned the Condo for decades. (Ex. 6). This bankruptcy case arose as the result of a dispute between Ed Cheshire and the Condo Association that began in 2007.

In 2007, four owners of condominium units at Shelter Cove filed a lawsuit against the Condo Association and other unit owners in the Circuit Court of Escambia County, Florida. (Hr'g at 9:39). The plaintiffs alleged fraud and negligence concerning the reconstruction and repair of their units after Hurricane Ivan. (Hr'g at 9:34, 10:05). The Debtor was not a plaintiff in the 2007 lawsuit and did not otherwise participate in the lawsuit.[3]

In 2009, when it became apparent that a judgment might be entered against the Condo Association and that the Condo Association might levy assessments to satisfy the judgment, Ed Cheshire conveyed the Condo to Arminta Trust by quitclaim deed. (Ex. 4; Hr'g at 9:53-9:54, 10:01-10:03, 10:05). Ed Cheshire's wife, Susan Cheshire, was the trustee of Arminta Trust. (Hr'g at 10:03). Although the deed was signed in 2009, it was not recorded in the land records of Escambia County until June 10, 2011 when Arminta Trust encumbered the Condo with a mortgage in the amount of $580,000.00. (Ex. 4). The mortgage purportedly secured a loan extended to Arminta Trust by the Debtor.[4] (Ex. 5). The mortgage was dated shortly after a mediation impasse in the

[3] The Debtor did not own the Condo until 2019. (Ex. 6).
[4] The purported mortgage of $580,000.00 exceeds the Debtor's valuation of the Condo in its bankruptcy schedules. (Dkt. #24).

Florida lawsuit and just after the plaintiffs were granted leave to assert fraud claims. (Hr'g at 10:05).

The plaintiffs and the Condo Association settled the lawsuit in 2012. (Hr'g at 9:42). As part of the settlement, the parties stipulated to the entry of a consent judgment against the Condo Association in the amount of $1,517,040.00 (the "Consent Judgment"). (Hr'g at 11:25). Under the settlement, the Condo Association agreed to levy special assessments on its members to fund the payments to the plaintiffs. (Hr'g at 9:47-9:49). In exchange for prosecuting the lawsuit, the plaintiffs and their units, however, were exempted from all assessments related to the settlement. (Hr'g at 11:25-11:27). Ed Cheshire signed the agreement that approved the $1,517,040.00 settlement. (Hr'g at 11:25-11:27).

For reasons not disclosed in the record, the Condo Association never levied those special assessments. (Hr'g at 9:47). In fact, Justin I. Remol ("Remol") testified that the Condo Association refused to do so. (Hr'g at 9:47-9:49). Because of its refusal, the Florida state court appointed a receiver to aid in the execution of the Consent Judgment on October 17, 2014. (Ex. 1); *see Petro v. Shelter Cove Condo. Ass'n, Inc.*, Case No. 2007-CA-001631 (Fla. Cir. Ct., Escambia Cty.). The order empowered the receiver to exercise all powers of the Condo Association "through or in place of its board of directors or officers" and required the receiver to take action to "satisfy the Final Judgment and the Settlement Agreement, including the imposition of additional assessments or special assessments upon Shelter Cove unit owners [and] enforcement or foreclosure proceedings against unit owners who fail to pay." (Ex. 1). Months later, the Florida court amended the order to replace the receiver with Risalvato. (Ex. 1).

The Condo Association, through the Receiver, levied a special assessment of $191,369.11 against each non-exempt unit, including the Condo owned by Arminta Trust.[5] Arminta Trust failed to pay any portion of the assessment, and the Condo Association, through the Receiver, recorded a Claim of Lien for Failure to Pay Condominium Assessments (Ex. 3 at 214) in the land records of Escambia County on May 20, 2015. *See* FLA. STAT. § 718.116(b); (Hr'g at 9:54).

On July 6, 2015, the Receiver authorized the Condo Association to file an action against Ed Cheshire, Susan Cheshire, and Arminta Trust to foreclose its claim of lien on the Condo for unpaid assessments. (Ex. 3; Hr'g at 9:59); *see Shelter Cove Condo. Ass'n, Inc. v. Cheshire*, Case No. 2015-CA-001127 (Fla. Cir. Ct., Escambia Cty.). During the pendency of this foreclosure action, Arminta Trust conveyed the Condo to the Debtor via a deed in lieu of foreclosure signed on June 11, 2019. (Ex. 6; Hr'g at 10:07-10:09). The deed purportedly preserved the Debtor's mortgage on the Condo, so the Debtor became not only the owner of the Condo but the first mortgagee. (Ex. 6). There was an advantage under Florida's Condominium Law for the Debtor to maintain its status as a first mortgagee. Under section § 718.116(1) of the *Florida Code*, the liability of a first mortgagee for unpaid assessments is limited if the first mortgagee acquires title to the unit by foreclosure or a deed in lieu of foreclosure.

Three days after the conveyance to Arminta Trust, the Debtor filed a lawsuit in federal district court against the Condo Association seeking a declaratory judgment that the Debtor's mortgage was senior to the Condo Association's lien. (Hr'g at 10:15). The Debtor also challenged the extent of its liability for unpaid assessments under Florida's Condominium Law. The deed in lieu of foreclosure transferring ownership of the Condo from Arminta Trust to the Debtor was recorded two days later. (Ex. 6). The federal district court dismissed the complaint after abstaining from

[5] In the notice, the receiver offered Arminta Trust an opportunity pay the special assessment in installments.

hearing the matter. *See First Fid. Tr. Servs., Inc. v. Shelter Cove Condo. Ass'n, Inc.*, No. 3:19CV1687, 2019 WL 13204933 (N.D. Fla. Aug. 20, 2019).

