

U.S. BANKRUPTCY COURT  
District of South Carolina

Case Number: 08-02709

Corrected Order

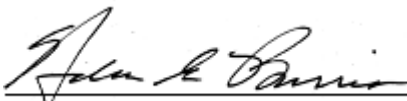
The relief set forth on the following pages, for a total of 12 pages including this page,  
is hereby ORDERED.

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**FILED BY THE COURT**  
**10/03/2008**



Entered: 10/03/2008

  
US Bankruptcy Court Judge  
District of South Carolina

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

David Hill,

Debtor(s).

C/A No. 08-02709-HB

Chapter 13

**ORDER**

This matter came before the Court on Mr. Hill's Motion to Reconsider involving an order granting relief from stay. At the continued hearing on this matter, Mr. Hill appeared *pro se* and creditor Wachovia Bank, N.A., as Indenture Trustee on behalf of the Noteholders of Aegis Asset Backed Securities Trust 2005-3, Mortgage-backed Notes, was represented by counsel. Mr. Hill asks to be relieved from default stay lift orders entered in favor of Wachovia and that the Court reconsider the stay lift request on its merits. After a careful review of the arguments, the proffered evidence and the record, the Court finds as follows:

**FINDINGS OF FACT**

1. Mr. Hill filed for Chapter 13 bankruptcy relief on May 5, 2008 at 10:14 a.m. The petition was filed electronically via CM/ECF by his attorney, James Michael Brown.

2. This matter involves Mr. Hill's residence, located at 8 Lindseybrook Trail, Mauldin, SC. Mr. Hill lives there with his wife, Gloria Hill. Before the filing of this case, the property was subject to a mortgage in favor of Aegis Mortgage Corporation executed by Gloria Hill in April of 2005 in the original amount of \$152,000. Mr. Hill is not a party to the note and mortgage, and the public record does not reflect that he had any interest in the property prior to May 11, 2007.

3. Counsel for Wachovia proffered evidence without objection that it was now the party in interest instead of Aegis. Wachovia filed a Motion for Relief from stay in this case. The Motion for Relief from Stay states that before this bankruptcy a serious delinquency in payment existed on the mortgage obligation; a foreclosure action was commenced on January 9, 2006; and an Amended Lis Pendens, Amended Summons, and Amended Complaint filed on January 26, 2006. The Lis Pendens was perfected by service dated January 26, 2006, and a Master's Order and Judgment of Foreclosure and Sale filed on March 13, 2008. A foreclosure sale was completed around noon on May 5, 2008, the day this bankruptcy case was filed. The sale was re-opened on June 4, 2008, whereby Aegis was declared the successful bidder. An assignment of bid assigning Aegis's Bid to Wachovia was filed on July 17, 2008. A Deed conveying the property to Wachovia was recorded July 17, 2008. Wachovia asked in its Motion for Relief from Stay that the stay be annulled to allow the foreclosure sale to stand. There is no evidence that Wachovia, Aegis or the Master-in-Equity were aware of Mr. Hill's current bankruptcy at the time of the foreclosure sale or execution of the deed.

4. Mr. Hill was not a party to the foreclosure proceeding. He stated that he was supposed to own an interest in the property in question, but Wachovia proffered evidence that he was not an owner per the public record at the time the foreclosure began and when the Lis Pendens was perfected. Rather, owner Gloria Hill, Mr. Hill's wife, conveyed a one-half interest in the property to Mr. Hill by deed dated and recorded on May 11, 2007. This conveyance occurred after the filing of the foreclosure and Lis Pendens.

5. The Court's records indicate that Mrs. Hill was a debtor in two prior bankruptcies. Mrs. Hill previously filed C/A No. 06-03594, on August 17, 2006. That case was dismissed on January 11, 2007, after entry of a settlement order between Mrs. Hill and Aegis providing for the cure of post-petition mortgage delinquencies. Mrs. Hill's most recent case was filed on April 5, 2007, C/A No. 07-01858. That case was dismissed on July 23, 2007, for failure to comply with an order of the Court before the plan was confirmed. The dismissal was with prejudice for one year as to any case under chapters 11, 12, or 13, and Mr. Hill admitted knowledge of his wife's prohibition from filing for bankruptcy protection at the time he filed this case and when the foreclosure sale was held. Further, Mr. Hill stated that his attorney advised him that he could file bankruptcy to stop the foreclosure instead.

