THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 96-16888
	)	
THOMAS GRAY,	)	Chapter 13
BARBARA GRAY,	)	
	)	Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	**MEMORANDUM OF OPINION**
	)	**AND ORDER**

This case is before the Court on the Motion for Relief from Stay filed by Bank One, Mansfield (Docket 16) and Debtors' Objection to that motion. (Docket 20). Bank One, Mansfield filed a Hearing Statement and Hearing Brief. (Docket 25, 26). Debtors filed a Hearing Statement, an Appendix to that Statement, a Hearing Memorandum, and a Supplement. (Docket 23, 24, 27, and 32). For the reasons stated below, the Motion is granted and the Objection is overruled.

JURISDICTION

The Court has jurisdiction to hear this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (G) and (O).

FACTS

The Court held an evidentiary hearing on April 29, 1997, at which time the parties stipulated to the admission of all exhibits.[1] Based on the testimony, exhibits, and the file, the Court finds these facts:

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[1] Neither party provided separate copies of its exhibits. Instead, Debtors' Exhibit 1 is an Appendix to their Hearing Statement, to which is attached three documents, and Bank's Exhibit 1 is its Motion for Relief from Stay, to which is attached five documents.

1. This dispute arises out of a transaction entered into in 1993 by Bank One, Mansfield ("Bank"), Thomas Gray, Barbara Gray, Daniel Notestone, and Markley Communications, Inc. (sometimes collectively referred to as "Borrowers"). As part of that transaction, Bank loaned $300,000 to Borrowers. In turn, Borrowers signed a Promissory Note (the "Note"), Mr. Gray signed a Continuing Guaranty (the "Guaranty"), and the Grays both executed a mortgage in favor of Bank on their residence (the "Residence") to secure their obligations under the Note. (Debtors' Exhibit 1).

2. Borrowers defaulted on their obligations to Bank. Bank then initiated collection activity, apparently starting by obtaining a cognovit judgment on the Guaranty and filing in Lorain County a judgment lien that encumbered both the Residence and a second parcel of real estate owned jointly by the Grays where a relative lives, rent-free ("Parcel 2") (both parcels are sometimes collectively referred to as the "Property"). (Debtors' Hearing Memorandum at p. 3).[2] Bank next filed two Complaints in the Lorain County Court of Common Pleas (the "State Court"): (a) Case No. 96-CV-116053, seeking, among other things, to obtain judgment on the Note and to foreclose on the mortgage held on the Residence; and (b) Case No. 96-CV-116055, seeking to foreclose on the judgment lien. *Id.* The Grays, and others, were named as defendants in these cases.

3. The Gray Defendants filed Answers in each of the State Court actions. Debtors admit that they raised as a defense in both cases that Bank violated the federal Consumer Protection Act (the "Act"), by requiring Ms. Gray to co-sign the Note and execute the mortgage.

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[2] Based on the admissions in the parties' pre-hearing filings and counsel's statements at the hearing, it appears that the parties agree on the State Court events although the evidence is sketchy on some points. The Court has, therefore, included in these findings the admissions and the statements of counsel.

(Tr.; Debtors' Hearing Statement ¶9; Debtors' Hearing Memorandum p. 3). They did not file Counterclaims in either case.

4. Bank filed a Motion for Summary Judgment in both of the State Court cases and the Gray Defendants filed a Reply. The State Court granted the Motions. In Case No. 96-CV-116053, the State Court entered a Judgment Decree in Foreclosure and Order of Sale that granted judgment in favor of Bank as against Mr. Gray in the amount of $253,353.78, included a finding that Bank has a first and best lien on the Residence after taxes, and ordered the Residence to be sold if the judgment was not paid within a stated time frame. (Bank's Exhibit 1, Exhibit A attached to it).

5. The Gray Defendants filed Motions for a New Trial in the State Court cases, both of which were denied. They then appealed both judgments to the Ohio Ninth District Court of Appeals. On December 12, 1996, while the appeals were pending, Debtors filed for protection under the bankruptcy laws. The appeals are stayed by virtue of these bankruptcy proceedings.

6. The parties agree that the Residence has a value of $225,000. The judgment of foreclosure obtained by Bank is in the amount of $253,353.78 plus interest. Debtors do not, therefore, have any equity in the Residence.

7. The parties agree that Parcel 2 has a value of $93,800. Beneficial Ohio holds a first mortgage in the amount of approximately $93,000 - 95,000. Debtors do not, therefore, have any equity in Parcel 2.

8. There was no evidence presented on the issue of whether the Property is necessary to an effective reorganization of Debtors.

9. Debtors' proposed Plan of Reorganization provides for a 1% dividend to unsecured creditors. It does not provide for any specific payment to be made to Bank and no

payments have been made outside of the Plan. Instead, the Plan states with respect to Bank's claim that Debtors will have the "validity and priority of secured status determined by the Bankruptcy Court and secured claim, if any, to be paid from proceeds of refinancing of Debtors' real estate [the Property] . . . ." (Docket 9). Debtors did not present any evidence on the issue of refinancing.

10. On April 22, 1997, shortly before the hearing on this Motion, Debtors filed Adversary Proceeding No. 97-1120 against Bank seeking a declaratory judgment that Bank violated the Act, as a consequence of which the Note and Mortgage executed by Ms. Gray are both void. Debtors seek a further declaration that Debtors hold the Property as tenants in common rather than as joint tenants and that they should receive a statutory award of attorney fees.

11. Debtors admit that the statute of limitations has run on any claims under the Act. (Tr.; Debtors' Hearing Memorandum at p.8).

12. Debtors testified at the hearing about the circumstances surrounding Ms. Gray's execution of the Note and mortgage. Bank disputed this evidence through cross-examination.

DISCUSSION

I.

Bank contends that it is entitled to relief from the automatic stay under 11 U.S.C. § 362(d)(2) because there is no equity in the Property and the Property is not necessary for an effective reorganization or, alternatively, for cause under 11 U.S.C. § 362(d)(1) because there is a lack of adequate protection. Debtors contend that relief should be denied until the Adversary Proceeding is heard and determined, permitting Debtors to preserve their rights under the Act. They also argue that Bank is not entitled to relief under (d)(1) because, in the absence of an

equity position, Bank does not have an interest that is subject to adequate protection. Additional arguments are set forth below.

II.

11 U.S.C. § 362(d) provides in relevant part that:

> (d) 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 --
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> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
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> (2) with respect to a stay of an act against property under subsection (a) of this section, if --
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> (A) the debtor does not have an equity in such property; and
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> (B) such property is not necessary to an effective reorganization; . . . .

There is a divided burden of proof under this section. Movant has the burden of proving that there is no equity in the property and the party opposing relief has the burden on all other issues. 11 U.S.C. § 362(g). To meet the burden of showing that property is "necessary to an effective reorganization," Debtors must present evidence that "the property is essential for an effective reorganization that is in prospect. This means . . . that there must be a 'reasonable possibility of a successful reorganization within a reasonable time'." *United Savings Ass'n. of Texas v. Timbers of Inwood Forest Ass'n., Ltd.*, 484 U.S. 365, 376 (1988).

The evidence is undisputed that Debtors do not have any equity in the Property. Debtors did not present any evidence that the Property is necessary to an effective reorganization. Since Bank has met its burden of proof and Debtors have not, Bank is entitled to relief from the

automatic stay under 11 U.S.C. § 362(d)(2). Moreover, the other considerations cited by Debtors do not dictate a different result.

As noted above, Debtors argue that there is a relevant additional factor and that is their Adversary Proceeding raising a claim under the Act. Debtors do not point to a Bankruptcy Code section or case law in support of their request to postpone relief, focusing instead on the merits of their claim under the Act and asking this Court to exercise its discretion to delay consideration of these issues. Bank replies that issues relating to the Act are outside of the scope of a motion for relief from stay and, in any event, such issues are res judicata because they were submitted to the State Court as a defense to Bank's claims and rejected by virtue of that court entering judgment against the Gray Defendants. To that, Debtors respond that the State Court should have treated the defenses as counterclaims under Ohio law and that, since the State Court did not do so, those "counterclaims" have not yet been decided, as a result of which this Court should consider them in the Adversary Proceeding. Debtors also believe that the running of the statute of limitations under the Act is not an impediment to their Adversary Proceeding because it is in the nature of recoupment rather than affirmative relief. (Tr.; Debtors' Hearing Memorandum p. 8)

Motions for relief from stay are summary proceedings and, ordinarily, affirmative defenses and counterclaims are not to be considered in connection with such a motion. *See D-I Enterprises, Inc. v. Commercial State Bank,* 864 F.2d 36 (5th Cir. 1989). Some courts recognize an exception, however, "in those limited instances where the defense contests the validity of the creditor's lien as distinguished from the amount of the lien." *In re Franklin,* 111 B.R. 582, 584 (Bankr. E.D. Tex. 1989). This is because relief from stay may only be sought by a ". . . 'party in interest.' If the moving creditor does not have a lien on the property in question, it follows that

the creditor is not a 'party in interest' as to such property." *In re Dino & Artie's Automatic Transmission Co., Inc,* 68 B.R. 264 (Bankr. S.D.N.Y. 1986).

The cases cited by Bank either decline to consider a counterclaim in the context of a motion for relief from stay or they consider and determine the competing claim. The instant case is a hybrid because, while Debtors contest the validity of Bank's lien both in response to the Motion for Relief from Stay and also in the Adversary Proceeding, they do not ask the Court to decide their claims on the merits at this point. Instead, they seek to use them as a reason to postpone decision on the Motion. While there may be circumstances under which a request such as that made by Debtors is appropriately considered in the context of a motion for relief from stay, the facts of this case do not warrant the relief requested.

Although Debtors have made a concerted effort to resuscitate their claims under the Act and to insert them into this Motion, it is to no avail. The facts are undisputed that the Gray Defendants raised the Act as a defense to both of the State Court actions and that the State Court entered judgment against them despite those defenses. The Gray Defendants appealed those judgments to the state appellate court. Whether the State Court erred in not considering the defenses as independent counterclaims is not for this bankruptcy court to decide in this context. What the Court has before it is this: two state court judgments by a court of competent jurisdiction in favor of Bank and against Debtors, at least one of which is a final judgment. That final judgment held that Bank is owed more than $250,000, Bank has a first and best lien, and the mortgage held by Bank to secure that lien should be foreclosed and was so ordered. Similarly, the other judgment foreclosed on the judgment lien. Beyond that, Debtors admit that

the statute of limitations has run on their claims under the Act.[3] The evidence establishes that Bank is entitled to relief from stay under § 362(d)(2) of the Bankruptcy Code. On balance, the equities of this case do not support delaying a decision on Bank's Motion for Relief from Stay in order to first decide the issues raised in the Adversary Proceeding. In light of this conclusion, it is not necessary to decide whether Bank also is entitled to relief under 11 U.S.C. § 362(d)(1).

CONCLUSION

Bank has met its burden of proof under 11 U.S.C. § 362 (d)(2) and Debtors have not met their burden of proof under that same statute. Moreover, equitable considerations do not support delaying a decision on the Motion for Relief from Stay, even if Debtors' affirmative claims are appropriately considered in opposition to the Motion. The Motion is, therefore, granted.

IT IS SO ORDERED.

Date: 9 May 1997

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Alexander Jurczenko, Esq.
Joel Rathbone, Esq.
Myron Wasserman, Esq.

By: Joyce L. Gordon Secretary
Date: 5/9/97

[3] Although Debtors do not identify the date on which the statute of limitations ran, it appears to have run before Bank filed the State Court actions. If so, this casts further doubt on Debtors' argument to this Court that they have viable counterclaims, rather than just a defense of recoupment.