

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

FILED
JAMES J. WALDRON, CLERK

[February 14, 2008]

U.S. BANKRUPTCY COURT
CAMDEN, N.J.
BY: /s/[Elizabeth Grassia], Deputy

_____	:	
IN RE:	:	
	:	
KYONG H. KIM,	:	CHAPTER 11
	:	
Debtor.	:	CASE NO. 02-20654 (GMB)
_____	:	
KYONG H. KIM	:	
	:	
Plaintiff,	:	ADVERSARY NO. 06-2005 (GMB)
v.	:	
	:	
UPPER DARBY TOWNSHIP, TAX CLAIM	:	
BUREAU OF DELAWARE COUNTY, ALLIED	:	
PROPERTY BROKERAGE, AND RAJ KUMAR	:	
KAPOOR,	:	
	:	
Defendants.	:	
_____	:	

MEMORANDUM OPINION

APPEARANCES:

William Mackin, Esquire, P.C.
105 N. Broad Street
P.O. Box 304
Woodbury, NJ 08096
Attorney for Debtor

David A. Kasen, Esquire
Kasen & Kasen
Society Hill Office Park, Suite 3
1874 E. Marlton Pike
P.O. Box 4130
Cherry Hill, NJ 08034
Attorney for Debtor

Colleen A. Garrity, Esquire
Flaster Greenberg, P.C.
1628 John F. Kennedy Boulevard, 15th Floor
Philadelphia, PA 19103
Attorney for Upper Darby Township

Samuel H. Israel, Esquire
Fox Rothschild LLP
2000 Market Street, 10th Floor
Philadelphia, PA 19103
Attorney for County of Delaware, Pennsylvania

Before the Court are two motions. First, Upper Darby Township (“Upper Darby”) and the County of Delaware, Pennsylvania (“Delaware County”¹) have moved for relief from the automatic stay *nunc pro tunc* to November 26, 2002² pursuant to 11 U.S.C. § 362(d) in the Debtor’s main bankruptcy case (the “Stay Relief Motion”). Second, Kyong H. Kim (the “Debtor”) has moved for summary judgment pursuant to 11 U.S.C. § 362(k)(1) in the adversary proceeding (the “Summary Judgment Motion”). A hearing on these matters was held on January 14, 2008.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a)-(b) and 157(a), and the Standing Order of the United States District Court for the District of New Jersey dated July 23, 1984, referring all proceedings related to a case under title 11 of the United States Code to the bankruptcy court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

¹ Hereinafter, references to Delaware County will include the Delaware County Tax Claim Bureau, which serves as the collection department for unpaid township, county and school taxes. Further, Delaware County notes in its opposition to the Summary Judgment Motion that it is incorrectly named in the adversary proceeding caption as the “Tax Claim Bureau of Delaware County.”

² In actuality, Upper Darby and Delaware County seek retroactive stay relief as of the filing date, November 6, 2002, but in their certifications in support of the Stay Relief Motion, both incorrectly assert that the Debtor filed for Chapter 11 relief on November 26, 2007.

Venue of this case is proper in the District of New Jersey pursuant to 28 U.S.C. §§ 1408 and 1409. The following shall constitute findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

I. FINDINGS OF FACT

On September 3, 1993, the Debtor purchased real property located at 6462 West Chester Pike³ in Upper Darby, Pennsylvania (the “Property”). The Search Report attached to Upper Darby’s and Delaware County’s Stay Relief Motion indicates that the deed to the Property was dated September 3, 1993 and was recorded on September 17, 1993. From 1994 through 2005, the Debtor failed to pay various taxes and fees owed to Upper Darby, Delaware County, and the Internal Revenue Service (the “IRS”) and, as a result of these delinquencies, numerous tax liens were filed against the Property.

Delaware County asserts that, in July 2000, it sent the Debtor a notice of delinquent taxes relating to county, township, and sewer tax assessments,⁴ but that the Debtor did not cure the delinquencies. Delaware County also asserts that, in July 2001, it sent the Debtor notice of an upset sale of the Property,⁵ but that the Debtor failed to cure these delinquencies. On September 10, 2001, Delaware County exposed the Property to an upset sale, but there were no bidders for the Property at the upset sale.

³ In the parties’ submissions to the Court, the Property is sometimes referred to as being located at 6462 Market Street in Upper Darby, Pennsylvania.

⁴ Delaware County did not provide documentary evidence of the notice or proof of service thereof, but the Debtor did not dispute the claim that she received such notice.

⁵ Delaware County did not provide documentary evidence of the notice or proof of service thereof, but the Debtor did not dispute the claim that she received such notice.

The Debtor filed for voluntary relief under Chapter 11 on November 6, 2002. Although Upper Darby was not listed as a creditor on the Debtor's schedules at the time of her bankruptcy filing, Upper Darby was notified of the Debtor's bankruptcy case by a letter from her attorney dated April 22, 2003 and faxed on April 23, 2003. Similarly, though Delaware County was not listed on the Debtor's schedules when she filed for bankruptcy relief, Delaware County was notified of the Debtor's bankruptcy case by a letter from her attorney dated June 9, 2003. In actuality, the Debtor's counsel's June 9, 2003 letter to Delaware County was in response to Delaware County's counsel's request for information regarding the Debtor's bankruptcy petition because Delaware County had learned of the Debtor's filing when Upper Darby had copied Delaware County in Upper Darby's counsel's May 19, 2003 letter response to the Debtor's counsel's April 22, 2003 letter.

Delaware County asserts that, in March 2005, its Sheriff's Department served a Petition and Rule upon the Debtor,⁶ providing notice of the Judicial Sale scheduled for May 25, 2005. On May 25, 2005, notwithstanding the filing of the Debtor's bankruptcy petition approximately two-and-one-half (2.5) years prior to that date and the aforementioned correspondence with the Debtor's counsel in 2003, Delaware County asserts that it held a duly noticed, properly conducted Judicial Sale⁷ of the Property.

⁶ Delaware County did not provide documentary evidence of the Petition and Rule or proof of service thereof, but the Debtor did not dispute the claim that she received such notice.

⁷ Delaware County did not provide documentary evidence of the notice or proof of service thereof, but the Debtor does not dispute the claim that she received such notice or that the Judicial Sale was properly conducted.

At the Judicial Sale, Allied Property Brokerage (“Defendant Allied”) made the winning bid on the Property in the amount of \$89,000, which amounted to \$85,322.10 net of transfer taxes and fees and was used to partially satisfy existing liens on the Property. Upper Darby and Delaware County assert that, at the time of the Judicial Sale, the existing liens on the Property totaled \$705,596.38: \$594,037.50 of judgment liens⁸ and \$111,558.88 of municipal and federal tax liens.

Delaware County deeded the Property to Defendant Allied on July 21, 2005 for the consideration stated above. In connection with the Judicial Sale transaction, a document entitled “Realty Transfer Tax Statement of Value” was prepared and submitted to the Recorder of Deeds, indicating that the fair market value of the Property was \$169,470 based on a county-assessed value (\$134,500) multiplied by a factor of 1.26. The Realty Transfer Tax Statement of Value was signed by a representative of Delaware County, Barbara Erle, who declared that “[u]nder penalties of law, [she] examined this Statement, including accompanying information, and to the best of [her] knowledge and belief, it is true, correct, and complete.” Notwithstanding this declaration, the Director of the Delaware County Tax Claim Bureau, Josephine Rizzo, states in her certification in opposition to the Summary Judgment Motion that the Realty Transfer Tax Statement of Value (1) was prepared to determine the local transfer tax that was required to be paid in connection with the Judicial Sale, (2) reflects the sale price, the type of sale, and the tax

⁸ The alleged judgment liens (the “Pickering Judgments”) were listed on the title Search Report attached to Upper Darby’s and Delaware County’s Stay Relief Motion as “01-011032 Joseph Pickering v. Christian Kim a/k/a Hye Y. Kim a/k/a Kyong Kim 10-5-01 \$264,018.75” and “01-011033 Joseph Pickering v. Christian Kim a/k/a Hye Y. Kim a/k/a Kyong Kim 10-5-01 \$330,18.75 (amt just like that on docket),” respectively. However, neither party addressed the issue of whether the Pickering Judgments were actually against the Debtor or why Joseph Pickering was not listed as a creditor on the Debtor’s schedules.

assessment, but (3) does not provide a statement and/or calculation of the Property's fair market value. Further, Ms. Rizzo notes that the Property was assessed at \$134,500 in the year 2000 county-wide reassessment and that the assessment value does not reflect fair market value but rather is a value given to the Property by Delaware County's Board of Assessments to determine the appropriate real estate tax. On January 11, 2006, Defendant Allied sold the Property to Raj Kumar Kapoor ("Defendant Kapoor") for \$185,000.

II. PROCEDURAL BACKGROUND

The Debtor filed for voluntary relief under Chapter 11 on November 6, 2002. The Debtor did not list any amounts owed to Upper Darby and Delaware County in her initial bankruptcy schedules.

On July 7, 2003, after Upper Darby's initial correspondence with the Debtor's counsel regarding the existence of the Debtor's bankruptcy case, Upper Darby's counsel wrote to Debtor's counsel to request an extension to file a Proof of Claim because Upper Darby did not receive notice of the Debtor's bankruptcy filing until after the deadline for filing a Proof of Claim had passed. On September 10, 2003, a stipulation was entered into between the Debtor and Upper Darby allowing Upper Darby to file a late Proof of Claim. Indeed, on January 15, 2004, Upper Darby filed its Proof of Claim and thereby indicated that the taxes due for 1999 through 2002 were certified for collection as delinquent to Delaware County. Pursuant to Upper Darby's Proof of Claim, the total amount of its claim at the time the Debtor's case was filed was \$5,177.70.

On June 29, 2006, the Debtor commenced adversary proceeding case number 06-2005 against Upper Darby, Delaware County, Defendant Allied, and Defendant Kapoor. In the

adversary complaint, the Debtor sought, *inter alia*, the avoidance of the unauthorized post-petition transfer of the Property that she had owned as of the petition date pursuant to 11 U.S.C. § 549 and damages for the willful violation of the automatic stay in accordance with 11 U.S.C. § 362(k).

On October 12, 2006, the Court entered an order approving the Debtor's disclosure statement. On December 18, 2006, the Court entered an order confirming the Debtor's First Amended Chapter 11 Plan (the "Order"), which addressed objections to confirmation raised by Upper Darby and Delaware County by referencing the pending adversary proceeding to account for claims by Upper Darby, Delaware County, and the Upper Darby School District. In particular, section 3(B) of the Order provided that:

Upper Darby's secured claim is the subject of adversary proceeding number 06-02005, which seeks to, *inter alia*, void the transfer of the [Property]. Upper Darby's claim should be resolved by the outcome of the Adversary Proceeding. In the event that the Debtor prevails in the Adversary Proceeding, Upper Darby shall retain its liens on the Property until such time that Upper Darby's claims have been satisfied in full.

Meanwhile, Delaware County and the Upper Darby School District, neither of which filed a proof of claim, were addressed in the Order in section 4 as follows:

- A. The secured claims of [Delaware County] and the Upper Darby School District were not addressed in the Debtor's Plan.
- B. Such claims shall receive the same treatment proposed in the Plan for the secured claims of Upper Darby Township.
- C. [Delaware County] and the Upper Darby School District shall have sixty (60) days from the date of the entry of the Order of confirmation to file proofs of claim establishing the amounts thereof.
- D. Debtor reserves the right to file appropriate objections to such claims. Any such objections to the claims of [Delaware County] and/or the Upper

Darby School District must be filed not later [than] 60 days after the entry of a final judgment (or other final resolution of) adversary proceeding number 06-02005-GMB.

In addition, section 5 of the Order provided that the Court would retain subject matter jurisdiction of post-confirmation disputes in accordance with the terms of the Plan. Neither Delaware County nor the Upper Darby School District filed a claim within the 60 days allotted under the Order or at any time thereafter. On March 13, 2007, the Court entered an order closing the Debtor's case effective March 31, 2007.

On November 11, 2007, Upper Darby and Delaware County filed the Stay Relief Motion in the Debtor's main bankruptcy case, seeking to retroactively annul the automatic stay to the date the Debtor filed her bankruptcy petition to validate the Judicial Sale, and the Debtor opposed the Stay Relief Motion. On November 27, 2007, the Debtor moved for summary judgment on her claim in the adversary proceeding against Upper Darby and Delaware County, alleging that the Judicial Sale constituted a willful violation of the automatic stay pursuant to 11 U.S.C. § 362(k)(1) and that she is therefore entitled to her actual damages, and Upper Darby and Delaware County opposed the Summary Judgment Motion claiming there were genuine issues of material fact.

On January 14, 2008, the Court conducted a hearing on the subject motions. Initially, the Court addressed the Debtor's concern that the Stay Relief Motion should not even be considered given the fact that the Debtor's main bankruptcy case closed on March 31, 2007. In response, Upper Darby and Delaware County orally moved to reopen the case for cause pursuant to 11 U.S.C. § 350(b); the Debtor did not oppose the motion. The Court granted the oral motion to

reopen the case based on the fact that the Stay Relief Motion would need to be decided in one context or another as it was implicated by the Summary Judgment Motion.

In addition, the Debtor argued at the January 14, 2008 hearing that Upper Darby and Delaware County should be estopped from seeking retroactive relief from the stay due to the preclusive effect of a confirmation order per 11 U.S.C. § 1141(a) or because such requested relief is inconsistent with their positions throughout the Chapter 11 Plan confirmation process. The Court considered the Debtor's estoppel arguments but ultimately ruled that Upper Darby and Delaware County could seek retroactive stay relief. Specifically, the Court noted that even if such requested relief should have been sought at an earlier juncture, Upper Darby and Delaware County justifiably thought that all issues relating to the Property at issue in the pending adversary proceeding would be addressed outside of the Plan and that they had not advocated inconsistent positions over time. Therefore, the Court heard arguments on the merits of the Stay Relief Motion and the Summary Judgment Motion on January 14, 2008.

After the hearing on January 14, 2008, the Court took the matters under advisement. The scheduled trial date set for the adversary proceeding is March 13, 2008.

III. DISCUSSION

A. The Stay Relief Motion

1. The Automatic Stay and Grounds for Relief from the Stay

As stated above, Upper Darby and Delaware County seek relief from the automatic stay *nunc pro tunc* to November 6, 2002. Section 362(a), which imposes the automatic stay upon the

commencement of a bankruptcy case, lists the acts that are prohibited by the stay.⁹ In pertinent part, 11 U.S.C. § 362(a) provides:

[A] petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—

(1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(3) 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;

(4) any act to . . . enforce a lien against property of the estate;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]

11 U.S.C. § 362(a). In general, the debtor and property of the estate are insulated during the pendency of the bankruptcy case by 11 U.S.C. § 362(a) against creditor action to recover on account of pre-petition obligations of the debtor. *See Maritime Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991) (noting that the automatic stay serves to provide the debtor with a breathing spell from creditors by stopping, among other things, all foreclosure actions). Importantly, not only does 11 U.S.C. § 362(a) stay all post-petition action to obtain possession or exercise control over property of the estate, but it is also automatic because it arises irrespective of whether the parties stayed are aware that a petition has been filed. *Id.* Moreover, any action taken in violation of the automatic stay is void *ab initio*. *See Raymark Indus., Inc. v.*

⁹ Section 362(b) enumerates specific exceptions to the automatic stay, but none of these exceptions apply to this case.

Lai, 973 F.2d 1125, 1131 (3d Cir. 1992) (noting that “actions taken in violation of the stay are without effect”).

Section 362(d) sets forth the grounds for relief from the automatic stay. In relevant part, 11 U.S.C. § 362(d) states that:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization[.]

11 U.S.C. § 362(d). If a creditor meets its burden under 11 U.S.C. § 362(d)(2)(A) by showing that the debtor does not have an equity in the property and the debtor cannot show that the property is necessary for an effective reorganization pursuant to 11 U.S.C. § 362(d)(2)(B), then relief from the automatic stay is appropriate. *See Nazareth Nat’l Bank v. Trina-Dee, Inc.*, 731 F.2d 170, 171 (3d Cir. 1984).

2. The Power to Retroactively Annul the Stay

In accordance with 11 U.S.C. § 362(d), bankruptcy courts are authorized to grant an annulment of the stay to retroactively ratify violations of the automatic stay. *See In re Siciliano*, 13 F.3d 748, 751 (3d Cir. 1994) (finding that a “post-petition sheriff’s sale would have been validated as an exception to the void *ab initio* rule” if the bankruptcy court had granted an annulment of the stay). Simply put, the facts in *In re Siciliano* were as follows: the debtor had

filed his second bankruptcy petition after repeatedly defaulting on mortgage payments; the creditor that had scheduled the mortgage foreclosure sale did not become aware of the second bankruptcy petition until after the sheriff's sale took place; the sheriff, who had also not been notified of the bankruptcy filing, held the foreclosure sale three days after the bankruptcy filing; and the creditor sought retroactive stay relief within weeks of the foreclosure sale. *Id.* at 749-50. The bankruptcy court and the district court both denied the creditor relief from the automatic stay to validate the sale. *Id.* at 750.

The Third Circuit, however, reversed on the basis of 11 U.S.C. § 362(d), explaining that “the inclusion of the word ‘annulling’ in the statute . . . indicates a legislative intent to apply certain types of relief retroactively and validate [such acts in violation of the automatic stay] that would otherwise be void *ab initio*.” *Id.* at 751. The Third Circuit concluded that the bankruptcy court “erred when it dismissed [the creditor’s] motion for relief from the . . . stay as void, not voidable,” *id.* at 751, and thereby established the legal principle that “[a]n annulment can operate retroactively to rehabilitate violations of an automatic stay,” *id.* at 752. Accordingly, the Third Circuit remanded the case to the bankruptcy court and, in dicta, directed the bankruptcy court to determine whether the debtor could satisfy the equity requirement imposed by 11 U.S.C. § 362(d)(2). *See id.* (stating that “the bankruptcy court must consider whether [the debtor] had an equity in the property and if not, grant appropriate relief to [the creditor]”).

On remand, after a full consideration of the elements of 11 U.S.C. § 362(d)(2), the bankruptcy court again denied the “extraordinary annulment relief sought by” the creditor. *In re Siciliano*, 167 B.R. 999, 1006-13 (Bankr. E.D. Pa. 1994). Notably, the *In re Siciliano* bankruptcy court reviewed the “rather narrow category of cases in which [retroactive stay] relief has been

deemed appropriate” to better understand the common characteristics of the cases where the stay was annulled. *Id.* at 1007. For example, the court noted how most courts acknowledge that “annulling the stay is only appropriate in the rarest of circumstances” and only if the creditor who violated the stay had no knowledge of the bankruptcy filing or if the debtor was guilty of some inequitable conduct. *Id.* at 1008 (internal citations omitted). Further, even though the bankruptcy court recognized that the Third Circuit emphasized the equity prong of 11 U.S.C. § 362(d)(2) when it remanded the case, the bankruptcy court nonetheless noted that creditors are not entitled to retroactive stay relief if that element alone is proven and that the equity requirement in 11 U.S.C. § 362(d)(2)(A) is “at best, one of the issues to consider to determine whether annulment is appropriate.” *Id.* at 1010.

Recently, the Third Circuit expanded upon its holding in *In re Siciliano* and determined that a decision regarding “whether to annul the automatic stay is a decision committed to the bankruptcy court’s discretion, and may be reversed only for abuse of that discretion.” *In re Myers*, 491 F.3d 120, 128 (3d Cir. 2007). In *In re Myers*, the Third Circuit affirmed the bankruptcy court’s decision to dismiss the debtor’s case which effectively granted the creditor retroactive stay relief. *Id.* at 125-29. Importantly, the Third Circuit acknowledged that other courts balance the equities to determine whether to retroactively annul the automatic stay and recognized certain key factors to consider in doing so: “(1) whether the creditor was aware of the filing or encouraged violation of the stay, (2) whether the debtor engaged in inequitable, unreasonable, or dishonest behavior, and (3) whether the creditor would be prejudiced.” *Id.* at 129. Accordingly, the Third Circuit approved of the way in which the bankruptcy court granted

retroactive relief from the stay after it had balanced the equities when “faced with rewarding the inequitable conduct of either the creditor or the debtor.” *Id.* at 130.

3. Retroactive Stay Relief is not Warranted

Here, Upper Darby and Delaware County contend that this case presents facts similar to those presented by *In re Siciliano*, and they emphasize the fact that the *In re Siciliano* court remanded the case to the lower courts to “determine whether [the Debtor] had an equity interest in the property and, if not, to grant appropriate relief under § 362(d)(2) [to the party seeking stay relief].” *In re Siciliano*, 13 F.3d at 752. In fact, Upper Darby and Delaware County assert that this Court must provide them with retroactive stay relief pursuant to *In re Siciliano* because they contend that the total amount of liens on the Property significantly exceeded the value of the Property at the time of the Judicial Sale, thereby indicating a lack of equity in the Property.

Nevertheless, the *In re Siciliano* decision is not determinative of the issues with respect to the case at bar. For example, unlike the circumstances surrounding the foreclosure sale in *In re Siciliano*, the Judicial Sale was consummated several years—not several days—after the Debtor filed for bankruptcy, Upper Darby and Delaware County had actual notice—rather than no notice—of the filing at the time of the Judicial Sale based on their correspondence with the Debtor’s attorney in 2003, Upper Darby and Delaware County never sought stay relief prior to proceeding with the Judicial Sale, and Upper Darby and Delaware County did not seek retroactive stay relief until over two years following the Judicial Sale. In the matter before this Court, Upper Darby and Delaware County knew of the Debtor’s bankruptcy case yet proceeded with the judicial sale and, consequently, deprived the Debtor’s estate of use and possession of the Property. And, even though the Debtor did not list any amounts owed to Upper Darby and

Delaware County in her initial bankruptcy schedules and may have failed to respond to the notice she allegedly received alerting her of the Judicial Sale, any culpability on her part does not rise to the level of “inequitable, unreasonable, or dishonest behavior.” *See In re Myers*, 491 F.3d at 129.

While this Court disagrees with the position of Upper Darby and Delaware County that stay relief is mandatory when a lack of equity in the Property alone is proven,¹⁰ this Court has considered whether Upper Darby and Delaware County are entitled to relief under 11 U.S.C. § 362(d) and, if so, whether annulment would be appropriate. First, the Court is not convinced that Upper Darby and Delaware County have met their burden under 11 U.S.C. § 362(d)(2)(A) because they have not conclusively proven that the Debtor lacks equity in the Property when such an assertion is premised on the validity of the Pickering Judgments pursuant to the title search report prepared to consummate the Judicial Sale; even so, “Joseph Pickering” was not listed as a creditor in the Debtor’s schedules and no evidence was presented to indicate that the Pickering Judgments were valid or that the Debtor is the party against whom the judgments were obtained.¹¹ Second, the Debtor sought to meet her burden of proof imposed by 11 U.S.C. § 362(g)¹² to show that there are no grounds for stay relief, asserting that the Property would have

¹⁰ *See In re Siciliano*, 167 B.R. at 1010 (noting that while the 11 U.S.C. § 362(d)(2)(A) equity requirement is a “necessary inquiry for this court on remand,” it is “at best, one of the issues to consider to determine whether annulment is appropriate”).

¹¹ The Pickering Judgments were listed as “Joseph Pickering v. Christian Kim a/k/a Hye Y. Kim a/k/a Kyong Kim” yet, excluding the title Search Report attached to Upper Darby’s and Delaware County’s Stay Relief Motion, the non-debtor individuals listed therein were not addressed throughout this bankruptcy proceeding. In addition, the name “Christian” generally refers to a male individual, whereas the Debtor is a female.

¹² The burden of proof on a motion for stay relief under 11 U.S.C. § 362(d) is a shifting one because 11 U.S.C. § 362(g) provides that, in a hearing on a stay relief motion, the party requesting stay relief has the burden of proof on the issue of the debtor’s equity in property whereas the party opposing stay relief has the burden on all other issues. 11 U.S.C. § 362(g)

been necessary for an effective reorganization. However, because she was deprived of the Property, she was prevented from utilizing the Property in her plan for the benefit of her creditors and specifically the IRS, whose lien could have been satisfied in whole or part from this Property.

In sum, the Court has taken into account the issue of whether Upper Darby and Delaware County have satisfied the requirements for stay relief and has balanced the equities to determine whether an annulment of the stay is appropriate. This Court finds that Upper Darby and Delaware County have not satisfied their burden of proving that the Debtor had no equity in the property. Further, because the Debtor was deprived of the Property prior to confirmation, she was unable to prove that the Property was necessary for an effective reorganization but has satisfied this Court that she could have utilized the Property in her reorganization. Thus, the movants are not entitled to stay relief pursuant to 11 U.S.C. § 362(d)(2).

Moreover, in balancing the equities, the Court finds that retroactive stay annulment is not justified. This Court finds it extremely significant that Upper Darby and Delaware County had actual notice of the Debtor's bankruptcy filing prior to the time the Judicial Sale was conducted in May of 2005 in violation of the automatic stay yet they did not seek stay relief until November of 2007. Additionally, the Debtor is hardly culpable for the events that unfolded because she rectified the only allegedly inequitable behavior on her part—the omission of Upper Darby and Delaware County from her schedules—by having her attorney contact them in 2003.¹³ Further,

¹³ As alluded to above, Upper Darby and Delaware County also noted in their Stay Relief Motion that “[a]t no point following her receipt of the Petition and Rule [served upon the Debtor to provide notice of the Judicial Sale scheduled for May 25, 2005] did the Debtor file a suggestion of bankruptcy or otherwise notify the parties of the pending bankruptcy and automatic stay” but that does not trivialize the fact that they had *actual* notice of her bankruptcy case during that particular period.

the Court is cognizant of the fact that the breathing room provided by the automatic stay would be limited if debtors feared such retroactive validations of stay violations. *See In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984) (acknowledging that “the important Congressional policy behind the automatic stay demands that courts be especially hesitant to validate acts committed during the pendency of the stay”); *see also Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 977 (1st Cir. 1997) (finding that “[u]ndoing the stay retroactively should require a measurably greater showing [than good reason]” because “[i]f retroactive relief becomes commonplace, creditors—anticipating *post facto* validation—will be tempted to pursue claims against bankrupts heedless of the stay”). Accordingly, the Court finds that retroactively annulling the stay under 11 U.S.C. § 362(d) is not appropriate in this case.

B. The Motion for Summary Judgment

The Debtor seeks an order for summary judgment against Upper Darby and Delaware County (i.e., not against Defendants Allied or Kapoor) for the willful violation of the automatic stay per 11 U.S.C. § 362(k)(1). Accordingly, the Debtor requests an order for (1) actual damages from Upper Darby and Delaware County in the amount of \$84,147.90—calculated by the Debtor as the difference between the fair market value of the Property at the time of the Judicial Sale and the monies distributed to creditors pursuant to the sale—and (2) attorneys’ fees and costs as additional actual damages. Upper Darby and Delaware County oppose the motion on three bases: (1) there was no violation of the stay, (2) there are genuine issues of material fact as to whether any injury resulted from the alleged stay violation to warrant damages, and (3) as a matter of law, the price received at the tax sale is the present fair equivalent value and, as a result, the Debtor suffered no damages.

1. Legal Standard Applicable to the Summary Judgment Motion

Rule 56 of the Federal Rules of Civil Procedure is applicable to adversary proceedings in bankruptcy pursuant to Bankruptcy Rule 7056. Accordingly, the Court should grant summary judgment for a movant if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). To meet these requirements, the movant is allowed to rely on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Id.*

In determining whether any genuine issues of material fact exist, the Court must view all factually-drawn inferences “in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Further, a fact is “material” in the context of a motion for summary judgment and would preclude the granting of such summary judgment if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense one of the parties asserts, and would necessarily affect application of appropriate principles of law to the rights and obligations of the parties. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

2. Ramifications of a Willful Stay Violation

Section 362(k)(1) provides that “[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.” 11 U.S.C. § 362(k)(1). As such, to recover damages pursuant to 11 U.S.C. § 362(k)(1), the debtor must show that the stay violation was “willful.” Indeed, it is a willful violation of the automatic stay when a creditor violates the stay with knowledge that the bankruptcy petition has been filed. *See In re Univ. Med. Ctr.*, 973

F.2d 1065, 1087-88 (3d Cir. 1992). Further, willfulness does not require that the creditor intend to violate the automatic stay provision, but rather requires that the acts which violate the stay be intentional. *Id.* at 1088; *see also In re Atl. Bus. and Community Corp.*, 901 F.2d 325, 329 (3d Cir. 1990). Importantly, even if a stay violation is later ratified by annulment of the stay, the imposition of damages against the party that violated the stay is appropriate. *See In re Myers*, 491 F.3d at 130 (citing *In re Atl. Bus. and Community*, 901 F.2d at 328-29).

3. The Imposition of Actual Damages is Appropriate

Initially, Upper Darby and Delaware County argue that the Debtor's summary judgment motion pursuant to 11 U.S.C. § 362(k)(1) should be denied because they are entitled to retroactive stay relief in accordance with *In re Siciliano* and based on the fact that the equity requirement imposed by 11 U.S.C. § 362(d)(2)(A) is satisfied. As discussed above, however, Upper Darby and Delaware County are not entitled to stay relief pursuant to 11 U.S.C. § 362(d)(2) and retroactive stay relief should not be granted in this instance because there are no extraordinary circumstances to justify that form of relief. Yet even assuming, *arguendo*, that Upper Darby and Delaware County were entitled to some form of relief from the stay, it is "appropriate for the Bankruptcy Court to impose damages under 11 U.S.C. § 362(h)¹⁴ against any parties that created, encouraged, or actively participated in violations of the automatic stay, even if those violations are later ratified by annulment of the stay." *See In re Myers*, 491 F.3d at 130 (citing *In re Atl. Bus. and Community*, 901 F.2d at 328-29).

¹⁴ Section 362(k)(1) was designated as section 362(h) prior to the 2005 amendments to the Bankruptcy Code.

Further, in making the argument that they are entitled to retroactive stay relief pursuant to *In re Siciliano*, Upper Darby and Delaware County implicitly concede the fact that they violated the automatic stay because *In re Siciliano* established that the Court may grant an annulment of a stay to validate acts that violated the stay and that would have otherwise been void *ab initio*. *In re Siciliano*, 13 F.3d at 751. Consequently, there are no genuine issues of material fact as to whether the Judicial Sale of the Property was conducted in violation of the automatic stay; specifically, it was Delaware County's actions in selling the Property to satisfy the Debtor's unpaid property tax obligations that violated the stay.

In addition, although Upper Darby and Delaware County assert that the Debtor failed to schedule them on her bankruptcy schedules and Statement of Financial Affairs as is required by Bankruptcy Rule 1007, they nonetheless had actual notice of the Debtor's bankruptcy petition. Because it is undisputed that Upper Darby and Delaware County had knowledge of the Debtor's bankruptcy filing, they acted willfully under 11 U.S.C. § 362(k)(1) in violating the stay and, therefore, the Debtor is entitled to recover her actual damages.¹⁵

4. The Amount of Actual Damages is Indeterminate

Upper Darby and Delaware County next assert that there are factual disputes as to whether the stay violation caused injury to warrant the recovery of damages. This Court finds this particular argument wholly unavailing because the Debtor was undeniably injured by the stay violation: she was deprived of the Property and was not able to use that Property for the benefit

¹⁵ As alluded to above, section 362(k) provides that an individual damaged by a willful violation of the stay may recover his or her actual damages and, in some cases, punitive damages; however, the Debtor explicitly states in the Summary Judgment Motion that she is not seeking to recover punitive damages so the Court did not consider whether punitive damages are appropriate in this instance.

of her creditors. If the Debtor were able to sell the Property on her own, she could have utilized the proceeds as part of her proposed reorganization.

Having found that there was a willful stay violation and that the Debtor was injured, the question then becomes how to quantify the damages that the Debtor is entitled to pursuant to 11 U.S.C. § 362(k)(1). Based on Upper Darby's and Delaware County's opposition, there is a genuine issue as to one material fact—the amount of damages. The Debtor seeks actual damages of \$84,147.90, which is the difference between the Property's fair market value at the time of the Judicial Sale (\$169,470 per the Realty Transfer Tax Statement of Value form prepared in connection with the Judicial Sale from Delaware County to Defendant Allied) and the stated consideration for the sale (\$85,322.10 per the July 21, 2005 deed memorializing the Judicial Sale).

In response, Upper Darby and Delaware County attempt to show that the Debtor's request for damages is mere speculation by pointing out that the Debtor has not shown that she attempted to market the Property for sale post-petition or that she would have realized a higher value for the Property had the Judicial Sale not been conducted. At the same time, however, the Realty Transfer Tax Statement of Value, which was executed under penalties of law, could be considered an admission by Delaware County as to the Property's fair market value because the multiple applied to the county-assessed value as of 2000 should, in theory, provide Delaware County's best estimate of the Property's fair market value on the date of the transfer in 2005. Moreover, at the hearing on January 14, 2008, Upper Darby and Delaware County objected to the amount of damages claimed by the Debtor based on timing: namely, the Realty Transfer Tax Statement of Value was executed on July 21, 2005, whereas the Judicial Sale took place on

May 25, 2005, so they claim that the Property's fair market value at the time of the Judicial Sale, as alleged by the Debtor for damage calculation purposes, was not necessarily the same as the fair market value listed in the Realty Transfer Tax Statement of Value document. Because this Court must construe facts and inferences in a light most favorable to the non-moving party at the summary judgment stage, *see Matsushita Elec.*, 475 U.S. at 587-88, even if the Realty Transfer Tax Statement of Value would appear to be an admission by Delaware County as to the value of the Property at the time of the Judicial Sale which was conducted in violation of the automatic stay, Delaware County disputes the Debtor's valuation and therefore is still entitled to submit evidence on the valuation issue at trial.

In addition, Upper Darby and Delaware County make an argument pursuant to 11 U.S.C. § 549(c) that the Court may determine that the "present fair equivalent value" as of the Judicial Sale was the amount paid by the winning purchaser at the sale. *See e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994) (finding that "a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at [a mortgage] foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with" for purposes of 11 U.S.C. § 548); *see also In re McGrath*, 170 B.R. 78, 83 (Bankr. D.N.J. 1994) (extending the holding in *BFP* to tax sale foreclosures because "fair market value is simply not the value in a forced sale context" for purposes of 11 U.S.C. § 548). Even so, the cases cited by Upper Darby and Delaware County in support of this argument concern valuation methodology in the context of fraudulent conveyance analyses, and 11 U.S.C. § 549(c) is inapplicable here because, even though the Debtor's adversary complaint sought to avoid the post-petition transfer

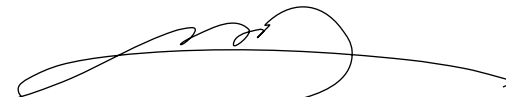
of the Property, the Debtor also seeks damages for the willful violation of the stay in accordance with 11 U.S.C. § 362(k)(1).

The Court finds that for the purposes of 11 U.S.C. § 362(k)(1), Upper Darby and Delaware County willfully violated the automatic stay. Therefore, the Debtor is entitled to her actual damages, but summary judgment is not appropriate at present regarding the amount of damages to which the Debtor is entitled because there are factual disputes as to that issue.

IV. CONCLUSION

Based on the foregoing, the Court finds that Upper Darby and Delaware County violated the automatic stay and that their violations should not be ratified by an annulment of the stay; accordingly, the Stay Relief Motion is denied. Further, the Court finds that Upper Darby and Delaware County willfully violated the automatic stay pursuant to 11 U.S.C. § 362(k)(1) by carrying out the Judicial Sale. As such, the Summary Judgment Motion is granted in part because the Judicial Sale constituted a willful violation of the stay, but the Debtor's request for summary judgment regarding actual damages is denied without prejudice so that the factual disputes can be addressed at the trial scheduled for March 13, 2008.

BY THE COURT:



GLORIA M. BURNS
United States Bankruptcy Judge