UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
DEBORAH H. WAYNE,
Debtor.

Case No. 01-37796-L
Chapter 13

Deborah H. Wayne,
Plaintiff,

v.

Adv. Proc. No. 01-1090

First Tennessee Bank, N.A.,
Defendant.

AMENDED OPINION

BEFORE THE COURT is a motion for summary judgment filed March 13, 2002, by the defendant, First Tennessee Bank, N.A. ("First Tennessee"), and in the main bankruptcy case, a Motion by Debtor to Amend and Set Aside Order Granting Relief from the Automatic Stay as to First Tennessee Bank, N.A., filed February 27, 2002, by the debtor. The parties raise a number of issues concerning the validity of a foreclosure sale conducted upon notice given during the pendency of a prior bankruptcy case. For the reasons set forth below, the motion for summary judgment will be granted and the motion to amend and set aside the prior order will be denied. This is a core proceeding. 28 U.S.C. § 157(b)(2)(G) and (O).

I.

The following facts are not in dispute. On April 28, 2000, Walter B. Wayne, the husband of the debtor, received title to property known as 4879 Horn Lake Road, Memphis, Tennessee, by quit claim deed from Martha A. Bell. On August 9, 2000, Mr. Wayne obtained a loan from First

Tennessee secured by the property. On May 17, 2001, Mr. and Mrs. Wayne filed a Chapter 13 petition under Case No. 01-27286-K which was dismissed on May 25, 2001, because the filing was not complete. On August 22, 2001, Mr. and Mrs. Wayne filed a second Chapter 13 petition, under Case No. 01-32720-K, which was dismissed on September 10, 2001, because that filing also was not complete. The attorney for First Tennessee, David A. Kirkscey, did not receive notice of the filing of the second Chapter 13 petition until after the case was dismissed. On August 30, 2001, Mr. Kirkscey mailed instructions to a local newspaper to begin publication notice of First Tennessee's intent to foreclose. The requested notices were published September 7, 14, and 21. Sale of the property was scheduled for and took place on October 19, 2001. First Tennessee was the successful bidder, and a Substitute Trustee's Deed conveying the property to First Tennessee was recorded on October 23, 2001. First Tennessee then instituted an action for possession of the property in the General Sessions Court of Shelby County Tennessee.

Mrs. Wayne alone filed a third Chapter 13 petition on November 15, 2001, and First Tennessee filed its motion for relief from the automatic stay on November 29, 2001. On December 19, 2001, the debtor filed an adversary complaint against First Tennessee seeking to set aside the foreclosure sale. On February 7, 2002, the debtor filed an "Amendment to Schedule A, C" which states that Walter Wayne transferred his interest in the property to the debtor by quit claim deed and that the debtor claims a $5,000 homestead exemption in the property as provided under Tennessee law. On February 26, 2002, the court entered its order granting First Tennessee relief

from the automatic stay and on February 27, 2002, entered its order dismissing the adversary complaint without prejudice with leave to amend. The debtor then filed on February 27, 2002, her "Motion by Debtor to Amend and Set Aside Order Granting Relief from the Automatic Stay as to First Tennessee Bank, N.A." and an "Amended Complaint." First Tennessee responded to the amended complaint by filing on March 13, 2002, a motion for summary judgment raising the issue of the debtor's standing to bring suit to set aside the foreclosure sale. In support of the motion, First Tennessee offers the Affidavit of David A. Kirkscey, to the effect that he has conducted a thorough search of the title to the property and that at the time of foreclosure, Walter B. Wayne was the sole owner of the property, having received it by quit claim deed from Martha A. Bell on April 28, 2000. A copy of the quit claim deed is appended to the affidavit. The debtor filed an opposing affidavit on March 19, 2002, which states that the facts in the Amended Complaint are true; that she has lived at 4879 Horn Lake Road for nine years; that her possessory rights are protected by the automatic stay; and that defendant could not evict her without first foreclosing. Attached to the affidavit is a copy of a quit claim deed from Walter B. Wayne to Deborah Hodges Wayne dated January 7 (no year is specified, but two acknowledgments on the second page bear dates of February 4, 2002). The copy of the quit claim deed bears no indication of having been recorded. In addition, attached to the affidavit is a copy of a handwritten document that provides, in total, the following:

2/20/2002

Walter Wayne
4879 Horn Lake Rd
Memphis, Tn 38109

To whom it may concern

I Walter Wayne give all rights & interests to my wife Deborah Wayne to the property located at 4879 Horn Lake Rd. Memphis, Tn 38109. I also give all rights and claims that First Tennessee Bank & Deed of Trustee and claims rights to the foreclosure deed in trust. I give all rights claims to her for violation of 11 US Code 362 and any other rights I have in dense to the loan and foreclosure.

