UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

CHARLES H. LAWTON	CASE NO. 01-61002
ANN MARIE CATHERINE LAWTON	Chapter 13

Debtors

APPEARANCES:

WAYNE R. BODOW, ESQ.
Attorneys for Debtors
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MARK W. SWIMELAR, ESQ. Chapter 13 Trustee 250 South Clinton Street Syracuse, New York 13202	LYNN HARPER WILSON, ESQ. Of Counsel
SCHILLER & KNAPP, LLP Attorneys for M&T Mortgage Corporation 950 New Loudon Road Latham, New York 12110	WILLIAM B. SCHILLER, ESQ. Of Counsel
EDWARD J. FINTEL & ASSOCIATES Local Counsel for M&T Mortgage Corporation 430 E. Genesee Street Syracuse, New York 13217	MICHELLE C. MARANS, ESQ. Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed by Charles H. Lawton and Ann Marie Catherine Lawton ("Debtors") on July 17, 2002, by way of an Order to Show Cause, signed by the Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge, seeking to enjoin M&T Mortgage

Corporation ("M&T") from enforcing its rights in connection with the foreclosure sale of the Debtors' residence on June 7, 2002.

The motion was heard on July 23, 2002, at the Court's regular motion term in Syracuse, New York. Following oral argument, the Court adjourned the matter to August 22, 2002, to allow both parties to submit briefs on the issue of laches, a defense asserted by M&T. After hearing additional oral argument on August 22, 2002, the Court indicated it would issue a decision.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(O).

FACTS

The Debtors filed a voluntary petition pursuant to chapter 13 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") on March 1, 2001. According to Schedule D, included with their petition, State of New York Mortgage Agency ("SONYMA"), of which M&T is the servicing agent, held a claim of $76,423.77, secured by a mortgage on the Debtors' residence.

On October 17, 2001, M&T filed a motion seeking relief from the automatic stay pursuant to Code § 362(d), alleging that the Debtors were in default on their postpetition mortgage

payments. According to M&T, the Debtors' April 2001 payment was received 12 days late; the May 2001 payment was 38 days late and the June payment was received 60 days late. M&T's counsel advised the Court that there had been no further payments by the Debtors.

However, the Debtors filed opposition to the motion on November 15, 2001, asserting that they:

> have made all post-petition payments as required;
>
> That the Debtors are in the midst of gathering evidence of said payments;
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> Accordingly, the Debtor [sic] would ask that this matter be adjourned until the December, 2001 calendar in order to produce the necessary receipts showing payments.

See Responsive Affirmation of Wayne R. Bodow, Esq., dated November 13. 2001.

The motion was heard on November 20, 2001, and adjourned to December 18, 2001, to allow Debtors an opportunity to provide proof of payment. The motion was then adjourned to January 22, 2002, at the request of the Debtors.

At the hearing on January 22, 2002, Debtors' counsel represented to the Court that the Debtors were current but failed to provide the Court with proof. There was some discussion of $8,000 that the Debtors alleged they had paid and was being held in escrow by M&T, which the Debtors asserted should be credited against their mortgage payments. M&T's local counsel, Michelle C. Marans, Esq. ("Marans"), represented to the Court that the $8,000, although noted on a statement provided to the Debtors as a credit, actually was a bookkeeping entry.[1]

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[1] At the request of the Court, M&T's counsel was asked to provide a letter of explanation to the Court concerning the $8,000 credit. In a letter, dated January 29, 2002, William B. Schiller, Esq. ("Schiller") of the law firm of Schiller & Knapp, LLP, explained that the bookkeeping entry was intended to reflect M&T's advances of over $8,000 to pay real estate taxes, which M&T

Accordingly, the Court agreed to a Conditional Order requiring that the Debtors make the January and February payments to M&T's counsel on or before February 18, 2002[2], and adjourning the balance of the motion to February 19, 2002, in the event that the two payments were made, in order for the Debtors to provide proof that they were otherwise current with their payments as alleged in their opposition filed on November 15, 2001. The Conditional Order submitted to the Court by M&T's counsel, Schiller & Knapp, and signed by the Court on February 1, 2002, required that the Debtors "remit" the January and February payments to Schiller & Knapp on or before February 18, 2002.

