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2
3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 SACRAMENTO DIVISION
6
7

8 In re)

Case No. 04-33957-A-13G)

9 STEPHEN and MANIS MOSES,)

10)
11 Debtors.)
12)

13 STEPHEN and MANIS MOSES,)

Adv. No. 05-2072)

14 Plaintiff,)

Docket Control No. PDM-1)

15 vs.)

16 LAW OFFICES OF STEVEN MELMET,)
17 INC., et al.,)

Date: April 18, 2005)

Time: 9:00 a.m.)

18 Defendant.)
19)
20)

21 *On April 18, 2005 at 9:00 a.m. the court considered the*
22 *motion of the Law Offices of Steven Melmet, Inc., to dismiss an*
23 *adversary proceeding filed by the debtors/plaintiffs against said*
24 *defendant and others. The text of the final ruling appended to*
25 *minutes of the hearing follows. This final ruling constitutes a*
26 *"reasoned explanation" for the court's decision and is*
27 *accordingly posted to the court's Internet site,*
28 *www.caeb.uscourts.gov, in a text-searchable format as required by*
the E-Government Act of 2002.

FINAL RULING

The motion will be denied.

One of the defendants moves to dismiss the case pursuant to

1 Fed. R. Civ. P. 12(b)(6), made applicable to this adversary
2 proceeding by Fed. R. Bankr. P. 7012(b). Under Rule 12(b)(6), a
3 defendant may move to dismiss a plaintiff's claim if the
4 plaintiff's allegations "fail to state a claim upon which relief
5 can be granted." Id. Dismissal under Rule 12(b)(6) is proper
6 where there is either no cognizable legal theory, or the absence
7 of sufficient facts alleged under a cognizable legal theory.
8 Newman v. Universal Pictures, 813 F.2d 1519, 1521-22 (9th Cir.
9 1987).

10 For purposes of a motion to dismiss, the complaint is
11 construed in the light most favorable to the plaintiff and the
12 plaintiff's factual allegations are taken as true. Scheurer v.
13 Rhodes, 94 S.Ct. 1683 (1974). This presumption of truthfulness,
14 however, applies only to the factual allegations; the court is
15 not compelled to accept the plaintiff's legal conclusions, or
16 interpretation of statutes. Western Mining Council v. Watt, 643
17 F.2d 618 (9th Cir. 1981), cert. denied, 454 U.S. 1031, 102 S.Ct.
18 567 (1981).

19 It appears from the motion and the court documents filed in
20 connection with the motion and the opposition to it that there is
21 no disagreement as to the basic facts which can be gleaned from
22 court documents in the court's file.

23 In 1998, the plaintiffs executed a deed of trust in favor of
24 defendant Ameriquet to secure an original indebtedness of
25 \$75,200. The deed of trust encumbers the plaintiffs' residence.
26 The plaintiffs defaulted on the loan. On March 10, 1999, the
27 moving defendant, acting as agent for the beneficiary under the
28 deed of trust, recorded and served on interested parties a notice

1 of default and thereby began the nonjudicial foreclosure process.
2 The plaintiffs filed a petition for relief under chapter 13 on
3 June 15, 1999.

4 On October 1, 2001, the court issued an order granting
5 defendant Ameriquest's motion for relief from the automatic stay.
6 Defendant Ameriquest caused to be recorded and served a notice of
7 sale setting a nonjudicial foreclosure sale for December 4, 2001.
8 The notice of sale was published in a newspaper of general
9 circulation on November 14, 21, and 28, 2001 as directed by Cal.
10 Civ. Code § 2924f.

11 On grounds of plaintiffs' counsel's excusable neglect, the
12 court issued an order on November 27, 2001, vacating the October
13 1 order terminating the automatic stay. Defendant Ameriquest did
14 not oppose the motion. After the October 1 order was vacated,
15 defendant Ameriquest caused the nonjudicial foreclosure sale to
16 be postponed from time to time.

17 The court then considered defendant Ameriquest's motion for
18 relief from the automatic stay anew on December 24, 2001. The
19 court declined to terminate the automatic stay but instead issued
20 an adequate protection order on January 3, 2002. The plaintiffs
21 eventually satisfied the terms of that order and by its terms it
22 expired.

23 Defendant Ameriquest filed a second motion for relief from
24 the automatic stay on June 2, 2003. It alleged that the
25 plaintiffs had failed to pay post-petition mortgage installments.
26 The court initially declined to terminate the automatic stay and
27 instead gave the plaintiffs additional time to cure the default.
28 When they failed to do so, the court issued a further order on

1 November 4, 2003 terminating the automatic stay.

2 Defendant Ameriquest conducted a trustee's sale on November
3 24, 2003. Co-defendant Northcutt purchased the debtors'
4 residence.

5 In their complaint, the plaintiffs assert that the
6 foreclosure sale to defendant Northcutt is void ab initio by
7 virtue of the order vacating the October 1 order terminating the
8 automatic stay. They argue that because the October 1 order was
9 vacated, the notice of sale recorded, posted, served, and
10 published pursuant to that order was void and of no effect.
11 According to the plaintiffs, in order to have sold the property
12 at a nonjudicial foreclosure, it was first necessary for
13 defendant Ameriquest to have recorded, posted, served, and
14 published a new notice of sale. Because this was not done, the
15 plaintiffs seek in this adversary proceeding damages pursuant to
16 11 U.S.C. § 362(h) and to quiet their title.

17 The plaintiffs also commenced a state court action which
18 remains pending.

19 The moving defendant's primary argument is that the notice
20 of sale recorded, posted, served, and published pursuant to the
21 October 1 order was valid because such was accomplished before
22 the order was vacated. The moving defendant asserts that the
23 vacating of the October 1 order had no retroactive effect on the
24 October 1 order terminating the automatic stay. Therefore, when
25 the automatic stay was later terminated a second time, it was not
26 necessary to start the notice of sale procedure anew.

27 In their opposition to the motion, the plaintiffs argue that
28 the vacation of the first order terminating the automatic stay

1 resulted in the automatic stay remaining in place without
2 interruption until the automatic stay was terminated the second
3 time. The plaintiffs note that the moving defendant was, or
4 should have been, aware that the order for relief was entered
5 erroneously, and that the moving defendant did not oppose the
6 motion to vacate.

7 The moving defendant cites two state court cases, Tully v.
8 World Savings & Loan Assn., 56 Cal. App. 4th 654 (1997) and Hicks
9 v. E.T. Legg & Associates, 89 Cal. App. 4th 496 (2001), for the
10 proposition that the publication of the notice of sale on
11 November 14, 21, and 28, 2001 provided sufficient notice to
12 support the trustee's sale on November 24, 2003. However, the
13 bankruptcy court has exclusive jurisdiction to determine all
14 issues relevant to the automatic stay. In re Gruntz, 202 F.3d
15 1074 (9th Cir. 2000). This state court authority, then, while
16 deserving of consideration for whatever persuasive force it may
17 have, is not binding on this court.

18 With respect to the issue of whether a vacated order was
19 void ab initio, the court concludes both that the plaintiffs have
20 failed to assert a cognizable legal theory and no facts have been
21 alleged to support such a theory.

22 The plaintiffs have failed to cite, and the court is unaware
23 of, authority holding that an order is rendered void ab initio if
24 it is later vacated regardless of the reasons for its vacation.
25 To the contrary, it has been held that a foreclosure sale held
26 between a dismissal of the case and its subsequent reinstatement
27 pursuant to an order vacating the dismissal does not violate the
28 automatic stay. See, e.g., In re Nail, 195 B.R. 922 (Bankr. N.D.

1 Ala. 1996).

2 Admittedly, courts in the Ninth Circuit recently held that
3 under one circumstance, a dismissal order is void ab initio. See
4 Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman),
5 234 F.3d 1081(9th Cir. 2000); Great Pac. Money Mkts., Inc. v.
6 Krueger (In re Krueger), 88 B.R. 238 (9th Cir. B.A.P. 1988). In
7 these cases, an order was vacated because the debtor had been
8 denied due process rights in connection with the notice and
9 hearing that resulted in the issuance of the order. For
10 instance, an order dismissing a case is void if it is issued in
11 violation of the debtor's Fifth Amendment due process rights.
12 See In re Whitney-Forbes, Inc. 770 F.2d 692 (7th Cir. 1985); In
13 re Krueger, 88 B.R. at 241, citing In re Blumer, 66 B.R. 109, 113
14 (9th Cir. B.A.P. 1986).

15 In Krueger the debtor was not given notice of a continued
16 hearing to dismiss the petition. Nonetheless, the case was
17 dismissed and a creditor foreclosed on the debtor's home. The
18 appellate court concluded that the debtor was entitled to notice
19 of the hearing as a matter of due process. "An order is void if
20 it is issued by a court in a manner inconsistent with the due
21 process clause of the Fifth Amendment." In re Krueger, 88 B.R.
22 at 241. Therefore, the absence of such notice was a denial of
23 the debtor's due process rights and the dismissal was void.
24 "[B]ecause the order dismissing the case was void, the
25 [automatic] stay was continuously in effect from the date the
26 petition was filed. Therefore, the foreclosure sale [that
27 followed dismissal] was held in violation of the stay. Acts
28 taken in violation of the automatic stay are generally deemed

1 void and without effect. [Citations omitted.]” Id.

2 Here, there is no evidence that the court vacated the
3 October 1 order terminating the automatic stay because the
4 plaintiffs’ due process rights had been violated. That is, there
5 is no allegation that the plaintiffs were not served with the
6 motion for relief from the automatic stay or that their counsel
7 was told the hearing had been continued. If such were the case,
8 the plaintiffs would have been denied their fundamental right to
9 notice and a hearing. They would have been denied their due
10 process rights. In that event, the October 1 order would have
11 been void ab initio.

12 A review of the motion filed to vacate the October 1 order
13 indicates that counsel for the plaintiffs merely assumed the
14 hearing on the motion for relief from the automatic stay would be
15 continued to occur concurrently with his motion to modify the
16 plaintiffs’ chapter 13 plan. Counsel for defendant Ameriquest
17 did not inform plaintiffs’ counsel that it would be continued nor
18 did the court or court personnel.

19 The attorney for defendant Ameriquest originally set the
20 hearing on the motion for relief from the automatic stay for
21 August 28, 2001. By the agreement of all counsel, the hearing
22 was continued to September 11, 2001. Because of the national
23 emergency on September 11, the courthouse was closed and the
24 hearing was continued by the court to September 19, 2001. The
25 minutes for the September 19 hearing indicate that both counsel
26 agreed to a further continuance to September 25, 2001.

27 The plaintiffs’ motion to modify their plan, set for hearing
28 on September 19 was also continued to September 25. At the

1 September 25 hearing, counsel for the plaintiffs continued the
2 hearing on the modification motion to October 23, 2001 in order
3 to deal with objections to confirmation made by the trustee.

4 The motion to vacate the October 1 order does not allege
5 that counsel for defendant Ameriquest had agreed to continue the
6 motion for relief from the automatic stay to October 23. Rather,
7 counsel for the plaintiffs assumed it would be, or had been,
8 continued because the relief form stay motion did not physically
9 appear on court's calendar consecutively with the modification
10 motion. Its appearance later on the calendar escaped plaintiffs'
11 counsel's notice. He erroneously concluded the hearing on the
12 motion for relief from the automatic stay had been continued to
13 October 23 and he disconnected his telephone appearance prior to
14 the calling of the relief from stay motion.

15 As a result, the plaintiffs did not participate at the
16 hearing on the motion for relief from the automatic stay and the
17 automatic stay was terminated in an order filed October 1, 2001.

18 The plaintiffs' motion to vacate the October 1 order was
19 then filed on October 30, 2001. The motion was not contested by
20 defendant Ameriquest.

21 In the minute order dated November 20, 2001, the court
22 granted the plaintiffs' motion to set aside the order granting
23 relief from stay based on excusable neglect under Fed. R. Civ. P.
24 60(b), made applicable by Fed. R. Bankr. P. 9024. The plaintiffs
25 argued excusable neglect occurred when their attorney failed to
26 appear at the hearing on the motion. The court held that based
27 on the factors used to establish excusable neglect, as set forth
28 in In re Magouirk, 693 F.2d 948 (9th Cir. 1982), the requisite

1 showing had been made and it vacated the order pursuant to Rule
2 60(b)(1). The record does not indicate that the order was
3 vacated pursuant to Rule 60(b)(4). That is, the order was not
4 vacated because it was void.

5 Despite the foregoing, the motion to dismiss pursuant to
6 Fed. R. Civ. P. 12(b)(6) will be denied. The court preliminarily
7 concludes that the plaintiffs have stated a sufficient claim for
8 violation of the automatic stay based on the third publication of
9 the notice of sale on November 28, 2001. The hearing granting
10 the motion to vacate the relief from stay order was held on
11 November 20, 2001, and the order granting the motion was filed on
12 November 27, 2001. The moving defendant caused to be published a
13 third and final notice of sale on November 28, 2001. Thus, the
14 third publication of the notice of sale appears to have been in
15 violation of the automatic stay.

16 The moving defendant cites Tully and Hicks for the
17 proposition that filing a notice of sale on the same day or the
18 day after the imposition of the automatic stay is not a violation
19 of the stay. For the reasons indicated above, the court does not
20 believe it is bound to follow that authority and it regards it as
21 unpersuasive.

22 The third publication of the notice of sale occurred after
23 the Order 1 order had been vacated. This was an affirmative act
24 in furtherance of a sale. The court can think of no reason such
25 an act is not subject to the automatic stay. It is no different
26 from submitting a proposed judgment to a state court before the
27 petition is filed only to have the judgment entered after the
28 bankruptcy petition is filed. The judgment is void unless the

1 automatic stay is annulled.

2 This is fundamentally different from a postponement of a
3 nonjudicial foreclosure sale. A postponement may be done despite
4 the automatic stay because the foreclosing creditor is merely
5 continuing the status quo. See In re Nghiem, 264 B.R. 557, 561
6 (B.A.P. 9th Cir. 2001). Absent a postponement, and even though
7 all prerequisites to a sale have been satisfied, the foreclosing
8 will have to start the notice of sale process anew when the
9 automatic stay has been terminated or has expired.

10 Publishing notice of a sale is not merely maintaining the
11 status quo. It is taking the last step prior to a sale. While
12 the inability to take that last step may mean the notice of sale
13 process will have to be repeated once the automatic stay is no
14 longer an impediment, more than the mere passage of time was
15 necessary when the petition was filed for that process to be
16 completed. If publication of a notice of sale were regarded as
17 mere maintenance of the status quo, then the court has difficulty
18 understanding why publication, service, and posting of a notice
19 of sale would not also be maintenance of the status quo.

20 The court also concludes at this preliminary stage that the
21 plaintiffs can state a claim for equitable/judicial estoppel.
22 The defendant Ameriquest's lack of opposition to the motion to
23 vacate the order combined with the statement in its later motion
24 for relief from the automatic stay to the effect that "no sale"
25 had been set, could be construed by to signify that it was not
26 relying on the notice of sale and that the notice of sale
27 procedure would be repeated.

28 Accordingly, the motion to dismiss will be denied.