Sincerely
[signature illegible]

The debtor argues that First Tennessee violated the automatic stay when it instituted notice of the foreclosure sale while the second Chapter 13 case was pending; that as a result, at least the notice published during the pendency of that case was void or voidable, and ineffective to give notice of the scheduled sale; and thus that the foreclosure sale should be set aside; and relief from the automatic stay should not have been granted. The debtor asserts that notices of the commencement of the case were mailed to First Tennessee at two separate post office boxes on August 25, 2001. Neither of these notices appears to have been directed to an officer of the bank. One of the addresses used by the debtor appears to be a post office box used for the collection of credit card payments. It is not clear when First Tennessee actually received notice of the commencement of the case. In its original memorandum of facts and law in support of its motion

to dismiss, First Tennessee argued, and the court agreed, that the giving of notice of the sale constituted mere "preparatory acts" leading to the foreclosure sale which did not violate the automatic stay. At the time of the original hearing on the motion for relief from the automatic stay, neither of the parties knew whether the instructions to begin publication were given before the second Chapter 13 petition was filed. The parties now agree that Mr. Kirkscey's letter to the newspaper was mailed after the bankruptcy petition was filed, but Mr. Kirkscey states that he had not received notice of the bankruptcy filing at that time, and the debtor has not controverted this statement.

II.

A. Standard for Consideration of Motion for Summary Judgment

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) ("the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'". *Celotex Corp.*, 477 U.S. at 324. That burden is not discharged by "mere allegations or denials." FED. R. CIV. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

B. Debtor as Real Party in Interest to Contest Validity of Foreclosure Sale

First Tennessee has based its motion for summary judgment upon the debtor's lack of standing to contest the validity of the foreclosure sale because she was not the owner of the property at the time of its sale. Actually, the bank's motion is better characterized as an objection that the debtor is not the real party in interest. *See* FED. R. CIV. P. 17(a)[1] (as incorporated at FED. R. BANKR. P. 7017). As a general rule, standing refers to "public suits," while real party in interest refers to

[1] Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

FED. R. CIV. P. 17(a)

"private suits." See *Malamud v. Sinclair Oil Corp*., 521 F.2d 1142, 1147 (6th Cir. 1975), where the distinction between standing and real party in interest is explained:

> [S]tanding pertains to suits brought by individuals or groups challenging governmental action which has allegedly prejudiced their interests. On the other hand, the real party in interest question is raised in those rarer instances between private parties where a plaintiff's interest is not easily discernable.

Id. The question of who is the real party in interest is one of who owns a legal right. Standing, at least in federal courts, refers to the question of who may seek a determination of a federal constitutional issue. *See Apter v. Richardson*, 510 F.2d 351, 353 (7th Cir. 1975).

In this case, First Tennessee argues in essence that the debtor does not own the legal right to challenge the validity of a foreclosure sale of property owned by her husband. The debtor counters with a number of arguments all designed to show that she has a sufficient interest in the property to maintain the cause of action. The court will discuss most of these arguments below in connection with its analysis of the debtor's motion to amend and set aside the order granting relief from the automatic stay because it is by these same arguments that debtor hopes to establish a right to cure the default in Mr. Wayne's obligation to First Tennessee through her Chapter 13 plan. The court concludes that, because the foreclosure sale was final prior to any attempted transfer of Mr. Wayne's interests, the debtor has no interest in the property formerly owned by her husband which may be the subject of her Chapter 13 plan. For the same reasons articulated below, the debtor cannot maintain any cause of action against First Tennessee premised upon an interest in the

property. In addition to her arguments relating to her asserted interest in the property itself, however, the debtor also has produced a purported assignment from Mr. Wayne to herself of any cause of action arising out of the conduct of the foreclosure sale. If the assignment were valid, then the debtor would be the owner of the cause of action and therefore the real party in interest to challenge the validity of the foreclosure sale. After careful analysis, however, the court concludes that the debtor has failed to demonstrate a valid assignment.

The purported assignment of Mr. Wayne's cause of action against First Tennessee occurred on February 20, 2002, after the debtor's bankruptcy petition was filed and after the original complaint in the case was filed, but before the amended complaint was filed. It is clear that the debtor did not have standing to bring the original complaint.

A cause of action is held to be alienable if it would survive the death or disability of a party. *See Can Do, Inc. Pension and Profit Sharing Plan and Successor Plans v. Manier, Herod, Hollabaugh & Smith*, 922 S.W. 2d 865, 867 (Tenn. 1996). Suits in equity generally survive the death or disability of a party. *See* 1 AMJUR 2d, *Abatement, Survival, and Revival*, § 63 (1994). Suits to set aside foreclosure sales are generally based either upon a theory of unjust enrichment or fraudulent conveyance. The complaint in this case is based upon alleged unjust enrichment. Specifically, the debtor alleges that notice of the foreclosure sale was inadequate and discouraged bidders from appearing at the sale, and further, that the price bid by First Tennessee was inadequate. The theory of unjust enrichment is one of several theories including quasi-contract, contracts implied

in law, and quantum meruit in which, on the basis of equity, the law imposes a contractual relationship between the parties. *See Paschall's, Inc. v. Dozier*, 219 Tenn. 45, 53-4, 407 S.W. 2d 150, 154 (1966). Under whatever theory, a suit to set aside a foreclosure sale is an equitable action and thus is assignable.

An assignment based upon a written agreement is subject to ordinary rules of construction. The document "must contain clear evidence of the intent to transfer rights, must describe the subject matter of the assignment, must be clear and unequivocal, and must be noticed to the obligor." 6 AMJUR 2d, *Assignments,* § 113. "Assignments are governed by contract law, so an assignment is subject to the same requisites for validity as are other contracts, such as intent or mutuality of assent, proper parties with the capacity to make a contract, consideration, and a legal subject matter." 6 AMJUR 2d, *Assignments*, § 118.

The purported assignment in this case is rather poorly drafted. Although the first sentence is clear enough, the second makes no sense. The third sentence is key for purposes of determining whether there was an assignment of a potential cause of action against First Tennessee. It states: "I give all rights claims to her for violation of 11 US Code 362 and any other right I have in dense to the loan and foreclosure." The court assumes that someone, perhaps debtor's counsel, dictated this language and that he intended for the last sentence to read "and any other rights I have *incident* to the loan and foreclosure." The assignment is not clear and unequivocal. Further, no consideration for the assignment is recited. In order for there to be a valid assignment, there must be

consideration. Finally, the assignment has not been properly authenticated. The debtor has attempted to authenticate it through her own affidavit, but she does not claim to be the author of the document nor is she the party to be charged. Mr. Wayne has not appeared either in person or by affidavit. In the face of First Tennessee's motion for summary judgment, it was incumbent upon the debtor to come forward with proof of her right to maintain the cause of action against First Tennessee. She failed to do so. For this reason alone, the motion for summary judgment should be granted. In this case, however, there are more fundamental defects in the amended complaint.

C. Debtor's Failure to Allege State Action

In her amended complaint, the debtor bases her attack upon the validity of the foreclosure sale upon certain federal constitutional issues. The debtor's argument is as follows: The advertisements given by First Tennessee of its foreclosure sale while the prior bankruptcy case was pending violated the automatic stay. Notices given in violation of the automatic stay failed to give notice to potential bidders of the impending sale, thus the highest bid could not be obtained. After the dismissal of the prior bankruptcy case, the (unspecified) Trustee failed to notify the debtor and potential bidders of the sale in violation of the due process clause (which one is not specified) of the United States Constitution. Failure to give notice rendered the sale a private sale not authorized by the deed of trust or Tennessee Code Annotated section 35-5-101. The sale was not conducted in accordance with Tennessee Code Annotated section 35-5-101 and the due process clauses of the Fifth and Fourteenth Amendments of the Constitution and was commercially unreasonable.

