

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 August Term, 2000

4 (Argued: June 22, 2001) (Decided: **MAR 7**, 2002)

5 Docket No. 00-5071

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7
8 IN RE: JOHN R. CANNEY, III, Chapter 7 Trustee for
9 the Estate of Maxwell Frazer,
10 Trustee,
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12 JOHN R. CANNEY, III, Chapter 7 Trustee for
13 the Estate of Maxwell Frazer,
14 Appellant,

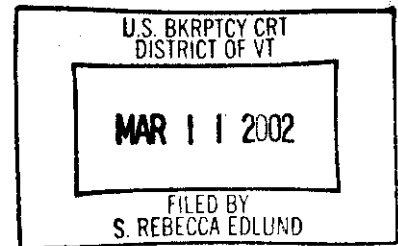
98-11881 #316-1

15 UNITED STATES TRUSTEE,
16 Trustee,

17 TOWN OF WEATHERSFIELD,
18 Movant,

19 v.

20 MERCHANTS BANK,
21 Appellee.



22 -----
23 BEFORE: CABRANES, F.I. PARKER, SOTOMAYOR Circuit Judges.

24 Appellant, John R. Canney, III, Chapter 7 Trustee for the
25 Estate of Maxwell Frazer, appeals from an opinion and order of
26 the United States District Court for the District of Vermont
27 (William K. Sessions, Judge), dated August 8, 2000. The district
28 court reversed the decision of the United States Bankruptcy Court
29 for the District of Vermont (Robert L. Krechevsky, Bankruptcy
30 Judge, sitting by designation from the United States Bankruptcy
31 Court for the District of Connecticut), dated August 30, 1999,
32 which denied relief from an automatic stay.

1 AFFIRMED.

2 Jess Thomas Schwidde, Gleb Glinka, Glinka &
3 Schwidde, Rutland, VT, for Appellant.

4 Norman Williams, Gravel & Shea, Burlington,
5 VT, for Appellee.

6 F.I. PARKER, Circuit Judge:

7 Appellant, John R. Canney, III, Chapter 7 Trustee for the
8 Estate of Maxwell Frazer ("Trustee"), appeals from an opinion and
9 order of the United States District Court for the District of
10 Vermont (William K. Sessions, Judge), dated August 8, 2000. The
11 district court reversed the decision of the United States
12 Bankruptcy Court for the District of Vermont (Robert L.
13 Krechevsky, Bankruptcy Judge),¹ dated August 30, 1999, which
14 denied Appellee Merchants Bank's request for relief from an
15 automatic stay.

16 This appeal concerns the intersection of federal bankruptcy
17 law with Vermont strict foreclosure law. After obtaining several
18 loans from Merchants Bank and securing the loans by mortgages on
19 his property and assignment and pledge of the stock in his
20 restaurant, Maxwell Frazer d/b/a Max's Country Village Store and
21 Mr. G's Restaurant ("Frazer") defaulted on the loans. Merchants
22 Bank obtained a foreclosure judgment from state court that
23 specified the amounts due and a deadline for Frazer to redeem,
24 i.e., cure his default. Days prior to the deadline, Frazer filed

25 ¹ The Honorable Robert L. Krechevsky is a bankruptcy judge of
26 the United States Bankruptcy Court for the District of
27 Connecticut and was sitting by designation.

1 for bankruptcy protection.

2 The issues raised by this appeal are: (1) whether the
3 automatic stay provisions of 11 U.S.C. § 362(a)² or the time

4 ² Section 362(a) provides in pertinent part:

5 (a) Except as provided in subsection (b) of
6 this section, a petition filed under section
7 301, 302, or 303 of this title, or an
8 application filed under section 5(a)(3) of
9 the Securities Investor Protection Act of
10 1970 operates as a stay, applicable to all
11 entities, of--

12 (1) the commencement or continuation,
13 including the issuance or employment of
14 process, of a judicial, administrative, or
15 other action or proceeding against the debtor
16 that was or could have been commenced before
17 the commencement of the case under this
18 title, or to recover a claim against the
19 debtor that arose before the commencement of
20 the case under this title;

21 (2) the enforcement, against the debtor
22 or against property of the estate, of a
23 judgment obtained before the commencement of
24 the case under this title;

25 (3) any act to obtain possession of
26 property of the estate or of property from
27 the estate or to exercise control over
28 property of the estate;

29 (4) any act to create, perfect, or
30 enforce any lien against property of the
31 estate;

32 (5) any act to create, perfect, or
33 enforce against property of the debtor any
34 lien to the extent that such lien secures a
35 claim that arose before the commencement of
36 the case under this title

37 11 U.S.C. § 362(a).

1 limitations of 11 U.S.C. § 108(b)³ apply when a mortgagor files
2 for bankruptcy during the equity of redemption period following
3 entry of judgment in a Vermont strict foreclosure action; and (2)
4 if the automatic stay provisions do not toll the equity of
5 redemption period, whether those provisions toll either the
6 recording of the certificate of non-redemption or the issuance of
7 the writ of possession. We follow our sister Circuits and hold
8 that § 108(b), not § 362(a), governs the tolling of a period of
9 equitable redemption. Because the redemption period lapsed
10 without redemption, we find that neither Frazer nor the Trustee
11 has a legally cognizable right or interest in the property that
12 justifies encumbrance by the federal bankruptcy laws. Finally,
13 we hold that neither the recording of the certificate of non-

14 ³ Section 108(b) provides in pertinent part:

15 (b) Except as provided in subsection (a) of
16 this section, if applicable nonbankruptcy
17 law, an order entered in a nonbankruptcy
18 proceeding, or an agreement fixes a period
19 within which the debtor . . . may file any
20 pleading, demand, notice, or proof of claim
21 or loss, cure a default, or perform any other
22 similar act, and such period has not expired
23 before the date of the filing of the
24 petition, the trustee may only file, cure, or
25 perform, as the case may be, before the later
26 of-

27 (1) the end of such period, including
28 any suspension of such period occurring on or
29 after the commencement of the case; or

30 (2) 60 days after the order for relief.

31 11 U.S.C. § 108(b).

1 redemption nor the issuance of the writ of possession is stayed
2 by § 362(a). Accordingly, we affirm the judgment of the district
3 court.

4 I. BACKGROUND

5 The facts in this case are undisputed. Between May 1992 and
6 March 1996, Merchants Bank provided several loans to Frazer.⁴
7 Merchants Bank secured the loans by either mortgages on Frazer's
8 real property located in the Town of Weathersfield, Vermont (the
9 "Property"), or assignment and pledge of the stock in his
10 restaurant. Frazer defaulted on the loans, and in January 1998,
11 Merchants Bank sought foreclosure.

12 In June 1998, Frazer entered into a Stipulation and Judgment
13 and Shortened Redemption Period, which was so ordered by the
14 state court on July 14, 1998. The parties agreed that the equity
15 of redemption period would expire on September 15, 1998.

16 On September 11, 1998, a Consolidated Judgment Order and
17 Decree of Foreclosure ("Foreclosure Judgment") was issued by the
18 Windsor Superior Court. See Merchants Bank v. Frazer, Windsor
19 Super. Ct. Docket No. 24-1-98Wrcv (Sept. 11, 1998). The
20 Foreclosure Judgment forever barred Frazer from equity redemption
21 unless Merchants Bank was paid the full amount due on the

22 ⁴ First National gave the first loan and on July 4, 1993,
23 transferred the note and mortgage to Merchants Bank. See
24 Merchants Bank v. Frazer, 253 B.R. 513, 515 n.1 (D. Vt.
25 2000).

1 mortgage on or before September 18, 1998.

2 On September 14, 1998, Frazer filed a Chapter 13 bankruptcy
3 petition. That petition was dismissed, however, for lack of
4 jurisdiction on December 15, 1998. The next day, Frazer filed a
5 Chapter 11 bankruptcy petition.

6 On June 23, 1999, Merchants Bank moved for relief from the
7 automatic stay, arguing that the equity of redemption period is
8 not stayed by 11 U.S.C. § 362, on the ground that the timing
9 provisions of 11 U.S.C. § 108(b) take precedence over § 362
10 tolling. Merchants Bank relied on decisions from the United
11 States Courts of Appeals for the Sixth, Seventh, and Eighth
12 Circuits.

13 The bankruptcy court denied Merchants Bank's motion on
14 August 30, 1999. See In re Frazer, 238 B.R. 262 (Bankr. D. Vt.
15 1999). The bankruptcy court considered it significant that all
16 but one of the Circuit court cases relied on by Merchants Bank
17 involved the statutory right of redemption following a
18 foreclosure by sale. See id. at 264. The bankruptcy court found
19 dispositive the "distinction between a mortgagor's equity of
20 redemption, which is a property interest that exists prior to the
21 passing of title, and a right, available only in those states
22 where statutes so provide, to repurchase the already foreclosed
23 property from a buyer following a foreclosure sale." Id.
24 (emphasis added). Relying on the prior decisions of bankruptcy

1 courts in Vermont and Connecticut,⁵ the two states in which
2 strict foreclosure (rather than foreclosure by sale) is the usual
3 method of foreclosure, rather than the decisions of the Sixth,
4 Seventh, and Eighth Circuits, the bankruptcy court held that the
5 equity of redemption period is stayed by 11 U.S.C. § 362 and
6 denied Merchants Bank's motion. Id. at 264-65. Merchants Bank
7 appealed.

8 On May 17, 2000, Frazer's Chapter 11 case was converted to a
9 Chapter 7 case, and John R. Canney, III, Esq. was appointed
10 trustee of the estate.

