IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

In Re: Heidi Ann Butterfield, Debtor **No. 5:08-bk-73801**
Ch. 13

ORDER

Before the Court is a Motion for Relief from Automatic Stay filed on December 10, 2008, by creditor Arvest Mortgage Company [Arvest], Benton County Commissioner Brenda DeShields [DeShields], and Clearwater Investments, Inc. [Clearwater]; a response filed on January 12, 2009, by Heidi Ann Butterfield, the debtor; and a reply to the debtor's response filed by Arvest, DeShields, and Clearwater [collectively, A/D/C] on January 13, 2009. The Court held a hearing on the motion, response, and reply on February 11, 2009. At the conclusion of the hearing, the Court took the matter under advisement. For the reasons stated below, the Court denies the motion for relief from stay and respectfully sets aside the Order Confirming Sale and Approving Commissioner's Deed entered by the Circuit Court of Benton County, Arkansas, on October 28, 2008.

Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (G). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

Background

On April 17, 2007, Heidi Ann Butterfield executed a promissory note in the amount of $60,000.00 to Arvest, secured by a mortgage on Butterfield's principal residence [the Property] in Bella Vista, Arkansas. In addition to the amount financed, Butterfield paid $70,000.00 of her own funds towards the purchase of the Property. Under the terms of

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the promissory note, Butterfield was to make monthly payments in the amount of $359.73 beginning June 1, 2007. Butterfield made her first payment timely. However, beginning with her July 2007 payment, Butterfield had difficulty making timely payments. Between July 2007 and June 2008, the parties entered into two repayment agreements in an attempt to keep the loan current, and Butterfield made eight additional payments on the note. Arvest received the last payment on April 10, 2008.

On June 23, 2008, Arvest filed a complaint of foreclosure in the Circuit Court of Benton County [Circuit Court].[1] On August 13, 2008, the Circuit Court entered a foreclosure decree [Decree], which states, in pertinent part:

> IT IS THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Plaintiff, Arvest Mortgage Company, have and recover against the lands and property described in Paragraph No. 4 above, judgment in the amount of $62,241.01, which includes accrued interest and late fees as of June 16, 2008, plus pre-judgment interest accruing at the rate of 6.00% per annum from June 16, 2008, until entry of this Decree, plus costs which include but are not limited to court costs in the sum of $155.00, taxes, insurance, property maintenance, inspections, preservation, title work in the sum of $150.00, service of process in the sum of $150.00, publication costs, recording fees, and commissioner's fees, plus $2,000.00 in attorney fees as provided in said note, all to bear post-judgment interest from the date of entry of this Decree, at the rate of 8.00% per annum until paid.
>
> IT IS FURTHER, CONSIDERED, ORDERED, ADJUDGED AND DECREED that if the judgment with interest thereon as herein adjudged shall not be paid within ten (10) days from the date hereof, together with costs, then, as of the eleventh (11th) day following the date of this judgment, the Commissioner of this Court hereinafter appointed shall, after advertising the time, terms, and place of sale . . . , sell at the front door of the Benton County Courthouse in the City of Bentonville, Arkansas, at public auction to the highest bidder, on a credit of three months, the lands and property herein described; and further that the *purchaser at such sale shall be required to give bond with approved security to secure the payment of the purchase price* . . . .

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[1] This was actually Arvest's second complaint of foreclosure against Butterfield. Arvest filed the first complaint on January 22, 2008. The first action was dismissed after Arvest and Butterfield entered into a second repayment agreement.

> IT IS FURTHER, CONSIDERED, ORDERED, ADJUDGED AND DECREED that *upon the sale of said lands and property and confirmation thereof by this Court, all of the right, title, claim, interest, equity and estate of the Defendant, Heidi A. Butterfield, in and to said property and every part thereof shall be and the same is hereby forever barred and foreclosed including all rights or possibility of dower and homestead and all legal and equitable rights of redemption.*
>
> IT IS FURTHER, CONSIDERED, ORDERED, ADJUDGED AND DECREED . . . that upon the sale, the purchaser at such sale shall be entitled, upon application to the Clerk of this Court, to a Writ of Assistance to place them in possession of said lands and property.

(Pls'. Ex. 6.)(emphasis added). The decree also appointed Brenda DeShields as Commissioner of the sale, which was subsequently scheduled to take place on September 25, 2008, at 9:00 a.m.

