

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: June 22, 2001)

(Decided: March 7, 2002)

Docket No. 00-5071

IN RE: JOHN R. CANNEY, III, Chapter 7 Trustee for  
the Estate of Maxwell Frazer,  
Trustee,

JOHN R. CANNEY, III, Chapter 7 Trustee for  
the Estate of Maxwell Frazer,  
Appellant,

UNITED STATES TRUSTEE,  
Trustee,

TOWN OF WEATHERSFIELD,  
Movant,

V.

MERCHANTS BANK,  
Appellee.

BEFORE: CABRANES, F.I. PARKER, SOTOMAYOR Circuit Judges.

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

1 AFFIRMED.  
2  
3

Jess Thomas Schwidde, Gleb Glinka, Glinka &  
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),<sup>1</sup> 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,

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25       <sup>1</sup> 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       *i.e.*, cure his default. Days prior to the deadline, Frazer filed  
2 for bankruptcy protection.

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

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4       <sup>2</sup> 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

(continued...)

1 limitations of 11 U.S.C. § 108(b)<sup>3</sup> 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

<sup>2</sup>      (...continued)  
          the case under this title . . . .

11 U.S.C. § 362(a).

<sup>3</sup> Section 108(b) provides in pertinent part:

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

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

(2) 60 days after the order for relief.

11 U.S.C. § 108(b).

has a legally cognizable right or interest in the property that justifies encumbrance by the federal bankruptcy laws. Finally, we hold that neither the recording of the certificate of non-redemption nor the issuance of the writ of possession is stayed by § 362(a). Accordingly, we affirm the judgment of the district court.

## I. BACKGROUND

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

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

On September 11, 1998, a Consolidated Judgment Order and Decree of Foreclosure ("Foreclosure Judgment") was issued by the Windsor Superior Court. See *Merchants Bank v. Frazer*, Windsor

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

1 Super. Ct. Docket No. 24-1-98Wrcv (Sept. 11, 1998). The  
2 Foreclosure Judgment forever barred Frazer from equity redemption  
3 unless Merchants Bank was paid the full amount due on the  
4 mortgage on or before September 18, 1998.

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

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

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

1 where statutes so provide, to repurchase the already foreclosed  
2 property from a buyer following a foreclosure sale." Id.  
3 (emphasis added). Relying on the prior decisions of bankruptcy  
4 courts in Vermont and Connecticut,<sup>5</sup> the two states in which  
5 strict foreclosure (rather than foreclosure by sale) is the usual  
6 method of foreclosure, rather than the decisions of the Sixth,  
7 Seventh, and Eighth Circuits, the bankruptcy court held that the  
8 equity of redemption period is stayed by 11 U.S.C. § 362 and  
9 denied Merchants Bank's motion. Id. at 264-65. Merchants Bank  
10 appealed.

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

14 On August 8, 2000, the district court issued its opinion and  
15 order reversing the bankruptcy court. See Merchants Bank, 253  
16 B.R. 513. The district court found persuasive the case law in  
17 other circuits analyzing the issue of how § 108(b) and § 362(a)  
18 interrelate and concluding that the timing provisions of § 108(b)  
19 take precedence over § 362(a) tolling where no affirmative act  
20 triggering the indefinite stay provision of § 362 may be found.  
21 See id. at 516-17. The district court noted that the Vermont

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23       <sup>5</sup> 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 cases that take a contrary approach rely primarily on the  
2 legislative history of § 362(a) without reference to 12 VT. STAT.  
3 ANN. §§ 4529–4530 and determined that the issue could be  
4 “resolved by the procedural requirements of Vermont law.” Id. at  
5 517. The district court recognized that although “the passage of  
6 full title, both legal and equitable, to the mortgagee, not under  
7 a decree of Judicial sale, passes after the recording of the  
8 decree in foreclosure in the appropriate city or town clerk’s  
9 office and the expiration of the redemption date(s) specified in  
10 the decree of foreclosure,” id. at 517–18 (quoting L.H. & A., 57  
11 B.R. at 267), “this affirmative act is only required on the part  
12 of the foreclosing mortgag[ee] prior to obtaining title when  
13 there are ‘subsequent purchasers, mortgag[ees] or attaching  
14 creditors.’” Id. at 518 (quoting 12 VT. STAT. ANN. § 4530). The  
15 court therefore concluded that, with respect to the mortgagor,  
16 title passes without reference to 12 VT. STAT. ANN. § 4529, and  
17 thus “no additional act is required in the state of Vermont which  
18 would trigger the indefinite stay of 362(a).” Id. at 518.

19 Additionally, the court reasoned that, while all debtors are  
20 generally protected under the indefinite stay of § 362(a), “that  
21 protection is limited for those who had pre-existing agreements  
22 to pay by a particular date under § 108(b).” Id. at 519.  
23 Consequently, the district court followed the direction of the  
24 Sixth, Seventh, and Eighth Circuits and held that the indefinite

1 stay provided for in § 362(a) is superseded by the timing  
2 provisions of § 108(b). *Id.* This appeal ensued.  
3

## II. DISCUSSION

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

### A. Vermont Strict Foreclosure Law

15 Before wading into federal bankruptcy law, a brief  
16 explanation of the Vermont strict foreclosure law is warranted.<sup>6</sup>  
17 "Strict foreclosure is the normal method of foreclosure only in  
18 Connecticut and Vermont." In re Frazer, 238 B.R. 262, 263 n.3

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21       <sup>6</sup> "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.

(Bankr. D. Vt. 1999) (quoting Baxter Dunaway, *The Law of Distressed Real Estate: Foreclosure, Workouts, Procedures* § 12.16 (1999)), rev'd, 253 B.R. 573 (D. Vt. 2000). In Vermont, a mortgage conveys legal title to the mortgagee at the time the mortgage is granted. See Mitchell v. Aldrich, 163 A.2d 833, 837-38 (Vt. 1960); Pierce v. Brown, 24 Vt. 165 (1852). “[O]nce the condition of a mortgage is broken, ‘the mortgagee becomes at law the absolute owner of the property and is entitled to immediate possession . . . .’” Rassman v. Am. Fid. Co., 460 A.2d 461, 463 (Vt. 1983) (quoting Kelly v. Clement Nat'l Bank, 10 A.2d 201, 202 (Vt. 1940)); see also Town of Bristol v. United States, 315 F.Supp. 908, 910-11 (D. Vt. 1970) (same, citing cases). A mortgagee may assert its right to possession by peaceable entry,<sup>7</sup> by eviction,<sup>8</sup> or by seeking a foreclosure judgment in county court.<sup>9</sup>

Through a foreclosure judgment, a mortgagee formally takes “possession” of the property. A foreclosure judgment vests full legal and equitable title to the property with the mortgagee, subject only to the mortgagor’s “equity of redemption,” which is a contingent equitable interest in the property, and limited

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<sup>7</sup> See, e.g., Fuller v. Eddy, 49 Vt. 11, 12 (1876).

<sup>8</sup> See, e.g., Hill v. Hill, 7 A. 468 (Vt. 1887); Hooper v. Wilson, 12 Vt. 695 (1839).

<sup>9</sup> See 12 Vt. STAT. ANN. §§ 4523(a), 4526, 4528.

1 rights to possession, rents, and profits of the property during  
2 the period of redemption. See Stowe Ctr., Inc. v. Burlington  
3 Sav. Bank, 451 A.2d 1114, 1115 (Vt. 1982) ("Under Vermont law if  
4 no one redeems foreclosed property within the prescribed period,  
5 the foreclosing mortgagee, pursuant to the Vermont strict  
6 foreclosure procedure, 12 V.S.A. chapter 163, subchapter 6,  
7 obtains full and complete title and has the right to sell the  
8 property and retain the surplus, if any."); Hooper v. Wilson, 12  
9 Vt. 695, 697-98 (1839) ("[I]t is universally allowed that [the  
10 mortgagor] is tenant, and therefore no trespasser, until the  
11 mortgagee has asserted his right of possession, and then the  
12 mortgagor has only the equity of redemption.") (emphasis added);<sup>10</sup>  
13 Dieffenbach v. Attorney Gen. of Vt., 604 F.2d 187, 192 n.8 (2d  
14 Cir. 1979)) ("[U]ntil a foreclosure decree, . . . the mortgagor  
15 was the equitable owner of the fee, with legal title vested in  
16 the mortgagee only for the protection of his security

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13       <sup>10</sup> 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.

