UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH CAROLINA

In re:

Georgia D. Green,

Debtor.

Case No. 03-08647-W
Chapter 13

ORDER DISMISSING CASE WITH PREJUDICE AND ANNULLING AUTOMATIC STAY OF PREVIOUS FILING

This matter comes before the court on the separate motions of Rommel McCants ("McCants")and the Chapter 13 Trustee (the "Trustee") seeking an order dismissing this case filed by Georgia D. Green ("Debtor").[1] McCants also seeks an order validating the foreclosure sale held during the pendency of Debtor's previously dismissed bankruptcy pursuant to 11 U.S.C. § 549(c)[1] or through an annulment of the automatic stay.

After considering the pleadings in this matter, the parties' arguments, and the evidence presented at the hearing, the Court makes the following Findings of Fact and Conclusions of Law.[2]

Findings of Fact

1. Rommel McCants was the successful purchaser of the property known as 427 Nassua Drive, Bowman, SC 29018 at a state court foreclosure sale held February 3, 2003. The Plaintiff in the foreclosure sale was Litton Loan Servicing LP ("the Plaintiff"). The foreclosure sale was

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[1] The hearing on McCants' and Trustee's motions to dismiss were held separately. The Court is hereby ruling on both motions contemporaneously.

[2] The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, these are adopted as such, and, to the extent any of the following Conclusions of Law constitute Findings of Fact, they are so adopted

conducted in accordance with state law and pursuant to a judgment of foreclosure dated January 7, 2003.

2. Debtor's first bankruptcy case (the "first case"), Case No. 03-01171, was commenced on January 31, 2003 and subsequently dismissed for failure to file schedules and statements on February 25, 2003. Debtor made no effort to seek reconsideration of the dismissal of her first case or to cure the deficiencies that led to its dismissal.

3. McCants responded to a newspaper advertisement of the foreclosure sale and became the successful bidder by outbidding the Plaintiff in the foreclosure action and one other third party bidder.

4. McCants paid the deposit required by the State Court. She paid the balance of her bid within the time allowed and received a deed to the property from the State Court.

5. Neither McCants, nor the State Court, nor the Plaintiff in the foreclosure action had any knowledge of Debtor's first case. A certification by Gail Haney, the Orangeburg County Register of Deeds, establishes that no notice of Debtor's first case was filed in the county records where real estate transfers must be recorded to be perfected.

6. McCants did not learn of Debtor's first case until after she was deeded the property and visited the property to discuss when Debtor would vacate the property.

7. Debtor's first case was dismissed before McCants could seek relief in that case. On June 16, 2003, McCants filed a motion in State Court seeking confirmation of the sale. That motion was scheduled for hearing on July 17, 2003 (the "State Court hearing").

8. Debtor filed a second bankruptcy case, Case No. 03-08647 (the "second case"), on July 15, 2003. Debtor admitted the second case was filed to prevent the State Court hearing. Debtor

did not disclose the filing of her first case in her petition. Debtor again failed to give notice to anyone of her bankruptcy filing until the conclusion of the State Court hearing.

9. The only creditor scheduled in Debtor's current bankruptcy case is the Plaintiff in the state court foreclosure action. Debtor's original Chapter 13 Plan appears unconfirmable in that it provides only to arrange "an agreement with Litton Loan Servicing, LLP on a monthly payment that I can afford to Pay".

10. Debtor's schedules as originally filed reflect an income of only $374.00 per month to support herself and her seven children. Debtor's schedules reflect expenses of $875.00 per month, including only $500.00 per month for food for the debtor and her seven dependants.

11. At the hearing on McCants' motion to dismiss on August 14, 2003, Debtor testified as to additional income not disclosed in her schedules or at her § 341 meeting, including child support payments of $220.00 and $250.00 per month. Debtor also testified that she receives $671.00 per month in food stamps to assist with the support of her family of eight.

12. Debtor also testified that she expects to resume her employment in the future, which will provide her with $964.00 per month in gross income. However, she conceded that she would lose all or part of her $374.00 in public assistance and $671.00 in food stamps when she begins work.

13. Debtor filed an amended Schedule I on August 26, 2003, following the hearing on McCants' motion to dismiss, reflecting income of $964.00 commencing September 2003, for a total of $1,704.00 inclusive of benefits and child support payments. Amended Schedule I does not reflect any loss of benefits, conceded by Debtor, due to her resumption of employment.

14. The Trustee's motion to dismiss was heard on September 2, 2003. The Trustee argued that

Debtor's case should be dismissed with prejudice because (1) Debtor did not disclose her first case as required by her petition in the second case, (2) Debtor's Plan is not feasible, (3) Debtor remains significantly in arrears on the mortgage, and (4) Debtor's amended Schedule I appears inaccurate or incomplete.

Conclusions of Law

I. Should Debtor's Current Case Should be Dismissed?

Debtor's current case should be dismissed on any of several independent grounds. Debtor has had a prior case dismissed and has failed to establish a sufficient change in circumstance since the dismissal of the prior case. In re Pryor 54 B.R. 679 (Bankr. D.S.C. 1985). Instead, it appears Debtor has used her serial filings in bad faith to retain her residence and thwart foreclosure without making payments during a period in which she was out of work due to her pregnancy. Further, Debtor failed to disclose the filing of her first case when she filed her second case.

Secondly, Debtor admitted that the present case was filed July 15, 2003 to stop the July 17, 2003 state court hearing. Debtor has scheduled only her mortgage creditor. However, her Plan does not adequately address or provide for treatment of that mortgage.

Finally, the Chapter 13 Trustee asserts that the Plan proposed by Debtor is not feasible. Debtor's amended Schedule I appears inaccurate in that it is inconsistent with Debtor's admission that she will lose some public assistance benefits once she resumes employment. It does not appear that Debtor can present a feasible Plan.

For these reasons, the Court finds this case should be dismissed with prejudice to bar any future filing for a period of 180 days from entry of this Order.

II. Should the foreclosure sale be validated?

McCants seeks to validate the foreclosure sale pursuant to 11 U.S.C. § 549(c) or, in the alternative, through annulment of the automatic stay.[3] The Court will first address McCants 11 U.S.C. § 549(c) argument. 11 U.S.C. § 549(c) provides, in relevant part:

> The trustee may not avoid under [11 U.S.C. § 549(a)] a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so far perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser.

Some courts have concluded that 11 U.S.C. § 549(c) provides an exception to 11 U.S.C. § 362(a) and protects a purchaser at a foreclosure sale held in violation of the automatic stay. See, e.g., In re Taylor, 884 F.2d 478 (9th Cir. 1989); In re Fulmer-Vaught, 218 B.R. 56 (Bankr. W.D. Mo. 1998). However, cases that have fully considered legal factors such as textual, structural, and

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3 The Court notes that McCants has standing to seek validation of the foreclosure sale before the bankruptcy court because McCants has a pecuniary interest in the outcome of this proceeding. See generally Willemain v. Kivitz (In re Willemain), 765 F.2d 1019, 1022 (4th Cir. 1985) (debtor lacks standing to challenge sale because he lacks a pecuniary interest in the litigation). McCants also has standing under generally recognized standing principles as having a "personal stake" in the outcome of this matter and will arguably suffer harm if the Court denies McCants' request to validate the sale. See In re Dellastatious, Inc., 121 B.R. 487, 490-91 (Bankr. E.D. Va. 1990) (debtor did not have standing in that he could not show any potential harm or personal stake in outcome). See generally McGuirl v. White ("Willemain's holding . . . parallels a similar rule that limits standing to appeal bankruptcy court orders to a "person aggrieved"; person aggrieved is adversely affected pecuniarily.) McCants paid a deposit and timely paid the balance of her bid from the foreclosure sale. McCants received a deed for the property. The outcome of this proceeding personally affects McCants pecuniarily. A denial of the motion to validate the sale could lead to many results affecting McCants, including re-initiation of the foreclosure proceeding. There is no guarantee that McCants would be the successful bidder, and even if she is, that the purchase price would remain the same.

policy arguments, have concluded that § 549(c) is inapplicable to a transfer in violation of the stay. See e.g., 40235 Washington Street Corp. v. Lusardi, 329 F.3d 1076 (9th Cir. 2003); Ford v. Loftin (In re Ford), No. 02-5047, 2003 WL 21853965, at *5 (Bankr. N.D. Ga. Aug. 1, 2003) (citing cases).

This Court agrees with the recent opinion and analysis of the Bankruptcy Court for the Northern District of Georgia in Ford. In Ford, the court thoroughly analyzed the text of 11 U.S.C. § 362(a) and § 549(c), discussed the jurisdiction of the Bankruptcy Court as it relates to the automatic stay and transfers of debtor's property, and addressed many policy considerations. Ford, 2003 WL at *5-9. The court concluded that "§ 362(a) renders a transfer of property in violation of its provisions invalid and without lawful effect and that § 549(c) does not provide an exception to such operation of the stay." Accordingly, 11 U.S.C. § 549(c) is not the proper avenue for McCants to validate the foreclosure sale.

McCants also seeks to validate the foreclosure sale through annulment of the automatic stay pursuant to 11 U.S.C. § 362(d). See In re Lampkin, 116 B.R. 450 (Bankr. D. Md. 1990) (proper procedure to validate foreclosure sale conducted in violation of stay is annulment). This Court has the power to validate actions taken in violation of the automatic stay. See In re Scott, 260 B.R. 375, 381 (Bankr. D.S.C. 2001). See also Ehrlich v. Ehrlich (In re Shaw), 294 B.R. 260, 271-72 (W.D. Va. 2003) ("The language of 362(d), in allowing a court to 'annul' the stay, permits a court to lift a stay retroactively."). In Scott, this Court cited compelling circumstances considered by courts as sufficient to annul the stay. Scott, 260 B.R. at 381. The Court finds that the majority of these factors cited in Scott have been met in the matter before the Court, thus

cause exists to annul the automatic stay retroactively and validate the foreclosure sale.[4]

Conclusion

Based on the Findings of Fact and arguments considered above, it is therefore,

ORDERED that Debtor's current bankruptcy is dismissed with prejudice to bar any refiling of bankruptcy under any chapter of the Bankruptcy Code for a period of 180 days from the entry of this Order. It is further

ORDERED that annulment of the automatic stay of 11 U.S.C. §362 in Case No. 03-01171 is hereby granted and thus the foreclosure sale is deemed valid and effective.

AND IT IS SO ORDERED.

John E. Waites
United States Bankruptcy Judge

Columbia, South Carolina
September 3, 2003.

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[4] The Court has jurisdiction to retroactively annul the stay in Debtor's first case without formally reopening the case based on the facts of this case. See Aheong v. Mellon Mortgage Co. (In re Aheong), 276 B.R. 233, 252 (B.A.P. 9th Cir. 2002) (motion to annul stay commenced a civil proceeding "arising under" title 11; "'arising under' jurisdiction does not depend on the present existence of a non-dismissed, non-closed bankruptcy case."). See also Johnson v. Commissioner, Nos. 92-75816, 02-80185, 2002 WL 31084142, at * 1 (Bankr. D.S.C. Jul. 31, 2002) (court had jurisdiction over adversary proceeding without reopening previous case as complaint raised two causes of action created by the Code); In re Banks-Davis, 148 B.R. 810, 812-13 (Bankr. E.D. Va. 1992) (noting that bankruptcy court retains jurisdiction of a closed case where party is claiming a right or remedy created by title 11).