Tennessee Code Annotated section 35-5-106, that provides that failure to comply with provisions of the Tennessee Code regulating foreclosure sales does not render such sales either void or voidable, violates the due process clause of the Constitution.

The court understands the amended complaint to allege that the debtor was deprived of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution because First Tennessee improperly and illegally conducted the foreclosure sale. *See Mildfelt v. Circuit Court of Jackson County,* 827 F.2d 343, 345 (8th Cir. 1987)(per curiam). This cause of action must fail for a number of reasons. Most fundamentally, there is no allegation of governmental action of any sort. The Fifth Amendment is directed toward action by the government of the United States. The Fourteenth Amendment is directed toward action by the states. A private right of action is given to any person who has been deprived of civil rights under color of state law at 42 U.S.C. § 1983, however, the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161 (1946).

The only defendant named in the amended complaint is First Tennessee, although there are certain allegations concerning the actions of an unspecified Trustee. There is no allegation concerning any action by an officer of the state of Tennessee or of the United States. While it is true that a private individual may act under color of state law, it is generally held that foreclosure of a deed of trust under a power of sale does not involve state action. *See, e.g., Mildfelt,* 827 F.2d at 346

(no significant state involvement in the conduct of a trustee's sale under Missouri law)*; Earnest v. Lowentritt,* 690 F.2d 1198; 1201 (it is not enough that lenders used state court and state procedures to satisfy debt under Louisiana law); (5th Cir. 1982); *Northrip v. Federal National Mortgage Assoc.,* 527 F.2d 23 (6th Cir. 1975) (involvement of sheriff and register of deeds in foreclosure of mortgage under Michigan law does not constitute state action); *Barrera v. Security Building & Investment Corp.,* 519 F.2d 1166, 1170 (5th Cir. 1975) (state regulation of mortgage and real property transactions not sufficient to implicate state, for Fourteenth Amendment purposes, in nonjudicial foreclosure under power of sale under Texas law).

A copy of the deed of trust given by Walter B. Wayne and Deborah D. Wayne to Thomas F. Baker IV, Trustee, for First Tennessee Bank National Association as Beneficiary, is appended to the Defendant's Response to Memorandum of Plaintiff in Opposition to Defendant's Motion for Summary Judgment. At paragraph 7(b) it empowers the Trustee to foreclose the deed of trust "in accordance with the requirements set forth in Tennessee Code Annotated § 35-5-101, as same may be amended from time to time, giving notice of the time, place and terms of sale, in some newspaper published in the County or Counties, in which the above described premises are situated . . . ." Tennessee Code Annotated section 35-5-101 provides in pertinent part: "(a) In any sale of land to foreclose a deed of trust, mortgage or other lien securing the payment of money or other thing of value or under judicial orders or process, advertisement of such sale shall be made at least three (3) different times in some newspaper published in the county where the sale is to be made. (b) The

first publication shall be made at least twenty (20) days previous to the sale." The Tennessee statutory scheme is similar to those of Missouri and Texas in that the state did not legislatively create the power of sale, nor does it authorize the power of sale, but merely sets minimum standards for the manner in which private parties may exercise a power of sale if created by contract between them. *See Barrera*, 519 F.2d at 1170-71. Nothing in the First Tennessee deed of trust, or in the statute which it incorporates, contemplates action by a state official in connection with the creation of the power of sale, the decision to exercise the power of sale, or the actual exercise of the power of sale. Furthermore, the debtor has alleged no state action in connection with the foreclosure sale. A trial court has the power to sua sponte dismiss a complaint for failure to state a claim. *See* 5A. C. Wright and A. Miller, Federal Practice and Procedure, § 1357, p.301 (West 1990), and cases cited therein. The debtor's constitutional claims should be dismissed for failure to state a claim. *See* FED. R. CIV. P. 12(b)(6).

