IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

FILED
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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

IN RE: **IN PROCEEDINGS UNDER CHAPTER 13**

MICHAEL J. SIMONE, **CASE NO. 05-15065**

JUDGE RANDOLPH BAXTER

Debtor.

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is a motion for stay relief filed by Dennis Corbett ("Movant"). Debtor opposes the relief. Core Jurisdiction of this matter is acquired and proper under provisions of 28 U.S.C. § 157(b)(2)(G), 28 U.S.C. § 1334(b), and General Order No. 84 of this District. Upon a hearing and an examination of the parties' respective briefs and supporting documentation, the following findings and conclusions are made:

Debtor's Chapter 13 bankruptcy case was filed on April 15, 2005. On his Schedule B, Debtor scheduled his interest in the real property located at 8264 Deepwood Boulevard, Unit 10, Mentor, Ohio ("the Property") as a "possessory interest". Prepetition, a foreclosure action styled *PNC Bank v. Sedivy*, (Case No. 01CF001315) was commenced in state court regarding the Property. Linda A. Sedivy was the defendant in that case and prior owner of the subject Property. Dennis Corbett, (Movant) was the successful purchaser of the Property at a sheriff's sale.

The record reveals that, prepetition, Corbett, (the third party purchaser of the Property) sought assistance from the sheriff's office to remove the Debtor from the premises. A Final Writ of Possession issued by the state court and was served upon the Debtor advising Debtor that the state court issued an order to the sheriff of Lake County to grant possession of this property to

Corbett, the purchaser of the property at a sheriff's sale. Subsequently, Debtor was ordered to vacate the premises before May 26, 2005 at 10:00 or he would be evicted by the sheriff's department (See Corbett Ex. D). Debtor notified Corbett of his bankruptcy filing, but Corbett was not scheduled as a creditor. Corbett now moves for stay relief on the basis that Debtor has no color of title in the Property and that Debtor has failed to provide adequate protection to overcome relief from the automatic stay.

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The dispositive issue before this Court is whether relief from the automatic stay is warranted.

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Section 362(a) of the Bankruptcy Code provides, in relevant part:

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

11 U.S.C. § 362(a). Herein, the record reveals that Corbett currently holds title to certain real property located at 8264 Deepwood Boulevard, Unit 10, Mentor, Ohio ("the Property") after becoming the successful bidder at a sheriff's sale of the Property. Debtor currently resides at the Property. It is undisputed, however, that Debtor has not made rental payments to Corbett or any

other entity.

The Sixth Circuit has determined that, by definition, a tenant which is a holdover tenant or tenancy at sufferance has a possessory interest in real property within the scope of § 541 of the Bankruptcy Code and, therefore, has a possessory interest[1] in real property falling within the ambit of the protections provided by the automatic stay. *In re Convenient Food Mart No. 144, Inc.*, 968 F.2d 592, 594 (6th Cir. 1992), *citing In re 48th St. Steakhouse, Inc.,* 835 F.2d 427, 430 (2d Cir. 1987)(even if the Debtor's interest in the Property is a mere, bare possessory interest, "a mere possessory interest in real property, without any accompanying legal interest, is sufficient to trigger the protection of the automatic stay); *In re Atlantic Business and Community Corporation,* 901 F.2d 325, 328 (3d Cir. 1990); *In re Adams* 94 B.R. 838, 852 (Bankr. E.D. Pa. 1989)(even a tenant's naked possessory rights to a premises are protected by the stay and that a leasehold is not terminated until a judgment for possession has been entered and executed upon and no relief from the automatic stay has been requested). That is because a debtor's bare possessory interest in realty is property of the estate that is protected by the automatic stay even if the realty itself is not property of the estate. *In re Fitzgerald*, 237 B.R. 252, 258 -259 (Bankr. D.

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[1]In explaining the scope of § 541(a)(1)'s definition of property, Congress used the term "possessory interest," not "possession". *See* S.Rep. No. 989, 95th Cong., 2d Sess. 82 (1978), 1978 U.S.C.C.A.N. 5787, 5868. A possessory interest is a "[r]ight to possess property by virtue of an interest created in the property though it need not be accompanied by title...." BLACK'S LAW DICTIONARY 607 (5th ed. 1983). When read against the backdrop of § 541(a)(1), which refers to equitable interests, courts have concluded that a possessory interest refers to cases in which the debtor has some *right* to possess the property, for example, by virtue of the title holder's consent or permission. Thus, a thief, who could have bald possession of property, without any corresponding right to possession, likely would be unable to use § 541 to claim that the stolen property constitutes property of the estate because he lacks a legal or equitable interest. *See In re Printup*, 264 B.R 169 (Bankr. E.D Tenn. 2001); *Matter of Sielaff*, 164 B.R. 560 (Bankr. W.D. Mich. 1994).

Conn. 1999) *citing Cuffee v. Atlantic Business and Community Development Corp. (In re Atlantic Business and Community Corp.),* 901 F.2d 325, 328 (3d Cir. 1990) (holding that debtor's possession of tenancy at sufferance in radio station was property of the estate and subject to Section 362(a)); *In re Reinhardt,* 209 B.R. 183, 187 (Bankr.S.D.N.Y. 1997) (holding that debtor's possessory interest in residential lease, for which lessor had obtained judgment of possession and warrant of execution, was protected by the automatic stay). Therefore, Corbett properly seeks stay relief from this Court.

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Relief from the automatic stay is governed under 11 U.S.C. § 362 (d) which provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
>
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
> > (2) with respect to a stay of an act against property under subsection (a) of this section, if--
> >
> > (A) the debtor does not have an equity in such property; and
> > (B) such property is not necessary to an effective reorganization...

11 U.S.C. § 362(a)(1)(2). Aside from a lack of "adequate protection," the Bankruptcy Code does not clearly set forth the circumstances which may constitute "cause" for relief from stay. The Sixth Circuit has held that the "courts must determine whether discretionary relief is appropriate on a case-by-case basis." *In re Trident,* 52 F.3d 127, 131 (6th Cir.1995). This approach was styled by the Court as the "totality of the circumstances" test. *Id. See also In re Shultz,* 325 B.R. 197, 200 (Bankr. N.D. Ohio 2005).

The burden of proof on a motion from relief from the automatic stay is a shifting one.

Section 362(d)(1) requires an initial showing of cause by the movant, while Section 362(g) places the burden of proof on the debtor for all issues other than the debtor's equity in property.····If the movant fails to make an initial showing of cause, however, the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection. *See e.g. Sonnax Industries, Inc. v. Tri Component Products Corp. (In re Sonnax Industries, Inc.),* 907 F.2d 1280, 1285 (2d Cir. 1990); *In re Wade*, 174 B.R. 252, 253 (Bankr. N.D. Ohio 1994)(the Debtor has the burden of proof on all issues except lack of equity in real property). If, however, the movant is able to make an initial showing of "cause," the burden then shifts to the debtor to demonstrate entitlement to the protection of the stay; the risk of nonpersuasion is on the debtor. *See Sonnax* Industries, 907 F.2d at 1285; *In re 234-6 West 22nd St. Corp.,* 214 B.R. 751, 756 (Bankr. S.D.N.Y. 1997) (stating that debtor bears burden of going forward with evidence and the "burden of ultimate persuasion.").

Herein, it is unrefuted that a judgment for possession has been duly entered by a court of record. It is also unrefuted that the Movant (Corbett) was the successful bidder for the subject property at a duly-noticed foreclosure sale. Thus Movant has provided sufficient cause for lifting of the automatic stay. Other than a bare possessory interest, it is undisputed that the Debtor has not provided adequate protection to the Movant to warrant Debtor's continued possession of the property. Consequently, it is hereby determined that the property is unnecessary for the Debtor's effective reorganization in these proceedings, and the stay relief prayed for is warranted.

Accordingly, the Movant's motion for relief from stay is hereby granted. The objection is

hereby overruled. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated this 5th day of January, 2006

RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

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	JUDGE RANDOLPH BAXTER
Debtor.	

JUDGMENT

At Cleveland, in said District, on this 4th day of January, 2006.

A Memorandum Of Opinion And Order having been rendered by the Court in this matter,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Movant's motion for relief from stay is hereby granted. The objection is hereby overruled. Each party is to bear its respective costs.

IT IS SO ORDERED.

RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT