

obtain possession of real property, the debtors' residence.

Debtor, Michael A. Davis, signed a Promissory Note and Security Deed on February 7, 1989, conveying to the holder a first in priority security interest in 3543 Windermere Drive, Hephzibah, Richmond County, Georgia. Debtors defaulted on the mortgage payments and Creditor foreclosed on the property, holding a foreclosure sale on March 4, 1997. Creditor was the highest cash bidder at the sale and no further action was taken by Creditor. Debtors remained on the property and filed for Chapter 13 relief on May 1, 1997. Subsequent to the bankruptcy filing Creditor sought relief from stay to proceed in state court to obtain possession and recover costs and fees for its motion.

The issue presented is whether the foreclosure progressed to the point that the Debtor's interest in the property terminated prepetition. Debtors argue a foreclosure deed must be recorded in the county records for a foreclosure sale to be complete and title

hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay --

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if --

(A) the debtor does not have an equity in such property;
and

(B) such property is not necessary to an effective reorganization; . . .

to pass to Creditor. Furthermore, because a recording was not made prepetition, the § 362(a) stay halted the Creditor from receiving title to the property. Creditor argues that Georgia law applies and the foreclosure sale on the courthouse steps is adequate to transfer title from Debtor to Creditor. In this case creditor asserts a "for cause" basis for relief contending that the debtors own no interest in the property as a result of the prepetition foreclosure.

'Cause' under § 362(d) (1) is not defined in the Bankruptcy Code and is determined on a case-by-case basis. In re Tucson Estates, Inc., 912 F.2d 1162, 1166 (9th Cir. 1990). When a party in interest alleges 'for cause' grounds for relief from stay, once the movant has established prima facie there is cause for relief from stay, the debtor bears the burden of proof by a preponderance of the evidence that 'cause' does not exist. 11 U.S.C. §362(g)²; In re Pioneer Commercial Funding Corp. 114 B.R. 45, 47 (Bankr. S.D.N.Y. 1990).

Sloan Elec. Co., Inc. v. Strode (In re Strode), Chapter 7 case No. 92-42515, Adv. Pro. No. 93-4041 (Bankr. S.D. Ga. December 29, 1993)
(Dalis J.)

²11 U.S.C. §362(g) provides:

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

In order for Creditor to succeed, it must make a prima facie showing that the prepetition foreclosure sale occurred and was sufficient to pass an ownership interest. Upon this prima facie showing, the burden of proof rests with the party opposing relief, the Debtors to establish that they retain an ownership interest in the property.

Debtors correctly assert that "nonbankruptcy law" in 11 U.S.C. § 1322(c)(1)³ of the Bankruptcy Code refers to both state and nonbankruptcy federal law. See Patterson v. Shumate, 504 U.S. 753, 759, 112 S. Ct. 2242, 2247 (1992) (applicable nonbankruptcy law means state law and nonbankruptcy federal law under the Bankruptcy Code); In re Meehan, 162 B.R. 367 (Bankr. S.D. Ga. 1993) aff'd, 173 B.R. 818 (S.D. Ga. 1994) (Bowen, J.), rev'd on other grounds, 102 F.3d 1209 (11th Cir. 1997). Therefore, 11 U.S.C. § 1322(c)(1) requires a foreclosure sale to be conducted in accordance with applicable nonbankruptcy federal and/or state law.

In order to prevail Creditor must prima facie establish that it fulfilled the requirements set forth in the security deed and Georgia state law. In re William C. Jones, Chapter 13 Case No.

³11 U.S.C. § 1322. Contents of plan.

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law --

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law.

93-10136, Adv. No. 93-1007, slip op. at 14 (Bankr. S.D. Ga. December 27, 1993) (Dalis, J.). The security deed signed by Michael Davis provides:

That in the event of a default in any of the covenants or conditions of this instrument, the Grantee [Creditor], at its option, may foreclose this instrument in any Court of competent jurisdiction....The Grantor [Debtor] covenants and agrees that time is of the essence of this contract and that if he shall fail to pay said indebtedness...Grantee...may sell said property at auction at the usual place for conducting sales at the courthouse in the county where the land lies, in said State, to the highest bidder for cash, first giving 4 weeks' notice of the time, terms, and place of such sale, by advertisement once a week in a newspaper published in said county, all other notice being hereby waived by the Grantor (and said Grantee or any person on behalf of said Grantee, or assignees, may bid and purchase at such sale), and thereupon execute and deliver to the purchaser at such sale a sufficient conveyance of said premises in fee simple, which conveyance shall contain recitals as to the happening of the default upon which the execution of the power of sale herein granted depends[.]

The Debtors do not contest the place of the sale, highest cash bidder, or the notice requirement. The requirements under the security deed were met.

Georgia law determines whether the creditor has fulfilled the foreclosure requirements for title. A debtor's interest in property is determined by state law. Barnhill v. Johnson, 503 U.S. 393, 397-98, 112 S. Ct. 1386, 1389 (1992) ("In the absence of any

controlling federal law, 'property' and 'interests in property' are creatures of state law."). Georgia law provides a foreclosure sale suffices to transfer title.

The Georgia Supreme Court has held that, 'a sale under power in a security deed divests the title of the grantor, and he has no legal right several days thereafter, on tender of the amount of the debt secured by the deed to the grantee, who is purchaser at the sale, to demand a conveyance of the land or a cancellation of the security deed. Where a sale of land is made under a power contained in a security deed...the grantor can not defeat the purchaser's right to have the sale fully consummated, by tender of the amount of his indebtedness to the grantee before the actual execution of the deed pursuant to the terms of the sale.' Carrington v. Citizens Bank of Waynesboro, 144 Ga. 52, 53, 85 S.E. 1027 (1915)....[T]he debtor's right of redemption is extinguished when the high bid is accepted at the foreclosure sale. In re: Gray, 37 B.R. 532 (Bankr. N.D. Ga. 1984); In re: Pearson, 75 B.R. 254 (Bankr. N.D. Ga. 1985). These subsequent opinions rely on the Carrington decision and other decisions by the Georgia courts to establish that as a matter of law in Georgia, a debtor's right to redemption is terminated at the time of the foreclosure sale regardless of when the deed under power of sale is recorded. See, e.g., Sanders v. AmSouth Mortgage Co. (In re: Sanders), Ch. 13 Case No. 488-01081, Adv. No. 488-0079 (Bankr. S.D. Ga. filed June 15, 1989).

In re Grissom, Chapter 13 Case No. 89-10496, slip op. at 5-6 (Bankr. S.D. Ga. December 20, 1989, Dalis, J.).

Debtors do not contest that proper notice was given, the foreclosure sale conducted, or the highest cash bidder was awarded

the property prior to the bankruptcy. Pursuant to the security deed and Georgia law, Creditor completed the requirements and obtained title to Debtors' property. The foreclosure sale was conducted on March 4, 1997, and Debtors' interest in the property terminated then under state law.

Debtors assert, because the debt was a "HUD-guaranteed mortgage," the "Single Family Mortgage Foreclosure Act," ("Act") 12 U.S.C. § 3751 et seq., applies to this security deed. Because the Act applies, 11 U.S.C. § 1322(c)(1)⁴ requires the foreclosure sale to be conducted in accordance with the Act. Furthermore, Debtors argue the Act under 12 U.S.C. § 3763⁵ requires the delivery of a

⁴11 U.S.C. § 1322(c)(1) provides:

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—

(1) a default with respect to, or that gave rise to, a lien on the principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law;

⁵12 U.S.C. § 3763. Transfer of title and possession.

(a) Delivery of deeds. The foreclosure commissioner shall, upon delivery" (sic) of a deed or deeds to the purchaser or purchasers (which shall be without warranty or covenants to the purchaser or purchasers) obtain the balance of the purchase price in accordance with the terms of sale provided in the notice of default and foreclosure sale. Notwithstanding any State law to the contrary, delivery of a deed by the foreclosure commissioner shall be a conveyance of the property, and constitute passage of title to the mortgaged property, and no judicial proceedings shall be required ancillary or supplementary to the procedures provided in this title

deed to transfer title to a purchaser. Only a foreclosure sale occurred in this case and no deed was delivered prepetition, so Debtors claim they still retain title.

The Single Family Mortgage Act applies to a security interest enumerated in 12 U.S.C. § 3751(b),⁶ which includes security interests created under 12 U.S.C. § 1702 et seq., "Housing Renovation & Modernization"; 12 U.S.C. § 1707 et seq., "Mortgage Insurance"; and 42 U.S.C. 1452(b), "Slum Clearance & Urban Renewal - Rehabilitation Loans."⁷

[12 USCS §§ 3751 et seq.] to assure the validity of the conveyance or confirmation of such conveyance.

(b) Right of possession. A purchaser at a foreclosure sale held pursuant to this title [12 USCS §§ 3751 et seq.] shall be entitled to possession upon passage of title under subsection (a) to the mortgaged property, subject to any interest or interests not barred under section 816 [12 USCS § 3765]. Any person remaining in possession of the mortgaged property after the passage of title shall be deemed a tenant at sufferance subject to eviction under local law.

⁶12 U.S.C. § 3751(b). Findings and purpose

(b) Purpose. The purpose of this title [12 USCS §§ 3751 et seq.] is to create a uniform Federal foreclosure remedy for single family mortgages that --

(1) are held by the Secretary pursuant to title I or title II of the National Housing Act [12 USCS §§ 1702 et seq. or §§ 1707 et seq.]; or

(2) secure loans obligated by the Secretary under section 312 of the Housing Act of 1964.

⁷In analyzing the text of 12 U.S.C. § 3751(b), the three included provisions and the legislative history of these provisions, the underlying promissory note and security deed do not appear subject to the Act. The only fact which indicates the Act may apply are the words on the first page of the Security Deed, "[t]his

Even if this transaction is subject to the Act, see, footnote 7, 12 U.S.C. § 3763 is not the exclusive remedy available to Creditor. In 12 U.S.C. § 3753⁸ the Secretary has the option to foreclose pursuant to the Act or to use other available foreclosure procedures. Therefore, the requirement in 12 U.S.C. § 3763 to deliver a deed to pass title is not binding on Creditor in its foreclosure activities. Creditor can therefore foreclose pursuant to other applicable law including as shown above, state law.

The Creditor having established a valid prepetition foreclosure pursuant to Georgia law and the Debtors having failed to establish any contrary binding federal foreclosure requirement, the property was not part of the bankruptcy estate on May 1, 1997, when Debtors filed their petition. Therefore, the Creditor holds title to the disputed property.

It is therefore ORDERED that Creditor, First Nationwide Mortgage Corporation, is granted relief from the stay of 11 U.S.C. § 362 for the purpose of proceeding with state court remedies to

form is used in connection with security deeds insured under the one-to-four family provisions of the National Housing Act." Emphasis added.

⁸12 U.S.C. § 3753. Applicability. Single family mortgages encumbering real estate located in any State may be foreclosed by the Secretary in accordance with this title [12 USCS §§3751 et seq.], or pursuant to other foreclosure procedures available, at the option of the Secretary.

obtain possession of the property located at 3543 Windermere Drive,
Hephzibah, Richmond County, Georgia.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 21st day of January, 1998.