



ORDERED in the Southern District of Florida on April 13, 2015.

**Robert A. Mark, Judge
United States Bankruptcy Court**

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

_____)	
In re:)	CASE NO. 14-33599-RAM
)	CHAPTER 13
RENE P. JOACHIN,)	
)	
)	
Debtor.)	
)	
_____)	

**ORDER DEEMING SALE VOID, DENYING MOTION TO RATIFY,
DENYING MOTION TO DISMISS, AND SETTING FURTHER REQUIREMENTS**

The Debtor filed his chapter 13 petition on October 24, 2014. The case was filed to stop a foreclosure sale of his condominium scheduled for October 27, 2014 in a state court foreclosure case initiated by Harbour Pointe of Miami

Condominium Association, Inc. ("Harbour Pointe"). At 11:06 a.m., on October 24, 2014, the Debtor's counsel faxed a Suggestion of Bankruptcy to Harbour Pointe's counsel. Unfortunately, the Suggestion of Bankruptcy was filed in state court Case No. 13-1960, not in Case No. 14-1960-CC-05, the case number of the foreclosure case. Nevertheless, it is undisputed that Harbour Pointe was aware of the Debtor's bankruptcy during the morning of October 24th and took no action to cancel the October 27th sale [DE #41-1].

Because the Suggestion of Bankruptcy was filed in the wrong case and because Harbour Pointe failed to notify the state court Clerk to cancel the sale, the foreclosure sale went forward on October 27, 2014. Vivian Nagel was the successful bidder on the Debtor's property located at 1251 N.E. 108th Street, Unit 220, Miami, FL 33161 (the "Property"). The Certificate of Title was issued on November 19, 2014 to Ms. Nagel. A Writ of Possession was issued on December 1, 2014.

The Debtor claims that he did not know the foreclosure sale went forward until the sheriff attempted to execute on the Writ of Possession, approximately 2 months after the sale took place. On January 6, 2015, the Debtor filed a motion to vacate the foreclosure sale in state court. On January 15, 2015, the state court stayed the state court case but, according to Debtor's

counsel, the state court declined to vacate the sale pending the outcome of the motions now before this Court.

As noted, the Debtor and Debtor's counsel both claim that they were unaware that the foreclosure sale took place on October 27, 2014 until after the Writ of Possession was issued and executed. Ms. Nagel was also unaware of the bankruptcy until after she obtained the Writ of Possession. Harbour Pointe never acted to stop or vacate the October 27, 2014 foreclosure sale.

Harbour Pointe has filed two motions seeking to validate the October 27th foreclosure sale: The Motion to Ratify Post-Petition Transaction and Request for Attorney Fees [DE #35] (the "Motion to Ratify") and the Motion to Dismiss and/or Annul the Automatic Stay and Request for Attorney Fees [DE #37] (the "Motion to Dismiss"). The Debtor filed a reply to both motions on March 2, 2015 [DE #41].

The Court held a preliminary hearing on the Motion to Ratify and the Motion to Dismiss on March 10, 2015 and entered the Order Setting Further Hearing on Creditor Motions [DE #47]. That Order scheduled a further hearing on April 9, 2015. The Order Setting Further Hearing on Creditor Motions also required the Debtor to file an amended plan and meet certain other requirements. Based on the record and all relevant matters, the Court announced at the April 9th hearing its findings and

conclusions related to the Motion to Ratify and the Motion to Dismiss.

In sum, the only blameless party in this unfortunate saga is Ms. Nagel, the buyer at the foreclosure sale. The Debtor's counsel filed the Suggestion of Bankruptcy in the wrong case and compounded his error by not following up to ensure that the sale was cancelled. However, Harbour Pointe was properly notified of the bankruptcy and took no action to cancel the sale or to otherwise stop the foreclosure process that proceeded through sale, issuance of a Certificate of Title, and issuance of, and attempted execution of, a Writ of Possession. For these reasons, and the additional reasons stated on the record, which are incorporated here by reference, the Court concludes as follows:

A. The October 27, 2014 foreclosure sale of the Debtor's Property is void. Moreover, there is no cause to annul the automatic stay *nunc pro tunc* to the petition date to validate the sale when Harbour Pointe knew of the bankruptcy prior to the sale. *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999) ("Once the creditor receives actual notice, the burden shifts to the creditor to prevent violations of the automatic stay.") and *In re Webb*, BAP No. 11-8016, 2012 WL 2329051, at *14 (B.A.P. 6th Cir. Apr. 9, 2012) ("In instances in which a foreclosure sale has been put in motion pre-petition,

creditors have an affirmative duty to stop the sale from continuing once they receive actual notice of a debtor's bankruptcy filing.").

B. Harbour Pointe improperly relies on 11 U.S.C. §549(c). Section 549(c) protects certain post-petition transfers from avoidance, but it does not provide a basis to validate a certificate of title issued pursuant to a foreclosure sale which took place post-petition and is void. *40235 Washington Street Corp. v. Lusardi*, 329 F.3d 1076, 1081 (9th Cir. 1992) ("The purpose of the automatic stay is to protect debtors from their creditors while bankruptcy proceedings are underway. The purpose of section 549, in contrast, is to provide a just resolution when the debtor himself initiates an unauthorized postpetition transfer." (citations omitted)). See also *Bustamante v. Cueva (In re Cueva)*, 371 F.3d 232, 238 (5th Cir. 2004) and *In re Striblin*, 349 B.R. 301, 303-04 (Bankr. M.D. Fla. 2006).

Based on these findings, it is -

ORDERED as follows:

1. The Motion to Dismiss [DE #37], to the extent it seeks dismissal, is denied without prejudice. The Motion to Dismiss, to the extent it seeks *nunc pro tunc* relief from the automatic stay, is denied.

2. The Motion to Ratify [DE #35] is denied.

3. The Debtor shall file a Second Amended Chapter 13 Plan which provides for post-petition payments to Harbour Pointe through the plan.

4. Harbour Pointe shall return to Vivian Nagel all monies paid by Ms. Nagel to Harbour Pointe as a result of the October 27, 2014 foreclosure sale. Harbour Pointe shall also return all monies paid by Ms. Nagel to Harbour Pointe for pre-petition and post-petition association fees.

5. The Clerk of the Courts for Miami-Dade County, Florida shall return to Vivian Nagel all fees collected or retained as a result of the October 27, 2014 foreclosure sale held in Case No. 14-1960 CC 05.

6. All payments to Ms. Nagel shall be made to Silvio Amico, Esq., counsel for Ms. Nagel. Mr. Amico's address is 10691 N. Kendall Drive Suite 300, Miami, Florida 33176.

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Nancy Neidich, Trustee

**(Attorney Schwitalla is directed to serve a copy of this
Order on all interested parties)**