



Below is a Memorandum Decision of the Court.

Mary Jo Heston

**Mary Jo Heston
U.S. Bankruptcy Judge**

(Dated as of Entered on Docket date above)

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

In re:

RICHARD LOUIS NELSON,

Debtor.

Case No. 16-44597

**MEMORANDUM DECISION ON
MOTION FOR RELIEF FROM STAY**

This matter came before the Court on February 16, 2017, on a motion for relief from stay filed by Pomaikai LLC (Movant). Movant seeks an order terminating the automatic stay to pursue an unlawful detainer action against Richard Louis Nelson (Debtor) and to take all acts necessary to enforce its interest in real property commonly described as 18718 95th St. E., Bonney Lake, Washington 98391 (Property). The Debtor objects to the motion. After the hearing, the Court took the matter under advisement. Based on the pleadings and arguments presented, the Court's findings of fact and conclusions of law are as follows:

On November 4, 2016, Movant purchased the Property at a non-judicial foreclosure sale in Pierce County, Washington, for a purchase price of \$205,000. After the completion of the foreclosure sale occurred, and after Movant tendered payment which was accepted by the foreclosure trustee (Trustee), the Debtor filed a voluntary Chapter 13 bankruptcy petition.

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1 The Debtor's petition was filed and docketed at 18:26:57 on November 4, 2016. The Debtor
2 filed a Chapter 13 Plan (Plan) on January 5, 2017.¹ The Trustee's Deed Upon Sale (Trustee's
3 Deed) is dated and was acknowledged on November 10, 2016. The parties did not provide
4 clear evidence of the date of delivery of the Trustee's Deed.

5 The Debtor's Chapter 13 bankruptcy case was dismissed on November 15, 2016 at
6 12:52:34, and the Debtor filed a motion to vacate the dismissal that same day. The Trustee's
7 Deed was recorded in Pierce County, Washington on November 16, 2016. An order granting
8 the Debtor's motion to vacate the dismissal was entered on November 17, 2016 at 08:04:54.

DISCUSSION

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10 Movant requests relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and
11 (2) in order to proceed with unlawful detainer litigation against the Debtor. Movant also
12 argues that if the delivery of the Trustee's Deed took place while the stay was in effect, such
13 delivery was a ministerial act which did not violate the automatic stay. In opposition, the
14 Debtor asserts that the post-sale actions of the foreclosure trustee taken while the Debtor's
15 bankruptcy case was pending (i.e. the acknowledgement and possibly the delivery of the
16 Trustee's Deed) violated the automatic stay, and are therefore void, which gives the Debtor
17 ownership rights in the Property without restriction due to the prior non-judicial foreclosure
18 sale. Debtor further asserts that the Movant, as a purchaser at the unchallenged non-judicial
19 foreclosure sale, has no standing to seek relief from stay and that vacation of the dismissal
20 order had the effect of re-imposing the automatic stay retroactively. The Debtor has not raised
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24 ¹ The Debtor's Plan reflects arrears on the Property of \$40,843, as well as a secured claim of the IRS in the
25 amount of \$193,792. The Chapter 13 Trustee filed an objection to confirmation of the Plan (Objection) which
alleges that the Plan is not feasible, does not commit all disposable income, as well as other grounds. Tr. Obj,
ECF No. 28. The Debtor did not file a response. The Objection was scheduled for the same hearing date, but
both the Debtor and the Chapter 13 Trustee requested a ruling on the stay motion and a deferral of the hearing
on the Plan and Objection.

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1 any issues concerning the conduct of the foreclosure sale under the Washington Deed of
2 Trust Act (DTA) or other applicable law other than Section 362 of the U.S. Bankruptcy Code.

3 **A. Does Movant Have Standing to Request Relief?**

4 The first issue presented is whether Movant, as a purchaser at an unchallenged non-
5 judicial foreclosure sale, has standing to request relief from stay where the Debtor filed
6 bankruptcy after the sale, but prior to acknowledgement, delivery and recordation of the
7 deed. The Debtor contends that the sale was void because of alleged post sale violations of
8 the automatic stay and that Movant therefore has no standing to bring the instant motion.
9 According to the Debtor, no property interest was transferred without a valid sale. Nelson
10 Resp. 7:17-21, ECF No. 29. This reading is incorrect. A party impacted by the stay should be
11 entitled to a hearing before a court.
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13 The Code provides that any “party in interest” may seek relief from stay. 11 U.S.C.
14 § 362(d). A “party in interest” may include “any party that has a pecuniary interest in the
15 matter, that has a practical stake in the resolution of the matter or that is impacted by the
16 automatic stay.” In re Cruz, 516 B.R. 594, 602 (9th Cir. BAP 2014) (citing Brown v. Sobczak
17 (In re Sobczak), 369 B.R. 512, 517–18 (9th Cir. BAP 2007)). Movant was a purchaser at the
18 non-judicial foreclosure sale and, but for the questions concerning the stay’s applicability to
19 the foreclosure trustee’s actions following such sale, would be entitled to enjoyment of the
20 Property. This interest is enough to allow Movant to bring the instant motion. Compare In re
21 B & I Realty Co., 158 B.R. 220, 223 (Bankr. W.D. Wash. 1993)(finding no standing in citizen
22 suit where movant did not have an “interest of its own” in the outcome). Unlike in B & I,
23 Movant has an interest of its own in that the scope and effect of the automatic stay may well
24 determine Movant’s rights in the Property and possession of the same.
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B. Does Vacation of a Dismissal Order Re-impose the Stay Retroactively?

1 The Debtor asserts that when this Court entered the order vacating the earlier
2 dismissal order, the effect was to re-impose the stay retroactively thus voiding all post sale
3 actions of the foreclosure trustee, including the recording of the Trustee's Deed. This is not
4 the law. Instead, the general rule is that the stay is re-imposed only prospectively when a
5 dismissal is vacated. See In re Sewell, 345 B.R. 174, 179 (9th Cir. BAP 2006); In re
6 Townley, 2011 WL 6934444, at *6 (9th Cir. BAP Nov. 7, 2011). While a court does have
7 discretion to re-impose the stay retroactively, no request to do so was made in the Debtor's
8 motion to vacate the order of dismissal and accordingly, the Court's order did not do so *sua*
9 *sponte*.²

**C. What is the Nature of Debtor's Ownership Interest in the Property Following
an Unchallenged Non-Judicial Foreclosure Sale?**

13 The Debtor contends that the Trustee's Deed was both acknowledged and delivered
14 while his bankruptcy case was pending and that such acknowledgement and delivery
15 violated the stay. Nelson Resp. 8:19-24, ECF No. 29. According to the Debtor, if the
16 acknowledgement and delivery of the Trustee's Deed violated the stay, then the Debtor
17 should be able to invalidate the entire foreclosure sale, retain the Property and proceed with
18 his Chapter 13 Plan as though no foreclosure sale occurred. Specifically, the Debtor argues
19 that without valid physical delivery of the Trustee's Deed following the Trustee's Sale, no
20 property interest was transferred to Movant and he may deal with the Property in a Chapter
21 13 Plan. Nelson Resp. 7:17-21, ECF No. 29. In support of this argument, the Debtor cites
22 the following language in the DTA: "Upon physical delivery of the trustee's deed to the
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24 _____
25 ² Similarly, the bankruptcy court has the authority to annul the stay retroactively in certain circumstances based on the equities of the case, but may not do so *sua sponte*. See In re Gasprom, Inc., 500 B.R. 598, 607-08 (9th Cir. BAP 2013).

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1 purchaser . . . the trustee's deed shall convey all of the right, title, and interest in the real and
2 personal property sold at the trustee's sale which the grantor had or had the power to convey
3" RCW 61.24.050(1). According to the Debtor, the foreclosure trustee's
4 acknowledgement and possibly the physical delivery of the Trustee's Deed while the stay
5 was in effect, voids the rights of the Movant in the Property. However, this argument
6 overstates the Debtor's legal rights and interests in the Property and understates the
7 consequences of a valid foreclosure sale on the Debtor's interests in the Property as
8 established under Washington State law. See Udall v. T.D. Escrow Svcs., Inc., 159 Wn.2d
9 903, 908, 154 P.3d 882, 887 (2007) (en banc); see generally Butner v. United States, 440
10 U.S. 48, 55, 99 S. Ct. 914 (1979) ("Property interests are created and defined by state law.
11 Unless some federal interest requires a different result, there is no reason why such interests
12 should be analyzed differently simply because an interested party is involved in a bankruptcy
13 proceeding.").

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15 In Udall the Washington State Supreme Court specifically considered the impact of
16 failure to deliver a trustee's deed following a foreclosure sale on the validity of the sale itself.
17 The Udall court held that the foreclosure trustee's acceptance of the bid on the fall of the
18 gavel bound the foreclosure trustee to the delivery of the deed subject only to procedural
19 irregularities in the sale or breaches of fiduciary duty by the foreclosure trustee. Udall, 154
20 P.3d at 890. In rejecting the Court of Appeals' conclusion that the introductory clause denied
21 a purchaser rights in the property sold at the foreclosure sale until physical delivery of the
22 deed, the Udall court further held that save for procedural irregularities in the sale or
23 breaches of fiduciary duty, the trustee was compelled to deliver the acknowledged deed to
24 the highest bidder. Udall, 154 P.3d at 890. Crucially, the foreclosure trustee's discretion to
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1 withhold the deed or void the sale is confined by the DTA itself. Within eleven days of the
2 sale, a foreclosure trustee, beneficiary, or authorized agent for the beneficiary (but not the
3 borrower) may declare the sale void if a defect in the actual sale exists.³ RCW
4 61.24.050(2)(a). The statute delineates three limited circumstances upon which the sale
5 could be set aside by such parties. Those reasons all relate to conduct at or just prior to the
6 sale. RCW 61.24.050(2)(a)(i)-(iii). The DTA also provides that collusive bidding is a basis to
7 void a foreclosure sale or withhold delivery of the deed. RCW 61.24.135(1). Thus, under
8 Washington law, the Debtor's and the estate's rights in the Property following the sale,
9 absent a challenge based on applicable procedural or other irregularities in the conduct of
10 the sale itself, are at most in the nature of bare legal title together with a possessory interest,
11 rather than full and unfettered ownership interests and rights in such Property. 11 U.S.C. §
12 541(a)(1).

**D. Was the Acknowledgement and Delivery of the Trustee's Deed Subject
to the Automatic Stay Where Recording of the Deed Took Place When
the Stay was Not in Effect?**

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16 In this case, the recording of the Trustee's Deed took place while the case was
17 dismissed, the acknowledgement of the Trustee's Deed took place while the stay was in
18 place, and it is unclear whether the automatic stay was in place at the time of delivery of the
19 Trustee's Deed. Movant argues that the sale is final and that it has title to the Property based
20 on the relation back language of the second sentence of RCW 61.24.050(1).⁴ This section
21 provides that "if the trustee accepts a bid, then the trustee's sale is final as of the date and
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24 ³ Following the Udall decision, the Washington State legislature added RCW 61.24.135 to allow a foreclosure
trustee to decline to complete a sale or deliver the trustee's deed if bidding is collusive, defective or the sale
might have otherwise been void. Notably, the provisions of RCW 61.24.050(1) were not changed.

25 ⁴ One court has suggested that in certain instances a relation back provision could validate a prepetition sale but
on the facts before the court it was unnecessary to decide the issue. See Bell v. Aurora Loan Svcs. (In re Bell),
386 B.R. 282, 292 n.4 (W.D. Wash. 2008).

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1 time of such acceptance if the trustee's deed is recorded within fifteen days thereafter." RCW
2 61.24.050(1). Movant also argued at the hearing that because the acknowledgement and
3 delivery of the deed is a ministerial act, even if it occurred during the existence of the
4 automatic stay, no violation of the stay has occurred.

5 Debtor contends that if the acknowledgement or delivery of the Trustee's Deed was
6 performed while the automatic stay was in effect, the stay was violated and the sale may be
7 undone. The Debtor relies in part on the Eastern District of Washington Bankruptcy Court's
8 decision in In re Betchan, 524 B.R. 830, 833-34 (Bankr. E.D. Wash. 2015). In Betchan the
9 foreclosing party moving for relief from stay was the debtor's pre-petition lender who had
10 initiated the foreclosure. The debtor in that case filed her bankruptcy case after the sale, but
11 before the acknowledgement, delivery and recording of the foreclosure trustee's deed. In the
12 case before this Court, the recording of the deed clearly took place while the stay was not in
13 effect and the Movant is a third party purchaser at the foreclosure sale seeking to perfect its
14 title in the property.
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16 In his argument, the Debtor did not specify which provision of Section 362(a) was
17 violated by the alleged actions of the foreclosure trustee. The only provision of the automatic
18 stay potentially implicated under the unique and specific facts of this case⁵ is Section
19 362(a)(3), which prohibits "any act to obtain possession of property of the estate or of property
20 from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

21 This Court holds that the acknowledgement of the Trustee's Deed, though a procedural
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23 ⁵ The Court in Betchan referenced subsections (1), (3), (4), (5) and (6) of Section 362(a) in determining that the
24 prepetition foreclosing creditor violated the stay by acknowledging, delivering and recording the stay. However,
25 under the facts of this case it is difficult to see how the potential postpetition acknowledgment and possibly the
delivery of a Trustee's Deed implicates Section 362(a), subsections (1) (continued actions against the debtor),
(4) (acts to create, perfect or enforce a lien against property of the estate), (5) (acts to create, perfect, or
enforce liens against property of the debtor) or (6) (acts to collect, assess or recover claims against the debtor).

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1 requirement of recording, did not violate Section 362(a)(3). However, if the delivery of the
2 Trustee's Deed took place while the Debtor's bankruptcy case was pending, such delivery
3 violated Section 362(a)(3) and is void. See Schwartz v. U.S. (In re Schwartz), 954 F.2d 569,
4 574 (9th Cir. 1992).

5 Furthermore, the Court holds that any such delivery of the Trustee's Deed while the
6 automatic stay was in effect does not come within the narrowly construed "ministerial act"
7 exception to the automatic stay because the foreclosure trustee has some discretion to not
8 deliver the deed.⁶ Since the foreclosure trustee has the ability under the DTA to determine the
9 sale is not valid on a variety of grounds that exercise of discretion is more than a ministerial
10 act. See McCarthy, Johnson & Miller v. North Bay Plumbing, Inc. (In re Pettit), 217 F.3d 1072,
11 1080 (9th Cir. 2000) (ministerial acts or automatic occurrences that entail no deliberation,
12 discretion, or judicial involvement do not constitute violations of the stay under Section
13 362(a)(1)).

E. Is Relief From Stay Appropriate Under the Circumstances of this Case?

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16 Movant requests relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and
17 (2).⁷ Pursuant to Section 362(d)(1) the Movant is entitled to relief from stay "for cause",
18 including a lack of adequate protection. 11 U.S.C. § 362(d)(1). There is no clear definition of
19 "cause" so it is left to the bankruptcy court to make a determination on a case-by-case basis.
20 Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th
21 Cir. 1990).

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24 ⁶ RCW 61.24.050(2)(a)(i)-(iii)(trustee may set aside sale for a variety of reasons such as an erroneous opening
bid, loan modification or satisfaction of the loan); RCW 61.24.135 (providing that foreclosure trustee may
withhold the deed and set aside the sale if it appears collusive or defective bidding occurred).

25 ⁷ Movant has not requested the Court annul the stay to validate delivery of the deed if such deed was in fact
delivered during the time the case was pending. As indicated prior, the Court has no authority to annul the stay
sua sponte.

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1 Under the facts of this case, the Court finds that "cause" exists to grant relief from stay
2 based on the following facts. First, Movant is a bona fide purchaser that paid the \$205,000
3 bid price to the foreclosure trustee and is "incurring significant financing charges" to a third
4 party lender that financed such purchase price. Carl Decl. 1:21-22 and 2:8-10, ECF No. 26-1.
5 The Debtor has not provided evidence of any adequate protection of the Movant's interests in
6 the Property. Second, the Debtor not only failed to take any allowed statutory action under the
7 Washington DTA to cure the default or to stay the foreclosure sale prior to the Trustee's
8 acceptance of Movant's bid, but has also failed to provide any evidence of procedural or other
9 irregularities in relation to such foreclosure sale or otherwise challenge the sale through the
10 filing of any action to void such sale. Based on the Court's determination that invalidity of the
11 physical delivery of the deed, if in fact done in violation of the stay, would not void the entire
12 foreclosure sale, it is appropriate to grant the Movant relief from stay for cause.
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14 Based on the foregoing, the Court finds that cause exists to grant Movant's request for
15 relief from stay to: 1) take whatever procedural steps are necessary to finalize the sale under
16 the Washington DTA or other applicable state law; and 2) seek possession of the Property in
17 accordance with applicable state law.
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20 /// End of Memorandum Decision ///