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2012 IL App (4th) 110788-U

Filed 9/19/12

NO. 4-11-0788

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

|   |                   |
|---|-------------------|
| HSBC BANK U.S.A., N.A., as Trustee on Behalf of ACE ) | Appeal from       |
| SECURITIES CORPORATION, HOME EQUITY )                 | Circuit Court of  |
| LOAN TRUST, and For the Registered Holders of ACE )   | Macon County      |
| SECURITIES CORPORATION, HOME EQUITY )                 | No. 08CH121       |
| LOAN TRUST, SERIES 2007-HE4, ASSET BACKED )           |                   |
| PASS-THROUGH CERTIFICATES, )                          |                   |
| Plaintiffs-Appellees, )                               |                   |
| v. )  | Honorable         |
| ANTHONY J. GRASON, )                                  | Albert G. Webber, |
| Defendant-Appellant. )                                | Judge Presiding   |

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

**ORDER**

¶ 1 *Held:* The trial court erred by not making a factual finding with regard to the time of the foreclosure sale as directed by the appellate court and by finding defendant's bankruptcy filing could not affect the validity of the foreclosure sale.

¶ 2 In June 2011, the trial court held defendant Anthony J. Grason's May 5, 2009, bankruptcy filing did not affect the validity of the foreclosure sale held on the same day because Grason was not an eligible debtor pursuant to section 109(g)(1) of the Bankruptcy Code (11 U.S.C. § 109(g)(1) (2006)). Grason appeals, arguing the trial court erred in (1) finding he was not entitled to the protection of an automatic stay pursuant to the filing of his bankruptcy petition on May 5, 2009, (2) failing to determine the time of the foreclosure sale as directed by this court, and (3) failing to recognize this court's holding with regard to the confirmation of the foreclosure

sale on June 30, 2009. We reverse and remand with directions.

¶ 3

### I. BACKGROUND

¶ 4 This case has previously been before this court. At issue is property purchased by Cynthia Deadrick and Mark Wolfer, apparently on behalf of Karl E. Meurlot, at a judicial sale on May 5, 2009. The background facts and procedural history of this case are set out in detail in our prior decision. See *HSBC Bank U.S.A. v. Grason*, No. 4-10-0090 (Apr. 11, 2011) (unpublished order under Supreme Court Rule 23) (hereinafter *HSBC I*). In that appeal, the primary issue was whether Grason filed his *pro se* bankruptcy petition before the property in question was sold at the foreclosure/sheriff's sale. *Id.* at 10. We found Grason's bankruptcy petition was filed at 8:37 a.m. on May 5, 2009. *Id.* at 3, 11-13. As a result, we remanded the case to the trial court with directions to make a factual finding whether the foreclosure sale occurred before or after 8:37 a.m. *Id.* at 14.

¶ 5

In our order, we directed the trial court as follows:

“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.” *Id.* at 15.

Because the record did not contain the bankruptcy proceedings with regard to Grason’s multiple filings, we did not direct the trial court to automatically deem the foreclosure sale void if it occurred after Grason’s petition was filed. Instead, we provided HSBC and Meurlot an opportunity to establish the sale would still be valid regardless of its occurrence after Grason filed his bankruptcy petition—assuming the trial court determined the sale occurred after Grason filed his petition on May 5. *Id.* at 15.

¶ 6 On remand, HSBC filed a motion to vacate the foreclosure sale, refund the sale proceeds, and vacate the order approving the report of sale and distribution, order of possession, and order for *in personam* deficiency. According to its motion, HSBC moved to vacate the foreclosure sale based on this court's order. HSBC noted it would be "extremely difficult to prove the exact time of the sheriff's sale and thus determine if the sale occurred before or after the bankruptcy filing" and "regardless of whether the sheriff's sale was proper or the automatic stay was in effect, the Appellate Court found that the trial court erred in confirming the sale at the hearing on June 30, 2009[,] and the confirmation of sale must be vacated."

¶ 7 The trial court held a status hearing on May 24, 2011. The court noted it did not know how it could determine what time the foreclosure sale took place. The court asked the parties for their views on how to proceed. Counsel for HSBC noted it had filed a motion to vacate the foreclosure sale.

