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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

IN RE

SAMANIEGO, FRANK B. and
SAMANIEGO, JOHNNIE H.,
husband and wife,

Debtors.

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NO. 97-06944-R33

MEMORANDUM OPINION

I.

PROCEDURAL POSTURE AND JURISDICTIONAL STATEMENT

The Debtors filed a case under Chapter 13 of the Bankruptcy Code, December 24, 1997. Thomas Biehl and Harold Apol, dba AB Investments filed a motion to annul the automatic stay to validate their post petition recording of four tax deeds based on pre petition purchases of debtor's real property at foreclosure sales. The debtors objected to the motion and moved to avoid the transfer of property. This is a core proceeding under 28 U.S.C. 157(b)(2)(G) and (H) and the court has jurisdiction to hear and determine these issues under Title 11 and United States Eastern District Court LR 83.5.

II.

FACTS

The debtors, Frank and Johnnie Samaniego, husband and wife,

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FILED

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T.S. MCGREGOR, CLERK
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1 are in their early sixties and reside in Yakima County, Washington.
2 Spanish is their first language. Mrs. Samaniego has difficulty
3 reading English and has relied on Mr. Samaniego to handle their
4 business affairs. Mr. Samaniego has operated his own business and
5 has been able to manage his own affairs in the past. The debtors
6 have owned a number of parcels of real estate.

7 Tax collection proceedings were instituted by the Yakima
8 County Treasurer for collection of past due real estate taxes on
9 the debtors real estate. The debtors were notified on June 4,
10 1997 that there were outstanding real property taxes past due for
11 three years or more on six parcels of their real estate. On July
12 2, 1997, a Certificate of Delinquency was filed with the Yakima
13 County Clerk listing taxes three years past due on debtors' six
14 parcels.

15 On September 19, 1997, the Yakima County Treasurer caused to
16 be filed an "Amended General Certificate of Delinquency" issued to
17 Yakima County, Washington. Once again the six parcels were listed
18 as being delinquent in payment of taxes for those years and subject
19 to foreclosure sale. Copies of this Amended Certificate of
20 Delinquency were sent to the debtors return receipt requested on
21 September 23, 1997, and receipted for September 24, 1997 by Linda
22 Rodriques. The debtors do not dispute receiving this notice.
23 Notice of these tax foreclosure proceedings was duly published.

24 On December 2, 1997, the Superior Court entered judgment in
25 these tax foreclosure proceedings and directed sale of debtor's
26 real estate on December 12, 1997.

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1 On December 5, 1997, Mr. Samaniego visited the Yakima County
2 Treasurer's office. He redeemed one parcel from the upcoming tax
3 sale and inquired as to an extension for payment as to the other
4 five parcels. At the Treasurer's office, Mr. Samaniego was advised
5 of his rights for a possible deferral of taxes on his residence,
6 what information he needed to provide in claiming a senior
7 exemption, and that he should consider filing bankruptcy. Mr.
8 Samaniego was given a list of attorneys specializing in bankruptcy
9 in the area and in response to his inquiry was told which of the
10 bankruptcy lawyers listed were closest to the courthouse.

11 Mr. Samaniego then went to the office of K. Denny Colvin and
12 consulted him about a possible bankruptcy. Mr. Colvin advised the
13 debtor as to the amount of retainer required and the information
14 that must be provided prior to the December 12, 1997, day of sale.

15 On December 8, 1997, Mr. Samaniego left with Mr. Colvin's
16 receptionist the required retainer but did not leave the list of
17 creditors nor any of the signature pages. Mr. Samaniego
18 mistakenly believed that all he had to do to stop the foreclosure
19 sale was to pay the retainer requested.

20 Mr. Samaniego suffers from a heart condition which caused him
21 to close his business in the mid 1990's. This condition required
22 exploratory surgery which was scheduled in Seattle, Washington
23 December 8th & 9th, 1997. After dropping the retainer off, Mr. and
24 Mrs. Samaniego went to Seattle where Mr. Samaniego was hospitalized
25 and the surgery performed. The debtors remained in Seattle
26 recuperating from the medical procedure and visiting a seriously
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1 ill son. They returned to the Yakima area on December 16th or 17th,
2 after the date of the scheduled tax sale.

3 The tax foreclosure sale had proceeded as scheduled in the
4 debtors' absence. At this tax sale, a partnership composed of
5 Harold Apol and Thomas G. Biehl, (hereinafter referred to as Apol
6 & Biehl) purchased four of the defendant's five parcels. The tax
7 sale was competitive with active bidding on the four parcels. Of
8 the four parcels purchased, two were purchased for a price in
9 excess of the assessed value of the property and two for less than
10 the assessed value. The actual fair market value of these parcels
11 is contested by the parties.

12 On December 19, 1997, the Yakima County Treasurer executed tax
13 deeds to the purchasers at the tax sales.

14 At some time around December 19, 1997, Mr. Samaniego was
15 contacted by Thomas Biehl, who advised Samaniego of the sale. Mr.
16 Samaniego in turn gave Mr. Biehl the name of Mr. Colvin, the
17 debtors' bankruptcy attorney. Mr. Biehl attempted to contact Mr.
18 Colvin but was unsuccessful. The debtors filed their Chapter 13
19 December 24, 1997. Mr. Colvin ultimately advised Mr. Biehl of the
20 debtors' bankruptcy by letter dated January 12, 1998. Until that
21 time the purchasers had no notice of the pending bankruptcy.

22 Notice of bankruptcy filing was not recorded with the Yakima
23 County Auditor nor was notice of the actual filing given to Apol &
24 Biehl prior to the debtors' attorney's letter of January 12, 1998.
25 Mr. Colvin did however mail a notice of stay to the Yakima County
26 Treasurer, c/o Ron Zirkle, a deputy prosecuting attorney on
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1 December 24, 1997.

2 On December 26, 1997, the Treasurer recorded the four tax sale
3 deeds of the debtors' property to Apol & Biehl with the Yakima
4 County Auditor.

5 After hearing of the bankruptcy, Apol and Biehl filed an
6 application to annul the automatic stay retroactively to validate
7 the post petition recording of the tax deeds. The debtors
8 objected to this requested relief and filed a motion to avoid the
9 transfers to Apol and Biehl. These issues were combined for
10 hearing and the court set the matter for summary judgment on both
11 parties' requests for relief.

12 III.

13 DISCUSSION

14 The debtors raise a number of issues in support of their
15 position based on both state law and bankruptcy law. The
16 interrelation of these two statutory schemes is somewhat
17 complicated. The court will first analyze the debtors' rights
18 under the state statute to determine what remedies they might have
19 under state law. The court will then determine whether the
20 debtors have additional grounds under the Bankruptcy Code for
21 setting aside the transfers incident to the tax sales. Last, the
22 court will determine whether the purchaser Apol and Biehl are
23 entitled to a retroactive annulment of the automatic stay in this
24 case.

25 **A. State Tax Foreclosure Issues.**

26 The State of Washington has established procedures for
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1 collection of past due real estate taxes. This procedure requires
2 that the county treasurer issue a certificate of delinquency if
3 taxes on real estate are three years delinquent. This certificate
4 of delinquency is filed with the county clerk and notice given by
5 publication and mailing by certified mail to the owner and all
6 persons having a recorded interest in the property. R.C.W.
7 84.64.050.

8 The state court is required to examine the application for
9 judgment foreclosing tax lien, hear and determine any defenses
10 offered in a summary manner and enter judgment. If that judgment
11 is that taxes are due, this is a judgment against the specific
12 land, and the court shall direct the clerk to enter an order of
13 sale. This order of sale is delivered to the treasurer. The
14 treasurer on receipt of this order and judgment shall proceed to
15 sell the property to the highest and best bidder for cash. Notice
16 of the sale is given by posting notice in three public places in
17 the county, one of which is the office of the treasurer. At such
18 sale the minimum bid is the total amount of taxes, interest,
19 penalties and costs. If the amount bid at the sale is in excess
20 of the minimum bid, the excess is to be refunded, upon application
21 therefore, to the record owner of the property. The treasurer is
22 to execute a tax deed to the purchaser and this deed is to be
23 recorded with the auditor. This vests title to the property in the
24 grantee of the deed. R.C.W. 84.64.080. The treasurer's deed is
25 prima facie evidence of the regularity of the foreclosure
26 proceeding. The judgment entered estops presentation of defenses
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1 and is conclusive evidence of regularity and validity and precludes
2 collateral attack. R.C.W. 84.64.180.

3 Appeal may be taken from this judgment within thirty days of
4 entry. The appellant must deposit a sum equal to the taxes,
5 interest, penalties and costs with the clerk of the court
6 conditioned upon effective prosecution of the appeal and payment of
7 the judgment. This deposit must be made within thirty days of the
8 entry of the judgment. R.C.W. 84.64.120.

9 This is the statutory scheme which the Yakima County Treasurer
10 followed in foreclosing on the debtors' five parcels of real
11 estate. Although in some circumstances a tax foreclosure
12 proceeding may be set aside on reasonable notice and due process
13 grounds, Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.
14 Ct. 2706, 77 L.Ed. 2d 180 (1983), those grounds are not available
15 to these debtors. The debtors had actual and timely notice of the
16 impending sale sufficient to allow them to protect their rights.

17 The debtors raise a number of arguments based on the
18 provisions of state law.

19 First, the debtors assert that their property was subject to
20 a property tax exemption and therefore could not be legally sold at
21 a tax foreclosure sale. R.C.W. 84.36.381 allows for taxpayers to
22 claim an exemption from property taxes imposed on their residence
23 if certain conditions are met. Among these conditions are that the
24 taxpayer is sixty-one years old or older or retired because of
25 physical disability. R.C.W. 84.36.381(3). Among other
26 qualifications included in this section is a combined disposable
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1 income requirement. If taxpayers wish to qualify for an exemption
2 they must file a written claim of exemption accompanied by
3 documentation verifying the taxpayer's income. R.C.W. 84.36.385;
4 R.C.W. 84.36.387. The debtors in this case did not file the
5 required claim of exemption prior to the sale.¹ The evidence
6 before the court is insufficient to establish whether these debtors
7 were entitled to a tax exemption on their residence. In any event
8 it is clear in this statutory scheme that such an exemption is not
9 an automatic one and must be claimed by filing. The debtors
10 failed to do so before the tax sale was conducted. They can not
11 do so now. The debtors argument that they were protected from the
12 tax sale because of the tax exemption provisions of the state law
13 are ill founded.

14 Second, the debtors assert that they were eligible for a
15 deferral of their taxes and thus protected from the tax sale.
16 R.C.W. 84.64.050 prohibits the treasurer from selling property
17 which is eligible for deferral of taxes under R.C.W. 84.38 but
18 requires the owner to file a declaration pursuant to R.C.W.
19 84.38.040. Among the qualifications for claiming a deferral
20 contained in R.C.W. 84.38.030 are income limits, insurance for fire
21 and casualty insurance on the property, and meeting the
22 requirements for exemption for a residence under R.C.W. 84.36.381.
23 Although the debtors were advised about filing for a deferment they
24 did not do so. The evidence is not clear that if they had filed

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26 ¹ Benacio Garcia Jr., in his April 23, 1998 sworn statement filed herein, indicated that at that
27 time he was filing a claim for Senior Exemption. The file contains no evidence that this was
accomplished.

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1 that they would have qualified for a deferment. The tax
2 foreclosure sale was conducted as scheduled and the debtors cannot
3 now assert a possible claim of deferment to defeat the sale.

4 Third, the debtors assert that they retain redemption rights
5 in the property foreclosed. R.C.W. 84.64.070 provides that real
6 property . . ."may be redeemed at any time before the close of
7 business the day before the day of the sale, by payment"... .

8 Debtors redeemed one of the six parcels originally certified as
9 delinquent, but did not redeem the remaining five. Pursuant to the
10 statute the debtors redemption rights are gone.² The debtors
11 maintain however that under another provision of this same section
12 they retain redemption rights. The language they rely on provides
13 "If the real property of . . . any person adjudicated to be legally
14 incompetent, be sold for payment of taxes, the same may be redeemed
15 at any time within three years after the date of sale upon the
16 terms specified in this section," The problem with this
17 argument is that neither of the debtors have been adjudicated
18 incompetent. The evidence submitted regarding Mr. Samaniego's
19 health problems, the mishandling of the tax sale foreclosure and
20 the voluntary granting of his son his power of attorney do not rise
21 to the level required for adjudicating him legally incompetent,
22 even if this court had jurisdiction to make such an adjudication,

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25 ² Prior to the adoption of this current language, the statute provided certificates of
26 delinquency "may be redeemed at any time before the issuance of tax deed, ..." RRS §11280. This
27 provision was amended by Laws 1963, Ch.88 §2. See also Stockard et ux v. Hall, et al, 54 Wash.
106, 109; 102 P. 1037, 1038 (1909); State ex rel. Race et al v. Cranney County Treasurer, et al. 30
Wash. 594, 604; 71 P.50, 53 (1902).

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1 which it does not.

2 Finally the debtors argue that at the time of filing their
3 bankruptcy case the tax judgment was appealable. The debtors are
4 correct. The tax judgment was entered December 2, 1997, and their
5 bankruptcy case filed December 24, 1997. Pursuant to R.C.W.
6 84.64.120, appellate review of such a judgment must be sought
7 within thirty days of entry of the judgment. The appeal time had
8 not lapsed as of the time of filing the bankruptcy case. The
9 Bankruptcy Code Section 11 U.S.C. §108(b) provides for a sixty day
10 extension of time for filing a notice of appeal from the date of
11 the order for relief, i.e the date of filing. 11 U.S.C. § 301.
12 The extended date for filing a notice of appeal pursuant to these
13 provisions has passed with no notice of appeal having been filed.
14 The debtors can not now rely on an argument that the judgment was
15 not final when they filed their bankruptcy case.

16 In summary, although the debtors have argued that they retain
17 viable rights under state law in the foreclosed properties they
18 have not prevailed on those grounds. The court must now consider
19 whether that result is different as a result of the operation of
20 the Bankruptcy Code.

21 **B. The Bankruptcy Law Issues.**

22 Superimposed over the state statutory rules governing tax
23 foreclosures is the complex matrix of provisions of the Bankruptcy
24 Code. The parties have identified a number of Bankruptcy Code
25 provisions that impact the decision in this case. It is necessary
26 to analyze each of these provisions separately.

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1 **1. Debtors' Standing to Enforce Bankruptcy Rights.**

2 Debtors have filed a motion to avoid the transfers of their
3 real property pursuant to 11 U.S.C. §544, 11 U.S.C. §548, and 11
4 U.S.C. §549. Although such relief customarily must be sought in an
5 adversary proceeding pursuant to Bankruptcy Rule 7001, it may be
6 sought by motion when it relates to exempt property. FRBP Rule
7 4003(d). Only the debtors' residence is claimed exempt. With
8 the exception of actions to avoid transfers of exempt property,
9 avoidance actions are customarily the prerogative of the Chapter 13
10 Trustee and can be prosecuted by the debtors only after the
11 Trustee's failure or refusal to act, after notice and hearing and
12 obtaining court authorization. In re Elam, 194 B.R. 412, (Bankr.
13 E.D. Tex. 1996); In re Young, 156 B.R. 282 (Bankr. Idaho 1993).
14 The debtors have not followed these procedures.

15 Here, however, the motion to avoid was filed in response to
16 Apol and Biehl's motion to annul the stay. The viability of the
17 various avoidance actions go to the merits of the stay annulment
18 litigation and have to be resolved in the course of consideration
19 of the annulment request. The parties to this litigation were
20 aware of these issues, but chose not to raise them in either their
21 briefs or their arguments, realizing perhaps that the raising of
22 these issues would simply delay the final resolution while the
23 debtors sought formal approval of their actions by the Trustee and
24 the court. The Trustee has been aware of this matter from the time
25 of filing the avoidance motion and has acquiesced in its
26 prosecution. Although the court does not condone this procedure,
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1 it would be inappropriate, given the actions of the parties, to
2 make these issues dispositive of these disputes. There is nothing
3 which would suggest these issues should not, could not, or were not
4 adequately prosecuted by the debtors. This is particularly so in
5 that even if the Trustee refused to prosecute the matter the
6 debtors could do so on their own pursuant to the provisions of 11
7 U.S.C. §522(h) as to their residence which they claim exempt.

8 The court will consider the avoidance issues raised by the
9 debtors as raised for the benefit of the estate and on behalf of
10 the Trustee and as defenses to the annulment request.

11 **2. 11 USC §544 - the Strong Arm Provision.**

12 The trustee has, as of commencement of the case, the rights of
13 certain hypothetical parties, including that of a bona fide
14 purchaser of real property. 11 U.S.C. 544 (a)(3).³ This right can
15 in appropriate cases be used to defeat competing claims in the
16 debtors real estate which are not perfected as of the time of
17 filing of the bankruptcy case. The debtors argue that using this
18 provision they can defeat the interest of Apol and Biehl in that at
19 the time of filing, December 24, 1997, the Treasurer's deed to Apol

21 _____
22 ³ 11 U.S.C. 544 provides in pertinent part:

23 (a) The trustee shall have, as of the commencement of the case, and without regard
24 to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any
25 transfer of property of the debtor or any obligation incurred by the debtor that is voidable by -

26 (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom
27 applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser
28 and has perfected such transfer at the time of the commencement of the case, whether or not such a
purchaser exists.