11 On August 8, 2000, the district court issued its opinion and
12 order reversing the bankruptcy court. See Merchants Bank, 253
13 B.R. 513. The district court found persuasive the case law in
14 other circuits analyzing the issue of how § 108(b) and § 362(a)
15 interrelate and concluding that the timing provisions of § 108(b)
16 take precedence over § 362(a) tolling where no affirmative act
17 triggering the indefinite stay provision of § 362 may be found.
18 See id. at 516-17. The district court noted that the Vermont
19 cases that take a contrary approach rely primarily on the
20 legislative history of § 362(a) without reference to 12 VT. STAT.
21 ANN. §§ 4529-4530 and determined that the issue could be
22 "resolved by the procedural requirements of Vermont law." Id. at

23 ⁵ E.g., In re Shea Realty, Inc., 21 B.R. 790, 792 (Bankr. D.
24 Vt. 1982); In re L.H. & A. Realty Co., 57 B.R. 265, 268
25 (Bankr. D. Vt. 1986); In re Amant, 41 B.R. 156, 163 (Bankr.
26 D. Conn. 1984).

1 517. The district court recognized that although "the passage of
2 full title, both legal and equitable, to the mortgagee, not under
3 a decree of Judicial sale, passes after the recording of the
4 decree in foreclosure in the appropriate city or town clerk's
5 office and the expiration of the redemption date(s) specified in
6 the decree of foreclosure," id. at 517-18 (quoting L.H. & A., 57
7 B.R. at 267), "this affirmative act is only required on the part
8 of the foreclosing mortgag[ee] prior to obtaining title when
9 there are 'subsequent purchasers, mortgag[ees] or attaching
10 creditors.'" Id. at 518 (quoting 12 VT. STAT. ANN. § 4530). The
11 court therefore concluded that, with respect to the mortgagor,
12 title passes without reference to 12 VT. STAT. ANN. § 4529, and
13 thus "no additional act is required in the state of Vermont which
14 would trigger the indefinite stay of 362(a)." Id. at 518.

15 Additionally, the court reasoned that, while all debtors are
16 generally protected under the indefinite stay of § 362(a), "that
17 protection is limited for those who had pre-existing agreements
18 to pay by a particular date under § 108(b)." Id. at 519.
19 Consequently, the district court followed the direction of the
20 Sixth, Seventh, and Eighth Circuits and held that the indefinite
21 stay provided for in § 362(a) is superseded by the timing
22 provisions of § 108(b). Id. This appeal ensued.

23 II. DISCUSSION

24 This appeal requires us to analyze the intersection of
25 federal bankruptcy law with Vermont strict foreclosure law in

1 order to address the following questions: (1) whether the
2 automatic stay provisions of 11 U.S.C. § 362(a) or the time
3 limitations of 11 U.S.C. § 108(b) apply when a mortgagor files
4 for bankruptcy during the equity of redemption period following
5 entry of judgment in a Vermont strict foreclosure action; and (2)
6 if the automatic stay provisions do not toll the equity of
7 redemption period, whether those provisions toll either the
8 recording of the certificate of non-redemption or the issuance of
9 the writ of possession.

10 A. Vermont Strict Foreclosure Law

11 Before wading into federal bankruptcy law, a brief
12 explanation of the Vermont strict foreclosure law is warranted.⁶
13 "Strict foreclosure is the normal method of foreclosure only in
14 Connecticut and Vermont.'" In re Frazer, 238 B.R. 262, 263 n.3
15 (Bankr. D. Vt. 1999) (quoting Baxter Dunaway, The Law of
16 Distressed Real Estate: Foreclosure, Workouts, Procedures § 12.16
17 (1999)), rev'd, 253 B.R. 573 (D. Vt. 2000). In Vermont, a
18 mortgage conveys legal title to the mortgagee at the time the
19 mortgage is granted. See Mitchell v. Aldrich, 163 A.2d 833, 837-
20 38 (Vt. 1960); Pierce v. Brown, 24 Vt. 165 (1852). "[O]nce the

21 ⁶ "Strict foreclosure does not involve a foreclosure sale.
22 Upon the borrower's default, the court will normally set a
23 time period in which the borrower may pay off or redeem the
24 mortgage debt. If the borrower fails to do so in the
25 allotted time, the lender is given an immediate right to
26 possession of the property." Baxter Dunaway, The Law of
27 Distressed Real Estate: Foreclosure, Workouts, Procedures §
28 12.16 (1999), quoted in Frazer, 238 B.R. at 263 n.3.

1 condition of a mortgage is broken, 'the mortgagee becomes at law
2 the absolute owner of the property and is entitled to immediate
3 possession' " Rassman v. Am. Fid. Co., 460 A.2d 461, 463
4 (Vt. 1983) (quoting Kelly v. Clement Nat'l Bank, 10 A.2d 201, 202
5 (Vt. 1940)); see also Town of Bristol v. United States, 315
6 F.Supp. 908, 910-11 (D. Vt. 1970) (same, citing cases). A
7 mortgagee may assert its right to possession by peaceable entry,⁷
8 by eviction,⁸ or by seeking a foreclosure judgment in county
9 court.⁹

10 Through a foreclosure judgment, a mortgagee formally takes
11 "possession" of the property. A foreclosure judgment vests full
12 legal and equitable title to the property with the mortgagee,
13 subject only to the mortgagor's "equity of redemption," which is
14 a contingent equitable interest in the property, and limited
15 rights to possession, rents, and profits of the property during
16 the period of redemption. See Stowe Ctr., Inc. v. Burlington
17 Sav. Bank, 451 A.2d 1114, 1115 (Vt. 1982) ("Under Vermont law if
18 no one redeems foreclosed property within the prescribed period,
19 the foreclosing mortgagee, pursuant to the Vermont strict
20 foreclosure procedure, 12 V.S.A. chapter 163, subchapter 6,
21 obtains full and complete title and has the right to sell the

22 ⁷ See, e.g., Fuller v. Eddy, 49 Vt. 11, 12 (1876).

23 ⁸ See, e.g., Hill v. Hill, 7 A. 468 (Vt. 1887); Hooper v.
24 Wilson, 12 Vt. 695 (1839).

25 ⁹ See 12 VT. STAT. ANN. §§ 4523(a), 4526, 4528.

1 property and retain the surplus, if any."); Hooper v. Wilson, 12
2 Vt. 695, 697-98 (1839) ("[I]t is universally allowed that [the
3 mortgagor] is tenant, and therefore no trespasser, until the
4 mortgagee has asserted his right of possession, and then the
5 mortgagor has only the equity of redemption.") (emphasis added);¹⁰
6 Dieffenbach v. Attorney Gen. of Vt., 604 F.2d 187, 192 n.8 (2d
7 Cir. 1979)) ("[U]ntil a foreclosure decree, . . . the mortgagor
8 was the equitable owner of the fee, with legal title vested in
9 the mortgagee only for the protection of his security
10 interest.");¹¹ see also 12 VT. STAT. ANN. § 4528; c.f. Aldrich v.
11 Lincoln Land Corp., 294 A.2d 853, 855-57 (Vt. 1972) (discussing
12 right of redemption and emphasizing that "responsibility for

13 ¹⁰ In Hooper, the court suggested that upon default, the
14 mortgagee has the right to take possession and that (1) if
15 the mortgagee exercises that right before the equity of
16 redemption period lapses (e.g., through eviction
17 proceedings), the mortgagor would be entitled to collect any
18 surplus, i.e., the "rents and profits[] upon the mortgage,"
19 from the mortgagee, but (2) if the mortgagee exercises that
20 right after the equity of redemption period lapses, the
21 mortgagee is entitled to the surplus. Hooper, 12 Vt. at
22 698. See also Hill v. Hill, 7 A. 468 (Vt. 1887) (same).
23 Thus, while the mortgagee holds legal and equitable title
24 during the redemption period, the mortgagor retains the
25 equity of redemption and limited rights to possession,
26 rents, and profits of the property during that period.

27 ¹¹ We disagree with the district court's suggestion that title
28 does not pass until a certificate of non-redemption is
29 recorded. Merchants Bank, 253 B.R. at 517-18 (relying on 12
30 VT. STAT. ANN. § 4530). This procedural requirement allows
31 the mortgagee to perfect title with respect to "subsequent
32 purchasers, mortgag[ees] or attaching creditors" but has no
33 effect whatsoever on the mortgagor. 12 VT. STAT. ANN. §
34 4530. See infra section C.1.

1 complying with the conditions of redemption are on the one
2 seeking the exercise of the right"). Redemption (or satisfaction
3 of the foreclosure judgment) is the operative contingency:
4 Curing the default within the time period specified in the
5 foreclosure judgment vests equitable title with the mortgagor;
6 failure to do so, however, extinguishes the contingent interest.
7 See, e.g., Stowe Center, 451 A.2d at 1115; Dieffenbach, 604 F.2d
8 at 192, 192 n.8; Aldrich, 130 Vt. at 376-78.

9 In this case, Merchants Bank effectively asserted its
10 rights, including its right of possession, and obtained a
11 Foreclosure Judgment in its favor in the Windsor Superior Court
12 on September 11, 1998. Accordingly, as of that date, Frazer's
13 only interest in the property was the equity of redemption. See,
14 e.g., Hooper, 12 Vt. at 698; Dieffenbach, 604 F.2d at 192 n.8.
15 As the decree makes clear, the equity of redemption is
16 irreversibly "foreclosed and forever barred" if the mortgagor
17 fails to redeem within the period set forth in the decree.

18 In analyzing whether §§ 362(a) or 108(b) apply in this case,
19 we must keep in mind that "[p]roperty interests are created and
20 defined by state law." Butner v. United States, 440 U.S. 48, 55
21 (1979). Because Frazer sought bankruptcy protection after the
22 foreclosure judgment had been filed but during the redemption
23 period specified in that judgment, his equity of redemption, a
24 contingent equitable interest in the property subject to
25 extinguishment absent redemption within the allotted time, became

1 "property of the estate" within the meaning of federal bankruptcy
2 laws. See 11 U.S.C. § 541(a).¹²

3 B. Tolling of the Period of Redemption

4 We begin our analysis of federal bankruptcy law with the
5 statutory text. Section 362(a) provides, in pertinent part:

6 (a) Except as provided in subsection (b) of
7 this section, a petition filed under section
8 301, 302, or 303 of this title, or an
9 application filed under section 5(a)(3) of
10 the Securities Investor Protection Act of
11 1970 operates as a stay, applicable to all
12 entities, of-

13 (1) the commencement or continuation,
14 including the issuance or employment of
15 process, of a judicial, administrative, or
16 other action or proceeding against the debtor
17 that was or could have been commenced before
18 the commencement of the case under this
19 title, or to recover a claim against the
20 debtor that arose before the commencement of
21 the case under this title;

22 (2) the enforcement, against the debtor
23 or against property of the estate, of a
24 judgment obtained before the commencement of
25 the case under this title;

26 ¹² Section 541 of the Bankruptcy Code defines "property of the
27 estate" as follows:

28 (a) The commencement of a case under section
29 301, 302, or 303 of this title creates an
30 estate. Such estate is comprised of all the
31 following property, wherever located and by
32 whomever held:

33 (1) Except as provided in subsections (b) and
34 (c)(2) of this section, all legal or
35 equitable interests of the debtor in property
36 as of the commencement of the case.

37 11 U.S.C. § 541(a)(1).

1 (3) any act to obtain possession of
2 property of the estate or of property from
3 the estate or to exercise control over
4 property of the estate;

5 (4) any act to create, perfect, or
6 enforce any lien against property of the
7 estate;

8 (5) any act to create, perfect, or
9 enforce against property of the debtor any
10 lien to the extent that such lien secures a
11 claim that arose before the commencement of
12 the case under this title

13 11 U.S.C. § 362(a). Section 108(b) provides, in pertinent part:

14 (b) Except as provided in subsection (a) of
15 this section, if applicable nonbankruptcy
16 law, an order entered in a nonbankruptcy
17 proceeding, or an agreement fixes a period
18 within which the debtor . . . may file any
19 pleading, demand, notice, or proof of claim
20 or loss, cure a default, or perform any other
21 similar act, and such period has not expired
22 before the date of the filing of the
23 petition, the trustee may only file, cure, or
24 perform, as the case may be, before the later
25 of-

26 (1) the end of such period, including
27 any suspension of such period occurring on or
28 after the commencement of the case; or

29 (2) 60 days after the order for relief.

30 11 U.S.C. § 108(b). The situation presented by this case seems
31 to fall within the scope of both provisions. On one hand, the
32 foreclosure judgment in favor of the mortgagee resulted from a
33 pre-petition "proceeding against the debtor" and left the
34 mortgagor with a right to redeem within a specified timeframe.
35 This right is "property of the estate" within the meaning of

1 § 541, suggesting that § 362(a) may apply. On the other hand,
2 the foreclosure judgment is "an order entered in a nonbankruptcy
3 proceeding [that] fixes a period within which the debtor . . .
4 may . . . cure a default," suggesting that § 108(b) may apply.

5 Neither the statutory text nor the legislative history of
6 § 362(a)¹³ and § 108(b)¹⁴ directly addresses how these provisions
7 relate to one another. Nonetheless, Vermont bankruptcy courts
8 have consistently held that the automatic stay provisions of 11
9 U.S.C. § 362(a) toll the duration of a debtor's equity of
10 redemption period. See In re Shea Realty, Inc., 21 B.R. 790, 793
11 (Bankr. D.Vt. 1982); In re L.H. & A. Realty Co., 57 B.R. 265, 268
12 (Bankr. D.Vt. 1986).

13 In contrast, three Circuit courts have considered the
14 interrelation between the provisions at issue here and determined
15 that the timing provisions of § 108(b) take precedence over §
16 362(a) tolling. See In re Tynan, 773 F.2d 177 (7th Cir. 1985);
17 In re Glenn, 760 F.2d 1428 (6th Cir. 1985); Johnson v. First
18 Nat'l Bank, 719 F.2d 270 (8th Cir. 1983); see also In re Maanum,
19 828 F.2d 459, 460 (8th Cir. 1987) ("[R]egardless of the type of
20 property interest affected, '§ 362(a) cannot be read to stay the
21 mere running of a statutory time period.' Section

22 ¹³ See 11 U.S.C. § 362(a) and H.R. Rept. No.95-595, at 340
23 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97.

24 ¹⁴ See 11 U.S.C. § 108(b) and H.R. Rept. No.95-595, at 318
25 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6275.

1 108(b) and section 362(a) are mutually exclusive; anything
2 temporarily stayed under the specific language of section 108(b)
3 is not indefinitely stayed by the more general language of
4 section 362(a).") (quoting Johnson, 719 F.2d at 276); c.f.
5 Justice v. Valley Nat'l Bank, 849 F.2d 1078, 1082 (8th Cir. 1988)
6 (applying Johnson rationale and holding that § 108(b) trumps §
7 1222(b)(2)). Following the reasoning of Johnson and Maanum, the
8 Eighth Circuit determined that § 108(b), rather than § 362(a),
9 governed in a strict foreclosure proceeding, where a South Dakota
10 state court had entered a foreclosure judgment declaring that the
11 Carvers had defaulted on a contract for deed they had entered
12 into pertaining to certain real estate in South Dakota and
13 specifying the conditions for redemption. See In re Carver, 828
14 F.2d 463, 464 (8th Cir. 1987).

15 The seminal case on the applicability of § 362(a) and §
16 108(b) to a statutory redemption period following a mortgage
17 foreclosure was Bank of Commonwealth v. Bevan, 13 B.R. 989 (E.D.
18 Mich. 1981).¹⁵ In that case, the mortgagee and purchaser
19 appealed an order of the bankruptcy court staying the statutory
20 redemption period following a foreclosure sale of the debtor's
21 residential property. Id. at 990. The district court noted

22 ¹⁵ The Sixth and Eighth Circuits explicitly relied on the
23 reasoning of Bevan in Glenn and Johnson. The Seventh
24 Circuit indirectly relied on Bevan as well. In Tynan, the
25 Seventh Circuit relied on the Eighth Circuit's decision in
26 Johnson, which in turn discussed and relied on Bevan. See
27 Tynan, 773 F.2d at 179; Johnson, 719 F.2d at 278 & n.12.

1 that, "[w]hile the nature and extent of the debtor's interest in
2 real property is determined by application of state law, the
3 Bankruptcy Code defines those interests in property which become
4 'property of the estate' and hence within the jurisdiction of the
5 bankruptcy court." Id. at 990-91 (citing 4 Collier on Bankruptcy
6 ¶ 541.07(1) (15th ed. 1980)).¹⁶ Accordingly, the Bevan court
7 concluded that the "right of redemption created under state law
8 generally passes into the estate of the debtor if the period of
9 redemption has not expired at the time the petition is filed."
10 Id. at 991 (citing 4 Collier on Bankruptcy, ¶ 541.07(3) (15th ed.
11 1980)). We agree.

12 The Bevan court concluded that "[u]nder the language of §
13 362(a), an automatic stay applies to 'acts,' 'proceedings' and
14 their 'continuation,' and 'enforcement' of judgments against the
15 debtor or property of the estate, and does not effect [sic] the
16 running of specific time periods unlike § 108 which speaks
17 explicitly to that issue." Id. at 993. The Bevan Court further
18 reasoned that:

19 An interpretation of § 362(a) as an
20 indefinite stay of the statutory period of
21 redemption would render § 108(b) superfluous.
22 If § 362(a) automatically stays the running
23 of the statutory right to redeem until the
24 stay is lifted pursuant to § 362(c) or (d),
25 the pertinent time allotments of § 108(b) are
26 completely extraneous as statutory time
27 periods designed to control the trustee's
28 activity. Moreover, if § 362(a) is

29 ¹⁶ See 11 U.S.C. § 541(a), quoted supra note 12.

1 interpreted to provide for the automatic stay
2 of time periods for an indefinite amount of
3 time, then subsections (a) and (b) of § 108,
4 which define minimum and maximum time periods
5 for the trustee to act, directly conflict
6 with § 362(a).

7 Id. at 994. The Bevan court noted that although § 362 would give
8 the debtor greater protection, "where one section of the
9 Bankruptcy Code explicitly governs an issue, another section
10 should not be interpreted to cause an irreconcilable conflict,"
11 and thus held that § 108 controls the period of time a trustee
12 has to redeem the debtor's property. See id.

13 We agree with the analysis in Bevan and thus join our sister
14 Circuits in holding that § 108(b), not § 362(a), governs the
15 tolling of a period of equitable redemption. The automatic stay
16 prevents only certain affirmative acts taken by a creditor, and
17 the running of time is not one of those acts. Redemption itself
18 may be an affirmative act, but it is one that the mortgagor or
19 Trustee must take to protect the equity of redemption.

20 Therefore, we hold that the period of equitable redemption
21 was not stayed when Frazer filed a Chapter 13 bankruptcy petition
22 on September 14, 1998, although it was extended by section 108(b)
23 by 60 days after filing of the petition, i.e., until November 13,
24 1998. Consequently, the equity of redemption was foreclosed when
25 the extended period lapsed without redemption by Frazer or the
26 Trustee. Under Vermont strict foreclosure law, the equity of
27 redemption extinguished completely; full title, both legal and

1 equitable, vested automatically with the mortgagee. See supra
2 II.A. Thus, having failed to redeem during the period of
3 equitable redemption, neither the mortgagor nor the Trustee has a
4 legally cognizable right or interest in the property that
5 justifies encumbrance by federal bankruptcy law.

6 C. Other Local Procedures

7 Appellant argues that even if the period of equitable
8 redemption is not stayed, § 362 stays local procedures that a
9 mortgagee must invoke to perfect its interest in the property
10 (i.e., record a certificate of non-redemption) and to enter the
11 property and obtain possession (i.e., execution of a writ of
12 possession). We disagree.

13 1. Recording the Certificate of Non-Redemption

14 Under Vermont law, a mortgagee must record a certificate of
15 non-redemption to perfect its interest against "subsequent
16 purchasers, mortgagers or attaching creditors." See 12 VT. STAT.
17 ANN. §§ 4529, 4530; see also Merchants Bank, 253 B.R. at 518. A
18 mortgagee's ability to record a certificate of non-redemption is
19 contingent upon the mortgagor's failure to redeem within the
20 allotted time. See 12 VT. STAT. ANN. § 4529. Once the redemption
21 period lapses, a mortgagee has 30 days to record a certificate of
22 non-redemption. See id. If a mortgagee does not do so,
23 "subsequent purchasers, mortgagees or attaching creditors" may
24 redeem the property as if the "time of redemption had not
25 expired." 12 VT. STAT. ANN. §§ 4529, 4530. It is quite clear

1 that under Vermont law, the act of recording a certificate of
2 non-redemption in no way affects the mortgagor, whose equity of
3 redemption extinguishes automatically when the redemption period
4 lapses. Recording simply perfects title against "subsequent
5 purchasers, mortgagees or attaching creditors." See id. § 4530
6 ("Such foreclosure shall not transfer the title to such lands as
7 against subsequent purchasers, mortgagees or attaching
8 creditors," unless the certificate is recorded on time) (emphasis
9 added).

10 Appellant argues that filing the certificate of non-
11 redemption affects its rights as "a subsequent attaching
12 creditor." For the reasons discussed below, we disagree both
13 with Appellant's premise (that it qualifies as "a subsequent
14 attaching creditor") and its conclusion (that such status would
15 entitle it to stay the filing of the certificate of non-
16 redemption). Appellant contends that pursuant to federal
17 bankruptcy law (1) a debtor-in-possession stands in the shoes of
18 a trustee, see 11 U.S.C. § 1107(a); (2) a trustee may, inter alia,
19 stand in the shoes of a creditor that issued credit at the time
20 the bankruptcy petition was filed, see 11 U.S.C. § 544(a)(1); and
21 (3) appellant "obtain[ed], at such time and with respect to such
22 credit, a judicial lien on all property on which a creditor on a
23 simple contract could have obtained such a judicial lien"
24 Id. While this argument seems to support appellant's claim that
25 a debtor may be deemed a "subsequent attaching creditor" by

1 operation of § 544 of the bankruptcy code, the argument distorts
2 the purpose of the "strong arm" powers under § 544. "The purpose
3 of the 'strong arm clause' is to cut off unperfected security
4 interests, secret liens and undisclosed prepetition claims
5 against the debtor's property as of the commencement of the
6 case." Collier on Bankruptcy ¶ 544.03 (15th ed. rev. 2001).
7 Given that Merchants Bank's mortgage is neither unperfected,
8 secret, nor undisclosed, we find § 544(a)(1) inapplicable in this
9 case.

10 Assuming arguendo that appellant is "a subsequent attaching
11 creditor," we nonetheless conclude that appellant's argument that
12 the filing of the certificate of non-redemption is stayed by §
13 362 fails for the following reasons. First, under Vermont law,
14 which cabins the creditor rights that a trustee (and a debtor-in-
15 possession standing in the shoes of a trustee) may exercise, the
16 mortgagee has the right to perfect its interest vis-a-vis
17 "subsequent purchasers, mortgagees or attaching creditors." 12
18 VT. STAT. ANN. §§ 4529, 4530. A subsequent attaching creditor
19 simply has no right to redeem unless and until a mortgagee fails
20 to record the certificate on time. Id. Second, as discussed
21 above, the mortgagee automatically perfects its interest vis-a-
22 vis the mortgagor because strict foreclosure leaves the mortgagor
23 without any right or interest in the property. Finally, to
24 exercise "strong arm" powers under § 544, a trustee must file an
25 adversary proceeding, see Fed. R. Bankr. P. 7001 et seq., and it

1 does not appear based on the record before us that any such
2 proceeding was initiated.

3 Therefore, we hold that the act of recording the certificate
4 of non-redemption is not barred by § 362.¹⁷

5 2. The Writ of Possession

6 Under Vermont law, when a mortgagor fails to redeem within
7 the allotted time and full title vests with the mortgagee, the
8 mortgagee is entitled as of right to obtain a writ of possession
9 from the clerk of the court in order to secure the assistance of
10 the sheriff in removing any occupants from the property. See
11 Vermont Tenants, Inc. v. Vermont Hous. Fin. Agency, 742 A.2d 745,
12 748 (Vt. 1999) ("Under § 4528, the mortgagee need not bring a
13 separate ejectment action to evict the tenant. The clerk can
14 issue a writ of possession based on the foreclosure judgment and
15 the failure to redeem, and the writ allows removal of any
16 tenants, as well as the mortgagor."); Dieffenbach v. Attorney
17 Gen. of Vt., 604 F.2d 187, 194 (2d Cir. 1979) ("[T]o obtain
18 possession after the equity of redemption has expired the
19 creditor must obtain from the clerk of the court a writ of

20 ¹⁷ In reaching our conclusion, we need not, and therefore do
21 not, decide whether filing the certificate of non-redemption
22 constitutes a ministerial or affirmative act. See In re
23 Carver, 828 F.2d at 463-64 (holding that certification of
24 non-redemption by the clerk of the court, where the debtor
25 failed to comply with a contract for deed within a
26 redemption period, was not an affirmative act required to
27 complete the running of the redemption period but was
28 instead merely a ministerial act not stayed by § 362).

1 possession which the sheriff must execute."). According to
2 statute, a writ of possession obtained after strict foreclosure
3 "shall have the same force and effect and be executed in the same
4 manner as similar writs issued after judgment by a court of law
5 in ejectment proceedings." 12 VT. STAT. ANN. § 4528. Despite this
6 language, there is (at least) one crucial distinction between
7 such writs: In an ejectment proceeding, a debtor may redeem and
8 thereby avoid ejectment if the clerk of court has not issued the
9 writ of possession; issuance of the writ in an ejectment
10 proceeding extinguishes the debtor's right to redeem.¹⁸ By
11 contrast, in a strict foreclosure proceeding, a debtor may not
12 redeem after the period of redemption lapses, regardless of
13 whether the clerk of court has issued the writ of possession;
14 issuance of the writ has no effect whatsoever on the debtor's
15 rights because, as discussed above, once the redemption period
16 has lapsed, the debtor's equity of redemption extinguishes and
17 the debtor has no legally cognizable right or interest in the

18 ¹⁸ See Tucker v. Bushway, 689 A.2d 426, 427 (Vt. 1996) (the
19 court discontinued an eviction action where the tenants
20 tendered their rent after judgment but before the clerk
21 issued the writ of possession); Town of Corinth v. Locke, 20
22 A. 809 (Vt. 1890) (writ of possession put legal possession
23 of premises in the orator); see also In re Stoltz, 197 F.3d
24 625, 631 (2d Cir. 1999) (holding that under Vermont law, a
25 tenant could assume lease after the court entered the
26 judgment of possession because the writ of possession had
27 not been entered); Couture v. Burlington Hous. Auth. (In re
28 Couture), 225 B.R. 58, 62 (D. Vt. 1998) (concluding that the
29 Vermont Supreme Court would find that the Chapter 7 debtors
30 retained possessory interest in their apartment until
31 execution of the writ of possession).

1 property. See supra II.A. Accordingly, we hold that the
2 issuance of the writ of possession after strict foreclosure is a
3 ministerial act that is not tolled by the automatic stay
4 provision.

5 We conclude that appellant's remaining arguments are without
6 merit.

7 III. CONCLUSION

8 We affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

98-11881

DATE: March 7, 2002

Re: In Re: Canney

Docket No(s) : 00-5071

Dear Counsel:

The court has issued its opinion in the above-entitled case, and the decision of the district court has been

AFFIRMED

Judgment was entered on 03/07/02, and a mandate will later issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

A copy of the opinion in manuscript form is enclosed herewith, and you will receive a mailed copy of the printed slip opinion in due course. Additional copies of the slip opinion are available from this office in accordance with Local Rule 0.17 (8).

If you are required by Rule 39(c) of the Federal Rules of Appellate Procedure to file an itemized and verified bill of cost, you are reminded to do so, with proof of service, within 14 days after entry of judgment.

Very truly yours,

ROSEANN B. MACKECHNIE, Clerk

By: 
Donnell Bolden
Deputy Clerk, USCA

FILED
2002 MAR 11 AM 11 38
BANKRUPTCY COURT
DISTRICT OF VERMONT