No. 19-____

IN THE SUPREME COURT OF THE UNITED STATES

SHARON D. ROSE,
Applicant,

v.

SELECT PORTFOLIO SERVICING, INCORPORATED;
US BANCORP,
Respondents.

From the Fifth Circuit United States Court of Appeals

EMERGENCY RULE 23 APPLICATION FOR STAY OF ENFORCEMENT OF MONEY JUDGMENT

J. Patrick Sutton
1505 W. 6th Street
Austin, Texas 78703
Telephone: (512) 417-5903
jpatricksutton@jpatricksuttonlaw.com

Attorney for Applicant

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

To: Justice Samuel A. Alito, Jr., Associate Justice and Justice for the Fifth Circuit

Applicant and non-prevailing party below, ShaRon D. Rose, asks that enforcement of the underlying judgment be stayed pending the disposition of this case in this court, subject to Rose's posting of security.

The question presented is this: If a contest over title to real property turns solely on an important issue of federal bankruptcy law over which the circuits have split, is it fair for the bank which prevailed in the lower courts to execute on the judgment by selling the property at foreclosure before this court has resolved the split?

A. Rose has satisfied the procedural prerequisites of Supreme Court Rule 23.

A foreclosure sale of the subject real property is set for January 7, 2019. Rose requests stay relief in this court after being denied such relief in both courts below.

The district court entered money judgment of $278,592.89 for Respondents ("Bank") on June 11, 2019.[1] The judgment permitted

[1] **App. A** (Civ. Action No. 1:18-cv-00491-LY, Doc. 43).

the Bank to foreclose on the real property whose title is being contested.

After the appeal was briefed, the Bank began enforcement proceedings on October 4, 2019.[2] Rose asked the court of appeals to stay enforcement of the judgment, but the motion was denied on October 24, 2019.[3] The court of appeals shortly thereafter affirmed the district court on December 10, 2019.[4] Foreclosure got formally set for January 7, 2020.

Rose asked the district court to stay enforcement subject to her posting security of $1,441 monthly, the amount of the loan payment. *See* Sup. Ct. Rule 62(b); 28 U.S.C. § 2101(f).[5] When this was denied on December 23, 2019,[6] Rose sought reconsideration on December 27, 2019, urging additional authority, argument, and

---

[2] **App. B** (Civ. Action No. 1:18-cv-00491-LY, Doc. 46).

[3] **App. C** (Appeal No. 19-50598, Doc. 00515172884).

[4] **App. D** (*Rose v. Select Portfolio Servicing, Inc.*, No. 19-50598, 2019 WL 6710177 (5th Cir. Dec. 10, 2019) (per curiam)).

[5] Civ. Action No. 1:18-cv-00491-LY, Doc. 47.

[6] **App. E** (Civ. Action No. 1:18-cv-00491-LY, Doc. 50).

security.[7] The district court denied reconsideration on December 30, 2019.[8]

B. Title to Rose's house hinges on an unresolved issue of federal bankruptcy law.

Rose filed suit to invalidate the Bank's mortgage lien owing to the expiration of a Texas four-year statute of limitations on foreclosure, including tolling days. The number of tolling days forms the heart of the dispute. The courts are split over an issue of federal bankruptcy law which determines the number of tolling days in this case. *Compare Rose,* 2019 WL 6710177 (11 U.S.C. § 362(c)(3)(A)'s curtailment of bankruptcy stay is narrow)*, with In re Smith*, 910 F.3d 576 (1st Cir. 2018) (11 U.S.C. § 362(c)(3)(A)'s curtailment of bankruptcy stay is broad).

After Rose filed her lawsuit, the First Circuit became the first circuit to decide the bankruptcy issue. Had the Fifth Circuit simply agreed with the First Circuit's lengthy analysis, Rose would have prevailed, and the Bank would have no lien to foreclose. In the event, the Fifth Circuit, acknowledging that the one issue was

[7] Civ. Action No. 1:18-cv-00491-LY, Doc. 51.

[8] **App. F** (Civ. Action No. 1:18-cv-00491-LY, Doc. 54).

dispositive, agreed summarily with courts which have gone the other way.[9]

The attached declaration under penalty of perjury establishes as follows. Rose lives on disability income plus rental income from the subject property. The rental income gets devoted to legal fees for this case. The home is special and unique to Rose, who lived in it when married, made sure she would get it back if her ex-husband failed to pay the mortgage, and whose son lives in it.

The Bank has paid the property taxes and insurance for many years while failing to exercise its foreclosure rights. Rose has now had to notice her tenants (including her son) to vacate their home, but Rose intends to keep the home in repair should this motion be granted. Finally, Rose has retained both undersigned counsel and seasoned Supreme Court counsel for proceedings in this court; she intends to seek review.

[9] There are numerous court opinions which analyze the bankruptcy issue with greater or lesser exhaustiveness, so the issue is well teed-up for determination on the present circuit split.

C. A stay of enforcement is warranted.

The 2018 amendments to the federal rules of civil procedure (Rule 62) and appellate procedure (Rule 8) indicate that "stays pending appeal should be the norm in mortgage foreclosure appeals." *Deutsche Bank Nat'l Tr. Co. as Tr. for GSAA Home Equity Tr. 2006-18 v. Cornish*, 759 F. App'x 503, 504 (7th Cir. 2019). That is because (1) the lender has the real property as the security it bargained for and (2) residential borrowers suffer irreparable damage during the appeal. *Id*. The lender's risk is harm to the collateral or dissipation of the borrower's assets, *id*., but both can be addressed with an order requiring the borrower to care for the home and pay any taxes and insurance, *id*. at 509-510.

In this case, Rose intends to preserve the house's condition, and, as is usual in these kinds of cases, the Bank has been paying the property taxes and insurance while taking no action for many years to foreclose.[10] Monthly payments by Rose of $1,441 during appeal would defray future property taxes and insurance.

[10] Civ. Action No. 1:18-cv-00491-LY, Doc. 53 (¶ 3).

Even under the traditional standards, however, a stay of enforcement is warranted. *See id.* at 510-511 (dissent notes former standards).

Rose is **likely to succeed on the merits**. The First Circuit's decision in *In re Smith* is not only exhaustive, but also (1) aligns with Congress's obvious intent in 2005 to thwart serial bankruptcy filings, and (2) adopts the position of creditors such as the respondents SLS and US Bancorp in this case, which have argued for the same result in other cases. *See*, *e.g.*, *In re Nath*, No. 15-CV-3694 (KMK), 2017 WL 1194735, at *3 (S.D.N.Y. Mar. 31, 2017), *aff'd*, 732 F. App'x 81 (2d Cir. 2018).

Because real property is unique, foreclosure may cause **irreparable harm** to the owner. *See Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 661–62 (9th Cir.1988). Rose fought her husband to get the home back following divorce, needs the rental income, and provides her son with a home there. Given her straightened financial condition and disability, loss of the home would be grievous and irreparable.

The Bank will **not be injured**. Its collateral will still be there. Taxes and insurance are current. Rose will be paying every month in a sum ample to pay them going forward. The Bank did not attempt to foreclose nonjudicially[11] after Rose filed suit until well into the appeal process, even after Rose failed to obtain an injunction at the outset of the case.

The **public interest** is served by preventing a sale which may result in later, additional litigation to set the sale aside, possibly involving a purchaser other than the Bank,[12] should Rose prevail. *See generally Bonilla v. Roberson*, 918 S.W.2d 17, 21–22 (Tex. App. – Corpus Christi 1996, no writ) ("to challenge a sale's validity, the proper action is to bring a cause of action to set aside the sale and cancel the trustee's deed").

---

[11] The Bank has long had the means to foreclose without any court order or judgment under Texas contractual foreclosure law. The Bank decided, after Rose filed suit, to forego its nonjudicial remedies and instead seek a judgment for foreclosure under Texas law, a process which entails judicial foreclosure through a sale by a sheriff or constable.

[12] Rose has filed a document in the county real property records placing potential buyers on notice of her suit to quiet title. It is possible the Bank itself would buy back the property, a common occurrence in such situations. *See*, *e.g.*, *Cornish*, 759 Fed.Appx. at 503 (lender bought property).

CONCLUSION

For the reasons above, ShaRon Rose asks that the judgment be stayed conditioned on Rose's payment monthly of $1,441 in security and preservation of the real property until proceedings in the U.S. Supreme Court are completed. Further, that this motion be accorded emergency consideration given the time constraints and the pending notice of a January 7, 2020 U.S. Marshall sale.

Respectfully submitted,

/s/ J. Patrick Sutton
J. Patrick Sutton
1505 W. 6th Street
Austin, Texas 78703
(512) 417-5903
jpatricksutton@
jpatricksuttonlaw.com
Counsel for Applicant

Dated: December 31, 2019.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Emergency Application upon counsel listed below, by email and postage prepaid first-class U.S. mail, on December 31, 2019.

Michael F. Hord, Jr.
mhord@hirschwest.com
Michael D. Conner
mconner@hirschwest.com
Hirsch & Westheimer
1415 Louisiana, 36th Floor
Houston, Texas 77002

/s/ J. Patrick Sutton
J. Patrick Sutton
1505 W. 6th Street
Austin, Texas 78703
(512) 417-5903
jpatricksutton@
jpatricksuttonlaw.com
Counsel for Applicant

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SHARON D. ROSE Plaintiff	§	
V .	§	C.A. NO. 1:18-cv-00491-LY
SELECT PORTFOLIO SERVICING INC. AND US BANCORP Defendants	§	

FINAL JUDGMENT AND ORDER OF FORECLOSURE

Defendants, Select Portfolio Servicing, Inc. ("**SPS**") and U.S. Bank, N.A., successor trustee to LaSalle Bank National Association, on behalf of the holders of Bear Stearns Asset Backed Securities I Trust 2007-HE3, Asset-Backed Certificates Series 2007-HE3's (improperly named as US Bancorp) ("**Trustee**") (collectively referred to herein as "**Defendants**") Motion for Summary Judgment (the "**Motion**") is **GRANTED**.

It is therefore **ORDERED** that claims of Plaintiff Sharon D. Rose ("**Plaintiff**") against Defendants are hereby dismissed with prejudice. It is further

It is therefore **ORDERED, DECLARED and DECREED** that, Trustee is entitled to a judgment for the judicial foreclosure of the real property collateral located at 2045 Rachel Lane, Round Rock, Texas 78664 (the "**Property**") as more particularly described in the subject Deed of recorded in the real property records of Williamson County, Texas as Document No. 2007083897 (the "**Deed of Trust**") and described to-wit as:

> **Lot 34, Block D, the Enclave of Towne Centre Phase 1, a subdivision in Williamson County, Texas, according to the map or plat thereof recorded in Cabinet Z, Slide 30, plat records of Williamson County, Texas.**

It is further **ORDERED, DECLARED AND DECREED** that Trustee is entitled to the issuance of an order of sale for the Property to be sold as if under an execution of satisfaction of the cost of sale including the attorney fees incurred by Trustee herein and the amounts due and to become due under that certain Adjustable Rate Balloon Note executed on or about December 4, 2006 (the "**Note**"). This Court directs any marshal, sheriff or constable within the State of Texas to seize and sell the Property same as under execution, in satisfaction of the judgment. Pursuant to Tex. R. Civ. P. 310, this Court orders that Trustee receive possession of the Property and that a marshal, sheriff and/or constable has the appropriate power and/or authorities to remove Plaintiff from possession of the Property pursuant to the Texas Rules of Civil Procedure. It is further

ORDERED, DECLARED AND DECREED and the Court finds that the Note and the lien against the Property evidenced by the Deed of Trust were transferred and assigned to Trustee and that after the requisite notice of default was provided, the Note was accelerated on August 2, 2018, and all outstanding principal and accrued but unpaid interest was declared to be immediately due and payable, and that Plaintiff has failed to pay those amounts. It is further

ORDERED, DECLARED AND DECREED and the Court finds that after allowing all just and lawful offsets, payments, and credits, there remains due and owing under the Note as of February 10, 2019, the outstanding principal balance of $213,550.87, accrued but unpaid interest in the amount of $65,042.03 through February 10, 2019, escrow advances in the amount of $50,815.67, loan level advance balance in the amount of $8,447.87, interest on advances in the amount of $88.61 and additional interest from February 10, 2019 to the date of this judgment calculated at $21.15 per day x 121 days = $ 2,559.15, that all foregoing amounts together with any interest accruing on the unpaid principal balance from and after February 10,

2019 at a per diem or daily rate of $21.15 per day until the balance due under the subject loan is paid are secured by the lien against the Property evidenced by the Deed of Trust, that Trustee is the current "mortgagee" as the term is defined in the Texas Property Code §51.0001(4), and that Trustee is entitled to foreclose on the Property by order allowing foreclosure and through the judgment for judicial foreclosure.

Signed this 11th day of June, 2019.

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WRIT OF EXECUTION

Cause No.: 1:18-cv-00491-LY

SHARON D. ROSE
Plaintiff

vs.

SELECT PORTFOLIO SERVICING INC. AND US BANCORP
Defendants

THE STATE OF TEXAS

To any Sheriff, Constable or any US Marshal within the State of Texas, Greetings:

WHEREAS, before our Honorable United States District Court for the Western District of Texas, Austin Division, in Cause No. 1:18-cv-00491-LY styled *Sharon D. Rose vs. Select Portfolio Servicing Inc. and US Bancorp,* on June 11, 2019, U.S. Bank, NA., successor trustee to LaSalle Bank National Association, on behalf of the holders of Bear Stearns Asset Backed Securities I Trust 2007-HE3, Asset-Backed Certificates Series 2007-HE3 (improperly named as US Bankcorp) obtained Final Judgment and Order of Foreclosure against Sharon D. Rose allowing judicial foreclosure of the property described as:

LOT 34, BLOCK D, THE ENCLAVE OF TOWNE CENTRE PHASE I, A SUBDIVISION IN WILLIAMSON COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN CABINET Z, SLIDES 30, PLAT RECORDS OF WILLIAMSON COUNTY, TEXAS,

commonly known as 2045 Rachel Lane, Round Rock, TX 78664

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, to proceed according to law and seize and sell the above described property as under execution and apply the proceeds thereof to the payment and satisfaction of the aforesaid Final Judgment and Order of Foreclosure in favor of U.S. Bank, et al. Costs are assessed against the party incurring same.

TO SERVING OFFICER:

HEREIN FAIL NOT. Return this writ with your return thereof, on or before 180 days from the date of issuance of this this Writ, to the Clerk of the United States District Court for the Western District of Texas, Austin Division.

FIRST retain your costs and fees for holding said sale.

SECOND, remit the court costs to the Clerk of the United States District Court for the Western District of Texas, Austin Division.

THIRD, remit the payment of the remaining monies received to the proper parties as shown in the Judgment. All in accordance with the statutes of the State of Texas.

GIVEN UNDER MY HAND and seal of said Court at my office in Austin, Texas, this 4th day of October, 2019.

Issued at the request of:
Dominique Varner
Hughes, Watters & Askanase, L.L.P.
1201 Louisiana, 28th Floor
Houston, Texas 77002

Jeannette J. Clack, Clerk
United States District Court for the
Western District of Texas, Austin
Division

Deputy Clerk

US MARSHAL'S RETURN

Came to hand the ___ day of _____ 2019, at _____ o'clock _m, and not executed the ____ day of _____, 2019, in person a true copy of this writ at _____ sheriff, served at _____

I traveled _____ miles in the execution of this writ.

Total Fees: $_____ Serving Writ $_____ Mileage _____ total $_____

Failure to serve writ _____

_____
US Marshal of the Western District of Texas, Austin Division

By: _____(Deputy)

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50598

SHARON D. ROSE,

Plaintiff - Appellant

v.

SELECT PORTFOLIO SERVICING, INCORPORATED; US BANCORP,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas

Before OWEN, Chief Judge, and SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's opposed motion to stay the judgment and writ of execution filed in the district court, pending appeal is DENIED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
December 10, 2019

Lyle W. Cayce
Clerk

No. 19-50598
Summary Calendar

SHARON D. ROSE,

Plaintiff–Appellant,

v.

SELECT PORTFOLIO SERVICING, INCORPORATED; US BANCORP,

Defendants–Appellees.

Appeal from the United States District Court
for the Western District of Texas

Before OWEN, Chief Judge, and SOUTHWICK and WILLETT, Circuit Judges.

PER CURIAM:

The case is about a foreclosure. Plaintiff ShaRon Rose (Rose) sued Select Portfolio Servicing, Inc. (SPS) and US Bank, N.A. (US Bank) (collectively Defendants), asserting a claim to quiet title and separately seeking a declaratory judgment that the statute of limitations had expired on Defendants' power to foreclose on certain real property. The Defendants counterclaimed for judicial foreclosure, relying on various tolling concepts. The district court denied Rose's motion for summary judgment, granted the Defendants' motion for summary judgment, and entered a Final Judgment and Order of Foreclosure. Rose now appeals, challenging the district court's

determination that the statute of limitations had not run on the Defendants' counterclaim for judicial foreclosure. We affirm.

I

In 2005, Rose and her then-husband purchased property with a purchase-money mortgage. The mortgage was eventually assigned to US Bank, with SPS servicing the loan. In 2010, Rose and her husband divorced. Rose's husband was awarded the home, subject to a lien that required him to convey the home to Rose in the event of default. The record indicates that no payment has been made on the loan since March 1, 2011. Although the property was not conveyed to Rose until 2016, she has been actively involved in litigation concerning foreclosure of the property since early 2014.

On October 1, 2013, Defendants sent Rose a Notice of Default regarding the loan and her property. Then, on March 26, 2014, Defendants sent Rose a Notice of Acceleration regarding the loan and property, setting a May 6, 2014 foreclosure sale. On May 5, 2014, Rose sued in Texas state court, asserting various claims relating to the pending foreclosure sale and requesting a TRO. The state court granted the TRO that same day, blocking the May 6th foreclosure sale. After the TRO expired, the Defendants removed the case to federal court. The case was then dismissed with prejudice by stipulation of the parties.

On June 2, 2015, the Defendants sent Rose a second Notice of Acceleration, setting a July 7, 2015 foreclosure sale. On January 4, 2016, Rose filed her first bankruptcy petition. The matter was dismissed on January 28, 2016 because Rose failed to file timely a "Plan and/or Schedules." Over the course of the next three years, the Defendants sent three additional Notices of Acceleration, each setting a new date for the foreclosure sale. Each time, Rose filed for bankruptcy protection just days before the scheduled sale, thwarting Defendants' attempts to foreclosure. According to the parties, the four

bankruptcy proceedings were pending for at least 269 days.

Before her last bankruptcy matter was dismissed, Rose sued to quiet title in state court, claiming that the statute of limitations had expired on Defendants' power to foreclose. Defendants removed under diversity jurisdiction. Then, on September 21, 2018, Defendants counterclaimed for judicial foreclosure. Both parties moved for summary judgment. The district court denied Rose's motion and granted the Defendants' motion, adopting the magistrate judge's report and recommendation that the statute of limitations had not expired on Defendants' power to foreclose. The district court then entered a Final Judgment and Order of Foreclosure in favor of the defendants. Rose appeals the Report and Recommendation, the Order on the Report and Recommendation of the United States Magistrate Judge, and the Final Judgment and Order of Foreclosure.

II

This court reviews a grant of summary judgment de novo.[1] A grant of summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[2] "The evidence and all inferences must be viewed in the light most favorable to the non-movant."[3]

III

Rose's appeal hinges on whether the statute of limitations expired on the Defendants' power to foreclose on her property. Whether the statute of limitations expired turns on the length of Rose's bankruptcy stays. According

---

[1] *Shepherd ex rel. Estate of Shepherd v. City of Shreveport*, 920 F.3d 278, 282 (5th Cir. 2019) (quoting *DeVoss v. Sw. Airlines Co.*, 903 F.3d 487, 490 (5th Cir. 2018)).

[2] FED. R. CIV. P. 56(a).

[3] *Germain v. US Bank Nat'l Ass'n as Tr. for Morgan Stanley Mortgage Loan Tr. 2006-7*, 920 F.3d 269, 272 (5th Cir. 2019) (citing *FDIC v. Dawson*, 4 F.3d 1303, 1306 (5th Cir. 1993)).

to Rose, her status as a repeat filer under the bankruptcy code curtails the stays in this case to 135 days. Under that calculation, the Defendants' claim would be barred. She argues that the district court erred in concluding otherwise.

Under Texas Civil Practice and Remedies Code § 16.035(a), "[a] person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues."[4] Similarly, "[a] sale of real property under a power of sale in a mortgage or deed of trust that creates a real property lien must be made not later than four years after the day the cause of action accrues."[5] After four years from accrual, "the real property lien and a power of sale to enforce the real property lien become void."[6]

Texas common law tolls the statute of limitations during a bankruptcy stay.[7] The federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), however, limits the automatic stay for debtors who have filed for bankruptcy within the past year. Specifically, 11 U.S.C. § 362(c)(3)(A) provides:

> (3) if a single or joint case is filed by or against a debtor who is an individual in a case under Chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than Chapter 7 after dismissal under section 707(b)—
>
> (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on

---

[4] TEX. CIV. PRAC. & REM. CODE § 16.035(a).

[5] TEX. CIV. PRAC. & REM. CODE § 16.035(b).

[6] TEX. CIV. PRAC. & REM. CODE § 16.035(d).

[7] *See HSBC Bank USA, N.A., as Tr. for Merrill Lynch Mortg. Loan v. Crum*, 907 F.3d 199, 204-205 (5th Cir. 2018) (discussing the Texas common law tolling principle); *see also Peterson v. Tex. Commerce Bank-Austin, Nat'l Ass'n*, 844 S.W.2d 291, 293-94 (Tex. App. 1992) (same).

the 30th day after the filing of the later case . . . .

Courts are divided on the proper interpretation of § 362(c)(3)(A) and the import of the phrase "with respect to the debtor."[8] The Fifth Circuit has not addressed the issue. The majority view, adopted by three bankruptcy courts in this circuit,[9] interprets the provision to terminate the stay as to actions against the debtor but not as to actions against the bankruptcy estate.[10] According to the majority, the plain meaning of the provision dictates such an interpretation.[11] The minority view, adopted by the First Circuit as a matter of first impression in the courts of appeals, "reads the provision to terminate the whole stay."[12] According to the minority, the provision is ambiguous; therefore, congressional intent is determinative.[13] After reviewing the legislative history surrounding the provision and the BAPCPA, the minority conclude that Congress intended the provision to terminate the stay in its entirety.[14]

We adopt the majority position, which has already been applied in the district where Rose has repeatedly filed for bankruptcy.[15] Specifically, after reviewing the plain language of the provision and the context of the provision

---

[8] *See In re Smith*, 910 F.3d 576, 581 (1st Cir. 2018) (noting the split); *see also Smith v. Me. Bureau of Revenue Servs.*, 590 B.R. 1, 7 n.1, 9 n.3 (D. Me. 2018).

[9] *In re Gautreaux*, No. 14-10226, 2014 WL 4657433, at *1 (Bankr. E.D. La. Sept. 16, 2014); *In re Williford*, No. 13-31738, 2013 WL 3772840, at *2-3 (Bankr. N.D. Tex. July 17, 2013); *In re Scott–Hood*, 473 B.R. 133, 136-40 (Bankr. W.D. Tex. 2012).

[10] *See, e.g.*, *In re Rinard*, 451 B.R. 12, 18-20 (Bankr. C.D. Cal. 2011).

[11] *See, e.g.*, *In re Holcomb*, 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008) (noting that there is "no ambiguity in the language of the statute"); *In re Williford*, 2013 WL 3772840, at *3 (noting that "the relevant statutory language is clear"); *In re Rinard*, 451 B.R. at 19 (noting that the "plain text of § 362(c)(3)(A) is crystal clear").

[12] *In re Smith*, 910 F.3d at 581; *see also In re Paschal*, 337 B.R. 274, 278-81 (Bankr. E.D.N.C. 2006).

[13] *See, e.g.*, *In re Reswick*, 446 B.R. 362, 371 (B.A.P. 9th Cir. 2011) (resorting to legislative history after determining the language in § 362(c)(3)(A) is ambiguous).

[14] *See, e.g.*, *Smith v. Me. Bureau of Revenue Servs.*, 590 B.R. 1, 9-10 (D. Me. 2018) (discussing how minority view courts examine the legislative history of the BAPCPA).

[15] *See In re Scott–Hood*, 473 B.R. 133, 136-40 (Bankr. W.D. Tex. 2012).

within § 362, we conclude that § 362(c)(3)(A) terminates the stay only with respect to the debtor; it does not terminate the stay with respect to the property of the bankruptcy estate.

We believe the language in § 362(c)(3)(A) is clear. As an initial matter, we note that § 362(c)(3)(A) cannot be read in isolation; it must be read in conjunction with § 362(a), which defines the scope of the automatic stay.[16] As the First Circuit aptly noted in *In re Smith*, § 362(a) "operates as a stay of certain actions in three categories: against the debtor, the debtor's property, and property of the bankruptcy estate."[17] For example, § 362(a)(1) stays actions "against the debtor"; § 362(a)(2) stays "enforcement of a judgment against the debtor or against property of the estate"; and § 362(a)(3) stays "any act to obtain possession of property of the estate or of property from the estate."[18] After recognizing that § 362(a) operates as a stay as to certain actions in three separate categories, the language in § 362(c)(3)(A) becomes clear. In § 362(c)(3)(A), Congress stated that "the stay under [§ 362(a)] . . . shall terminate *with respect to the debtor*."[19] There is no mention of the bankruptcy estate, and we decline to read in such language.

Moreover, "Congress knew how to terminate the entire stay, and in fact did so in the very next section of the statute."[20] Section 362(c)(4)(A)(i)—which discusses debtors who have had two or more cases pending in the prior year—does not include the limiting language in § 362(c)(3)(A).[21] It merely states that

---

[16] *See* 11 U.S.C. § 362(a).

[17] *In re Smith*, 910 F.3d 576, 580 (1st Cir. 2018) (internal quotation marks omitted).

[18] *See In re Alvarez*, 432 B.R. 839, 842 (Bankr. S.D. Cal. 2010) (quoting *In re Jones*, 330 B.R. 360, 363-64 (Bankr. E.D.N.C. 2006)); 11 U.S.C. § 362(a).

[19] *See* 11 U.S.C. § 362(c)(3)(A) (emphasis added).

[20] *In re Williford*, No. 13-31738, 2013 WL 3772840, at *3 (Bankr. N.D. Tex. July 17, 2013).

[21] *See* 11 U.S.C. § 362(c)(4)(A)(i). In its entirety, § 362(c)(4)(A)(i) provides the following

"the stay under subsection (a) shall not go into effect upon the filing of the later case."[22] Accordingly, for debtors falling under § 362(c)(4)(A)(i), the automatic stay is terminated in its entirety.[23] In contrast, Congress chose to use a qualifier in § 362(c)(3)(A). This can only be interpreted as "impl[ying] a limitation upon the scope of the termination of the automatic stay."[24]

Importantly, we are not convinced that this plain meaning interpretation substantially harms creditors.[25] As one court in this circuit aptly noted,[26] creditors may file a motion for relief under § 362(d) if a debtor is abusing the automatic stay.[27] The motion must be heard within 30 days, and it will be granted unless the debtor can offer the creditor adequate protection.[28] Therefore, even if the automatic stay remains in effect with respect to the bankruptcy estate—as is the case under our interpretation of § 362(c)(3)(A)—creditors can still obtain judicial relief under § 362(d) if circumstances demand it.

We recognize that several courts have found § 362(c)(3)(A) somewhat ambiguous.[29] But when read in conjunction with § 362(a) and the other

---

> [I]f a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case . . . .

Id.

[22] *Id.*

[23] *See, e.g.*, *In re Williford*, No. 13-31738, 2013 WL 3772840, at *3 (Bankr. N.D. Tex. July 17, 2013) (discussing § 362(c)(4)(A)(i)'s language in relation to § 362(c)(3)(A)'s).

[24] *Id.*

[25] *See, e.g.*, *In re Scott–Hood*, 473 B.R. 133, 136 n.3 (Bankr. W.D. Tex. 2012); *but see In re Jupiter*, 344 B.R. 754, 761-62 (Bankr. D.S.C. 2006) (suggesting that the majority's plain meaning interpretation would harm creditors).

[26] *In re Scott–Hood*, 473 B.R. at 136 n.3.

[27] *See* 11 U.S.C. § 362(d).

[28] *Id.*

[29] *See In re Williford*, No. 13-31738, 2013 WL 3772840, at *2 (Bankr. N.D. Tex. July 17, 2013) (collecting cases); *see also In re Baldassaro*, 338 B.R. 178, 182 & n.3 (Bankr. D.N.H.

language in § 362(c), we believe the meaning of the provision is clear. Moreover, we are not unsympathetic to other courts' conclusions that a contrary interpretation may better serve the BAPCPA's policy goals. But in a statutory construction case such as this, we begin with the plain language of the statute.[30] When that language is clear, that is where our inquiry ends.[31] Such is the case here.

IV

Having determined that § 362(c)(3)(A) does not terminate the automatic stay with respect to property of the bankruptcy estate, we conclude that Texas's statute of limitations does not bar Defendants' claim for judicial foreclosure. Under Texas Civil Practice and Remedies Code § 16.035(a), a suit for foreclosure must be brought within four years from the date the statute of limitations began to accrue.[32] Rose claims that the statute of limitations began to accrue on March 26, 2014, the date the Defendants sent the first Notice of Acceleration. Therefore, absent any tolling, the statute of limitations in this case would have expired on March 26, 2018. U.S. Bank filed its counterclaim for judicial foreclosure 179 days after March 26, 2018. The question, then, is whether the bankruptcy stays in this case tolled the statute of limitations more than 179 days.

The four bankruptcy proceedings in this case lasted at least 269 days. Rose admittedly filed several bankruptcy petitions within one year of each other. However, under the interpretation of § 362(c)(3)(A) of the bankruptcy code that we adopt today, Rose's successive filings did not terminate the action

---

2006) (describing § 362(c)(3) as "poorly written" and "bad work product"); *In re Charles*, 332 B.R. 538, 541 (Bankr. S.D. Tex. 2005) (explaining how § 362(c)(3) is "at best, . . . difficult to parse").

[30] *See In re Condor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010).

[31] *Id.*

[32] TEX. CIV. PRAC. & REM. CODE § 16.035(a).

with respect to the property of the bankruptcy estate. There is no debate that the property at issue in this case is part of the bankruptcy estate. Therefore, the stay with respect to the property at issue in this case lasted the duration of the bankruptcy proceedings (269 days), and the statute of limitations was tolled for at least the same. Accordingly, because the Defendants' counterclaim for judicial foreclosure was filed within the 269-day tolling period, it is not barred by the statute of limitations. The district court correctly concluded the same.

* * *

For these reasons, we AFFIRM the district court's judgment.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SHARON D. ROSE, PLAINTIFF,	§	
V.	§	CAUSE NO. A-18-CV-491-LY
SELECT PORTFOLIO SERVICING INC. AND BANCORP, DEFENDANTS.	§	

ORDER

Before the court are Plaintiff's Opposed Emergency Motion to Stay Execution of the Judgment Pending Appeal and to Approve Security filed December 12, 2019 (Doc. #47); Defendants' Response to In Opposition to Plaintiff's Motion to Stay Execution of the Judgment Pending Appeal and to Approve Security filed December 18, 2019 (Doc. #48); and Plaintiff's Reply on Opposed Emergency Motion to Stay Execution of the Judgment Pending Appeal and to Approve Security filed December 18, 2019 (Doc. #49).

On June 11, 2019, the court rendered Final Judgment in this action ordering the judicial foreclosure of the property at issue in the case (Doc. #43). Plaintiff appealed, and the United States Court of Appeals for the Fifth Circuit affirmed this court's judgment on December 10, 2019. On December 4, 2019, the United States Marshal issued a Notice of United States Marshal Sale of the Property on January 7, 2020, at 10:00 a.m.

Plaintiff argues that the Fifth Circuit's opinion affirming this court's judgment diverges from First Circuit law, and that she intends to petition the United States Supreme Court for certiorari to resolve the split among the circuits. Plaintiff seeks a stay of execution of judgment to halt the sale

of the property on January 7, 2020, which Plaintiff notes is before the filing deadline for a petition for writ of certiorari with the U.S. Supreme Court.

A party seeking a stay pursuant to Rule 62 of the Federal Rules of Civil Procedure asks the court to delay the implementation of its decision until the court of appeals has had an opportunity to consider the validity of that ruling, thereby interrupting the ordinary process of judicial review and postponing relief for the prevailing party at trial. Thus, the stay of an equitable order is an extraordinary device which should be sparingly granted. *See United States v. State of Texas*, 523 F. Supp. 703, 729 (E.D. Tex. 1981); *Atlantic Richfield Co. v. Federal Trade Commission*, 398 F. Supp. 1, 17 (S.D. Tex.1975), *aff'd.* 546 F.2d 646 (5th Cir. 1976). *See also F.M.C. v. New York Terminal Conference*, 373 F.2d 424, 426 (2nd Cir. 1967). The burden of proof is on the movant to demonstrate that the issuance of a stay pending appeal is warranted. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 532 F.2d 1001, 1002 (5th Cir. 1976).

Having considered the motion, response, and reply, the court finds that Plaintiff has failed to make a sufficient showing to warrant a stay of execution of judgment pending appeal. *See Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992); *Drummond*, 532 F.2d at 1002. Under Rule 62, Plaintiff must show the likelihood of her prevailing on the merits on appeal, that she is likely to suffer irreparable injury from the denial of the stay, that Defendants will not be substantially harmed by the grant of stay, and that granting the stay will serve the public interest. *Beverly v. United States*, 468 F.2d 732, 741 (5th Cir. 1972).

Even assuming that Plaintiff has shown that without a stay she will suffer irreparable injury, Plaintiff fails to show that the other three requirements of the standard are satisfied in this case. A stay would serve the public interest and would not substantially harm Defendants only if Plaintiff

were likely to prevail on the "ultimate" merits of the case before the U.S. Supreme Court. If Plaintiff were not likely so to prevail, then Defendants' interest and the public interest would not be better served by a stay. This court's decision applies only to the very narrow question whether Plaintiff has met the strict requirements for a stay pending appeal. The court finds that she has not, and therefore will deny the motion for a stay. *See Drummond*, 532 F.2d at 1002.

IT IS THEREFORE ORDERED that Plaintiff's Opposed Emergency Motion to Stay Execution of the Judgment Pending Appeal and to Approve Security filed December 12, 2019 (Doc. #47) is **DENIED**.

SIGNED this 23rd day of December, 2019.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SHARON D. ROSE, PLAINTIFF,	§	
V.	§	CAUSE NO. A-18-CV-491-LY
SELECT PORTFOLIO SERVICING INC. AND BANCORP, DEFENDANTS.	§	

ORDER

Before the court is Plaintiff's Amended Emergency Motion Reconsideration of Opposed Emergency Motion to Stay Execution of the Judgment Pending Appeal and to Approve Security filed December 27, 2019 (Doc.#52). Having considered the motion, the court is of the opinion that the motion should be denied.

IT IS THEREFORE ORDERED that Plaintiff's Amended Emergency Motion Reconsideration of Opposed Emergency Motion to Stay Execution of the Judgment Pending Appeal and to Approve Security filed December 27, 2019 (Doc.#52) is **DENIED**.

SIGNED this 30th day of December, 2019.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE