UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re

Case No.: 3:05-00688-JAF

MARY ALICE MCFARLAND,

Debtor.
_____/

MARY ALICE MCFARLAND,
Individually and as Debtor In Possession,

Plaintiff,

v.

Adversary No. 3:07-00058-JAF

CITY OF JACKSONVILLE, a Municipal Corporation,

Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This proceeding is before the Court upon the complaint filed by Plaintiff seeking damages against Defendant for violation of the automatic stay pursuant to 11 U.S.C. § 362(a).[1] After a trial held on January 3, 2008, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Mary McFarland ("Plaintiff") filed her petition for bankruptcy under Chapter 13 of the United States Bankruptcy Code on January 24, 2005 (the "Petition Date"). On the Petition Date, Plaintiff owned 10 rental properties, plus her homestead property located at 3872 Cove St. Johns, Jacksonville, Florida. (Def's. Ex. 25). As of the Petition Date, Plaintiff was in default on all her mortgage notes and was facing foreclosure proceedings on at least four of her properties. (Def's. Exs. 26, 27). Pre-petition arrearages on the mortgages totaled over $106,897.43. (Def's. Ex. 27).

The property Plaintiff owns at 3915 Stuart Street, Jacksonville, Florida (the "Stuart Street Property") is in extremely poor condition and has been vacant since approximately 1995. The property and improvements are worth approximately $50,000. (Def's. Ex. 40, pgs. 9-10). Since Mach of 2002, the City of Jacksonville's Property Safety Division has inspected the property approximately 20 times, and has issued 8 separate citations for violations of the City's Building, Health and Safety Codes. (Def's. Exs. 7, 23, 27).

The initial citation concerning the Stuart Street Property was issued on March 14, 2002, and Plaintiff was given 29 months to correct the violations. (Def's. Ex. 7). On August 11, 2004, the Stuart Street Property again failed to pass inspection, which resulted in the inspector submitting a Statement of Violation and Request for Hearing to the Municipal Code Enforcement Board (the "Code Enforcement Board"). (Def's. Exs. 7, 13). In the Statement of Violation, dated September 28, 2004, the inspector requested the imposition of an administrative fine in the amount of $250 for each day the violations continued. (Def's. Ex. 7).

Although the Duval County Tax Collector was listed as a creditor in Plaintiff's schedules, she failed to list either the City of Jacksonville Property Safety Division or the Code Enforcement Board as potential creditors. (Def's. Ex. 27). Accordingly, neither agency received notice of Plaintiff's bankruptcy at the time her petition was filed. (Def's. Ex. 40, pgs. 24-25).[2]

On March 23, 2005, following a hearing held in regards to the code violations on the Stuart Street Property, the Code Enforcement Board issued an order which gave Plaintiff 30 days to correct the violations on the Stuart Street Property.[3] (Def's. Ex. 14). On April 27, 2005, Plaintiff signed a stipulation which gave her additional time to cure the violations based upon her commitment to (i) submit plans and specifications and apply for the necessary building permits within 90 days of the stipulation, (ii) commence construction on the property within 120 days, and (iii) complete the rehabilitation of the property within 180 days. (Def's. Ex. 15).

[1] Although Count Two of the Complaint raises the issue of slander of title, it was determined earlier in the litigation of this proceeding that the issue of slander of title would be decided in state court. Specifically, the Court reminded Defendant's counsel during the trial that he had previously objected to this Court making a ruling upon the slander of title issue. (Tr. at 150).

[2] Edward Tannen, an attorney with the City of Jacksonville's General Counsel Office, testified that the Duval County Tax Collector's Office operates completely independent of the Property Safety Division and Code Enforcement Board, and that notice to the Tax Collector is insufficient to apprise other city agencies of a bankruptcy filing. (Tr. at 159-160). Mr. Tannen also testified that the Duval Tax Collector has no role in connection with the fines assessed by the Code Enforcement Board. (Tr. at 161).

[3] Though a copy of the notice of hearing was mailed to Plaintiff, she did not attend the hearing. (Def's. Exs. 8, 14).