D. Notice of Foreclosure Sale was Adequate

The decision that the debtor's constitutional claims should be dismissed does not end the court's inquiry, however, for the debtor may have stated a cause of action under state law arising out of some failure to comply with the provisions of the deed of trust itself. Taking the complaint in the light most favorable to the debtor, the debtor has alleged that the substitute trustee in effect failed to give the required notices of the foreclosure sale because the first two notices were given

in violation of the automatic stay. This cause of action must fail because the debtor has named only the purchaser of the property, not the substitute trustee who conducted the sale, as a defendant.

Assuming that this defect can be cured, the debtor is further prevented from setting aside the sale by Tennessee statutes and case law. Under Tennessee Code Annotated section 35-5-106 and 107, failure to comply with the provisions of the statute does not render a foreclosure sale void or voidable, but merely gives rise to a cause of action for damages. The prescribed legal remedy for a sale made without notice is not a declaration that the sale is void, but money damages in accordance with Tennessee Code Annotated section35-5-107. *See, e.g., Doty v. Fed. Land Bank of Louisville,* 89 S.W. 2d 337, 339 (Tenn. 1936). As noted above, the amended complaint seeks a declaration that the referenced statute is unconstitutional. It does not seek damages pursuant to that provision.

In addition to the legal remedy, borrowers aggrieved by the conduct of a foreclosure sale have traditionally brought suits in equity to set aside such sales based either upon a theory of unjust enrichment or fraudulent conveyance. The complaint in this case is based upon alleged unjust enrichment. At one point in Tennessee history, it was possible to set aside a foreclosure sale on the basis of "inadequacy of price so great as to shock the conscience of the court." *See Holt v. Citizens Central Bank*, 688 S.W. 2d 414, 414 (Tenn. 1984). As a result of *Holt*, the rule in Tennessee now is that "[i]f a foreclosure sale is legally held, conducted and consummated, there must be some evidence of irregularity, misconduct, fraud, or unfairness on the part of the trustee or the mortgagee

that caused or contributed to an inadequate price, for a court of equity to set aside the sale." *Holt*, 688 S.W. 2d at 416. The debtor alleges that the giving of notice during the pendency of a prior bankruptcy case was just such an irregularity because the giving of notice violated the automatic stay.

The court disagrees. The bankruptcy case just preceding the present one was open less than thirty days. It was filed on August 22, 2001, and was dismissed on September 10, 2001, for failure to file a plan. This was not the Waynes' first bankruptcy case. They had filed another Chapter 13 case earlier in 2001 by the same attorney, which was also dismissed within thirty days of filing for failure to file required documents.

There is nothing in the record to indicate that First Tennessee or any of its agents actually knew about the pendency of the bankruptcy case filed August 22, 2001, because the addresses given by the debtor for First Tennessee were inadequate. As set forth in the amended complaint, notice was given to First Tennessee, P.O. Box 31, Memphis, TN 38101-0031; and to First Tennessee, Bankcard Center, P.O. Box 385, Memphis, TN 38101-0385. Notices sent to either would not have been likely to reach a bank officer with knowledge of the impending foreclosure sale.

The foreclosure notices required by the deed of trust were given in fact by the substitute trustee. They served the intended purpose of apprizing potential bidders of the impending sale. The debtor alleges no facts that would tend to indicate that any potential bidder for the property was even aware of the pendency of the prior bankruptcy case. If no potential bidder knew about the prior

case, it is reasonable to assume that the fact of the filing had no effect upon a bidder's readiness to bid. If a potential bidder did know about the pending bankruptcy case, the fact that the substitute trustee continued to publish notice after the bankruptcy case was dismissed would certainly have caused an interested bidder to make further inquiry.

The court concludes as a matter of law that the notices of foreclosure were adequate under the deed of trust to apprize potential bidders of the foreclosure sale. The fact that one of the notices was given while the prior aborted bankruptcy case was pending does not render the foreclosure sale so irregular as would justify setting aside the sale. Further, for cause the court may modify or even annul the automatic stay. *See* 11 U.S.C. § 362(d)(1). The court has no trouble in concluding that if the first notice of foreclosure technically violated the automatic stay, the stay should be annulled.

For the foregoing reasons, First Tennessee's motion for summary judgment should be granted.

III.

A. Motion for New Trial

The court now turns to the debtor's motion to amend and set aside the order granting relief from the automatic stay. Although the motion does not set forth the rule or statute upon which it is based, the court believes that what the debtor intended to file was a motion for new trial pursuant to FED. R. BANKR. P. 9023, which makes FED. R. CIV. P. 59 applicable in bankruptcy cases, except as provided in Rule 3008. Rule 3008 is concerned with reconsideration of orders allowing or

disallowing claims against the estate. The motion in this case is concerned with relief from the automatic stay. Thus the exception to application of FED. R. CIV. P. 59 does not apply in this case.

Rule 9023 applies to "judgments," which are defined at Rule 9002(5) as "any order appealable to an appellate court." An order from a bankruptcy court is appealable to an appellate court when that order is final. 28 U.S.C. § 158(a)(1). For purposes of appeal, an order is final if it "'ends litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Midland Asphalt Corp. v. U.S.*, 109 S. Ct. 1494 (1989) (quotations omitted). The order entered by the court on February 28, 2002, finally disposed of all issues raised in the motion. Orders granting relief from the automatic stay are final and appealable. *See Sun Valley Foods Co. v. Detroit Marine Terminals, Inc. (In re Sun Valley Foods Co.)*, 801 F.2d 186, 190 (1986). Thus the order is final and is a judgment as defined in Rule 9002. Rule 9023(e) provides that any motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment. The debtor's motion was filed on February 27, 2002, the day before the entry of the Order Granting Relief from the Automatic Stay. The motion is timely. *See* FED. R. BANKR. P. 9006(a) concerning the computation of time.

Rule 59(a)(2) allows a new trial to be granted in a non-jury action if a new trial might be obtained under similar circumstances in a jury action. In a jury action, a new trial may be granted whenever the action is required to prevent an injustice. The grounds relied upon by the debtor are: (1) that First Tennessee informed the court at the prior hearing that it had obtained a judgment for

possession of the property prior to the filing of the debtor's bankruptcy case when in fact it had not; and (2) cause does not exist to lift the automatic stay because the debtor is funding her plan.

Counsel for debtor is mistaken in believing that the entry or non-entry of a judgment for possession prior to the filing of the debtor's bankruptcy case had a material influence on the court's decision to grant First Tennessee relief from the automatic stay. Instead the court concluded that the sale was final prior to the filing of the bankruptcy petition. The debtor had no interest in the property at the time the bankruptcy case was filed and has no interest in the property today. The quit claim deed from Walter Wayne could not convey an interest to the debtor that he himself no longer held. Realizing this, the debtor has attempted to identify other interests that should be protected. In connection with her arguments concerning standing to bring the adversary complaint, the debtor identified four categories of potential rights in the property that she claims should be protested in this bankruptcy case: (1) physical possession; (2) spousal rights; (3) right to claim a homestead exemption; and (4) right under 11 U.S.C.§ 1322(c)(1) to cure default. No explanation has been given for Mr. Wayne's failure to join in the debtor's bankruptcy petition.

B. Debtor has no Interest in Real Property that Became Property of Her Bankruptcy Estate

The filing of a bankruptcy petition creates an estate which generally consists of all the legal and equitable interests of the debtor as of the commencement of the case. *See* 11 U.S.C. § 541(a)(1). In Chapter 13 cases, the bankruptcy estate also consists of property acquired after the

commencement of the case, including the debtor's wages. *See* 11 U.S.C. § 1306(a). Property for which the debtor holds neither a legal or equitable interest is not property of the estate. The debtor argues that she holds one or more equitable interests in the real property which is the subject of this dispute.

First, the debtor argues that her physical possession of the real property gives rise to an interest in property that is entitled to protection. With respect to her claim based upon physical possession, the debtor relies upon *In re Acorn Investments,* 8 B.R. 506 (Bankr. S.D. Ca. 1981), for the proposition that the mere possessory interest of a tenant after a lease terminates is entitled to the protection of the automatic stay. While it is true that *Acorn Investments* holds that a landlord is prevented by the automatic stay from proceeding with its state court remedy for possession when a tenant files a bankruptcy petition, it also holds that where a debtor has no legal or equitable interest in property, the stay should be lifted. *Id.* at 509-10. Thus, the debtor's reliance on *Acorn Investments* is misplaced if she believes that it elevates mere possession to a legal or equitable interest in property. Recognizing that the debtor's possession of the property prevented it from proceeding to obtain possession of the property, First Tennessee sought and obtained relief from the automatic stay in this case. The relief it obtained was based upon the foreclosure sale being complete and the debtor having no interest in the property when the petition was filed. Mere possession without more does not create an interest in property that becomes property of the

bankruptcy estate upon the filing of a bankruptcy petition, nor does it create an enforceable right to possession.

