

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:

VIVIAN DRAKE EARLY
(Chapter 13 Case 95-40222)

Debtor

VIVIAN DRAKE EARLY

Plaintiff

v.

BARCLAYS AMERICAN/
MORTGAGE CORPORATION

Defendant

Adversary Proceeding

Number 95-4026

FILED

at 2 O'clock & 18 min. P.M

Date 8-29-95

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia



MEMORANDUM AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Creditor, Barclays American/Mortgage Corporation ("Barclays"), comes before this Court requesting dismissal of the above-captioned matter. In its Motion for Summary Judgment, Barclays asserts that the Debtor's discharge during a previous Chapter 7 extinguished the automatic stay, precluding any possible stay violations

resulting from the subsequent breach of a Consent Order arising out of that case. Based upon the parties' briefs, the record in the file, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The following facts are not in dispute. On December 2, 1991, the Debtor filed for Chapter 13 bankruptcy; ultimately, this matter was converted to a Chapter 7 and a discharge was issued on November 24, 1994. During the proceedings, Barclays American Mortgage Corporation, a creditor possessing a mortgage on the Debtor's primary residence, agreed with the Debtor to be bound by the terms of a Consent Order. Collateral to this agreement, the debtor reaffirmed its obligation to the creditor.

The Consent Order established that (1) an arrearage sum of \$1,741.92 would be paid on or about November 15, 1994, (2) the Debtor would reaffirm its obligation to the creditor, (3) the Debtor would subsequently make timely payments, and (4) in the event of default the creditor would submit an affidavit to this Court requesting an "Order Lifting Stay" and permission to institute foreclosure proceedings.

The Debtor allegedly tendered payment approximately eight days after

the "due date," but within an alleged ten day grace period.¹ Barclays rejected the Debtor's tender and instituted foreclosure proceedings. The foreclosure forced the Debtor to re-file for Chapter 13 bankruptcy protection.

In its complaint, the Debtor states generally that Barclays has committed a violation of Title 11. This Court assumes from the discussion during the hearing that the Plaintiff has alleged a violation of the automatic stay. Although Plaintiff argues throughout its brief that Barclays wrongfully rejected tender of the debtor payments, neither a breach of contract claim nor any other theory of recovery has been alleged within the Debtor's complaint.

Debtor contends that she complied with the terms of the Consent Order and that the creditor breached the automatic stay of the previous Chapter 7 case when it instituted foreclosure proceedings without submitting default affidavits to this Court. To remedy this violation of the Consent Order, the Debtor requests, (1) attorney's fees, (2) punitive damages, (3) damages for anguish and mental suffering, and (4) other equitable relief.

¹ This Court reserves judgment on this issue since it is immaterial to the current matter.

CONCLUSIONS OF LAW

In support of its Motion for Summary Judgment, creditor Barclays asserts that the discharge extinguished the automatic stay and that Barclays was not required to follow the terms of the Consent Order in order to obtain relief from a non-existent automatic stay. *See* Brief in Support of Defendant's Motion for Summary Judgment, p.2. Within its brief, Barclays argues that the property has been abandoned to the Debtor; the automatic stay only governs property in the estate; and the creditor has not violated Section 362. *See* §362(c)(1). Further, Barclays notes that the automatic stay only prohibits acts before discharge; the Plaintiff received a discharge and the subsequent act of instituting foreclosure is not a violation of the automatic stay. *See* §362(c)(2). This Court agrees.

In order for this Court to grant a motion for summary judgment, there must be no genuine issue as to any material fact and the moving party must be entitled to judgment as a matter of law. Rule 56 F.R.Civ.P. For the above reasons, this Court finds for the Defendant and grants the Motion. Debtor's discharge constituted an extinguishment of the automatic stay. No act thereafter undertaken could constitute an actionable stay violation. While there is evidence to support Debtor's argument that Barclays failed to abide by the terms of the Consent Order prior to instituting its foreclosure, that arguable breach is not a Section 362 claim. This case is therefore

dismissed. Debtor is free to pursue her other remedies in any court of competent jurisdiction.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment filed by Barclays American/Mortgage Corporation is granted and the case is dismissed.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 21st day of August, 1995.