Upon Plaintiff's failure to comply with the stipulation, the Code Enforcement Board scheduled a second hearing for December 7, 2005, which resulted in the Code Enforcement Board entering an Order Assessing Administrative Fine Until Compliance is Achieved (the "Administrative Order").[4] (Def's. Ex.17). The Administrative Order assessed a fine of $250 per day until the violations at the Stuart Street Property were corrected and was recorded in the public records of Duval County in accordance with the City's normal code enforcement procedures.

On January 5, 2006, Plaintiff filed a Notice of Appeal of the Administrative Order with the Fourth Judicial Circuit in Duval County, Florida. (Def's. Ex. 18). The Notice of Appeal was the first time the Code Enforcement Board received actual notice of Plaintiff's bankruptcy. (Def's. Ex. 40, pg. 64).

On April 11, 2005, Plaintiff's Chapter 13 case was converted to Chapter 11. On May 9, 2006, Plaintiff filed a Disclosure Statement and Plan of Reorganization. (Def.'s Exs. 27, 28). On November 16, 2006, Plaintiff filed a modified plan to obtain acceptance by Community First Credit Union, the first mortgage holder on her homestead property. Pursuant to the modified plan, Plaintiff was to refinance her home within thirty days from November 16, 2006, and the Plan of Reorganization was confirmed upon that condition. (Def's. Ex. 28).

On October 31, 2006, Plaintiff filed a motion to obtain credit to refinance the mortgage on her homestead. (Def's. Ex. 29). On November 13, 2006, the Court entered an Order Granting Debtor's Motion to Obtain Credit. (Def's. Ex. 30). On January 4, 2007, Plaintiff applied for refinancing with Yale Mortgage Corporation ("Yale Mortgage"), a hard equity line lender. (Pl's. Ex. 1). Although Plaintiff testified that she was "pre-approved" by Yale Mortgage, she was unable to produce a written commitment letter. (Tr. at 38).

As part of the loan underwriting process, Yale Mortgage retained Steven Weitz, a title agent in South Florida, to complete the requisite title search and handle the potential closing.[5] The title abstract showed the existence of the Code Enforcement Lien due to violations occurring on a "different property." (Def's. Ex. 33). In an attempt to clear the lien from the record, Mr. Weitz's office contacted Howard Conner, at the City of Jacksonville Property Safety Division, to request that the lien be subordinated to the potential Yale Mortgage encumbrance. (Pl's. Ex. 12B). In an e-mail dated January 22, 2007, Mr. Conner informed the title agent that, after consulting with the City of Jacksonville's General Counsel's office, he had no authority or discretion under the City ordinances to subordinate the lien.[6] Mr. Conner suggested however that Plaintiff could apply for amnesty, which could reduce the administrative fine by a significant amount. (Pl's. Ex. 12F).[7]

Plaintiff failed to produce credible evidence, which shows that she was ultimately unable to obtain refinancing from Yale Mortgage, based upon the effect that the recordation of the Administrative Order had upon the title to her homestead. The evidence does show, however, that Yale Mortgage was a lender of last resort for Plaintiff, who in addition to her bankruptcy filing, also has a poor payment history and a low credit score. Additionally, Plaintiff's expert, Ms. Martineaux, testified that over half of the "pre-approved" loans she has placed with Yale Mortgage have failed to close for various reasons. (Tr. at 100).

On March 9, 2007, Plaintiff filed this proceeding upon the basis that the assessment of the Administrative Order violated the automatic stay and slandered title to her homestead property.

CONCLUSIONS OF LAW

The issue before the Court is whether Defendant's actions, as a governmental unit, are excepted from the automatic stay under the police or regulatory exception contained within 11 U.S.C. § 362(b)(4). If Defendant's actions are not excepted, the Court will then make a determination as to whether Defendant committed a willful violation of the automatic stay that would entitle Plaintiff to an award for damages.

A. Enforcement of a Government Unit's Police and Regulatory Power

The police or regulatory exception contained within 11 U.S.C. § 362(b)(4) provides in pertinent part:

[4] Plaintiff asserts that she did not attend the hearing as she was told, in error, that the hearing was scheduled for December 8, 2005.

[5] According to Mr. Weitz, the file was "still very early" in the approval process and there were other issues that still needed to be resolved prior to closing . (Def's. Ex. 33, pgs. 28, 29).

[6] During a deposition, Mr. Conner testified that it was his understanding from the General Counsel's Office that the Administrative Order placed a lien upon all of Plaintiff's real property. (Pl.'s Ex. 36 at pgs. 13-14).

[7] On January 30, 2007, Plaintiff submitted an application to the Amnesty Program. (Def's. Ex. 20). Plaintiff's application for reduction of the administrative fine was granted, and the fine was reduced from over $107,000 to $3,336.30, upon the condition that payment of the reduced fine be made by February 28, 2007. (Def's. Ex. 21). Plaintiff, however, choose not to participate in the Amnesty Program.

(b) The filing of a petition under § 301, 302 or 303 of this title … does not operate as a stay –

(4) Under paragraph (1), (2), (3) or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit … to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

1 U.S.C. § 362(b)(4).

Based upon the police or regulatory exception contained within § 362(b)(4), Defendant asserts that a violation of the automatic stay did not occur as the actions of the Code Enforcement Board are excepted. Conversely, Plaintiff asserts that the exception is not applicable in the instant proceeding, as the actions of the Code Enforcement Board went beyond its police or regulatory powers. Specifically, Plaintiff alleges that Defendant acted to protect its own pecuniary interest by issuing the Administrative Order, which pursuant to Florida Statute § 162.09(3) created a lien upon property of the estate when it was recorded.[8]

In support of its position, Defendant points to the fact that the Code Enforcement Board adopted the conclusion reached by the Property Division Inspector that the structural hazards on Plaintiff's Stuart Street Property posed, "a threat to the health and safety of the occupants or the public." (Def's. Exs. 7, 14). Accordingly, Defendant maintains that it was not protecting its own pecuniary interest when it assessed the fine but was merely fulfilling its duty to abate a danger.

Plaintiff maintains, however, that § 362(b)(4) does not give a governmental unit the right to create, perfect or enforce a lien against property of the estate, and that as the Administrative Order was entered post-petition, Plaintiff's property had already become property of the estate. In support of her position, Plaintiff points to the deposition of Mr. Conner, a Management Improvement Officer of the City of Jacksonville. Specifically, Plaintiff references the section of Mr. Conner's deposition in which he testified that his understanding from the General Counsel's Office was that the Administrative Order placed a lien upon all of Plaintiff's real property. (Pl's. Ex. 36 at pgs. 13-14).

[8] Fla. Stat. § 162.09(3) provides that, " A certified copy of an order imposing fine, or a fine plus repair costs, may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator." Fla. Stat. § 162.09(3).

Although § 362(b)(4) allows a governmental unit to proceed to enforce its regulatory power in spite of §§ 362 (a)(1),(2),(3), or (6), Congress left the automatic stay in effect as to other subsections, in order to preclude the collection of a fine which is thereafter imposed by that governmental unit against property of the estate. In re Paul A. Nelson, P.A., 203 B.R. 756, 764 (Bankr. M.D. Fla. 1996). Thus, the exception, which is narrowly drafted, does not apply to §§ 362(a)(4) and (5), which are applicable in the instant proceeding. 11 U.S.C. § 362(a)(4) stays "[a]ny act to create, perfect or enforce a lien against property of the estate." Likewise, 11 U.S.C. § 362(a)(5) stays "[a]ny act to create, perfect or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title."

As discussed above, although § 362(b)(4) permits a governmental unit to enforce its regulatory powers in certain circumstances, the creation, perfection or enforcement of a lien that is imposed by a governmental unit against property of the estate does not fall within the exception. Therefore, although it appears that the Defendant's action of recording the post-petition Administrative Order was done for the purpose of enforcing its governmental regulatory powers, and not to generate or collect revenues, it effectively created a lien upon all Plaintiff's non-homestead real properties, which qualified as property of the estate.[9] Accordingly, the Court finds that the police or regulatory exception of § 362(b)(4) is not applicable as Defendant went outside the confines of the exception by creating a lien upon property of the estate.

B. "Willful" Violation of the Automatic Stay

As the Court has determined that Defendant's actions are not excepted from the automatic stay, the Court will next look to whether a "willful" violation of the stay occurred.

11 U.S.C. § 362(h) provides for a recovery of damages, costs, and attorneys' fees by an individual damaged by a willful violation of the stay. In pertinent part, § 362(h) provides,

> An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 362(h).

[9] The issue of whether the Administrative Order created a lien upon Plaintiff's homestead will be discussed infra.

The Eleventh Circuit has previously held that a willful violation occurs when the creditor: (1) knew that the automatic stay was invoked; and (2) intended the actions which violated the stay. Jove Engineering v. Internal Revenue Service, 92 F.3d 1539, 1555 (11th Cir. 1996). However, a "willful violation" does not require a specific intent to violate the automatic stay only to commit an intentional act with knowledge of the stay. Id. The Eleventh Circuit has also held that actions taken in violation of the automatic stay are void and without effect. In re Albany Partners, Ltd., 749 F.2d 670, 675 (11th Cir. 1984).

Defendant asserts that it could not have knowingly violated the automatic stay as neither the City of Jacksonville Property and Safety Division nor the Code Enforcement Board had any knowledge of Plaintiff's bankruptcy case when it was filed, as Plaintiff failed to list them as potential creditors in her schedules. (Def's. Ex. 25). Thus, although the Duval County Tax Collector received notice of the filing, Defendant maintains that the first either of the aforementioned agencies heard of Plaintiff's bankruptcy was when the Code Enforcement Board received the January 5, 2006 Notice of Appeal of Administrative Order. In support, Defendant called Edward Tannen, an attorney with the City of Jacksonville's General Counsel Office, to testify. Mr. Tannen testified that the Duval County Tax Collector's Office operates completely independent of the Property Safety Division and Code Enforcement Board, and that notice to the Tax Collector is insufficient to apprise other city agencies of a bankruptcy filing. (Tr. at 159-160). Mr. Tannen also testified that the Tax Collector has no role in connection with the fines assessed by the Code Enforcement Board. (Tr. at 161).

Conversely, Plaintiff argues that the notice sent to the Duval County Tax Collector's office was sufficient to apprise the Property Safety Division and Code Enforcement Board of the filing of her bankruptcy case. In response to this argument, Defendant cites to a case out of the Fifth Circuit, in which the court stated that, "given the formidable infrastructure of many of these government entities, automatic imputation of notice or actual knowledge from one branch office to another is seldom a viable concept." United States of America, Small Business Administration, v. Bridges, 894 F.2d 108, 113 (5th Cir. 1990). The court in Bridges also stated that, "a debtor should give special attention to insure timely and meaningful notice to the correct agency." Id.

The Court agrees with the reasoning set forth by the Fifth Circuit in Bridges and also finds the testimony of Mr. Tannen to be credible. Although the City of Jacksonville has a consolidated government, each of its numerous agencies has its own policies and procedures specific to its designated purpose and operation within the city. It is neither reasonable nor logical to expect that notice to one agency is adequate to confer notice upon all agencies maintained under the umbrella of the city's consolidated government. To hold otherwise, would place an undue burden upon the city's operations and would neither be an efficient nor effective use of taxpayer dollars. Accordingly, the Court finds that a "willful" violation of the automatic stay did not occur upon the entry of the Administrative Order, as the subject agencies did not have knowledge that a stay was in effect as to Plaintiff's properties at that time.

However, the Court also finds that once the Code Enforcement Board received actual notice of Plaintiff's bankruptcy case, it had an affirmative duty to undo the judgment that had been levied against her properties as a result of the recordation of the Administrative Order. In re Allied Holdings, Inc., 355 B.R. 372, 379 (Bankr. M.D. Ga. 2006); In re Braught, 307 B.R. 399 (Bankr. S.D. N.Y. 2004); Keene v. Premium Asset Recovery Corp., 301 B.R. 749, 753 (Bankr. S.D. Fla. 2003) (noting that a "failure to take action to undo an innocent violation of the automatic stay constitutes a willful violation of the stay). As the Code Enforcement Board failed to take any affirmative corrective action, despite having knowledge that its act of recording the Administrative Order created a lien upon Plaintiff's properties, the Court finds that Defendant committed a willful violation of the automatic stay. Accordingly, the Defendant's act of recording the Administrative Order is void.

Damages

As a result of Defendant's willful violation of the automatic stay, Plaintiff asserts that she is entitled to damages for (1) the loss she incurred in relation to her inability to refinance due to the cloud created upon her homestead's title by operation of Fla. Statute § 162.09(3), and (2) the reasonable attorney's fees and costs she has incurred in connection with the litigation of this proceeding.

As to Plaintiff's allegation that she is entitled to damages in relation to her inability to refinance, Defendant asserts that Plaintiff's homestead property was never impaired by the recordation of the Administrative Order, as a lien never attached to her homestead pursuant to Article X § 4 of the Florida Constitution. Demura v. County of Volusia, 618 So. 2d 754, 756 (Fla. 5th DCA 1993). Conversely, Plaintiff maintains that although a lien may be legally unenforceable by virtue of the Florida Constitution's cloak of protection, for practical purposes a lien still creates a cloud upon the homestead title. In re Thornton, 186 B.R. 155, 157 (Bankr. M.D. Fla. 1995); In re Lowe, 250 B.R. 422 (Bankr. M.D. Fla. 2000). For example, the courts in Thornton and Lowe reasoned that although a lien upon a homestead is legally unenforceable, that such

a lien still creates a cloud upon the title by the mere fact that it was recorded in the public records. In re Thorton, 186 B.R. at 157, In re Lowe, 250 B.R. at 425. The Court agrees, and finds that the recordation of the Administrative Order did create a cloud upon Plaintiff's title to her homestead.

However, the mere finding that a cloud existed upon Plaintiff's homestead title is not sufficient to warrant the imposition of damages against Defendant, in relation to her inability to refinance. An award for damages must not be based upon "mere speculation, guess or conjecture." In re Washington, 172 B.R. 415, 427 (Bankr. S.D. Ga. 1994). In the instant proceeding, the Court finds that nothing more than mere speculation or conjecture exists as to Plaintiff's claims. Although Plaintiff's homestead title was clouded as a result of the recordation of the Administrative Order, the evidence produced does not support the conclusion that Yale Mortgage refused to extend Plaintiff mortgage refinancing solely upon that basis. In fact, the only evidence upon which the Court could rely to reach such a conclusion is Plaintiff's unsubstantiated testimony, that the cloud upon her title was the sole reason she was not approved for the loan. Specifically, the Court notes that no documentation or testimony from the lender, Yale Mortgage, was offered into evidence in support of such a finding. In fact, Yale Mortgage was a lender of last resort for Plaintiff, as she was unable to qualify for traditional financing. (Tr. at 92). Additionally, Plaintiff's expert, Ms. Martineaux, testified that over half of the "pre-approved" loans she has placed with Yale Mortgage, have failed to close for various reasons. (Tr. at 100). Accordingly, the Court finds that Plaintiff is not entitled to an award for actual damages, aside from attorney's fees and costs, as she failed to produce credible evidence in support of her position that the cloud of title upon her homestead prevented her from refinancing.[10] However, the Court does find that pursuant to § 362(h), Plaintiff is entitled to recover the reasonable attorney's fees and costs she has incurred in the litigation of this proceeding, as the offending agencies failed to take affirmative action to remedy the situation upon receiving notice of her bankruptcy case.[11]

CONCLUSION

Based upon the above, the Court finds that Defendant committed a willful violation of the automatic stay and that Plaintiff is entitled to recover the reasonable attorney's fees and costs that she incurred in conjunction with this proceeding. Defendant shall also take the necessary action to void the recording of the Administrative Order. The Court will enter a separate judgment that is consistent with these Findings of Fact and Conclusions of Law.

Dated this 24 day of April, 2008 in Jacksonville, Florida.

/s/ Jerry A. Funk
Jerry A. Funk
United States Bankruptcy Judge

Copies to:
Plaintiff
Defendant

[10] As the Court has determined that Defendant is not liable to Plaintiff in regards to her inability to refinance her home, it is not necessary for the Court to set a hearing as to whether Plaintiff could have mitigated her damages by participating in the Amnesty Program.

[11] Although Defendant's counsel asserts in his post-trial brief that Plaintiff could have mitigated her damages as to attorney's fees, the Court disagrees, and finds that based upon its review of the contemporaneous time records submitted by Plaintiff's counsel that the fees and costs in the amount of $16,417.50 are reasonable. (Plt.'s Ex. 40).