Two months later, in October 2019, the Debtor initiated another action in Florida state court to foreclose on the Condo—even though the Debtor already owned the Condo by virtue of the deed in lieu of foreclosure. (Hr'g at 10:15). At the Condo Association's request, the Florida state court consolidated the two foreclosure actions. (Hr'g at 10:15-10:16).

In the consolidated foreclosure actions, the Florida court disqualified the Debtor's lead counsel because of a conflict of interest, a decision that was affirmed on appeal.[6] *First Fid. Tr. Servs., Inc. v. Shelter Cove Condo. Ass'n., Inc.*, 329 So. 3d 222 (Fla. Ct. App. 2021). Shortly thereafter, the Debtor's remaining counsel withdrew. Because the Debtor, as a corporation, could not lawfully represent itself in the foreclosure action, the Florida court allowed the Debtor a period of time to obtain substitute counsel. (Hr'g at 10:16); *see, e.g., Rowland v. Cal. Men's Colony*, 506 U.S. 194, 201-02 (1993). When the Debtor failed to obtain new counsel, the Florida court entered an order striking the Debtor's pleadings and entering a default judgment against the Debtor. (Ex. 7). Then, on November 4, 2022, the Florida court entered the Final Judgment of Foreclosure Regarding Unit 302 (the "Foreclosure Judgment") (Ex. 7) holding that the Condo Association's lien against the Condo was superior to the Debtor's and awarding the Condo Association $357,702.62 plus interest of 10% per annum. The Foreclosure Judgment ordered the clerk of court (not the Condo Association or the Receiver) to sell the Condo at a public auction on January 5, 2023 to the highest bidder at www.escambia.realforeclose.com. (Ex. 7). The Debtor never appealed or otherwise challenged

[6] The Debtor's lead counsel had formerly represented the first receiver appointed by the Florida state court. Because that representation included the imposition of the special assessment against the Condo, the Florida state court determined that his representation of the Debtor in the foreclosure action gave rise to a conflict of interest. *First Fid. Tr. Servs., Inc. v. Shelter Cove Condo. Ass'n, Inc.*, 329 So. 3d 222 (Fla. Ct. App. 2021)

this Foreclosure Judgment. (Hr'g at 10:16-10:17). On November 23, 2022, the Condo Association noticed the public auction for January 5, 2023 and before that date placed an online bid of $10,100.00. (Ex. 8; Hr'g at 10:23).

Under Florida law, judicial sales following foreclosure are conducted by the clerk of court, not the creditor. FLA. STAT. § 45.031(3). After the auction is concluded, the clerk issues a certificate of sale which identifies the "highest and best bid received for the property" and the person "to whom the property was sold." FLA. STAT. § 45.031(4); (Hr'g at 10:34-10:36). In Escambia County, the clerk of the court transmits information about all scheduled foreclosure sales to a company that oversees the online auction. (Hr'g at 11:34). Interested buyers place bids ahead of the date of the sale. (Hr'g at 11:34). "If no objections to the sale are filed within 10 days after filing the certificate of sale," the bids are tabulated, and the clerk issues the certificate of title. FLA. STAT. § 45.031(5). Ownership of the property is transferred to the highest bidder only when the certificate of title is filed. FLA. STAT. § 45.031(6).

In an effort to stop the public auction scheduled for January 5, 2023, the Debtor commenced this chapter 11 case on December 27, 2022. (Dkt. #1). The Debtor elected to proceed under subchapter V of chapter 11. (Dkt. #1, #4); *see* 11 U.S.C. § 103(i). The filing of the bankruptcy case stayed the Foreclosure Judgment and public auction. The Debtor, however, did not file a Suggestion of Bankruptcy in the foreclosure action and did not notify the clerk of court of the bankruptcy filing. Instead, the Debtor's counsel's only action to stop the auction was to send the following email on January 2, 2023 to Remol, the Condo Association's foreclosure counsel: "[P]lease see attached copy of the Notice of Filing/Automatic Stay that requires you to cease any action to collect or to pursue the final judgment of foreclosure." (Ex. 9). But that email was flagged and diverted to Remol's spam folder. (Hr'g at 10:30-10:32). A note generated by Remol's email system

appearing above the email warned: "Outlook blocked access to the potentially unsafe attachments." (Ex. 9). The Debtor's counsel sent the same email to two other persons at Remol's law firm, but these emails were similarly diverted to spam folders and carried the same warning. (Hr'g at 10:30-10:32). In his testimony, Remol theorized that the January 2, 2023 email went to their spam folders because of the unsafe attachments. (Hr'g at 10:30-10:32). Remol's testimony was credible: there was no evidence that he or his law firm had any prior knowledge of any problem with the firm's spam filter or its email settings or that they had actual notice of the bankruptcy filing before the public auction.

As discussed above, judicial sales in Escambia County are conducted online. Once the Condo Association issued the notice of the public auction, the "cake is baked," according to Remol. (Hr'g at 10:23-10:26). Neither the clerk of court nor the company responsible for managing the online auction having notice of the bankruptcy case, the public auction automatically took place as scheduled on January 5, 2023. The clerk of the court then issued a certificate of sale identifying the Condo Association as the highest bidder. Technically, even though the Debtor did not provide notice to the clerk of court and the Debtor's email to Remol was diverted to the spam filter because of the unsafe attachment, the public auction violated the automatic stay.

On January 6, 2023, the Debtor's counsel sent a second email to Remol but this time did not attach any documents. (Ex. 10). That January 6, 2023 email went to Remol's in-box folder, and he read it. (Hr'g at 10:25). In the email, the Debtor's counsel inquired why the foreclosure sale had proceeded "despite having notice of the automatic stay." (Ex. 10). Remol searched his email folders and found the January 2, 2023 email in his spam folder. (Hr'g at 10:25-10:26). He immediately called the Debtor's counsel and left a message. (Hr'g at 10:26). He also emailed the Debtor's counsel asking if he intended to file a Suggestion of Bankruptcy. (Ex. 10). The Debtor's counsel

never responded to his telephone call or his email. (Hr'g at 10:26). Remol became concerned that the clerk of court might issue the certificate of title to the Condo Association, and so he filed on behalf of the Receiver and the Condo Association a Suggestion of Bankruptcy. (Ex. 11; Hr'g at 10:27-10:28). As a result of the filing of the Suggestion of Bankruptcy, the clerk of court did not issue a certificate of title to the Condo Association, and no foreclosure sale took place.[7] (Hr'g at 10:29-10:30). Remol convincingly testified that he had no knowledge of the bankruptcy filing until January 6, 2023. (Hr'g at 10:34, 10:40).

Although the Debtor commenced the bankruptcy case on December 27, 2022, it did not file the creditor matrix until January 2, 2023 (Dkt. #15), leaving only two business days for the Receiver and/or the Condo Association to receive notice of the bankruptcy filing by mail before the public auction scheduled for January 5, 2023. The Debtor filed its schedules and statement of financial affairs (Dkt. #24-30) on January 11, 2023. In its schedules, the Debtor disclosed the Condo as its only asset (Dkt. #24), no secured creditors (Dkt. #25), and two unsecured creditors, Shelter Cove and Clark Partington.[8] (Dkt. #26).

The Condo Association filed a proof of claim (Cl. #3-1) in the bankruptcy case asserting a lien against the Condo in the amount of $362,896.70 based on the Foreclosure Judgment. It is undisputed that the Debtor has not made any post-petition payments to the Condo Association.

On February 1, 2023, a motion to convert or dismiss the bankruptcy case under 11 U.S.C. § 1112(b)(1) was filed by David W. Asbach, acting United States Trustee for Region 5 (the "UST"). (Dkt. #37). A hearing was held after which the Court denied the UST's motion. The Debtor argues that the Court's denial of the UST's motion constituted a finding that the Debtor acted in good faith when it filed its bankruptcy case and that the Court may not revisit that issue.

[7] In Florida, a foreclosure sale is not complete until the certificate of title is issued. FLA. STAT. § 45.031(6).
[8] Notably, the Debtor did not list the $580,000.00 loan to Arminta Trust as an asset of the estate. (Dkt. #24).

(Dkt. #117 at 4). Because of the Debtor's argument, the UST's motion and the Court's order denying the UST's motion are discussed in some detail below.

In his motion, the UST questioned whether the Debtor qualified as a subchapter V debtor. (Dkt. #37). He argued that the Debtor's primary business activity appeared to be owning and renting the Condo, and the definition of a subchapter V debtor specifically excludes owners of single asset real estate. 11 U.S.C. § 1182(1)(A). The UST asked the Court to dismiss or convert the case to a chapter 7 case because the Debtor lacked operations, the case was a two-party dispute between the Debtor and the Condo Association, and rehabilitation of the Debtor was unlikely. (Dkt. #37). The UST pointed out that the Debtor appeared to have no current operations, no cash on hand, no current income, no accounts receivable, no investments, no inventory, no furniture or equipment, and no insurance on the Condo.

Both the Debtor and the subchapter V chapter trustee opposed the UST's motion. (Dkt. #55, #56). The subchapter V trustee was doubtful about the Debtor's ability to reorganize but asked the Court to allow the case to advance, at least to plan confirmation. (Dkt. #55).

At the hearing on the UST's motion on March 7, 2023, Ed Cheshire testified that the Debtor's primary and historical business has been funding car loans but that COVID-19 had adversely affected its operations. (Dkt. #61). He explained how the Debtor had used rental income from the Condo to fund the car loans.

Although at the time of the hearing on the UST's motion, the Court agreed with the UST that the case carried many of the hallmarks of a two-party dispute, it declined to convert or dismiss the case at that time. (Dkt. #61). Based on Ed Cheshire's testimony, the Court, giving the Debtor the benefit of the doubt, allowed the Debtor an opportunity to reorganize and denied the UST's motion without prejudice. (Dkt. #61).

After the denial of the UST's motion, the Debtor attempted to address some of the UST's concerns. For example, the Debtor filed on the docket a one-page application for homeowners insurance dated March 14, 2023. (Dkt. #64). The application indicates that the Debtor had not had property insurance on the Condo in the last 45 days. (Dkt. #64). It also showed that the Debtor valued the Condo at only $111,656.00. (Dkt. #64; *see* Dkt. #24 (valuing Condo at $350,000.00)). The Debtor did not provide a copy of an insurance policy or any other proof that a policy was issued.

The bankruptcy case did not progress. As shown by later events, Ed Cheshire's previous testimony about material aspects of the Debtor's reorganization efforts was optimistic, if not misleading. A major step in the Debtor's reorganization effort should have been the filing of a plan by the statutory deadline of March 27, 2023. *See* 11 U.S.C. § 1189(b) (subchapter V plan becomes due within ninety days of the petition date). The Debtor ignored this crucial step and never filed a plan. The Court issued a show cause order requiring the Debtor to appear at a hearing on April 18, 2023 to explain why it failed to file the plan and why the case should not be dismissed. (Dkt. #75). In the meantime, the Condo Association filed the Stay Motion, which was set for hearing on May 16, 2023.[9] (Dkt. #84).

