CONSUMER BANKRUPTCY

Strike One, Strike Two, Strike Three . . . You're Out!

By Craig D. Robins

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In the past six months, Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court, issued just two written opinions, yet both addressed an increasingly common application — a motion for relief from the automatic stay. In each case, Judge Trust granted the bank's motion.

In the most recent decision, decided on Sept. 16, 2019, Wells Fargo as servicer for US Bank sought to lift the stay in the debtor's third bankruptcy filing. In re Atkinson, Case No.19-71044-ast (Bankr. E.D.N.Y).

In the first filing, the debtor, represented by counsel, filed a routine Chapter 7 consumer petition in January 2018 on the eve of foreclosure. Shortly thereafter, the mortgagee filed a motion for relief which the court granted.

However, the debtor failed to take the required debtor education financial management course at the tail end of her case, leading the court to close her case without the debtor receiving a discharge. Then, on the next eve of foreclosure in September 2018, the debtor, still represented by counsel, filed her second Chapter 7 case. Again, just a few weeks later, the mortgagee filed its motion for relief which the court granted. This time the debtor took the financial management course and she received her discharge in December 2018.

One wonders whether the debtor was irresponsible in failing to take the financial management course during the first filing or brilliantly devious. Since the court closed her case without a discharge, she was able to refile a second Chapter 7 case and essentially get an extra half-year in the house before the next foreclosure sale.

In any event, the mortgagee scheduled its third foreclosure sale for February 2019, and again, on the eve of foreclosure, the debtor filed another bankruptcy case, her third, although this time she filed under Chapter 13 and this time she represented herself pro se.

The mortgagee quickly filed another motion for relief from the stay, except this time the mortgagee sought in rem relief. In rem relief is the prospective relief that will apply to others who may file a petition and invoke the automatic stay as to the same property.

At the hearing in April 2019, Judge Trust observed that the debtor had not made a single payment since 2012, the original $400,000 mortgage had swelled to over $800,000, and

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the house was only worth $400,000. The debtor announced that she wanted to retain counsel. Judge Trust found cause to lift the stay but directed the bank to settle the order on 14 days notice, giving the debtor two weeks to find counsel and object to the proposed order. Not surprisingly, a few days later the trustee brought a motion to dismiss.

Thirteen days after the proposed order was settled, debtor retained counsel who filed a letter in opposition to the notice of settlement. Debtor's counsel did not challenge the factual allegations concerning her defaults, the loan balance, the property value, or the scheduled foreclosure sales, nor did she claim that the mortgagee lacked standing to seek stay relief. The debtor also did not address how she could adequately protect the mortgagee's interest in the property or why her proposed Chapter 13 plan was viable. The debtor's sole objection was that the court should not grant in rem relief. In other words, the debtor's attorney, without explicitly saying it, likely wanted the ability to file a petition for the debtor's husband down the road and utilize the automatic stay with that filing.

Judge Trust dismissed the case at the hearing but reserved decision on the issue of in rem relief. In his decision, the judge noted that Congress added Section 362(d)(4) to the Bankruptcy Code in 2005, to address perceived abuses in the bankruptcy process by repeat filers. This section provides that the court can order that any and all future filings by any person or entity with an interest in the subject property will not operate as an automatic stay against the creditor for a period of two years after the date of the entry of such an order, if the court finds that the filing of the bankruptcy filing was part of a scheme to delay, hinder and defraud creditors that involved, among other things, multiple bankruptcy filings affecting the property.

In his decision, Judge Trust Court stated that the mortgagee successfully met its burden of demonstrating a scheme to hinder, delay and defraud. Judge Trust cited his ten-year-old Montalvo decision in which he joined other courts which hold that the mere timing and filing of several bankruptcy cases is an adequate basis from which the court can draw a permissible inference that the filing of a subsequent case was part of a scheme to hinder, delay and defraud. In re Montalvo, 416 B.R. 386, 2009 WL 5203738 (2019).

Judge Trust granted the mortgagee in rem relief for two years although he did indicate in his motion that a debtor in a subsequent case may move or relief from the order based upon changed circumstances or good cause.

The judge noted that while the debtor did earn her Chapter 7 discharge in her second case, which mitigates in her favor, had the debtor's goal been just to obtain a discharge, she could have avoided a second filing by simply completing her financial management course, or by filing after the foreclosure sale was complete if she was concerned about a deficiency judgment.

Here's what this decision means. Judges are becoming less tolerant of debtors who seem to flout the rules and engage in abusive practices. Here, the debtor's third filing, especially when combined with the facts of her case, was more than the court was willing to permit, and the court put its foot down, recognizing that creditors have important rights also. So, with the "third strike," Judge Trust called this debtor out.

Practical Tip: If the debtor in a similar case can demonstrate some aspect of good faith, such as making mortgage payments during or after prior bankruptcy filings, or having a viable Chapter 13 plan, then the debtor may prevail. However, if you are considering defending a client with a rotten track record, don't expect the court to be sympathetic.

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