The events of September 25 were testified to in detail at the February 11 hearing on A/D/C's motion for relief from stay. A/D/C alleged that the foreclosure sale was completed before the debtor filed her bankruptcy petition and no violations of the automatic stay occurred. The debtor argued that DeShields and the successful bidder at the sale, Clearwater, had notice of Butterfield's bankruptcy filing before the sale was completed, that a violation of the automatic stay occurred, and that DeShields told Butterfield's counsel, Vaughn-Michael Cordes, that the sale had been stopped. However, neither party disputes that at some time after 9:00 a.m. on September 25, 2008, DeShields began the foreclosure sale and Butterfield filed her chapter 13 bankruptcy petition. It is also undisputed, and it remained undisclosed until the end of the February 11 hearing, that Clearwater remitted two down payments to purchase the Property, the second down payment occurring after DeShields voided the first down payment and after both DeShields and Clearwater knew the bankruptcy petition had been filed. The testimony about the events of this day and whether either down payment violated the automatic stay will be discussed below.

As previously stated, Butterfield filed her chapter 13 bankruptcy petition on September 25, 2008. This Court takes judicial notice that according to court records, her petition was filed at 9:18 a.m.[2] On October 14, 2008, the debtor's bankruptcy case was dismissed because she failed to file certain schedules timely. That same day, the debtor filed the delinquent schedules as well as a motion to set aside the dismissal order. On October 15, 2008, Arvest objected to the debtor's motion. The Court scheduled a hearing on the debtor's motion and Arvest's objection on November 13, 2008. Neither party filed a motion requesting that the hearing be held sooner.

Before the hearing was held, on October 23, 2008, an order was signed in Circuit Court confirming the foreclosure sale, which states, in relevant part:

> NOW ON THIS day comes Brenda DeShields, Commissioner herein, and presents to the Court her report of sale as such Commissioner.
>
> The Court finds that the Commissioner held said sale in conformity with the law and with the decree of this Court, and that the same should be approved and confirmed. Said sale to Clearwater Investments for the sum of $63,260.48, is therefore approved and confirmed.
>
> . . .
>
> The Court finds that the purchaser at said sale has paid into the registry of the Court the amount of his bid, or has executed a bond as required by law and said decree in the amount of his bid . . . .

(Pls'. Ex. 8.) The order confirming the sale was filemarked October 28, 2008.

[2] A court may take judicial notice of its own orders and records in a case before the court. Fed. R. Evid. 201.

November 13, 2008, Hearing

At the November 13 hearing, counsel for Arvest, Burton E. Stacy, Jr.,[3] described the events that took place between the time the foreclosure sale began and when the debtor filed her bankruptcy petition:

> The sale took place 9:00 o'clock a.m. on September 25th. And within 20 to 30 minutes thereafter, Ms. Butterfield did in fact file bankruptcy. In that interim time, the third party purchaser, who I believe is here today and would be willing to testify, put his ten percent down. *There was no further action taken.* The case was dismissed. We went and we confirmed the sale. And, certainly, we knew that they wanted to treat us in the Chapter 13, they wanted to keep the property, but the case was dismissed, so we confirmed it.

Stacy added that "we don't have a problem with them getting reinstated"; rather, Stacy explained that he was concerned whether granting the debtor's motion and *setting aside* the order of dismissal would cause the automatic stay to be retroactively imposed. To alleviate this concern, he asked that the Court "reinstate" the debtor's case instead of setting aside the dismissal order.[4] At the conclusion of the November 13 hearing, the Court set aside the order dismissing the debtor's case, noting that the debtor's failure to file the remaining schedules was inadvertent and the relief requested was routinely granted.[5]

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[3] Stacy filed the motion for relief from stay and the reply to the debtor's response on behalf of Arvest, Brenda DeShields, and Clearwater. However, his objection at the November 13 hearing was brought on behalf of Arvest only.

[4] "Reinstating" a case is a term of art that is used frequently by litigants in the context of dismissed cases, and there is no practical difference between reinstating a case and setting the dismissal order aside. When a court "reinstates" a case, the court is proceeding under Federal Bankruptcy Rule of Procedure 9024, which incorporates Federal Rule of Civil Procedure 60, and granting the debtor relief from its dismissal order. Fed. R. Bankr. P. 9024. Setting aside the order of dismissal does not retroactively impose the automatic stay during the time the case was dismissed. *In re Searcy*, 313 B.R. 439, 441-42 (Bankr. W.D. Ark. 2004).

[5] The Court takes judicial notice of Stacy's statements at the November 13, 2008, hearing.