Neither the Debtor nor its counsel appeared at the show cause hearing on April 18, 2023. The Debtor's counsel did not file a motion for a continuance and did not notify the Court in advance of his absence. The Court dismissed the case under 11 U.S.C. § 1112(b)(4)(J) for failure "to file . . . a plan, within the time fixed by this title"(the "Dismissal Order") (Dkt. #94); *see* 11 U.S.C. § 1112(b)(4)(J). The Final Decree/Order Closing Case (Dkt. #100) was entered on May 8, 2023

[9] The Condo Association did not seek an expedited hearing to assure that the bankruptcy case would not be dismissed before the Court could address the Stay Motion.

without resolution of the Condo Association's Stay Motion. The Debtor did not appeal the dismissal of the case.

On May 9, 2023, the Condo Association filed the Relief Motion asking the Court for relief from the Dismissal Order and the Final Decree/Order Closing Case pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, as made applicable by Federal Rule of Bankruptcy Procedure 9024. It requests Rule 60(b)(6) relief for the limited purpose of seeking an annulment of the automatic stay *nunc pro tunc* to January 4, 2023 to validate the public auction. (Dkt. #102). The Condo Association then filed a motion to reopen for the limited purpose of resolving the Stay Motion.[10] (Dkt. #107). Because the Condo Association had no recourse to seek annulment of the stay except in this Court and for other reasons, the Court entered an order reopening the case on May 24, 2023 for that limited purpose.[11] (Dkt. #109). The Court held a combined hearing on the Relief Motion and Stay Motion on July 24, 2023.

The Relief Motion and Stay Motion present two legal issues: (1) whether the order dismissing the bankruptcy case should be vacated to allow the Condo Association to seek retroactive relief from the automatic stay and (2) if so, whether retroactive relief should be granted.

[10] On May 22, 2023, the Debtor filed a motion asking the Court to reopen the case for all purposes, including filing a plan of reorganization and initiating an adversary proceeding. (Dkt. #132). That motion is set for hearing on August 28, 2023. This Order addresses only the relief requested by the Condo Association in the Relief Motion and the Stay Motion.

[11] On June 20, 2023, after the order reopening the case had been entered, the Debtor filed a response opposing the motion or, in the alternative, asking the Court for permission to pursue bad faith claims against the Condo Association in an adversary proceeding. (Dkt. #115). At the Hearing, counsel for the Debtor withdrew this response.

Discussion

1. Vacating Dismissal Order

The Condo Association asks this Court for relief from the Dismissal Order and the Final Decree/Order Closing Case under Rule 60(b)(6).[12] Rule 60(b)(6) allows an order to be vacated for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6). This provision "is a residual clause used to cover unforeseen contingencies; that is, it is a means for accomplishing justice in exceptional circumstances." *Steverson v. GlobalSantaFe Corp.*, 508 F.3d 300, 303 (5th Cir. 2007). A court retains "especially broad" discretion when considering Rule 60(b)(6) relief. *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992); *see Lifeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988).

The circumstances here warrant limited relief from the Dismissal Order. Because the Condo Association had no actual knowledge of the bankruptcy filing, it had no opportunity to seek relief from the automatic stay before the public auction. Importantly, the Condo Association cannot return to the Florida state court for retroactive relief from the automatic stay. Only a bankruptcy court has jurisdiction to terminate, annul, or modify the automatic stay. *In re Siskin*, 258 B.R. 554, 562 (Bankr. E.D.N.Y. 2001). Other bankruptcy courts have granted Rule 60(b)(6) relief under similar facts. *See In re Cunningham*, 506 B.R. 334 (Bankr. E.D.N.Y. 2014) (granting creditor limited relief from dismissal order to seek annulment of stay to validate post-petition foreclosure sale).

[12] The closing of a bankruptcy case under 11 U.S.C. § 350(a) and the dismissal of a case under 11 U.S.C. § 1112(b) are two distinct events. The Court treats the Relief Motion as a request for relief from the Dismissal Order rather than a request to reopen the case under 11 U.S.C. § 350(b). Indeed, the case has already been reopened to consider the Condo Association's motions.

2. Annulment of the Automatic Stay

Pursuant to 11 U.S.C. § 362(a),[13] the filing of the bankruptcy petition on December 27, 2022 stayed all judicial proceedings against the Debtor. 11 U.S.C. § 362(a). The Foreclosure Judgment, therefore, was stayed as of December 27, 2022, and the public auction conducted nine days after the bankruptcy filing and before the case was dismissed constituted a technical violation of the stay. This stay violation occurred regardless of whether the Condo Association or the Receiver had knowledge of the bankruptcy filing. *In re Nazu, Inc.*, 350 B.R. 304, 324 (Bankr. S.D. Tex. 2006). The Condo Association, however, asserts that there are grounds to annul the stay retroactively. (Dkt. #80). In the absence of such retroactive relief, the Condo Association would have to recommence its foreclosure action against the Debtor. The Debtor opposes the Condo Association's Stay Motion. According to the Debtor, the public auction resulted in a commercially unreasonable sale of the Condo for only $10,100.00, and the Condo Association should be required to begin anew to "give others a chance to bid on the property." (Dkt. #131 at 6).

