



Dated: July 02, 2018
The following is SO ORDERED:


David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

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

In re

Sherita Arleen Clinton-Briscoe,

Case No. 18-24703 -K

Debtor.

Chapter 13

S.S.N: xxx-xx-6400

Sherita Arleen Clinton-Briscoe,

Plaintiff,

v.

Adv. Proc. No. 18-00134

Pacific Union Financial,

Defendant.

MEMORANDUM AND ORDER RE MOTION TO SET ASIDE FORECLOSURE SALE

INTRODUCTION

The Court has before it for consideration two motions. The Motion for Order Confirming No Stay in Effect was filed by Creditor Pacific Union Financial on June 12, 2018 in Chapter 13 case number 18-24703. [Doc. No. 21.] Debtor filed an adversary proceeding against Pacific Union Financial, case number 18-00134, on June 7, 2018. In that proceeding, Debtor filed a Motion to Set Aside Foreclosure Sale. [A.P. Doc. No. 4.] These matters require resolution of the same background facts and issues. Therefore, the Court will consider them together.

These are core proceedings under 28 U.S.C. § 157(b)(2). The following shall constitute the Court's findings of fact and conclusions of law according with Fed. R. Bankr. P. 7052(a).

FACTS

The background facts are as followed and are undisputed.

Debtor filed a Chapter 13 case on June 6, 2018. She had previously had two cases pending in the past year. Case number 16-29962 was filed on October 28, 2016 and dismissed on September 29, 2017. Case number 17-29976 was filed on November 13, 2017 and dismissed on March 2, 2018.

Debtor owns and occupies residential real property located at 4672 Crestfield Road, Millington, TN 38053. A foreclosure sale was scheduled for Thursday, June 7, 2018 at 10 a.m., less than 24 hours after the filing of the Chapter 13 petition. Counsel for the Debtor contacted counsel for the mortgage company, Pacific Union Financial, and was informed that the mortgage company would be proceeding with the foreclosure sale.

At 10 a.m., the foreclosure sale was indeed held and the property sold to a third party bidder. At 10:51 a.m., counsel for the Debtor filed an adversary proceeding, case number 18-00134, in the Bankruptcy Court seeking a temporary restraining order to stop the foreclosure.

Debtor then filed a motion in the adversary proceeding to set aside the foreclosure sale as it had already taken place. [A.P. Doc. No. 4.]

DISCUSSION

The question before the Court can be stated simply: Did Debtor have the protection of the automatic stay when her home was sold at foreclosure? To answer this question, the Court must consider the applicable bankruptcy statute, specifically 11 U.S.C. § 362(c)(4)(A)(i).

Statutory interpretation of bankruptcy legislation begins with the language of the statute: "When the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004)(quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

Nelson v. George Wong Pension Tr. (In re Nelson), 391 B.R. 437, 446 (B.A.P. 9th Cir. 2008).

Section 362(c)(4)(A)(i) states:

if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)], the stay under subsection (a) shall **not** go into effect upon the filing of the later case (emphasis added).

The Court believes the meaning of this section is plain and unambiguous. In fact, this is the overwhelming understanding of § 362(c)(4)(A)(i). *See, for example and among others, In re Jumpp*, 356 B.R. 789, 795 (B.A.P. 1st Cir. 2006) ("With respect to debtors with two or more prior cases, section 362(c)(4)(A)(i) clearly provides that 'the stay under subsection (a) shall not go into effect upon the filing of the later case.'"); *In re Benefield*, 438 B.R. 706, 709 (Bankr. D. N.M. 2010) ("In this case, the stay never came into effect due to the two previous cases dismissed within a year of the filing of this case. Section 362(c)(4)(A)(i) is unambiguous on this issue."); *In re Curry*, 362 B.R. 394, 399 (Bankr. N.D. Ill. 2007) ("Section 362(c)(4)(A)(i) thereby

provides in no uncertain terms that the automatic stay does not come into effect at all upon the filing of a debtor's third bankruptcy case within a one year period."); *In re Murray*, 350 B.R. 408, 413 (Bankr. S.D. Ohio 2006) ("It must be recognized that the plain meaning of the text 'the stay under subsection (a) shall not go into effect upon the filing of the later case' results in a determination that the automatic stay is not in effect in this case."); *Whitaker v. Baxter (In re Whitaker)*, 341 B.R. 336, 342 (Bankr. S.D. Ga. 2006) ("For [filers of two or more previous petitions], the stay does not go into effect automatically.").

Applying the statute to the facts of the current case: Debtor is an individual who filed a single case under the Bankruptcy Code. She had two cases pending within the previous year that were dismissed. Neither previous case was a case refiled after dismissal under section 707(b). Therefore, the automatic stay did not go into effect upon the filing of her current case.

Because there was no stay in effect, Debtor's creditors were free to continue their collection efforts, including this home foreclosure, until such time as the stay was imposed under § 362(c)(4)(B). When Pacific Union Financial foreclosed Debtor's property, the stay had not yet been imposed, so Pacific Union Financial did not violate the § 362(a) stay. All of this is to say that Pacific Union Financial has not violated any section of the Bankruptcy Code and there have been no allegations that the foreclosure was unlawful in any other regard, so the Court has no reason to set aside the foreclosure sale.

Accordingly, while the Court has granted the Debtor's motion to impose the stay on all other creditors without opposition, the Court sees no reason to impose the stay as Pacific Union Financial. The home has already been foreclosed, divesting Debtor of her ownership interest (other than her possessory interest). And there is no lease in effect, meaning Debtor has no legal interest in the property. However, while the Court will not grant a permanent stay as to Pacific

Union Financial, it will require that Pacific Union Financial and/or its successors-in-interest provide Debtor with 30 days from the entry of this order before evicting her from the property. This 30-day period will afford the Debtor a reasonable period of time to relocate. Debtor shall pay Pacific Union Financial the monthly contractual mortgage payment prorated for the share of the 30-day period in which she actually occupies the property.

CONCLUSION

Accordingly, IT IS ORDERED AND NOTICE IS HEREBY GIVEN that:

1. Debtor's motion to set aside the foreclosure of 4672 Crestfield Road, Millington, TN 38053 which occurred on June 7, 2018 is **DENIED**.
2. Debtor shall be provided 30 days from the entry of this order in which to relocate consistent with the foregoing.
3. The Bankruptcy Court Clerk shall cause a copy of this Memorandum, Order, and Notice of the entry thereof to be sent to the following:

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