




SO ORDERED.

SIGNED this 11th day of July, 2016.



LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION**

In re:)	
)	
LARRY DARNEL DANIEL,)	Case No. 16-80216
)	Chapter 13
Debtor.)	
_____)	

**MEMORANDUM AND ORDER GRANTING JONES FAMILY HOLDINGS, LLC’S
MOTION FOR RELIEF FROM AUTOMATIC STAY TO PROCEED WITH EVICTION**

THIS MATTER came before the court on June 16, 2016 on the Motion by Jones Family Holdings, LLC (“JFH”), for Relief From Automatic Stay to Proceed with Eviction pursuant to 11 U.S.C. § 362(d). At the hearing, Edward Dilone appeared on behalf of JFH, Benjamin Busch appeared on behalf of Larry Darnel Daniel (the “Debtor”) who was also present, and Benjamin Lovell appeared on behalf of the Chapter 13 Trustee. Based upon the pleadings, the evidence presented at the hearings, the record in this case, and applicable law, the court concludes that the Motion must be granted.

BACKGROUND

The basic facts that are relevant to this motion do not appear to be in dispute. Prior to filing for bankruptcy, the Debtor owned and resided at real property located at 6 Bonham Court, Durham, North Carolina, 27703 (the “Property”), subject to a mortgage with State Employees Credit Union. The Property is within the Ashley Forest Association of Durham, Inc. (the “Association”) subdivision, with assessments due monthly to pay for the subdivision’s common expenses. On November 19, 2013, the Association filed a claim of lien on the property for ongoing nonpayment of the monthly assessment pursuant to North Carolina law. On March 24, 2014 the Association authorized foreclosure of the Property, and a substitute trustee was appointed to conduct the sale. On April 2, 2014 the substitute trustee sent the Debtor a demand letter for the past-due balance, and the Debtor paid the requested sum on May 19, 2014. However, the substitute trustee asserted that the Debtor’s payment did not completely satisfy the account and proceeded to foreclose on the claim. The Association was granted an Order of foreclosure on October 16, 2014, and the Property was sold at auction just over one year later. JFH made the highest bid of \$4,308.00 on December 18, 2015, and the upset-bid period closed December 28, 2015. On February 5, 2016, the substitute trustee delivered a foreclosure deed to JFH. JFH’s Mot. Automatic Stay Ex. 1, ECF No. 30. JFH then obtained a writ of possession. *Id.* at Ex. 2. The instant case was filed one day prior to the forced sheriff’s eviction, which was scheduled for March 11, 2016.

On May 11, 2016, JFH filed its Motion seeking relief from the automatic stay as to the Property so that it could proceed with eviction and assume possession of the Property. The court held a hearing on June 2, 2016, with Mr. Dilone and Mr. Lovell in attendance. At the request of the parties, the hearing was continued to June 16, 2016, at which time the Debtor opposed the requested relief. The foreclosure, sale, and subsequent transfer of the Property are contested by

the Debtor in an adversary proceeding (the “Adversary Proceeding”). The Debtor claims that the foreclosure sale constitutes a fraudulent transfer pursuant to 11 U.S.C. § 548(a)(1)(B), and that the substitute trustee breached his fiduciary duty in the process of selling the Property.¹ Because of the pending Adversary Proceeding, the Debtor contends that relief from the stay cannot be granted, as the Adversary Proceeding goes to the heart of whether JFH is the true owner of the Property.

LEGAL STANDARD

Pursuant to 11 U.S.C. § 362(a)(2), the filing of a bankruptcy petition operates as a stay against the enforcement of a judgment obtained prepetition against either the debtor or property of the estate, as defined by 11 U.S.C. § 541. Section 362(d) provides relief from stay, with (d)(1) awarding relief for cause. The Code provides no definition for “cause,” so courts must determine whether relief is appropriate on a case-by-case basis. *Claughton v. Mixson*, 33 F.3d 4, 5 (4th Cir. 1994). Subsection 362(d)(2) allows a party in interest to seek relief from stay where the debtor does not have equity in the property on which the party has a claim, and the property is not necessary to an effective organization. Section 362(g) instructs that the party requesting relief has the burden of proof as to the issue of the debtor’s equity in the property, and the party opposing relief has the burden of proof on all other issues. *See, e.g., In re Joyner*, 416 B.R. 190, 192 (Bankr. M.D.N.C. 2009). If the moving party meets its burden of persuasion, the burden shifts to the opposing party to demonstrate why the stay should remain in place. *In re Busch*, 294 B.R. 137, 140-41 (B.A.P. 10th Cir. 2003).

¹ Among other objectives in Adversary Proceeding 16-9014, the Debtor is seeking to avoid the transfer of the property to JFH as a fraudulent transfer under 11 U.S.C. § 548. *See In re Roszkowski*, 494 B.R. 671 (Bankr. M.D.N.C. 2013). The Chapter 13 Trustee has joined the proceeding as a necessary party.

DISCUSSION

For JFH to prevail in its Motion, JFH must demonstrate that cause exists to grant relief from the stay. Alternately, JFH must prevail on either of the two elements set forth in § 362(d)(2), that the Debtor has no equity in the Property or that the Property is not necessary to an effective reorganization. The Debtor must prevail on both elements to prevent the stay from being lifted.

Cause

JFH asserts that the automatic stay should be lifted because the Debtor no longer owns the Property, and thus the Property should not be protected by the stay imposed by § 362(a). The determination of property rights in assets belonging to the bankruptcy estate is governed by state law. *Butner v. United States*, 440 U.S. 48, 54 (1979). Under North Carolina law, after each bid at the sale on the foreclosed real estate, a 10-day upset bid period follows. N.C. GEN. STAT. § 45-21.27. Once the 10-day upset bid period has passed, the rights of the parties to the foreclosure sale become fixed. § 45-21.29A. Pursuant to § 45-21.29(k), the purchaser at the foreclosure sale may then seek an order for possession from the clerk of the superior court of the county in which the property is located with 10 days' notice given to possessory parties, and under § 45-21.29(l) the sheriff shall execute an order for possession and remove all occupants and their personalty from the property.

In applying North Carolina law, bankruptcy courts in North Carolina have consistently held that, in accordance with N.C. GEN. STAT. § 45-21.29A, once the 10-day upset period has passed, the rights of the parties become fixed and the debtor no longer legally owns the property, giving sufficient cause to lift the stay. For instance, in *In re Sarver*, No. 10-81039C-13D, 2010 WL 3501795 (Bankr. M.D.N.C. Sept. 1, 2010), Judge Stocks found, “[U]nder North Carolina

law a debtor's equity of redemption is lost upon the expiration of the ten-day period following the filing of the report of sale if during the ten-day period no upset bid is filed and no injunctive relief is obtained [under state law]. . . .” *Id.* at *2. In *Sarver*, the debtor filed a bankruptcy petition 1 minute and 36 seconds after close of business on the tenth and final day of the upset bid period, and the stay was lifted because § 45-21.27 requires that the last notice of upset bid be filed by the close of normal business hours and the debtor was too late. *Id.* at *3. Unlike in *Sarver* where a razor-thin 96 seconds tipped matters in favor of the creditor, here the Debtor filed his bankruptcy petition months later — on the eve of eviction by the sheriff, after the upset bid period closed, after a foreclosure deed was issued, after the deed was recorded, after JFH acquired an order for possession, and after JFH had turned to the sheriff to execute its order.

The Eastern District of North Carolina has similarly found that under North Carolina law, following the expiration of the upset bid period, a debtor no longer owns the subject real property and therefore cannot withstand a motion for relief from stay. In *In re Alexieff*, No. 12-03248-8-JRL, 2012 WL 2064584 (Bankr. E.D.N.C. June 7, 2012), the debtor filed for bankruptcy after the upset period but before recordation of the foreclosure deed to the purchaser. In *In re Hawkins*, No. 11-02379-8-JRL, 2011 WL 5909627 (Bankr. E.D.N.C. June 9, 2011), the debtor filed for bankruptcy after the upset period but before the execution of a commissioner’s deed. And in *In re Salinas*, No. 12-02303-8-ATS, Adv. No. 12-00304-8-ATS, 2014 WL 657400 (Bankr. E.D.N.C. Feb. 20, 2014) the debtor filed for bankruptcy after the Report of Foreclosure Sale and the Substitute Trustee’s Deed had been drawn up and filed, but before eviction.² In all

² The debtor in *Salinas* filed a motion in state court seeking to set aside the order allowing the foreclosure sale 48 days after the upset bid period closed, which was denied. In denying the motion, the Clerk of Court outlined the statutory mechanisms available to the debtor to challenge the order allowing the foreclosure sale:

[P]laintiffs had failed to appeal the original order to the Wake County Superior Court, which would then have assessed the clerk's order and finding of fact de novo; failed to assert equitable defenses as permitted by N.C.G.S. § 45–21.34; and failed to seek injunctive relief prior to

three cases, relief from stay was granted, just as relief from stay was granted in *Sarver*, because legal title had passed to the purchaser.³

Here, it is clear that the Debtor sat on his rights and failed to take any action prior to the completion of the foreclosure sale. North Carolina law directs, and bankruptcy courts have upheld, that the running of the upset bid period fixes property rights in favor of the purchaser. JFH is now the owner of the Property, and cause therefore exists to modify the automatic stay.⁴

Debtor's equity in the property and necessary for effective reorganization

Alternately, the stay should be lifted under § 362(d)(2) because the Debtor has failed to meet his burden in opposing granting relief. At issue is whether the Debtor has any equity in the Property due to contested ownership, and whether the Property is necessary for an effective reorganization. Taking the second element first, the Debtor has made no argument, either in his response brief filed prior to the hearing, or orally at the hearing, that the Property is necessary for an effective reorganization. Assuming that the Debtor had made such an argument, the Debtor would still be unsuccessful in opposing granting relief due to a lack of equity in the Property. JFH purchased the Property at foreclosure, and is now asserting that the Debtor lacks an interest in the Property, thus lacking equity. JFH provided evidence of its ownership in the form of a recorded foreclosure deed, demonstrating its legal claim to the property and meeting its prima

expiration of the upset bid period, such that the issues were moot and there was “no good cause to set aside either the order allowing foreclosure or the foreclosure sale.”

2014 WL 657400 at *1.

³ Once legal title has passed to the purchaser, the debtor is left with a mere possessory interest. JFH has properly recognized that this possessory interest is subject to the automatic stay by filing the present motion seeking relief from the stay to proceed with its remedies under state law.

⁴ Though applying Maryland law and in the context of a motion for preliminary injunction, *Scott v. Bierman*, 429 Fed.Appx. 225, 2011 WL 1807330 (4th Cir. 2011) is also instructive on this point, denying a motion for preliminary injunction where a foreclosure sale had become final prepetition on the grounds that the real property at issue was not part of the bankruptcy estate.

facie burden under § 362(g). A certified copy of the deed was entered into evidence as Exhibit 1 at the June 16, 2016 hearing. Since the Debtor no longer has legal title to the Property, any difference between the fair market value of the Property and the liens encumbering the Property is not presently an asset of the Debtor.

In response, the Debtor claims the transfer was fraudulent under 11 U.S.C. § 548 and that the substitute trustee violated his fiduciary duty as set forth in the Debtor's Adversary Proceeding, and that the Property should remain part of the estate. The Debtor also argues that since the Adversary Proceeding addresses JFH's ownership of the Property directly, the motion for relief must be denied while the Adversary Proceeding is adjudicated so as not to disturb or prejudice the Debtor's rights. The Debtor's argument is analogous to that of the Debtor in *In re Budd*, No. BAP CC-11-1015-MKKID, 2011 WL 4485190 (B.A.P. 9th Cir. July 12, 2011). In *Budd*, the debtor claimed property ownership by adverse possession, and a creditor holding a foreclosure deed sought relief from stay to evict the debtor. *Id.* at *1. At the time the creditor filed its motion for relief, the debtor had filed an adversary proceeding asserting invalidity or illegality of the foreclosure and eviction. *Id.* The court determined that the debtor's claims implicated the same state law claims that were in the eviction litigation, and that the claims did not need to be heard in the adversary proceeding, but could otherwise proceed in state court. *Id.* at *5. The court therefore granted relief from stay, despite the pending adversary proceeding. *Id.* at *5-6.

In his response to the motion for relief from stay, the Debtor did not cite, and the court has not found, any such case where the court denied relief from stay under the circumstances presented in this case. Here, the breach of fiduciary duty claim is a state law claim, and the outcome of that claim will have no impact on the Property. As for the Debtor's § 548 claim,

fraudulent transfer claims are premised on Property of the estate having already been transferred, and the outcome of litigating the fraudulent transfer claim is unaffected by whether relief from stay is granted since legal title already passed to JFH. Thus, the Adversary Proceeding is no barrier to granting relief from stay.

CONCLUSION

As legal ownership of 6 Bonham Court, Durham, North Carolina, 27703 passed to Jones Family Holdings, LLC on December 28, 2015 when the foreclosure sale upset bid closed, the court finds that adequate grounds and good cause exist to grant Jones Family Holdings, LLC relief from the automatic stay under 11 U.S.C. § 362(d)(1), or alternately under § 362(d)(2). Jones Family Holdings, LLC is permitted to pursue its state law remedies with respect to the Property.

NOW THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Pursuant to 11 U.S.C. §362(d)(1) and (d)(2), Jones Family Holdings, LLC is GRANTED relief from the stay to pursue its state law remedies, including eviction of the Debtor from the Property.
2. Jones Family Holdings, LLC's request that this order be effective immediately upon entry and that the stay of Bankruptcy Rule 4001(a)(3) be lifted is DENIED.

END OF DOCUMENT

PARTIES TO BE SERVED

Larry Darnel Daniel
16-80216 C-13

Larry D. Daniel
6 Bonham Ct.
Durham, NC 27703-9230

Benjamin Busch
4220 Apex Hwy Suite 230
Durham, NC 27713

Edward D. Dilone
P.O. Box 12107
Durham, NC 27709

Richard M. Hutson
P.O. Box 3613
Durham, NC 27702