IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1751

IN THE MATTER OF: NORTHTOWN MALL ASSOCIATES,
a Texas Limited Partnership,

Debtor.

EUGENE H. ROSEN,
G/R ASSOCIATES,
and
NORTHTOWN MALL ASSOCIATES,
a Texas Limited Partnership,

Appellants,

VERSUS

FLORIDA DISCOUNT DISTRIBUTORS, INC.,

Appellee.

Appeals from the United States District Court
for the Northern District of Texas
(3:92-CV-0825-G c/w 826-G)

(August 10, 1993)

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

The debtor, Northtown Mall Associates ("NMA"), appeals

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

the district court's order affirming the bankruptcy court's order lifting the automatic stay. Because we conclude that the appellee creditor, Florida Discount Distributors, Inc. ("Florida Discount"), failed to establish cause to lift the automatic stay, we reverse.

I.

North Town Mall, Limited ("NTL"), was a limited partnership formed in the 1960's that owned a shopping center, Northtown Mall, and the real property on which Northtown Mall was located (the "Property"). On June 30, 1967, NTL made a note payable to Jefferson Standard Life Insurance Company ("Jefferson Life") in the principal amount of $4,850,000, secured by a first lien on the Property. NTL executed a second promissory note payable to Fladger F. Tannery in the amount of $5,098,640, creating a second lien on the Property. In 1991, Florida Discount purchased the promissory note payable to Jefferson Life.

In 1981, NTL conveyed all its general and limited partnership interests to Southmark Corporation ("Southmark"), a real estate-based financial services corporation. No public recordation of such conveyance exists, however, in Dallas County or in the office of the Texas Secretary of State.

In 1983, Southmark formed NMA, a Texas limited partnership, to which Southmark conveyed the Property. The only recorded instrument documenting the transaction between Southmark and NMA is a deed of trust executed by NMA and payable to Southmark and referring to a ground lease entered into by NMA, as lessee, and

Southmark, as lessor. A renewal deed of trust was recorded in 1990.

On January 6, 1992, Eugene H. Rosen, G/R Associates, and Robert E. Holland, all limited partners of NMA, filed an involuntary petition under the Bankruptcy Code on behalf of NMA. As of the date when the petition was filed, the principal balance on the note purchased by Florida Discount was $274,410.89, and the balance on the second note was $3,098,640. NMA's leasehold interest in the Property constituted the sole asset of the estate.

On January 7, 1992, Florida Discount foreclosed under the deed of trust, and the trustee in bankruptcy posted a notice of sale providing for sale of the property, which Florida Discount purchased, as highest bidder, for the sum of $760,944.66. On January 9, 1992, Florida Discount filed a motion for relief from the automatic stay under section 362 of the Bankruptcy Code, 11 U.S.C. § 362, or, in the alternative, for adequate protection or injunctive relief. NMA and petitioning creditors Rosen and G/R Associates opposed the motion. At the preliminary hearing held by the bankruptcy court on Florida Discount's motion, Florida Discount represented that outstanding property taxes in the amount of approximately $400,000 were due and owing.

The bankruptcy court modified the automatic stay to provide that Florida Discount would assume management of the Property and that the court would lift the stay on February 3, 1992, unless NMA paid all taxes due for 1991 by January 31, 1992. Upon reconsideration, the bankruptcy court amended its order to provide that if NMA

furnished, by January 31, 1992, a letter of credit payable to Florida Discount in the amount of $800,000 to cover taxes and penalties for nonpayment, as an alternative to what was mentioned in the court's previous order, the stay would not terminate. All other provisions in the previous order remained unchanged.

After NMA failed to pay the taxes or submit a letter of credit by January 31, 1992, the order lifting the stay on that date became effective. NMA, joined by appellants Rosen and G/R Associates, appealed to the district court, which affirmed.

II.

Florida Discount's sole argument on appeal is that NMA has no interest in the Property adequate to invoke the protections of section 362. Florida Discount contends that NTL, not NMA, held record title ownership of the property and at all times was the obligor on the instruments securing the lien of Florida Discount's predecessor in interest. Florida Discount asserts that because NMA has failed to show the existence of some conveyance that vests in it some interest in law or equity, NMA cannot claim the protections of section 362.

