

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

IN RE:

THOMAS R. WILLIAMS and
ZONDRA L. WILLIAMS,

Bankruptcy No. 95-27130-WHB
Chapter 7

Debtors

THOMAS R. WILLIAMS
and ZONDRA L. WILLIAMS,

Plaintiffs,

vs.

Adversary Proceeding
No. 95-1330

ITT RESIDENTIAL CAPITAL
SERVICES, INC.,

Defendant.

**MEMORANDUM OPINION AND ORDER ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

The defendant, ITT Residential Capital Services, Inc. ("ITT") filed a motion for summary judgment on the plaintiffs' amended complaint for damages. The debtors filed a written memorandum in response and the motion was heard on March 8, 1996. Because the Court finds no genuine issues of material fact in dispute the Court will grant ITT's motion.

This adversary proceeding was initiated by the *pro se* debtors with a complaint filed in the United States District Court for the Western District of Tennessee and that Court transferred the complaint to this Court, as the complaint alleged violations of 11 U.S.C. § 362(a). After the transfer, this Court conducted a hearing on the debtors' motion for a stay pending appeal and for a temporary restraining order to prevent the debtors' eviction from a home that had been

foreclosed by ITT. The Order denying the debtors' motion allowed the eviction to proceed on December 19, 1995, and the debtors have now vacated the subject property. No appeal from that Order is pending.

The debtors amended their complaint on January 23, 1996 to allege that ITT foreclosed upon the property at 5539 Hyacinth Cove, Memphis, Tennessee, after the debtors had filed their bankruptcy petition under chapter 7 of the Bankruptcy Code and while the automatic stay was in effect. That complaint asked for monetary damages in the amount of \$100,000 and for additional punitive damages for the alleged violation of the automatic stay. The motion for summary judgment relies upon the pleadings in the adversary proceeding and in the case, as well as the affidavit of a Vice President for ITT. The affidavit states that the foreclosure was held without knowledge that the debtors had filed for bankruptcy relief. It also states that ITT was the successful bidder at the foreclosure sale for a bid of \$72,600.45.

In their memorandum in response to the motion, as well as in statements made by Zondra Williams in open court, the debtors contend that Zondra Williams called the law offices of Shapiro and Kirsch, the attorneys for ITT, prior to the foreclosure sale to inform the attorneys that a bankruptcy petition had been filed. This disputed issue of fact would seem to prevent the granting of summary judgment; however, the dispute of fact is not material. In court on March 8, 1996, Zondra Williams stated that the only issue before the Court was her contention that the foreclosure should not have been held because of the automatic stay that went into effect upon the filing of the debtors' chapter 7 case. Throughout this proceeding the debtors have ignored the fact that this Court entered an Order on ITT's motion to annul the automatic stay and to ratify the postpetition foreclosure sale. ITT filed its motion and served notice on the debtors of their

opportunity to object to the relief sought or to request a hearing on the motion. The motion and service of it were in compliance with former Local Bankruptcy Rule 6 (present Rule 9013-1).

At hearings in open court, Zondra Williams has admitted that the debtors received notice of ITT's motion and that they did not object nor did they file a request for a hearing. They also did not appear on the day that a hearing on the motion would have been scheduled. The debtor's only explanation was that she thought their case would be dismissed due to the United States Trustee's motion to dismiss for the debtors' failure to complete or correct deficiencies in their bankruptcy petition and schedules. That latter motion was filed on September 19, 1995, and the hearing on ITT's motion was scheduled for September 21, 1995. An Order was entered on ITT's motion on September 21, 1995, and that Order is now final. The Order was served on the debtors pursuant to the applicable Local Bankruptcy Rule. The case was dismissed on the United States Trustee's uncontested motion on October 20, 1995; however, on the debtors' subsequent motion the case has been reinstated, giving the debtors an opportunity to correct any filing deficiencies and to either pay the case filing fee or file an application for *in forma pauperis* waiver of the chapter 7 filing fee.

From these undisputed facts, it is clear that the debtors allowed the granting of ITT's motion for annulment of the automatic stay and that they may not complain of violation of the stay before the Court granted ITT's motion. The debtors had a due process opportunity to object to annulment of the stay but they chose to do nothing. Moreover, based upon the affidavit of ITT's Vice President and the statements of Zondra Williams in open court, the bid price at the foreclosure sale exceeded the debtors' opinion that the property had a value of \$60,000. The debtors complain that they were not given adequate opportunity to sell their home before ITT's

foreclosure. However, had the Court conducted an evidentiary hearing on ITT's motion for annulment of the stay, assuming that the debtors had requested a hearing, the proof would have established cause for relief from the stay due to the value being less than the price bid by ITT at foreclosure. This is a chapter 7 liquidating case, and the debtors have presented no suggestion of a factual or legal basis upon which the Court could have denied ITT's right to foreclose in the face of the lack of adequate protection to ITT and other cause to grant ITT relief from the automatic stay.

Thus, accepting the debtors' best case factual assertion that notice was given to ITT's attorneys of the debtors' filing for chapter 7 relief, the debtors have not justified their failure to object to ITT's motion for annulment of the automatic stay. The debtors are correct that the automatic stay went into effect immediately upon their bankruptcy filing, and no notice to ITT was required to trigger that stay. However, § 362(d) authorizes the bankruptcy court to "grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay." ITT's motion squarely placed the debtors on notice that ITT sought annulment of the automatic stay, and the Court's Order of September 21, 1995 granted that. Moreover, the Order provides that relief from the stay was granted in order to confirm the foreclosure sale that occurred on July 14, 1995, one day after the bankruptcy filing.

In addition to the above findings of fact and conclusions of law, the Court observes that the debtors' position that they did not respond to ITT's motion because they thought their case would be dismissed is inconsistent with their present contention that the automatic stay should have been maintained. The debtors failed to respond to the United States Trustee's motion to

dismiss the case, and their inaction led to dismissal of the case. The debtors' inaction contributes to an appearance that the debtors were seeking merely to delay ITT's foreclosure.

Based upon the foregoing discussion of the facts and law presented in this case and adversary proceeding, the motion for summary judgment may be granted. There can be no cause of action for damages for violation of the automatic stay when the Court granted an annulment of the stay and when the debtors did not object to that relief.

IT IS THEREFORE ORDERED that ITT's motion for summary judgment is granted and this amended complaint for damages is dismissed.

SO ORDERED this 20th day of March, 1996.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

cc:

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