

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 97-16478
Chapter 13

KENNETH ODELL FRITZ

Debtor

MEMORANDUM OPINION

Appearances: Kenneth C. Rannick, Kenneth C. Rannick, P.C., Chattanooga,
Tennessee, Attorney for Debtor

Carl E. Anderson, Chattanooga, Tennessee, Attorney for Great
Financial Mortgage

HONORABLE R. THOMAS STINNETT,
UNITED STATES BANKRUPTCY JUDGE

This chapter 13 case is before the court on a motion for relief from the automatic stay filed by Great Financial Mortgage (“GFM”) and an objection to confirmation of the chapter 13 plan by the same creditor.

Kenneth O. Fritz (“Debtor”) proposed a Chapter 13 plan that included regular monthly maintenance payments and the cure of an arrearage on a note held by GFM and secured by a home mortgage.

GFM objects on the ground that Debtor no longer had any interest in the house at the time he filed his Chapter 13 case. GFM bases this argument on two events. First is the Debtor’s divorce in 1996. According to GFM, the divorce decree made the Debtor’s ex-wife the sole owner of the property. Second is the foreclosure by GFM shortly before Debtor filed his Chapter 13 case. According to GFM, the foreclosure was completed to the point that cure is no longer allowed in a Chapter 13 case.

Debtor disputes both points. He contends the divorce decree did not divest him of all of his interest in the house. He also contends the foreclosure sale is void or should be set aside for any one of three reasons: (1) it was done in violation of the automatic stay; (2) it was done in violation of the codebtor stay that resulted from the filing of a Chapter 13 case by the Debtor’s ex-wife shortly before the foreclosure sale; (3) it was not done properly because the substitute trustee did not record his appointment until advertisement of the foreclosure sale had already commenced.

The court finds the facts as follows:

When Debtor and his wife bought the house in question, the seller's mortgage was held by GFM. Debtor and his wife agreed with the seller to assume the mortgage to GFM or its predecessor in interest, but they did not obtain an agreement with GFM or its predecessor in interest allowing them to assume the mortgage. GFM and/or its predecessor in interest accepted payments on the note and mortgage from Debtor and his former wife without protest.

Debtor and his wife later executed a second mortgage on the house pursuant to a home equity line of credit. Equicredit holds the second mortgage. Debtor's plan proposed to pay Equicredit in full, including any arrearage.

In May 1996, Debtor and his wife were divorced. The divorce decree incorporated a marital dissolution agreement. As to the house in question, it provided:

4. Real Property. Wife shall receive title, ownership and possession of real property located at 315 Crestway Drive. Wife shall be responsible for the payment of the first mortgage on the property. Husband shall pay the second mortgage on the property. Husband shall execute a quitclaim deed to wife, subject to a reversionary interest for a right of redemption, divesting all title, ownership and interest Husband has in the real property located at 315 Crestway Drive and vesting said title, ownership and interest in Wife. Wife agrees to make timely payment of the outstanding balance on the first mortgage and agrees to indemnify and save Husband harmless from any liability thereon. Husband agrees to make timely payment of outstanding balance of the second mortgage and agrees to indemnify and save Wife harmless from any liability thereon. Wife shall

attempt to refinance the subject real property into her own name within two (2) years after the second mortgage is paid in full.

Debtor's ex-wife apparently was unable to make the mortgage payments to GFM. In June 1996, she filed the first of four Chapter 13 cases. Under the Bankruptcy Code, the Chapter 13 filing by Debtor's ex-wife imposed an automatic stay; it stopped a foreclosure proceeding by GFM. 11 U.S.C. § 362(a). After dismissal of her first Chapter 13 case, Debtor's ex-wife filed a second case before GFM could complete foreclosure. After her second Chapter 13 case was dismissed, Debtor's ex-wife filed her third Chapter 13 case. It again stopped a foreclosure by GFM. In the third case, the court entered an order lifting the automatic stay to allow GFM to proceed with the foreclosure.

