

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

IN RE:

WILLIE PEARL JOHNSON and
CARL JOHNSON

Case No. 98-24882
Chapter 13

Debtors.

WILLIE PEARL JOHNSON and
CARL JOHNSON,

Plaintiffs,

v.

Adversary Proceeding
No. 99-0065

COUNTRYWIDE HOME LOANS and
UNITED STATES DEPARTMENT OF
VETERAN'S AFFAIRS,

Defendants.

**MEMORANDUM OPINION GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT**

This adversary proceeding is before the Court on motions for summary judgment filed by each party, and upon the parties' agreement that the contested motions would be submitted without oral argument. The motions and supporting memoranda assert that there are no disputed issues of material fact and that the issue is ripe for decision as a matter of law. The Court agrees and will grant summary judgment for the defendants, while denying the plaintiffs' summary judgment motion.

ISSUE

The principal issue presented by these motions and this adversary proceeding is whether the automatic stay was in effect when the defendant Countrywide Home Loans, Inc. ("Countrywide")

conducted its foreclosure sale of the plaintiffs' home and when the defendant United States Department of Veterans' Affairs ("VA") acquired Countrywide's interest in the property. The determination of that issue depends upon whether the plaintiffs' motion to reinstate their dismissed chapter 13 case had been effectively granted prior to the foreclosure sale. These issues are core under 28 U.S.C. § 157(b)(2)(A), (G), and (O), and this opinion contains findings and conclusions pursuant to FED. R. BANKR. P. 7052.

FACTS

The undisputed and relevant facts are as follows: The plaintiffs were debtors in a chapter 13 case that was dismissed, for failure to make plan payments, by court order entered on June 9, 1998. On June 25, 1998, the debtors filed their motion to reinstate their dismissed case. The debtors or their attorney had responsibility for noticing their motion to affected creditors and parties in interest. The motion was set for hearing on July 15, 1998, but it was continued, according to the clerk's docket entries, by announcements made to the courtroom deputy, to July 29 and again to August 12. On the latter date, in the absence of objection in writing or by appearance, it was announced to the courtroom deputy that the reinstatement motion could be granted. No actual hearing was held. An order granting the motion was not entered until September 4, 1998. In the meantime, Countrywide conducted its foreclosure sale on August 14, purchasing the property as the highest bidder for \$44,736.00. On September 1, 1998, the United States, through the VA, acquired the property from Countrywide for \$44,736.00 and sent a notice to the debtors to vacate the property.

On July 20, 1998, Countrywide's attorney gave notice by letter to the debtors' attorney that a foreclosure sale was set for August 14, 1998. On August 5, the debtors' attorney responded with a letter saying that the reinstatement motion was reset for August 12; however, it is disputed whether this letter was received by Countrywide's attorney. The Court has determined that this dispute of fact is not material to the outcome of the summary judgment motions, as the Court concludes that the failure to obtain an order of reinstatement or other extraordinary relief to stop the foreclosure sale is the decisional element of this proceeding.

DISCUSSION AND CONCLUSIONS

The plaintiffs argue in their motion and other pleadings that Countrywide's attorney had notice of

the pendency of their motion to reinstate the dismissed chapter 13 case and that the Court orally granted that motion prior to the foreclosure sale; thus, the argument proceeds to the conclusion that the automatic stay had been effectively reinstated so as to render the foreclosure void or voidable. The defendants, on the other hand, argue that the Court's order of reinstatement was not effective until its entry. Although the result may seem harsh, the Court must agree with the defendants.

As stated previously, this chapter 13 case was dismissed for failure of the debtors to make required plan payments, and the dismissal order was entered by the clerk on June 9, 1998. The debtors' motion is styled one to reinstate the case. The term reinstatement is commonly used by practitioners, but the effect of such a motion is to seek the remedy of vacating the dismissal order; essentially, this is relief under FED. R. BANKR. P. 9024, which provides that FED. R. CIV. P. 60 applies in most cases under the Bankruptcy Code.¹ "Although couched as a motion to reinstate, the motion can only be considered as a motion to vacate the Dismissal Order. Such a motion is proper under Bankruptcy Rule 9024." *Diviney v. Nationsbank of Texas (In re Diviney)*, 211 B.R. 951, 962 (Bankr. N. D. Okla. 1997). The parties do not raise an issue of whether the debtors' filing of their Rule 9024 motion to reinstate was appropriate; rather, the issue is whether that motion was properly and timely granted.

The debtors were not attempting a hollow reinstatement of their dismissed case; they were obviously attempting to "reinstate" the automatic stay. They did not seek extraordinary relief to accomplish that result. Knowing that a foreclosure sale was scheduled, the debtors' safest course after dismissal of a chapter 13 case would have been to file an adversary proceeding and motion seeking a temporary restraining order to prevent the foreclosure sale from going forward while their reinstatement motion was pending. *See* FED. R. BANKR. P. 7001(7). "A request to 'reinstate' the § 362(a) stay is, in fact, a request for an injunction and should meet the standards therefor." *Zahn Farms v. Key Bank of New York*

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The exceptions to Rule 60 applicability are not relevant here. It should be noted that the debtors' motion to reinstate is distinct from a Code § 350 motion to reopen a closed bankruptcy case. Reopening is a remedy reserved for cases that are closed after full administration. *See* FED. R. BANKR. P. 5009; *Armel Laminates, Inc. v. The Lomas & Nettleton Co. (In re Income Property Builders, Inc.)*, 699 F.2d 963 (9th Cir. 1982); *In re Garcia*, 115 B.R. 169 (Bankr. N.D. Ind. 1990). This case was closed prior to its complete administration; thus, reopening is not the appropriate concept.

(*In re Zahn Farms*), 206 B.R. 643, 645 (B.A.P. 2d Cir.1997). *See also Metmor Fin., Inc. v. Bailey* (*In re Bailey*), 111 B.R. 151 (W.D. Tenn. 1988) (a motion to reimpose the automatic stay is a Rule 9024 motion).

Aside from this procedural aspect, the issue presents a question of when the bankruptcy court's orders are effective. The initial premise is that bankruptcy courts, as units of the United States district courts, *see* 28 U.S.C. § 151, are courts of record, taking action "only by an order duly entered." *Schmidt v. Esquire, Inc.*, 210 F.2d 908, 914 (7th Cir. 1954), cert. denied 348 U.S. 819, 75 S.Ct. 31, 99 L.Ed. 646. *See* FED. R. BANKR. P. 5003. Circumstances may exist that would justify or mandate deviation from this general rule. For example, in *In re Nail*, 195 B.R. 922 (Bankr. N.D. Ala. 1996), the bankruptcy court held that its reinstatement of a dismissed case, while identical to granting a temporary restraining order, was nevertheless effective when orally ordered. *Nail* is distinguishable from the present case, however, because in *Nail* a hearing was actually held by the bankruptcy judge and that judge actually made an oral ruling. No hearing was held in the present case on the debtors' reinstatement motion.

This requires an understanding of the chapter 13 motion calendaring practice in this court. Under Local Bankruptcy Rule 9013-1(c)(2), a motion is routinely calendared for an initial docket call on the particular judge's chapter 13 day. If no one appears to contest the requested relief, an announcement that the motion is to be granted may be made by the moving party and/or the chapter 13 trustee. Thereafter, the Local Rule requires the moving party to "promptly submit an order for entry." L.B.R. 9013-1(c)(2). The debtors' motion was originally set, however, for 10:00 a.m. on July 15, 1998; the motion was not heard then but was reset twice. There is no indication in the Court's file or docket sheet as to a reason for the resettings, except that the form notice of continuance states that it was by agreement of parties present in court.

The Court's file, calendar and docket sheet also do not indicate that an actual hearing was held on August 12, 1998; rather, an announcement was apparently made to the courtroom deputy that the motion was unopposed. For unexplained reasons, an order granting the reinstatement was not promptly submitted. The order of reinstatement bears a clerk's receipt stamp of August 26, 1998, and the order was signed by the judge on September 2 and entered on September 4. The order was not approved for entry by anyone

other than the debtors' attorney and the chapter 13 trustee. By the time of submission of the order to the clerk, Countrywide had conducted its foreclosure, and, before entry of the order, VA had acquired Countrywide's interest.

The debtors contend that equity favors their argument that Countrywide's attorney knew of the pendency of their reinstatement motion. If the facts ended there, their argument would have merit; however, the Court must look at the totality of circumstances. The debtors, as the moving parties, had responsibility to pursue their own motion and to assure that Countrywide knew not only of the filing of the motion but also of its disposition. It is a hollow argument to say that Countrywide could have checked the court docket to see when the motion was reset or to see what happened to the motion. The movants, both under Local Bankruptcy Rule and common practice, were responsible for submitting an order for entry and for noticing the entered order to affected parties. *See* L.B.R. 9013-1(c). The fact that no actual hearing was held and, thus, no oral ruling was made by a bankruptcy judge defeats the debtors' argument that the motion was orally granted. All that occurred in court, if anything in fact occurred there, was an announcement that the reinstatement motion was unopposed and that the movants would submit an order. Under this particular judge's docket call and uncontested motion procedure, the judge would not have been present for the clerical announcement.

When viewed in the light of finality of a court's order, the importance of written orders is highlighted. Absent a written order, there can be no appealable, final order. *See* FED. R. BANKR. P. 9001(7), 9021, 5003. It is not necessary in this case, however, to decide whether an order vacating a dismissal order must be accompanied by a separate judgment to satisfy the above Rules. The parties are not disputing the appealability of the reinstatement order; they dispute its legal effect on the previously conducted foreclosure sale.

CONCLUSION

The Court concludes, under the circumstances of this case and limiting its ruling to the facts of this case, that the debtors' motion to reinstate their chapter 13 case was not effectively granted until entry of the order on September 4, 1998. As a result, there was no active chapter 13 case and no automatic stay at the time of Countrywide's foreclosure sale or the subsequent transfer to VA. There being no automatic

stay or injunctive relief in effect at those times, neither defendant's actions were wrongful. There is no relief available to the debtors to permit an avoidance of the sale to Countrywide or VA.²

A separate order and judgment will be entered granting the defendants' summary judgment motions and denying the plaintiffs' summary judgment motion.

William Houston Brown
United States Bankruptcy Judge

Date: July 16, 1999

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The plaintiffs first argued a violation of § 549 but relinquished that argument in a subsequent responsive pleading. Their mention in the complaint, although not a part of their prayer for relief, of a possible violation of § 548 is not supported by any facts in the pleadings, especially in view of the Supreme Court's decision, *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994).