SO ORDERED.

SIGNED this 08 day of January, 2007.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:
JOHN LEROY IV
TERRI LEE LEROY,

Debtors.

Case No. 05-41993
Chapter 13

MEMORANDUM AND ORDER DENYING
DEBTORS' MOTION TO VOID SHERIFF'S SALE
AND REQUIRING AMENDED PLAN, CONVERSION OR DISMISSAL

Debtors' Motion to Void Sheriff's Sale[1] is the subject of this decision. This is a core proceeding under 28 U.S.C. § 157(b)(2)(G), and this Court has jurisdiction to decide this contested matter pursuant to 28 U.S.C. §§ 157 and 1334.

I. FINDINGS OF FACT

The parties have stipulated to the relevant facts, which this Court summarizes. Debtors owned real property located on Sixteenth Avenue in Reno County, Kansas, which

---

[1]Doc. 63.

was their principal residence. They executed a note and mortgage to Washington Mutual's predecessor in interest, but failed to make the payments, so Washington Mutual filed a foreclosure action. It was pending when Debtors filed this bankruptcy petition on June 21, 2005.

Washington Mutual also alleges, and this Court takes judicial notice of the fact, that this was Debtors' second bankruptcy petition. The first one, Case No. 03-43227, was dismissed June 29, 2005, for failure to timely make payments.[2] A Conditional Order Granting Relief from Stay to Washington Mutual on the subject real property was entered December 13, 2004 in that first bankruptcy.[3] A Final Order Granting Relief from Stay was then entered, after a Notice of Default, on May 16, 2005.[4]

Washington Mutual filed a pre-petition arrearage proof of claim in the instant case on October 3, 2005 in the amount of $20,781.62. Although a portion of this claim was paid through the Chapter 13 plan, the second bankruptcy was ultimately dismissed on May 31, 2006, also for failure to make timely payments under the plan.[5] Debtors did not appeal that order of dismissal.

---

[2]Doc. 84 in first bankruptcy.

[3]Doc. 57 in first bankruptcy.

[4]Doc. 74 in first bankruptcy.

[5]Doc. 44. Although the parties do not stipulate to this fact, Washington Mutual alleges that Debtors never made even one full plan payment before it was dismissed.

Debtors then filed a Motion to Reinstate on June 15, 2006, presumably pursuant to 11 U.S.C. § 350(b),[6] but because an objection by another creditor (Bank of Kansas) required the taking of evidence, the motion was ultimately set for trial on the Court's September 19-20, 2006 stacked docket. Shortly before the trial, the parties announced that the dispute between those parties had been resolved, and ultimately, Bank of Kansas withdrew its objection to reinstatement when Debtors agreed to grant it relief from stay to reclaim a vehicle. The Order of Reinstatement was then entered October 16, 2006.[7]

In the meantime, on July 11, 2006, a foreclosure sale of Debtors' home was held in Reno County. The sale was confirmed by an ordered entered July 14, 2006. The parties have stipulated that Debtors' schedules state the house was worth $98,000, while Washington Mutual's claim was in the approximate amount of $64,632. Although the parties' stipulation does not so state, and it is not dispositive to the Court's ultimate decision herein, the Court assumes that Debtors' redemption rights have likely expired pursuant to the provisions of K.S.A. 60-2414(m), and that Debtors did not exercise their redemption rights.

Debtors do not dispute that they received proper and timely notice of the foreclosure sale, but apparently they did neglect to tell their bankruptcy attorney about the sale, who

---

[6]This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became effective. All statutory references to the Bankruptcy Code are thus to 11 U.S.C.A. §§ 101 - 1330 (2004), unless otherwise specified.

[7]As the court explained in *In re Searcy*, 313 B.R. 439, 442 (Bankr W. D. Ark. 2004), "[t]he term reinstatement is commonly used by practitioners after a case has been dismissed but before the case has closed. Because reinstatement of a case is not recognized in the bankruptcy code or rules, the only effect a motion to reinstate can have in a case is to vacate the order of dismissal, otherwise there would be no case to reinstate. *Diviney v. NationsBank of Texas* (*In re Diviney*), 211 B.R. 951, 962 (Bankr. N.D. Okla.1997). A motion to vacate the dismissal order is properly brought under Federal Rule of Bankruptcy Procedure 9024, which incorporates Federal Rule of Civil Procedure 60. Under Rule 9024(b)(6), a court can grant relief from an order dismissing a case for any reason justifying such relief."

claims he did not receive independent notice of the foreclosure sale. Debtors did not request an expedited hearing of their Motion to Reinstate, so as to forestall the foreclosure sale, nor did they request the Court enjoin the foreclosure sale by filing an adversary proceeding.

II. CONCLUSIONS OF LAW

Debtors bear the burden of persuasion on their Motion to Void the Sheriff's Sale, and they have not sustained that burden. Debtors' first argument is that if a dismissed Chapter 13 case is later reinstated, the very act of setting aside a dismissal necessarily eviscerates all effects of the dismissal as a matter of law, as if the automatic stay never terminated. Alternatively, Debtors argue that the Court should in essence deem that when the automatic stay under 11 U.S.C. § 362 was reinstated, the automatic stay was retroactively reinstated so as to apply during the time the case was dismissed. This is simply not the law.[8]

First, it is clear that upon dismissal, the automatic stay provided by § 362 is no longer available to protect a Chapter 13 debtor or his assets from efforts by his creditors to collect their debts.[9] In addition, the dismissal of Debtors' bankruptcy case served to revest the

---

[8] *In re Searcy*, 313 B.R. at 443 (holding that reinstating case does not retroactively reinstate the automatic stay during the time the case was dismissed, and that there is no authority that permits the court to retroactively impose a stay); *In re Hill,* 305 B.R. 100, 105 (Bankr. M.D. Fla. 2003) (same), citing numerous other like decisions; *In re Henry Parks, Mortgage Electronic Registration Systems,* 2005 Bankr. LEXIS 526 (Bankr. N. D. Ga. 2005) (same).

[9] *In re Myers*,336 B.R. 601, 2005 WL 3115771 at *4 (10th Cir. BAP 2005) (holding that because the bankruptcy stay is created by the Bankruptcy Code and is applied only within a bankruptcy case, it is not relevant outside bankruptcy, and finding that appeal of order granting relief from stay was mooted when foreclosure sale was held and confirmed after bankruptcy was dismissed). *See also In re Hanson,* 282 B.R. 240, 245-45 (Bankr. D. Colo. 2002) (citations omitted); *In re Hill*, 305 B.R. 100, 104 (Bankr. M. D. Fla. 2003) (holding that although a case may remain open after dismissal for the trustee's final report and other administrative tasks, the automatic stay terminates upon the earlier of the time the case is closed, the time it is dismissed, or the time a discharge is granted).

subject real estate in the Debtors,[10] and the property was no longer property of the estate. Washington Mutual was thus not required to seek relief from the stay to conduct the Sheriff's Sale after the case was dismissed.

Further, Debtors' suggestion that the provisions of the Confirmation Order (which allowed Debtors to cure the arrearage in the home mortgage) bind Washington Mutual, and somehow precludes it from foreclosing on this property, is also not supported by the law. Debtors failed to perform under their Chapter 13 Plan, and their case was thus dismissed. Washington Mutual is not now bound in perpetuity by the terms of a Plan that was never consummated.

Debtors also suggest that Washington Mutual, by not objecting to the Motion to Reinstate, is equitably estopped from now arguing that the reinstatement of the case does not retroactively re-institute the § 362 stay back to the date of dismissal. But Washington Mutual was not required to object to the Motion to Reinstate. There was no stay in effect on the date it conducted the sale, and there was no stay in place when the state court confirmed the sale. Admittedly, if no one had objected to the Motion to Reinstate by the July 8, 2006 deadline, and if the order granting the reinstatement had been entered prior to the date of sale, the stay would have barred the foreclosure sale. That did not happen, however, and Washington Mutual cannot be faulted for electing not to intervene in a bankruptcy with which it no longer

[10] 11 U.S.C. 349(b)(3) provides, in pertinent part, that ".... dismissal of a case ... revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title."

needed to be involved. The law allowed it to resort to state law remedies, without running afoul of § 362, and it cannot be faulted for doing so.

Debtors further suggest that this Court should use its § 105 equitable powers because they had acquired considerable equity in their home. The Court will not invoke its equitable powers, however, for several reasons. One reason is that as a matter of law, Debtors had the right to redeem the property from the sale to capture that equity. State law provides the remedy of redemption for mortgagors to recapture equity they have built up in real estate. Debtors apparently elected not to avail themselves of this state law remedy, and thus this Court declines to provide a different remedy.

The Court also declines to resort to § 105 to solve Debtors' admittedly significant problem, because Debtors sat on their rights while the sale was conducted and confirmed. Debtors could have sought an emergency hearing prior to the foreclosure sale, but they failed to use that tool. Debtors could have also brought an adversary proceeding and sought to enjoin the foreclosure sale.[11] It is certainly possible that the Court, using the well known four-part test for granting injunctive relief,[12] might have granted the injunction.[13] Instead,

---

[11]*See* Federal Rule of Bankruptcy Procedure 7001(7).

[12]*Winnebago Tribe of Nebraska v. Stovall*, 205 F. Supp.2d 1217, 1221 (D. Kan. 2002) (holding that to obtain a preliminary injunction or a temporary restraining order in federal court, the movant has the burden of establishing that: (1) the party will suffer irreparable injury unless the motion is granted; (2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood that the moving party will eventually prevail on the merits, citing *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir.1998).

[13]Prior to the sale, Debtors may well have been able to demonstrate that the element dealing with the injunction being adverse to the public interest was not implicated. At that point, the sale had not been held and consummated. As noted below, the analysis of that element changed immediately after the sale was conducted and confirmed.

Debtors waited over four months after the sale was confirmed to ask the Court to void the sale. The Court will not use its equitable powers to do so.

In effect, Debtors want this Court to use its equitable powers to set aside a long-confirmed judicial sale. An analogous situation arises when a debtor appeals an order granting relief from stay, but while the appeal is pending, the underlying property is sold at a foreclosure sale. It is well established in that situation that the appeal must be dismissed as moot when the debtor fails to obtain a stay pending appeal of a bankruptcy court order granting relief from the automatic stay.[14] This rule is " 'intended to provide finality to orders of bankruptcy courts and to protect the integrity of the judicial sale process upon which good faith purchasers rely.' "[15]

Purchasers at foreclosure sales deserve to trust the system. If sales like this one could be set aside, months after the purchaser paid (or bid) in money to purchase the property, it would likely discourage bidders at judicial sales, and result in depressed bids. Accordingly, issues of public policy also weigh heavily against granting the relief sought.

Finally, this Court agrees with the Tenth Circuit Bankruptcy Appellate Panel, which noted in *In re Egbert Development, LLC* that "Absent a state law that would allow this Court to set aside the foreclosure sale, we are without power to create a remedy under "equitable

---

[14]*In re Egbert Development*, LLC, 219 B.R. 903, 905 (10th Cir. BAP 1998) (rejecting Ninth Circuit authority that if buyer at judicial sale is the appellee, court may be able to grant equitable relief).

[15]*Id.* at 905-06 (citations omitted). *See also In re Sewell*, 345 B.R. 174, 180 (9th Cir. BAP 2006) (holding that "a title company or purchaser at a foreclosure sale can verify within a short time after the sale is completed whether a bankruptcy petition was filed before that time, but if reinstatement orders were to retroactively impose the automatic stay there would be no way to protect against the sale being rendered retroactively void at some future date").

principles."[16] The parties have not offered, nor has this Court found, any applicable state law allowing the Court to set aside the foreclosure sale under these facts.[17]

IV. CONCLUSION

Because the automatic stay provided by 11 U.S.C. § 362 was lifted upon dismissal of Debtors' Chapter 13 case, because Debtors did not seek either an emergency hearing or injunctive relief to prevent the foreclosure sale pending the Court's decision on their Motion to Reinstate, and because the property in question (except perhaps Debtors' redemption rights) was no longer property of the estate when the stay did go back into effect upon reinstatement on October 16, 2006,[18] this Court cannot and will not void the Sheriff's Sale.

As a result of these events, which have obviously served to significantly change Debtors' financial situation, Debtors are now required to amend their Chapter 13 plan. The original plan provided that the now foreclosed mortgage would be cured. Because § 1322(c)(1) does not permit that result,[19] Debtors are thus given twenty days from the date of

---

[16]*Id.* at 907.

[17]As the bankruptcy court noted in *In re Searcy*, if Debtors believe Washington Mutual somehow failed to follow the requirements for foreclosure under state law, they can pursue a cause of action in the state court. "This Court knows of no principal of law or equity that sanctions setting aside the foreclosure sale in this instance. Even though equity follows the spirit of the law rather than the strict letter of the law, *Carter v. Bogden*, 13 F.2d 90, 92 (8th Cir.1926), the failure of the debtors to act is insufficient reason for this Court to set aside the foreclosure sale based on equity." *In re Searcy*, 313 B.R. at 443.

[18]Legal title remains in owner until sheriff's deed is executed, and purchaser at sale has an equitable interest and does not receive legal title or "ownership," until passage of the redemption period and execution of the sheriff's deed. *Application of Small Business Admin. for Exemption from Ad Valorem Taxation in Meade County, Kan.*, 14 Kan. App.2d 600, 797 P.2d 879, 884 (Kan. App.1990) (relying on K.S.A. 60-3439).

[19]*Cf. In re McCarn*, 218 B.R. 154, 160 (10th Cir. BAP 1998) (holding that "the language of section 1322(c)(1) is clear and unambiguous in establishing the date of the actual foreclosure sale as the cut-off for curing a mortgage default under section 1322(b), and supports the bankruptcy court's conclusion that the debtors had no right to cure their default to the Credit Union because their home had been sold at a foreclosure sale prior to the time that they filed chapter 13").

this decision to file an amended plan, to convert, or to dismiss. If none of those options is selected, the Court will assume that Debtors have chosen to dismiss this case, and the case will likely be forthwith dismissed, pursuant to 11 U.S.C. § 1307(c)(1), unreasonable delay by the debtor that is prejudicial to creditors, or § 1307(c)(3) failure to timely file a plan pursuant to the terms of this Order.

IT IS, THEREFORE, ORDERED that Debtors' Motion to Void the Sheriff Sale is denied, and the Court confirms that as to the real property that was sold in July 2006, the stay was not violated, and is no longer property of the estate or of the Debtors (unless they still retain some state law redemption rights).

IT IS FURTHER ORDERED that within twenty days of the date of this Order, Debtors shall either file an amended plan (and properly notice it for a prompt hearing), or shall convert, or dismiss this case. If the case has not been earlier converted or dismissed, the Court will conduct a status hearing at the time previously scheduled for it on **February 13, 2007 at 1:30 p.m.** At that time, the Court will determine the future course of these proceedings.

# # #