

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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DISTRICT OF NEW MEXICO

In re: MELISSA ANNE WRIGHT,
Debtor
MELISSA ANNE WRIGHT,

No. 7-09-10892 JR

Plaintiff

v.

Adversary No. 09-1048 J

VANDERBILT MORTGAGE AND FINANCE, INC.,
CRADDOCK, DAVIS, AND KRAUSE, LLP, SUSAN
CRAWFORD, MICHAEL J. CRADDOCK, RIO GRANDE
TITLE COMPANY f/k/a AMERICAN SURETY TITLE,
REMAX OF SANTA FE, VISTA DEL MUNDO CORPORATION,

Defendants.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the Defendants Vanderbilt Mortgage and Finance, Inc., Craddock Davis & Krause LLP, Susan Crawford and Michael Craddock's Motion for Summary Judgment and Memorandum in Support filed February 18, 2010 (the Motion for Summary Judgment" (Docket No. 53). Plaintiff Melissa Wright filed a Response on March 9, 2010 (the "Response") (Docket No. 55). Defendants Vanderbilt Mortgage and Finance, Inc., Craddock Davis & Krause LLP, Susan Crawford and Michael Craddock (together, the "Defendants") filed a Reply on March 12, 2010 (the "Reply") (Docket No. 56).

Ms. Wright asserts a claim for compensatory and punitive damages, costs and interest under 11 U.S.C. §362(k) based on Defendants' alleged willful violation of the automatic stay.¹ Ms. Wright alleges in her Complaint that Defendants willfully violated the stay by taking the

¹ By an order entered November 24, 2009 (Docket No.44), the Court dismissed all claims against the Defendants in this adversary proceeding except for Ms. Wright's claim that Defendants willfully violated the automatic stay.

following actions after she commenced her Chapter 7 Bankruptcy Case and while the automatic stay was in effect and while an appeal was pending in state court of the foreclosure judgment: (i) conducting a foreclosure sale of her residence, (ii) filing an affidavit of publication of the sale, (iii) filing a Special Masters Report of the sale, and (iv) obtaining a state court order confirming the foreclosure sale. Ms. Wright alleges that when Defendants took these actions they had actual or constructive notice of Ms. Wright's bankruptcy filing.²

Ms. Wright also alleges in her original Complaint, in support of her claim for damages for willful violation of the stay, that aspects of the state court foreclosure judgment were in error. She states that Vanderbilt Mortgage and Finance, Inc. ("Vanderbilt Mortgage") committed certain bad acts before Ms. Wright commenced her bankruptcy case, and that Defendants intentionally delayed giving Ms. Wright information about the foreclosure sale both pre- and post-petition to limit her ability to seek a stay from the state appellate court and from the bankruptcy court to prevent the foreclosure sale from taking place.

Defendants assert that they did not willfully violate the automatic stay because they had no actual knowledge or constructive notice of the pendency of Ms. Wright's bankruptcy case when any acts in violation of the stay took place.

The Court having reviewed the Motion for Summary Judgment, the Response, and the Reply, and being sufficiently advised, finds that the evidence presented is insufficient to grant summary judgment in favor of any of the Defendants. The Court therefore will deny the Motion

² See Complaint, filed April 6, 2009. (Docket No. 1). Although Ms. Wright filed an amended complaint on May 4, 2009 before any of the Defendants answered the original complaint to join other defendants and assert additional claims, for the reasons set forth in this Court's Memorandum Opinion filed October 30, 2009 the Court will treat the amended complaint as having incorporated by reference all of the allegations contained in the original complaint. (See Docket No. 36; see also *Wright v. Vanderbilt Mortgage and Finance, Inc.*, 2009, 2009 WL 3633811 (Bkrcty.D.N.M. 2009)).

for Summary Judgment without prejudice to the filing of another motion for summary judgment supported by additional evidence.

SUMMARY JUDGMENT STANDARD

It is appropriate for the Court to grant summary judgment if the pleadings, discovery materials, and any affidavits before the Court show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c) made applicable to the adversary proceeding by Fed. R. Bankr.P 7056. “[A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion, and . . . [must] demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Courts must review the evidentiary materials submitted in support of a motion for summary judgment to ensure that the motion is supported by evidence. If the evidence submitted in support of the summary judgment motion does not meet the movant’s burden, then summary judgment must be denied.³ Hearsay evidence cannot be considered on a motion for summary judgment. *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994). Any documentary evidence submitted in support of summary judgment must either be properly authenticated or self authenticating under the Federal Rules of Evidence. *Goguen v. Textron, Inc.*, 234 F.R.D. 13, 16 (D. Mass. 2006). Furthermore, New Mexico Local Bankruptcy Rule 7056-1 provides that the movant’s statement of material facts as to which the movant contends no genuine fact exists must “refer with particularity to those portions of the record upon which the movant relies.” NM LBR 7056-1.

FACTS AS TO WHICH NO GENUINE DISPUTE

³ See, e.g. *D.H. Blair & Co., Inc. v. Gottidiener*, 462 F.3d 95, 110 (2nd Cir. 2006) (“If the evidence submitted in support of the summary judgment motion does not meet the movant’s burden of production, then summary judgment must be denied. . . .”) (quoting *Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2nd Cir. 2004) (emphasis in original)); *One Piece of Real Property Located At 5800 SW 74th Avenue, Miami, Florida*, 363 F.3d 1099, 1101-02 (11th Cir. 2004).

HAS BEEN RAISED IN THE RECORD⁴

On October 2, 2008, the Court entered a Final Judgment against Kevin Uyehara and Melissa Wright and in favor of Vanderbilt Mortgage in a case entitled *Vanderbilt Mortgage and Finance Inc. v. Kevin Uyehara and Melissa Wright*, Fifth Judicial District, County of Chaves, State of New Mexico, Case No. CV-2006-1193 (the “Foreclosure Action”). (Motion for Summary Judgment, Exhibit A). On December 5, 2008, the state court entered a Decree of Foreclosure and Order of Sale and Appointment of Special Master in the Foreclosure Action. (Motion for Summary Judgment, Exhibit B). The property subject to the foreclosure is Ms. Wright’s residence.

Ms. Wright filed her voluntary petition under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et. seq.*, on March 5, 2009 in the United States Bankruptcy Court for the District of New Mexico commencing a bankruptcy case assigned No. 09-10892 (sometimes, the “Chapter 7 Case”). (See Docket No. 1 in the Chapter 7 Case). On June 22, 2009, an order was entered in the Chapter 7 Case granting Ms. Wright a discharge, and on June 23, 2009 the Chapter 7 Case was closed. (See Docket No. 34 and Docket Entry of 06/23/09 in the Chapter 7 Case).

On March 7, 2009, the Bankruptcy Noticing Center served a copy of the Notice of Chapter 7 Case, Meeting of Creditors and & Deadlines on the Chapter 7 Trustee filed in the Chapter 7 Case (“Notice of Commencement of Case”) on the United States Trustee, the New Mexico Taxation & Revenue Department, and Ms. Wright. (See Docket No. 7 in the Chapter 7

⁴ The only evidence before the Court in support of or in opposition to the Motion for Summary Judgment consists of a Final Judgment, a Decree of Foreclosure and Order of Sale and Appointment of Special Master, Appellants Expedited Motion for Stay, an Affidavit of Susan Crawford, and the Docket and papers filed in Ms. Wright’s chapter 7 case, of which the Court takes judicial notice. See Motion for Summary Judgment, Exhibits A, B, H, and K. The other documents submitted to the Court in connection with the Motion for Summary Judgment consist of unauthenticated documents not admitted by the other party to be genuine or written arguments of the parties. The Court cannot consider those materials as evidence.

Case). The Bankruptcy Noticing Center did not serve a copy of the Notice of Commencement of Case on any of the Defendants. *Id.*

Ms. Crawford is an attorney employed by Craddock Davis and Krause LLP, and while working for that firm represented Vanderbilt Mortgage in the Foreclosure Action. (Crawford Affidavit, ¶¶ 3 and 4.)⁵ Ms. Crawford served as Special Master to conduct the foreclosure sale of Ms. Wright's residence. *Id.* at ¶ 5. Ms. Crawford conducted a foreclosure sale of Ms. Wright's property on March 9, 2009 at 1:00 p.m. on the west side of the Chaves County Courthouse steps where the notice of foreclosure sale stated that the foreclosure sale would be held. *Id.* at ¶¶ 8 and 9. Before conducting the foreclosure sale, Ms. Crawford looked about but did not see Ms. Wright. *Id.* at ¶ 8. ⁶ After the sale, Ms. Crawford walked around the Courthouse looking for Ms. Wright but did not see her, and then left. *Id.* at ¶ 10.

Ms. Wright never contacted Ms. Crawford to inform her that the Chapter 7 Case had been filed. *Id.* at ¶ 17. Ms. Crawford was not aware that the Chapter 7 Case had been filed at the time of the foreclosure sale. *Id.* at ¶ 9.

On March 10, 2009, Ms. Crawford mailed to the State Court Judge an order confirming the foreclosure sale. *Id.* at ¶ 21. Neither Ms. Crawford nor any of the other Defendants took any action with respect to the order confirming the foreclosure sale after the order was mailed to the State Court Judge for entry. *Id.* The State Court signed the order confirming the foreclosure sale on March 16, 2009. *Id.* See also, Motion for Summary Judgment, Exhibit F.

Ms. Crawford received Ms. Wright's Notice of Filing of Bankruptcy in the mail on March 12, 2009. *Id.* at 19. Ms. Wright attached to her Response a Notice of Bankruptcy filing

⁵ Ms. Wright asserts that Michael Craddock was also active in the prosecution of the Foreclosure Action. Response, p. 3.

⁶ Ms. Wright asserts that on March 9, 2009 she went to the Chaves County Court house to attend the foreclosure sale, armed with a copy of a notice of her bankruptcy petition, but was unable to locate the place of the foreclosure auction. Response, page 2. (This is not an undisputed fact because it is not support by admissible evidence.)

bearing the caption of the Foreclosure Action, which contains a certificate of service stating that the notice was forwarded to Ms. Crawford on March 9, 2009. After receiving the Notice of Filing of Bankruptcy in the mail, Ms. Crawford immediately contacted Vanderbilt Mortgage and advised it of the Chapter 7 Case, that the foreclosure sale was void, and that stay relief was needed to conduct a valid foreclosure sale. *Id.* at ¶ 19. Vanderbilt Mortgage did not file the Special Masters Deed approved by the order confirming the foreclosure sale signed by the State Court Judge on March 16, 2009. *Id.* at ¶ 21.

On March 16, 2009, Vanderbilt Mortgage filed a motion for relief from stay in the Chapter 7 Case seeking modification of the stay to permit it to complete the foreclosure sale. (Docket No. 8 in the Chapter 7 Case). After conducting an evidentiary hearing on Ms. Wright's objection to the motion, on June 4, 2009 this Court entered an order granting stay relief. (Docket No. 29 in the Chapter 7 Case). In that order, the Court found that Ms. Wright had no equity in her residence. *Id.*

DISCUSSION

Upon the filing of a voluntary petition under the Bankruptcy Code, 11 U.S.C. § 362 imposes an automatic stay applicable to all entities that, among other things, prohibits certain actions against the debtor or against property of the bankruptcy estate unless the stay is modified to permit those actions. 11 U.S.C. §362(a). The scope of the automatic stay is broad⁷ and, among other things, specifically prohibits:

the commencement or continuation, including the issuance of employment of process, 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[.]

⁷ *Sternberg v. Johnston*, 582 F.3d 1114, 1119 (9th Cir. 2009). See also *Acands, Inc. v. Travelers Casualty and Surety. Co.*, 435 F.3d 252, 259 (3rd Cir. 2006); *Bartucci v. O'Neil*, 64 Fed. Appx 344, *2 (3rd Cir. 2003).

11 U.S.C. §362(a)(1).

By the express terms of Section 362(a), any action taken by a creditor to commence or continue litigation against the debtor, unless excepted from the stay under 11 U.S.C. §362(b), violates the automatic stay. Actions taken without notice or knowledge on the part of a creditor of the commencement or pendency of the bankruptcy case nevertheless violate the stay, but the violation is merely “technical”⁸ and no damages are to be awarded.⁹ “Notice of the commencement or pendency of a bankruptcy case need not be formal in nature ‘where the creditor had sufficient facts which would cause a reasonably prudent person to make further inquiry’.”¹⁰

The Motion for Summary Judgment fails to demonstrate the absence of genuine issues of material fact to support summary judgment in favor of any of the Defendants. There is no evidence before the Court as to specifically when Ms. Crawford first learned of the Chapter 7 Case.¹¹ The evidence establishes that she learned of the Chapter 7 Case after the foreclosure sale was held on March 9, 2009 and no later than her receipt of a Notice of Commencement of Case on March 12, 2009. There is no evidence, for example, whether she learned of the Chapter 7

⁸ “Technical” violation of the stay” as used by this Court means a stay violation committed without notice or knowledge of the bankruptcy case in which the stay was violated.

⁹ *In re McMullen*, 386 F.3d 320,330 (1st Cir. 2004)(“Absent such knowledge [of the bankruptcy case] on the part of a creditor, however, the violation is merely ‘technical,’ and no damages are to be awarded”); *In re Kolberg*, 199 B.R. 929, 933 (W.D. Mich. 1996) (“To award damages under 11 U.S.C. § 362(h), the court must find a willful violation of the automatic stay”); *In re Galmore*, 390 B.R. 901, 906 (Bankr. N.D. Ind. 2008) (“Sanctions should not be imposed where there has been a technical violation of the stay”); *In re Rijos*, 260 B.R. 330, 340 (Bankr. D. Puerto Rico 2001) (“a technical violation does not warrant the imposition of sanctions except for the affirmative duty to restore the status quo after learning of the stay”); *In re Jackson*, 2000 WL 33943201, *1 (Bankr. S.D. Ga. 2000) (“In order to recover damages the violation must be willful”); *Shaddock v. Rodolakis*, 221 B.R. 573, 585 (Bankr. D. Mass. 1998)(no damages are allowable for technical violation, even where debtor incurred attorney fees as result of violation).

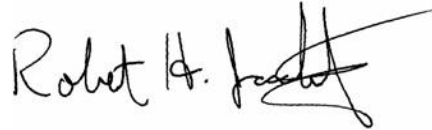
¹⁰ *In re Reed*, 102 BR 243, 245 (Bankr.E.D.Okla.,1989) (citing *In re Bragg*, 56 BR 46,49(Bankr.M.D.Ala 1985). See also, *In re WVF Acquisition, LLC*, 420 B.R.902, 910(Bankr. S.D. Fla. 2009); *In re Reynolds*, 2008 WL 373521, *8 (Bankr. D. Kan. 2009).

¹¹ Evidence may be proffered in the form of documents such as pleadings filed by a party opponent, authenticated papers filed in a court action, affidavits, deposition transcripts, and discovery responses. Unauthenticated documents will not be considered in connection with a motion for summary judgment unless the other party admits that the documents are genuine. See Rule 56(e), Fed. R. Civ. Pro., made applicable to this adversary Proceeding by Rule 7056, Bank. R. Civ. P.

Case before she mailed the order confirming the foreclosure sale to the State Court on March 10, 2009.

Further, there is no evidence before the Court as to whether Craddock Davis & Krause LLP or Vanderbilt Mortgage learned of the Chapter 7 Case prior to March 12, 2009, or when Michael Craddock learned of the Chapter 7 Case. No affidavits from Craddock Davis & Krause LLP, Vanderbilt Mortgage or Michael Craddock were submitted in support of the Motion for Summary Judgment. It would also be helpful to have in evidence the date a motion was filed in the State Court seeking to vacate the order confirming the sale, and the date such an order was entered.¹²

WHEREFORE, IT IS HEREBY ORDERED that the Motion for Summary Judgment is DENIED, without prejudice to the Defendants filing another motion for summary judgment supported by additional evidence.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: March 18, 2010
COPY TO:

Melissa Anne Wright

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Susan P Crawford

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¹² Ms. Wright asserts that Vanderbilt Mortgage filed a motion in the Foreclosure Action on June 15, 2009 to vacate the order confirming the foreclosure sale, and that such an order was filed in the Foreclosure Action on June 22, 2009. Response, p. 3.

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