The bankruptcy court considered this argument and, in its order on the motion for relief from the automatic stay, stated as follows:

> THE COURT HEREBY FINDS: . . . On a review of the documents, . . . it appears to the Court that there is substantial doubt as to the right or title of [NMA] to the property involved but that involves an evidentiary hearing)) in all likelihood adversary proceedings)) to determine whether the liquidating partners of North Town

> Mall have, in fact, followed Texas law in whatever was going to be done . . . .

The bankruptcy court then ordered that the stay should continue only on condition that the parties meet certain requirements, including "[t]hat any adversary proceeding that may become relevant for the trying of title and the like must be filed on or before 21 days from the date of the hearing hereon . . . ."

Upon reconsideration of its order modifying the automatic stay, the bankruptcy court reached the following conclusion:

> The issue is one of the title to the property and whether the title went from [NMA] and whether [NMA], the alleged debtor, has a sufficient interest in the property so that the stay would apply as to [Florida Discount] . . . . Litigation would be required in order to test the issues of title and the rights of the limited partner group. The Court in a bankruptcy case does not try all these matters but reviews them at a stay hearing. Counter-claims and all these types of matters are not tried in a stay hearing.[1]

No adversary proceeding to try title to the property ever was filed. On review of the bankruptcy court's order, the district court noted that it reviews only issues decided by the lower court, and because the record was not sufficiently developed for the bankruptcy court to make a finding on the issue of NMA's interest in the Property, the district court declined to rule on the question.

We similarly decline to address the issue of NMA's interest in the Property. We are "solely a court of appeals, and [our] powers

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[1] Rule 4001(e) of the Local Bankruptcy Rules provides, in pertinent part, "Absent compelling circumstances, evidence presented at preliminary hearings in the Dallas Division on motions for relief from the automatic stay will be by affidavit only."

are limited to reviewing issues raised in, and decided by, the trial court." Masat v. United States, 745 F.2d 985, 988 (5th Cir. 1984). The bankruptcy court did not decide the issue of NMA's title to the property in the stay proceeding and emphasized that separate litigation, in the form of an adversary proceeding, is the proper manner in which to address the question. We therefore do not consider the issue of NMA's interest in the Property.

III.

The remaining issue is whether the bankruptcy court properly modified, then lifted, the automatic stay. We review the factual findings of the bankruptcy court under the clearly erroneous standard, Fabricators, Inc. v. Technical Fabricators, Inc. (In re Fabricators, Inc.), 926 F.2d 1458, 1464 (5th Cir. 1991); Wilson v. Huffman (In re Missionary Baptist Found. of Am.), 712 F.2d 206, 209 (5th Cir. 1983), and we review de novo the legal conclusions of the district and bankruptcy courts, Besing v. Hawthorne (In re Besing), 981 F.2d 1488, 1491 (5th Cir. 1993), petition for cert. filed, 61 U.S.L.W. 3836 (U.S. May 5, 1993) (No. 92-1932); Bradley v. Pacific Southwest Bank (In re Bradley), 960 F.2d 502, 507 (5th Cir. 1992), cert. denied, 113 S. Ct. 1412 (1993).

Section 362 provides in pertinent part as follows:

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

in interest; or

(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) (1993). In its order on Florida Discount's motion for relief from the automatic stay, the bankruptcy court made no findings or conclusions concerning cause to lift the stay. The court merely listed the requirements that NMA must meet in order that the stay should continue, including the requirement that "[a]ll taxes due for 1991 whether to the City, County, Hospital, or any other taxing authority including all ad valorem taxes due for 1991 are to be paid by 5:00 p.m. Friday, January 31, 1992, or the Stay will be terminated automatically on Monday, February 3, 1992, at twelve o'clock noon . . . ."

Upon reconsideration of its order, the bankruptcy court attempted to clarify the grounds upon which it modified the automatic stay. The court acknowledged that it should have referred to sections 362(d)(1) and (2) in its earlier order, where it "expressed doubt as to adequate protection."[2] The court

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[2] Bankruptcy Code section 361 reads as follows:

When adequate protection is required under section 362, 363 or 364 of this title of an interest of an entity in property, such adequate protection may be provided by))

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease

(continued...)

amplified its earlier order as follows:

> . . . [M]ainly, because in view of what has been heard on this record, there is cause to terminate the stay unless adequate protection could be furnished to the moving party so as to keep the stay in effect while the parties litigate the issue [of NMA's interest in the Property]. To not afford adequate protection to the movant would be contrary to the Congressional purpose in Sections 361 and 362 of the Code. To not require the protection as to taxes would be to allow the limited partner group to control the property while it asserts a violation of the stay or an inadequate foreclosure; meanwhile the moving party has to pay the taxes on the property that were held by the managing entity as to this shopping mall, collecting the rent and not paying the taxes for time previous to the filing of the bankruptcy proceeding against Northtown Mall Associates. This is contrary to the meaning of the continuance of the stay.

Thus, the bankruptcy court appears to have ordered relief from the stay "for cause," specifically, "lack of adequate protection of an interest in property." The court expressed its concern that the stay remain in effect while the parties litigate the issue of title. Indeed, that issue is particularly critical in this case, as the sale at which Florida Discount purchased the Property may be rendered void if Florida Discount did not purchase from the party having title. The bankruptcy court, however, declined to declare the sale void during the course of the stay hearing. It appears,

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(...continued)

> in the value of such entity's interest in such property;
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> (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
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> (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 361 (1993).

therefore, that, at the present time, any concern regarding the danger of a decrease in the value of the collateral while in the hands of the debtor is moot.[3]

The district court interpreted the bankruptcy court's order in terms of "cause," requiring a balancing of the hardships of the parties in light of the goals of the Bankruptcy Code. The district court concluded that the bankruptcy court was correct in its determination that payment of $400,000 of overdue taxes was a considerable hardship on Florida Discount and that such hardship supported a finding of cause. We disagree.

At the January 30, 1992, hearing on NMA's motion for reconsideration of the bankruptcy court's original order, NMA offered to place into the registry of the bankruptcy court an

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[3] In United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365 (1988), the Court held that the "value of [a creditor's] interest in such property" that merits adequate protection under § 361, when applied to secured creditors, means "the value of the collateral." Id. at 372. Should the bankruptcy court declare the sale of the Property void and find that NMA owns the Property, concern regarding the danger of a decrease in the value of the Property in the hands of NMA while the stay is in effect would be valid.

In that context, NMA contests the bankruptcy court's finding of lack of adequate protection, citing figures of the total debt and taxes, which amounted to less than $700,000, and the value of the property, which is over $6 million, resulting in an equity cushion of approximately $5.5 million. NMA asserts that Florida Discount failed to present any evidence that the equity cushion was eroding, and NMA emphasizes that a buyer for the property was ready, willing, and able to purchase the property for $7.5 million.

NMA is correct that should the court find that NMA still owns the property, Florida Discount has failed to establish lack of adequate protection. Only if Florida Discount's collateral, the Property, is declining in value during the term of the automatic stay does lack of adequate protection under § 362 come into play, meriting relief from the automatic stay. See Westchase I Assocs., L.P. v. Lincoln Nat'l Life Ins. Co. (In re Westchase I Assocs., L.P.), 126 B.R. 692, 694 (W.D.N.C. 1991) (if value of property is not declining, creditor would not be entitled to protection); Lomas Mortgage USA v. Elmore (In re Elmore), 94 B.R. 670, 677 (Bankr. C.D.Cal. 1988) (creditor's security interest is not adequately protected if collateral is declining in value during term of automatic stay). Florida Discount has the burden of raising the issue of a decrease in value, Elmore, 94 B.R. at 677, and it did not address the issue in the bankruptcy court or present any evidence to that effect. Therefore, Florida Discount failed to establish lack of adequate protection of its interest in the Property in the hands of the debtor while the stay is in effect.

amount equal to any interest and penalties Florida Discount would suffer from the nonpayment of outstanding taxes for thirty days and offered to pay Florida Discount's claim in full, including the taxes, within thirty days. Florida Discount replied that if the taxes remained unpaid by January 31, 1992, it would default on the mortgage created by NTL's second note made payable to Tannery, to which Florida Discount had subordinated its original first lien on the property. Florida Discount presented no other evidence, in the form of sworn statements or at the hearings, that payment of the taxes would constitute considerable hardship. When asked by the bankruptcy court whether Florida Discount was in a position to pay the taxes on January 31, 1992, counsel replied that he thought Florida Discount had "tried to provide for that eventuality" but considered the court's previous order providing for NMA's payment of the taxes by that date appropriate.

The district court was correct that "in determining whether or not cause exists, the bankruptcy court must balance the inherent hardships on all parties and base its decision upon the degree of hardship and the overall goals of the Bankruptcy Code." In re Opelika Mfg. Corp., 66 B.R. 444, 449 (Bankr. N.D. Ill. 1986); see also In re Cardinal Indus., 116 B.R. 964, 983 (Bankr. S.D. Ohio 1990) (determination of whether "cause" exists under section 362(d)(1) is essentially a balancing test). "Cause to lift the stay exists when the stay harms the creditor and lifting the stay will not unjustly harm the debtor or other creditors." Opelika Mfg., 66 B.R. at 448.

The bankruptcy court did not expressly engage in the balancing of hardships required in a hearing on relief from the stay "for cause." The district court asserted that nonpayment of the taxes by NMA, together with potential default by Florida Discount if the taxes remained unpaid by January 31, 1992, was enough to establish cause. The court cited several cases that NMA correctly distinguishes from the case at bar.[4]

Furthermore, at least one court has held that nonpayment of pre-petition taxes, up to two years worth, did not inflict hardship upon the creditor constituting cause to lift the automatic stay. In In re Asbridge, 66 B.R. 894, 903 (Bankr. D.N.D. 1986), the debtor was two years delinquent in paying real estate taxes, and the creditor asserted that such tax delinquency constituted cause to lift the automatic stay. Id. The court disagreed, emphasizing that the property was several years away from being sold for taxes, and thus the creditor was in no immediate danger of losing its collateral. Id. The court concluded that the creditor had not

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[4] In In re McMartin Indus., 62 B.R. 718, 723 (Bankr. D. Neb. 1986), the court held that a debtor's failure to pay post-petition state and federal taxes constituted a sufficient disregard for the law and the rights of the secured creditor to be considered cause to lift the automatic stay. The court in In re Brown, 78 B.R. 499, 503 (Bankr. S.D. Ohio 1987), in considering what constitutes "lack of adequate protection" under § 362(d)(1), listed nonpayment of taxes as evidence that a creditor's interest in a debtor's property lacked adequate protection.

Again, the focus in considering adequate protection is on the collateral in the hands of the debtor, and, as we stated above, the collateral in this case is in the hands of the creditor who bought the property at the foreclosure sale. The court in Brown also appears to have contemplated nonpayment of post-petition taxes as evidence of lack of adequate protection of the collateral in the hands of the debtor. Finally, in In re Crompton, 73 B.R. 800, 802 (Bankr. E.D. Pa. 1987), the court denied the creditor's motion for relief from the automatic stay on the condition that the debtor make certain that all post-petition real estate taxes were paid through completion of the chapter 13 plan. None of these cases establishes that failure to pay some pre-petition taxes alone constitutes cause to lift the stay.

established cause to lift the stay. Id.

Similarly, we conclude that Florida Discount has not established cause: It has not shown that payment of the taxes, for which eventuality it had prepared, with repayment of the taxes with money placed in the court's registry within thirty days thereafter, is a hardship that outweighs the harm to the debtor resulting from a lifting of the stay. NMA's interest in and title to the property is in doubt; the same inequity would result in lifting the stay and forcing NMA to pay taxes on property whose ownership is uncertain. Florida Discount must present evidence before the court regarding any potential harmful effects of payment of the taxes, including any possible default or loss of the collateral, for the court to determine whether sufficient hardship exists in this case and in order for the court to balance that hardship against hardship on the debtor in light of the goals of the Bankruptcy Code.

For these reasons, we REVERSE the bankruptcy court's order lifting the automatic stay and REMAND for proceedings consistent with this opinion.