As authority for the *nunc pro tunc* relief it seeks, the Condo Association relies on § 362(d). That provision authorizes bankruptcy courts to grant relief from the automatic stay "by terminating, *annulling*, modifying, or conditioning" the stay. 11 U.S.C. § 362(d) (emphasis added); *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989). The Fifth Circuit Court of Appeals has held that "actions taken in violation of the automatic stay are not void, but rather they are merely voidable, because the bankruptcy court has the power to annul the automatic stay pursuant to section 362(d)." *Jones v. Garcia (In re Jones)*, 63 F.3d 411, 412 (5th Cir. 1995) (quoting *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990)). Thus, the Fifth Circuit has

[13] Unless noted otherwise, all references to statutes are to the U.S. Bankruptcy Code found at title 11 of the U.S. Code.

recognized that bankruptcy courts have the power to annul the automatic stay retroactively to the date of the filing of the petition. *In re Sikes*, 881 F.2d at 179.

Notwithstanding this clear precedent from the Fifth Circuit, the Debtor contends that the landscape of the law has changed because of the U.S. Supreme Court's recent decision in *Roman Catholic Archdiocese of San Juan v. Acevedo Felciano*, 140 S. Ct. 696 (2020). The Debtor argues that post-*Acevedo*, *nunc pro tunc* relief can never validate a foreclosure sale conducted in violation of the stay. For this proposition, the Debtor cites *In re Telles*, 8-20-7032, 2020 WL 2121254 (Bankr. E.D.N.Y. Apr. 30, 2020).

The Fifth Circuit has not yet addressed the issue, but a majority of courts that have done so have disagreed with *In re Telles*. "We do not interpret *Acevedo* as pertaining to a bankruptcy court's power to annul the automatic stay under § 362(d)." *In re Merriman*, 616 B.R. 381, 391 (B.A.P. 9th Cir. 2020); *see In re Patel*, 642 B.R. 187, 197 n.8 (Bankr. N.D. Ga. 2022) (rejecting the reasoning in *In re Telles*); *In re Dellinger*, No. 20-41208, 2021 WL 4465583, at *2 n.5 (Bankr. N.D. Ala. Sept. 29, 2021); *In re Wellington*, 628 B.R. 19, 24 n.5 (Bankr. M.D.N.C. 2021) (same); *In re SS Body Armor I, Inc.*, No. 10-11255, 2021 WL 2315177, at *3 & n.30 (Bankr. D. Del. June 7, 2021) (citing *In re Merriman* favorably). As explained in a treatise on Subchapter V:

> Although an annulment order operates retroactively like a *nunc pro tunc* order, *Acevedo* does not prohibit such relief because the context of an annulment order authorized by statute is materially different from the jurisdictional principles involved in *Acevedo*. . . . The critical point is that Congress expressly authorized annulment of the stay. *Acevedo* dealt with the federal removal statute that contained no authority for the court in the removed matter to do anything until remand occurred or for the district court to grant retroactive relief in connection with remand. In contrast, Code § 362(d) expressly authorizes the annulment of the automatic stay as one method of providing relief from it.

W. Homer Drake, Paul W. Bonapfel, & Adam M. Goodman, CHAPTER 13 PRACTICE & PROCEDURE § 15:9 (June 2023 Update). Having determined that this Court's power to annul the automatic stay

remains unchanged after *Acevedo*, the Court next turns to the merits of the Condo Association's request for relief.

Bankruptcy courts have broad discretion with respect to whether to annul the automatic stay. *Bustamante v. Cueva (In re Cueva)*, 371 F.3d 232, 236 (5th Cir. 2004). The Fifth Circuit, however, has cautioned courts "to use this discretion sparingly because of the adverse impact that validation could have on other creditors who honored the stay." *City Bank v. Indus. Bank NA (In re Brown)*, 178 F. App'x 409, 410 (5th Cir. 2006). Whether to annul the stay is an equitable determination. *In re Jones*, 63 F.3d at 413 n.5.

The Fifth Circuit has not articulated the specific factors that bankruptcy courts should consider in determining whether to grant retroactive relief from the stay to validate a foreclosure sale. Other bankruptcy courts have taken into consideration the following factors:

> (1) if the creditor had actual or constructive knowledge of the bankruptcy filing; (2) if the debtor has acted in bad faith; (3) if there was equity in the property of the estate; (4) if the property was necessary for an effective reorganization; (5) if grounds for relief from the stay existed and a motion, if filed, would have been granted prior to the violation; (6) if failure to grant retroactive relief would cause unnecessary expense to the creditor; and (7) if the creditor has detrimentally changes its position on the basis of the action taken.

In re Thornburg, 227 B.R. 719, 730 n.18 (Bankr. E.D. Tex. 2002); *see Fjeldsted v. Lien (In re Fjeldsted)*, 293 B.R. 12, 25 (B.A.P. 9th Cir. 2003) (listing twelve factors bankruptcy courts may consider when determining whether to annul automatic stay); 3 COLLIER ON BANKRUPTCY ¶ 362.12[1] (16th ed. 2023) ("[R]etroactive relief should be granted only in extraordinary circumstances, such as when a creditor acted without knowledge of the stay, under circumstances in which relief from the stay would have been available and where the creditor changes its position in reliance on the validity of its action."). Such factors provide a framework for this Court's analysis but are not a definitive checklist.

a. The Condo Association had no actual or constructive knowledge of the bankruptcy filing.

Remol's testimony that he was unaware of the bankruptcy case until January 6, 2023, one day after the public auction, is entirely credible. If Remol had received the January 2, 2023 email, he would have filed the Suggestion of Bankruptcy that same day or the next in the Florida state court, and the public auction would not have taken place. When Remol received no response from the Debtor's counsel, he initiated such action on January 6, 2023, the date Remol first learned of the bankruptcy case. Only because of Remol's actions, title to the Condo was not transferred to the Condo Association by the clerk of court.

If Remol must be charged with constructive knowledge of the Debtor's bankruptcy case because of the errant email on January 2, 2023, less weight should be attributed to this factor under these facts where the Debtor bears some responsibility for not filing a Suggestion of Bankruptcy in the Florida state action or notifying the clerk of the court before January 5, 2023. *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 978 (5th Cir. 1997) (holding that parties' errors can be evaluated when deciding whether to accord stay relief); *Mutual Benefit Life Ins. Co. v. Pinetree, Ltd. (In re Pinetree, Ltd)*, 876 F.2d 34, 37 (5th Cir. 1989) (annulling stay despite proper notice of bankruptcy case to the mortgage servicer who failed to notify the lender). It is also undisputed here that after the Condo Association filed the notice of foreclosure sale, its participation in the foreclosure process ended, and the clerk of court's, began. In Florida, foreclosure sales are conducted by the clerk of the court, not the creditor.

b. The Debtor has acted in bad faith.

Courts have granted *nunc pro tunc* stay relief based upon a debtor's bad faith alone. *See NKL Enters., LLC v. Oyster Bay Mgmt. Co.*, No. 12-CV-5091, 2013 WL 1775051, at *6 (E.D.N.Y. Apr. 25, 2013) (listing cases); *In re Webb*, 294 B.R. 850, 853-54 (Bankr. E.D. Ark. 2003) (annulling

stay based on debtor's bad faith in filing and prosecuting its current and past bankruptcy cases). The Fifth Circuit has noted that a bad faith filing is evidenced when:

> The debtor has one asset.
>
> The secured creditors' liens encumber this tract.
>
> There are generally no employees except for the principals, little or no cash flow, and no available sources of income to sustain a plan of reorganization or to make adequate protection payments.
>
> There are only a few, if any, unsecured creditors who claims are relatively small.
>
> The property has usually been posted for foreclosure because of arrearages on the debt and the debtor has been unsuccessful in defending actions against the foreclosure in state court.
>
> The debtor and one creditor may have proceeded to a stand-still in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford.
>
> Bankruptcy offers the only possibility of forestalling loss of the property.
>
> There are sometimes allegations of wrongdoing by the debtor or its principals.
>
> The "new debtor syndrome," in which a one-asset entity has been created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors.

Little Creek Dev. Co. v. Commonwealth Mtg. Corp. (In re Little Creek Dev. Co.), 779 F.2d 1068, 1073 (5th Cir. 1986). Most of these facts are present here.

The Condo is the Debtor's only asset, which remains encumbered by the Condo Association's lien. (Dkt. #24). The Debtor has no employees except for its principal, Ed Cheshire. The Debtor has no cash flow. (Dkt. #69). The Debtor has no source of income to sustain a plan of reorganization or to make adequate protection payments given the lack of loans on its books or cash or reserves to extend loans. The Debtor only has two unsecured creditors (including the Condo Association). (Dkt. #26). The Debtor has engaged in protracted litigation in Florida's state and federal courts to forestall the foreclosure of the Condo and commenced the bankruptcy case to stop the public auction. Before the bankruptcy filing, Ed Cheshire, the Debtor's principal, engaged in a

series of steps to avoid paying the special assessment. They included: (1) transferring the Condo to Arminta Trust; (2) encumbering the Condo with a mortgage to the Debtor; (3) causing Arminta Trust to convey the Condo to the Debtor via a deed in lieu of foreclosure; (4) attempting to preserve the Debtor's status as a first mortgagee after the Debtor acquired the Condo to take advantage of Florida's Condominium Law; (5) filing a federal lawsuit challenging the Condo Association's lien priority; and (6) filing a new state court foreclosure action during the pendency of the Condo Association's foreclosure action.

At this juncture, it is clear that this bankruptcy case is a two-party dispute that does not serve the purpose of the Bankruptcy Code. Under the totality of the circumstances, it is evident that the Debtor filed the bankruptcy case in bad faith as a litigation tactic. That the Debtor acted in bad faith is further shown by its failure to file a plan by the deadline imposed under § 1188(c), as well as its failure to seek an extension before that deadline expired. In none of its filings before the Court does the Debtor attempt to explain its previous abandonment of the case.

In the Response, the Debtor suggests that its business has increased since the dismissal of its case. (Dkt. #117 at 4). It has secured two financing transactions and a tenant to lease the Condo. The Debtor provides no details about these supposed transactions. More important, the Debtor presented no testimony or other admissible evidence at the Hearing to support these allegations in its Response.

The Debtor's counsel argued at the Hearing that any evidence of the Debtor's bad faith conduct is irrelevant because the Court previously ruled in its order denying that UST's motion that the Debtor commenced and prosecuted the bankruptcy case in good faith and that decision is the "law of the case." (Hr'g at 9:22). The Debtor's counsel cited *Federal Deposit Insurance Corp. v. McFarland*, 243 F.3d 876 (5th Cir. 2001), in support of his argument. (Hr'g at 9:22). There, the

Fifth Circuit described the "law of the case" doctrine as follows: "a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." *Id*. at 884 (quotation & citation omitted). The Fifth Circuit has also recognized, however, that the law of the case doctrine applies only to issues actually decided by a court, not that could have been decided but were not. *Lindquist v. City of Pasadena*, 669 F.3d 225, 238-39 (5th Cir. 2012).

Contrary to the Debtor's assertion, the UST's motion was not predicated on the Debtor's bad faith but on the factors set forth in § 1112(b). (Dkt. #37). Also, the UST's motion was denied without prejudice, meaning that the UST or any other interested party could raise the same issues again. (Dkt. #61); *see Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) ("The primary meaning of dismissal without prejudice . . . is dismissal without barring the plaintiff from returning later, to the same court with the same underlying claim."). Therefore, the Debtor's argument is factually incorrect as this Court did not adjudicate the Debtor's good faith or bad faith in the order denying the UST's motion. (Dkt. #61). Accordingly, this Court is not precluded by the law of the case doctrine from considering the Condo Association's request for relief based on allegations of the Debtor's bad faith.

Much of the cross-examination of Remol by counsel for the Debtor focused on the Debtor's perception that it was treated unfairly by the Condo Association and, in particular, questioned: (1) the agreement of the Condo Association to exempt the plaintiffs in the lawsuit from the special assessments levied against all other unit owners in the Consent Judgment and (2) the Condo Association's winning bid of only $10,100.00 for the Condo at the public auction. (Hr'g at 11:10-11:14, 11:29-11:30). The Debtor's argument at the Hearing suggested that the Condo Association's alleged bad faith should cancel out the Debtor's. (Hr'g at 11:12-11:14). The cross-

examination fell short because the Debtor's complaints were largely about the wrong party. The Receiver was merely carrying out his court-ordered duties on behalf of the Condo Association to enforce the Foreclosure Judgment pursuant to Florida law and had no part in the Consent Judgment.

The Consent Judgment is a final judgment of the Florida state court, and the *Rooker-Feldman* doctrine prevents this Court from reviewing that decision. Under that doctrine, federal courts lack jurisdiction to consider collateral attacks on state court judgments. *Reitnauer v. Tex. Exotic Feline Found, Inc. (In re Reitnauer)*, 152 F.3d 341, 343 (5th Cir. 1998) (describing doctrine). As the Fifth Circuit has explained:

> [F]ederal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify, or nullify final orders of state courts. If a state trial court errs, the judgment is not void, it is to be reviewed and corrected by the appropriate state appellate court. Thereafter, recourse at the federal level is limited solely to an application for a writ of certiorari to the United State Supreme Court.

Weekly v. Morrow, 204 F.3d 613, 615 (5th Cir. 2000). The Debtor chose not to appeal the Consent Judgment or otherwise seek relief from the Consent Judgment or the Foreclosure Judgment in Florida state courts and cannot do so now before this Court. As to the Debtor's argument that the amount of the Condo Association's winning bid was unreasonably low, that too is an issue that should have been raised in the Florida state court.[14] No certificate of title has been issued to the Condo Association, and Florida law provides a procedure for objecting to a certificate of sale before ownership of property is transferred through the certificate of title.[15]

[14] As Remol thoroughly explained, in Florida the amount of a successful bid at public auction is not conclusive proof of the property's value, which would depend on numerous factors, including the presence of liens on the property. (Hr'g at 11:39-11:40).

[15] The Court makes no finding as to whether the Debtor would be entitled to relief from the certificate of sale under Florida law.

c. The Debtor has no equity in the Condo.

According to the Condo Association's proof of claim, the amount of the debt secured by its lien on the Condo as of the petition date was $362,896.70 (Cl. #3-1). The value of the Condo is less than that, by the Debtor's own admissions. (Schedule A/B, Dkt. #24). The Debtor, therefore, has no equity in the Condo.

d. The Condo is not necessary for an effective reorganization.

Property is necessary for an effective reorganization only when it "is in prospect," meaning that there is a "reasonable possibility of a successful reorganization within a reasonable time." *United Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 375-76 (1988); *see In re Mitrany*, No. 08-40034, 2008 WL 2128162, at *4-6 (Bankr. E.D.N.Y. May 16, 2008) (holding that property is "essential for an effective reorganization *that is in prospect*"). "Courts usually require the debtor do more than manifest unsubstantiated hopes for a successful reorganization." *Canal Place Ltd. v. Aetna Life Ins. Co. (In re Canal Place Ltd.)*, 921 F.2d 569, 577 (5th Cir. 1991).

Here, the Debtor did not file a subchapter V plan by the 90-day deadline set forth in § 1188(c) and admits that it is presently not in a position to develop a plan of reorganization. (Dkt. #117 at 2). The Debtor's alleged business is funding car loans, but the Debtor has no cash or reserves to make loans and has no receivable due on any loans.[16] The Debtor contends that its business relies on its ability to leverage the Condo, by pledging it as collateral to borrow working capital and by leasing it as rental property. (Dkt. #131). Without the Condo, the Debtor's "business growth will occur at a slower pace." (Dkt. #117 at 3). The Debtor alleges in its Response that it "has been

[16] The Condo Association questions whether the Debtor's business has historically been funding car loans. (Dkt. #80 at 10 n.2). The Condo Association alleges that at one point, Ed Cheshire purported to run the Debtor as a process-service company. *In re McDonald*, 98 So. 3d 1040 (Miss. 2012).

seeking re-capitalization since its case was dismissed," but its efforts so far have been unsuccessful. (Dkt. #117 at 2).

The Debtor's assertions that it is now ready to reorganize are contradicted by its own admission that it is not in a position to develop a plan and are belied by its failure to appear at the show cause hearing to oppose the dismissal of the case. Most troubling is the Debtor's counsel's failure to provide the Court with any explanation for his absence from the show cause hearing of the Debtor's previous abandonment of the case.

In the Response, the Debtor suggests that its reorganization efforts were hampered by the Condo Association's refusal to allow Ed Cheshire access to the Condo. (Dkt. #117 at 2-3). Attached to the Rebuttal is the affidavit of Gordon Carey ("Carey"), who states that he previously rented the Condo from Ed Cheshire. He alleged that Emile Petro ("Petro") informed him in February 2022 that no one, including Ed Cheshire, could occupy or rent the Condo pursuant to the instructions of "the judge (or perhaps [Petro] said the receiver)" and that Petro had been told to notify the Sheriff of any trespassers. (Dkt. #131). Petro is a unit owner and a named plaintiff in the 2007 state court litigation against the Condo Association. (Hr'g at 10:40-10:42). According to Carey, Petro owns the Oyster Bar near Shelter Cove, which is where they first met. Neither Carey nor Petro were present at the Hearing to testify.

At the Hearing, Remol testified that neither he nor the Receiver ever informed Petro or anyone else to restrict access to the Condo. (Hr'g at 10:40). He also testified that Petro is not an agent of the Receiver or the Condo Association. The Debtor provided no evidence to rebut Remol's testimony, which the Court found persuasive.

e. The Stay Motion, if filed before the public auction, would have been granted.

Under § 362(d)(1), "the court shall grant relief from the stay upon a showing of 'cause,' including the lack of adequate protection." 11 U.S.C. § 362(d)(1); *In re Mantachie Apartment Homes, LLC*, 488 B.R. 325, 331 (Bankr. N.D. Miss. 2013). The Bankruptcy Code does not define "cause," as used in § 362(d)(1), thus "giving bankruptcy courts the flexibility to define cause in a particular case." *Id*. (citing *Little Creek* 779 F.2d at 1072). "Many courts have found a debtor's bad faith, or lack of good faith, to constitute 'cause' for lifting the stay to permit creditors to proceed in rem against a debtor's property." *In re Mantachie Apartment Homes, LLC*, 488 B.R. at 331 (citing *Little Creek*, 779 F.2d at 1072). Relief from the automatic stay is also appropriate under § 362(d)(2) where the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2).

The Condo Association asserts that grounds existed for relief from the stay under § 362(d)(1) before the public auction because the Debtor acted in bad faith and failed to provide adequate protection and under § 362(d)(2) because the Debtor has no equity in the Condo and the Condo is not necessary for an effective reorganization. In a motion for relief from the stay, the burden of proof is on the debtor as to all issues except the issue of the debtor's equity in the property. 11 U.S.C. § 362(g).

(1) Debtor's Bad Faith

The Bankruptcy Code requires that debtors act in good faith both in the commencement and the prosecution of a bankruptcy proceeding. *Little Creek*, 779 F.2d at 1071. The Court finds that the Condo Association would have been entitled to relief from the automatic stay under § 362(d)(1) had the Stay Motion been heard before the dismissal because of the Debtor's bad faith conduct, as previously detailed.

(2) No Adequate Protection

In addition to bad faith, the automatic stay would also have been terminated under § 362(d)(1) because the Debtor failed to provide adequate protection to the Condo Association. The value of the Condo is insufficient to provide the Condo Association with an "equity cushion," and the Debtor never made any payments to the Condo Association to adequately protect its interests. Also, the Condo is either uninsured or underinsured.

(3) No Equity and Not Necessary to an Effective Reorganization

The Condo Association also would have been entitled to relief from the stay under § 362(d)(2). That section provides that the court "shall grant relief from the stay . . . if—(A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization." 11 U.S.C. § 362(d)(2). As set forth above, the Debtor had no equity in the Condo as of the Petition date, and the Condo was not necessary for an effective reorganization in prospect.

f. The expense to the Condo Association favors annulling the stay.

Without retroactive stay relief, the Condo Association would be forced to incur significant unnecessary expenses. It would have to seek again a judgment of foreclosure from the Florida state court and notice another sale of the Condo.

g. Summary

The Courts finds that the Condo Association lacked actual knowledge of the bankruptcy filing and its technical violation of the stay was unintentional; the Debtor acted in bad faith; there was no equity in the Condo; the Condo was not necessary for the Debtor's effective reorganization; multiple grounds for relief from the automatic stay existed and a motion, if filed, would have been granted; and that the failure to grant retroactive relief would cause unnecessary expense to the Condo Association.

Conclusion

This bankruptcy case is one of many attempts by the Debtor to avoid paying assessments and prevent the public auction and foreclosure of the Condo. For the above reasons, the Court finds that an order should be entered annulling the automatic stay with respect to the Condo Association and the Condo, and abandoning the Condo from the bankruptcy estate.

IT IS, THEREFORE, ORDERED that the Relief Motion is hereby granted and the Condo Association is entitled to limited relief from the Dismissal Order for the purpose of seeking an annulment of the automatic stay.

IT IS FURTHER ORDERED that the Stay Motion is hereby granted and the Condo Association is hereby granted relief from the automatic stay under 11 U.S.C. § 362 *nunc pro tunc* to December 27, 2022 with respect to the Condo so as to permit the Condo Association to enforce its liens and interest in the Condo and exercise its rights and remedies relating to the Condo, including: (1) foreclosing or otherwise realizing upon the Condo; and (2) taking any other action consistent with foreclosure of the Condo to maintain or liquidate the Condo.

##END OF ORDER##