

**NOTICE**  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 4-10-0090 Order Filed 4/11/11

IN THE APPELLATE COURT  
OF ILLINOIS

FOURTH DISTRICT

HSBC BANK U.S.A., N.A., as Trustee on	)	Appeal from
Behalf of ACE SECURITIES CORPORATION,	)	Circuit Court of
HOME EQUITY LOAN TRUST, and for the	)	Macon County
Registered Holders of ACE SECURITIES	)	No. 08CH121
CORPORATION, HOME EQUITY LOAN TRUST,	)	
Plaintiff-Appellee,	)	
v.	)	
ANTHONY J. GRASON, a/k/a ANTHONY JAMES	)	
GRASON, and UNKNOWN OWNERS AND	)	Honorable
NONRECORD CLAIMANTS,	)	Albert G. Webber,
Defendants-Appellants.	)	Judge Presiding.

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JUSTICE POPE delivered the judgment of the court.  
Presiding Justice Knecht and Justice Appleton concurred  
in the judgment.

**ORDER**

*Held:* Cause remanded to the trial court for a factual finding  
whether the foreclosure sale occurred before the  
automatic stay took effect at 8:37 a.m. on May 5, 2009,  
and further proceedings.

On June 30, 2009, the trial court confirmed the  
foreclosure sale of property commonly known as 4202 West Route  
36, Decatur, Illinois 62521. On December 29, 2009, the court  
denied defendant Anthony Grason's motion to vacate the order  
confirming the foreclosure sale. Defendant appeals. We remand  
with directions.

I. BACKGROUND

In March 2008, plaintiff, HSBC Bank U.S.A., N.A., as  
Trustee on Behalf of Ace Securities Corporation, Home Equity Loan

Trust and for the Registered Holders of Ace Securities Corporation, Home Equity Loan Trust (HSBC), filed a complaint to foreclose mortgage on property commonly known as 4202 West Route 36, Decatur, Illinois, against defendants Anthony J. Grason, the United States of America, and unknown owners and nonrecord claimants. On June 6, 2008, HSBC filed a motion to dismiss unknown owners and/or nonrecord claimants as party defendants, a motion for default judgment against Grason, a motion for summary judgment against the United States of America, and a motion for the entry of a judgment of foreclosure and sale pursuant to section 15-1506 of the Code of Civil Procedure (Code) (735 ILCS 5/15-1506(a)(1) (West 2008)).

On June 17, 2008, the trial court allowed HSBC's motions (1) to dismiss unknown owners and nonrecord claimants, (2) for default judgment against defendant Grason, and (3) for summary judgment against the United States of America. The court also allowed HSBC's motion for entry of judgment of foreclosure and sale and continued the matter for a judicial sale.

On February 19, 2009, HSBC filed a notice of sheriff's sale scheduled for March 10, 2009, at 8:30 a.m. On March 3, 2009, the trial court allowed Grason's motion to continue the sheriff's sale until April 14, 2009, at 8:30 a.m. On April 14, 2009, the trial court continued the sheriff's sale on HSBC's motion until May 5, 2009, at 8:30 a.m.

On May 4, 2009, defendant Grason filed an emergency motion for 30-day stay of the foreclosure/sheriff's sale scheduled for May 5, 2009, at 8:30 a.m. On May 5, 2009, after hearing arguments on defendant Grason's emergency motion, the trial court denied the motion and allowed the foreclosure/sheriff's sale to proceed.

The sale then occurred. According to the sheriff's report of sale and distribution, Cynthia Deadrick and Mark Wolfer purchased the property that day with a bid of \$260,401. Deadrick and Wolfer apparently purchased the property on behalf of attorney Karl E. Meurlot. Grason was left with a \$215,543.28 deficiency. The sheriff's report of sale does not specify the exact time the sale occurred. The trial court allowed a motion to continue the confirmation of sale proceeding until May 26, 2009.

Unbeknownst to the trial court and the parties present for the foreclosure/sheriff's sale on the morning of May 5, Grason filed a *pro se* bankruptcy petition at the Bankruptcy Court for the Central District of Illinois at 8:37 a.m. The petition was entered into the electronic filing system at 9:02 a.m. the same day.

On May 26, 2009, Meurlot filed an objection to Grason's (1) objection to confirmation of the sale and (2) motion to vacate judicial sale. According to Meurlot, Grason incorrectly

stated in his objection to the foreclosure sale that the sale occurred after 9 a.m. on May 5, 2009. In an affidavit from Cynthia A. Deadrick, which Meurlot attached to his objection, Deadrick stated she attended the sheriff's sale at 8:30 a.m. on May 5, 2009. According to her affidavit, the sale occurred prior to 9 a.m. However, her affidavit does not state the sale occurred before 8:37 a.m. In addition, Meurlot argued Grason incorrectly stated he filed his bankruptcy petition at 8:37 a.m. when the petition was actually filed at 9:02:16 a.m.

At the May 26, 2009, confirmation hearing, the following exchange occurred:

[TRIAL COURT:] Can somebody tell me what's happening? I understand that there may be a bankruptcy.

[HSBC'S ATTORNEY:] This is what happened. You might remember. It's kind of an odd one.

[TRIAL COURT:] Yes.

[HSBC'S ATTORNEY:] We came in and we had a hearing on whether or not we could proceed with this sale. He filed an Emergency Motion, the defendant did. You ruled that Emergency Motion was improper. It was too late and so we went ahead and held

the sale. They filed a bankruptcy at 9:02 that morning. They filed an objection to the sale saying that the sale was held after 9:02, which [sic] some affidavit of someone, who I don't even think was here--who did that affidavit?

[ATTORNEY MEURLLOT:] The Attorney Berlin.

[HSBC'S ATTORNEY:] Oh, he did it himself.

[ATTORNEY MEURLLOT:] He did it himself.

[HSBC'S ATTORNEY:] He filed an affidavit saying it was before 9 o'clock or the sale was after 9 o'clock so the sale should be stricken. And he noticed it up for today. And it's my opinion that I just ask the motion to be dismissed if he didn't appear.

I don't know whether or not--I can't testify as to whether or not it was before 9 o'clock or not. It was really close. I don't remember. I didn't write it down. And so, that's where we are on this thing. I'd like to see the motion dismissed and have

them re-file, or appear, or whatever on this thing. He noticed it for today."

Neither defendant Grason nor his attorney was present for the hearing. Based on representations by the attorneys present that day, they believed Grason might be in bankruptcy. The trial court continued the matter and set a status hearing for June 30, 2009.

On June 3, 2009, attorney Meurlot filed his second objection to Grason's (1) objection to confirmation of sale and (2) motion to vacate judicial sale. According to the objection, Grason's May 5, 2009, bankruptcy petition was dismissed on May 21, 2009, and on June 2, 2009, defendant Grason's motion to reinstate was denied. The motion stated no legal basis precluded the trial court from confirming the judicial sale because the automatic stay was not in effect.

On June 29, 2009, HSBC filed a response to Grason's motion to vacate the judicial sale. Plaintiff argued the foreclosure sale did not violate defendant's bankruptcy stay because the foreclosure sale was held before Grason filed his bankruptcy petition. In addition, HSBC pointed to the fact the bankruptcy case had been dismissed, thereby allowing plaintiff to proceed with the foreclosure action.

On June 30, 2009, the trial court entered an order approving the report of sale and distribution, an order of

possession, and an order for *in personam* deficiency.

On July 2, 2009, Grason filed a motion to vacate the order approving the report of sale and distribution, the order of possession, and the order for *in personam* deficiency. Grason pointed to a June 22 docket entry which noted the June 30, 2009, hearing was vacated and the cause was continued to further order of the court. According to the motion, Grason and his attorneys did not appear for the June 30, 2009, hearing because they relied on the June 22 docket entry.

On July 14, 2009, the trial court called a hearing on all pending motions. However, because of a suggestion Grason had filed for bankruptcy again, the court continued the matter and vacated a July 23, 2009, time allotment.

Grason's bankruptcy case was dismissed on September 23, 2009. On October 9, 2009, HSBC filed a motion for a ruling on defendant's motion to vacate (1) the order approving the report of sale and distribution, (2) the order of possession, and (3) the order for *in personam* deficiency.

On December 23, 2009, attorney Meurlot filed a memorandum in response to Grason's motion to vacate. Meurlot conceded the time of the sheriff's sale was in dispute and no definitive record existed to establish when the sale occurred. However, because the exact time of the sheriff's sale was uncertain and defendant failed to cite any case law to the

contrary, Meurlot argued the trial court should accept the time set forth in the published notice of sheriff's sale (8:30 a.m.) as the official time of the sheriff's sale. Attorney Meurlot also argued the time of the sheriff's sale was immaterial because Grason was not qualified to file for bankruptcy on May 5, 2009, and, as a result, no *bona fide* automatic stay took effect. Finally, attorney Meurlot argued Grason's motion to vacate the sale is barred by section 15-1509 of the Code (735 ILCS 5/15-1509 (West 2008)) because a sheriff's deed was issued on July 2, 2009. (HSBC does not make any of these arguments on appeal, and Meurlot did not file a brief.)

On December 29, 2009, Grason filed an objection to the confirmation of the sale and motion to vacate the judicial sale pursuant to the bankruptcy automatic stay provisions. Grason argued he filed for bankruptcy prior to the judicial sale. As a result, the judicial sale was void as a matter of law because it violated the bankruptcy automatic stay. While the record is not entirely clear, it appears this is the objection HSBC and attorney Meurlot responded to in June 2009 but for some reason was not formally filed until December 29, 2009.

That same day, the trial court held a hearing on all pending motions. The court first heard arguments on defendant's motion to vacate the order approving the foreclosure sale. Grason's attorney stated none of defendant's attorneys appeared



for this hearing because of a June 22 docket entry stating the June 30 date was vacated. The trial court asked, assuming it vacated the order confirming sale, what defense defendant would argue. Defense counsel stated his defense was Grason's filing of a *pro se* bankruptcy petition prior to the sheriff's sale. As a result, the sale was void because it violated the automatic stay.

According to Grason's counsel, on the morning of the foreclosure sale on May 5, both he and HSBC's counsel went to the judge's chambers before the judge took the bench for the 8:30 a.m. hearing and before any sales occurred to discuss the emergency motion filed by Grason. Grason's counsel stated the trial judge informed the attorneys he would allow other sales scheduled for 8:30 a.m. to proceed first, take a recess, and then go back on the bench to hear arguments on the emergency motion to continue the sale.

After later denying the emergency motion to continue the sale, the trial judge went back into his chambers and the property at issue was sold at the foreclosure sale. Grason's attorney argued the actual sale could not have occurred before 8:37 a.m. HSBC's attorney stated he thought the sale occurred before 9:02 a.m. but probably after 8:37 a.m.

Grason's attorney argued another sale was necessary because the first sale violated the automatic stay. If the trial court vacated the sheriff's sale, Grason's attorney advised the

court Grason would attempt to cure the mortgage deficiency through a new bankruptcy filing. Without ruling whether the automatic stay went into effect at 8:37 or 9:02 and without making any kind of factual finding as to the time the actual foreclosure sale occurred, the trial court found the *pro se* bankruptcy filing was not a bar to the confirmation of the sheriff's sale.

## II. ANALYSIS

The primary issue in this appeal is whether Grason filed his *pro se* bankruptcy petition before the foreclosure/sheriff's sale occurred. To resolve this issue, we must determine when Grason's *pro se* petition is considered filed for purposes of the automatic stay.

"Under federal law, when debtors enter bankruptcy, their assets are protected from action against them by their creditors by the provisions of an automatic stay provided by section 362 of the Bankruptcy Code." *In re Application of the County Collector for Delinquent Taxes*, 291 Ill. App. 3d 588, 591, 683 N.E.2d 995, 997 (1997). The automatic stay goes into effect immediately when the bankruptcy petition is filed. See *Townsend v. Magic Graphics, Inc.*, 169 Ill. App. 3d 73, 76, 523 N.E.2d 208, 210 (1988). State court proceedings must immediately abate after a bankruptcy petition is filed. See *Townsend*, 169 Ill. App. 3d at 76, 523 N.E.2d at 210. Judicial acts done in violation of the

automatic stay are void *ab initio*. See *Concrete Products, Inc. v. Centex Homes*, 308 Ill. App. 3d 957, 959, 721 N.E.2d 802, 804 (1999).

According to Grason, the petition was filed at 8:37 a.m. According to HSBC, the petition was not filed until 9:02 a.m. Both HSBC and Grason rely on documents from the United States Bankruptcy Court for the Central District of Illinois (bankruptcy court). From the record, it is undisputed Grason hand-delivered his petition to the clerk of the bankruptcy court at 8:37 a.m. In addition, it appears the petition was not entered into the electronic case filing system until 9:02 a.m. We must determine whether the automatic stay commenced at the time of hand-delivery or when the petition was entered into the bankruptcy court's electronic filing system.

The third amended general order authorizing electronic case filing in the bankruptcy court, which was adopted on January 10, 2007, states:

"1. Electronic Filing Authorized

The court will accept for filing documents submitted, signed or verified by electronic means that comply with procedures established by the court.

The court will designate which cases will be assigned to the 'Electronic Filing

System' (the court's system that receives documents filed in electronic form). Except as expressly provided and in exceptional circumstances preventing a "Filing User" (those who have a court-issued log in and password to file documents electronically) from filing electronically all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the court in connection with a case assigned to the Electronic Filing System must be electronically filed.

Notwithstanding the foregoing, *pro se* debtors, certain creditor-claimants, and attorneys currently enrolled in a bankruptcy electronic filing training class in this district are not required to electronically file pleadings and other papers in a case assigned to the System."

The third amended general order is clear "[a] document filed electronically is deemed filed at the date and time stated on the Notice of Electronic Filing from the court." However, it does not specify a document filed conventionally by a *pro se* debtor is considered filed when the document is scanned into the

electronic filing system rather than when delivered to the clerk for filing.

In responding to defendant's motion to vacate the judicial sale, HSBC argued Grason's bankruptcy petition was not actually filed until 9:02 a.m. HSBC attached as an exhibit to its response a notice of bankruptcy case filing from the United States Bankruptcy Court for the Central District of Illinois. HSBC relies on text found near the top of the notice which states: "A bankruptcy case concerning the debtor(s) listed below was filed under Chapter 13 of the United States Bankruptcy Code, entered on 05/05/2009 at 09:02 AM and filed on 05/05/2009." However, plaintiff ignores the bankruptcy court's file stamp which clearly states the case was filed on May 5, 2009, at 8:37 a.m. Because a *pro se* debtor is not required to file electronically, it is clear the petition is considered filed when the clerk receives possession of the petition, which in this case was at 8:37 a.m.

In *In re Schleier*, 290 B.R. 45, 50 (2003), the issue before the court was as follows: "At what time is a bankruptcy petition filed with the court: (i) when the clerk first received possession; (ii) when the petition is time-stamped; or (iii) some other time?" The Bankruptcy Court for the Southern District of New York held "the date and time-stamp on a bankruptcy petition creates a rebuttable presumption as to when it was filed."

*Schleier*, 290 B.R. at 50. In *Schleier*, the bankruptcy petition was time-stamped after the foreclosure sale occurred. However, the debtor was able to establish he presented the petition in acceptable filing form to the clerk of the bankruptcy court prior to the time stamp and prior to the time of the actual foreclosure sale by approximately 10 to 15 minutes. *Schleier*, 290 B.R. at 50. As a result, the bankruptcy court in that case found the foreclosure sale was void.

Because the local rules for the Bankruptcy Court for the Central District of Illinois did not require *pro se* debtors to electronically file bankruptcy petitions, defendant's petition was filed at 8:37 a.m. The clerk of the bankruptcy court was clearly in possession of defendant's bankruptcy petition at that time as is evidenced by the court's file stamp on the notice of bankruptcy case filing.

Based on the record before this court, we remand this cause and direct the trial court to make a factual finding whether the foreclosure sale occurred before or after 8:37 a.m. Everyone involved in this case appears to agree the exact time of the foreclosure sale cannot be determined. However, a determination of the exact time of the sale is not essential. The trial court only needs to determine whether the sale occurred before or after 8:37 a.m.

Based on the record before this court, no one claims

the actual sale occurred prior to 8:37 a.m. As discussed earlier, the mortgage foreclosure sale was scheduled for 8:30 a.m. Prior to the trial judge taking the bench, the attorneys for both HSBC and Grason met with the trial judge regarding defendant's emergency motion to stay the sale. The judge agreed to allow the other sales scheduled for 8:30 a.m. to proceed first, take a recess, and then go back on the bench to hear arguments on the emergency motion to continue the sale. After hearing arguments on the emergency motion to continue the sale, the court denied the motion and returned to chambers. Only then did the sale proceed.

If the trial court finds the sale occurred after 8:37, the foreclosure sale is void unless HSBC or Meurlot can establish as a matter of law the automatic stay did not go into effect. On appeal, HSBC failed to argue the automatic stay did not go into effect when Grason filed his bankruptcy petition. As stated earlier, Meurlot did not file a brief with this court.

Even if the trial court finds the foreclosure sale occurred before 8:37 a.m., the trial court erred in confirming the sale at the confirmation sale hearing on June 30, 2009, because a docket entry dated June 22, 2009, states the June 30, 2009, confirmation hearing was vacated and continued to further order of court.

On June 30, 2009, HSBC's attorney and Meurlot appeared

for the hearing which had previously been vacated. The trial court was aware of the docket entry vacating the hearing for that day and continuing it until further order of the court. However, the court allowed the confirmation hearing to proceed after the following exchange.

[TRIAL COURT:] Did we reset [the confirmation hearing] for today in open court?

[HSBC'S ATTORNEY:] No.

[MEURLLOT:] Yes.

JUDICIAL CLERK: Today's date was vacated.

[TRIAL COURT:] Well, I understand that. But that was what by telephone call from somebody? That was after we reset it in open court.

[HSBC'S ATTORNEY:] Right.

[MEURLLOT:] Yes.

[TRIAL COURT:] Okay. What's your information on this telephone call Mr. Reese?

[HSBC'S ATTORNEY:] I don't know. I didn't know. I just saw the docket today when I went downstairs to look to get the file.



[TRIAL COURT:] Well, I mean, I think, if we reset this in open court I'm not concerned about a lack of notice unless you gentlemen are?"

While neither HSBC's attorney nor Meurlot had any concerns with proceeding with the confirmation sale, the party with the most at risk, *i.e.*, Grason, did not stipulate to the confirmation hearing proceeding because neither he nor his attorney were present.

Grason's attorney at a later hearing stated he was not present because he relied on the court's docket entry stating the hearing date had been vacated and the hearing continued until further notice. The trial court should not have proceeded with the hearing and confirmed the sale without Grason or his attorney's stipulation to proceed because of the June 22 docket entry vacating the date and continuing the matter until further notice.

At a December 2009 hearing on Grason's motion to vacate the order approving the foreclosure sale, Grason's attorney told the trial court he did not appear for the June 30 hearing because he relied on the June 22 docket entry vacating the June 30 hearing date. At that hearing, the trial court and HSBC's attorney had the following exchange when HSBC's attorney suggested someone cannot simply cancel a hearing via a telephone call:

"[TRIAL COURT]: What I can tell you [(HSBC's attorney)] is that particularly in the chancery docket we have cases and hearings and motions which are constantly being cancelled and rescheduled by phone.

[HSBC'S ATTORNEY]: Really.

[TRIAL COURT:] It is a continual constant process. It's hard for us to keep the docket current because just as soon as lawyers schedule a judgment or scheduled [sic] a Confirmation then their office calls up and wants to cancel that date and get a new date. This is a continual process here.

[HSBC'S ATTORNEY:] Right.

[TRIAL COURT:] And so, when one calls up and says I represent one side or the other and by agreement we're vacating a date we just take [it] as true.

[HSBC'S ATTORNEY:] And to some extent I'm wondering, I mean it doesn't happen very often that somebody is gonna check the computer docket and rely on that as a basis for not appearing on a hearing is somewhat odd. You know you would call or something I

would think, but I don't know. That's something, that's a Court rule here that I'm unfamiliar with Macon County.

[TRIAL COURT:] No. It's a practice which we follow here to let the system work, otherwise if we had to do it all by--

[HSBC'S ATTORNEY:] We'd have to appear--

[TRIAL COURT:] Written motion and appearances we'd [*sic*] probably wouldn't get through our chancery docket between now and the next millennium."

When a court's policy allows hearings to be cancelled based solely on a phone call and publicly notes in its docket the hearing has been vacated until further notice of the court, the court should reschedule the hearing with notice to all parties, rather than proceeding.

The trial court should not have confirmed the foreclosure sale at the June 30, 2009, hearing based on the circumstances outlined above. As a result, if the court determines the foreclosure sale took place prior to 8:37 a.m. on May 5, 2009, we direct the court to vacate its order confirming the foreclosure sale and proceed with another confirmation hearing after due notice is given to all parties.

#### C. HSBC's Arguments

HSBC made two arguments in its appellate brief. Plaintiff first argued the trial court did not err in denying defendant's emergency motion to stay the foreclosure sale for 30 days because defendant's right to redeem the property had expired. However, the trial court's decision to deny defendant's emergency motion to stay became irrelevant when defendant filed his *pro se* bankruptcy petition.

Second, HSBC argued the trial court's confirmation of the foreclosure sale was proper because proper notice was given, the terms of the sale were not unconscionable, the sale was not conducted fraudulently, and justice was otherwise done. 735 ILCS 5/15-1508 (West 2008). However, once again, these statutory requirements are irrelevant if the sale violated the automatic stay.

### III. CONCLUSION

For the reasons stated, we remand this case to the trial court with directions to make a factual finding whether the foreclosure sale occurred before or after 8:37 a.m. on May 5, 2009, and then proceed as directed by this court based on its finding.

Remanded with directions.