6. Mrs. Hill's transfer of a one-half interest in the residence to Mr. Hill occurred during her second bankruptcy filing, without permission from this or any other court, and violated 11 U.S.C. § 363.

7. Aegis filed a mortgage arrearage claim in the amount of \$39,447.40, for amounts due through April of 2007, in Mrs. Hill's prior case. At the hearing on this Motion, when questioned by the Court, Mr. Hill did not recall any significant payments to the creditor since that time.

8. Mr. Hill's petition listed two prior bankruptcies, the most recent one filed in 2003.

9. Mr. Hill's petition was initially filed without accompanying schedules and statements. The Court issued a notice of deficiency requesting those documents within fifteen (15) days of filing and later an order granting Attorney Brown's motion to extend

time for filing those documents, allowing an additional 15 days. However, the documents were not filed by the extended deadline. As a result, the Chapter 13 Trustee requested that pursuant to South Carolina Local Bankruptcy Rules 1007-2, 9010-4, and 3015-1, and Federal Rules 1007, 1019, and 3015(b) of the Federal Rules of Bankruptcy Procedure, the case should be dismissed. The documents were filed after they were due and after the dismissal request.

10. The Court entered an order on May 29, 2008, dismissing this case for failure to timely file schedules and statements.

11. On June 10, 2008, Mr. Hill's attorney filed a Motion to Reconsider the dismissal. A hearing was scheduled and the Motion granted without objection. However, by consent order the relief was conditioned on an agreement that Mr. Hill would remain current on his plan obligations or the Trustee could submit an affidavit of default and proposed order dismissing the case without further notice and hearing, and it further provided that if the case be dismissed in the future for any reason, such dismissal shall be with prejudice for one year, and the order shall set forth *in rem* relief as to property owned jointly by Mr. Hill and his spouse.

12. The record reflects that a copy of Wachovia's Motion for Relief from Stay was served on Mr. Hill and his counsel on July 29, 2008. Wachovia's Motion for Relief referenced an opportunity for a hearing on August 21, 2008 should a party in interest file a timely objection. As no objection was filed, the Order granting the relief was entered on August 12, 2008, and the matter was removed from the Court's calendar. However, the Order was incomplete when compared to the relief requested in the Motion due to a clerical error. On August 15, 2008, Wachovia submitted an Amended Proposed Order

including relief in the form of an annulment of the stay. That order was signed on August 20, 2008.

13. On August 21, the date for hearing on any timely objections set forth in the Motion, Mr. Hill appeared before the Court and stated that his attorney was supposed to file an objection to the motion on his behalf. The S.C. Supreme Court placed Mr. Hill's attorney on interim suspension on or about the same date. As the motion was no longer before the Court, counsel for Wachovia was not present, so the Court accepted Mr. Hill's oral and written motion for reconsideration of the order granting relief and scheduled a hearing for September 4, 2008. That hearing was subsequently continued to September 11, 2008, to give Mr. Hill additional time to obtain his file and speak with a substitute attorney. Mr. Hill has since advised the Court that he has not been successful in his attempts to obtain an attorney to assist him.

14. Mr. Hill's proposed plan, not yet confirmed, provides for monthly payments to the Chapter 13 Trustee of \$600 beginning in June of 2008 (\$36,000 total payments), with the sum of \$250 or more designated as payable to Aegis to cure the pre-petition payment arrearage. Mr. Hill's schedules list the mortgage balance to that creditor at approximately \$212,000<sup>1</sup>. The collateral for that loan was valued by Mr. Hill at \$225,000, listing a tax appraisal value of \$176,842, and Mr. Hill has exempted any equity in the property. Mr. Hill's statement of financial affairs disclosed a foreclosure pending on behalf of Aegis. His plan proposes a resumption of contractual mortgage payments to Aegis in June 2008. Mr. Hill stated that the contractual mortgage payment for his house is approximately \$1,200. He has not paid and/or Aegis/Wachovia has not accepted the mortgage payments since filing. Further, he did not have sufficient funds on

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<sup>1</sup> The evidence in this case does not include the exact amount of the debt.

hand at the continued hearing to bring post-petition arrearages current. At the hearing, Mr. Hill stated that he might be able to tender all payments due for June and thereafter within a week. Moreover, Mr. Hill stated that he was current on his payments to the Chapter 13 Trustee through August, with September due, but explained that he could pay the September payment immediately.<sup>2</sup>

### **DISCUSSION AND CONCLUSIONS OF LAW**

Mr. Hill asks the Court for relief from the order annulling the stay because his attorney failed to file a response to the motion requesting a hearing on that matter. Without this response, the Court entered an order by default and no hearing was held. Mr. Hill appeared at the time scheduled for hearing on any timely objections and was unaware of his attorney's suspension or failure to file a response. The Court interprets the *pro se* Motion as a request to set aside the Order pursuant Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b). Deciding whether to grant a motion for relief under the standard set forth in Rule 60(b) lies within the discretion of the trial judge. Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 810 (4th Cir. 1988); Park Corp. v. Lexington Ins. Co., 812 F.2d 894, 896 (4th Cir. 1987); Home Port Rentals, Inc. v. Ruben, 957 F.2d 126, 132 (4<sup>th</sup> Cir. 1992). Relief under Rule 60(b)(1) for mistake, inadvertence, surprise or excusable neglect "is an extraordinary remedy and is granted only in exceptional circumstances." U.S. v. One 1979 Rolls-Royce Corniche Convertible, 770 F.2d 713, 716 (7th Cir. 1985); 3 Penny Theater Corp. v. Plitt Theatres, Inc., 812 F.2d 337, 340 (7th Cir. 1987); C.K.S. Engineers, Inc. v. White Mountain

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<sup>2</sup> A party appeared on behalf of the Chapter 13 trustee to advise the Court that Mr. Hill was not current on his payments to the Chapter 13 Trustee. However, when challenged, details of any delinquency could not be timely obtained, so the Court advised the parties that it would accept Mr. Hill's representation of his payment status for the purposes of this decision.

Gypsum Co., 726 F.2d 1202, 1205 (7th Cir. 1984). In this matter, the Court agrees that entry of the order in question by default should be reconsidered, and rather the matter decided on the merits.

Turning to the merits of Wachovia's Motion for Relief, there is no dispute that the bankruptcy filing took place shortly before the foreclosure sale. In order to validate the post-petition actions, Wachovia asks the court to annul any stay applicable to the property sold at the foreclosure sale and transferred to Wachovia.

11 U.S.C. § 362 provides that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the automatic stay provided under subsection (a)..., such as by terminating, *annulling*, modifying or conditioning the stay." Therefore, a court can retroactively annul the stay to validate actions taken that may have violated the stay. See In re Behr, 78 B.R. 447, 449 (Bankr.D.S.C. 1987), In re Albany Partners, Ltd., 749 F.2d 670, 675 (11<sup>th</sup> Cir. 1984); In re Siciliano, 13 F.3d 748, 751 (3d Cir. 1994). A non-exhaustive list of factors to consider include:

(1) if the creditor had actual or constructive knowledge of the bankruptcy filing and, therefore, of the stay; (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 changed its position on the basis of the action taken.

In re Lett, 238 B.R. 167, 195 (Bankr.W.D.Mo. 1999).

In this case, there is no evidence that Aegis or Wachovia completed the foreclosure sale and transferred the deed with knowledge of the bankruptcy stay. Further, Wachovia and Aegis have detrimentally changed their positions based on the foreclosure



sale and execution of the deed, and the documents presented to the Court indicate consideration paid for the purchase of the property at the foreclosure sale after assignment of the bid to Wachovia. Failure to grant relief in this case would require voiding of the deed, return of the consideration, and a new foreclosure sale, resulting in additional costs and delay to creditors.

The Court is unable to determine on this record whether Mr. Hill has equity in the property, or had equity prior to the foreclosure and sale, because the exact amount of the debt before the foreclosure sale is absent from the record. Using the unsubstantiated figures in Mr. Hill's schedules, at best there is a \$13,000 difference between the debt balance and Mr. Hill's opinion of the value of the residence, and likely there is no equity when considering the tax value. Further, Mr. Hill owns only one-half of any equity, and has exempted any such amounts.

Any finding of equity would assume that Mr. Hill has enforceable ownership rights in the property. A debtor's rights in real property are determined by state law, even though he is a debtor in a bankruptcy proceeding. See Butner v. United States, 440 U.S. 48, 52-55, 99 S.Ct. 914, 916-19 (1979). Wachovia asserts that the transfer of an interest in the property to Mr. Hill after the filing and perfection of the Lis Pendens was not legally sufficient to affect the foreclosure and resulting transfer of the property per state law. In South Carolina, notice of the pendency of an action, a "lis pendens", properly filed on the public record and perfected by service, binds subsequent purchasers to all proceedings stemming from the associated litigation. S.C. Code Ann. § 15-67-40; Pond Place Partners, Inc. v Poole, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct.App.2002).

