

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

FRANK GEORGE KAGEL, III and
JENNIFER ANN KAGEL,

Debtors.

Case No. DK 13-06663
Chapter 13
Hon. Scott W. Dales

FRANK GEORGE KAGEL, III and
JENNIFER ANN KAGEL,

Plaintiffs,

Adversary Pro. No. 13-80218

v.

LINDA IRWIN, CASS COUNTY, and
MARTIN J. SPAULDING,

Defendants.

ORDER DENYING MOTION FOR TEMPORARY
RESTRAINING ORDER

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

Chapter 13 debtors Frank and Jennifer Kagel (“Debtors”) filed a complaint and a verified emergency motion (the “Motion,” Base Case DN 7) to enjoin a “tax sale” of their home which was scheduled to take place hours after the filing (the “Sale”). Given this urgency, the court promptly scheduled a telephone hearing to consider whether to enjoin the Sale. Jennifer Kagel, her counsel, counsel for the Cass County Treasurer (the “Treasurer”), an Assistant Attorney General, and Title-Check, LLC (“Title-Check”) participated in the hearing. After listening to the

parties, the court announced its intention to withhold injunctive relief and permit the Sale to proceed. This Order supplements the court's ruling, and gives further direction to the Clerk and the parties.

At the hearing, the Debtors and the Treasurer agreed that, pursuant to a judgment of foreclosure entered in the Cass County Circuit Court in February of this year, and after the statutory redemption period expired on April 1, 2013, the Treasurer took title to the Debtors' home in Cass County (the "Property"). The Debtors contend that they did not receive constitutionally sufficient notice of the tax foreclosure proceedings, and that they were not aware that the Treasurer took title to the Property last April, learning about the foreclosure and the Sale from a Facebook exchange earlier this month. Title-Check, on the Treasurer's behalf, intends to sell the Property at auction this afternoon, presumably in accordance with M.C.L. § 211.78m(2), but the Debtors urge the court to enjoin the Sale, given their due process concerns.

Although the parties did not argue the usual standards governing requests for injunctive relief, the standards are well-known, and require a showing of a likelihood of success on the merits, irreparable harm in the absence of injunctive relief, balance of hardships favoring the moving party, and a consideration of the public's interest. *American Civil Liberties Union of Kentucky v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003).

The court finds, based on the parties' statements during the hearing, that title to the Property is vested in the Treasurer. *See* M.C.L. § 211.78k(6). Absent an order setting aside the tax foreclosure judgment, the Debtors no longer have a right to redeem, and they retain only bare possession of the Property. Accordingly, although the automatic stay continues to protect their possessory interest notwithstanding the imminent Sale, it does not prevent the Sale from taking place. Because the Debtors have no interest in the Property other than their possessory interest

(which the automatic stay will protect until modified), the court sees no occasion to invoke 11 U.S.C. § 105(a) or any equitable powers to stay the Sale.

Under the circumstances, the Debtors are left with two unhappy options: making a motion to set aside the foreclosure judgment under cases such as *Wayne County Treasurer v. Perfecting Church*, 732 N.W.2d 458 (Mich. 2007); or (2) filing an action for damages under M.C.L. § 211.78l.¹ Nothing about today’s Sale will interfere with their first option, assuming they act quickly, and their second option—an action for damages in the Michigan Court of Claims if they prove a due process violation— suggests that any injury *from the Sale* is not irreparable.²

Title-Check argued, without contradiction, that staying or postponing the Sale will result in a lower sale price for the Property, a plausible assertion given the publicity surrounding the first sale of recently foreclosed properties and the statutory provision that, at a later sale, “the minimum bid [required in the first sale] shall not be required.” M.C.L. § 211.78m(5). This statutory reality suggests that enjoining the sale will adversely affect the Treasurer.

As for the public interest, the public has an interest in the finality of state court judgments, including those affecting title to properties that “foreclosing governmental units” such as the Treasurer acquire under the General Property Tax Act. *See Perfecting Church*, 732 N.W.2d at 459 (noting “legislative effort to provide finality to foreclosure judgments and to quickly return property to the tax roles”); *Fisher v. Moon (In re Fisher)*, Slip Op., Adv. No. 04-81373 (Bankr. W.D. Mich. 2006) (same).

¹ Assuming the Treasurer transfers title to a successful purchaser within 30 days after the Sale as contemplated in M.C.L. § 211.78m(2), the Debtors will likely be left with an action for damages under M.C.L. § 211.78l. If the Debtors persuade the Cass County Circuit Court to set aside the foreclosure judgment for due process reasons, they may be permitted to redeem by paying delinquent taxes and related charges.

² The Debtors may have suffered injury from the foreclosure process, which they may address by promptly moving in the Cass County Circuit Court to set aside the foreclosure sale.

The function of a preliminary injunction or temporary restraining order is to preserve the *status quo* pending trial. Here, the *status quo* is that the Treasurer owns the Property, and the Debtors have at most a right to ask the state court to set aside the foreclosure judgment. Permitting today's Sale to go forward does not eliminate that avenue, though it does mean that the Debtors must move quickly, presumably before the Cass County Circuit Court, rather than the United States Bankruptcy Court.³

Finally, as the court noted during the telephone hearing, the Debtors mistakenly filed their Motion in their main bankruptcy case, rather than the above-captioned adversary proceeding. The court will direct the Clerk to enter the Motion in the adversary proceeding docket so that this Order and the Motion will appear in both dockets. *See* Fed. R. Bankr. P. 9005 (harmless error rule).

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion (Base Case, DN 7) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall enter the Motion in the docket of the above-referenced adversary proceeding, and shall enter this Order in that docket and the base case docket.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Frank George Kagel, III and Jennifer Ann Kagel,

³ Given the time pressures, the strictures of 28 U.S.C. § 1738, and the limit on federal jurisdiction under the *Rooker-Feldman* doctrine, the Debtors should strongly consider seeking relief from the Cass County Circuit Court if they believe they can establish a due process violation in connection with that court's judgment. *Hood v. Keller*, 341 F.3d 593, 599 (6th Cir. 2003).

Doug Allen Bernacchi, Esq., Manish Joshi, Esq., Martin Spaulding at Title-Check, LLC, Thomas King, Esq., D.J. Pascoe, Esq., and Attorney General Bill Schuette.

END OF ORDER

IT IS SO ORDERED.

Dated August 26, 2013



A handwritten signature in black ink, appearing to read "S. W. Dales".

Scott W. Dales
United States Bankruptcy Judge