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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:) Case No. 01-13445
)
LEONARD J. BOROWSKI,) Chapter 13
)
Debtor.) Judge Arthur I. Harris

ORDER DENYING EMERGENCY MOTION FOR EVIDENTIARY HEARING
AND EMERGENCY MOTION TO SET ASIDE SHERIFF'S SALE

Before the Court are the debtor's emergency motion for evidentiary hearing (Docket # 36) and emergency motion to set aside or vacate sheriff's sale (Docket # 33). The Court heard argument regarding these motions on September 4, 2003. William Kaplan appeared on behalf of the debtor, and Michael Linden appeared on behalf of Third Federal Savings & Loan Association of Cleveland (Third Federal). For the reasons that follow, both motions are denied.

CHRONOLOGY

This controversy began almost nine years ago on November 2, 1994, when Third Federal filed a foreclosure action against the debtor in the Cuyahoga County Court of Common Pleas (Case CV-94-279709). Three months later on February 24, 1995, the debtor filed for protection under Chapter 13 of the Bankruptcy Code (Case #95-10809), and that case was eventually completed with

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the debtor receiving a discharge on September 23, 1999. Attorney Lee Kravitz represented the debtor in that case.

Third Federal revived the foreclosure proceedings in October of 1999, and the Court of Common Pleas issued an order of sale on June 22, 2000, with the sale to take place on August 7, 2000. The debtor filed his second Chapter 13 petition on July 14, 2000 (Case # 00-15167), again with Attorney Kravitz representing him. That bankruptcy case was dismissed on December 19, 2000, because of the debtor's failure to fund the plan.

Given this dismissal of the debtor's bankruptcy case, Third Federal applied for an order of sale yet again on January 8, 2001. The Court of Common Pleas issued an order of sale on March 15, 2001, and the sale was scheduled to take place on April 16, 2001. On the date scheduled for the sale, the debtor filed his third petition in bankruptcy (Case # 01-13445), and Attorney Kravitz initially represented the debtor but was later substituted as counsel on August 11, 2003, by William Kaplan. The Court dismissed this third bankruptcy on June 6, 2001, because of the debtor's failure to file a plan as required by 11 U.S.C. § 1321 and Bankruptcy Rule 3015. The case was later reinstated on July 31, 2001, after the debtor had filed a plan.

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On September 24, 2001, Third Federal applied for relief from stay, and that relief was granted on October 25, 2001. Three weeks later on November 19, 2001, Third Federal applied for another order of sale, and a sale was scheduled for February 4, 2002. Before that sale could take place, however, the parties resolved the dispute, and the Common Pleas Court issued an order to return the order of sale. An agreed order reinstating the automatic stay was entered on February 5, 2002. Nearly three months later on April 30, 2002, the debtor's Chapter 13 plan was confirmed.

In September of 2002, Third Federal obtained an order of sale in state court, and a sale was scheduled for December 30, 2002, even though the automatic stay remained in effect. Third Federal might have mistakenly taken this action as a result of the notice of dismissal that the Court issued on August 8, 2002, with respect to the debtor's second bankruptcy case (00-15167), even though that case had been dismissed since December 19, 2000. On January 7, 2003, the Common Pleas Court ordered the sheriff to return the order of sale without execution.

On March 12, 2003, Third Federal filed an affidavit of default in the debtor's present bankruptcy case. Based on that affidavit of default, the Court issued an order granting Third Federal relief from stay on March 14, 2003. After

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receiving relief from stay, Third Federal applied yet again for an order of sale from the Common Pleas Court, and a sale was set for August 11, 2003. The sale actually took place on August 11, 2003, and an order of sale was returned to the state court on August 13, 2003, indicating such. According to the debtor's emergency motion to set aside or vacate the sheriff's sale (Docket #34), the residence was sold for \$132,000, which is only \$3,000 less than the value reported by the debtor in his schedules and presumably could result in some equity being paid back to the debtor. On August 18, 2003, the debtor filed his emergency motion to set aside or vacate the sheriff's sale.

The next day, the Court heard argument from debtor's counsel and counsel from Third Federal, and the Court indicated that it did not appear that a bankruptcy judge had jurisdiction to vacate a state order for sale that had been issued after the automatic stay had been lifted. However, the Court indicated that it might reconsider its order of March 4, 2003, lifting the automatic stay with respect to Third Federal. Even that reconsideration, though, would not affect the state court action that had gone forward while the stay was lifted. On August 28, 2003, the debtor filed an emergency motion for an evidentiary hearing (Docket #36).

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DISCUSSION

Bankruptcy Rule 7001(7) requires that a party seeking injunctive or other equitable relief must file an adversary proceeding. An order to vacate or set aside a sheriff sale at a time when relief from stay had been granted would fall into the category of injunctive or equitable relief and, therefore, would require the filing of an adversary proceeding. While the Court is skeptical that it has authority to issue such an order, without an adversary complaint, the Court need not address that issue.

The Court could also treat the debtor's motion as one for reconsideration of the March 14, 2003, order lifting the automatic stay. However, such a motion to alter or amend a judgment would be untimely under Federal Rule of Civil Procedure 59(e) and Bankruptcy Rule 9023. *See also* Bankruptcy Rule 9006(b)(2) (limiting court's discretion to extend time under Bankruptcy Rule 9023). While the request might also be considered a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) and Bankruptcy Rule 9024, even those rules require that motions "shall be made within a reasonable time," and nothing in debtor's motion, even if all of it were true, would establish that debtor's motion was made in a reasonable time.

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Specifically, Third Federal filed its affidavit of default on March 12, 2003.

The debtor has not proffered a reasonable excuse for failing to object to the affidavit, or the ensuing order, during the months of March, April, May, June, July, or any time prior to the sale date of August 11, 2003. Even though the debtor began working in New Jersey, he never indicated to the Court a change of address, as is his duty pursuant to Bankruptcy Rule 4002(5). Furthermore, a letter from debtor's counsel dated July 21, 2003, expressly notified the debtor of the sheriff's sale that had been scheduled for August 11, 2003. *See* Exhibit G to Debtor's Emergency Motion to Set Aside or Vacate Sheriff Sale (Docket # 33). In addition, the state court issued a notice to the debtor regarding the August 11, 2003, sale during the month of July, 2003. Given these repeated attempts to inform the debtor of the impending sale, the Court concludes that the debtor's objections to the sheriff's sale were not made within a reasonable time.

While Third Federal may have violated the automatic stay with its earlier actions, these actions would only give rise to a possible claim for money damages under 11 U.S.C. § 362(h), but no such motion is presently before the court. With respect to the possibility that Third Federal allegedly signed a false affidavit that precipitated the granting of relief from stay, a claim for damages or injunctive

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relief due to fraud would require the filing of an adversary complaint, which is not presently before the Court. Regarding the requests for an accounting or an emergency hearing, no discovery is needed to resolve the motions that are before this Court.

The debtor remains free to seek some or all of these remedies in state court. For instance, some of the costs associated with the sheriff's sale that was scheduled while the automatic stay remained in effect may be improper, as well as late charges for payments that Fifth Third allegedly returned to the debtor, but this Court need not address those issues because they are not before the Court.

For the foregoing reasons, the debtor's emergency motion for evidentiary hearing (Docket # 36) and emergency motion to set aside or vacate sheriff's sale (Docket # 33) are denied.

IT IS SO ORDERED.

/s/ Arthur I. Harris 10/08/2003
Arthur I. Harris
United States Bankruptcy Judge