[W]hoever purchases or acquires an interest in property that is involved in pending litigation stands in the same position as his vendor, is charged

with notice of the rights of his vendor's antagonist, and takes the property subject to whatever valid judgment may be rendered in the litigation.

14 S.C. Jur. Lis Pendens § 3, quoting 51 Am. Jur. 2d, Lis Pendens § (1970).

In this case Wachovia has provided evidence that a foreclosure lawsuit and Lis Pendens were filed and perfected prior to the time that Mrs. Hill transferred one-half of her interest in the residence to Mr. Hill. Therefore, the only interest that Mrs. Hill transferred to Mr. Hill by her deed was an interest subject to the pre-existing foreclosure proceeding and the rights of Aegis. These facts render questionable the value of Mr. Hill's ownership interest at the time this case was filed.

Reorganization must be more than a mere hope—relief from the stay is warranted by § 362(d)(2) “unless the debtor establishes a reasonable possibility of a successful reorganization within a reasonable time.” United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, 484 U.S. 365, 366, 108 S.Ct. 626, 628 (1988). This case has been pending for nearly five months with no distribution to creditors. Mr. Hill's current plan is not confirmable. The last balance information available for the creditor's arrearage claim exceeds the total amount to be paid into this plan. Perhaps the plan could be fixed or the claim challenged, but no steps have been taken to amend the plan, challenge or discover the amount of the claim, or prove that the plan is confirmable. The Court has allowed Mr. Hill since August 21, 2008, to acquire substitute counsel or proceed with this case on his own. There has been no progress. Mr. Hill is not able to reorganize at this time, and is not in compliance with all provisions of his proposed plan.

Based on Mr. Hill's questionable equity in the property and his inability to reorganize, it is likely that relief from stay would have been granted pursuant to § 362(d)(2) had it been requested prior to the foreclosure sale.

Relief for cause pursuant to § 362(d)(1) is and would have been appropriate due to bad faith. There have been multiple bankruptcy cases affecting this real property. The creditor's right to foreclose against the record owner free of bankruptcy court intervention was established by orders of this Court in Gloria Hill's case preventing her from filing a case for one year from dismissal thereof. Mrs. Hill transferred one-half of her interest in the property to Mr. Hill, and he filed this bankruptcy petition to halt the foreclosure and circumvent the prior order despite Mr. Hill's full knowledge of the prior events and Mrs. Hill's prohibition against filing. These facts indicate Mr. Hill's lack of good faith in filing this Chapter 13 case. This evidence of Mr. Hill's bad faith, coupled with the lack of a confirmable plan, would have motivated the Court to grant relief from the automatic stay for cause to allow a foreclosure sale if that request had been made prior to the foreclosure sale. See In re Conference of African Union First Colored Methodist Protestant Church, 184 B.R. 207, 218 (Bankr. D. Del. 1995) (providing that "[f]iling bankruptcy in bad faith is 'cause' for relief under Code § 362(d)(1)"); see also In re Fairfield Executive Associates, 161 B.R. 595, 599 (Bankr. C.D. Cal. 1993) (stating that "a creditor is entitled to stay relief where the proposed plan violates the requirements for confirmation"); see also In re Kelly, C/A No. 01-07701, 2001 WL 1806044 at \*2 (Bankr.D.S.C. 2001) (noting the frequent dismissal of cases for bad faith resulting from "multiple filings which [have] the effect of thwarting collection efforts of creditors, including foreclosures by a secured creditor").

Upon reconsideration of the prior orders granting Wachovia's motion, it appears that all factors weigh in favor of annulling the stay and reaffirming the prior relief granted.

NOW, THEREFORE, IT IS ORDERED that the Orders annulling stay entered initially on August 12, 2008, and amended on August 20, 2008, remain valid and of full force and effect, and all actions taken in State Court pursuant to Movant's foreclosure of Mr. Hill's residence located at 8 Lindseybrook Trail, Mauldin, SC, including the sale, the securing of the subject property and conveyance of the subject property to Movant are deemed valid and of full force and effect.