

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 13
PERRY MICHAEL BALDWIN,)
) No. BK 91-50764
Debtor.)
)
S.I.V.I.,)
)
Plaintiff,)
)
v.)
)
PERRY MICHAEL BALDWIN,)
)
Defendant.)

OPINION

Debtor Perry Michael Baldwin failed to pay 1987 real estate taxes assessed on property owned by him in Madison County, Illinois. On December 7, 1988, the Madison County collector sold the property for the real estate taxes to S.I.V.I. at a tax sale. Ill. Rev. Stat. ch. 120, para. 719 et seq. (1987). The debtor had until December 7, 1990, two years from the date of the sale, to redeem the property. Ill. Rev. Stat. ch. 120, para. 734 (1987). S.I.V.I., however, extended the period of redemption to August 30, 1991. Ill. Rev. Stat. ch. 120, para. 744 (1987). On April 24, 1991, S.I.V.I. filed a petition in the Circuit Court of Madison County for the issuance of a tax deed to the property. Ill. Rev. Stat. ch. 120, para. 747 (1991).

The debtor filed a petition for Chapter 13 bankruptcy relief on

July 31, 1991. S.I.V.I. filed a motion for relief from the automatic stay, 11 U.S.C. § 362 (1991), on August 23, 1991. S.I.V.I. requests that it be allowed to proceed in state court with its application for a tax deed upon the expiration of the redemption period. S.I.V.I. contends the automatic stay does not suspend or toll the running of the redemption period, the debtor has no equity in the property upon the expiration of the redemption period, and thus the automatic stay does not apply to its application for a tax deed. The debtor claims the stay prevents S.I.V.I. from obtaining any further interest in his property. The trustee has no objection to the motion of S.I.V.I. In Illinois, a tax lien attaches to real property on the first day of January in the year in which the taxes are levied. Ill. Rev. Stat. ch. 120, para. 697 (1987). Upon a determination that a taxpayer has failed to pay his or her assessed real estate taxes, the county collector may obtain a judgment for sale from the court and then sell the taxpayer's property at a tax sale. Ill. Rev. Stat. ch. 120, paras. 706, 716, 719 (1987). The county clerk issues the purchaser of such property a certificate of purchase after the court confirms the sale. Ill. Rev. Stat. ch. 120, paras. 716a, 729 (1987). The issuance of a certificate of purchase does not affect the property owner's legal or equitable interests in the property. Richard v. City of Chicago, 80 B.R. 451, 454 (N.D. Ill. 1987); In Re Younci, 14 B.R. 809, 812 (Bankr. N.D. Ill. 1981); Tabor Enterprises, Inc. v. People of the State of

Illinois, 65 B.R. 42, 45 (N.D. Ohio 1986). The delinquent taxpayer may redeem the property sold at a tax sale at any time within two years after the date of the sale by paying the amount for which the property was sold plus other costs. Ill. Rev. Stat. ch. 120, para. 734 (1987). The purchaser may extend the redemption period for up to three years after the date of the sale. Ill. Rev. Stat. ch. 120, para. 744 (1987). Within five months prior to the expiration of the redemption period, the purchaser may file a petition in the circuit court requesting that the court direct the county clerk to issue a tax deed in the event the delinquent taxpayer fails to redeem the property. Ill. Rev. Stat. ch. 120, para. 747 (1991). The tax deed is issued only after notice is given and a hearing is held. Id. Any person owning or interested in the property may appear in the proceeding. Id. The court will order the issuance of a tax deed if the purchaser has complied with certain statutory requirements. Id.

Generally, section 362(a) of the Bankruptcy Code, the automatic stay, prohibits certain affirmative acts, including judicial and administrative proceedings, taken against the debtor or property of the estate after a bankruptcy petition is filed. The parties do not dispute that had the debtor filed his bankruptcy petition prior to the tax sale, the sale would have violated the automatic stay. In Re Greer, 89 B.R. 757, 759 (Bankr. S.D. Ill. 1988); Richard, 80 B.R. at 453; Young, 14 B.R. at 811. The debtor, however, filed his bankruptcy

petition after the tax sale took place, but before the redemption period expired and the tax deed issued. The issue is whether section 362(a) tolls the running of the redemption period and stays the issuance of the tax deed, and if so, whether S.I.V.I. may nevertheless be granted relief from the stay.

The majority view, which includes our Seventh Circuit Court of Appeals, is that section 362(a) does not toll the running of a statutory redemption period. In the Matter of Tynan, 773 F.2d 177, 179-80 (7th Cir. 1985); Counties Contracting & Construction Co. v. Constitution Life Ins. Co., 855 F.2d 1054, 1059 (3rd Cir. 1988); In the Matter of Roach, 824 F.2d 1370, 1372 n.1 (3rd Cir. 1987) ; In Re Glenn, 760 F.2d 1428, 1439-40 (6th Cir. 1985) ; Johnson v. First National Bank of Montevideo, 719 F.2d 270, 277 (8th Cir. 1983); In Re Wells Properties, Inc., 102 B.R. 685, 690-91 (Bankr. N.D. Ill. 1989); Tabor, 65 B.R. at 46. This court is bound by Tynan and therefore holds that section 362(a) did not toll the running of the redemption period.

The same courts which have held that section 362(a) does not toll the running of a statutory redemption period have also held that section 108(b) of the Bankruptcy Code does extend the debtor's redemption period for sixty days from the date the bankruptcy petition is filed, if the filing occurs before the expiration of the redemption

period.¹ Tynan, 773 F.2d at 179;

foreclosure or tax sale is the right of redemption. See Tynan, 773 F.2d at 179; Johnson, 719 F.2d at 276; First Financial Savings & Loan Assoc. v. Winkler, 29 B.R. 771, 773 (N.D. Ill. 1983). When the debtor files his Chapter 13 petition, that statutory right of redemption is an asset which passes to the trustee and becomes property of the estate. See Tynan, 773 F.2d at 179; Johnson, 719 F.2d at 276; 4 Collier on Bankruptcy, ¶ 541.07[3], at 541-32 (15th ed. 1991). The real property sold at a foreclosure or tax sale does not become part of the estate. Id. Thus, when the redemption period expires, neither the debtor nor

¹Section 108(b) provides:

[I]f applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

11 U.S.C. § 108(b)(1991)(emphasis added).

the estate has any remaining interest in the property, see Tynan, 773 F.2d at 179; Wells, 102 B.R. at 691; Tabor, 65 B.R. at 46-47, so section 362(a) does not operate to stay further actions or proceedings taken against the property, First Financial, 29 B.R. at 773-74, including a proceeding in state court to obtain a tax deed to the property.

For example, in Tabor, the debtor filed for bankruptcy after his Illinois property was sold at a tax sale, but before the redemption period expired and the tax deeds were issued. After the tax deeds on the three parcels of land were issued, the debtor sought to void the deeds. The Tabor court held that the expiration of the redemption period, which extinguished the debtor's interest in the property, was not the type of affirmative act prohibited by section 362(a), and therefore section 362(a) did not apply to void issuance of the tax deeds. Tabor, 65 B.R. at 46.

In determining that section 549 of the Bankruptcy Code, 11 U.S.C. § 549 (1982), which prohibits certain transfers of property subsequent to the filing of the bankruptcy petition, also was not violated by issuance of the tax deeds, the Tabor court stated:

No transfer of property under § 549 occurred upon the issuance of the tax deed because the expiration of the redemption period extinguished the property owner's rights in the property. The Court is convinced that the property owner's rights in the property are divested at the time the statutory redemption period expires; if not,

then the running of the redemption period carries no practical significance. Further, the Illinois statute provides that the issuance of the tax deed conveys merchantable title to the purchaser. It follows, then, that the notice and hearing required before issuance of the tax deed are intended to protect other persons with an interest in the property, and not necessarily to protect the interest of the property owner.

Tabor, 65 B.R. at 46-47 (footnotes omitted) (citation omitted). The Tabor court held further that although the filing of a petition for a tax deed after the commencement of a bankruptcy proceeding, but before the expiration of a redemption period, could arguably violate the automatic stay because the filing could be construed as an act to take possession of property of the estate, such a violation does not occur because the tax deed may issue only if the property owner fails to redeem. Id. at 47 n.9.

Even assuming, however, the debtor or the bankruptcy estate retains some legal or equitable interest in the property such that the tax deed proceeding would be an affirmative act taken against the property of the estate in violation of section 362(a),² this court finds

²In Illinois, a tax deed does not automatically issue upon the expiration of the redemption period. Some courts have indicated that in instances where a deed is transferred to the purchaser, upon expiration of the redemption period, without the necessity of a court proceeding, the transfer is characterized as a ministerial act, not an affirmative act, such that no violation of section 362(a) occurs. In Re Farmer, 81 B.R. 857, 861 n.7 (Bankr. E.D. Pa. 1988); see Johnson, 719 F.2d at 276-77; First Financial, 29 B.R. at 773. Illinois law, however, does require a court proceeding before a tax deed may issue, so obtaining a tax deed would arguably violate the stay. Wells, 102 B.R. at 691 n.3 ("It might well be that the

that S.I.V.I. is nevertheless entitled to relief from the stay. If this court were to stay the tax deed proceeding, the debtor still could not redeem the property because the period within which he could redeem has expired. In fact, at the tax deed proceeding the debtor cannot defend against the petition of S.I.V.I. by attempting to redeem the property. At the tax deed proceeding, the circuit court determines whether the holder of the certificate of purchase has complied with certain statutory requirements, including payment of all taxes and other costs on the property which became due subsequent to the sale, and issuance of proper notice of the proceeding. Ill. Rev. Stat. ch. 120, para. 747 (1991). The proceeding is only held at the end of the redemption period. Id. Although the property owner must be given sufficient notice of, and has a right to appear at the proceeding, if the purchaser has complied with all of the statutory requirements, the court will enter an order directing the county clerk to issue the tax deed. Id. The purpose of the tax deed proceeding, therefore, is not to give the owner another opportunity to redeem the property, but simply to determine whether the purchaser has complied with all of the statutory requirements and thus is entitled to the deed. Since the debtor's right of redemption has expired, there is no reason not to lift the stay to proceed with the hearing on the issuance of the tax

automatic stay would operate to prohibit the tax purchasers from proceeding in state court to obtain issuance of a deed, since this proceeding would be an affirmative action....").

deed.

In effect what the debtor asks is that the redemption period be tolled for the life of his plan so that he may attempt to redeem the property through his plan payments. As this court has already stated, however, section 362(a) does not toll the redemption period.³ Debtors may not spread payment of their redemption amounts over the life of their Chapter 13 plans, if the property already has been sold. Tynan, 773 F.2d at 178-79; Glenn, 760 F.2d at 1441-43.

Under section 362(d)(1) of the Bankruptcy Code, the court may grant relief from the stay by terminating, annulling, modifying, or conditioning the stay for cause, including the lack of adequate protection of an interest in the property of a "party in interest." 11 U.S.C. § 362(d)(1) (1991). In First Financial, in the context of a mortgage foreclosure, the court held that once it is determined that the interest in property of a "party in interest" includes the right to obtain a deed in the absence of timely payment, no payment over time

³As the Glenn court noted:

Although it is possible, in theory, to hold that a Chapter 13 debtor is entitled to pay the redemption amount over the life of his plan and also to hold that the statutory redemption period is not tolled by the bankruptcy proceeding, the practical effect of allowing the debtor to pay the redemption amount over an extended period would in many respects be the same as a suspension of the redemption period.

Glenn, 760 F.2d at 1442 (footnote omitted).

through a Chapter 13 plan will adequately protect that right. First Financial, 29 B.R. at 776. Thus, the "party in interest" is entitled to relief from the stay. Id. Similarly, in Wells, in the context of an Illinois tax sale, the court stated that although the stay could operate to prohibit a tax purchaser from proceeding in state court to obtain a tax deed, the purchaser would have "little difficulty in showing cause for relief from the stay if the period of redemption had expired without an effective redemption." Wells, 102 B.R. at 691 n.3. The Wells court indicated that in such circumstances, the purchaser "would have at least an apparent right to immediate possession of the delinquent property" which the property owner "would not be able to adequately protect." Id.; see In Re DiCello, 80 B.R. 769, 773-74 (Bankr. E.D. N.C. 1987).

For these reasons, the court finds cause to grant the motion by S.I.V.I. for relief from the stay to allow it to proceed in state court in order to determine whether it has complied with the applicable statutory requirements and thus is entitled to a tax deed. If the state court finds that S.I.V.I. has so complied and is entitled to the deed, then the stay is automatically lifted in its entirety, because upon issuance of the deed, no property of the estate exists for which the stay would attach. If the state court finds that S.I.V.I. has not complied with the statutory requirements and is not entitled to a tax deed, the stay reattaches and S.I.V.I. is restrained from taking any

further action against the debtor or the property until it seeks permission from the bankruptcy court. The court at this time makes no finding regarding what interest, if any, the debtor or the bankruptcy estate has in the property should the state court determine that S.I.V.I. is not entitled to a tax deed.

See written order entered even date.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: November 21, 1991