

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

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In re:

CASE NO. 01-24220

SANDRALEE RODGERS,

Debtors.

DECISION & ORDER

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**BACKGROUND**

On November 6, 2001, Sandralee Rodgers (the "Debtor") filed a petition initiating a Chapter 13 case. On December 7, 2001, the Debtor filed the Schedules and Statements required by Section 521 and Rule 7001, which indicated that: (1) her home address was 545 State Street, Rochester, New York, where she operated a country music bar; (2) she and her former spouse were the owners of an income-producing single family residence located at 370 Lake Road, Webster, New York (the "Webster Property"), which: (a) had a current market value of \$120,000.00; (b) was rented for \$650.00 per month; and (c) had a \$7,302.00 lien against it for unpaid real estate taxes; (3) she was also the owner of a second single family residence located at 57 Appleton Street, Rochester, New York, where a friend lived and paid all of the expenses of the property; (4) on or about November 9, 2001, the City of Rochester completed tax foreclosure sales of properties she owned which were located at 25 Darien Street and 19 Lorenzo Street; and (5) on or about

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November 9, 2001, the County of Monroe (the "County") completed a tax foreclosure sale of the Webster Property; and (6) she had no unsecured creditors.

A Chapter 13 plan (the "Plan") filed by the Debtor on December 7, 2001, provided for the payment of \$250.00 per month to the Chapter 13 Trustee in order to pay: (1) \$508.50 in unpaid fees for the Debtor's attorney; (2) \$400.00 to the New York State Department of Taxation and Finance; and (3) \$7,302.00 to the County for the unpaid real estate taxes and legal fees due for the Webster Property, together with interest at eight percent (8%) per annum.

On November 19, 2001, the Debtor filed a motion (the "Contempt Motion") which alleged that: (1) on or about November 5, 2001, the Debtor learned that on October 25, 2001 there had been a real estate tax foreclosure auction sale of the Webster Property (the "Auction Sale") as part of an In Rem Real Estate Tax Foreclosure proceeding commenced by the County (the "Tax Foreclosure Proceeding"); (2) after the Debtor's petition had been filed, but before a deed for the Webster Property had been delivered, the Debtor's attorney had attempted to prevent the County from delivering a deed by: (a) on November 6, leaving a voice mail message for one of the attorneys for the County,

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which advised her that the Debtor had filed a bankruptcy petition and requested that the County not deliver a deed; (b) on November 6 and November 7, delivering copies of the petition to the County Offices along with a letter which requested that no deed be delivered; and (c) on November 7, having a telephone conversation with one of the attorneys for the County during which the Debtor's attorney was advised that the County did not believe that the Debtor had any interest in the Webster Property at the time of the filing of her petition because her equity of redemption had been extinguished, so that the delivery of a deed would not violate the stay provided for by Section 362 (the "Stay"); (3) on November 7, 2001, the Referee in the Tax Foreclosure Proceeding delivered a deed of the Webster Property (the "Webster Property Deed"); (4) the Webster Property Deed was recorded in the Monroe County Clerk's Office on November 8, 2001; and (5) the Webster Property had an assessed value of \$69,100.00.

The Contempt Motion further alleged that: (1) when she filed her petition, because the Webster Property Deed had not yet been delivered, the Debtor was still the owner of the Property, and therefore, the Property was property of the estate under Section

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541<sup>1</sup>; (2) the County violated the Stay provided for by Sections 362(a)(1), 362(a)(3) and (a)(6)<sup>2</sup> when it allowed the Referee to deliver the Webster Property Deed after the Debtor had filed her

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<sup>1</sup> Section 541 provides that:

(a) The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541 (2001).

<sup>2</sup> Section 362 provides in part that:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]

11 U.S.C. § 362 (2001).

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petition; (3) Section 28 of the Monroe County In Rem Tax Foreclosure Act (the "Foreclosure Act"), which governs real estate tax foreclosures by the County, makes it clear that it is only upon the recording of a deed that all of the interests of the owner, including any equity of redemption, are terminated<sup>3</sup>; (4) because the County had notice of the Debtor's filing before it allowed the Referee to deliver and record the Webster Property Deed, it had willfully violated the Stay; (5) the Debtor wished to and was able to pay the unpaid real estate taxes and legal fees due the County over the term of the Plan; and (6) even if the Court were to find that the Webster Property was not property of the estate and the Stay did not apply so as to prevent the post-petition delivery and recording of the Webster Property Deed, because the Property had an assessed value of \$69,100.00 and was sold for a bid of \$7,302.26, the

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<sup>3</sup> Section 28 provides that:

Upon execution and recording of such deed the grantee shall be seized of an estate in fee simple absolute ... and all persons including the state, infants, incompetents, absentees and nonresidents, persons in prison and all other persons or corporations whether under disability or not, who may have had any right, title, interest, claim, lien or equity of redemption in, to or upon such parcel of land shall be forever barred and foreclosed of all such right, title, interest, claim, lien or equity of redemption (emphasis added).

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transfer was for less than reasonably equivalent value and, therefore, was an avoidable fraudulent conveyance under Section 548.<sup>4</sup>

The Contempt Motion requested that the Court enter an Order: (1) pursuant to Section 362(h), finding the County in contempt for having willfully violated the Stay; (2) pursuant to Section 549, declaring the post-petition conveyance of the Webster Property to be a nullity; and (3) pursuant to Section 105, enjoining any act by anyone other than the Debtor to exercise dominion or control over the Webster Property.

On November 27, 2001, the County filed a Memorandum of Law in Opposition to the Contempt Motion (the "County Memorandum") which: (1) asserted that it is well-settled New York Law that the right of a mortgagor/owner to redeem their interest in

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<sup>4</sup> Section 548 provides, in part, that:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -

(2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B) (i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation[.]

11 U.S.C. § 548 (2001).

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foreclosed real property is extinguished at the time of a mortgage foreclosure public auction sale<sup>5</sup>; (2) the New York Court of Appeals in its decision in *Tuthill v. Tracy*, 31 N.Y. 157, 162 ("*Tuthill*"), held that it was the foreclosure and sale that barred the mortgagor's equity of redemption, not the delivery of a deed; (3) Bankruptcy Courts applying New York Law have also consistently held that it is the foreclosure sale, not the delivery of a deed, which extinguishes the right to redeem; (4) Section 34(9) of the Foreclosure Act stated that, except as otherwise provided, In Rem Tax Foreclosures would be regulated by the civil practice law and rules applicable to mortgage foreclosures<sup>6</sup>; (5) this Court, Hon. Edward D. Hayes presiding,

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<sup>5</sup> The underlying objective of a foreclosure action is to extinguish the right of redemption of all interests in the property subordinate to that of the foreclosing plaintiff and [divest [sic] complete title in the purchaser at the foreclosure sale. That right of redemption, however, is not extinguished by the rendering of a judgment of foreclosure and sale, final though it may be. Rather the right to redeem survives up to the moment of an actual sale pursuant to the foreclosure judgment. Significantly, when the phrases "sale" or "actual sale" are employed, they are intended to refer to the auction sale which [proceeds] precedes [sic]the passing of actual title at the closing from referee to bidder. Thus the right to redeem is extinguished when the property is "struck down" at the auction.

Bruce J. Bergman, Bergman on New York Mortgage Foreclosures, § 27.02(2) (2001).

<sup>6</sup> Section 34(9) provides that:

Except as otherwise provided herein such action in rem to foreclose a tax lien shall be regulated by the provisions of the civil practice law and rules and by all other provisions of law and rules of practice applicable to foreclosure of a mortgage on real

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had held in his decisions in *In re Smith*, 7 B.R. 106 (Bankr. W.D.N.Y. 1980) and *In re Upham*, 48 B.R. 495 (Bankr. W.D.N.Y. 1985), that real property purchased at a foreclosure sale conducted prior to a mortgagor's filing of a bankruptcy petition was not part of the bankruptcy estate even though no deed had been delivered, because under New York Law, the foreclosure sale of real property effectively cut off all of the legal and equitable interests the mortgagor had in the property; (6) the Bankruptcy Court for the Western District of Pennsylvania in its decision in *In re Pulcini*, 261 B.R. 836 (Bankr. W.D.Pa. 2001), ("*Pulcini*") applied New York Law and held that once a public auction sale had taken place, the purchaser, not the mortgagor, possessed the equitable interest in the foreclosed property; and (7) for the same reasons set forth by the United States Supreme Court in its decision in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S.Ct. 1757 (1994), ("*BFP*") the Court should find that: (a) the proceeds received for the Webster Property in the properly conducted Tax Foreclosure Proceeding were reasonably equivalent value; and (b) the sale was not an avoidable fraudulent conveyance.

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property[.]

Monroe County In Rem Tax Foreclosure Act § 34(9).



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In a December 12, 2001 Affidavit, the Debtor asserted that: (1) neither she nor her former spouse had ever received notice of the intention of the County to auction the Webster Property; and (2) although it was currently being utilized as rental property, the Debtor intended to reside at the Webster Property during her retirement.

In a December 12, 2001 Memorandum (the "Debtor Memorandum"), the Debtor asserted that: (1) the decisions in *In re Butchman*, 4 B.R. 379 (Bankr. S.D.N.Y. 1980), *In re Smith*, 7 B.R. 106 (Bankr. W.D.N.Y. 1980), *In re Cretella*, 42 B.R. 526 (Bankr. E.D.N.Y. 1984), and *In re Upham*, 48 B.R. 495 (Bankr. W.D.N.Y. 1985), which had held that, in a mortgage foreclosure proceeding, once an auction sale had taken place and the debtor's time to redeem had expired pre-petition, the Debtor had no legal or equitable interest in the foreclosed property for purposes of Sections 362 and 541, were incorrect; (2) the proper interpretation of New York Law is that it is only after a deed is delivered that all of the interests of an owner of property sold as part of a mortgage or real estate tax foreclosure proceeding are terminated; (3) at the time of a mortgage foreclosure sale, there is only an agreement between the referee and the purchaser to buy and sell the foreclosed property, there

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is not a transfer of ownership; (4) until a deed is delivered as a part of an In Rem Mortgage or Tax Foreclosure Proceeding, the owner has the exclusive right to possession, bears the risk of loss, and is liable for anyone injured on the property; and (5) the Debtor had a legal interest in the Webster Property at the time of the filing of her petition, and the Stay was willfully violated when that legal title was transferred by the post-petition delivery of the Webster Property Deed.

In a December 17, 2001 Memorandum, the County once again asserted that the Webster Property was not property of the estate for purposes of Sections 362 and 541 after the Debtor's equity of redemption had expired at noon on the day preceding the Auction Sale.

On December 11, 2001, the attorneys for William M. Lissow ("Lissow"), the grantee of the Webster Property Deed, filed an Affidavit and Memorandum of Law in Opposition to the Contempt Motion.

## **DISCUSSION**

### **I. Summary of Decision**

As in the case of regularly conducted New York In Rem Mortgage Foreclosure Proceedings, in a New York In Rem Tax Real Estate Tax Foreclosure Proceeding such as that conducted by the

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County of Monroe, where the governing statute provides for judicial involvement and a public sale, once the owner's right to redeem has been extinguished by the completion of the public sale: (1) the foreclosed property is not property of the estate for purposes of Section 541, even though the owner may retain some incidents of ownership between the time of the public sale and the time when the referee delivers a deed; and (2) the Stay provided for by Section 362 does not apply to prevent the referee from delivering a deed.

In a regularly conducted New York In Rem Real Estate Tax Foreclosure Proceeding such as that conducted by the County of Monroe, where the governing statute provides for judicial involvement and a public sale: (1) the proceeds received at the sale constitute reasonably equivalent value; and (2) the transfer of the property by the public sale and the delivery of a deed by the referee is not an avoidable fraudulent conveyance.

**II. The Equity of Redemption**

A. Mortgage Foreclosure Proceedings

I agree with the County that the decisions of the State and Federal Courts, including Bankruptcy Courts, which have addressed the issue have correctly decided that: (1) in a regularly conducted mortgage foreclosure proceeding, completion

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of the public sale, not the delivery of a deed, extinguishes the mortgagor's right to redeem the mortgaged property, See *Tuthill v. Tracy*, 31 N.Y. 157, 162; *Belsid Holding Corp. v. Dahm*, 12 A.D.2d 499 (1960); *Citibank, N.A. v. Press Realty Corp.*, 139 Misc.2d 558 (1988); *In re Butchman*, 4 B.R. 379 (Bankr. S.D.N.Y. 1980); *In re Smith*, 7 B.R. 106 (Bankr. W.D.N.Y. 1980); *In re Cretella*, 42 B.R. 526 (Bankr. E.D.N.Y. 1984); and *In re Upham*, 48 B.R. 495 (Bankr. W.D.N.Y. 1985); and (2) in the event that a mortgagor files a bankruptcy petition after the completion of the public sale but before the referee delivers a deed: (a) the mortgaged property is not property of the bankruptcy estate for purposes of Section 541, because the mortgagor no longer has an equitable interest in the property, and, therefore, the Stay provided for by Section 362(a)(3) does not apply to prevent the referee from delivering a deed; and (b) the Stay provided for by Sections 362(a)(1) and 362(a)(6) does not apply to prevent the referee from delivering a deed because: (i) the administration of the bankruptcy estate would not be affected by the loss of any remaining legal interests the debtor may still retain in the mortgaged property; (ii) the delivery of a deed would affect only the mortgaged property in which the debtor has no equitable interest and not the debtor's personal liability; (iii) under

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these circumstances and for bankruptcy purposes the delivery of a deed is a ministerial act, See *In re Pulcini*, 261 B.R. 836 (Bankr. W.D.Pa. 2001); and (iv) the delivery of a deed would not frustrate any other policies or purposes underlying the enactment of the Stay.

In a regularly conducted New York In Rem Mortgage Foreclosure Proceeding, once the ability of the mortgagor to redeem has expired at the completion of the public sale, the mortgagor has lost any equitable interest in the property. Even though, as the Debtor asserts, the mortgagor may still retain some of the incidents of ownership until the referee delivers a deed, such as the right to possession and record legal title, those retained interests in the property, without an equitable interest or the ability to reacquire the equitable interest,<sup>7</sup> are not sufficient for the property to be considered to be property of the estate for purposes of Section 541, since neither the estate nor its creditors can benefit from these retained interests.

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<sup>7</sup> Having lost any equitable interest in the property when the public sale is completed, there is nothing in the Bankruptcy Code or Rules which would afford the mortgagor the ability in a bankruptcy proceeding to regain that equitable interest, either by bringing the foreclosed mortgage current or paying it off. See *In re Cretella*, 42 B.R. 526, 530 (Bankr. E.D.N.Y. 1984).

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By the time the "hammer has fallen" at the public sale, the mortgagor has had sufficient opportunities, both before and after the entry of a judgment of foreclosure and sale, to redeem the property by paying whatever amounts were necessary to have the foreclosure action discontinued. Therefore, terminating the interests of the mortgagor in the property at the completion of the public sale for bankruptcy purposes provides needed finality for purchasers at mortgage foreclosure sales.

In its Decision & Order in *In re Moss*, 270 B.R. 333 (Bankr. W.D.N.Y. 2001), this Court stated that the Stay was enacted to: (1) preserve the status quo for the benefit of the Debtor, the bankruptcy estate and the creditors of the estate; (2) prevent any actions against the Debtor's property or property of the estate; (3) prevent the continuing harassment of the Debtor; and (4) prevent actions by creditors that would negatively impact on the Bankruptcy Code's policy of equality of distribution.

Permitting the post-petition delivery of a deed by a referee in a mortgage foreclosure proceeding where the public sale has been completed prior to the filing of a bankruptcy petition does not frustrate any of the underlying purposes or policies for the enactment of the Stay provided for by Sections 362(a)(1) and 362(a)(6), in that: (1) the debtor's status with respect to an

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equitable interest in the property or the ability to redeem would not be affected because, once the public sale was completed, the debtor lost any equitable interest and there is nothing in the Bankruptcy Code or Rules that would afford the debtor the ability to reacquire that interest; (2) it would not be an affirmative act by the mortgagor to harass the debtor or attempt to force the debtor to pay the amounts due on the mortgage because once the public sale was completed the debtor lost any ability or right to pay off the mortgage and redeem the property; (3) it would not alter the relationships between the mortgagor and the debtor or the debtor and any of the debtor's other creditors because those rights had either been fully determined in the mortgage foreclosure proceeding or would not otherwise be determined solely by the delivery of a deed; (4) as discussed above, no property of the estate would be affected; and (5) terminating the debtor's remaining incidents of ownership, such as the right to possession and record legal title, would not affect the relationships between the debtor and the debtor's pre-petition creditors.

Therefore, I find that for purposes of Sections 362(a)(1) and 362(a)(6), the post-petition delivery of a deed by the referee in a regularly conducted New York In Rem Mortgage

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Foreclosure Proceeding where a public sale was completed pre-petition does not violate the Stay because it would not frustrate any of the policies underlying the enactment of the Stay.

B. Real Estate Tax Foreclosure Proceedings

In the event that an owner of real property has lost the right to redeem the property as part of a regularly conducted New York In Rem Real Estate Tax Foreclosure Proceeding, the law applicable to mortgage foreclosure proceedings should be extended to such real estate tax foreclosure proceedings should that owner file a bankruptcy petition. Therefore, once the ability to redeem has been lost pre-petition, the foreclosed property sold at a public sale is no longer property of the estate for purposes of Section 541, and the Stay provided for by Section 362 does not apply to prevent the delivery of a deed by a referee, See In re Comis, 181 B.R. 145 (Bankr. N.D.N.Y. 1994).

In the case of the Webster Property, the Foreclosure Act provides, and the Notice of Sale and Judgment of Foreclosure and Sale in the Tax Foreclosure Proceeding specifically provided, that the last opportunity for the Debtor to redeem the Webster Property was noon on the day preceding the October 25, 2001 public sale. In addition, as discussed above, the Foreclosure



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Act states that except as otherwise provided, the law of mortgage foreclosure proceedings is applicable. Therefore, there can be no question that in the Tax Foreclosure Proceeding of the Webster Property, the Debtor lost any right to redeem the Property at the latest at the time of the completion of the public sale on October 25, 2001, and that after that time the Debtor had no further equitable interest in the Property. Therefore, upon the filing of her petition on November 5, 2001, the Webster Property did not become property of the estate, and, for the reasons discussed above, the Stay did not apply to prevent the referee from delivering a deed.

**III. Avoidable Fraudulent Conveyance**

The Tax Foreclosure Proceeding, which was governed by statute, provided for: (1) notice to the Debtor that complied with the requirements of due process<sup>8</sup>; (2) judicial involvement, including the entry of a judgment of foreclosure and sale by a New York State Court with jurisdiction; (3) an advertised public sale; and (4) a procedure to administer surplus proceeds if they were generated at the public sale. Therefore, the proceeds received in the Webster Property Real Estate Tax Foreclosure

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<sup>8</sup> The Debtor's claim that she did not receive the required statutory notices of the Tax Foreclosure Proceeding must be addressed in the New York State Court which entered the Judgment of Foreclosure and Sale, if at all.

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Proceeding were for reasonably equivalent value and the sale and transfer were not avoidable fraudulent conveyances under Section 548. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994); *In re Comis*, 181 B.R. 145 (Bankr. N.D.N.Y. 1994).<sup>9</sup>

**CONCLUSION**

The Contempt Motion is in all respects denied.

**IT IS SO ORDERED.**

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**HON. JOHN C. NINFO, II**  
**CHIEF U.S. BANKRUPTCY JUDGE**

**Dated: January 10, 2002**

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<sup>9</sup> The tax foreclosure statute in *Comis* did not provide for judicial involvement.