¶ 8 The trial court indicated it did not know whether the foreclosure sale could be vacated at that point. The court later stated:

"[T]he mandate from the Appellate Court was for this Court to hold a hearing to determine when the sale took place before or after 8:37 a.m. on a certain date. A—motion to vacate the sale things, such as that, I'm quite frank to say again I don't know if those can even be brought at this point. And so, that would be a matter for the parties to brief before the Court. So, I'm gonna set this for hearing consistent with the mandate of the Appellate Court on the issue of determining when the sale took place. *And that will be the only issue before the Court at that time* because that is what the Appellate Court gave back to me at this time." (Emphasis added.)

The court set the hearing on this single issue for June 24.

¶ 9 On May 27, 2011, Grason filed a *pro se* motion to substitute judge, requesting Judge A.G. Webber be replaced by another judge.

¶ 10 On June 7, 2011, HSBC filed an amended motion to vacate the foreclosure sale, refund the sale proceeds, and vacate the order approving the report of sale and distribution, order of possession and order for *in personam* deficiency. The amended motion noted this court vacated the trial court's order approving the sale, finding the trial court erred in confirming the foreclosure sale at the June 30, 2009, hearing because of the June 22, 2009, docket entry vacating the confirmation hearing on June 30. HSBC stated it had no evidence to prove the sale occurred before 8:37 a.m. and stated it was willing to concede that the sale occurred after 8:37 a.m. As a result, HSBC sought to vacate the May 5, 2009, sale.

¶ 11 HSBC argued it was the master of its cause of action and nothing in the Illinois

Mortgage Foreclosure Law (735 ILCS 5/15-1101 to 15-1706 (West 2008)) precluded a mortgagee from declining to seek a confirmation of a judicial sale. HSBC further noted:

"Being the highest bidder at a judicial sale does not confer on said bidder a legally cognizable interest in the property.

*Jennings v. Dunphy*, 174 Ill. 86, 90-91, 50 N.E. 1045 (1898). The highest bid received by a sheriff at a judicial foreclosure sale is merely an irrevocable offer to purchase the property. The offer is not deemed to have been accepted and the sale is not complete until it has been confirmed by the circuit court. *Plaza Bank v.*

*Kappel*, 334 Ill. App. 3d 847, 852, 779 N.E.2d 359, \*\*\* (2002)."

HSBC correctly noted "[t]hat regardless of whether the sheriff's sale was proper or the automatic stay was in effect, the Appellate Court found that the trial court erred in confirming the sale at the hearing on June 30, 2009[,] and the confirmation of sale must be vacated." HSBC continued by stating the third party bidder in this case has no legally cognizable interest in the property because of this court's order directing the vacation of the order confirming the sale. HSBC asked the trial court to enter an order vacating the May 5, 2009, foreclosure sale and the order approving the report of sale and distribution and directing the Macon County Circuit Clerk to refund the third party bidder's funds it was holding to said third party bidder, Karl Meurlot.

¶ 12 On June 17, 2011, Meurlot filed a brief and argument with the trial court. Meurlot argued two issues were before the trial court: (1) whether the sale occurred after 8:37 a.m. on May 5, 2009, and (2) whether the bankruptcy stay was in effect at the time of the sale? Meurlot argued the actual pleading before the court was Grason's motion to vacate the

foreclosure sale. Meurlot also argued Grason, as the moving party, had the burden of proof on all grounds for the relief he sought. According to Meurlot, Grason had the burden of proving the sale took place after 8:37 a.m. and that the automatic stay was in effect at that time. Without citing to any authority, Meurlot argued the sale was presumed to have occurred at 8:30 a.m. because a court order scheduled the sale for that time.

¶ 13 Meurlot also argued the automatic stay did not go into effect when Grason filed his bankruptcy petition on May 5, 2009. According to Meurlot, Grason did not qualify as a "debtor" as defined by section 109 of the Bankruptcy Code (11 U.S.C. § 109 (2006)). Meurlot attached orders from the Bankruptcy Court for the Central District of Illinois dated December 8, 2008, and May 21, 2009, dismissing bankruptcy petitions filed by Grason.

¶ 14 On June 24, 2011, the trial court held the hearing. The court denied Grason's motion to substitute judge. Meurlot's attorney stated his client had recorded the deed for the property in question. Grason asked for a continuance so he could consult with an attorney with regard to Meurlot's arguments found in the brief and argument Meurlot filed with the court, which Grason had only received days before the hearing, attacking the validity of Grason's bankruptcy filing. The court denied Grason's motion to continue, finding the issues before the court had been well-known for some time. (However, we note the trial court at the May 24 status hearing stated the only issue it would hear on June 24 was the timing of the sale *vis a vis* the filing of the bankruptcy petition.)

¶ 15 HSBC's attorney stated based on their investigation the foreclosure sale occurred after 8:37 a.m. According to his explanation to the trial court:

"At the time we moved to confirm the sale we had checked the

bankruptcy online court information, and from our investigation at that time, we understood that the bankruptcy had been filed at around 9:02 a.m. and it wasn't until much later on that we had learned that there was, apparently, some type of delay. We have evidence now that the bankruptcy was actually filed at 8:37 a.m. Based on that it's undisputed, at least from our point of view, that the sale occurred after 8:37 a.m."

Grason agreed the sale took place after 8:37 a.m. Meurlot's attorney also stated he did not have any evidence whether the sale took place before or after 8:37 a.m. However, Meurlot's attorney argued Grason had the burden of proving the sale occurred after 8:37 a.m. The trial court then paraphrased the arguments raised by Meurlot in his filing and asked whether Meurlot's argument changed HSBC's position with regard to vacating the foreclosure sale. HSBC stated it was still asking the court to vacate the sale.

¶ 16 The trial court asked what would happen if it allowed HSBC's motion to vacate the sale considering the title had already passed to Meurlot. HSBC stated an order vacating the sale would also have to void the transfer of the property to Meurlot.

¶ 17 The trial court noted it retained jurisdiction over the entirety of the case on remand. However, the court recognized its discretion was limited by the instructions it received from this court. The court stated it had the ability to entertain HSBC's motion to vacate the sale. However, before ruling on that motion, the court asked Meurlot's attorney to present his argument whether Grason was entitled to the protections of the Bankruptcy Code regardless of whether the sale occurred before he filed his bankruptcy petition.

¶ 18 According to Meurlot's argument at the June 24, 2011, hearing, Grason did not qualify as a debtor under section 109(g) of the Bankruptcy Code because his petition was filed within 180 days of the dismissal of his previous bankruptcy petition. Meurlot's attorney argued this prior petition had been dismissed because of Grason's "intentional, willful refusal to abide by the rules and the orders of the bankruptcy court." Meurlot's attorney argued case law notes the purpose of section 109(g) of the Bankruptcy Code is to stop what Meurlot characterized as "the precise abuse of the system that we have here with Mr. Grason."

¶ 19 After hearing the parties' arguments, the trial court stated:  
“[G]iven the fact that we do not make an official record of the time of the sale or how the sale takes place an actual determination of the time is probably impossible.

Now, there is some indication in transcripts which [HSBC’s counsel] provided on behalf of the plaintiff, that it may have taken place after 8:37. But I don't know if I can say that conclusively based upon the record here, but there is some indication that it took place after 8:37 a.m. on that date. But a hundred percent certainty as the time of the sale I don't think is possible to do. And I know and counsel have looked at the transcripts, looked at the records, looked at the comments made in court. We can make some inferences. We cannot make any conclusions to a hundred percent, although, I think the indications are it was probably after 8:37 a.m.”

The court commented that until Meurlot's attorney filed his brief in this case, which was after this court remanded the case to the trial court, the court did not have the benefit of the record from the bankruptcy court. The court then stated:

"I think I would have to say that any fair reading of this document, documents, would show that the order of the bankruptcy court of December 8, 2008[,] dismissing of the bankruptcy makes it clear to me that when we had the sale then the following May 5, 2009, less than 180 days after that, that Mr. Grason was not a debtor as defined by the bankruptcy code. And that pursuant to provisions of Section 109(g) of the code the automatic stay was not in [e]ffect at the time the sale took place.

I believe that was the important consideration for the Appellate Court in [its] order. The fact that I can't make a completely[—] and I'm searching for the word[—]unimpeachable determination when the sale took place \*\*\* given this finding may be irrelevant. Because I do believe that without the protection of bankruptcy code the time of the sale becomes an irrelevant matter in this case.”

After examining the Bankruptcy Code, the motions filed by the bankruptcy trustee, and the bankruptcy court's order of December 8, 2008, the trial court found these documents “make it clear that Section 109(g) removed from Mr. Grason any protections of honoring a stay might have afforded him. And so, therefore, based upon that finding, \* \* \* I will deny your motion to

vacate the sale." The court then later stated—without making any additional findings—that it had completed the findings which the appellate court asked it to make on remand. The court then stated it thought that meant the sale "does remain as confirmed."

¶ 20 On July 21, 2011, Grason filed this appeal.

¶ 21 II. ANALYSIS

¶ 22 In our earlier decision in this case, we found Grason's bankruptcy petition was filed at 8:37 a.m. on May 5, 2009. We remanded 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. According to our order:

"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." *HSBC I*, No. 4-10-0090, at 14.

We did not give any explicit direction as to how the court was to make this determination, however, if necessary, the person conducting the sale and anyone else present for the sale could have testified, including but not limited to the purchasers and Grason's attorney.

¶ 23 As we stated in our order, if the trial court determined the sale occurred after 8:37 a.m., the foreclosure sale would clearly be void—or at least voidable—unless HSBC or Meurlot could establish as a matter of law that the automatic stay did not go into effect when Grason filed his bankruptcy petition at 8:37 a.m. See *Concrete Products, Inc. v. Centex Homes*, 308 Ill. App. 3d 957, 959, 721 N.E.2d 802, 804 (1999) (judicial acts done in violation of an automatic stay are

void *ab initio*). As the trial court noted on remand, the record from the bankruptcy court was not part of the record when this court decided *HSBC I*. As a result, this court did not order the trial court to automatically void the sale if it occurred after 8:37 a.m. because we concluded HSBC or Meurlot should have the opportunity to establish the bankruptcy filing did not affect the foreclosure sale. On remand, however, only Meurlot argued Grason's May 5 bankruptcy filing did not affect the foreclosure sale. HSBC's position was that the foreclosure sale violated the automatic stay and is void.

¶ 24 The trial court stated it did not believe it could conclusively say the sale occurred after 8:37 a.m. and made no finding on this question. (However, the trial court stated the foreclosure sale "was probably after 8:37 a.m.") Instead, the trial court found the automatic bankruptcy stay did not apply to the foreclosure sale regardless of whether the sale occurred before or after Grason filed his bankruptcy petition because Grason was not an eligible debtor pursuant to section 109(g)(1) of the Bankruptcy Code (11 U.S.C. § 109(g)(1) (2006)).

¶ 25 In passing, we note the trial court should not have heard arguments regarding whether Grason was an eligible debtor pursuant to section 109(g)(1) at the June 24, 2011, hearing. At the hearing on May 24, 2011, the trial court specifically told the parties the time of the sale would be the only issue before the court at the June 24, 2011, hearing. Grason's request for a continuance to retain counsel to address Meurlot's bankruptcy arguments was understandable, in light of the parties' anticipation that the court would only consider the timing issue at the hearing. Meurlot filed his brief and argument on the bankruptcy issues just a few days in advance of the scheduled hearing.

¶ 26 However, we believe the court would not have allowed Meurlot to present

arguments on this issue had Grason made a specific objection citing the court's earlier pronouncement to the parties. This is especially true considering HSBC had stated at the earlier hearing it bore the burden of establishing the sale occurred prior to 8:37 a.m.—a point upon which the trial court seemed to be in agreement—and had filed motions to vacate the foreclosure sale.

¶ 27 That being said, Grason only made a general request for a continuance to consult an attorney with regard to Meurlot's arguments. Further, Grason did not raise this issue on appeal. As a result, we ignore this procedural error and turn to the substance of the trial court's ruling.

¶ 28 Section 109(g)(1) states:

"Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case[.]" 11 U.S.C. § 109(g)(1) (2006).

According to section 362(b)(21) of the Bankruptcy Code (11 U.S.C. § 362(b)(21) (2006)):

“(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

\* \* \*

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title.” 11 U.S.C. § 362(b)(21) (2006).

The trial court found any fair reading of the bankruptcy court records supplied to the trial court showed Grason was not a debtor as defined by the Bankruptcy Code because his May 5, 2009, petition was filed less than 180 days after his prior bankruptcy case was dismissed on December 8, 2008.

¶ 29 We disagree with the trial court’s assessment, which was based more on the bankruptcy trustee’s pleading seeking the dismissal of the prior bankruptcy case (case No. 08-71631) rather than the bankruptcy court’s actual orders dismissing that case. Regardless of the trustee's pleadings, the bankruptcy court's December 8, 2008, order dismissing Grason's bankruptcy case stated as follows:

"The Trustee's motion to dismiss came on for hearing on December 4, 2008, in Decatur, Illinois, after notice thereof was given by the Clerk of the Court, and the Court having heard from the Trustee, from Debtor's counsel, and from counsel for

Craftmasters Inc., and being fully advised in the premises,

THE COURT FINDS that the Debtor did not turn over a copy of his 2005 federal income tax return to the Trustee seven days prior to the first scheduled first meeting of creditors.

THE COURT ALSO FINDS that the Debtor did not demonstrate that the failure to do so was due to circumstances beyond his control.

IT IS THEREFORE ORDERED that the case is dismissed pursuant to 11 USC 521(e)(2)(B)."

While the bankruptcy court found Grason did not establish his failure to timely turn over his 2005 tax return was due to circumstances beyond his control, it did not find a willful failure to abide by an order of the bankruptcy court or a failure to appear before the court in proper prosecution of the case. Either of these findings would have made Grason ineligible to be a debtor pursuant to section 109(g)(1) of the Bankruptcy Code (11 U.S.C. § 109(g)(1) (2006)) on May 5, 2009, and may have nullified any automatic stay applying to the foreclosure sale pursuant to section 362(b)(21) of the Bankruptcy Code (11 U.S.C. § 362(b)(21) (2006)).

¶ 30           However, the record before us contains no indication the bankruptcy court found a willful failure. "For Section 109(g)(1) to apply, a debtor's predecessor case must be dismissed for 'willful' conduct. Although the term 'willful' is not defined in the [Bankruptcy] Code, courts have interpreted it to mean deliberate or intentional, rather than accidental or that which is beyond the debtor's control." *In re Wen Hua Xu*, 386 B.R. 451, 455 (Bankr. S.D.N.Y. 2008).

While the bankruptcy court found Grason *did not demonstrate* his failure to turn over a copy of

his federal income tax return to the trustee seven days prior to the "first scheduled first meeting of creditors" was "due to circumstances beyond his control," this does not equate to a finding Grason's failure was not due to circumstances beyond his control or willful. To draw a comparison, a judge in a criminal bench trial might find the State failed to establish a defendant's guilt; however, this does not mean the trial court made a finding the defendant was innocent.

¶ 31 We further note according to the trustee's motion to dismiss filed on November 11, 2008, Grason did turn over a copy of his 2005 federal income tax return seven days after the first scheduled section 341 meeting. Further, the bankruptcy court's December 8, 2008, order dismissing case No. 08-71631 did not prohibit Grason from filing another bankruptcy petition, which counsel for HSBC noted to the trial court is usually included in an order dismissing a petition based on a debtor's willful conduct. See 11 U.S.C. § 362(b)(21)(B) (2006).

¶ 32 In addition, the bankruptcy court's May 21, 2009, order dismissing Grason's bankruptcy case (case No. 09-71353), based on his May 5, 2009, filing does not cite section 109(g)(1) as the reason for the dismissal. Instead, according to the order, the case was dismissed because Grason "failed to obtain credit counseling within 180 days preceding the case filing." As a result, the trial court erred in determining an automatic stay based on Grason's May 5, 2009, bankruptcy filing would not have affected the foreclosure sale because of section 109(g), regardless of the time the foreclosure sale occurred.

¶ 33 Meurlot relies on *Wen Hua Xu*, 386 B.R. at 455, for the proposition "a court may make a finding of willfulness when called upon to determine if [an] earlier case renders the debtor ineligible under § 109(g)—*i.e. during the second bankruptcy case.*" (Emphasis added.) Meurlot ignores the fact this proceeding is not part of the second bankruptcy case. Further, *Wen*

*Hua Xu* is also distinguishable from the case *sub judice* because of the record before the bankruptcy court in that case.

¶ 34 In *Wen Hua Xu*, a creditor was seeking the dismissal of a debtor's second bankruptcy filing pursuant to section 109(g)(1) of the Bankruptcy Code. *Id.* at 453. This was the debtor's second recent bankruptcy filing. The prior petition was dismissed pursuant to section 707(a)(1), 36 days before the second petition was filed. *Id.* at 453.

¶ 35 In dismissing the second bankruptcy filing, the bankruptcy court stated the bankruptcy judge in the predecessor case "noted several infirmities that constituted 'cause' under section 707(a)(1)—clear misrepresentations in court filings, repeated failures to attend section 341 meetings, failures to produce business records and failures to fully and truthfully disclose assets and businesses held by the Debtor and his then co-debtor wife." *Id.* at 454. Unlike this case where this court does not have access to a transcript from the December 4, 2008, hearing on the trustee's motion to dismiss Grason's bankruptcy case No. 08-71631, the bankruptcy court in *Wen Hua Xu* had access to a transcript of the hearing in which the judge in the predecessor case spelled out its factual findings with regard to the debtor's conduct. *Id.* at 454. Based on the transcript from the dismissal hearing in the first bankruptcy case, the judge in the second bankruptcy case was able to conclude:

"There is no question that the Debtor's conduct before [the judge in the first case] was 'willful' as that word is defined by the relevant caselaw. [The judge in the first case] found, and this Court accepts as true, that the Debtor failed to attend multiple section 341 meetings and failed to disclose assets and business interests on his

schedules and to the chapter 7 trustee. The Debtor has not offered any credible explanation for these actions. Absent such an explanation, these acts are demonstrative of intentional conduct and the Debtor's complete indifference to his known responsibilities. Moreover, courts routinely construe repeated failures to abide by statutory or judicial directives or to act with the appropriate diligence as supporting an inference of willful and deliberate conduct. [Citations.] The inference is particularly strong here in light of the Debtor's repetitive and flagrant disregard of several such directives. Accordingly, the Court holds that the Debtor's repeated failure to follow proper procedure, disclose assets and diligently respond to the trustee's requests evidences deliberate and 'willful' conduct as that term is used in section 109(g)(1)." *Id.* at 456.

¶ 36 In the case *sub judice*, the record contains nothing establishing the bankruptcy court in case No. 08-71631 found Grason willfully (1) failed to abide by an order of the bankruptcy court or (2) failed to appear before the bankruptcy court in proper prosecution of the case. Nor is the order dismissing the bankruptcy petition at issue in this case based on a finding of debtor ineligibility pursuant to section 109(g). If HSBC or Meurlot thought the bankruptcy court's determination on December 4, 2008, supported a finding under section 109(g), they should have sought from that court a clarification of the bankruptcy court's order and/or relief from the automatic stay. Neither this court nor the trial court can determine from this record that

Grason's bankruptcy cases were dismissed for any reason other than the reasons cited in the dismissal orders.

¶ 37 Because bankruptcy law is extremely complicated, we stated in our prior order "[i]f 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" (*HSBC I*, No. 4-10-0090, at 15). Splits of authority between bankruptcy courts add to the complexity of bankruptcy law. For example, a split of authority exists between bankruptcy courts on the issue of whether the filing of a bankruptcy petition by an ineligible debtor results in an automatic stay. Compare *In re Ross*, 338 B.R. 134, 138 (Bankr. N.D. Ga. 2006), and *In re Brown*, 342 B.R. 248, 255 (Bankr. D. Md. 2006), with *In re Salazar*, 339 B.R. 622, 632 (Bankr. S.D. Tex. 2006). We anticipated HSBC and/or Meurlot would return to bankruptcy court and attempt to obtain an order stating either no automatic stay was in effect on the date of the sale or the automatic stay did not apply to the foreclosure sale. However, they did not do so.

¶ 38 This means the trial court must still determine whether the foreclosure sale occurred before or after 8:37 a.m. We note trial courts rarely if ever can make a factual determination to an absolute certainty, nor are they expected to. The court can make its finding based on whether it is more likely true than not true the sale occurred after 8:37 a.m.

¶ 39 Based on our review of the record, the trial court could have found the sale occurred after 8:37 a.m. HSBC took on the burden of proof with respect to establishing the time of sale. The trial court impliedly agreed HSBC bore the burden of proof on this issue. HSBC conceded the sale occurred after 8:37 a.m. based on its investigation of the issue. Grason agreed with that concession. Meurlot had no evidence to show the sale occurred prior to 8:37 a.m.

Although not introduced at the hearing, the record also contained attorney Berlin's affidavit the sale occurred after 9:00 a.m.

¶ 40 If the parties fail to stipulate as to whether the sale occurred before or after 8:37 a.m., the trial court can (1) hold an evidentiary hearing, (2) if agreed, rely on affidavits in the record to decide, based on a preponderance of the evidence, whether the sale occurred before or after 8:37 a.m., (3) or rely on the concessions made at the June 24 hearing. The trial court is not required to hold an evidentiary hearing if it decides to make its findings based on HSBC's concession and the lack of any contradictory evidence presented by Meurlot.

¶ 41 With regard to our comments on the confirmation hearing in this case, our order was not entirely clear. In hindsight, we should have specifically instructed the trial court to vacate its order confirming the foreclosure sale, and we do so now. We did specifically state "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." *HSBC I*, No. 4-10-0090, at 15. We clearly noted the trial court was aware of the docket entry vacating the hearing for that date and continuing the matter until further order of the court. According to our order, "[w]hile 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." *HSBC I*, No. 4-10-0090, at 17.

¶ 42 The trial court certainly cannot be faulted for allowing the sale to proceed on the morning of May 5—even though the sale may be void as a result of Grason's May 5 bankruptcy filing—because it was unaware of the bankruptcy filing. However, the confirmation hearing

should not have proceeded in light of the docket entry cancelling it. Neither the debtor nor his or her representative was present for the confirmation hearing and therefore were unable to stipulate to the proceeding going forward. The confirmation hearing should have been rescheduled, with notice to all counsel.

¶ 43 We now have a situation where Meurlot has recorded a deed and made "improvements" to the property. While this court understands Meurlot may suffer some economic loss if this sale is set aside, this potential consequence has no impact on our decision. Meurlot invited the trial court's error. The trial court clearly asked Meurlot and HSBC's counsel if they were concerned about a lack of notice for the confirmation hearing and they both said they were not. In addition, when these "improvements" were made, appeals in this case were pending, and Meurlot should have been well aware the foreclosure sale could be deemed void.

¶ 44 We recognize the trial court's and Meurlot's frustrations and understand Grason may well be "working" the system. Nevertheless, where, as here, the foreclosure sale "probably" occurred (as the trial court noted) after Grason filed his bankruptcy petition, the parties should have taken great care to obtain relief from the bankruptcy court before proceeding with the confirmation of the sale. This relief could have been in the form of an order from the bankruptcy court ruling either the automatic stay did not affect the foreclosure sale, the bankruptcy filing did not create an automatic stay, or the stay was retroactively annulled with regard to the foreclosure sale (see *In re Campbell*, 356 B.R. 722, 724 (Bankr. W.D. Mo. 2006)). HSBC or Meurlot could still attempt to obtain this relief from the bankruptcy court.

¶ 45 Where, as here, the bankruptcy court's original dismissal order on December 8, 2008, does not indicate on its face the dismissal was due to a willful failure on the debtor's part

and the court's May 21, 2009, dismissal order also does not indicate on its face the dismissal was based on a finding the first dismissal resulted from willful conduct of the debtor, the record contains no support for a finding the automatic stay did not take effect. Consequently, for finality purposes, it appears the best course will be for HSBC and/or Meurlot to obtain a definitive ruling from the bankruptcy court.

¶ 46

### III. CONCLUSION

¶ 47 For the reasons stated, we reverse the trial court's ruling finding Grason's May 5, 2009, bankruptcy filing did not affect the foreclosure sale regardless of the time the bankruptcy petition was filed. We also vacate the confirmation and reconfirmation of the foreclosure sale and again order the trial court to determine, by a preponderance of the evidence, whether the foreclosure sale occurred before or after 8:37 a.m. on May 5, 2009. In other words, is it more likely than not the sale occurred after 8:37 a.m. If the court finds the sale occurred after 8:37 a.m, the automatic stay applied to the foreclosure sale and the sale is void unless HSBC or Meurlot can obtain relief from the automatic stay with regard to the foreclosure sale from the Bankruptcy Court for the Central District of Illinois.

¶ 48 Reversed and remanded with directions.