

3. Debtor filed its voluntary Chapter 11 bankruptcy case on September 7, 2011, at 10:24 a.m. (Amended Complaint, ¶ 6).

4. Defendant Nizhoni Properties Revocable Trust (“Nizhoni Properties”), as a holder of a junior trust deed encumbering the Property, redeemed the Property from the public trustee foreclosure and received a certificate of redemption (Amended Complaint, ¶ 9).

5. On October 4, 2011, following the expiration of all redemption periods applicable to foreclosure sale no. 2011-079, title to the Property vested in Nizhoni Properties as the holder of a certificate of redemption, and the La Plata County Public Trustee issued to Nizhoni Properties a confirmation deed, all pursuant to C.R.S. sections 38-38-501 and 502. (Amended Complaint, ¶ 19; Exh. 3 to Summary Judgment Motion).

6. On September 30, 2011, defendants Anesi and Andrews advised debtor that, if, at the time Nizhoni Properties expected to receive a public trustee deed on October 4, 2011, the Debtor had not signed a lease and was not paying rent, it could expect to be evicted. (Affidavit of James Salzillo, ¶¶ 5 and 6, Doc. No. 29-1; Debtor’s Answers to Defendants’ Interrogatories, Nos. 3 and 4, Exh. 2 to Motion for Summary Judgment).

7. The only damages debtor claims to have suffered as a result of defendants’ alleged violation of the automatic stay of 11 U.S.C. § 362(a) are for attorneys’ fees and costs arising from litigation initiated by debtor to enforce the stay or recover damages for violation of it. (Debtor’s Answers to Interrogatories, ¶¶ 7 and 8, Exh. 2 to Motion for Summary Judgment).

Discussion

(a) Declaratory Relief to Void Foreclosure Sale - Withdrawn

In debtor’s response to defendants’ summary judgment motion it concedes that the foreclosure sale preceded the filing of this case and admits that defendants are entitled to judgment dismissing the first claim. Judgment will enter accordingly.

(b) Avoidance of Vesting of Title in Nizhoni Properties as an Unauthorized Section 549 Postpetition “Transfer”

Having conceded that the September 7, 2011 foreclosure sale was completed prior to the filing of this bankruptcy case, debtor maintains that under applicable Colorado non-judicial public trustee foreclosure statutes, the debtor’s estate retained an interest in the Property after the foreclosure sale was completed. According to Colorado Revised Statutes section 38-38-501, the debtor continues in title to property that has gone to foreclosure sale for at least eight business days after the sale, or, if applicable redemption periods of junior encumbrancers run longer, until the expiration of the applicable redemption period. Only at that time does “title to the property sold [at foreclosure sale] vest in the holder of the certificate of redemption. . . .”

Until such vesting under the Colorado statute, the bankruptcy estate owns the property and the rights to possession, sale and any rents, all subject to divestment under the statute.¹ Debtor argues that the statutory vesting of title -- either eight days after a foreclosure sale or at the end of the lienor post-foreclosure sale redemption periods -- is an unauthorized, post-petition involuntary transfer of the debtor's interest in the Property and, thus, is subject to avoidance under 11 U.S.C. section 549. Section 549 of the Bankruptcy Code permits a bankruptcy trustee or Chapter 11 debtor-in-possession to avoid transfers of property of the estate that occur post-petition and are not authorized by the bankruptcy court or by the Bankruptcy Code itself.²

This Court concludes that, as a matter of law, the vesting of title in the holder of a certificate of purchase or a certificate of redemption under C.R.S. § 38-38-501 is not a "transfer" for purposes of avoidance under section 549(a) of the Bankruptcy Code. The term "transfer" is very broadly defined in Bankruptcy Code section 101(54):

The term "transfer" means –

- (A) the creation of a lien;
- (B) the retention of title as a security interest;
- (C) the foreclosure of a debtor's equity of redemption; or

¹The Colorado statute in relevant part states:

Title vests upon expiration of redemption periods - confirmation deed.

Upon expiration of all redemption periods allowed to all lienors entitled to redeem under part 3 of this article or, if there are no redemption periods, upon close of the officer's business day eight business days after the sale, title to the property sold shall vest in the holder of the certificate of purchase or in the holder of the last certificate of redemption in the case of redemption. . . . No less than fifteen business days after the date of sale or, if later, the expiration of all redemption periods. . . the officer shall execute and record a confirmation deed. . . to the holder of the certificate of purchase or, in the case of redemption, to the holder of the last certificate of redemption confirming the transfer of title to the property. Failure of the officer to execute and record such deed. . . shall not affect the validity of the deed or the vesting of title.

C.R.S. § 38-38-501.

²Postpetition transactions.

(a) Except as provided in subsection (b) or (c) of this section [not relevant to the instant case], the trustee may avoid a transfer of property of the estate –

- (1) that occurs after the commencement of the case; and
- (2) (A) that is authorized only under section 303(f) or 542(c) of this title [not relevant in the instant case]; or
- (B) that is not authorized under this title or by the court.

11 U.S.C. § 549(a)

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with –

- (i) property; or
- (ii) an interest in property

11 U.S.C. § 101(54)

Under current Colorado law, a property owner has no post-foreclosure sale redemption rights from a public trustee foreclosure sale.³ C.R.S. § 38-38-301 *et seq.* **Janicek v. Obsideo, LLC**, 271 P.3d 1133, 1139 (Colo. Ct. App. 2011). Whatever equity of redemption rights debtor had prior to the completion of the foreclosure sale in this case, these rights were extinguished with the pre-bankruptcy completion of the sale.

Consequently, a post-bankruptcy vesting of title under C.R.S. § 38-38-501 could not be a post-petition transfer foreclosing the debtor's equity of redemption for purposes of sections 101(54)(C) and 549(a) of the Bankruptcy Code.

Such post-petition vesting of title as occurred in this case could only be a "transfer" for purposes of section 549 if it was a "mode, . . . voluntary or involuntary, . . . of disposing of or parting with (i) property; or (ii) an interest in property." "Disposing of" or "parting with" for these purposes involves something more than the mere passage of time. When a debtor's interest in property, by operation of nonbankruptcy law, ceases to exist upon the mere passage of time, the extinguishment of the debtor's interest in property is not an avoidable transfer. Bankruptcy does not affect the consequences under nonbankruptcy law of the passage of time except as provided in section 108 of the Bankruptcy Code, "Extension of Time." See *In re Cucumber Creek Development, Inc.*, 33 B.R. 820 (D. Colo. 1983). There, Judge Kane held that the

³Effective January 1, 2008, Colorado's statutory public trustee non-judicial foreclosure procedures were amended to expand a property owner's pre-foreclosure sale statutory cure rights and to eliminate a property owner's post-foreclosure sale redemption rights. As noted in a leading treatise on Colorado practice:

Perhaps the most perceptible change to the Colorado foreclosure statutes produced by HB 06-1387 and HB 07-1157 is the elimination of the owner's formal statutory redemption period. Although a property owner no longer has a statutory right to redeem from a public trustee foreclosure sale, that right (which, in effect, was a right to pay off the lender *after* the foreclosure sale during the redemption period), the owner still may pay off the lender at any time *prior* to the sale. West's C.R.S.A. § 38-38-108 effectively combined the time periods of the former cure and owner redemption periods into one "before-sale cure and payoff period" (between 110 and 125 calendar days for nonagricultural property and between 215 and 320 days for agricultural property). As a result, the elimination of the owner's formal statutory redemption period is not truly a substantive change. Furthermore, West's C.R.S.A. § 38-38-302 preserved the right to redeem for lienors who meet the statutory requirements set forth in subsection (1) of the statute. Note that the provisions of West's C.R.S.A. § 38-38-108 creating the new "before-sale cure and payoff period" and the redemption provisions of West's C.R.S.A. § 38-38-302 apply to any foreclosure of a deed of trust if the Notice of Election and Demand for Sale is recorded on or after January 1, 2008. (*footnote omitted*)

William G. Horlbeck, "Real Estate Transactions, Chapter 68 Deeds of Trust, Their Release and Their Foreclosure," § 68.19 Redemption from Sale, in 2 Colorado Methods of Practice (Krendl et al. eds, 5th ed., rev. 2012).

automatic bankruptcy stay does not toll Colorado's foreclosure redemption period, reasoning that "the mere running of time . . . is not an act of a creditor within the meaning of § 362." *Id.* at p. 821. Redemptive rights may be extended "only to the extent provided in § 108." *Id.*

A deadline on a period of time that is running when a bankruptcy is filed may be extended in the specific circumstances enumerated in section 108 of the Bankruptcy Code.⁴ Nothing in section 108, however, applies to extend the period for vesting of title following a pre-petition foreclosure sale. In any event, avoidance of such vesting as an unauthorized section 549(a) post-petition transfer would be a futile act for the bankruptcy estate in the circumstances at hand. Under Colorado foreclosure law, there remains nothing to be recovered by the estate. The foreclosure sale is final, and the debtor has no further rights to redeem the Property.

(c) Damages for Violation of Automatic Stay

Debtor's third claim is against defendants Andrews and Anesi for damages for violating the automatic stay of 11 U.S.C. § 362(a)(3). That subsection of the automatic stay prohibits,

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. . . .

According to debtor, the specific offending conduct was communications from defendants Anesi and Andrews on September 30, 2011, and from defendant Andrews on October 6, 2011. In the first, the defendants purportedly advised debtor's representative that when Nizhoni Properties received a deed from the foreclosure, unless the debtor vacated the property or signed a lease with Nizhoni Properties, Nizhoni Properties planned to evict the debtor. (Debtor's Answers to Defendants' Interrogatories, ¶ 3, Exh. 2 to Motion for Summary Judgment). In the October 6 communication, two days after a public trustee's confirmation deed to the Property had issued to Nizhoni Properties, Mr. Andrews purportedly told the debtor that unless rents were forthcoming, an eviction action would commence. (Debtor's Answers to Defendants' Interrogatories ¶ 4, Exh. 2 to Motion for Summary Judgment).

Debtor acknowledges in its Response to Motion for Summary Judgment that defendants neither evicted debtor nor diverted any rents from it before obtaining this Court's relief from the automatic stay. All debtor has asserted is that defendants Andrews and Anesi advised it that if the debtor did not vacate the property or negotiate a new lease after title vested in Nizhoni Properties, debtor would be evicted. Defendants simply told debtor exactly what Nizhoni Properties was entitled to do. These communications themselves, in these circumstances, simply do not amount to acts to obtain or control the debtor's property in violation of section 362(a)(3) of the Bankruptcy Code. This is particularly apparent where, as here, the debtor admits to having suffered no damages beyond its attorneys' fees and costs incurred in the course of this Chapter 11 case.

⁴Section 108(a) extends the bankruptcy estate's unexpired limitations periods on filing suits to the later of the limitations period or two years from the filing of the bankruptcy case. Section 108(b) extends periods created by nonbankruptcy law, agreements and court orders within which a debtor may file a pleading, demand, notice, proof of claim, cure a default or perform any similar act to the later of the period or sixty days from the filing of the bankruptcy case. Section 108(c) extends periods created by nonbankruptcy law, agreements, or orders by nonbankruptcy courts within which action may be taken against a debtor to the later of the expiration of such period or thirty days after notice of termination or expiration of the automatic bankruptcy stay that has protected the debtor.

The Court concludes that no genuine issue of material fact exists with respect to debtor's three claims for relief. For the reasons above stated, it is

ORDERED that judgment shall enter in favor of defendants on each of the claims asserted by debtor in this adversary proceeding; and

FURTHER ORDERED that defendants may be awarded their costs herein.

DATED: *June 1, 2012*

BY THE COURT:

A handwritten signature in black ink, appearing to read "A. Bruce Campbell", written over a horizontal line.

A. Bruce Campbell
U. S. Bankruptcy Judge