

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

Robert E. Harris,

Debtor.

Chapter 13
Case No. 01-10365

Appearances:

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Honorable Robert E. Littlefield, Jr.

Memorandum Decision

The procedural vehicles which have brought a limited matter before the court are a motion filed by the County of Albany ("County") to lift the automatic stay and a motion by the Debtor seeking enforcement of it and sanctions for having violated it. The limited matter is whether two properties described below are property of the estate under 11 U.S.C. § 541. The court has jurisdiction over that matter pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(G) and 1334(b).

Facts

On March 4, 1997, the County commenced in rem delinquent tax foreclosure proceedings, pursuant to Real Prop. Tax L. § 1123, in the Albany County Court against two properties, one located at 38 South Main Avenue, Albany, NY and the other at 323 State Street, Albany, NY. The Petition and Notice of Foreclosure provided that the in rem procedure allowed for the payment of outstanding tax liabilities within a 90 day period or required the filing of a verified answer in order to avoid the loss of ownership.

The Debtor filed an answer for himself with regard to 323 State Street and for a "Helen Harris" with regard to 38 South Main Avenue. Both answers contained general denials of the County's allegations. They also contained three affirmative defenses: failure to state a claim, lack of jurisdiction over the parties and failure to include a necessary party.

On December 26, 2000, in documents titled "Decision and Order," the Albany County Court, Judge Larry J. Rosen, granted the County's motions for summary judgment and final judgment of foreclosure ("in rem foreclosure orders"). Each in rem foreclosure order noted the Debtor's appearance for the defendant and the defendant's opposition to the County's motion. Each order reflects that Judge Rosen considered the arguments the Debtor raised in his answer and then determined they were without merit. The in rem foreclosure orders specifically granted the County's motion for summary judgment and final judgment of foreclosure.

On January 5, 2001, the County's tax enforcing officer executed and recorded deeds in foreclosure to the County for the two properties. On January 24, 2001, the Debtor filed his Chapter 13 petition; he listed the two properties on his Schedule A. On

February 2, 2001, the Debtor filed notices of appeal of the in rem foreclosure orders with the Appellate Division. He also obtained orders to show cause from the Albany County Court which set a hearing on February 16, 2001 to consider his motions to reargue or reconsider the in rem foreclosure orders.

On February 12, 2001, the County filed a motion to lift the automatic stay. The Debtor filed his response on February 26, 2001, alleging, *inter alia*, that the deeds were not issued in accordance with N.Y. Real Prop. Tax L. § 1136 and that the issuance of the deeds constituted preferential transfers of property pursuant to 11 U.S.C. § 547. He also indicated that he intended to file an action to set aside the deeds.

The Debtor next filed a motion for an order enforcing the automatic stay against the County. In this motion, he challenges the constitutionality of N.Y. Real Prop. Tax L. § 1136, arguing that it fails to require a sale at public auction rather than conveyance to the County, thereby depriving him and his creditors of any "excess funds" that may exist. He also challenges the adequacy of the notice of commencement of the in rem foreclosure proceedings pursuant to N.Y. Real Prop. Tax L. § 1125, both to himself as owner and others as mortgage holders, the County's refusal to permit redemption unless all of the original assessments were paid and its refusal to allow for a payment plan pursuant to N.Y. Real Prop. Tax L. § 1180.

Regarding the alleged stay violations, the Debtor says the County sent the tenants of two buildings that are on the foreclosed properties a notice instructing them to leave. He asserts the County's actions were premature and without judicial or statutory authority. In his motion, he asks the court to restrain and enjoin the County from claiming title, ownership or possession of the two properties and that it declare the deeds

illegal, void and cancelled. His remaining allegations regarding the County's actions largely mimic the allegations contained in a motion to reargue or reconsider the in rem foreclosure orders that he filed in state court and that is described more fully below.

After filing his bankruptcy petition and while the automatic stay was in place, the Debtor filed a motion in state court, seeking reconsideration of the in rem foreclosure orders. On April 17, 2001, the Albany County Court, Judge Dan Lamont, issued a decision/order and judgment, amending the December 26, 2000 decision and order with regard to the two properties. Specifically, after determining that Judge Rosen had clearly intended the in rem foreclosure orders to grant final judgments of foreclosure, Judge Lamont amended the orders to include the following language, *nunc pro tunc*: "The enforcing officer of the tax district shall prepare, execute and cause to be recorded a deed conveying to such tax district full and complete title to such parcel." In addition, Judge Lamont restrained the Debtor from interfering with the County's use and enjoyment of the properties.

On June 8, 2001, the Debtor filed a notice of appeal of Judge Lamont's April 17, 2001 decision/order and judgment with the Appellate Division. Technically, that appeal is still pending although the Debtor's appeals of Judge Rosen's in rem foreclosure orders have been withdrawn. Both the Debtor and the County have recently advised the court that the Appellate Division has decided not to render a decision on the merits of the *nunc pro tunc* order while the automatic stay is in effect.¹

¹After the court held a conference during which the state court appeal was discussed, it issued an order lifting the automatic stay for the limited purpose of allowing the County to file a motion seeking an expedited briefing schedule and hearing on the state law issues and to allow the Appellate Division to determine the appeal on the merits. During a subsequent conference,

On July 18, 2001, the County filed a proof of claim for the unpaid taxes that were the subject of the in rem delinquent tax foreclosure proceedings against the two properties. Several amended plans and objections to confirmation followed as the Debtor and the County tried to agree to a plan acceptable for a consensual confirmation. When that proved unsuccessful, the County and the Debtor narrowed the issues requiring resolution with the help of the Chapter 13 Trustee. In a letter dated November 27, 2001, the Trustee lists six numbered and three unnumbered issues. None of the nine issues involves preferences or fraudulent transfers under 11 U.S.C. § 547 or § 548. As stated in the jurisdictional statement above, this decision deals only with the validity of the in rem foreclosure orders and whether the two properties are property of the estate under 11 U.S.C. § 541.

Arguments

The County asserts it conducted the in rem foreclosure proceedings in accordance with the state law, therefore, the Debtor did not own the properties when he filed his bankruptcy petition. The Debtor counters with the argument that the in rem delinquent tax foreclosure proceedings violate constitutional due process because N.Y. Real Prop. Tax L. § 1136 fails to require a sale at public auction. According to him, the statute's provision for a conveyance to the County deprives him and his creditors of any "excess

the parties informed the court that an "expedited appeal" could take many months and, given the "no confirmed plan" status of the Debtor's case, the court decided to render its own decision on the validity of the in rem foreclosure orders, centering largely on the issue of whether the two properties were property of the estate under 11 U.S.C. § 541.

funds” that may exist.² He alleges the County failed to give adequate notice of the commencement of the proceedings pursuant to N.Y. Real Prop. Tax L. § 1125, both to himself as owner and to others as mortgage holders, but offers nothing to support that bare allegation. The Debtor also challenges the County’s refusal to permit redemption unless all of the original assessments were paid and its refusal to allow for a payment plan pursuant to Real Prop. Tax L. § 1180. For the Debtor, another defect in the County’s perfection process was its failure to docket the in rem foreclosure orders; he asserts that without docketing, nothing became effective as a final judgment. He cites N.Y. Civ. Prac. L. & R. 2220.

As for the effect of the *nunc pro tunc* order, the Debtor contends Judge Lamont’s sua sponte remedy did not save the County’s deeds from avoidance because, in order to be effective, the order had to be entered, served with notice of entry and docketed. According to him, his bankruptcy stayed any such actions taken by the County to accomplish that.

Discussion

I. 11 U.S.C. § 541

Section 541(a) of the Bankruptcy Code states that a bankruptcy case creates an estate. The “estate” is comprised of all of a debtor’s legal and equitable interests in property as of the date of the case’s commencement. 11 U.S.C. § 541(a)(1). The deeds and the *nunc pro tunc* foreclosure order would clearly support a determination that the

²The Debtor also asserts the two properties are worth more than the County’s tax liens; he even goes so far as to state that the parties agree the value of the properties exceed the amount of the tax liens by a substantial amount. The County denies any allegation that the properties have substantial equity.

Debtor does not have a legal or an equitable interest in the two properties under state law. The *nunc pro tunc* order, however, resulted due to the Debtor's post petition motion to reargue or reconsider the in rem foreclosure orders, a motion he essentially lost in state court. For purposes of this decision, the court need not consider the substance or legal effect of that order.

Some case law exists that would support a determination that the Debtor lost any interest he had in the two properties once his right of redemption was extinguished, however, those cases involved tax foreclosure sales where all of the applicable procedures were unquestionably followed. See *In re Comis*, 181 B.R. 145, 148 (Bankr. N.D.N.Y. 1994)("[T]he Debtors were involuntarily divested of any ownership rights they might have had...when their right of redemption expired..."); *In re Butler*, 171 B.R. 321, 326 (Bankr. N.D. Ill. 1994)("Although the formal act of title transfer does not occur until the tax deed is obtained and recorded, the owner's interest in the property dissipates upon expiration of the redemption period."). The question before this court is what effect an in rem tax foreclosure proceeding has on a debtor's legal or equitable interests in the real property that was the subject of the proceeding when the state court itself has not followed all of the state law's provisions.

II. N.Y. Real Prop. L. § 1136

In order to determine whether the two properties are property of the estate, the court must consider New York law as "[p]roperty interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55 (1979). On the day he filed, the Debtor did not have legal title to the two properties because the deeds were issued to the County on January, 5, 2001, weeks before he filed his petition. Since the state court

essentially overruled his mainly procedural challenges to the in rem foreclosure proceedings and, by operation of law, he no longer had a right of redemption, the Debtor also did not have an equitable right in the properties when he filed. N.Y. REAL PROP. TAX L. § 1136(2) and (3); *See Thwaites Place Assoc. v. Secretary of U.S. Dep't of Housing and Urban Dev.*, 638 F. Supp. 301 (S.D.N.Y. 1986).

In further support of this, the court notes the presumption of validity a tax district is entitled to under N.Y. Real Prop. Tax. L. § 1134, and, in particular, a taxpayer's (or other respondent's) burden to "affirmatively establish" any defense alleging "jurisdictional defect or invalidity in the tax, or in the proceeding for the enforcement thereof." Since the state court overruled all of the Debtor's objections and its decision grants the County's motion seeking a final judgment of foreclosure, the issues he raised in his answer are res judicata and entitled to full faith and credit under 28 U.S.C. § 1738.

As for the state court's failure to include the direction to issue the deeds as required by N.Y. Real Prop. Tax L. § 1136(3), to this court, the omitted language was not fatal to the in rem foreclosure orders; it was mere oversight on the state court's part. Since the Debtor waited more than two weeks after the deeds were issued before filing his bankruptcy petition, a time period well after both his equitable and legal interests in the two properties terminated, his argument of "invalid procedures" does not persuade this court to set aside the deeds.

III. The Debtor's Remaining Arguments

The court need not spend any time addressing the Debtor's constitutional challenge to the statutory provisions governing an in rem delinquent tax proceeding because the state's highest court has already done that. *See City of New Rochelle v. Echo*

Bay Waterfront Corp., 268 A.D. 182 (2d Dept. 1944), *aff'd*, 294 N.Y. 678 (1945), *cert. denied*, 326 U.S. 720 (1945)(holding former § 165-h [now § 1136] was not unconstitutional). The Debtor's main point, of course, is had a tax "sale" occurred, the two properties might have generated surplus proceeds he could have used to fund a Chapter 13 plan. However, his failure to assert any of that as a defense in his answer, thereby giving the state court the opportunity to rule on its merits, precludes this court from considering it now.

As for the Debtor's argument regarding N.Y.C.P.L.R. 2220 which requires the filing of a state court order, once again, he merely raises a point of law without elaborating on it. Since compliance with the state law provisions covering in rem delinquent tax proceedings results in a "final judgment" under N.Y. Real Prop. Tax L. § 1136, this argument is equally unavailing.

IV. 11 U.S.C. § 105

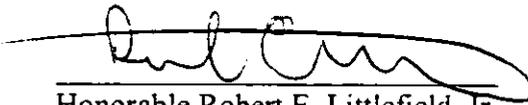
Although he did not specifically request such a determination, the court also concludes the Debtor is **not** entitled to equitable relief under 11 U.S.C. § 105. Once he filed his petition, rather than asking this court to make a determination regarding his interests in the two properties, he took it upon himself to file a motion to reconsider in the state court. Then, after the state court decided he was not entitled to relief under state law, the Debtor asked this court to find the County in violation of the automatic stay when it sent a letter to his tenants regarding its ownership and their requirement to vacate the premises. In his opposition to the County's lift stay motion, the Debtor argues the same points he did in his motion to reconsider, essentially setting this court up as a one-man appellate division, a role it does not relish assuming on any occasion especially one

challenging the constitutionality of the state law and one the Debtor could have easily avoided merely by asking this court for a lift stay. Furthermore, this is not a situation where the creditor did not follow all of the requirements attendant with a foreclosure procedure; it was the court that did not include the direction to issue the deeds as required by N.Y. Real Prop. Tax. L. § 1136(2) and (3). The creditor, the County, has followed all of the state law requirements. Equity does not lie with the Debtor.

Conclusion

For the reasons stated above, the two properties are not property of the estate under 11 U.S.C. § 541.

Dated: **SEP 24 2002**



Honorable Robert E. Littlefield, Jr.
United States Bankruptcy Judge