On February 19, 2002, the attorneys for both M&T and the Debtors were present in court. Marans, on behalf of M&T, represented to the Court that as of that morning no payments had been received by Schiller & Knapp pursuant to the Conditional Order. Debtors' counsel indicated to the Court that he had not been able to reach the Debtors to verify that the payments had been sent. Nor did he offer any proof of payment between July 2001 and November 2001, as previously alleged in the Debtors' opposition to M&T's motion.

On February 20, 2002, M&T's counsel signed for receipt of the bank check sent by the Debtors via certified mail, allegedly on February 14, 2002, in the amount of $1,524, covering the

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recognized it would recover through plan payments on its prepetition arrears. Schiller indicated that the entry did not reflect an actual payment by the Debtors of $8,000 outside the plan. He explained that M&T was required to provide the Debtors with a yearly escrow analysis, which served as the basis for their monthly mortgage payments in the upcoming year. Without the bookkeeping entry of a credit of $8,000, the monthly mortgage payment for the Debtors would have been approximately $695 higher than the Debtors were actually required to pay outside the plan while in bankruptcy as a result of the advances made by M&T.

[2] The Court takes judicial notice that Monday, February 18, 2002, was President's Day, a Federal holiday on which there was no mail delivery by the U.S. Post Office.

January and February mortgage payments. Pursuant to a letter, dated February 20, 2002, and addressed to Debtors' counsel, the check was returned to Debtors' counsel, and he was apprized that an Order granting relief from the automatic stay had been submitted to the Court for signature prior to receipt of the bank check.

On March 12, 2002, the Court signed the Order granting relief from the automatic stay and allowing M&T to proceed with its foreclosure of the Debtors' residence.[3] On or about March 20, 2002, Debtors' counsel was served with a copy of the Order. It is also alleged that on or about May 2, 2002, the Debtors were served with a copy of the Notice of Foreclosure Sale that was scheduled for June 7, 2002.

On June 6, 2002, the Debtors met with their counsel and presented him with a copy of the receipt allegedly signed by Schiller on February 20, 2002, in connection with the receipt of a bank check covering the January and February 2002 payments. Debtors' counsel placed a call to Schiller informing him that he had proof of the Debtors' compliance with the Conditional Order and requesting that the foreclosure sale be cancelled pending consideration by this Court.[4]

It is alleged that the foreclosure sale occurred as scheduled on June 7, 2002, and that

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[3] The Court delayed signing the Order until after it had received an affidavit from M&T's counsel on March 12, 2002, indicating the Debtors' non-compliance with the prior Conditional Order of February 1, 2002. According to the Schiller affidavit, the Order lifting the automatic stay was submitted to the Court on the morning of February 20, 2002. He acknowledged that a bank check was received by his office from the Debtors the afternoon of February 20, 2002, which was returned to Debtors' attorney. *See* Affidavit of Noncompliance, sworn to by William B. Schiller, Esq., on February 28, 2002.

[4] At the hearing on August 22, 2002, the Court acknowledged on the record that Debtors' counsel had contacted the Court on June 6, 2002, in the hopes of obtaining a temporary restraining order enjoining the sale. Debtors' counsel was informed that all Federal judges in the District were attending the Second Circuit Judicial Conference in New Paltz, New York, and were not readily available to grant the relief requested.

SONYMA was the high bidder.

Allegedly, on or about July 13, 2002, the Debtors were served with a ten day notice to vacate their residence. On July 17, 2002, the Debtors filed their motion which is the subject of the matter now under consideration by this Court.

DISCUSSION

At the hearing held on July 23, 2002, the Court found that the Conditional Order was to be construed against M&T as the drafter of the document insofar as the language specified that the January and February payments were to be "remitted," as opposed to "received," on or before February 18, 2002.[5] The Court concluded that the Debtors had complied with the terms of the Conditional Order by actually sending the payments to Schiller's office on February 14, 2002.[6]

Nevertheless, it is M&T's position that the Debtors should be denied relief and should be required to vacate their residence based on the doctrine of laches. M&T contends that at the hearing on February 19, 2002, Debtors' counsel should have been prepared to prove that the Debtors had remitted payment on February 14, 2002,[7] and were current with their mortgage

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[5] "Remit" is defined as "to send or transmit." BLACK'S LAW DICTIONARY 1297 (7th ed. 1999).

[6] Although Debtors have not provided the Court with a copy of the receipt, M&T has not disputed that the bank check, representing the January and February 2002 mortgage payments, was sent by the Debtors on Thursday, February 14, 2002, and received on Wednesday, February 20, 2002, by Schiller & Knapp.

[7] M&T contends that the Debtors did not have to await return of the receipt signed by Schiller on February 20, 2002. They should have also been in possession of a receipt when they mailed the bank check via certified mail on February 14, 2002.

payments from July 2001 - November 2001, as represented in their opposition to M&T's motion, which they filed on November 15, 2001. M&T also directs the Court to the fact that Debtors' counsel received a copy of the Order of March 12, 2002, on or about March 20, 2002, and made no attempt to vacate or appeal it. In addition, M&T notes that the Debtors were given notice of the foreclosure sale scheduled for June 7, 2002, on or about May 2, 2002, and again did nothing to stop it until they consulted with their attorney on June 6, 2002, one day prior to the foreclosure sale. Finally, M&T questions the reason why the Debtors then waited until July 17, 2002, to file the motion now before this Court. It is M&T's contention that the Debtors are not entitled to the relief they request given their delay in seeking it, despite the fact that the Court has concluded that they complied with the Conditional Order of February 1, 2002.

Laches

The equitable doctrine of laches is available as a defense when "an otherwise meritorious suit must be dismissed where there has been an inexcusable delay in bringing the claim for relief and where the delay has unreasonably prejudiced the defendant." *Baylor Univ. Medical Ctr. v. Heckler*, 758 F.2d 1052, 1057 (5th Cir. 1985); *see also In re Morris*, 155 B.R. 422, 430 (Bankr.W.D.Tex. 1993) (indicating that "[t]he mere passage of time is insufficient to constitute laches. The defendant must show undue prejudice resulting from an unreasonable delay . . . ." (citation omitted)). In this case, M&T bears the burden of proof because it is asserting the laches defense. *See EEOC v. Great Atlantic & Pacific Tea Co.*, 735 F.2d 69, 80 (3d Cir. 1984). In considering the defense of laches, the Court must examine: (1) proof of delay by the Debtors in filing their motion to enjoin M&T from enforcing its rights in connection with the foreclosure sale

of the Debtors' residence, (2) lack of M&T's knowledge that Debtors had a valid basis for seeking vacatur of the Court's Order lifting the automatic stay prior to the foreclosure sale, and (3) prejudice to M&T should the Court grant the relief sought by the Debtors. *See generally, In re Cutillo*, 181 B.R. 13, 15 (Bankr. N.D.N.Y. 1995), citing *Rapf v. Suffolk County of New York*, 755 F.2d 282, 292 (2d Cir. 1985).

A court may deny relief to a party against whom laches is asserted if that party inexcusably and unreasonably delayed in seeking relief. *See In re Feldman*, 261 B.R. 568, 578 (Bankr. E.D.N.Y. 2001) (citation omitted). "The length of delay is not dispositive; 'it is the reasonableness of the delay . . . which is the focus of inquiry.'" *Id.*, quoting *Stone v. Williams*, 873 F.2d 620, 624 (2d Cir. 1989). M&T contends that Debtors are guilty of laches as measured from February 20, 2002. It was on that date that the Debtors were put on notice that their payment had not been accepted and that an order had been submitted to the Court granting M&T relief from the automatic stay to proceed with foreclosure on their residence. M&T argues that Debtors unreasonably delayed in apprizing the Court of their compliance with the Conditional Order.

At the hearing on February 19, 2002, Debtors' counsel raised no defense to M&T's counsel's assertion that it had not received the January and February payment from the Debtors. There is no evidence that Debtors' counsel requested proof from the Debtors of their having mailed the bank check on February 14, 2002, before he appeared in Court on the 19th. Nor is there any evidence that he contacted the Debtors upon receipt of M&T's letter of February 20, 2002, and requested that they provide him with proof of their timely remittance of the payments. As a result of his apparent lack of due diligence, Debtors' counsel did not learn of the timely mailing until one day before the scheduled foreclosure sale. At that time, he promptly contacted

M&T's counsel in an attempt to halt the sale and also contacted the Court in an effort to stay the sale. M&T chose to proceed with the sale, which resulted in the transfer of the property to its principal, SONYMA, the mortgagee.

Under these circumstances, the Court need not make a determination whether the delay of approximately five months in bringing the motion now before this Court was unreasonable because M&T cannot establish that it had no knowledge that Debtors had a valid basis for seeking vacatur of the Court's Order lifting the automatic stay prior to the foreclosure sale and that M&T would be prejudiced should the Court grant the relief sought by the Debtors.

M&T's counsel acknowledges receiving a call from the Debtors' counsel on June 6, 2002, indicating that he had proof that the January and February payments had been "remitted" in compliance with the terms of the Conditional Order. M&T's counsel neither admits nor denies Debtors' counsel's representation to the Court that he offered to fax a copy of the receipt as proof of the timely remittance to Schiller, which was declined. Since Schiller signed for the bank check on February 20, 2002, and returned it with a letter to Debtors' counsel that same date, he certainly was aware that the payment had been sent to his firm. Whether or not it was deemed to be in compliance with the Court's Order was, of course, a matter which required the Court's interpretation of the word "remit" as used in the Conditional Order submitted on behalf of M&T on February 1, 2002. Nevertheless, the Court finds that M&T had knowledge that the Debtors took the position that they had complied with the terms of the Conditional Order.

In addition, the party asserting the defense must also show that he or she has been prejudiced via reliance on and a change of position resulting from that delay. *See Rapf* , 755 F.2d at 292. M&T cannot establish that it would be prejudiced if the Court were to enjoin it from

enforcing its rights in connection with the foreclosure sale of the Debtors' residence since the real property was actually sold to the holder of the mortgage, SONYMA. Any costs and expenses it may have incurred after March 12, 2002, when the Court signed the Order lifting the automatic stay, could have been mitigated had M&T delayed the foreclosure sale until a ruling by this Court on whether the Debtors had, in fact, complied with the Conditional Order had been obtained.

Therefore, the Court concludes that M&T's assertion of laches in defense of the Debtors' request that it enjoin M&T from enforcing its rights in connection with the foreclosure sale and vacate its prior Order lifting the automatic stay must fail. However, the Court is cognizant of the fact that on February 19, 2002, Debtors' counsel failed to offer any proof to support his allegations that the Debtors were current with their mortgage payments from July - November 2001, notwithstanding subsequent representations to the Court that Debtors' counsel was presently holding sufficient funds in escrow to bring the mortgage payments current. Accordingly, the Court will grant the relief sought by the Debtors conditionally.

Based on the foregoing, it is hereby

ORDERED that the Court's Order of March 12, 2002, granting relief from the automatic stay, is hereby vacated; it is further

ORDERED that M&T file with the Court and serve on Debtors' counsel within fifteen (15) days of the date of this Order an itemized statement covering the period from July 1, 2001 to December 1, 2002, including a breakdown of the amounts received directly from the Debtors and the months to which those payments were applied in a format easily understood by the Court and by the Debtors; it is further

ORDERED that in the Debtors file with the Court and serve on M&T's counsel within

thirty (30) days of the date of this Order proof of payment of monies M&T claims to be due from July 1, 2001 to December 1, 2002, and which the Debtors dispute, including any monies deposited with Debtors' attorney; it is further

ORDERED that in the event that the Debtors fail to provide satisfactory proof to the Court

within thirty (30) days of the date of this Order that they have made the July - November 2001 payments to M&T, as well as payments from December 2001 to December 2002 to either M&T or to Debtors' attorneys for deposit in his escrow account, the Court will grant M&T relief from the automatic stay retroactive to March 12, 2002, upon submission of a separate order.

Dated at Utica, New York

this 18th day of December 2002

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge