The following constitutes the ruling of the court and has the force and effect therein described.

Signed March 3, 2010 **United States Bankruptcy Judge**

GERARDO VASQUEZ	§	CASE NO. 09-47043-DML13
	§	
	§	CHAPTER 13
DEBTOR.	§	

MEMORANDUM ORDER

Before the court is the *Motion of Laredo National Bank For Relief From Automatic Stay* (the "Motion") filed by Laredo National Bank (the "Bank"). Gerardo Vasquez ("Debtor") filed his *Response to Motion of Laredo National Bank For Relief From Automatic Stay*. In support of the Motion the Bank filed its *Letter Brief Relating to The Motion of The Laredo National Bank For Relief From Automatic Stay*. In reply Debtor filed his *Letter Brief in Response To The Motion Of The Laredo National Bank For Relief From Stay*. The court conducted a hearing on the Motion on January 28, 2010, during which the Bank and Debtor presented argument. Debtor was also prepared to present evidence relevant to the Motion, but the court declined to hear evidence at such time due to lack of notice to the Bank.

This matter is subject to the court's core jurisdiction. 28 U.S.C. §§ 1334 and 157(b). This memorandum order embodies the court's findings of fact and conclusions of law. *See* FED. R. BANKR. P. 9014 and 7052.

BACKGROUND

Debtor was indebted to the Bank on a promissory note dated April 7, 2005. This note was secured by a lien on Debtor's homestead (the "Property"). After Debtor fell into arrears, the

Bank accelerated the note with proper notice. Notice of foreclosure was also given to Debtor and a foreclosure sale was conducted on October 6, 2009, at which the Bank purchased the Property. On the same day, but apparently after the sale, Debtor, *pro se*, filed a case (the "First Case") under chapter 13 of the Bankruptcy Code (the "Code")[1] in this court. Debtor did not give the Bank notice of this filing.

On October 12, 2009, the Bank recorded a trustee's deed (the "Trustee's Deed") to the Property. Following this, on October 15, 2009, the First Case was dismissed for failure to provide a list of creditors and a social security or tax identification number.

On November 2, 2009, the Bank obtained an eviction judgment from the Justice Court of Rockwall County. The judgment was granted on the assumption that the Trustee's Deed validly conveyed title to the Property to the Bank. On the same day, Debtor filed the presently pending case under chapter 13 of the Code with the assistance of counsel (the "Second Case").

DISCUSSION

Debtor asserts that recordation of the Trustee's Deed by the Bank during the pendency of the First Case was a violation of the automatic stay of section 362(a)[2] of the Code. The Bank

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[1] 11 U.S.C. §§ 101 et seq.

[2] Code §§ 362(a)(1)-(5) provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> (2) the enforcement, against the debtor or against the property of the estate, of a judgment obtained before the commencement of the case under this title;
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> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

does not dispute this fact. Debtor asks the court to hold that (1) the recordation of the Trustee's Deed after the commencement of the First Case was void because it was in violation of the automatic stay; and (2) there is no reason for the court to validate retroactively the Bank's action by annulling the automatic stay. The Bank, agreeing that its title to the Property is flawed, nevertheless contends that (1) there is cause to validate retroactively its recordation of the Trustee's Deed and so cure the defect in its title and (2) the court could order such relief.

Most courts have held that actions in violation of the automatic stay are void *ab initio*. *See Miller v. Savings Bank of Baltimore*, 10 B.R. 778 (Bankr. D.Md. 1981); *In re Azone Agribiz, Inc.*, 416 B.R. 755 (Bankr. D.Mont. 2009); 3 COLLIER ON BANKRUPTCY ¶ 362.11[1] (15th ed. rev. 2009). However, other courts, including the Court of Appeals for the Fifth Circuit, have concluded that actions in violation of the stay are "voidable and [the defect in such an act is] capable of discretionary cure" pursuant to section 362(d) of the Code. *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990); *In re Thornburg*, 277 B.R. 719 (Bankr. E.D. Tex. 2002). The bankruptcy court's power to, *inter alia*, annul the automatic stay suggests an ability to grant retroactive relief. Otherwise the word "annul" would not be included as optional relief in section 362(d). *Id*. On the other hand retroactive relief should be granted only sparingly and in compelling circumstances. *Thornburg*, 277 B.R. 719.

Foreclosures in violation of the automatic stay under section 362 of the Code are invalid "even if the parties did not have notice of the bankruptcy, unless retroactive relief from the stay is granted by the court." *Bustamante v. Cueva (In re Cueva)*, 371 F.3d 232, 237 (5th Cir. 2004). Debtor's failure to list the Bank as a creditor in or otherwise give it notice of the First Case does not validate the Bank's actions in foreclosure. *See Paine v. Sealey,* 956 S.W.2d 803, 805

(Tex.App.-Houston [14th Dist.] 1997, no writ); 3 COLLIER ON BANKRUPTCY, ¶ 362.02 (15th ed. rev. 2005). Neither did this court grant retroactive relief from the stay during the First Case.

Dismissal of a bankruptcy proceeding will not serve to eliminate the effect of the automatic stay and validate violations that occurred during the pendency of that bankruptcy proceeding. *See In re* Brown, 178 Fed.Appx. 409 (5th Cir. 2006). The court may, however, consider lifting the stay retroactively during a subsequent bankruptcy case to validate such actions. Although the court has the authority to grant retroactive relief, such relief should be granted only sparingly and in compelling circumstances. *Thornburg*, 227 B.R. at 731 n. 18.

It is the view of the court that the test that should be applied in deciding whether to grant retroactive relief from the stay is whether, if relief from the stay had been sought before the action in violation of the stay was taken, the relief would have been granted. While lack of knowledge of the stay and other similar considerations are pertinent to the court's analysis in a case like that at bar, it does not make sense in most cases[3] that it should be easier to obtain retroactive annulment of the stay after its violation than it would be to obtain the same relief before acting.

Relief from the stay should be granted under section 362(d)[4] of the Code where there is cause, including the lack of adequate protection, or where a debtor lacks equity in the property

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[3] If the party invoking protection of the stay purposely concealed its existence from the party acting in violation of it or otherwise abused the system, the case in favor of retroactive annulment would be strengthened. Indeed, like serial filings, such conduct might constitute sufficient cause for relief from the stay under Code § 362(d)(1). There is no evidence in the case at bar of that sort of misconduct by Debtor.

[4] See applicable Code sections 362(d)(1), (2) which provide:

> (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;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if-
>
> (A) the debtor does not have . . . equity in such property; and
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> (B) such property is not necessary to an effective reorganization . . . .

and the property is not necessary to an effective reorganization. Section 362(d)(1),(2); *In re Beeman*, 235 B.R. 519, 526 (Bankr. D.N.H. 1999); 3 *Collier on Bankruptcy*, 362.07[4] (15th ed. rev. 2005).

If a debtor has sufficient equity in the lender's collateral the lender may be adequately protected by the equity cushion.[5] According to his schedules Debtor has approximately $37,000[6] of equity in the Property, so the value of the Bank's collateral substantially exceeds its debt of $153,000. Thus, the court would not grant relief from the stay under section 362(d)(1) of the Code. Relief from stay would not be granted under 362(d)(2) because Debtor has equity in the Property and the Debtor's homestead – his residence – is necessary in order for there to be an effective reorganization.

On the facts before it, the court would not have granted relief from stay prior to the foreclosure sale. Accordingly, it will not now grant retroactive relief. Some courts, however, have adopted a laundry list of circumstances warranting retroactive relief. Circumstances considered compelling by courts in lifting the automatic stay retroactively, thereby validating actions which would otherwise be void, include (1) if the creditor had actual or constructive knowledge of the bankruptcy filing; (2) if the debtor has acted in bad faith; (3) if there was equity in the property of the estate; (4) if the property was necessary for an effective

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[5] What constitutes a sufficient cushion is within the discretion of the bankruptcy court. *In re San Clemente Estates*, 5 B.R. 605 (Bankr. S.D. Cal. 1980); *See also In re Mendoza*, 111 F.3d 1264 (5th Cir. 1997) (holding that case law has almost uniformly held that an equity cushion of 20% or more constitutes adequate protection); *In re Kleibrink*, 346 B.R. 734 (Bankr. N.D. Tex. 2006) (holding that in determining whether a secured creditor's interest is adequately protected, in connection with a request for relief from stay, the property's equity cushion must be analyzed); 3 *Collier on Bankruptcy*, 361.03[1] (15th ed. rev. 2002).

[6] Debtor's Schedules A and D, filed on November 30, 2009. As the schedules were signed under oath by Debtor, the court will consider them prima facie evidence showing equity. This is consistent with the local practice of use of affidavits in preliminary stay hearings. If the Bank seeks relief from the stay in the future, Debtor will be required to present admissible evidence of equity, and the Bank may present its own evidence.

reorganization; (5) if grounds for relief from the stay existed and a motion, if filed, would have been granted prior to the violation; (6) if failure to grant retroactive relief would cause unnecessary expense to the creditor; and (7) if the creditor has detrimentally changed its position on the basis of the action taken. *Thornburg*, 227 B.R. at 731, n. 18. The court therefore considers these seven tests.

The Bank did not have actual or constructive knowledge of the bankruptcy filing. There is no evidence that Debtor acted in bad faith by filing his chapter 13 petition. According to the documents before the court there is substantial equity in the Property, a fact not so far contested by the Bank. The schedules provided by Debtor suggest approximately 20% equity in the Property. The Property is certainly necessary to the reorganization as it is a debtor's homestead and place of residence. As already discussed, if a motion for relief from stay had been filed prior to the violation of the automatic stay, the motion would not have been granted. Failure to grant retroactive relief will not create an unnecessary burden to the Bank. Although the Bank has expended funds in pursuing its remedies, these expenditures are nominal and outweighed by the factors favoring Debtor. The Bank has not detrimentally changed its position on the basis of the action taken by Debtor. The main focus of the Bank is realizing the value of its interest in the Property. This goal is best achieved by Debtor paying the debt to the Bank. Thus, even following *Thornburg*, the court would decide in Debtor's favor in the case at bar.

CONCLUSION

In sum, when the deed was recorded during the pendency of the First Case, the Bank was in violation of the automatic stay under section 362 of the Code. It would not have been entitled to relief from the stay had a motion been filed in the First Case. There is no compelling reason for the court to lift the automatic stay retroactively and validate the recordation of the deed in

violation of the stay. Pursuant to the court's findings above, the Motion is therefore DENIED without prejudice.

It is so **ORDERED.**

END OF MEMORANDUM ORDER