1 interest.");<sup>11</sup> see also 12 VT. STAT. ANN. § 4528; c.f. Aldrich v.  
2 Lincoln Land Corp., 294 A.2d 853, 855-57 (Vt. 1972) (discussing  
3 right of redemption and emphasizing that "responsibility for  
4 complying with the conditions of redemption are on the one  
5 seeking the exercise of the right"). Redemption (or satisfaction  
6 of the foreclosure judgment) is the operative contingency:  
7 Curing the default within the time period specified in the  
8 foreclosure judgment vests equitable title with the mortgagor;  
9 failure to do so, however, extinguishes the contingent interest.  
10 See, e.g., Stowe Center, 451 A.2d at 1115; Dieffenbach, 604 F.2d  
11 at 192, 192 n.8; Aldrich, 130 Vt. at 376-78.

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

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27       <sup>11</sup> 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 fails to redeem within the period set forth in the decree.

2 In analyzing whether §§ 362(a) or 108(b) apply in this case,  
3 we must keep in mind that “[p]roperty interests are created and  
4 defined by state law.” Butner v. United States, 440 U.S. 48, 55  
5 (1979). Because Frazer sought bankruptcy protection after the  
6 foreclosure judgment had been filed but during the redemption  
7 period specified in that judgment, his equity of redemption, a  
8 contingent equitable interest in the property subject to  
9 extinguishment absent redemption within the allotted time, became  
10 “property of the estate” within the meaning of federal bankruptcy  
11 laws. See 11 U.S.C. § 541(a).<sup>12</sup>

12 B. Tolling of the Period of Redemption

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

15 (a) Except as provided in subsection (b) of  
16 this section, a petition filed under section  
17 301, 302, or 303 of this title, or an  
18 application filed under section 5(a)(3) of

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26 <sup>12</sup> 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                   the Securities Investor Protection Act of  
2                   1970 operates as a stay, applicable to all  
3                   entities, of-

4                   (1) the commencement or continuation,  
5                   including the issuance or employment of  
6                   process, of a judicial, administrative, or  
7                   other action or proceeding against the debtor  
8                   that was or could have been commenced before  
9                   the commencement of the case under this  
10                  title, or to recover a claim against the  
11                  debtor that arose before the commencement of  
12                  the case under this title;

13                  (2) the enforcement, against the debtor  
14                  or against property of the estate, of a  
15                  judgment obtained before the commencement of  
16                  the case under this title;

17                  (3) any act to obtain possession of  
18                  property of the estate or of property from  
19                  the estate or to exercise control over  
20                  property of the estate;

21                  (4) any act to create, perfect, or  
22                  enforce any lien against property of the  
23                  estate;

24                  (5) any act to create, perfect, or  
25                  enforce against property of the debtor any  
26                  lien to the extent that such lien secures a  
27                  claim that arose before the commencement of  
28                  the case under this title . . . .

29                  11 U.S.C. § 362(a). Section 108(b) provides, in pertinent part:

30                  (b) Except as provided in subsection (a) of  
31                  this section, if applicable nonbankruptcy  
32                  law, an order entered in a nonbankruptcy  
33                  proceeding, or an agreement fixes a period  
34                  within which the debtor . . . may file any  
35                  pleading, demand, notice, or proof of claim  
36                  or loss, cure a default, or perform any other  
37                  similar act, and such period has not expired  
38                  before the date of the filing of the  
39                  petition, the trustee may only file, cure, or  
40                  perform, as the case may be, before the later

of -

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

(2) 60 days after the order for relief.

11 U.S.C. § 108(b). The situation presented by this case seems to fall within the scope of both provisions. On one hand, the foreclosure judgment in favor of the mortgagee resulted from a pre-petition "proceeding against the debtor" and left the mortgagor with a right to redeem within a specified timeframe. This right is "property of the estate" within the meaning of § 541, suggesting that § 362(a) may apply. On the other hand, the foreclosure judgment is "an order entered in a nonbankruptcy proceeding [that] fixes a period within which the debtor . . . may . . . cure a default," suggesting that § 108(b) may apply.

Neither the statutory text nor the legislative history of § 362(a)<sup>13</sup> and § 108(b)<sup>14</sup> directly addresses how these provisions relate to one another. Nonetheless, Vermont bankruptcy courts have consistently held that the automatic stay provisions of 11 U.S.C. § 362(a) toll the duration of a debtor's equity of redemption period. See *In re Shea Realty, Inc.*, 21 B.R. 790, 793

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

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

1 (Bankr. D.Vt. 1982); In re L.H. & A. Realty Co., 57 B.R. 265, 268  
2 (Bankr. D.Vt. 1986).

3           In contrast, three Circuit courts have considered the  
4 interrelation between the provisions at issue here and determined  
5 that the timing provisions of § 108(b) take precedence over §  
6 362(a) tolling. See In re Tynan, 773 F.2d 177 (7th Cir. 1985);  
7 In re Glenn, 760 F.2d 1428 (6th Cir. 1985); Johnson v. First  
8 Nat'l Bank, 719 F.2d 270 (8th Cir. 1983); see also In re Maanum,  
9 828 F.2d 459, 460 (8th Cir. 1987) ("[R]egardless of the type of  
10 property interest affected, '§ 362(a) cannot be read to stay the  
11 mere running of a statutory time period.' . . . . Section  
12 108(b) and section 362(a) are mutually exclusive; anything  
13 temporarily stayed under the specific language of section 108(b)  
14 is not indefinitely stayed by the more general language of  
15 section 362(a).") (quoting Johnson, 719 F.2d at 276); c.f.  
16 Justice v. Valley Nat'l Bank, 849 F.2d 1078, 1082 (8th Cir. 1988)  
17 (applying Johnson rationale and holding that § 108(b) trumps §  
18 1222(b)(2)). Following the reasoning of Johnson and Maanum, the  
19 Eighth Circuit determined that § 108(b), rather than § 362(a),  
20 governed in a strict foreclosure proceeding, where a South Dakota  
21 state court had entered a foreclosure judgment declaring that the  
22 Carvers had defaulted on a contract for deed they had entered  
23 into pertaining to certain real estate in South Dakota and  
24 specifying the conditions for redemption. See In re Carver, 828

1 F.2d 463, 464 (8th Cir. 1987).

2 The seminal case on the applicability of § 362(a) and §  
3 108(b) to a statutory redemption period following a mortgage  
4 foreclosure was Bank of Commonwealth v. Bevan, 13 B.R. 989 (E.D.  
5 Mich. 1981).<sup>15</sup> In that case, the mortgagee and purchaser  
6 appealed an order of the bankruptcy court staying the statutory  
7 redemption period following a foreclosure sale of the debtor's  
8 residential property. Id. at 990. The district court noted  
9 that, "[w]hile the nature and extent of the debtor's interest in  
10 real property is determined by application of state law, the  
11 Bankruptcy Code defines those interests in property which become  
12 'property of the estate' and hence within the jurisdiction of the  
13 bankruptcy court." Id. at 990-91 (citing 4 Collier on Bankruptcy  
14 ¶ 541.07(1) (15th ed. 1980)).<sup>16</sup> Accordingly, the Bevan court  
15 concluded that the "right of redemption created under state law  
16 generally passes into the estate of the debtor if the period of  
17 redemption has not expired at the time the petition is filed."  
18 Id. at 991 (citing 4 Collier on Bankruptcy, ¶ 541.07(3) (15th ed.  
19 1980)). We agree.

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22       <sup>15</sup> 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.

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

1           The Bevan court concluded that “[u]nder the language of §  
2       362(a), an automatic stay applies to ‘acts,’ ‘proceedings’ and  
3       their ‘continuation,’ and ‘enforcement’ of judgments against the  
4       debtor or property of the estate, and does not effect [sic] the  
5       running of specific time periods unlike § 108 which speaks  
6       explicitly to that issue.” Id. at 993. The Bevan Court further  
7       reasoned that:

8           An interpretation of § 362(a) as an  
9       indefinite stay of the statutory period of  
10      redemption would render § 108(b) superfluous.  
11      If § 362(a) automatically stays the running  
12      of the statutory right to redeem until the  
13      stay is lifted pursuant to § 362(c) or (d),  
14      the pertinent time allotments of § 108(b) are  
15      completely extraneous as statutory time  
16      periods designed to control the trustee’s  
17      activity. Moreover, if § 362(a) is  
18      interpreted to provide for the automatic stay  
19      of time periods for an indefinite amount of  
20      time, then subsections (a) and (b) of § 108,  
21      which define minimum and maximum time periods  
22      for the trustee to act, directly conflict  
23      with § 362(a).

24       Id. at 994. The Bevan court noted that although § 362 would give  
25       the debtor greater protection, “where one section of the  
26       Bankruptcy Code explicitly governs an issue, another section  
27       should not be interpreted to cause an irreconcilable conflict,”  
28       and thus held that § 108 controls the period of time a trustee  
29       has to redeem the debtor’s property. See id.

30       We agree with the analysis in Bevan and thus join our sister  
31       Circuits in holding that § 108(b), not § 362(a), governs the  
32       tolling of a period of equitable redemption. The automatic stay

1 prevents only certain affirmative acts taken by a creditor, and  
2 the running of time is not one of those acts. Redemption itself  
3 may be an affirmative act, but it is one that the mortgagor or  
4 Trustee must take to protect the equity of redemption.