GFM advertised the foreclosure for September 19, 1997. The advertisements were run by the substitute or successor trustee who had been appointed earlier. The substitution, however, was not registered until August 28, 1997, after the first two advertisements had run. The third advertisement was run on September 3, 1997.

On September 10, Debtor's ex-wife filed her fourth Chapter 13 case. It automatically stayed the foreclosure scheduled for September 19. GFM proceeded with the foreclosure sale despite the automatic stay. GFM bid in the amount of its debt, and that was the highest bid.

On September 22, the attorney for Debtor's ex-wife wrote a letter to GFM's attorney advising him that Debtor's ex-wife did not file her fourth Chapter 13 case to stop

the scheduled foreclosure. Subsequently, the attorneys for GFM and Debtor's ex-wife, and the Chapter 13 trustee, signed an agreed order stating:

In this cause, for good cause shown, and no adverse interest appearing, it is hereby Ordered that the automatic stay in this cause be lifted so as to allow the creditor, Great Financial Mortgage to proceed with and finalize a foreclosure sale heretofore scheduled on September 19, 1997, against the real property of the debtor located at 315 Crestway Drive, Chattanooga, Tennessee.

This order was lodged with the court on October 31, 1997. It was signed by Judge Cook and entered on November 4, 1997.

No motion was filed and no order was entered regarding the codebtor stay imposed by 11 U.S.C. § 1301 when Debtor's ex-wife filed the fourth Chapter 13 case.

There is no indication that Debtor knew of or participated in any of the four cases filed by his ex-wife. Debtor testified that he was surprised to learn his ex-wife had not kept the mortgage payments current.

Debtor filed his Chapter 13 case on November 5, 1997. On November 7, 1997, Debtor and his ex-wife filed in the state court an agreed order that modified the original decree and marital dissolution agreement as to the house in question. It made Debtor the owner and divested his ex-wife of any interest in the property. Debtor, who is an attorney, signed the agreed order, as did his ex-wife. No attorney signed on her behalf.

DISCUSSION

The court disagrees with the argument of GFM that the divorce decree and marital dissolution agreement deprived Debtor of any interest in the property. A divorce decree can transfer ownership by divesting title out of the husband and vesting it in the wife. *Tenn. Code Ann.* § 36-4-121(a)(2). A marital dissolution agreement that divests title out of the husband and vests it in the wife will have the same effect when it is adopted by the divorce decree. This marital dissolution agreement, however, did not divest title out of Debtor and vest it in his ex-wife. It provided that Debtor's ex-wife "shall receive title, ownership and possession of the property." It also provided that Debtor would execute a quitclaim deed to his ex-wife vesting title and ownership in her. Further, Debtor retained "a reversionary interest for a right of redemption." Thus, the marital dissolution agreement did not immediately change title and ownership of the property. It left the transfer of ownership for the future, when the Debtor executed the quitclaim deed. *Compare DeWitt v. American Family Mut. Ins. Co.*, 667 S.W.2d 700 (Mo. 1984) (Decree directing conveyance can be enforced by contempt or amended to make the transfer itself), *and Richardson v. Park Avenue Bank*, 325 S.E.2d 455 (Ga. Ct. App. 1984) (Decree that divested title from husband and vested it in wife made her the owner, even though he never executed a deed as ordered by the decree.); *see Huggins v. Emory*, 484 S.W.2d 351 (Tenn. 1972) (Court compelled ex-wife to execute deed to carry out divorce decree that merely released her interest in the property); *Cline v. Cline*, 186 Tenn. 509, 212 S.W.2d 361 (1948) (Instead of ordering husband to convey property, decree should have divested title from him and

vested it in daughter). Debtor retained an interest in the property subject to the duty to convey imposed by the divorce decree and marital dissolution agreement.

As to the foreclosure, the court is of the opinion that it should be set aside. When Debtor's ex-wife filed her fourth Chapter 13 case, the automatic stay enjoined the foreclosure scheduled by GFM for September 19, 1997. 11 U.S.C. § 362(a). GFM did not request or obtain relief from the automatic stay but went ahead with the foreclosure on September 19. At the end of October 1997, the attorneys for GFM and Debtor's ex-wife submitted an agreed order. They may have intended this order to annul the automatic stay, which means to lift it retroactively, so that the foreclosure that was done in violation of the stay would nevertheless be valid. The order, however, does not say that. It lifts the stay to allow GFM to "proceed with and finalize a foreclosure sale heretofore scheduled on September 19, 1997." The order does not say that it is lifting the stay to allow GFM to complete a foreclosure sale "held" on September 19, 1997 in violation of the automatic stay, instead of merely "scheduled" on September 19, 1997.

The Agreed Order recites that there is "no adverse interest appearing." Of course, no notice was given that the Agreed Order would be submitted for consideration. Attorneys for GFM and Debtor's ex-wife failed to disclose to the court that Mr. Fritz and more importantly, Equicredit, the second mortgage holder, would be adversely affected by a retroactive order.

The automatic stay does more than protect the debtor in bankruptcy. It protects the debtor's creditors as a group by preventing each of them from collecting ahead

of the others. Therefore, the court has an obligation to guard against violations of the stay even when the debtor is slow to assert it or fails to do so. *In re Clark*, 69 B.R. 885, 889 (Bankr. E. D. Pa. 1987). In this regard, retroactive relief from the stay is particularly troubling. Creditors may be encouraged to violate the stay if the courts readily grant retroactive relief. The courts should grant retroactive relief only in the most limited circumstances. *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 917-918 (6th Cir. 1993); *Mellor v. Pistole (In re Mellor)*, 31 B.R. 151, 154 (B. A. P. 9th Cir. 1983) *rev'd on other grounds* 734 F.2d 1396 (9th Cir. 1984).

Agreed orders are generally interpreted as contracts. The court attempts to find the intention of the parties. *City of Covington v. Covington Landing Ltd. Partnership*, 71 F.3d 1221, 1227 (6th Cir. 1995). The intention of the judge is not controlling, as it would be if the judge had decided the dispute. *UNR Industries, Inc. v. Bloomington Factory Workers (In re UNR Industries, Inc.)*, 173 B.R. 149, 156-157 (N. D. Ill. 1994).

Nevertheless, the court can not ignore its own duty to give effect to the automatic stay, and especially the limits on retroactive relief. The court thinks that an agreed order granting retroactive relief from the stay must clearly state that it is granting retroactive relief. *Schulz v. Holmes Transportation, Inc.*, 149 B.R. 251, 258 (D. Mass. 1993). The order in question does not clearly grant retroactive relief from the automatic stay. Indeed, the court observes that it unambiguously grants prospective relief from the stay.

Even if the order is slightly ambiguous, the court should not interpret it as granting retroactive relief from the automatic stay. The court should adopt the more reasonable interpretation of an agreed order. *Hendrie v. Lowmaster*, 152 F.2d 83, 85 (6th Cir. 1946). Since granting retroactive relief from the stay is rare, the court finds it more reasonable to interpret this order as granting only prospective relief from the stay.

GFM has not proved grounds for retroactive relief from the stay. The result is that the foreclosure sale by GFM is void as being in violation of the automatic stay. The sale being void, the deed is also void and must be set aside and cancelled.

GFM's motion for relief from the stay is based on the same arguments as its objection to confirmation of the plan. In light of the court's decision on that issue, the court will also deny the motion for relief from the stay and overrule its objection to confirmation.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

BY THE COURT

entered April 20, 1998

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 97-16478
Chapter 13

KENNETH ODELL FRITZ

Debtor

ORDER

For the reasons stated in a Memorandum Opinion entered this date,

It is ORDERED that the motion by Great Financial Mortgage for relief from the automatic stay is DENIED;

It is further ORDERED that the objection to confirmation filed by Great Financial Mortgage is OVERRULED; and

It is further ORDERED that the case shall continue under the plan as confirmed by order entered January 29, 1998, subject to the objection by the Internal Revenue Service, which objection shall be heard on June 18, 1998, at 1:30 p.m.

ENTER:

BY THE COURT

entered April 20, 1998

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE