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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

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10 In re

No. 00-42066 J
Adv. No. 00-4482 AJ

11 WEBSTER SOUTHALL, JR., and
12 ANGELA SOUTHALL,

_____ Debtors.____/

13 WEBSTER SOUTHALL, JR., and
14 ANGELA SOUTHALL,,

Plaintiffs,

15 vs.

16 FAIRBANKS CAPITAL CORPORATION;
17 SHK PROPERTIES, INC.,

_____ Defendants.____/

18 DECISION: CROSS MOTIONS FOR SUMMARY JUDGMENT

19
20 This is an adversary proceeding in which plaintiffs Webster and
21 Angela Southall, the above debtors (jointly, "the Southalls"), seek
22 to avoid a foreclosure sale of certain real property located on 79th
23 Ave. in Oakland, California (the "Property"), and money damages,
24 against defendants Fairbanks Capital Corporation ("Fairbanks"), the
25 foreclosing creditor, and SHK Properties, Inc. ("SHK"), which
26 purchased the Property at the foreclosure sale. The Southalls

Decision

1 contend that the foreclosure sale was a nullity because Fairbanks
2 did not properly serve its motion for relief from the automatic stay
3 by which it obtained leave to conduct the foreclosure sale. The
4 parties have filed cross-motions for summary judgment pursuant to
5 Fed. R. Civ. P. 56, which applies in adversary proceedings pursuant
6 to Fed. R. Bankr. P. 7056.

7 The court concludes that genuine issues of material fact are
8 present with respect to the issue of whether Fairbanks served its
9 motion for relief from the automatic stay in compliance with Fed. R.
10 Bankr. P. 7004(b)(9). The court also concludes, however, that even
11 if Fairbanks did not effect service of its stay relief motion in
12 compliance with Fed. R. Bankr. P. 7004(b)(9): (a) SHK is protected
13 by Bankruptcy Code § 549(c),¹ and (b) Fairbanks is entitled to
14 annulment of the automatic stay such to validate its actions at
15 issue herein.

16 The court will therefore deny the Southalls' motion for summary
17 judgment and grant the motions for summary judgment filed by
18 Fairbanks and SHK.

19 DISCUSSION

20 A. Background

21 On April 4, 2000, Webster Southall filed a voluntary chapter 13
22 petition herein. He filed the petition pro se. On April 19, the
23 Southalls filed an amended chapter 13 petition; the amendment added

24
25 ¹Unless as otherwise stated, all further section references
26 herein are to the United States Bankruptcy Code, 11 U.S.C. § 101
et. seq.

1 Angela Southall as a debtor, and listed attorney Richard L.
2 Boeckholt ("Boeckholt") as the Southalls' counsel. The Southalls
3 did not serve a copy of the amended petition on Fairbanks. Nor did
4 the Southalls record a copy of the original or amended chapter 13
5 bankruptcy petition with the recorder of Alameda County, California,
6 where the Property is located.

7 The Southalls scheduled the Property as having a value of
8 \$85,000, subject to a first lien in favor of Fairbanks in the sum of
9 \$65,000.

10 On May 28, 2000, the Southalls signed a Substitution of
11 Attorney stating that they were substituting Boeckholt as their
12 counsel in the place of Webster Southall, acting in pro per. The
13 document does not appear to have been filed or served on anyone
14 until after the Southalls filed the complaint herein.

15 On June 6, 2000, the Clerk of this court caused to be mailed to
16 the scheduled creditors, including Fairbanks, a Notice of
17 Commencement of Case stating that the Southalls had filed a chapter
18 13 case. The notice listed Boeckholt as the Southalls' counsel.

19 On June 9, 2000, Fairbanks filed a motion for relief from the
20 automatic stay imposed under § 362(a) seeking relief to foreclose on
21 the Property, and set the matter for hearing. The motion alleged,
22 inter alia, that the loan secured by the Property was in default at
23 the date of the petition, and that the Southalls had failed to make
24 two postpetition loan payments as they were required to do, In re
25 Ellis, 60 B.R. 432 (9th Cir. BAP 1985). Fairbanks served the moving
26 papers on debtor Webster Southall. Fairbanks did not serve

1 Boeckholt. The court's docket at the time stated that Webster
2 Southall was a pro se debtor. A declaration filed by Charles
3 Nunley, Fairbanks's counsel herein, stated that he was unaware that
4 Webster Southall had retained counsel, and that he had served the
5 motion only on Webster Southall in reliance on the court's docket.

6 On July 21, the hearing on Fairbanks's motion went forward.
7 Neither the Southalls nor Boeckholt appeared. At the conclusion of
8 the hearing, the court ruled that stay relief would be granted. On
9 July 24, Fairbanks served a copy of a proposed stay relief order on
10 Webster Southall. On August 2, the court entered its order granting
11 Fairbanks's motion. The facts before the court do not reveal
12 whether Fairbanks served a copy of the signed order on the
13 Southalls.² The declaration filed by Fairbanks's counsel in support
14 of its motion states that he was unaware that the Southalls were
15 represented by counsel until commencement of the present adversary
16 proceeding.

17 On October 3, 2000, Fairbanks caused a foreclosure sale to be
18 held. SHK purchased the Property for the cash sum of \$78,200. (The
19 the amount of the debt then owing to Fairbanks was in the sum of
20 \$80,503.) Thereafter, SHK recorded a trustee's deed.

21 On November 9, 2000, the Southalls filed the present adversary
22 proceeding against Fairbanks and SHK. It is their contention that
23 the order granting Fairbanks relief from the automatic stay is void

24
25 ²The file for R.S. No. 00-0881, the number assigned to
26 Fairbanks's stay relief motion, contains an unsigned proof of
service of the order.

1 because Fairbanks did not serve Boeckholt with a copy of its motion
2 in compliance with Fed. R. Bankr. P. 7004(b)(9),³ which provides, in
3 relevant part:

4 Except as provided in subdivision (h), in addition to the
5 methods of service authorized by Rule 4(e)-(j) F.R.Civ.P.,
6 service may be made within the United States by first
class mail postage prepaid as follows:

7
8 (9) Upon the debtor, after a petition has been filed
9 by or served upon the debtor and until the case is
10 dismissed or closed, by mailing copies of the summons and
11 complaint to the debtor at the address shown in the
12 petition or statement of affairs or to such other address
as the debtor may designate in a filed writing and, if the
debtor is represented by an attorney, to the attorney at
the attorney's post-office address.

13 The Southalls argue that because the foreclosure sale was held
14 pursuant to a stay relief order that was void, the foreclosure sale
15 was also void, and SHK must therefore return the Property to them.
16 The Southalls do not allege any bad faith or intentional misconduct
17 on the part of Fairbanks or SHK.

18 B. Fairbanks's Failure to Serve Boeckholt

19 Fairbanks does not dispute that proper service under Fed. R.
20 Bankr. P. 7004(b)(9) requires service of motion papers on a
21 bankruptcy debtor's counsel of record. It argues, however, that
22 because the Southalls did not serve it with the amended bankruptcy
23

24
25 ³Although Fed. R. Bankr. P. 7004 is part of the rules that
26 govern adversary proceedings, it applies to motions for relief
from the automatic stay via Rules 4001(a)(1) and 9014.

1 petition in compliance with Fed. R. Bankr. P. 1009,⁴ or with the
2 Notice of Substitution of Attorney in compliance with the court's
3 local rules,⁵ the Southalls are responsible for Fairbanks's failure
4 to serve Boeckholt and that service of the stay relief motion was
5 therefore valid. There is indeed authority for the proposition that
6 otherwise invalid service under Fed. R. Bankr. P. 7004(b)(9) may be
7 excused if such invalidity resulted from a failure by debtor's
8 attorney to file and serve a change of address on the parties. See
9 In re Cossio, 163 B.R. 150 (9th Cir. BAP 1994), aff'd 56 F.3d 79.

10 Nevertheless, the Declarations filed by Fairbanks are not
11 adequate to rebut the presumption that the notice sent out by the
12 court on June 6, 2000, which stated that Boeckholt was the
13 Southalls' counsel, was received by Fairbanks. This is so because
14 Fairbanks's counsel is not competent to testify as to whether
15 Fairbanks received the notice, and because a mere declaration of

16
17 ⁴Fed. R. Bankr. P. 1009 provides:

18 A voluntary petition, list, schedule, or statement may be
19 amended by the debtor as a matter of course at any time
20 before the case is closed. The debtor shall give notice of
21 the amendment to the trustee and to any entity affected
22 thereby. On motion of a party in interest, after notice and
23 a hearing, the court may order any voluntary petition, list,
24 schedule, or statement to be amended and the clerk shall
25 give notice of the amendment to entities designated by the
26 court.

24 ⁵The bankruptcy court's local rule B.L.R. 1001-2(a)17,
25 incorporating district court's Civil L.R. 3-11, requires a party
26 proceeding pro se whose address changes to serve a notice of
change of address on "all opposing parties."

1 non-receipt is not sufficient to rebut the presumption. In re
2 Ricketts, 80 B.R. 495, 498-99 (9th Cir. BAP 1987); In re Carter, 511
3 F.2d 1203 (9th Cir. 1975); In re Bucknum, 951 F.2d 204, 207 (9th
4 Cir. 1991).⁶

5 The court believes that a genuine issue of material fact is
6 present as to whether Fairbanks was served by the clerk of court
7 with notice of the amended bankruptcy petition, and thus put on
8 notice that Boeckholt represented the Southalls.⁷

9 C. Rights of SHK

10 Here the court assumes, arguendo, that Fairbanks failed to
11 serve Boeckholt with its stay relief motion, without just cause or
12 excuse, and that the resulting order was thus void.

13 It is true that acts in violation of the automatic stay are
14 void. In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992). Even so,
15

16 ⁶The court is not suggesting that the clerk of court's
17 service of the Notice of Commencement of Case on Fairbanks was
18 necessarily adequate service, or that Fairbanks cannot attempt to
19 rebut the presumption of receipt. The court does believe,
20 however, that the declarations now before the court are
21 insufficient to permit a finding in the present context that
22 Fairbanks was not notified or served with notice of the fact that
23 Boeckholt was the Southalls' counsel.

24 ⁷Fairbanks has also argued that it substantially complied
25 with service of process requirements, and that service on Webster
26 Southall comports with due process requirements. The Southalls
dispute that Fairbanks substantially complied, and also argue
that "substantial compliance" with service of process
requirements is not legally sufficient service. Given the
conclusions expressed in sections C. and D., the court need not
address these arguments.

1 the weight of authority is that Bankruptcy Code § 549(c)⁸ protects a
2 good faith purchaser of real property for present fair equivalent
3 value, without knowledge of the commencement of the case, even if
4 the postpetition transfer was unauthorized, unless a copy of the
5 petition was recorded in the real property records before the deed
6 at issue was recorded. See Schwartz, 954 F.2d at 574 ("Subsection
7 549(c) is an exception to section 362 regardless of whether
8 violations of the automatic stay are void or merely voidable.") See
9 also In re Shaw, 157 B.R. 151 (9th Cir. BAP 1993) (holding that a
10 purchaser at a tax lien sale held in violation of § 362(a) is
11 eligible for protection under § 549(c), but that the purchaser at
12 the sale at issue failed to establish payment of "equivalent
13 value"). In re Williams, 124 B.R. 311 (Bankr. C.D. Cal. 1991),
14 cited by the Southalls, is not authority to the contrary; in
15 Williams, unlike the present case, the debtor recorded a copy of the
16

17 ⁸Bankruptcy Code § 549(c) provides:

18 (c) The trustee may not avoid under subsection (a) of this
19 section a transfer of real property to a good faith purchaser
20 without knowledge of the commencement of the case and for present
21 fair equivalent value unless a copy or notice of the petition was
22 filed, where a transfer of such real property may be recorded to
23 perfect such transfer, before such transfer is so perfected that
24 a bona fide purchaser of such property, against whom applicable
25 law permits such transfer to be perfected, could not acquire an
26 interest that is superior to the interest of such good faith
purchaser. A good faith purchaser without knowledge of the
commencement of the case and for less than present fair
equivalent value has a lien on the property transferred to the
extent of any present value given, unless a copy or notice of the
petition was so filed before such transfer was so perfected.

1 bankruptcy petition in the real property records. Id. at 313.

2 Here, the undisputed facts show that SHK is protected by
3 § 549(c). SHK paid cash (present value) in the sum of \$78,200, an
4 amount that the court holds is "fair equivalent value" for purposes
5 of § 549(c), based on the Southalls' valuation. The Southalls did
6 not record a copy of their bankruptcy petition, and SHK did record a
7 trustee's deed of the property. The uncontroverted declaration
8 filed by David Underwood states that SHK purchased the Property
9 without knowledge of the bankruptcy case. SHK is therefore
10 protected by § 549(c).

11 D. Annulment of the Automatic Stay

12 Even if § 549(c) were inapplicable, the court would grant the
13 motions for summary judgment filed by SHK and Fairbanks because, in
14 an appropriate case, the court may annul the automatic stay, i.e.,
15 grant retroactive relief to validate an otherwise void action. See
16 § 362(d); Schwartz, 954 F.2d at 572. Whether annulment is
17 appropriate must be determined on a case by case basis, and requires
18 the court to balance the equities. In re National Environmental
19 Waste Corp., 129 F.3d 1052, 1055 (9th Cir. 1997). The court
20 believes that this is an appropriate case for annulment, for
21 numerous reasons.

22 First, it is undisputed that the Southalls failed to make their
23 required loan payments to Fairbanks after they filed chapter 13, and
24 thus, that Fairbanks alleged and established cause for relief from
25 the automatic stay. Section 362(d)(1). The facts also show that
26 the Southalls had little or no equity in the Property at the time of

1 the foreclosure sale.

2 Moreover, there is no indication or allegation in the record
3 that the Southalls did not receive Fairbanks's moving papers, and
4 the Southalls have not so alleged. It thus appears that the
5 Southalls elected not to attend the hearing on the stay relief
6 motion, or to contest it. (The record is silent as to whether the
7 Southalls notified Boeckholt of Fairbanks's stay relief motion.)

8 In addition, at the time it purchased the Property, SHK was and
9 is an innocent third party who parted in good faith with present,
10 fair, equivalent value in exchange for title.

11 It is also clear from the record that the Southalls failed to
12 serve any notice of Boeckholt's entry into the case on Fairbanks, as
13 they were required to do pursuant to Fed. R. Bankr. P. 1009 and
14 B.L.R. 1001-2(a)17.

15 Finally, it appears that even if the court were to avoid the
16 foreclosure sale and restore the parties to the status quo,
17 immediate entry of a stay relief order followed by a new foreclosure
18 sale would be appropriate because of the substantial loan defaults,
19 without apparent intent or means on the part of the Southalls to
20 effect a cure.⁹ Thus avoidance of the sale would be an idle act.

21
22 ⁹At oral argument, Boeckholt suggested that the Southalls'
23 chapter 13 discharge would immunize them from having to repay
24 their debt to Fairbanks and that they could also keep the
25 Property. This argument appears to be based on the following
26 facts. On November 20, 2000, eleven days after the Southalls
filed this adversary proceeding, the Southalls filed an amended
chapter 13 plan that ignored the fact that they no longer owned

(continued...)

1 The court holds that even if the order granting Fairbanks stay
2 relief was invalid because of Fairbanks's failure to serve its
3 motion on Boeckholt, grounds are present to annul the stay.

4 E. CONCLUSION

5 Although the court has concluded that a genuine issue of
6 material fact is present with respect to Fed. R. Bankr. P.
7 7004(b)(9), the court holds that no genuine issues of material fact
8 are present as to the right of SHK Properties to protection under
9 § 549(c) and Fairbanks's entitlement to an order annulling the
10 automatic stay. This ruling moots out the Fed. R. Bankr. P.
11 7004(b)(9) issue.

12 The court will therefore deny the Southalls' motion for summary
13 judgment and grant summary judgment in favor Fairbanks and SHK.¹⁰

14
15 ⁹(...continued)
16 the Property. The plan provided that the Southalls would cure
17 the prepetition arrearage to Fairbanks, make the contractual
18 monthly postpetition loan payments, and that all creditors would
19 be paid in full within six months. On January 18, 2001, the
20 court, unaware that the Southalls did not own the Property,
21 confirmed the plan. On February 13, 2001, the chapter 13 trustee
22 filed a certification that the Southalls had completed their
23 plan, and an order of discharge issued on February 16, 2001.

24
25 However, were the court to order the return of the Property,
26 the revived debt to Fairbanks would not be discharged because,
among other reasons, such debt would have arisen after the date
of the discharge order, or alternatively, because the debtors did
not pay it in full in accordance with their plan. See § 1328(a).

¹⁰The court acknowledges that Fairbanks and SHK did not
request annulment of the stay in their moving papers. Even so,
(continued...)

1 Dated: June 14, 2001
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4 Edward D. Jellen
5 United States Bankruptcy Judge
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19 _____
20 ¹⁰(...continued)
21 when the facts show that they are entitled to relief on a theory
22 other than that pled, the court may grant such relief. See Fed.
23 R. Civ. P. 54(c) and Fed. R. Bankr. P. 7054 ("every final
24 judgment shall grant the relief to which the party in whose favor
25 it is rendered is entitled, even if such party has not demanded
26 such relief in the pleadings"). See also Cool Fuel Inc. v. Connett, 685 F.2d 309, 311 (9th Cir. 1982) (holding that sua sponte grant of summary judgment to the party opposing summary judgment is permissible if the documents presented establish absence of genuine issue of material fact as to movant's case).