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1 and Biehl had not yet been recorded in the real estate records of
2 the Yakima County Auditor. Accordingly, because the case was filed
3 prior to recording of the Treasurer's deed on December 26, 1997,
4 the debtors argue they win the race to the court house and thus
5 prevail over the purchasers.

6 Apol and Biehl respond that the state of the title of the
7 subject real estate put any purchaser on inquiry notice of their
8 rights in the property. Therefore, they argue a bona fide
9 purchaser would only take subject to Apol and Biehl's interest in
10 the real estate.

11 The issue here turns on whether "under applicable law", i.e.
12 Washington real estate law, the Trustee's rights as a bona fide
13 purchaser are superior to these purchasers at a tax foreclosure
14 sale. The Washington state tax foreclosure statutes provide for
15 filing of certificates of delinquency with the county clerk. "Each
16 certificate shall have the same force and effect as a lis pendens
17 required under chapter 4.28 R.C.W." R.C.W. 84.64.050. Pursuant
18 to R.C.W. 4.28.320 lis pendens are to be filed with the county
19 auditor but R.C.W. 84.64.050 provides that filing with the clerk
20 will have the same force and effect. R.C.W. 4.28.320 goes on to
21 provide:

22 From the time of the filing only shall the pendency of
23 the action be constructive notice to a purchaser or
24 encumbrancer of the property affected thereby, and every
25 person whose conveyance or encumbrance is subsequently
26 executed or subsequently recorded shall be deemed a
27 subsequent purchaser or encumbrancer, and shall be bound
by all proceedings taken after the filing of such notice
to the same extent as if he were a party to the action.
For the purpose of this section an action shall be deemed
to be pending from the time of filing such notice . . .

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1 (emphasis added).

2 The Ninth Circuit in In re Professional Investment Properties
3 of America, 955 F.2d 623, 629 (9th Cir. 1991) discussed the impact
4 of a lis pendens on claims of subsequent purchasers in a §544
5 context as follows:

6 The filing of a lis pendens in connection with a
7 lawsuit against the record title holder of real property
8 gives constructive notice of an action to subsequent
9 purchasers from the record title holder. In re Gurs, 27
10 B.R. 163, 165 (9th Cir. BAP 1983).

11 Given the constructive notice provided by the filing of the
12 certificate of delinquency, it is clear that the Trustee relying on
13 his powers as a hypothetical bona fide purchaser would take with
14 notice of the rights of the purchasers at the tax sale and subject
15 thereto.

16 **3. 11 USC §548 - Fraudulent Transfer.**

17 The trustee may avoid a transfer of debtors property made
18 within one year of filing if the debtors were insolvent at the date
19 of transfer and the debtors received less than a reasonable
20 equivalent value in exchange for the transfer. 11 U.S.C.
21 548(a)(2). The debtors assert that the four parcels of property
22 sold to Apol and Biehl at the tax foreclosure sale were sold for
23 less than reasonable equivalent value and thus are subject to being
24 avoided.

25 The debtors contend that their four parcels worth a combined
26 fair market value of \$102,319 and with a combined assessed value of
27 \$76,800 were sold at tax sale to Apol and Biehl for \$40,750 to pay
28 taxes due of \$7,596. In addition to the taxes the property sold

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1 was also encumbered to Household Finance Corporation for
2 approximately \$32,000. These assertions are based on the
3 affidavit of Benacio Garcia Jr., the son of Mrs. Samaniego, who has
4 some education and experience in the real estate field and who owns
5 numerous rental properties in the pertinent neighborhood.

6 The purchasers contest the debtors evidence regarding
7 valuation of the property. Mr. Biehl, an experienced real estate
8 broker in the area, valued the purchase price of the two vacant
9 parcels at more than the fair market value. He valued the one
10 rental property at somewhat less than the assessed value and the
11 debtors residence at roughly its assessed value.

12 Thus the evidence on value of the parcels sold is contested
13 and if the determination of this matter is to turn on valuation a
14 trial would have to be conducted on these issues.

15 Apol and Biehl argue however that this contest on valuation is
16 immaterial in the context of this case relying on the authority of
17 BFP v. Resolution Trust Corp, 511 U.S. 531, 114 S.Ct. 1757, 128 L.
18 Ed. 556 (1994). They argue that as a matter of law the purchase
19 price at a non collusive and regularly conducted tax sale
20 constitutes reasonable equivalent value for purposes of 11 U.S.C.
21 §548.

22 The debtors counter that BFP is not good authority in this
23 case in that BFP dealt with a deed of trust/mortgage foreclosure
24 sale and not a tax sale. The debtors buttress this argument by
25 reference to footnote 3 in the BFP opinion which states:

26 We emphasize that our opinion today covers only mortgage
27 foreclosures of real estate. The considerations bearing

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1 upon other foreclosures and forced sales (to satisfy tax
2 liens, for example) may be different.

3 511 U.S. at 537.

4 It is unclear to this court in what respect the Supreme Court
5 felt that a regularly conducted non collusive tax sale might be
6 treated differently than deed of trust/mortgage foreclosures.
7 Certainly some tax collection sale procedures might be subject to
8 challenge Mennonite Board of Missions v. Adams, 462 U.S. 791, 103
9 S.Ct. 2706, 77 L.Ed. 2d 180 (1983) but this court's review of the
10 county's tax collection procedure used in the case do not support
11 such a challenge here. Tax foreclosure procedures vary from state
12 to state. For example, under Illinois law a tax sale only creates
13 a lien. In re Shamblin, 890 F.2d 123, 127 (9th Cir. 1989). It is
14 possible that the Supreme Court had such laws in mind, when it
15 drafted its limiting footnote 3 in the BFP decision. Although
16 there are different procedures to be followed at judicial
17 foreclosures and deeds of trust sale, it is not clear that the tax
18 foreclosure procedures applicable in this case are so significantly
19 different as to justify a different treatment of these sales under
20 §548 than the Supreme Court approved in BFP for a deed of
21 trust/mortgage foreclosure.

22 The debtors here do not identify how the state's statutory
23 scheme and procedures are inherently defective, or that the
24 county's execution in the case was irregular in any way. The
25 unrefuted evidence before the court is that there was active
26 competitive bidding at the sale and the properties sold for
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1 significantly more than the tax debt on each parcel. The court
2 determines the purchase prices paid for the parcels in question
3 constituted their reasonable equivalent value within the meaning of
4 11 U.S.C. §548. The prices paid were the product of a non
5 collusive, regularly conducted statutory procedure. The court
6 finds no reason why it should depart from the rule of BFP as it
7 applies to these tax sales.

8 **4. 11 USC §362 Violation of the Automatic Stay.**

9 The debtors argue that the recording of the Treasurer's deeds
10 were void because they were done in violation of the provisions of
11 the automatic stay, 11 U.S.C. §362. This statute prohibits parties
12 from taking certain specified activities against the debtors and
13 their property after the filing of a bankruptcy petition. A
14 review of this section shows that at least three of its sub-
15 sections which prohibits action might be applicable to this case.

16 Section 362(a)(1) stays the continuance of "judicial
17 administrative or other actions" which were commenced before the
18 filing of the case. The tax collection and foreclosure process
19 which is the subject here would seem to be covered by this section.
20 Delivery and recording of the Treasurer's deed is the final step in
21 that statutory process. As such it is stayed.

22 Likewise §362(a)(2) appears applicable in that it prohibits
23 the enforcement against the debtors or the property of their estate
24 of a pre filing judgment. Once again delivery and recording of
25 the deeds is the final step in the tax judgment foreclosure process
26 and is stayed.

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1 Finally, §362(a)(3) stays "any act to obtain possession of
2 property of the estate or of property from the estate or to
3 exercise control over property of the estate; ...". Bare legal
4 title constitutes property of the estate. 11 U.S.C. §541(d).
5 Delivery and recording of the Treasurer's deeds are clearly acts to
6 obtain possession of that bare legal title from the estate and
7 establish control over it. This provision is the one most clearly
8 applicable to the facts of this case.

9 The Ninth Circuit has ruled clearly and unambiguously that
10 acts taken in violation of the automatic stay are void. In re
11 Schwartz, 954 F.2d 569 (9th Cir. 1992). Therefore, the delivery
12 and recording of the Treasurer's deeds were void and of no force
13 and effect.

14 **5. 11 USC §549 Post Petition Transfer.**

15 Apol and Biehl argue that even if these acts would normally be
16 void as stay violations, they fall within the exception contained
17 in 11 U.S.C. 549(c).

18 The Ninth Circuit analyzed the interrelationship between §362
19 and §549 in the Schwartz case ruling "The law in this circuit is
20 that violations of the automatic stay are void and that section 549
21 applies to transfers of property which are not voided by the stay."
22 954 F.2d at 574. Since the delivery and recording of the
23 Treasurer's deeds were done in violation of the automatic stay,
24 they are void and §549 is therefore inapplicable. Even if §549 was
25 viewed as an exception to operation of the automatic stay, Apol and
26 Biehl would not fall within this exception.

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1 Section 549(c) provides:

2 The trustee may not avoid under subsection (a) of
3 this section a transfer of real property to a good faith
4 purchaser without knowledge of the commencement of the
5 case and for present fair equivalent value unless a copy
6 or notice of the petition was filed, where a transfer of
7 such real property may be recorded to perfect such
8 transfer, before such transfer is so perfected that a
9 bona fide purchaser of such property, against whom
10 applicable law permits such transfer to be perfected,
11 could not acquire an interest that is superior to the
12 interest of such good faith purchaser. A good faith
13 purchaser without knowledge of the commencement of the
14 case and for less than present fair equivalent value has
15 a lien on the property transferred to the extent of any
16 present value given, unless a copy or notice of the
17 petition was so filed before such transfer was so
18 perfected.

11 This section provides an exception to the Trustee's power to
12 avoid post petition transfers. The transfer in question here is
13 the delivery and recording of the Treasurer's deeds post petition.
14 Only bare legal title was transferred, the debtors equitable
15 interest in the property having been transferred at the pre-
16 petition tax sale. Thus the only transfer that can be the focus of
17 §549(c) was this delivery and recording of the Treasurer's deeds.

18 To qualify for the exception to this avoiding power, the
19 transfer must be of real property. Bare legal title to real
20 property was transferred. The court assumes that this constitutes
21 real property within the terms of the subsection.

22 The transfer must be "to a good faith purchaser". Although
23 Apol and Biehl are transferees, they are not purchasers in the
24 strict sense of §549(c). Clearly and unambiguously §549 applies
25 to post petition purchasers. In re Schwartz, 954 F.2d at 573-574.
26 Here the purchases took place pre-petition at the tax sale.

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1 Whether the language of §549 is applicable to pre filing purchasers
2 is problematic.

3 One must be "a good faith purchaser without knowledge of the
4 commencement of the case" to fall within the exception provided by
5 §549(c). This requirement makes no sense applied to pre-filing
6 purchasers, because here there was no case in existence at the time
7 of purchase.

8 Even more troubling is the requirement that the transfer be
9 for "present fair equivalent value". Apol and Biehl did pay
10 substantial purchase prices at the tax sales, twelve days prior to
11 the filing of the bankruptcy and fourteen days prior to the
12 recording of the deeds. Does the term "present" used in §549(c)
13 refer to the time of sale or to the time of transfer? Use of
14 "present" to refer back to the date of the sale for these purposes
15 would require the adoption of a relationship back interpretation of
16 §549(c). There is no language in §549 or anywhere in the Code
17 which authorizes this relation back. In situations where such a
18 relation back was contemplated, it was specifically provided by
19 Code provisions, for example §362(b)(3); §546(b) and §547(e)(2)(A).
20 The Ninth Circuit has instructed §549(c)'s protection of good faith
21 purchasers is specific and narrow. In re Schwartz, 954 F.2d at
22 574. Interpreting the term "present" as relating to the time of
23 delivery and recording rather than the time of sale is consistent
24 with this instruction and the court adopts that time as the
25 appropriate one for determining what value was given for the
26 transfer.

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1 If §549 is to be applied to pre petition sales such as these,
2 the statute is confusing. As we have seen from our previous
3 discussion, these sales withstand an avoidance attack under §548 as
4 being made for "reasonable equivalent value."⁴ Under the §549(c)
5 exemption the test is whether the transfers were made for "present
6 fair equivalent value". These two standards are different, with
7 the §549(c) test the more strict of the two. In re Shaw, 157 B.R.
8 151 (B.A.P. 9th Cir. 1993).⁵ This interpretive problem vanishes if
9 §549 is read as being inapplicable to pre petition sales.

10 Given these arguments, the court concludes that §549 does not
11 apply to pre filing sales which are unperfected at filing.

12 Even if §549(c) does somehow apply to these sales, it is not
13 clear Apol and Biehl gave any value at the time of delivery and
14 recording of the deeds. The court will consider that they gave
15 nominal value at the time of the transfer. What was the value of
16 the bare legal title they received? The Ninth Circuit Bankruptcy
17 Appellate Panel has ruled that the term "present fair equivalent
18 value" used in §549(c) "tolerates little deviation from fair market
19 value". In re Shaw, 157 B.R. at 154; But see In re T.F. Stone Co.,
20 Inc., 72 F.3d 466 (5th Cir. 1995) (equates "reasonable equivalent
21 value" under §548 with "present fair equivalent value" under §549
22 and neither term with "fair market value"). What is the fair
23 market value of bare legal title in property where the equitable

24
25 ⁴ See discussion pages 14 through 17 herein.

26 ⁵ The court's reasoning in T.F. Stone Co. Inc., 72 F.3d 466 (5th Cir. 1995) that these two
27 clearly different terms really mean the same thing is not convincing.

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1 ownership is elsewhere?

2 "Bare legal title may be of great value to the bankruptcy
3 estate if it enables the Trustee to avoid the unperfected transfer
4 of real property." In re Stork, 212 B.R. 970, 971-972, (Bankr.
5 N.D. Cal. 1997). This might be significant if the debtors had
6 recorded notice of their bankruptcy prior to recording of the
7 purchasers deed. The race statute provisions of §549(c) and the
8 Washington recording statute could give this bare legal title
9 significant value. In re Walker, 861 F.2d 597 (9th Cir. 1988); In
10 re Williams, 124 B.R. 311, (Bankr. C.D. Cal. 1991); But see In re
11 Engles, 193 B.R. 23 (Bankr. S.D. Cal 1996). Here however the
12 purchasers were first to record and that recording deprives the
13 bare legal title of its value to the debtors.

14 Apol and Biehl gave only nominal value at the time of delivery
15 and recording of the deeds, in exchange they received the market
16 value of the property free of debtors' interest. If debtors have
17 won the recording race, debtors would have retained the market
18 value of the property, less Apol and Biehl's lien for the value
19 given. The market value exceeds the value given by Apol and Biehl
20 at the time of delivery and recording, therefore Apol and Biehl did
21 not give present fair equivalent value for the interest the debtors
22 lost by the transfer. Apol and Biehl would thus not qualify for
23 the protection of the exception provided by §549(c).

24 In summary, the delivery and recording of the Treasurer's
25 deeds were void because done in violation of the automatic stay.
26 Section 549 is not applicable to transfers which are void. Even
27

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1 if §549(c) is interpreted as an exception to the operation of the
2 automatic stay it is narrowly construed and not applicable to pre
3 petition sales. Even if it was applicable, as an exception to the
4 operation of §362, Apol and Biehl would not qualify for the
5 protection of §549(c) because they did not give present fair
6 equivalent value for the transfer at the time of delivery and
7 recording. The value they gave was less than the value of the
8 debtors' interest in the property transferred.

9 **6. Annulment of the Automatic Stay.**

10 Finally the court comes to the issue of whether the automatic
11 stay should be annulled.

12 The court has analyzed the debtors' arguments concerning their
13 rights to exemption, deferment, redemption and appeal under the
14 Washington state tax foreclosure law and procedure and concluded
15 that the debtors have no viable rights remaining under those laws
16 and procedures.

17 The court has also analyzed the debtors' rights under the
18 Bankruptcy Code and concluded that the tax sales and transfer
19 incident thereto cannot be avoided under 11 U.S.C. §544 or 11
20 U.S.C. §548 and that 11 U.S.C. §549 is not applicable to the facts
21 of this case. The court has determined that the delivery and
22 recording of the Treasurer's deeds were void as done in violation
23 of the automatic stay. Apol and Biehl seek annulment of the stay
24 thereby validating the previously recorded deeds.

25 The debtors hold bare legal title to the lots sold at the tax
26 sale. They retain no interest in this property of benefit to
27

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1 themselves or their estate. In such instances where the
2 purchasers hold equitable title and the debtors retain only bare
3 legal title, cause exists to allow the equitable owner to obtain
4 the legal title. In re Engles, 193 B.R. 23, 26 (Bankr. S.D. Cal
5 1996). The automatic stay will be annulled as to delivery and
6 recording of the tax deeds.

7 IV.

8 **CONCLUSION**

9 The debtors lack viable issues under either state law or
10 bankruptcy law which would allow them or their estate to benefit
11 from the bare legal title they currently hold in the real property
12 at issue. Therefore the purchasers should be granted the relief
13 they seek annulling the stay and validating the delivery and
14 recording of the deeds which unite the legal title with their
15 existing equitable title.

16 DONE this 13 day of August, 1998.

17
18 
19 Chief Bankruptcy Judge

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