A/D/C's Motion for Relief from Stay

On December 10, 2008, Stacy filed a motion for relief from stay and a brief in support of the motion on behalf of A/D/C, to which the debtor responded on January 12, 2009. The motion for relief from stay requests that this Court "lift, terminate and annul the automatic stay" so that A/D/C "may take all steps necessary to complete the foreclosure sale thereon and gain possession of the Property." In their motion and brief, A/D/C states that "the debtor did not file this bankruptcy action until after the Commissioner's Sale." In her response, the debtor asked the Court to void the order confirming the foreclosure sale and deny A/D/C's motion for relief from stay. A/D/C replied to the debtor's response on January 13, 2009, in which they state:

> Brenda DeShields did not have knowledge about the bankruptcy filing until after the Commissioner's Sale of the Property to a third party, Clearwater Investments, Inc. Brenda DeShields accepted the 10% payment made by Clearwater Investments, Inc. on the morning of the Commissioner's Sale to hold in case the sale could later be confirmed. *However, Brenda DeShields took no further steps regarding the sale at this time.*

The Court held a hearing on A/D/C's motion for relief from stay, the debtor's response, and A/D/C's reply on February 11, 2009. At the hearing, the focus of the parties' attention was not on whether relief from the automatic stay should be granted under 11 U.S.C. § 362; rather, the majority of the testimony, evidence, and argument focused on what happened the day of the foreclosure sale, September 25, 2008.

Day of the Foreclosure Sale, September 25, 2008

As stated above, the events that took place the day of the foreclosure sale were testified to at length at the February 11 hearing. Brenda DeShields, the Circuit Clerk of Benton County, was appointed Commissioner of the sale by the Decree. DeShields is in her seventh year as circuit clerk, and she has been appointed Commissioner of "thousands" of foreclosure sales. She testified that she began the sale on September 25, 2008, at 9:00 a.m., on the front courthouse steps. Nancy Bane, who worked as a legal assistant with Stacy's law firm, Hood & Stacy, and Tyler Thompson, a representative for Clearwater,

were also present at the bidding. Thompson, on behalf of Clearwater, was the high bidder. DeShields testified that after the bidding she and Thompson entered her office, Thompson paid ten percent of the purchase amount down, and he signed a bond that Clearwater would remit the remaining amount within 90 days. DeShields testified that "[Thompson] then left the office. I was then notified by Mr. Cordes [by telephone] of the bankruptcy. I explained to him we already had the sale."

Thompson also testified at the February hearing. He stated that following the bidding, he "went inside with [DeShields] and wrote a check for ten percent of the purchase amount." He stated, "Ms. DeShields did not receive a phone call while I was in her office, which was approximately five to ten minutes." The bulk of Thompson's testimony, which was brief, focused on whether he was in DeShields's office when Cordes called to notify her of the bankruptcy filing.

During Cordes's cross-examination of DeShields, he questioned her about whether she had told him the down payment was submitted after DeShields and Clearwater had notice of the bankruptcy:

Cordes:	Do you recall a conversation with me January 9th of this year?
DeShields:	I have talked to you a couple of times since the sale. I don't know exact dates. No, sir.
Cordes:	Okay. On January 9th, I'm referring to a specific conversation with you that occurred after I had visited your office and spoken with your clerks that day. Do you--
DeShields:	Yes. Yes, I am aware.
Cordes:	Okay. Do you remember a conversation that day?
DeShields:	Yes. Yes.
Cordes:	And do you remember that day you telling me that Clearwater had submitted its payment after the notice of bankruptcy and after the notice of stay had been delivered to your office?
DeShields:	That's not totally correct. *I took the payment after the sale, before I was notified of the bankruptcy.* I did talk with you after they left, like I have stated, then they were notified that a bankruptcy had taken place and *I voided out the receipt.*

Cordes:	What do you mean you voided out the receipt?
DeShields:	*I gave their money back to them.*[6]
Cordes:	Okay. Did you communicate that information to me--
DeShields:	I did.
Cordes:	–during that conversation?
DeShields:	I did.
Cordes:	*. . . So the ten percent that they put down, your testimony today is that you received that prior to my call to you notifying you that the bankruptcy had been filed*?
DeShields:	*Yes, sir*.
. . .	

On re-direct examination of DeShields, Stacy asked one final question to "get this in the record":

Stacy:	Is it in fact true that the foreclosure sale that's the subject of this action took place prior to the bankruptcy filing?
DeShields:	Yes.

To the extent DeShields was asserting that she accepted Clearwater's down payment before the bankruptcy was filed, her testimony is supposition. DeShields did not testify to the exact time any event occurred other than when she began the sale, and her recall of certain details was inconsistent. The automatic stay took effect at 9:18 a.m. *See In re Vierkant*, 240 B.R. 317, 320 (B.A.P. 8th Cir. 1999)(automatic stay "'is triggered upon the filing of a bankruptcy petition regardless of whether the other parties to the stayed proceeding are aware that a petition has been filed.'" (*quoting Constitution Bank v. Tubbs*, 68 F.3d 685, 691 (3d Cir. 1995)). DeShields testified that she began the sale at 9:00 a.m., and that she was first notified that the debtor had filed her bankruptcy petition by Cordes's telephone call, which occurred "shortly after the sale. Clearwater Investments had already paid the money, left. . . . As an exact time, I cannot tell you." Cordes's phone records were placed into evidence, and they reflect that he placed a nine minute outgoing call at 9:24 a.m. The word "Court" is handwritten beside the entry for

[6] Later, DeShields testifies that she did not recall handing the money back to Clearwater.

this call. Presumably, this is the call in which Cordes informed DeShields the debtor had filed her bankruptcy petition, and, if so, it took place six minutes after the automatic stay took effect. Thompson testified that he was in DeShields's office for about five to ten minutes.

Based on the testimony and evidence, a rough timeline of the morning's events is that the foreclosure sale began at 9:00 a.m.; between the beginning of the sale and Cordes's call, the bidding occurred and DeShields and Thompson walked to DeShields's office; Thompson spent about five to ten minutes in the office; at some point before Thompson left, he tendered the down payment; and Cordes called "shortly" after Thompson left to tell DeShields the bankruptcy had been filed earlier, possibly about six minutes earlier. Because this reconstruction of the morning's events is all that can be determined, the Court cannot find that the down payment was accepted before or after the automatic stay took effect at 9:18 a.m. While DeShields was consistent in her testimony that the down payment was tendered and accepted before she *knew* the bankruptcy petition was filed, this lack of knowledge only goes to any issues concerning bad faith, *Otoe County Nat'l Bank v. Easton* (*In re Easton*), 882 F.2d 312, 315 (8th Cir. 1989), or willful stay violations. *See* 11 U.S.C. § 362(h).

After several more witnesses and both parties had rested, the Court recalled DeShields to clarify her testimony elicited on cross-examination that she "voided out" the receipt and "gave their money back to them":

Court:	I just want to clarify one short part of your testimony. I think you told me that upon learning of the bankruptcy you voided out the receipts, I think is the terminology you used, and gave the money back to Clearwater. Is that what you did?
DeShields:	I did void it out. It was a check. I don't recall handing it back to anyone. Later, I did receive a call and they said there might be some complications with the bankruptcy, could I hold the money in the registry. *So that is where I think he's saying I took the money after.* I had already receipted the money.

Court: Okay.
DeShields: Initially, right after the sale, before I knew of the bankruptcy.
Court: Okay.
DeShields: When I did find out about the bankruptcy, and it was later, and I voided the receipt, let the parties know that there was a bankruptcy. I was contacted later by Clearwater, stating that they thought there might be some complications in the Bankruptcy Court, could I hold the money. *That money is still being held in the registry.* It hasn't went anywhere.

DeShields's position was that the bidding occurred and the down payment was remitted before she had knowledge of the bankruptcy. Regardless, she voided the receipt and tore up the check upon learning of the bankruptcy; DeShields provided no additional reasons why she did this other than referencing her subsequent discovery of the bankruptcy and a phone call in which she was told of possible bankruptcy complications. The exchange continued:

Court: Okay. So on your books and records, you voided receipts, but you never gave the money back?
DeShields: I do not recall actually handing that money back. Actually, what I remember--and it's just going from memory, I have no notes--is *I do believe I tore the check up and then Clearwater came back and handed me another check*,[7] is what I remember. I do not have any notes of that. No, sir. And then I did do a new receipt.

This is the first time the existence of the second down payment was disclosed to the Court. Apparently, even with knowledge of possible "complications," Clearwater handed DeShields a second down payment, and DeShields did a "new" receipt. DeShields offered no explanation for the second transaction, and Thompson was not questioned regarding his knowledge, if any, of the phone call or second down payment from Clearwater. Stacy did not have any questions in response to the Court's questions; however, Cordes did:

[7] DeShields later testifies she cannot recall whether the second down payment was a check or cash.

Cordes:	I just want to clarify that there was a second check that was received from Clearwater; is that what your testimony just was?
DeShields:	*There were--was a second set of funds, whether that was check or cash I don't recall without looking at my records.*
Cordes:	Okay. And you did take that and that's still in the registry?
DeShields:	*That is still in the registry.*
Cordes:	Okay. And when did you receive that?
DeShields:	That was the same day.
Cordes:	The same day?
DeShields:	Within minutes after.
Cordes:	*That was after you received notice of the bankruptcy?*
DeShields:	*Yes, sir. That was.*
Cordes:	Okay. And that's the issue that we're talking about today.

The disclosure of the second down payment conflicts with DeShields's earlier testimony, representations of A/D/C's counsel in pleadings, and representations made at the November 13 hearing. In each instance, it was implicit that the down payment referenced was "put down" just once, that the down payment was not subsequently voided, and that the "funds in the registry" were the result of the one, and only, down payment. Nowhere in A/D/C's motion for relief from stay or the seven page brief in support of that motion do they disclose that DeShields voided the first down payment or accepted a second down payment. On the contrary, it was expressly stated in the motion for relief from stay, and verbally by Stacy at the November 13 hearing, that DeShields did nothing else after accepting the down payment. Because there was no disclosure of a second down payment prior to this Court's inquiry, the only possible inference from the pleadings of A/D/C and representations of A/D/C's counsel is that DeShields did absolutely nothing else with this sale after accepting a single down payment. In fact, further actions regarding this sale *were* taken: DeShields voided the initial receipt and tore up the check, Clearwater remitted a second set of funds, DeShields accepted the second down payment, and DeShields created a new receipt.

Both Clearwater and DeShields are before this Court requesting relief from the stay, presumably just to be safe before proceeding with their conviction that Clearwater is entitled to possession of the Property. Despite their certitude that they are entitled to the

requested relief, they still have a duty to not mislead the Court or permit the Court to be misled. The Court has considered the testimony, and is not convinced that A/D/C's lack of candor was because of an opinion that the second down payment was of no legal consequence; on the contrary, Stacy asserted at the November 13 hearing and in A/D/C's motion for relief from stay that DeShields did *nothing else* regarding the sale after accepting Clearwater's ten percent down payment, and DeShields obfuscated when asked on cross-examination about whether Clearwater had submitted its down payment after she had knowledge of the bankruptcy.[8] A/D/C's denial that any subsequent actions took place and failure to disclose the second down payment suggests that the parties knew that the voided down payment and existence of a second down payment could have an impact. To DeShields's credit, she disclosed the existence of two down payments upon the Court's inquiry. But had the Court not followed up with a general question, the second down payment would not have been disclosed at all.

Whether the Foreclosure Sale Should Be Set Aside

Based on the foregoing findings of fact, this Court concludes that there are two interrelated bases that compel this Court to set aside the foreclosure sale. First, the Court finds that Clearwater's second payment violated the automatic stay, specifically, § 362(a)(3), and as such is void. *Vierkant*, 240 B.R. at 324. The violation of the stay in this case is reason enough to compel this Court to set aside the sale. Second, the Court finds that additional facts and circumstances exist that are unusual, compelling, and particularly egregious; specifically, these facts and circumstances include, but are not limited to, the following: (1) the second payment was not disclosed up front by A/D/C; (2) DeShields's testimony was confusing and her actions of voiding the first payment but accepting the second payment is unexplained; and (3) the foreclosure sale was not

[8] This is not to say that DeShields was lying. DeShields has most likely conducted several foreclosure sales since the one at issue in this case. However, her testimony was sometimes inconsistent and confusing.

completed in accordance with applicable state law. The Court will address each basis in turn.

Violation of Automatic Stay Under § 362(a)

A debtor's bankruptcy estate consists of all legal and equitable interests of the debtor existing at the commencement of the bankruptcy case. 11 U.S.C. § 541(a). Whether a debtor has any legal or equitable interest in property is determined under state law. *In re Sugarloaf Props., Inc*., 286 B.R. 705, 708 (Bankr. E.D. Ark. 2002). It is well-settled in Arkansas that a judicial foreclosure sale is complete upon confirmation of the sale by the court. *Id.* at 709*; Dellinger v. First Nat'l Bank of Russellville*, 970 S.W.2d 223, 225 (Ark. 1998). An Arkansas bankruptcy case elaborated on this general rule and addressed the exact nature of a debtor's interest after a foreclosure decree is issued but before confirmation of the sale:

> This generalization, that sale is not final until confirmation, is based upon the expiration of the right of redemption. *Once the right of redemption ceases, usually occurring upon confirmation of the sale, the debtor has no further rights in the property.* Indeed, after the contract has merged into the judgment, and prior to the sale, the identifiable interests of the debtor are merely the statutory and equitable rights of redemption. . . . Further, those rights are generally extinguished by the foreclosure decree and sale. . . . Where, as here, the decree provides for satisfaction of the judgment within a particular time period, i.e., a specific time in which to redeem the property, and sale thereafter, the possibility of redemption is foreclosed after the expiration of that time period and upon the sale. *However, if the decree were to provide that title was foreclosed upon sale and confirmation, the sale is not final until confirmation.*

In re Crime Free, Inc., 196 B.R. 116, 117 (Bankr. E.D. Ark. 1996); *see also Fleming v. Southland Life Ins. Co.*, 564 S.W.2d 216, 218 (Ark. 1978)(stating that where a foreclosure decree contains wording "that appellants' title would be foreclosed and barred 'upon the sale of said lands . . . and confirmation thereof . . .' the sale is conditional, and mortgagor's equity of redemption is not extinguished until confirmation."); *Jermany v. Hartsell*, 216 S.W.2d 381, 382 (Ark. 1949)(finding that the decree required sale and confirmation to extinguish the debtor's equitable redemption rights); *Pope v. Wylds*, 266 S.W. 458, 458-59 (Ark. 1924)(same). The Decree in this case gave the debtor ten days to

satisfy the judgment, but, like the language cited in *Fleming* and the decrees in *Jermany* and *Pope*, it was "upon the sale of said lands and property and confirmation thereof" that all of the debtor's "right, title, claim, interest, equity and estate . . . including all rights or possibility of dower and homestead and all legal and equitable rights of redemption" was to be foreclosed. Pursuant to the Decree, until the Property was sold and confirmed, the debtor, at a minimum, still had equitable redemption rights in the Property at the time her bankruptcy petition was filed. Equitable redemption rights are equitable interests that become property of the estate upon filing. *Crime Free, Inc.*, 196 B.R. at 117. Although an order confirming the sale was subsequently entered, the Commissioner did not complete, and has not completed, the sale of the Property in accordance with Arkansas law. The Commissioner voided the first down payment; the automatic stay voided the second down payment.

Section 362 states that the filing of a bankruptcy petition stays "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." 11 U.S.C. § 362(a)(3). Property of the estate in this case includes all legal and equitable interests the debtor had in the Property at 9:18 a.m. on September 25, 2008. It is unknown whether the first down payment was tendered before 9:18 a.m., and the fact that DeShields voided and tore up the first down payment is some evidence to show that it may not have been. However, even if it had been tendered and accepted, such payment did not extinguish the debtor's remaining rights in the Property, and DeShields subsequently voided the first down payment, giving the payment no effect. As a term of the sale, payment had to be completed for the sale to be completed in accordance with Arkansas law.

Arkansas law requires that "[i]n all sales on credit, the purchaser shall execute a bond, *with good surety*, to be approved by the person making the sale, and the bond shall have the force of a judgment." Ark. Code Ann. § 18-49-104(b)(1)(West, WESTLAW through 2009 Reg. Sess.)(emphasis added). DeShields, as the judicially appointed Commissioner

of the sale, executed the notice of Commissioner's Sale, which stated that the "TERMS OF SALE" are, in pertinent part, as follows:

> On a credit of three months, the purchaser being required to execute a bond as required by law and the order and decree of said Court in said cause, *with approved security*, bearing an interest rate of 10.0 percent per annum from date of sale until paid, and a lien being retained on the premises sold to secure the payment of the purchase money."

(Pls'. Ex. 7.)(emphasis added). There was no testimony that Clearwater gave anything other than the ten percent down payment to satisfy the "good surety" or "approved security" requirement. DeShields testified that Clearwater "[was] required to pay ten percent down or the payment in full. They chose to do ten percent down."

The second down payment is void because it violated the automatic stay under § 362(a)(3). Because the first down payment was voided by DeShields, Clearwater had to make the second down payment in order to meet an absent term of sale. Making a ten percent down payment was not inconsequential or merely a memorialization of the bidding; rather, it was a step Clearwater had to take if it wanted to obtain certain rights to the Property. *See Capital Realty Servs, LLC v. Benson* (*In re Benson*), 293 B.R. 234, 240-41 (Bankr. D. Ariz. 2003)(finding that where bid price was necessary for bidder to conclude purchase of the property, payment of the bid price after bankruptcy petition has been filed was an act to obtain property of the estate and violated § 362(a)(3)). Arkansas law and the Decree both require that the purchaser provide surety or security, respectively, and DeShields testified to the specific kind of security that was required--ten percent of the purchase price down. If Thompson had walked into DeShields's office and refused to proffer the ten percent down payment, it would have had legal implications and affected Clearwater's ability to acquire rights in the Property. *See In re Carver*, 828 F.2d 463, 464 (8th Cir. 1987)(certification by the clerk of the court required under state statute was "ministerial" because, *inter alia*, it did not have certain legal implications on the rights of the parties).

The ten percent down payment was not simply a clerical or automatic function that the parties performed without discretion. Clearwater could have walked into DeShields's office and refused to make the payment had it changed its mind. DeShields, a judicially appointed officer, could have refused to accept the second down payment if it did not meet her requirements, and her actions regarding the first down payment exemplifies her discretion. *See Vierkant*, 240 B.R. at 321 (holding that a post-petition *entry* of the default judgment was not a ministerial act even though the hearing at which the debtor's failed to appear occurred before the bankruptcy filing).

By tendering the second payment, Clearwater was performing an act to purchase, obtain possession of, and foreclose the debtor's remaining interest in the Property. And because the second payment was tendered after the debtor's interest in the Property became property of her bankruptcy estate, it violated § 362(a)(3). The Court cannot annul the automatic stay to validate the actions performed after the stay was in effect in this case. *See Vierkant*, 240 B.R. at 324. Although A/D/C perfunctorily requested in their motion for relief from stay that this Court annul the automatic stay, A/D/C did not argue or introduce any evidence to prove they were entitled to such relief. To this Court's knowledge, Arvest has not yet disposed of, or even received, any funds resulting from the sale; Arvest did not otherwise show how it would be prejudiced if the sale was set aside; and Arvest did not allege that the debtor was unfairly using the automatic stay as a shield. Further, there was no proof that the debtor withheld notice of the bankruptcy; in fact, debtor's counsel tried to notify the parties before and after the sale began. *See In re Scott*, 182 B.R. 31, 33-34 (Bankr. W.D. Ark. 1995)(stating circumstances under which a bankruptcy court could validate actions taken in violation of the stay). Additionally, the debtor likely had substantial equity in the property; A/D/C did not seek relief from the automatic stay until December 10, 2008; A/D/C did not disclose the existence of a second down payment until the Court's questioning; and Arvest did not show how it has changed its position as a result of the sale. *See In re Williams*, 257 B.R. 297, 301 (Bankr. W.D. Mo. 2001)(listing factors considered in determining whether to annul the automatic stay).

Therefore, to the extent that this issue was before the Court, the automatic stay cannot be annulled.

The Bankruptcy Appellate Panel for the Eighth Circuit has held that actions taken in violation of the automatic stay are void and without effect. *Vierkant*, 240 B.R. at 325 (reversing a bankruptcy court order that gave collateral estoppel effect to a default judgment that was entered in violation of the automatic stay); *see also In re Brown*, 282 B.R. 880, 882-83 (Bankr. E.D. Ark. 2002)(holding that a confirmation order was "void and of no effect" because it was filed after the bankruptcy case was filed, resulting in a "technical violation of the automatic stay"); *Scott*, 182 B.R. at 33 (finding an order confirming a foreclosure sale invalid because it was entered after the automatic stay took effect); *but see In re Williams*, 257 B.R. 297, 301 (Bankr. W.D. Mo. 2001)(finding actions taken in violation of the automatic stay are voidable, not void). With both down payments void, either by DeShields's actions or by operation of law, Clearwater failed to meet a term of the sale and the sale was not completed in accordance with Arkansas law. The order of confirmation was entered while the automatic stay was not in force; however, the confirmation order does not deprive this Court of the authority to review the sale when stay violations are alleged, or to set aside the sale when, after review, unusual, compelling, and egregious facts exist.[9]

[9] Further, no evidence was presented that the circuit court judge actually held a hearing on whether the sale conformed to Arkansas law or whether the automatic stay was violated. The order confirming the sale reflects that its findings are based on the Commissioner's Report of Sale, which does not cite any irregularities in the sale. It is also generally known within this jurisdiction that reports of sales and orders of confirmation are routinely submitted to circuit court judges for their review and signature without a hearing.

Setting Aside the Foreclosure Sale Under § 105 When Unusual, Compelling, and Particularly Egregious Facts Exist

The Eighth Circuit has recognized that a bankruptcy court can set aside a state court order confirming a foreclosure sale on the basis of unusual and compelling circumstances or particularly egregious facts pursuant to 11 U.S.C. § 105(a). *Easton*, 882 F.2d at 315. Section 105(a) allows bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

In *Easton*, the Eighth Circuit affirmed the district court's affirmation of the bankruptcy court's ruling to set aside a sheriff's sale as a result of the bank's bad faith actions. *Easton*, 882 F.2d at 315. The bank had obtained a valid foreclosure judgment; the bank was granted relief from the automatic stay to pursue foreclosure; the debtor had received good notice of the foreclosure sale; and the debtor did not move to enjoin the sale or reimpose the stay at any point. *Id.* at 314-16. However, the bankruptcy court found that the bank acted in bad faith by proceeding to the sale because the bank had attended a confirmation hearing at which it was implicit that the debtor's plan would be confirmed once certain amendments were filed. *Id.* at 314. Rather than object to the subsequently filed amendments, the bank proceeded to the foreclosure sale. *Id*. In contrast, other circumstances do not justify the use of the bankruptcy court's power under § 105(a). *See, e.g.*, *In re Berg*, 152 B.R. 289, 293 (Bankr. D.S.D. 1993)(stating that "bankruptcy courts must, in addition, look to the substance of a particular transaction, as opposed to the form, when deciding to exercise the broad grant of equitable powers provided by Section 105(a)"); *Piccolo v. Dime Sav. Bank of New York*, 145 B.R. 753, 759 (N.D.N.Y. 1992)(reversing a bankruptcy court order setting aside a foreclosure sale when it appeared the decision was based on equitable considerations that the debtors had dependent children and their counsel had committed errors).

The Court is making no finding in this Order as to whether A/D/C acted in bad faith. The discovery of the second down payment was not only new evidence to this Court, but also to debtor's counsel. It was disclosed after both parties had rested, and it was not clear

that the representative from Clearwater who was present at the hearing was the same person that tendered the second payment on behalf of Clearwater. At this time, it would be unfair to the parties for the Court to rule on this issue.

However, a finding of bad faith is not the lynchpin determination regarding whether the circumstances of this case are unusual, compelling, or egregious. A violation of the automatic stay, the discovery of a second payment, the existence of inconsistent testimony and unexplained actions, and a foreclosure sale not completed in accordance with applicable state law are by far enough. Additionally, injustice would result in this case if the sale was not set aside--the debtor's substantial equity interest in her home would be foreclosed by an order confirming an uncompleted sale that also violated the automatic stay. This Court is not moved by irrelevant equitable considerations concerning the debtor's personal life. Rather, the Court is moved by the violation of the automatic stay and the inexplicable circumstances surrounding the foreclosure sale, including, but not limited to, the following: DeShields voided the first payment despite her position that the "sale took place" before the bankruptcy was filed; Clearwater remitted a second payment even though someone at Clearwater was aware of "complications"; DeShields accepted the second payment after she knew of the bankruptcy filing; and finally, A/D/C did not disclose the existence of the second down payment in any pleading filed with this Court.

Conclusion

For the reasons stated above, the Court finds that the second down payment remitted by Clearwater to DeShields is a violation of the automatic stay, and that unusual and compelling circumstances, and particularly egregious facts, exist to warrant setting aside the order confirming the foreclosure sale. As stated in this opinion, the parties did not focus on whether A/D/C should be granted relief from the automatic stay prospectively. Based on the evidence before the Court, the Court finds that the debtor has equity in the Property, it is needed for her reorganization, and there is no evidence to show that Arvest

is not being adequately protected. Accordingly, A/D/C's motion for relief from stay is denied.

IT IS SO ORDERED.

May 29, 2009
DATE

BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

cc: Vaughn-Michael H. Cordes, attorney for debtor
Burton E. Stacy, Jr., attorney for Arvest Mortgage Company, Commissioner Brenda DeShields, and Clearwater Investments, Inc.
Joyce Bradley Babin, chapter 13 trustee