Second, the debtor argues that she has certain rights in the property flowing from her relationship to her husband. The debtor claims to have "spousal rights" that entitle her to the protection of the automatic stay. The debtor has not specified the source of her spousal rights, but the court will discuss two possible theories upon which the debtor may rely. As the debtor admits, dower (the common law right of a married woman to a life estate in one-third of her husband's land) was abolished in Tennessee in 1977. *See* TENN. CODE ANN. § 31-2-102. At common law, no transfer of a husband's property during his lifetime could defeat his widow's right of dower, thus it was necessary for wives to join in conveyances of their husbands' property in order to convey fee simple title. In place of dower and curtesy (the male equivalent), the Tennessee legislature provided a statutory right for a surviving spouse of an intestate decedent to share in the estate. *See* TENN. CODE ANN. § 31-2-104(a). Unlike the common law right of dower, the statute confers no rights during the lifetime of a property owner. It only confers rights upon a spouse who survives an intestate decedent by at least 120 hours. *See* TENN. CODE ANN. § 31-3-120.

In addition, Tennessee provides that the right of a head of household to claim a homestead exemption will enure to the benefit of the surviving spouse and their minor children so long as the spouse or minor children use such property as their principal residence. *See* TENN. CODE ANN. § 26-2-301(a). As a result, if a marital relationship exists, joint consent of the spouses is required

for the alienation or waiver of a homestead exemption. *See* TENN CODE. ANN. § 26-2-301(b). In this instance, Mr. Wayne agreed in the deed of trust given to First Tennessee that in the event of a trustee's sale, the trustee would be permitted to sell his property free of his homestead exemption, which was expressly waived. The debtor joined in the deed of trust pursuant to TENN. CODE ANN. § 26-2-301(b) for the purpose of waiving the homestead exemption. By her signature on the deed of trust, the debtor indicated her consent to Mr. Wayne's waiver of his homestead exemption in the property. A spouse's right to claim a homestead exemption in the other spouse's property arises only upon the death of property owner. Not only did the debtor consent to the waiver of Mr. Wayne's homestead exemption, but the debtor has no "special right" to claim a homestead exemption in property owned by her husband during his lifetime. The debtor has no "spousal rights," entitled to protection in this bankruptcy case.

Third, the debtor argues that she may claim a homestead exemption in the property and this right should enable her to obtain the protections of Chapter 13. A debtor's right to claim exemptions is fixed when the bankruptcy petition is filed. *See In re Miller*, 246 B.R. 564, 566 (Bankr. E. D. Tenn. 2000), and cases cited therein. The homestead exemption that the debtor may claim in this case is the exemption that existed on November 15, 2001, the date her Chapter 13 petition was filed. Tennessee's homestead exemption is set out at TENN. CODE ANN. § 26-2-301, which provides:

> Basic Exemption. – (a) An individual, whether a head of family or not, shall be entitled to a homestead exemption upon real property which is owned by the individual and used by the individual or the

> individual's spouse or dependent, as a principal place of residence. The aggregate value of such homestead exemption shall not exceed five thousand dollars ($5,000); provided, individuals who jointly own and use real property as their principal place of residence shall be entitled to homestead exemptions, the aggregate value of which exemptions combined shall not exceed seven thousand five hundred dollars ($7,500), which shall be divided equally among them in the event the homestead exemptions are claimed in the same proceeding; provided, if only one (1) of the joint owners of real property used as their principal place of residence is involved in the proceeding wherein homestead exemption is claimed, then the individual's homestead exemption shall be five thousand dollars ($5,000). The homestead exemption shall not be subject to execution, attachment, or sale under legal proceedings during the life of the individual. Upon the death of an individual who is head of a family, any such exemption shall inure to the benefit of the surviving spouse and their minor children for as long as the spouse or the minor children use such property as a principal place of residence.
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> (b) If a marital relationship exists, a homestead exemption shall not be alienated or waived without the joint consent of the spouses.
>
> (c) The homestead exemption shall not operate against public taxes nor shall it operate against debts contracted for the purchase money of such homestead or improvements thereon nor shall it operate against any debt secured by the homestead when the exemption has been waived by written contract.
>
> (d) A deed, installment deed, mortgage, deed of trust, or any other deed or instrument by any other name whatsoever conveying property in which there may be a homestead exemption, duly executed, conveys the property free of homestead exemption, but the homestead exemption may not be waived in a note, other instrument evidencing debt, or any other instrument not conveying property in which homestead exemption may be claimed.

TENN. CODE ANN. 26-2-301.

In order for a person to be entitled to claim a homestead exemption in real property, two conditions must be met: (1) the property must be owned by the individual, and (2) the property must be used by her, her spouse, or a dependent as a principal place of residence. *Miller*, 246 B.R. at 566; *In re Hachler*, 35 B.R. 326, 328 (Bankr. E.D. Tenn. 1983). The debtor concedes that she was not the owner of the property on the date of, and based upon the substitute trustee's deed attached as an exhibit to the motion for relief from the automatic stay, it does not appear that Mr. Wayne had any remaining interest in the property after the date of that deed, October 23, 2001. As the court set out in a prior opinion, a foreclosure sale is complete when two requirements are fulfilled: satisfaction of the statute of frauds and giving of consideration. *See In re Comes*, No. 99-23175-L, slip op. at 2-3 (Bankr. W.D. Tenn., June 30, 1999); *see also In re Johnson*, 213 B.R. 134, 136 (Bankr. W.D. Tenn.), *modified on reh'g by* 215 B.R. 988 (Bankr. W.D. Tenn. 1997); *and see Federal Land Bank v. Glenn (In re Glenn)*, 760 F. 2d 1428, 1442 (6th Cir. 1985) ("Once the property has been sold, the right to cure the default and reinstate the terms of the mortgage under section 1322(b) ceases."). The substitute trustee's deed satisfies the statute of frauds requirement and the deed recites that consideration was given in the amount of $47,250 for the property. The foreclosure sale was complete on October 23, 2001, and from that date, First Tennessee was the sole owner of the property. Mr. Wayne retained no interest in the property that could have been transferred to the debtor prior to the filing of her petition on November 15, 2001. On that date, she was not an owner of the property, and thus could not claim a homestead exemption in the property.

Fourth, the debtor argues that she has the right under 11 U.S.C. § 1322(c)(1) to cure the default in the home mortgage. As explained above, Mr. Wayne's right to cure default terminated when the foreclosure sale was complete. The debtor can have no greater right than Mr. Wayne, and he had no right to cure the default on the day Mrs. Wayne's petition was filed. Further, Mrs. Wayne was not the owner of the property on the date her petition was filed and for that additional reason had no right to cure the default through her Chapter 13 plan.

Whether or not the debtor is making payments in her Chapter 13 plan is irrelevant to the court's conclusion that the debtor holds no legal or equitable interest in the real property that was sold to First Tennessee at foreclosure. Because that property is not property of the debtor's bankruptcy estate, the automatic stay should have been modified to permit First Tennessee to proceed to obtain possession of its property. Nothing in the debtor's motion leads the court to conclude that a mistake was made. The motion to amend and set aside order granting relief from the automatic stay will be denied.

IV. Conclusion

Based on the foregoing, the Motion for Summary Judgment filed by First Tennessee will be granted and the Motion to Amend and Set Aside Order Granting Relief from the Automatic Stay as to First Tennessee Bank filed by the debtor will be denied. The court will enter separate orders consistent with this opinion.

BY THE COURT:

_____
JENNIE D. LATTA
United States Bankruptcy Judge

Dated: _____

cc: Plaintiff
Plaintiff's Attorney
Defendant
Defendant's Attorney
Chapter 13 Trustee