UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re: Case No. 3:16-bk-1965-PMG

Christine Irene Schulte,

Debtor. Chapter 13

ORDER ON MOTION FOR DETERMINATION THAT NO STAY IS IN EFFECT OR IN THE ALTERNATIVE, AMENDED MOTION FOR RELIEF FROM AUTOMATIC STAY IN SUPPORT OF FINAL JUDGMENT

THIS CASE came before the Court to consider the Motion for Determination that No Stay is in Effect or in the Alternative, Amended Motion for Relief from Automatic Stay in Support of Final Judgment. (Doc. 35). The Motion was filed by the Bank of New York Mellon fka the Bank of New York as Trustee (the Bank).

The Debtor claims an interest in certain non-residential real property located in Jupiter, Florida (the Property). A sale of the Property was conducted in connection with a State Court foreclosure action on April 8, 2016, and a Certificate of Sale was issued on April 11, 2016. On May 25, 2016, the Debtor filed her petition under Chapter 13 of the Bankruptcy Code.

Generally, if a Certificate of Sale for a debtor's property was issued in a foreclosure action before the debtor filed a bankruptcy petition, the property is not property of the bankruptcy estate and is not protected by the automatic stay. Accordingly, the Bank asserts in its Motion that (1) the Debtor was

divested of her ownership interest in the Property before her bankruptcy case was filed, and that (2) the Property is not property of the estate or subject to the automatic stay in this case.

In response, the Debtor asserts that the State Court Certificate of Sale is void because she was never served with the foreclosure complaint in accordance with Florida law. Consequently, she contends that the State Court lacked personal jurisdiction to adjudicate her interest in the Property.

On March 31, 2017, this Court entered its initial Order regarding the Bank's Motion for Determination that No Stay is in Effect. (Doc. 114). In the initial Order, the Court recognized the well-established rule in Florida that property is sold at a foreclosure sale "at the time of the filing of the certificate of sale" in the State Court. In the initial Order, however, the Court also found that further hearings should be scheduled to determine whether the Debtor had submitted to the State Court's jurisdiction in the foreclosure action.

Since the entry of the initial Order, the Court has reconsidered the record in this case, and finds that the Debtor had submitted to the foreclosure court's jurisdiction.

First, the record shows that the Debtor filed two papers in the foreclosure action before asserting the defense of insufficient process. The papers did not challenge the State Court's authority to adjudicate the foreclosure action. Instead, the papers evidence the Debtor's participation in the proceeding, and the foreclosure Court viewed the papers as a submission to its authority. The State Court's view is entitled to deference on the issue of its own jurisdiction.

For these reasons, the Court finds that the Property was sold at the foreclosure sale before the Debtor filed her bankruptcy petition, that the Property is not property of the bankruptcy estate or protected by the automatic stay, and that the Bank's Motion for Determination that No Stay is in Effect should be granted.

I. Background

The Property at issue in this case is located at 4207 Fairway Drive N., Jupiter, Florida.

On October 14, 2015, the Bank filed an action to foreclose a mortgage on the Property in the Circuit Court for Palm Beach County, Florida (the State Court). (Doc. 84, Exhibit 29). The Debtor was named as a defendant in the foreclosure action.

On January 19, 2016, the State Court entered a Final Judgment in the foreclosure action. (Doc. 81, Exhibit A).

A foreclosure sale was conducted on April 8, 2016, and the State Court Clerk issued a Certificate of Sale on April 11, 2016. (Doc. 81, Exhibit H).

On May, 25, 2016, the Debtor filed a petition under Chapter 13 of the Bankruptcy Code.

The Bank subsequently filed the Motion that is currently before the Court. (Doc. 35). In the Motion, the Bank asserts that the pre-bankruptcy filing of the Certificate of Sale in the State Court divested the Debtor of any ownership interest in the Property, and that the Property is not property of her bankruptcy estate.

In response, the Debtor contends that the Certificate of Sale is void, because she was never served with the foreclosure complaint in strict compliance with Florida law, and the State Court therefore lacked personal jurisdiction over her in the foreclosure action.

On March 31, 2017, the Court entered its initial Order on the parties' dispute. (Doc. 114). In the initial Order, the Court first recognized the well-settled law in Florida that property is sold at a foreclosure sale at the time that a Certificate of Sale is filed in the State Court. Accordingly, where a Certificate of Sale related to a debtor's property is filed before the debtor's bankruptcy petition, the

property does not belong to the debtor on the petition date and is not property of the bankruptcy estate. (Doc. 114, pp. 4-5).

In the initial Order, the Court also recognized the law in Florida regarding the defense of insufficient process or lack of personal jurisdiction. Generally, under Rule 1.140(b) of the Florida Rules of Civil Procedure, the lack of personal jurisdiction is a waivable defense that must be raised at the first opportunity, before the defendant takes any steps that constitute submission to the court's jurisdiction. A defendant's submission to jurisdiction may be evidenced in a number of ways, such as by acquiescing in the proceeding, or by other conduct that is inconsistent with an objection to jurisdiction. (Doc. 114, pp. 5-7).

In the initial Order, the Court ultimately found that it could not determine whether the Debtor had submitted to the State Court's jurisdiction in the foreclosure action. (Doc. 114, pp.7-8). Accordingly, the Court scheduled an evidentiary hearing for July 24, 2017, at 9:45 a.m. to resolve the issue. (Doc. 118).

At the time set for trial, the parties requested permission to engage in settlement discussions, and proceeded to negotiate the dispute throughout the day. At approximately 3:50 p.m. on the date set for trial, the parties advised the Court that agreements had been reached in principle.

Unfortunately, the settlement agreements have not been concluded, and the Bank's Motion is again before the Court.

The Court has reconsidered the record created by the parties in this case. Based on the record, the Court finds that (1) the Debtor had submitted to the State Court's jurisdiction in the foreclosure action, and that (2) the Certificate of Sale issued by the State Court is not void for lack of personal jurisdiction over the Debtor.

II. The Debtor's participation in the foreclosure action

First, the Debtor filed two papers in the foreclosure action before asserting the defense of insufficient process. The papers did not challenge the State Court's authority to adjudicate the foreclosure action. Instead, the papers evidence the Debtor's participation in the proceeding.

Specifically, the foreclosure complaint was filed on October 14, 2015. No response to the complaint was filed by the Debtor.

A Final Judgment in Mortgage Foreclosure was entered by the State Court on January 19, 2016, and the Final Judgment provided that the Property would be sold on February 23, 2016.

The Debtor learned of the foreclosure action at some point before the scheduled sale, but did not file a motion to dismiss the complaint for insufficiency of process.

Instead, on February 22, 2016, the Debtor filed a Motion to Cancel Sale of February 23, 2016. (Doc. 81, Exhibit C). In this first paper, the Debtor alleged that:

> 1. She had submitted a loan modification application.
>
> 2. A loan servicer should not seek a judgment or sale while such an application is pending, pursuant to federal law.
>
> 3. Foreclosures "are equitable proceedings under Florida law and settlements between litigants are favored."
>
> 4. The Motion was "filed in good faith and not for the purpose of delay."

Based on the allegations, the Debtor asked the State Court to cancel the foreclosure sale. The sale was rescheduled for April 8, 2016, and was conducted as scheduled on that date. The Certificate of Sale was issued on April 11, 2016. (Doc. 81, Exhibit H).

On April 18, 2016, the Debtor filed a Verified Objection to Sale and Issuance of Certificate of Sale and Motion to Vacate and/or Set Aside Foreclosure Sale and Certificate of Sale. (Doc. 82, Exhibit A). In this second paper, the Debtor alleged that:

1. She contacted the Bank once she became aware of the foreclosure sale.

2. She received a reinstatement amount from a Bank representative.

3. She complied with the reinstatement agreement by paying the amount provided by the Bank.

4. She relied on the Bank's representation that it had the authority to cancel the sale.

5. She "was not afforded the opportunity to address the court regarding the details of the [reinstatement] agreement," because of her reliance on the Bank's representations.

The State Court scheduled a hearing for May 26, 2016, to consider the Objection and Motion, but the Debtor filed her bankruptcy petition on May 25, 2016, the day before the scheduled hearing. On May 25, 2016, the Debtor also filed a Motion to Quash Service of Process in the foreclosure action, and raised the issue of insufficient process for the first time. (Doc. 84, Exhibits 1 and 2).

The two papers filed before the Motion to Quash Service are inconsistent with the Debtor's preservation of her jurisdictional objection to the Court's authority. Mybusinessloan.com, LLC v. Forum Networking Events, Inc., 2016 WL 3919484, at 3-4 (M.D. Fla.).

Courts in Florida have recently confirmed that the defense of improper service is waived where the defendant fails to raise the objection before appearing in the case. See Dow v. Fidelity Investments, 2017 WL 3616402 (Fla. 4th DCA), and Rodriguez v. Wells Fargo Bank, N.A., 220 So.3d 494 (Fla. 3d DCA 2017). In both Dow and Rodriguez, the Courts relied on the prior decision of Solmo v. Friedman, 909 So.2d 560, 564 (Fla. 4th DCA 2005), for the rule that a party waives his

jurisdictional challenge if he takes steps in the proceeding that amount to a submission to the court's authority. In such circumstances, the party's active participation in the proceeding without objecting to improper service constituted a submission to the court's jurisdiction.

In this case, the Debtor filed two papers in the foreclosure action before filing the Motion to Quash Service. The papers did not assert that the Debtor had not been properly served with the foreclosure complaint. On the contrary, the papers indicate that the Debtor was attempting to work with the Bank to address the loan default, and was asking for the Court's assistance as she made acceptable financial arrangements.

In the first paper, for example, the Debtor asked the Court to cancel the sale while she pursued a loan modification, and invoked the Court's equitable power to promote settlements. In fact, the Debtor received the benefit of a rescheduled date, when the Court granted the Bank's parallel Motion to cancel the sale. (Doc.81, Exhibit D).

In the second paper, the Debtor asked the State Court to set aside the sale because of her misunderstanding with the Bank, and even suggested that she might appeal to the Court regarding the reinstatement agreement if given the opportunity. Additionally, the second paper included a "memorandum of law" which acknowledged the State Court's "wide discretion" regarding its review of foreclosure sales.

By filing the Motion to Cancel Sale and the Verified Objection to Sale in the foreclosure action, the Debtor waived her defense of insufficient process and submitted to the State Court's jurisdiction.

III. The State Court's view

The Debtor filed the Motion to Quash Service of Process in the foreclosure action on May 25, 2016, the same date that she filed her bankruptcy petition. The Bank filed a Motion to Strike the

Motion to Quash Service, and the State Court conducted a hearing on the Motions on September 20, 2016. The Debtor has filed a transcript of the State Court hearing as an exhibit in this Court. (Docs. 83 and 84, Exhibit 27).

The transcript reflects the State Court's view that the Debtor's Motion to Quash Service of Process should be stricken because the Debtor previously had submitted to its jurisdiction. During the course of the hearing, the State Court stated:

> The motion to strike very clearly points out that it appears that Ms. Schulte has already submitted herself to the jurisdiction of the court by filing a couple of pleadings previously . . . .
>
> . . .
>
> So I should disregard the fact that two separate attorneys for Ms. Schulte filed separate motions, which from the court's perspective submitted herself to the jurisdiction of the court, did not challenge the service of process at that time specifically in either pleading and find that the motion to quash service that was filed, was it in June?
>
> . . .
>
> April 18, 2016, it was filed by Mr. Kornstein and I see nothing in that that challenges the effectiveness of the service of process. She talks about representations made by the Plaintiff that she relied upon, but nothing about not being properly served.
>
> In the February 22, '16 motion to cancel sale, it says the defense submitted a loan modification which is currently pending. Pursuant to federal statute the loan servicer should not move for a judgment or a stay as long as an application is proceeding. Nothing in that challenges the service of process so as counsel for Plaintiff pointed out, under the Solmo versus Friedman case, 909 So.2nd 560, it not only says an active participation and proceedings in the trial court especially without objecting to jurisdiction, due to lack of service of process constitutes a submission to the court's jurisdiction and waiver of any objection.
>
> It very clearly appears to me that that is active participation and that there is no reference to lack of service of process.
>
> . . .

> It may relate back to the beginning of the case for all that matters because Ms. Schulte has filed pleadings that have submitted herself to the jurisdiction of the court, so I will grant the motion to strike and by order that the Plaintiff's counsel will prepare, will strike the motion to quash service of process filed on behalf of Ms. Schulte by the Golant's.

(Docs. 83 and 84, Exhibit 27, pp. 5, 7-8, 11-13)(Emphasis supplied). According to the State Court, the Debtor's Motion to Quash Service should be stricken because she had actively participated in the case. The State Court ultimately withheld its ruling on the Debtor's Motion to Quash Service, however, to allow the parties to seek a decision from the Bankruptcy Court regarding the applicability of the automatic stay. (Docs. 83 and 84, Exhibit 27, p. 36).

Generally, bankruptcy courts should interpret and apply Florida law in the same manner as Florida state courts. In re Colwell, 196 F.3d 1225, 1226 (11th Cir. 1999); In re Chesley, 526 B.R. 888, 893 (M.D. Fla. 2014); In re Minton, 402 B.R. 380, 383 (Bankr. M.D. Fla. 2008)(A bankruptcy court must interpret and apply the Florida exemption law in the same manner as a Florida State Court.). See also In re Basil Street Partners, LLC, 2013 WL 4461566, at 7 (Bankr. M.D. Fla.), and In re Grubbs Construction Company, 306 B.R. 372, 375 (Bankr. M.D. Fla. 2004)(Federal courts follow state courts on substantive state law issues.).

Further, a bankruptcy court's deference to a state court's decision gains special importance when the issue involves "control and jurisdiction over [the state court's] own proceedings." In re Ridley Owens, Inc., 391 B.R. 867, 872 (Bankr. N.D. Fla. 2008).

In this case, the record demonstrates that the State Court viewed the Debtor's prior papers as a waiver of her defense of insufficient process and as a submission to its jurisdiction. The State Court's view of the Debtor's participation in the foreclosure action is entitled to deference in any later proceedings.

IV. Conclusion

The Bank has filed a Motion for Determination that No Stay is in Effect or in the Alternative, Amended Motion for Relief from Automatic Stay. (Doc. 35).

The Debtor claims an interest in certain non-residential real property located in Jupiter, Florida. A sale of the Property was conducted in connection with a State Court foreclosure action on April 8, 2016, and a Certificate of Sale was issued on April 11, 2016. On May 25, 2016, the Debtor filed her petition under Chapter 13 of the Bankruptcy Code.

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For these reasons, the Court finds that the Property was sold at the foreclosure sale before the Debtor filed her bankruptcy petition, that the Property is not property of the bankruptcy estate or protected by the automatic stay, and that the Bank's Motion for Determination that No Stay is in Effect should be granted.

Accordingly:

IT IS ORDERED that the Bank of New York Mellon's Motion for Determination that No Stay is in Effect or in the Alternative, Amended Motion for Relief from Automatic Stay in Support of Final Judgment is granted. The real property located at 4207 Fairway Drive N., Jupiter, Florida is not property of the estate in this bankruptcy case, and is not subject to the automatic stay provided by §362 of the Bankruptcy Code.

DATED this 12 day of October, 2017.

BY THE COURT

Paul M. Glenn

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PAUL M. GLENN
United States Bankruptcy Judge