UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
PAMELA KNAPPER f/k/a PAMELA JONES	:	
Debtor	:	Bankruptcy No. 02-17323F
PAMELA KNAPPER and EDWARD SPARKMAN	:	
Plaintiffs	:	
v.	:	
BANKERS TRUST CO., as Trustee for Amresco Residential Securities Corp.	:	
Defendant	:	Adversary No. 02-0640

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MEMORANDUM

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By BRUCE FOX, Chief Bankruptcy Judge:

In the above-captioned adversary proceeding, the plaintiff, Pamela Knapper (a/k/a Pamela Jones), seeks to set aside pre-bankruptcy foreclosure sales of two pieces of real estate.[1] Primarily, she alleges that the foreclosure judgments giving rise to these execution sales were "void" under state law due to improper service. The defendant,

[1]The standing chapter 13 trustee is listed as a plaintiff, but he has not participated in this proceeding in any manner.

Bankers Trust Co. (as trustee for Amresco Residential Securities Corp.) opposes the relief sought. It contends that the foreclosure judgments were valid under relevant Pennsylvania law; alternatively, it maintains that if any defects in service existed under state law, the plaintiff is now barred from raising these issues.

The parties have submitted post-trial memoranda,[2] and this matter is now ripe for determination.

After a trial, the following facts were proven.

I.

The plaintiff, Pamela Knapper, married Robert Knapper about seven years ago. Before her marriage, she used the name Pamela Jones.

Mrs. Knapper purchased the real property located at 8612 Gilbert Street, Philadelphia, Pennsylvania in 1982. Around 1989, she inherited an interest in real property located at 5013 Willows Avenue, Philadelphia, Pennsylvania. She testified that, after her marriage, she and her husband lived in the Gilbert Street property. She leased the Willows Avenue realty and collected rent from the tenant.

In February 1998, the plaintiff entered into one or more loan agreements with the defendant, which resulted in the recordation of mortgage liens upon both properties. On March 19, 1999, the defendant commenced a foreclosure complaint on the

[2]They had been requested to submit trial memoranda, but apparently were unable to do so. Therefore, they were afforded a second opportunity for memoranda.

Willows Avenue property in the Philadelphia Court of Common Pleas. Ex. D-9. This complaint alleged that the defendant resided at 8612 Gilbert Street. Id. This complaint was served on September 7, 1999 at 2:50 P.M. by Louis Giacomelli upon an "adult in charge of Defendant's residence who refused to give name or relationship." Ex. D-10 (affidavit of service).

Mr. Giacomelli testified that he is a self-employed process server who was engaged by counsel for the defendant to serve this complaint. Further, he testified that the adult served was a male whom he now believes to be Mr. Knapper. Mr. Knapper testified that he did not recall being served with any foreclosure complaint. (For reasons discussed below, I find Mr. Giacomelli's testimony credible.)

No answer was filed to this complaint, and so Bankers Trust took judgment in foreclosure by default in the amount of $43,333.72 in July 2000. Ex. D-10. Thereafter, Bankers Trust scheduled the Willows Avenue property for foreclosure sale. Mr. Giacomelli served notice of the intended sale upon Mrs. Knapper on October 3, 2001 at the Gilbert Street address. Ex. D-11.[3] The sale took place on April 2, 2002, and a Sheriff's Deed was issued on June 3, 2002. Ex. D-12.[4]

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[3]There were earlier attempts at a foreclosure sale, but these were stayed by the debtor's earlier bankruptcy filings.

[4]Although the defendant argues that the bankruptcy stay does not bar the Sheriff from issuing a deed postpetition if the sale took place prepetition, the plaintiff does not address that issue. Presumably, Mrs. Knapper recognizes that if the deed were invalidated but not the sale then section 1322(c)(1) would preclude her reorganization in chapter 13.

As the plaintiff does not press this legal question, I need not consider it.

Similarly, in April 1999, Bankers Trust began a state court foreclosure action involving the Gilbert Street property. Mr. Giacomelli served this complaint on April 24, 1999 at 12:15 P.M. at the Gilbert Street property upon an "adult in charge of Defendant's residence who refused to give name or relationship." Ex. D-6 (affidavit of service). While Mr. Knapper disputes receiving any such complaint, Mr. Giacomelli believes he was the adult male who received service.

Once again, a default judgment was entered (in either July or August 2000), this time in the amount of $67,232.03. Ex. D-6. A writ of execution was then issued, and notice of the proposed Sheriff's sale was served personally upon the plaintiff by Mr. Giacomelli on October 3, 2001 at Gilbert Street. Ex. D-7. This sale also took place on April 2, 2002, and a deed was issued on June 3, 2002.[5] For both the Gilbert Street and Willows Avenue properties, the defendant, Bankers Trust, was the Sheriff's sale purchaser. See Exs. P-8, D-8, D-12.

Although Mrs. Knapper never challenged the two foreclosure judgments in state court, she acknowledged filing prior unsuccessful bankruptcy petitions under chapter 13 in an effort to prevent the foreclosure of her properties. The first such effort

[5]Again, prior Sheriff's sales were stayed by earlier bankruptcy filings by Mrs. Knapper.

was filed on September 3, 1999 and docketed at Bankruptcy No. 99-31119.[6] Ex. D-1.[7] That case was dismissed on May 9, 2000, due to the debtor's failure to tender plan payments.[8] Her second case was commenced on September 21, 2000, but was dismissed because she failed to appear at the creditors meeting mandated by section 341(a). Ex. D-2. A third bankruptcy case was then filed on May 3, 2001, and was dismissed because the requisite bankruptcy schedules were not filed. Ex. D-3. Her fourth bankruptcy filing, on January 4, 2002, was dismissed for the same reason as the second. This yielded her present fifth chapter 13 case.

While these state court lawsuits and September 1999 bankruptcy case were being filed in the Philadelphia Court of Common Pleas and in the Eastern District of Pennsylvania, the debtor testified that, for employment-related reasons, she rented an apartment and lived in Virginia Beach, Virginia from August 1998 until June 2000. While living in Virginia, she would visit Philadelphia once or twice each month. Her husband remained at the Gilbert Street property, living by himself during this interval.

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[6]Thus, this bankruptcy filing occurred after service of one complaint upon Mr. Knapper and just prior to service of the other complaint.

[7]This, however, was not the debtor's first bankruptcy filing in this court. Court records reflect that Pamela Jones, with the same social security number as Mrs. Knapper, filed bankruptcy in 1990 (at Bankruptcy No. 90-12211), in 1991 (at Bankruptcy No. 91-11036), and in 1995 (at Bankruptcy No. 95-10683).

[8]I take judicial notice, under Fed. R. Evid. 201 (incorporated into bankruptcy cases by Fed. R. Bankr. R. 9017), of the docket entries of that case. See Maritime Electric Co., Inc. v. United Jersey Bank, 959 F.2d 1194, 1200 n.3 (3d Cir. 1991); Levine v. Egidi, 1993 WL 69146, at *2 (N.D.Ill. 1993); In re Paolino, 1991 WL 284107, at *12 n.19 (Bankr. E.D. Pa. 1991); see generally In re Indian Palms Associates, Ltd., 61 F.3d 197 (3d Cir. 1995).

In support of her assertion that she lived in Virginia during that time period, the debtor offered in evidence a Virginia driver's license with an issuance date of January 11, 1999, Ex. P-1, a moving expense reimbursement voucher from her employer with the year 1998 on it, Ex. P-4 (but no location is mentioned on this voucher), an employee evaluation dated September 1999 which makes reference to her work in Norfolk, Virginia, Ex. P-5, and various utility bills dated in 1999 and 2000 which refer to her address in Virginia Beach. Ex. P-6.

The defendant counters, however, that the address for Mrs. Knapper (or Jones) listed on the plaintiff's September 3, 1999 bankruptcy petition[9] (as well as all subsequent petitions) was Gilbert Street in Philadelphia.[10] Bankers Trust also emphasizes that the plaintiff acknowledged her failure to file any forwarding address with the postal authorities.[11] Moreover, Mrs. Knapper offered no evidence that she moved any of her furnishings from Philadelphia to Virginia. See Ex. P-4 (the moving expense voucher lists no expenses for moving household goods or personal effects). She also provided no tax

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[9]Which petition was filed before service of the foreclosure complaint involving Willows Avenue.

[10]The plaintiff argues that this district was the proper venue for her bankruptcy filings because her primary assets - the two real properties - were located in this district. See 28 U.S.C. § 1408(1). That would not, however, explain why she failed to disclose her Virginia address on her bankruptcy petition. (The bankruptcy petition form, Official Bankruptcy Form #1, contains blocks for distinguishing between the address of the debtor and the location of the principal assets of the debtor.) Moreover, the address on the petition would be used by the court and creditors for notices and pleadings. Indeed, creditors such as the defendant here would receive notification of the bankruptcy filing and would be informed only of the debtor's Gilbert Street address.

[11]Thus, all bankruptcy court notices, as well as motions filed by creditors or the trustee, would be sent to Gilbert Street and not forwarded to the debtor in Virginia Beach.

documents (e.g., W-2 forms or federal or state tax returns) or voting registration reflecting a Virginia residency. Finally, there was no testimony that Mrs. Knapper never intended to return to Philadelphia to live with her husband at Gilbert Street.

Nonetheless, I am persuaded by the evidence that the plaintiff worked in Norfork, Virginia and rented an apartment in Virginia Beach during April and September 1999 when the two foreclosure complaints were served.

In addition, Mrs. Knapper offered no evidence that she tendered mortgage payments after leasing an apartment in Virginia Beach, and her husband testified that he tendered no mortgage payments to the defendant. Clearly then, the debtor was not in full compliance with the payment schedule on her loan(s) with Bankers Trust.

II.

A.

The plaintiff's primary argument in support of her request that the Sheriff's sales of her two properties be vacated is that the two sales were based upon invalid default judgments. In essence, she requests that I apply state law to invalidate these two sales.

The defendant, Bankers Trust, does not contend that only the Pennsylvania state courts have the power to set aside these execution sales. See Joint Pretrial

Statement.[12] Challenges to state court foreclosure sales have been made previously in bankruptcy courts in this district without any suggestion that the court lacks the power to vacate such a sale if state law would so require. See, e.g., In re Smith, 866 F.2d 576 (3d Cir. 1989); In re Lucas, 41 B.R. 785 (Bankr. E.D. Pa. 1984); In re Scardino, 17 B.R. 737 (Bankr. E.D. Pa. 1982); see also In re Graves, 33 F.3d 242 (3d Cir. 1994) (denying a creditor's request for relief from the stay based upon non-compliance with Pennsylvania's Sheriff sale notice procedures).

Indeed, my predecessor, the Honorable Emil F. Goldhaber, concluded that a challenge to a prepetition foreclosure sale under state law fell within the subject matter jurisdiction of the bankruptcy court for the following reasons:

> Section 541 of the Code provides that the commencement of a case under sections 301, 302 or 303 creates an estate and that the estate is comprised of all legal or equitable interests of the debtor in property, wherever located, as of the date the case is commenced. . . . However, the existence and nature of the debtor's interest in property are determined by nonbankruptcy law. . . . Consequently, our determination of the validity of the instant sheriff's sale will, in and of itself, establish whether the debtors had an interest in the subject property as of the date their chapter 13 case was commenced since if we decide that the sheriff's sale was invalid under Pennsylvania law then the debtors would still possess an interest in the subject property as contemplated by section 541(a) of the Code. On the other hand, if we conclude that the sheriff's

[12]As will be discussed below, the plaintiff's position is that the default judgments against her should be stricken. Had such a motion been pending in state court and then removed to this court under 28 U.S.C. § 1452 after the plaintiff's bankruptcy filing, a remand may have been appropriate if requested. See In re Warren, 125 B.R. 128 (E.D. Pa. 1991).

Here, however, there was no pending state court motion and thus no removal or possibility of remand. Moreover, the defendant has made no request for abstention under 28 U.S.C. § 1334(c).

> sale was lawfully conducted then the debtors would have no interest in the property and we would no longer have any jurisdiction over the disposition of that property. Consequently, we conclude that we have jurisdiction to determine whether the debtors retained any legal or equitable interest in the property in question at the time they filed their petition--and the validity or invalidity of the sheriff's sale itself is dispositive on that issue.

In re Sharp, 24 B.R. 817, 818-19 (Bankr. E.D. Pa. 1982) (citation and footnote omitted).

I also note that Pennsylvania law, upon which the plaintiff relies, does permit a Sheriff's sale to be invalidated if it was based upon a "void" judgment. See Meritor Mortgage Corp.-East v. Henderson, 421 Pa. Super. 339 (1992); ContiMortgage Corp. v. Castillo, 1999 WL 1213082 (Pa. Ct. Com. Pl., Carbon Co. 1999). To establish that the default judgments entered against her in 1999 were "void," Mrs. Knapper asserts the defendant's non-compliance with the Pennsylvania Rules of Civil Procedure.

Pa. R. Civ. P. 410(a) provides that, "[i]n actions involving title to, interest in, possession of, or charges or liens upon real property, original process shall be served upon the defendant in the manner provided by Rule 400 et seq."[13] Pa. R. Civ. P. 402 is the rule which governed service of the two foreclosure complaints in 1999. In relevant part, this rule specified service as follows:

> a) Original process may be served
>
> (1) by handing a copy to the defendant; or
>
> (2) by handing a copy

[13]As there is no assertion that any other party holds an interest in the two real properties, the provisions of Rule 410(b) are not germane to this proceeding.

> (i) at the residence of the defendant to an adult member of the family with whom he resides; but if no adult member of the family is found, then to an adult person in charge of such residence; . . . .

(emphasis added).

Therefore, Bankers Trust was authorized to serve its foreclosure complaints either upon Mrs. Knapper personally or, if not personally, then at her "residence" by serving either an adult member of her family or an adult person in charge of the residence. See, e.g., Collins v. Park, 423 Pa. Super. 601, 606 (1993). In addition, Rule 400.1 permits service in Philadelphia County to be made either by the Sheriff or by a competent adult.

In this instance, service was made by a competent adult, Mr. Giacomelli, upon Mr. Knapper. The latter was both a member of the debtor's family (her husband) and the adult in charge of the residence (he was the only person living there).[14] See also American Express Co. v. Burgis, 328 Pa. Super. 167, 177-78 (1984). Accordingly, if the Gilbert Street property was Mrs. Knapper's residence at the time service was made, then Bankers Trust complied with these state court procedural rules concerning service of process. See Simmons v. Delaware County Tax Claim Bureau, ___ Pa. Commw. ___, 796 A.2d 400, 405 (2002).

[14]There was no evidence of any adult male with access to the Gilbert Street property other than Mr. Knapper. Thus, the testimony of the process server regarding the identity of the individual who received service is credible.

Here, of course, Mrs. Knapper maintains that, in 1999, she resided in Virginia, not in Philadelphia. In Pennsylvania, courts have permitted a defendant to demonstrate defective service by proving that her residence was other than the location where service was made. See, e.g., Frycklund v. Way, 410 Pa. Super. 347, 350 (1992); Quatrochi v. Gaiters, 251 Pa. Super. 115, 120-22 (1977). Accordingly, the debtor reasons that, if she has proven that she did not reside at Gilbert Street in April and September 1999, then service of the foreclosure complaints was invalid, the default judgments were therefore "void," and the Sheriff's sales were thus improper and must be vacated.

Bankers Trust counters that Gilbert Street was the debtor's residence for purpose of service. Alternatively, it contends that even if there was a defect in service, the plaintiff has known about it for years and is now barred from raising the issue for the first time in this bankruptcy proceeding.

Because Pennsylvania law is less than pellucid on the issues raised by these parties, some extensive analysis of state law concerning residency and the effect of defects in service of process is required.

B.

In some states, the term "residence," for purposes of determining the proper location for service of process, is deemed to be synonymous with the term "domicile." See Allen E. Korpela, Construction of Phrase "Usual Place of Abode," or Similar Terms Referring to Abode, Residence, or Domicil, as Used in Statutes Relating to

Service of Process, 32 A.L.R.3d 112 (1970). Pennsylvania, however, is not among them. Id. The Pennsylvania Supreme Court held long ago that "the term 'residence,' as used in the substitute service provisions of former Pa. R. C. P. 1009, must be construed to mean 'actual residence' and cannot be held to mean or be the equivalent of 'constructive residence' or 'domicile' as contended by appellee." Robinson v. Robinson, 362 Pa. 554, 560 (1949). Therefore, for purposes of applying Rule 402, state law focuses upon Mrs. Knapper's actual residence and not her domicile. See Simmons v. Delaware County Tax Claim Bureau, 796 A.2d at 404.

The issue of residency may arguably be more complicated than simply focusing upon where the plaintiff lived at the time of service because, under state law, an individual apparently may have more than one residence. See id. (quoting Black's Law Dictionary). Thus, in Bednar v. Zubko, 1909 WL 2890, at *2 (Pa. Ct. Com. Pl., Luz. Co. 1909), a court noted that an individual "might be a resident of this [C]ommonwealth and also have removed therefrom. He unquestionably could maintain a residence after having removed therefrom. The fact of removal may not affect the fact of residence."

Nonetheless, upon reviewing numerous reported state court decisions, I conclude that, given these facts, Pennsylvania courts would probably hold that the residence of Mrs. Knapper at the time of service of either of the two foreclosure complaints was not Gilbert Street. See, e.g., Simmons v. Delaware County Tax Claim Bureau, 796 A.2d at 404 (residence of wife changed when she left family home for three weeks due to marital dispute); Frycklund v. Way, 410 Pa. Super. at 350-51; First

Pennsylvania Bank, N.A. v. Selser, 9 Pa. D. & C.3d 89 (Ct. Com. Pl., Phila. Co. 1979); Tomlinson v. Halfhill, 57 Pa. D. & C.2d 793 (Ct. Com. Pl., Bucks Co. 1972).[15]

This conclusion, however, does not end my analysis.

If the debtor did not "reside" at Gilbert Street, for purposes of Rule 402, when service was made, then clearly, had she filed preliminary objections to the method of service, such objections would have been granted by the state court. See, e.g., Frycklund v. Way, 410 Pa. Super. at 350; U.R.E. Federal Credit Union v. Bealko, 224 Pa. Super. 288 (1973); First Pennsylvania Bank, N.A. v. Selser, 9 Pa. D. & C.3d at 89. The foreclosure complaints would not have been dismissed, but Bankers Trust would have been directed to make proper service. See Frycklund v. Way, 410 Pa. Super. at 353; U.R.E. Federal Credit Union v. Bealko, 224 Pa. Super. at 290. This Mrs. Knapper did not do, although I conclude from the timing of her bankruptcy filings that she likely was aware of the foreclosure litigation prior to entry of the default judgments. Through her testimony, Mrs. Knapper acknowledged that the bankruptcies were undertaken to prevent foreclosure. The September 1999 bankruptcy filing occurred before either default judgment was entered.

Therefore, I must consider whether she can now assert this service defect to vacate the two foreclosure judgments and the subsequent execution sales.

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[15]In construing state law, bankruptcy courts must predict how the highest state appellate court would rule. See, e.g., In re Bargfrede, 117 F.3d 1078, 1080 (8th Cir. 1997); In re Burlington Motor Carriers, Inc., 1999 WL 1427683, at *6 (D. Del. 1999); In re Goldman, 192 B.R. 1, 5 (D. Mass. 1996); In re Kasden, 186 B.R. 667, 669-70 (D. Minn. 1995), aff'd, 84 F.3d 1104 (8th Cir. 1996).

C.

There are Pennsylvania state court decisions which contain language suggesting that any defect in service of a complaint invalidates the judgment arising therefrom. See, e.g., Dubrey v. Izaguirre, 454 Pa. Super. 505, 508-09 (1996); Mamlin v. Tener, 146 Pa. Super. 593, 596 (1941) ("It is never too late to attack a judgment for want of jurisdiction of either the subject matter or the person for a fatal deficiency appearing on the face of the record"). The plaintiff in this proceeding contends that this principle represents settled state law binding upon this court in this proceeding.

There are, however, other Pennsylvania state court decisions noting that a defect in personal service must be timely raised or it will be barred. See, e.g., Commonwealth ex rel Schwarz v. Schwarz, 252 Pa. Super. 95, 99 (1977) ("Questions of personal jurisdiction . . . must be raised at the first reasonable opportunity or they are waived"); Drury v. Zingarelli, 198 Pa. Super. 5, 9 (1962) ("Defects in service may be waived by delay"); see also Selmer v. Smith, 285 Pa. 67 (1926) (defendants untimely raised the issue of fraudulent personal service). The defendant implicitly urges reliance upon the principle enunciated in those cases.

After some review, I believe these somewhat differing declarations of Pennsylvania law concerning the effect of defects in personal service upon the validity of a default judgment may be harmonized. I conclude that Pennsylvania courts will set aside a default judgment without regard to the timeliness of the request if there is proven a

constitutional defect in personal service, or if a material defect in service is apparent on the face of the record. Conversely, if the defect is not apparent from the face of the record and is not constitutionally significant, then a default judgment will not be set aside unless a timely request is made by the defendant. See Romeo v. Looks, 369 Pa. Super. 608, 620-23 (1987), appeal denied, 518 Pa. 641 (1988).

I reach this construction of Pennsylvania law for the following reasons:

Insofar as service of process is concerned, the constitutional notion of due process - both for Pennsylvania and federal law - requires notice reasonably designed to inform the defendant that she has been sued. See, e.g., Simmons v. Delaware County Tax Claim Bureau, 796 A.2d at 405; Noetzel v. Glasgow, Inc., 338 Pa. Super. 458 (1985), cert. denied, 475 U.S. 1109 (1986); Woods v. Somerset County Tax Claim Bureau, 32 Pa. D. & C.3d 62, 78 (Ct. Com. Pl., Som. Co. 1984); First National Bank & Trust Co. v. Anderson, 7 Pa. D. & C.3d 627, 634-35 (Ct. Com. Pl., Som. Co. 1977). Actual notice is not required; rather, all that is necessary is notice that is reasonably designed to inform.

Thus, this constitutional requirement does not mandate that notice be actually received by a defendant. See, e.g., United States v. Clark, 84 F.3d 378, 380 (10th Cir. 1996) ("[D]ue process does not require that the interested party actually receive the notice"); Scott v. United States, 950 F. Supp. 381, 387 (D.D.C. 1996); Noetzel v. Glasgow, Inc., 338 Pa. Super. at 1377-78. Instead:

> [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . .

> . . . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950) (citiations omitted); accord Noetzel v. Glasgow, Inc., 338 Pa. Super. at 1377-78.

To the extent that a plaintiff in Pennsylvania undertakes a method for service of process which is not reasonably designed to inform the defendant, typically because there has been significant non-compliance with the procedural rules directing proper service of process - i.e., by providing no service at all or by serving someone other than a person authorized under the rules to receive service - then there is a constitutional violation which may be asserted at almost any time. See Meritor Mortgage Corp.-East v. Henderson, 421 Pa. Super. at 341-42, 344; Woods v. Somerset County Tax Claim Bureau, 32 Pa. D. & C.3d at 78 (default judgment based upon constitutionally defective service is void). Thus, if a plaintiff serves process in a grossly defective manner, the judgment arising therefrom is invalid, and the defendant will readily obtain relief from that judgment upon demonstration of the defect.[16]

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[16]I construe Liquid Carbonic Corp. v. Cooper & Reese, Inc., 272 Pa. Super. 462 (1979), as holding that service made on the incorrect address to an unknown person is essentially constitutionally defective. Accord Romeo v. Looks, 369 Pa.Super. at 620. Thus, that decision includes language regarding the lack of power to enter judgment. See also Deer Park Lumber, (continued...)

If a default judgment is taken against a defendant, Pennsylvania provides two distinct methods for setting aside that judgment. State law distinguishes between striking or opening the judgment. A judgment will be stricken only if a defect in the judgment - such as a defect in service - is apparent on the face of the record. No extrinsic evidence may be offered to demonstrate that defect. See Dubrey v. Izaguirre, 454 Pa. Super. at 509-10:

> A petition to strike a judgment does not involve the discretion of the court . . . . Instead, it acts as a demurrer to the record and, as such, may be granted only when "a fatal defect in the judgment appears on the face of the record." . . . . Therefore, to grant a petition to strike a judgment based upon improper service, the court must be unable to find proper service, reviewing only the record as it existed when judgment was entered.

(citations omitted); accord Cintas Corp. v. Lee's Cleaning Services, Inc., 549 Pa. 84, 89-90 (1997); City of Philadelphia v. Campbell, 32 Pa. Commw. 166 (1977) (default judgment is stricken because of a defect in service apparent in the affidavit of service).

Conversely, if there is no defect apparent upon examination of the record, then a defendant may seek to open a default judgment by presenting extrinsic evidence. See, e.g., Liquid Carbonic Corp. v. Cooper & Reese, Inc., 272 Pa. Super. 462 (1979).[17]

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[16](...continued)
Inc. v. Major, 384 Pa. Super. 625 (1989) (when a plaintiff obtains a court order to serve a complaint by publication without first investigating the location of the defendant, such service is so defective as to warrant striking or opening the default judgment); In re Soto, 221 B.R. 343, 350 (Bankr. E.D. Pa. 1998) (default judgment in state court was void because the record does not reflect that service was ever attempted upon the defendant).

[17]In her post-trial memorandum of law, at 3, the plaintiff apparently confuses a petition to open with a petition to strike and vice versa.

However, unless the defect in service is such as to rise to a due process violation, in order to open a judgment, the defendant must demonstrate a reasonable explanation for the entry of the default, some likelihood of a meritorious defense, and prompt action once the entry of default is known. See, e.g., Romeo v. Looks, 369 Pa. Super. at 620; Commonwealth ex rel Schwarz v. Schwarz, 252 Pa. Super. at 99-100.

From my review of Pennsylvania law, those decisions which have found that the defendant acted too late in raising a defect in service have generally fallen into the category of requests to open the default judgment where the defect in service did not constitute a lack of due process. See Romeo v. Looks, 369 Pa. Super. at 620; Quatrochi v. Gaiters, 251 Pa. Super. 115 (1977) (where defendant seeks to set aside default judgment due to service upon his former residence, he must act promptly upon learning of the judgment); Drury v. Zingarelli, 198 Pa. Super. at 9.

In this instance, applying Pennsylvania law, I conclude that state courts would find no defect on the face of the record concerning service of the two foreclosure complaints, nor would they find any constitutional violation.

Bankers Trust attempted to serve Mrs. Knapper personally with both complaints, by hand at her residence on Gilbert Street. It knew of her residency from loan documents (or from her bankruptcy filing) and was unaware that she had moved to Virginia. Thus, it made no effort to serve her at Willows Avenue because it knew that she did not reside there and, therefore, was not reasonably likely to learn of the lawsuit through such service. Instead of personal service, the defendant served both complaints upon Mrs. Knapper's husband at Gilbert Street. In so doing, there is no evidence that

Bankers Trust was told by the individual accepting service that Mrs. Knapper was then residing in Virginia.[18]

Clearly, such service - even if her husband neglected to advise her of the lawsuit - was reasonably calculated to inform Mrs. Knapper of the two foreclosure actions. Therefore, this method of service fell within constitutional standards. See Simmons v. Delaware County Tax Claim Bureau, 796 A.2d at 405 (service of process made at the defendant's residence upon the defendant's wife met constitutional standards even though the wife did not reside with the defendant at the time of service); see also Romeo v. Looks, 369 Pa. Super. at 618-19.[19]

Moreover, the affidavits of service in both foreclosure lawsuits appear to be in compliance with the procedural rules in all respects. See U.R.E. Federal Credit Union v. Bealko, 224 Pa. Super. at 290; Drury v. Zingarelli, 198 Pa. Super. at 9 (service of process upon the defendant's mother-in-law at the defendant's residence complied with state law, even if the relative was only a visitor). The defect asserted by the debtor in this proceeding only emerges from testimony and documentary evidence concerning her relocation to Virginia. Thus, under state law, Mrs. Knapper could not strike the two default judgments. See Myers v. Mooney Aircraft, Inc., 429 Pa. 177, 190 (1967) (defendant may not strike a judgment where proof of defective service comes from facts

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[18]Moreover, the plaintiff does not argue that Bankers Trust somehow should have known that she was living in Virginia during 1999.

[19]Indeed, the debtor's use of the Gilbert Street address on her September 1999 bankruptcy petition - even if it does not, as the defendant contends, conclusively establish that location as her residence - does reflects a willingness on her part for notices in the bankruptcy case to be served there, thus implying that such notices were likely to become known to her.

outside the record at the time the judgment was entered). Compare U.K. LaSalle, Inc. v. Lawless, 421 Pa. Super. 496 (1992) (the record revealed defective service made only upon an attorney in a related matter, not upon the defendant); Dubrey v. Izaguirre, 454 Pa. Super. at 510 (the affidavit of service clearly demonstrates that service was improperly made by someone other than the Sheriff and not in the manner required for serving corporate defendants, thereby justifying the striking of the default judgment).

As a result, under Pennsylvania law, absent a defect on the record and absent a due process violation, the debtor must seek state court discretion to open the two default judgments and thereby set aside the foreclosure sales. See Myers v. Mooney Aircraft, Inc., 429 Pa. at 189-90; Minetola v. Samacicio, 399 Pa. 351, 352 (1960); Tomlinson v. Halfhill, 57 Pa. D. & C.2d at 793 (petition to open default judgment on the grounds that defective service was made upon the defendant's daughter at the defendant's former residence).

Even if I assume that her husband did not inform her of the two lawsuits immediately upon service, Mrs. Knapper apparently knew about the foreclosure actions in either 1999 or 2000 (before or shortly after default judgments were taken) because she sought to stay those actions through repeated bankruptcy filings. Moreover, the evidence reflects that she was personally served in 2001 with notice of the forthcoming Sheriff's sales. Exs. D-7, D-11. Yet she took no action in state court and only raised the issue in this court in May 2002, after the defendant had undertaken the time and expense of execution sales.

Given the nature of the service defect, and given the plaintiff's knowledge of the lawsuits and lack of action for many months if not years, she would be precluded from opening these default judgments under Pennsylvania law. See Myers v. Mooney Aircraft, Inc., 429 Pa. at 190 (when the defendant waited 16 months to challenge a judgment due to defective service, the petition to open must be denied as untimely); Quatrochi v. Gaiters, 251 Pa. Super. at 124 (defendant who was served improperly at a former residence took too long to challenge the default judgment by filing a petition to open 63 days after learning of judgment). Compare Liquid Carbonic Corp. v. Cooper & Reese, Inc., 272 Pa. Super. 465 (defendant sought to open judgment within 16 days); Tomlinson v. Halfhill, 57 Pa. D. & C.2d at 798 (defendant timely sought to raise defective service "within weeks after her discovery of the existence of this action and within approximately two months after judgment was entered").[20]

Accordingly, even though the plaintiff in this bankruptcy proceeding has demonstrated a defect in personal service of the two foreclosure complaints under state law, the nature of the defect, coupled with her inaction, prevents her from now obtaining relief from the foreclosure sales under Pennsylvania law in this forum.

III.

[20]Mrs. Knapper also offered no evidence of a meritorious defense. See Minetola v. Samacicio, 399 Pa. at 354 (although service upon the defendant was defective, the default judgment could not be opened because the defendant failed to offer evidence of a meritorious defense). Compare Liquid Carbonic Corp. v. Cooper & Reese, Inc., 272 Pa. Super. at 467 (if the defendant proves it has never been served, and if the defect in the method of service was egregious, then no meritorious defense need be demonstrated to open a judgment).

The plaintiffs two remaining issues are equally unpersuasive.

A.

First, Mrs. Knapper argues that the two foreclosure sales were "fraudulent conveyances," either under section 548 of the Bankruptcy Code or under state law incorporated by section 544. Presumably, this argument is premised upon the plaintiff's belief that the two foreclosure sales yielded a price different from the fair market value of the properties.

However, the Supreme Court in BFP v. Resolution Trust Corp., 511 U.S. 531, 545 (1994) held that a Sheriff's sale properly conducted under state law is never constructively fraudulent under section 548:

> For the reasons described, we decline to read the phrase "reasonably equivalent value" in § 548(a)(2) to mean, in its application to mortgage foreclosure sales, either "fair market value" or "fair foreclosure price" (whether calculated as a percentage of fair market value or otherwise). We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.

Pennsylvania law is similar in that a properly conducted sheriff sale will only be set aside for a "grossly inadequate price," not because the properties did not sell for fair market

value.[21] See, e.g., Capozzi v. Antonoplos, 414 Pa. 565 (1964) (applying the state fraudulent conveyance statute, petitioner must demonstrate that the foreclosure price was "grossly inadequate"); Blue Ball National Bank v. Balmer, 2002 Pa. Super. 329 (2002).

Here, Mrs. Knapper does not complain that the Sheriff's sales were undertaken in a manner different from that permitted by Pennsylvania law. Rather, she complains that the sales are fraudulent because they were based upon "void" default judgments. As I have found that position unpersuasive, the plaintiff holds no claim under sections 544 or 548.

Alternatively, I note that her underlying premise regarding loss of value was not proven.

On her bankruptcy schedules filed in this case, she estimated that the fair market values of the two properties at the time of her bankruptcy filing were $60,000.00 for Gilbert Street and $45,000.00 for Willows Avenue. Ex. P-7. The defendant took default judgments in the amounts of $67,232.03 and $43,333.72.[22]

The consideration received at a foreclosure sale is not simply the bid price. Under Pennsylvania law, the amount of the foreclosure judgment (into which the

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[21]Both state and federal analyses recognize that the nature of foreclosure sales - which do not involve marketing, home inspections, warranties or contingencies - are unlikely to yield as high a price as a sale done through a broker, with multiple listings, open houses, home inspections and mortgage contingencies.

[22]At trial, the debtor estimated the present values of the properties to be $70,000.00 to $80,000.00 for Gilbert Street and $40,000.00 for Willows Avenue. The foreclosure sales occurred in April 2002. As plaintiff's counsel acknowledged at the trial, the relevant valuation for purposes of avoidance of transfers is measured when the transfer occurred. Therefore, to the extent the debtor's opinion as to value was persuasive to any degree (there was no expert valuation testimony offered), her opinion of the values as of the date of her bankruptcy filing in May 2002 - placed on her schedules - has greater weight for purposes of this proceeding than her opinion of the values as of January 30, 2003 - the date of trial.

mortgage loan is merged) is extinguished by the foreclosure sale. See In re Brasby, 109 B.R. 113, 122 (Bankr. E.D. Pa. 1990), aff'd sub nom. Brasby v. Joseph C. Perry, Inc., 1992 WL 21362 (E.D. Pa. 1992). Moreover, the purchaser would take the property subject to any prior liens (such as tax liens). See id. The debtor's bankruptcy schedules reflect liens for unpaid property taxes in the amount of $5,000.00. Ex. P-7. Therefore, the consideration paid at foreclosure sale by the buyer is not simply the amount paid to the Sheriff (for which, in this instance, no evidence was provided). It also includes the value of any liens remaining on the property after the sale plus the value of the liens extinguished by the sale. Id.

In this proceeding, Bankers Trust extinguished more than $110,000.00 worth of liens and either paid or took title to the properties subject to another $5,000.00 in tax liens. The value thus paid exceeds the debtor's fair market value estimate.

B.

The plaintiff/debtor also maintains that these two foreclosure sales, where the mortgagee was the successful bidder, were preferential transfers under section 547(b) which may therefore be avoided.

Section 547(b) provides:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

In general, a foreclosure sale will represent a transfer on account of an antecedent debt owed to the mortgagee. Insolvency is rebuttably presumed under section 547(f). Thus, if the foreclosure sale occurred - as in this proceeding - within 90 days of the debtor's bankruptcy filing, then four of the five elements of a preference under section 547(b) will be established.

Typically, however, the requirements of section 547(b)(5) will not be met. As one commentator has noted, "[g]enerally, payments to a fully secured creditor will not be considered preferential because the creditor would not receive more than in a chapter 7 liquidation." 5 Collier on Bankruptcy ¶ 547.03[7], at 547-46 (L. King et al. eds., 15th ed. rev. 2002). This follows because, in a chapter 7 case, the secured creditor is entitled to the value of its collateral. See, e.g., In re Villamont-Oxford Associates, L.P., 236 B.R. 467, 477-78 (Bankr. M.D. Fla. 1999); 3 Norton Bankruptcy Law and Practice 2d § 57:9,

at 57-41 (2002) ("[I]f a creditor with a valid security interest repossesses the collateral prior to bankruptcy, there is no preferential effect -- he would have received the value of the collateral as part of the distribution in any event"); see also In re Union Meeting Partners, 163 B.R. 229, 236-37 (Bankr. E.D. Pa. 1994) ("[P]laintiff, to satisfy § 547(b)(5), must show that the creditor was preferred in some amount, and it cannot succeed if it is proven that (1) the creditor was fully secured; (2) the transfer was nothing more than a seizure of the secured creditor's collateral; or (3) the unsecured creditors would be paid in full in a Chapter 7 case").

The plaintiff argues in this proceeding that if a secured creditor repossesses collateral - e.g., via foreclosure sale - with a fair market value in excess of the amount of the debt, such a creditor has received more than it would have received in a chapter 7 liquidation. Some courts have agreed. See, e.g., In re Andrews, 262 B.R. 299 (Bankr. M.D. Pa. 2001); In re Wheeler, 34 B.R. 818, 822 (Bankr. N.D. Ala. 1983). Other courts, however, have not, relying upon two somewhat different analyses.

The plaintiff's contention that a preferential transfer has occurred can only be made when an oversecured mortgagee is the successful bidder at the foreclosure sale. If the mortgagee is undersecured - that is, the fair market value of the real estate collateral is less than the amount owed on the mortgage lien - then the execution sale transfers to the secured creditor a value less than the amount of the lien extinguished by the sale and there can be no preferential transfer.[23] If a third party were the successful bidder at the foreclosure sale, then the mortgagee would only receive payment in full on its judgment.

[23]Moreover, in a chapter 7 case, the bankruptcy trustee will typically abandon the collateral of an undersecured creditor.

To the extent that the purchaser later sells the realty for more than it paid at the execution sale, the execution sale purchaser could not have received any preference because it was never a creditor of the debtor, and so did not receive the property in satisfaction of an antecedent debt.

Based upon the recognition that the preference argument is limited to those circumstances of an oversecured creditor being the successful prepetition foreclosure purchaser, the Ninth Circuit Court of Appeals in In re Ehring, 900 F.2d 184 (9th Cir. 1990), held that a duly conducted foreclosure sale to a mortgagee can never be preferential. To the extent the mortgagee obtains property by bidding less than the fair market value, it only profits by that difference as a purchaser, not as a creditor. "Since section 547 does not reach a third-party purchaser, it is difficult to see why the existence of a preference should turn on the status of the purchaser as a creditor. . . . We see no reason to construe section 547 to permit avoidance of an otherwise properly conducted sale based solely on the creditor being the highest bidder." Id. at 188-89.

Other courts which have rejected the plaintiff's preference contention have focused upon the holding of the Supreme Court in BFP.

As mentioned above, the Supreme Court concluded that real property sold at a properly conducted, state - authorized foreclosure sale sells for its "reasonably equivalent value" under section 548. See BFP v. Resolution Trust Corp., 511 U.S. at 545. In a chapter 7 case, a bankruptcy trustee has discretion to determine the most appropriate manner to dispose of property of the estate, including the use of the auction process. See Hayes v. Sullivan, 1992 WL 486914 (D. Mass. 1992), aff'd, 993 F.2d 1530 (1st Cir. 1993) (Table). The bankruptcy trustee is not obligated to use a sale method

which will yield a fair market value return. See id. 1992 WL 486914, at *7 (auction sale of realty by the bankruptcy trustee will be set aside only upon a showing of "grossly inadequate" sale price). Moreover, a secured creditor could credit bid at such an auction. See 11 U.S.C. § 363(k).

Therefore, the disposition of the collateral in a chapter 7 case may be similar to the result of the prepetition foreclosure action. If so, the mortgagee has received no more from the foreclosure sale than it would have received in the hypothetical chapter 7 case, and the provisions of section 547(b)(5) have not been met. See In re FIBSA Forwarding, Inc., 244 B.R. 94, 96 (S.D. Tex. 1999); see also In re Pulcini, 261 B.R. 836, 843-44 (Bankr. W.D. Pa. 2001) (BFP decision "compels" the result that section 547(b)(5) is not established); see also In re Turner, 225 B.R. 595, 599-600 (Bankr. D.S.C. 1997).

Therefore, those courts which interpret section 547(b)(5) in the foreclosure sale context in a manner consistent with BFP are essentially concluding that a prepetition involuntary transfer of collateral to a secured creditor, which is conducted in accordance with state law, should not be later invalidated by a voluntary bankruptcy filing because a hypothetical trustee may (or may not) later sell the property by a method which could yield a higher price.

Whether Congress intended in section 547(b) to avoid duly conducted foreclosure sales as preferential, even if they would be valid under state law, is an issue I need not decide. Again, the debtor's underlying premise - that Bankers Trust was an oversecured creditor who obtained the debtor's real property at a foreclosure sale for less than market value - was unproven.

As I discussed earlier, the evidence presented demonstrated that Bankers Trust extinguished more than $110,000.00 worth of liens and either paid or took title to the properties subject to another $5,000.00 in tax liens. The value the mortgagee "paid" was equal to or exceeds the debtor's fair market value estimate. Therefore, either Bankers Trust received no more in value than it would have received in a chapter 7 case or, by virtue of section 547(c)(1), it contemporaneously provided new value - the release of liens and assumption of liens on the realty in an amount equal to or greater than the value of the transfer. See, e.g., In re E.R. Fegert, Inc., 88 B.R. 258, 259 (9th Cir. BAP 1988):

> To enjoy the benefits of Section 547(c)(1), the creditor must provide new value as defined in Section 547(a)(2) in contemporaneous exchange for the debtor's payments. In re George Rodman, Inc., 792 F.2d 125, 127 (10th Cir. 1986); 11 U.S.C. § 547(a)(2). The Code protects these transfers because, unlike payments to unsecured creditors, they do not affect the equality of distribution of estate assets. Brown v. First Nat. Bank of Little Rock, Ark., 748 F.2d 490, 491 (8th Cir. 1984). Thus, payments by a debtor made in exchange for a secured creditor's release of its lien or security interest on property of the debtor falls within the shelter of Section 547(c)(1).

aff'd, 887 F.2d 955, 959 (9th Cir. 1989); see also In re JWJ Contracting Co., Inc., 287 B.R. 501, 508 (9th Cir. BAP 2002).

Accordingly, the plaintiff here has proven no avoidable preferential transfer. In addition, as she has failed to present evidence entitling plaintiff to relief under any of her claims, judgment must be rendered in favor of the defendant.

An appropriate order shall be entered.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
PAMELA KNAPPER f/k/a PAMELA JONES	:	
Debtor	:	Bankruptcy No. 02-17323F
PAMELA KNAPPER and EDWARD SPARKMAN	:	
Plaintiffs	:	
v.	:	
BANKERS TRUST CO., as Trustee for Amresco Residential Securities Corp.	:	
Defendant	:	Adversary No. 02-0640

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ORDER

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AND NOW, this 21st day of February, 2003, for the reasons stated in the accompanying memorandum, it is hereby ordered that judgment is entered in favor of the defendant and against the plaintiffs on all counts of the complaint.

BRUCE FOX
Chief Bankruptcy Judge

IN RE:
PAMELA KNAPPER
Pamela Knapper and Edward Sparkman
v.
Bankers Trust Co.

Chapter 13
Bankruptcy No. 02-17323F
Adversary No. 02-0640

Copies of the Chief Bankruptcy Judge's Memorandum and Order dated February 21, 2003, were mailed on said date to the following:

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