UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 04-32640
	)	
Dorothy A. Heebsh,	)	Chapter 7
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

ORDER REGARDING MOTION FOR RELIEF FROM STAY AND ABANDONMENT

This case is before the court for decision after hearing on a Motion for Relief from Stay and Abandonment [Doc. #17] filed by Bay Area Credit Union ("the Credit Union") and the Chapter 7 Trustee's objection [Doc. # 24]. Debtor does not oppose the motion. .

The Credit Union seeks relief from the automatic stay in order to enforce a mortgage lien against property located at 1526 Bradner Road, Northwood, Ohio, and abandonment of the property pursuant to 11 U.S.C. § 554. The Trustee opposed the motion, arguing that there may be equity in the real estate for the benefit of unsecured creditors. At the hearing, the issue was raised as to whether the Credit Union has any secured interest in the property and, thus, whether it has standing to and is entitled to relief from stay. The court ordered and has received further briefing on this issue. [Doc. ## 32, 33 and 34]. For the reasons that follow, the Credit Union's motion will be granted in part and denied in part.

FACTUAL BACKGROUND

The following facts are undisputed. On November 25, 1997, Debtor obtained a loan from the Credit Union in the amount of $133,855. To secure payment in accordance with the loan agreement evidencing said loan, Debtor executed a mortgage, also dated November 25, 1997, granting a lien on the real property located at 1526 Bradner Road, Northwood, Ohio ("the Property"). The mortgage lien was duly perfected by the Credit Union's filing of the mortgage in the office of the Wood County Recorder on November 26, 1997. The value of the Property is $156,000 and there is currently due and owing to the Credit Union the outstanding balance of $128,564, plus interest, of which $5,559.08 is in arrears.

On January 16, 2001, a mortgage was recorded in the Wood County Recorder's office by another creditor, Household Realty Corporation ("Household Realty") that became a lien upon the

same real property serving as security for the Credit Union's mortgage. During 2003, Debtor defaulted on her loan with Household Realty and it filed a Complaint in Foreclosure in state court. The Credit Union, among others, was named as a defendant and was served with, but failed to file an answer to, the foreclosure complaint.

Although Household Realty never filed a motion for default judgment against the Credit Union, it did file a motion for summary judgment against Debtor and her non-debtor husband, Jack R. Heebsh. On January 15, 2004, the Wood County Common Pleas Court entered a Judgment and Decree in Foreclosure ("Foreclosure Judgment"). [Doc. # 32, Movant's Brief, Ex. B]. The court found that Household Realty was entitled to summary judgment against Debtor and her husband. It further found that "defendants, Jack R. Heebsh . . . and Bay Area Credit Union, Inc. were duly served and are in default for answer or other pleading." [*Id.*]. The court then made express findings regarding the debt owed and mortgage granted to Household Realty. [*Id.*]. The court found that Household Realty had a valid mortgage lien and that the Wood County Treasurer also had a valid interest in the Property. [*Id.*]. The court ordered that unless the sum due to Household Realty was paid in full within three days, it would order the sale of the real estate and that the proceeds, upon confirmation of the sale, be distributed in the following order of priority:

1. To the Clerk of Courts for the costs of [the] action, including the fees of appraisers;
2. To the Treasurer and Auditor of Wood County, Ohio for taxes and assessments due and payable . . .;
3. To the plaintiff Household Realty Corporation, as and for its first mortgage lien filed January 16, 2001;
4. The balance of said proceeds, if any, shall be paid by the Sheriff of Wood County to the Clerk of Courts to await further Orders of [the] Court.

[*Id.*].

On February 11, 2004, the state court entered an Order of Sale and a Sheriff's sale was set for April 8, 2004. Debtor then filed her bankruptcy petition on April 6, 2004.

Thereafter, the Credit Union filed in the state court foreclosure action a motion for relief from judgment under Rule 60(b) of the Ohio Rules of Civil Procedure. On June 15, 2004, the state court vacated its Judgment and Decree of Foreclosure and granted the Credit Union leave to file "a pleading responsive to [Household Realty's] complaint to establish its interest and the priority of its claim in the foreclosed premises. . . ." [Doc. # 32, Movant's Brief, Ex. C, p. 7]. In proceeding in this court, however, the Credit Union rightfully acknowledges that relief here cannot be premised upon the state

court's vacation of the Judgment and Decree of Foreclosure. The reason is that the order vacating the Judgment and Decree of Foreclosure is a nullity since the Rule 60(b) motion and order were filed postpetition without relief from and in violation of the automatic stay in this case. *See Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 909-10 (6th Cir. 1993)(actions taken in violation of the automatic stay are generally void).

LAW AND ANALYSIS

A party seeking relief from stay has the burden of going forward to establish a *prima facie* right to the relief requested before the burden shifts to the objecting party to disprove that cause exists for relief from stay. This burden of going forward encompasses both statutory and jurisprudential standing requirements, with relief under § 362(d) statutorily reserved to "a party in interest." *In re Village Rathskeller, Inc.*, 147 B.R. 665, 668-71 (Bankr. S.D.N.Y. 1992); *In re Comcoach Corp.*, 698 F.2d 571, 573-74 (2d Cir. 1983); *In re Lakeside I. Corp.*, 104 B.R. 468, 471-72 (Bankr. M.D. Fla. 1989). In the context of secured creditors, the burden of going forward includes a showing that the movant holds a perfected security interest in property of the estate. *In re Planned Systems, Inc.*, 78 B.R. 852, 860 (Bankr. S.D. Ohio 1987); *In re Elmira Litho, Inc*., 174 B.R. 892, 900-902 (Bankr. S.D.N.Y. 1994). The issue raised by the Trustee is whether the Credit Union holds a valid security interest in property of the estate in light of the decision rendered by the state court in its Foreclosure Judgment. The Trustee contends that the Foreclosure Judgment extinguished the Credit Union's mortgage lien and that, under the doctrine of collateral estoppel, it may not now argue otherwise in this court. Therefore, she argues, relief from stay and abandonment should be denied. The Credit Union asserts that collateral estoppel does not apply since the state court made no express findings regarding its mortgage lien, except as to priority of the lien. It further argues that, under Ohio law, lien rights are not extinguished until confirmation of the sale of the property and, since no sale has taken place, its mortgage lien could not have been extinguished.

Under 28 U.S.C. § 1738, the federal full faith and credit statute, a federal court must accord a state court judgment the same preclusive effect the judgment would have in state court. *Corzin v. Fordu (In re Fordu),* 201 F.3d 693, 703 (6th Cir. 1999). In determining whether the prior judgment should be given preclusive effect in a federal action, the federal court must apply the law of the state in which the prior judgment was rendered. *Id.* In this case, the court must therefore apply Ohio issue preclusion principles.

Under Ohio law, there are four elements to the application of the doctrine of collateral

estoppel: (1) a final judgment on the merits after a full and fair opportunity to litigate the issue; (2) the issue was actually and directly litigated in the prior action and must have been necessary to the final judgment; (3) the issue in the present suit must have been identical to the issue in the prior suit; and (4) the party against whom estoppel is sought was a party or in privity with the party to the prior action. *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186, 189 (B.A.P. 6th Cir. 2002). "Issue preclusion precludes the relitigation of an issue that has been ***actually and necessarily*** litigated and determined in a prior action." *MetroHealth Medical Ctr. v. Hoffmann-LaRoche, Inc.*, 80 Ohio St. 3d 212, 217 (1997) (emphasis added). The person asserting collateral estoppel carries the burden of proving its requirements by a preponderance of the evidence. *A Packaging Service Co. v. Siml (In re Siml),* 261 B.R. 419, 422 (Bankr. N.D. Ohio 2001).

On the first element, a state court's foreclosure judgment is a final judgment under Ohio law. *See In re Monas*, 309 B.R. 302, 306 (Bankr. N.D. Ohio 2004); *Daneman v. Federal Home Loan Mortgage Corp. (In re Hoff)*, 187 B.R. 190, 195 (Bankr. S.D. Ohio 1995). And there is no question that the Credit Union was duly served with Household Realty's complaint but failed to file an answer in the state proceeding. Under these circumstances, the Credit Union had a full and fair opportunity to protect its interests in the state court. Also, the fourth element is clearly met since the Credit Union was a party in the state court action.

The second element, however, is more difficult. Ohio courts have disagreed on whether or how to apply the standards of collateral estoppel, and in particular the "actually litigated" standard, in situations involving default judgments. *See Sweeney*, 276 B.R. at 192 and cases cited therein. The Ohio Supreme court has not decided this issue. *See Hinze v. Robinson (In re Robinson)*, 242 B.R. 380, 386 n.4 (Bankr. N.D. Ohio 1999).

In *Robinson*, Judge Speer of this court set forth a test for application of the doctrine of collateral estoppel in bankruptcy court when a default judgment has been entered against a debtor in a prior Ohio state court lawsuit. That test has two elements. First, the state court plaintiff must have actually submitted to the state court admissible evidence apart from just the complaint. Second, the state court, from the evidence submitted, must actually make findings of fact and conclusions of law that are sufficiently detailed to support application of the doctrine of collateral estoppel in the subsequent action. And "[i]n addition...this Court will only make such an application if the circumstances of the case would make it equitable to do so." *Robinson*, 242 B.R. at 387. The

Bankruptcy Appellate Panel for the Sixth Circuit later adopted this test in *Sweeney*, finding it an accurate predictor of how the Ohio Supreme Court would rule on the issue of the preclusive effect to be accorded Ohio default judgments. *Sweeney*, 276 B.R. at 194.

Applying this test here, the motion for summary judgment filed by Household Realty in state court and the state court's Foreclosure Judgment establish that the judgment was entered after the presentation of evidence in the form of an affidavit in support of Household Realty's motion. Although the affidavit itself is not before this court, the memorandum in support of the summary judgment motion sets forth the salient facts elicited from the affidavit. Those facts relate only to issues regarding the default in payment on a debt owed to Household Realty by Debtor and her husband and the terms of the mortgage securing that debt. There is no indication that any evidence was offered relating to the validity of the Credit Union's mortgage nor was the Credit Union even mentioned in Household Realty's motion or Memorandum in Support. Thus, the first element of the *Robinson* test is not satisfied.

Consequently, the second element, that the state court made findings based on such evidence, cannot be satisfied. In fact, the state court made no express findings regarding the validity of the Credit Union's lien. The specific findings of fact and conclusions of law made in the Foreclosure Judgment dealt with the validity of Household Realty's mortgage and the debt owed to it by Debtor and her husband and the validity of the Wood County Treasurer's interest in Debtor's property. The state court clearly determined that Household Realty had a first mortgage lien on the property. While this determination may be sufficient to infer that the court determined the priority of the Credit Union's lien, there is no indication that it specifically addressed the validity of the lien. *Cf*. *Monas*, 309 B.R. at 306-7. (giving a foreclosure judgment entered against a defaulting mortgage lienholder issue preclusive effect where the state court expressly barred the creditor from asserting any right, title or interest in the property and cancelled its mortgage of record). The state court's only express finding regarding the Credit Union is that it is "in default for answer or other pleading." [Doc. # 32, Movant's Brief, Ex. B]. In the absence of any findings of fact or conclusions of law in the state court that address the validity of the Credit Union's mortgage lien, this court finds that the Trustee has failed to meet the test articulated in *Robinson* and *Sweeney* for determining whether an issue was actually litigated in state court.

The third element under *Sweeney* requires that the issue in the present suit be identical to the issue in the state court action. This element is also problematic since it is not at all clear that the issue

of the validity of the Credit Union's lien was ever properly an issue before the state court. At no time did Household Realty file a motion for default judgment against the Credit Union. Household Realty's summary judgment motion requested judgment against Debtor and her husband and presented only issues relating to the debt owed and mortgage granted to Household Realty. There is nothing in the record to suggest that the state court was ever presented with the issue of the validity of the Credit Union's lien. Thus, this court cannot find the requisite identity of issues underpinning the state court judgment necessary to afford it collateral estoppel effect in this bankruptcy proceeding.

To the extent that the Trustee is arguing that any judgment of foreclosure extinguishes a party's lien if the judgment does not specifically address the validity of a party's lien and include that party's lien in the list of liens marshaled by the court, this court disagrees. The Foreclosure Judgment lists the order of priority that proceeds from a sale of Debtor's property should be paid, with the clerk of courts being first to receive payment for costs followed by the Wood County Treasurer and Auditor and Household Realty. The state court then ordered that any balance remaining be paid to the clerk of courts to await further order of the court. Thus, the state court apparently anticipated further proceedings to determine payment of the balance of the sale proceeds. *Cf. Dabney v. Rose Bros. Co.*, 47 Ohio App 278, 280 (1933) (recognizing that a court may properly defer consideration of the validity of liens until after the sale has been completed).

In light of the foregoing, the court cannot presently conclude that the Credit Union has lost its secured status with respect to the real property serving as the collateral for its loan to Debtor. The facts alleged by the Credit Union are not otherwise disputed by the Trustee or by Debtor.

Relief from the automatic stay under 11 U.S.C. § 362(d) is in the alternative. A party in interest need only be entitled to relief under one of the two subsections to prevail. A party in interest, such as the Credit Union, is entitled to relief under § 362(d)(2) when the debtor has no equity in the property and the property is not necessary to an effective reorganization. As this is a Chapter 7 liquidation case, the debtor's residence is not necessary to an effective reorganization. The Credit Union offers an Appraisal Report that is not disputed, indicating that the value of the Property is $156,000. Debtor owes a debt to the Credit Union in the amount of $128,564 and to Household Realty in the amount of $46,934.03. The total amount of both debts thus exceeds the value of the Property. The Credit Union is, therefore, entitled to relief from stay under § 362(d)(2). But given the circumstances of this case and for the reasons discussed below, the relief granted will consist of

modifying, rather than terminating, the automatic stay. *See* 11 U.S.C. § 362(d) (providing that relief may consist of "terminating, annulling, modifying, or conditioning" the stay).

The Credit Union also requests that the court direct abandonment of the Property by the Trustee, as burdensome and of inconsequential value or benefit to the estate, pursuant to 11 U.S.C. § 554(b). But under the circumstances of this case, that determination is premature. The Credit Union seeks relief in order to return to state court to enforce its mortgage lien. Nevertheless, in light of the procedural posture of the state court case, with the state court's order vacating its Foreclosure Judgment a nullity, it is at least conceivable that the Credit Union could return to state court, move once again for Rule 60(b) relief, and be denied such relief. And the Trustee may very well intervene in the state court action. It is also conceivable that the state court would then, after confirmation of a sale of the Property, extinguish any lien of the Credit Union. If this occurs, there would in fact be equity in the Property for the benefit of unsecured creditors in this case. While this scenario is perhaps unlikely given the state court's original ruling on the Credit Union's Rule 60(b) motion, its possibility renders abandonment of the Property from the bankruptcy estate premature. The Credit Union may, however, renew its motion to abandon the Property if and when the state court acknowledges the validity of its mortgage lien.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Trustee's Objection [Doc. # 24] to Bay Area Credit Union's Motion for Relief from Stay and Abandonment is hereby **GRANTED in part** and **OVERRULED in part**; and

IT IS FURTHER ORDERED that Bay Area Credit Union's Motion for Relief from Stay and Abandonment [Doc. #3] is **GRANTED** to the extent it seeks relief from the automatic stay and is **DENIED** to the extent it seeks abandonment of Debtor's property; and

IT IS FINALLY ORDERED that the automatic stay, imposed pursuant to 11 U.S.C. § 362(a),

is modified with respect to Bay Area Credit Union, its successors and assigns, to the extent necessary for it to take steps in order to obtain a determination of the validity and priority of its lien in the state court action. At that time, the Credit Union may renew its motion in this court for abandonment. [1]

/s/ Mary Ann Whipple
Mary Ann Whipple
United States Bankruptcy Judge

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Debtor Dorothy Heebsh received her Chapter 7 discharge in this case on August 13, 2004. Under 11 U.S.C. § 362(c)(2), according to the terms of the statute, her discharge effected a partial termination of the automatic stay. But under § 362(c)(1), the automatic stay of acts against property of the estate, such as foreclosing a lien, continues until the property in issue is no longer property of the estate. For that reason, modification of the stay is necessary for the Credit Union to proceed further in state court. Any abandonment of the Property from the estate on further motion of the Credit Union would terminate the balance of the stay now remaining in effect. The court also notes that Household Realty Corporation requires and has not sought relief from the automatic stay should it desire to proceed with and complete its foreclosure.