IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN RE:

JOAN ANN MARIE WATKINS — CASE NO. 870~~1540~~2224JC

DEPOSIT GUARANTY NATIONAL BANK as Trustee Under the Single Family Mortgage Revenue Bond Resolution (assignee of Cameron-Brown South, Inc.) — PLAINTIFF

vs. — ADV. NO. 880099JC

JOAN MARIE WATKINS — DEFENDANT

Eugene Sexton Berry, Jr.
P. O. Box 6450
Jackson, MS 39212 — Attorney for Debtor

R. Conner McAllister
200 South Lamar Street
Suite 308
Jackson, MS 39201 — Attorney for Deposit Guaranty National Bank

Edward Ellington, Bankruptcy Judge

OPINION

This is an adversary proceeding in which Deposit Guaranty National Bank as Trustee Under the Single Family Mortgage Purchase Revenue Bond Resolution (assignee of Cameron-Brown South, Inc.) (hereinafter referred to as "Deposit Guaranty") is seeking a declaratory judgment to determine that a

foreclosure sale of certain real property of the debtor, Joan Ann Marie Watkins, was a valid foreclosure.

The parties have entered into the following stipulation, to-wit:

That some time prior to September 29, 1987, the Defendant fell into arrearage with Plaintiff on the mortgage payments on her home, located at 5661 Spencer Drive, Jackson, Mississippi 39212, same having a legal description of Lot One, Royal Forest of Willowood, Part 3, Plat Book 29 at Page 4, First Judicial District, Hinds County, Mississippi.

That on or about September 29, 1987, Defendant filed Chapter 7 Bankruptcy, listing the claim of Plaintiff as a debt on said Bankruptcy Petition. In Defendant's statement of intent, she indicated her intent to retain, exempt and reaffirm the debt owed to Plaintiff.

On October 26, 1987, at 10:30 A.M., a 341 Meeting was held pursuant to Title 11 of the United States Code.

On or about November 5, 1987, Plaintiff filed a Motion to Lift Automatic Stay, abandonment and other relief.

That said Motion was set for hearing on Tuesday, November 24, 1987, at 3:00 P.M.

Upon said Motion, this court entered its order of November 24, 1987, granting to Plaintiff relief from the Automatic Stay for purposes of foreclosing said property.

Defendant was of the opinion that she would be able to find the money to bring her mortgage arrearage to Plaintiff current, but was unable so to do. Thereupon, Defendant on December 9, 1987, filed Chapter 13 Schedules in connection with this cause, along with a Motion to Convert this case from a Chapter 7 case to a Chapter 13 case. In her said Petition, she filed a plan, proposing to pay the arrearage to Plaintiff for the months of July through December, 1987, over a period of 36 months.

On December 14, 1987, this court entered its order, allowing Defendant to so convert said case to a Chapter 13 Case.

Plaintiff had knowledge of said conversion prior to January 4, 1988, when it attempted to foreclose on said property. Said foreclosure proceeding had errors in same and was thereby void.

On March 9, 1988, this court entered its order confirming the aforementioned Chapter 13 Plan of the Defendant.

Subsequent thereunto, Plaintiff attempted to foreclose on said property again at a time subsequent to March 9, 1988. Plaintiff contends that said foreclosure is a valid foreclosure, while Defendant contends that said foreclosure is void, as this court had confirmed a Chapter 13 Plan approving Defendant's method of dealing with Plaintiff prior to the actual commencement of said foreclosure sale.

The facts in this case are not in dispute. The only dispute between Plaintiff and Defendant is the significance of the order of November 24, 1987; whether same prejudiced the rights of Defendant to convert same to a Chapter 13 and pay the mortgage arrearage under the plan; and whether or not the confirmation order of March 9, 1988, overruled the order of November 24, 1987.

CONCLUSIONS OF LAW

As stipulated by the parties, the issue this Court is to determine is as follows, to-wit:

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> The only dispute between Plaintiff and Defendant is the significance of the order of November 24, 1987; whether same prejudiced the rights of Defendant to convert same to a Chapter 13 and pay the mortgage arrearage under the plan; and whether or not the confirmation order of March 9, 1988, overruled the order of November 24, 1987.

The Court is of the opinion and so finds that the order on November 24, 1987, which lifted the stay for foreclosure on the home of the debtor is determinative of the issue; that the confirmation order of March 9, 1988 did not overrule the order lifting the stay; and that the foreclosure sale conducted subsequent to March 9, 1988 is valid.

The Court finds that the opinion of U. S. District Judge Walter Gex in Jefferson v. Mississippi Gulf Coast YMCA, Inc., 73 B.R. 179 (S.D.Miss. 1986) is controlling of the issues in the case at bar.

In Jefferson the debtors had filed an adversary proceeding requesting that a foreclosure be set aside and that they be awarded compensatory and punitive damages. The Bankruptcy Court had dismissed the adversary, See 59 B.R. 707, and the debtors had appealed.

On appeal Judge Gex summarized the facts as follows:

> The Court need not state in detail the procedural history of this case as such was accurately recounted in the Bankruptcy Court's Order of Dismissal and Conclusions

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of Law on Dismissal of Proceedings. Briefly, the adversary proceeding from which this appeal is taken was instituted subsequent to the fourth bankruptcy filing by the debtors within a period of nineteen months. Several months subsequent to the dismissal of the debtor's first filing (No. 8208144SC) on June 20, 1983, which was dismissed for their failure to file a plan of reorganization, the debtors again became in arrears with Landmark and Landmark again 2/ commenced foreclosure proceedings. The second foreclosure sale was cancelled because of the debtors' second filing (No. 8407357SC) on the day of the scheduled sale, March 19, 1984. Landmark's Motion to Lift the Automatic Stay was granted by the Court's Order of March 27, 1984. This second filing was dismissed on April 3, 1984, on the debtors' own Motion to Dismiss. The third filing (No. 8407488SC) also occurred on the day the new foreclosure sale was scheduled, April 19, 1984. Oral authority to proceed with the sale was obtained from the Bankruptcy Judge (Record, pp. 24-26), and the sale was conducted that day. This third bankruptcy proceeding was dismissed on May 7, 1984, for the debtors' failure to file the required schedules.

The fourth bankruptcy filing (No. 8407599SC) occurred on May 17, 1984. The debtors, without being joined in by the trustee, commenced the adversary proceeding from which the instant appeal is taken by filing an Amended Complaint 3/ on April 17, 1985, against the Y.M.C.A. and Landmark alleging, **inter alia**, (1) "collusion and conspiracy" on the part of appellees as well as inadequate consideration with regard to the Trustee's Deed executed in favor of

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> the Y.M.C.A., (2) slander of title, and (3) that the trustee, Tom Anderson, should be removed for mismanagement, failing to adequately protect the debtors' estate, and for neglect of duty. The debtors requested that the foreclosure be set aside and that they be awarded compensatory and punitive damages. The Bankruptcy Court granted the Motion to Dismiss filed by the appellees (and joined in by the trustee) and awarded attorney's fees against the appellants.
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> Footnotes in above quotation:
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> 2/ Prior foreclosure proceedings scheduled for October 14, 1982, were cancelled because of the automatic stay (11 U.S.C. Section 362) invoked by the debtors' initial filing that same day.
>
> 3/ The debtors' initial Complaint was filed March 20, 1985.

Judge Gex first upheld the finding of the Bankruptcy Court that the consideration paid at the foreclosure sale was reasonable and adequate and the result of competitive bidding.

He then went on to address the issue which is relevant to the case at bar:

> The Court next addresses the legal propriety of the lower court's holding that the automatic stay provisions of 11 U.S.C. Section 362(a) did not operate to bar or preclude the foreclosure proceedings where an Order pursuant to 11 U.S.C. Section 362(d) was entered lifting the stay and allowing a sale to proceed in a previous bankruptcy involving the same debtors, the same creditors and the

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> same property. The Court has studied the issue and concludes that the lower Court's decision that the April 19, 1984, foreclosure sale did not violate the automatic stay provision of 11 U.S.C. Section 362(a)--whether based on principles of res judicata, ODECO v. Mont Boat Rental Services, Inc., Et Al, 799 F.2d 213 (5th Cir. 1986), or collateral estoppel, United States v. Mendoza, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984)--did not constitute error as a matter of law and, in fact, was fully justified given the posture of this case. **See** In re Bystrek, 17 B.R. 894 (E.D.Pa. 1982); Carondelet Savings and Loan Assn. v. McKanders, 42 B.R. 108 (N.G.Ga. 1984). The lower court's decision to lift the automatic stay in No. 8407357SC was an act within the discretion of the bankruptcy judge, In re MacDonald, 755 F.2d 715 (9th Cir. 1985), In re Timbers of Inwood Forest Associates, Ltd., 793 F.2d 1380 (5th Cir. 1986), and to have allowed the debtors to effectively circumvent the effects of the Order Lifting the Automatic Stay by voluntarily dismissing their own bankruptcy and filing a new bankruptcy shortly thereafter would have amounted to a condonation of appellants' attempts to thwart the purposes of 11 U.S.C. Section 362(a). **See** GATZ Aircraft Corp. v. M/V Courtney Leigh, 768 F.2d 711 (5th Cir. 1985).

This Court interprets Judge Gex's opinion to mean that in regard to the lifting of a stay pursuant to 11 U.S.C. Section 362(d), "once lifted--always lifted."

In the case at bar, Deposit Guaranty filed its motion to lift stay on November 6, 1987. The motion was noticed for hearing on November 24, 1987, 637

and the debtor was directed to file an answer or written response on or before November 23, 1987. No answer or written response was filed and neither the debtor nor the attorney appeared at the scheduled hearing on November 24, 1987. Accordingly, an Order lifting the stay was entered on that date. No appeal was taken from the entry of the Order.

As was noted in the stipulation, this Court entered its order on December 14, 1987, allowing the debtor to convert her Chapter 7 case to a Chapter 13 case. However, it should also be noted that the debtor had an absolute right to this conversion pursuant to 11 U.S.C. Section 706(a) and the Court had no discretion in the matter and neither Deposit Guaranty nor any other creditor was entitled to any notice or hearing.

As a practical matter, once a stay has been lifted, if a debtor can stop a foreclosure by exercising his absolute right to convert to a Chapter 13 the situation is analogous to the Jefferson case with repetitive filings.

The question is not before the Court and nothing in the opinion should be interpreted as dealing with the question of whether once a stay has been lifted a Bankruptcy Court can enjoin a proposed foreclosure pursuant to the powers of 11 U.S.C. Section 105.

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The attorney for Deposit Guaranty shall prepare an appropriate judgment consistent with this opinion as required by Bankruptcy Rule 9021. He shall submit it to the attorney for the debtor for signature indicating approval as to form.

This the 18 day of November, 1988.

U. S. BANKRUPTCY JUDGE

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