UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:15-bk-08721-FMD
Chapter 13

Juan Rivera,

Debtor.
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**ORDER DENYING MOTION TO AMEND STAY RELIEF ORDER**

THIS CASE came on for hearing on December 17, 2015, and January 28, 2016, of Debtor's *Motion to Alter or Amend the Order Granting WJS Bonding LLC's Motion for Relief from Automatic Stay* (Doc. No. 50) (the "Motion for Reconsideration"). The record reflects the following undisputed facts.

On June 13, 2012, Wells Fargo Bank, N.A. ("Wells Fargo") commenced a foreclosure proceeding in Lee County Circuit Court (the "State Court") of Debtor's real property located at 6717 Garland Street, Fort Myers, Florida (the "Property"). On April 28, 2015, the State Court entered a consent final judgment finding that Wells Fargo was owed $428,089.78 and setting a foreclosure sale of the Property for August 27, 2015 (the "Final Judgment").[1]

On August 27, 2015, at 8:35 a.m., Debtor, acting *pro se*, filed a Chapter 13 bankruptcy petition together with Schedule D, listing Wells Fargo Home Mortgage as a secured creditor for the Property.[2] He did not, however, file the other required bankruptcy schedules. Debtor filed no suggestion of bankruptcy with the State Court; nor did he otherwise notify the State Court, the Lee County Clerk of Court, or the attorney for Wells Fargo that he had filed a bankruptcy case.

Approximately one hour after Debtor filed his bankruptcy petition, the Lee County Clerk of Court, having no knowledge of the bankruptcy filing, conducted a foreclosure sale of the Property as provided for in the Final Judgment. WJS Bonding, LLC ("WJS") submitted the high bid for the Property at the foreclosure sale. WJS had no notice of Debtor's bankruptcy filing. At the conclusion of the foreclosure sale, the Lee County Clerk of Court issued a certificate of sale. On September 9, 2015, a certificate of title was issued to WJS.[3] On September 14, 2015, the State Court issued a writ of possession that was posted on the Property that same day and required that everyone be out of the Property by September 16, 2015 at 7:00 a.m.[4] On September 16, 2015, Debtor, for the first time, filed a Suggestion of Bankruptcy in the State Court.[5]

Also on September 16, 2015, due to Debtor's failure to file the required bankruptcy schedules, this Court entered its *Order Dismissing Case*.[6] On September 18, Debtor filed a *Motion to Reinstate Case*, together with the bankruptcy schedules and Chapter 13 Plan.[7] Debtor's Schedule A listed the Property as being his homestead and having a value of $220,000.00 with a secured claim against it of $365,000.00.[8] In his Chapter 13 Plan, Debtor stated that he intended to seek a modification of the mortgage on the Property held by Wells Fargo.[9] On September 23, 2015, the Court entered its order reinstating the case.[10]

The Court learned for the first time of the issues involving the foreclosure of the Property on October 1, 2015, when WJS filed a motion for relief from the automatic stay (Doc. No. 28) (the "Motion for Stay Relief") that sought annulment of the automatic stay *nunc pro tunc* to the August 27, 2015 petition date in order to validate the foreclosure sale and the issuance of the certificate of title. Debtor retained bankruptcy counsel who filed an opposition to the Motion for Stay Relief on October 20, 2015 (Doc. No. 42), arguing that

[1] Doc. No. 28, pp. 5-12.
[2] Doc. No. 1, p. 7.
[3] Doc. No. 28, p. 13.
[4] Doc. No. 66-2, pp. 90 -91.
[5] Doc. No. 66-2, p. 5.
[6] Doc. No. 12.
[7] Doc. Nos. 13 through 17.
[8] Doc. No. 14, p. 3.
[9] Doc. No. 17, p. 2.
[10] Doc. No. 19.

Debtor filed the bankruptcy petition in good faith to save his homestead and that Debtor would seek a mortgage modification.

On October 29, 2015, the Court conducted a hearing on the Motion for Stay Relief. Counsel for Debtor and WJS were present. At the hearing, the question arose whether the Property was in fact Debtor's homestead and whether Debtor was actually living at the Property. Counsel for WJS directed the Court's attention to Debtor's Amended Schedules A and C,[11] that listed Debtor's ownership interest in two additional parcels of real property and that failed to describe the Property as exempt homestead property. Based on the Amended Schedules A and C, information from WJS's State Court counsel, and the fact that WJS had obtained possession of the Property without changing the locks to the property, WJS's counsel advised the Court that Debtor was not residing at the Property. Debtor's counsel could neither confirm nor deny that assertion. WJS's counsel informed the Court that WJS had taken out a loan to finance its bid of $202,200.00 for the Property at the foreclosure sale and that WJS had incurred costs and expenses of nearly $17,000.00 to obtain title to and possession of the Property.

At the conclusion of the October 29, 2015 hearing, the Court granted WJS's Motion for Stay Relief. The Court found that despite numerous opportunities for Debtor to seek relief in this Court (after issuance of the certificate of sale on August 27, 2015, the issuance of the certificate of title on September 9, 2015, and being evicted on September 16, 2015), he did nothing until he responded to WJS's Motion for Stay Relief on October 20, 2015. In balancing Debtor's total inaction against WJS's status as an innocent *bona fide* purchaser, and considering, in light of Debtor's failure to offer reimbursement to WJS of its out of pocket expenses, the prejudice that would befall WJS if the Court avoided the foreclosure sale, the Court determined that it would be inappropriate to overturn the sale and attempt to unwind the sale and the disbursements made by the Lee County Clerk of Court.[12] On November 5, 2015, the Court entered its order annulling the automatic stay as of filing date of the petition and validating the foreclosure sale to WJS (Doc. No. 47) (the "Stay Relief Order").

Debtor timely moved for reconsideration under Federal Rule of Civil Procedure 59(e) as incorporated by Federal Rule of Bankruptcy Procedure 9023. In the Motion for Reconsideration, Debtor explains (though the explanation is unsupported by an affidavit) that he thought his State Court counsel was negotiating a mortgage modification with Wells Fargo and that he had no knowledge that the foreclosure suit had even been filed against him until three days before the foreclosure sale was scheduled (and after the "consent" Final Judgment had been entered against him, allegedly without his consent). Debtor argues that this Court overlooked that Debtor's case was not filed in bad faith, that the foreclosure sale was conducted in violation of the automatic stay, and that annulment of the stay should be granted sparingly and only under compelling circumstances.

If true,[13] Debtor's assertions in the Motion for Reconsideration, and in some of the State Court filings now filed with this Court,[14] raise serious concerns about the representation Debtor received in connection with the attempted mortgage modification and the foreclosure case. But those concerns implicate potential causes of action that Debtor may have against his former counsel. They do not override the fact that WJS, a third party with no notice of Debtor's bankruptcy filing, purchased the Property in good faith at the foreclosure sale and incurred significant expense in obtaining title to and possession of the Property.

[11] Doc. No. 31, pp. 3, 5.

[12] *See In re Brown*, 290 B.R. 415 (Bankr. M.D. Fla. 2003). *Cf. In re Iskandar*, 2014 WL 7176467 (Bankr. S.D. Fla. Dec. 15, 2014).

[13] The Court makes no findings on this point. It is difficult to ascertain from the State Court docket whether Debtor was receiving direct notice of the documents that were filed in the foreclosure case or whether those documents were served only on Debtor's counsel.

[14] *See* Doc. No. 66-2, pp. 58-68.

The Eleventh Circuit Court of Appeals has long recognized that bankruptcy courts may annul the automatic stay in appropriate circumstances in order to grant retroactive relief from the automatic stay to validate a postpetition foreclosure sale.[15] The bankruptcy court's determination of whether to annul the stay is made on a case-by-case basis and falls within the wide latitude of the court.[16] Factors that the court considers include, among others, whether the foreclosing creditor had actual or constructive knowledge of the bankruptcy filing; whether the denial of retroactive relief would result in unnecessary expense to the creditor; and whether the creditor has detrimentally changed its position on the basis of the action taken.[17]

Here, those factors militate in favor of the Court's decision to annul the stay and validate the foreclosure sale. The State Court, the Lee County Clerk of Court, and WJS had no notice of Debtor's bankruptcy filing. WJS changed its position by consummating the sale and has incurred nearly $17,000.00 in expenses. The Lee County Clerk of Court has also made disbursements to Wells Fargo, which no longer has an interest in the Property. Further, Debtor admits there is no equity in the Property. Because Debtor has provided no evidence that the Property is his homestead or that he resided in the Property on the date of the foreclosure sale, the Court cannot find that its ruling resulted in undue hardship upon him.

Additionally, although the Court did not find that Debtor filed his bankruptcy case in bad faith, he did not try to notify anyone in a timely manner of his filing, and it would be very difficult to unwind the sale at this late date. Last, even if the sale could be unwound and WJS, the Lee County Clerk of Court, and Wells Fargo all put back into their pre-foreclosure sale positions, public policy would be disserved by such a ruling, as bidding at foreclosure sales would be chilled for fear of such sales being undone in the event of an undisclosed bankruptcy.

A Rule 59(e) motion permits the Court to reconsider an order when it learns of "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice."[18] This Court enjoys substantial discretion in ruling on motions for reconsideration.[19] Here, Debtor has not met his burden under Rule 59. Although the Motion for Reconsideration raised concerns about the attorneys who represented Debtor in the State Court, those concerns do not impact upon the Court's underlying decision. The other grounds raised in the Motion for Reconsideration merely reargue facts that were provided to and considered by the Court at the October 29, 2015 hearing.[20]

Accordingly, it is **ORDERED** that the Motion for Reconsideration (Doc. No. 50) is DENIED.

**DATED:** February 9, 2016.

/s/ Caryl E. Delano

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Caryl E. Delano
United States Bankruptcy Judge

**W. Justin Cottrell, Esq.**
Naples, Florida
*Counsel for Debtor, Juan Rivera*

**Robert E. Tardiff, Jr., Esq.**
Fort Myers, Florida
*Counsel for WJS Bonding LLC*

[15] *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984); *In re Williford*, 294 F. App'x 518, 521 (11th Cir. 2008).
[16] *In re Stockwell*, 262 B.R. 275, 280 (Bankr. D. Vt. 2001).
[17] *In re Barr*, 318 B.R. 592, 598 (Bankr. M.D. Fla. 2004).
[18] *Lamar Advertising of Mobile, Inc., v. City of Lakeland, Fla.*, 189 F.R.D. 480, 489 (M.D. Fla. 1999).
[19] *Sussman v. Salem, Saxon &Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994).
[20] *Walker v. U.S. Bank, N.A.*, 572 F. App'x 740, 743 (11th Cir. 2014) (not an abuse of discretion for court to deny motion for reconsideration where movant did not present evidence, arguments, or law that was unavailable at the time of judgment); *In re University Creek Plaza, Ltd.*, 176 B.R. 1011, 1022 (S.D. Fla. 1995) (no abuse of discretion where motion for reconsideration reargues issues already considered by the bankruptcy court).