5 Therefore, we hold that the period of equitable redemption  
6 was not stayed when Frazer filed a Chapter 13 bankruptcy petition  
7 on September 14, 1998, although it was extended by section 108(b)  
8 by 60 days after filing of the petition, i.e., until November 13,  
9 1998. Consequently, the equity of redemption was foreclosed when  
10 the extended period lapsed without redemption by Frazer or the  
11 Trustee. Under Vermont strict foreclosure law, the equity of  
12 redemption extinguished completely; full title, both legal and  
13 equitable, vested automatically with the mortgagee. See supra  
14 II.A. Thus, having failed to redeem during the period of  
15 equitable redemption, neither the mortgagor nor the Trustee has a  
16 legally cognizable right or interest in the property that  
17 justifies encumbrance by federal bankruptcy law.

18 C. Other Local Procedures

19 Appellant argues that even if the period of equitable  
20 redemption is not stayed, § 362 stays local procedures that a  
21 mortgagee must invoke to perfect its interest in the property  
22 (i.e., record a certificate of non-redemption) and to enter the  
23 property and obtain possession (i.e., execution of a writ of  
24 possession). We disagree.

1           1. Recording the Certificate of Non-Redemption

2           Under Vermont law, a mortgagee must record a certificate of  
3           non-redemption to perfect its interest against "subsequent  
4           purchasers, mortgagees or attaching creditors." See 12 VT. STAT.  
5           ANN. §§ 4529, 4530; see also Merchants Bank, 253 B.R. at 518. A  
6           mortgagee's ability to record a certificate of non-redemption is  
7           contingent upon the mortgagor's failure to redeem within the  
8           allotted time. See 12 VT. STAT. ANN. § 4529. Once the redemption  
9           period lapses, a mortgagee has 30 days to record a certificate of  
10          non-redemption. See id. If a mortgagee does not do so,  
11          "subsequent purchasers, mortgagees or attaching creditors" may  
12          redeem the property as if the "time of redemption had not  
13          expired." 12 VT. STAT. ANN. §§ 4529, 4530. It is quite clear  
14          that under Vermont law, the act of recording a certificate of  
15          non-redemption in no way affects the mortgagor, whose equity of  
16          redemption extinguishes automatically when the redemption period  
17          lapses. Recording simply perfects title against "subsequent  
18          purchasers, mortgagees or attaching creditors." See id. § 4530  
19          ("Such foreclosure shall not transfer the title to such lands as  
20          against subsequent purchasers, mortgagees or attaching  
21          creditors," unless the certificate is recorded on time) (emphasis  
22          added).

23           Appellant argues that filing the certificate of non-  
24          redemption affects its rights as "a subsequent attaching

1 creditor." For the reasons discussed below, we disagree both  
2 with Appellant's premise (that it qualifies as "a subsequent  
3 attaching creditor") and its conclusion (that such status would  
4 entitle it to stay the filing of the certificate of non-  
5 redemption). Appellant contends that pursuant to federal  
6 bankruptcy law (1) a debtor-in-possession stands in the shoes of  
7 a trustee, see 11 U.S.C. § 1107(a); (2) a trustee may, inter alia,  
8 stand in the shoes of a creditor that issued credit at the time  
9 the bankruptcy petition was filed, see 11 U.S.C. § 544(a)(1); and  
10 (3) appellant "obtain[ed], at such time and with respect to such  
11 credit, a judicial lien on all property on which a creditor on a  
12 simple contract could have obtained such a judicial lien . . . ."  
13 Id. While this argument seems to support appellant's claim that  
14 a debtor may be deemed a "subsequent attaching creditor" by  
15 operation of § 544 of the bankruptcy code, the argument distorts  
16 the purpose of the "strong arm" powers under § 544. "The purpose  
17 of the 'strong arm clause' is to cut off unperfected security  
18 interests, secret liens and undisclosed prepetition claims  
19 against the debtor's property as of the commencement of the  
20 case." Collier on Bankruptcy ¶ 544.03 (15th ed. rev. 2001).  
21 Given that Merchants Bank's mortgage is neither unperfected,  
22 secret, nor undisclosed, we find § 544(a)(1) inapplicable in this  
23 case.

24 Assuming arguendo that appellant is "a subsequent attaching

1 creditor," we nonetheless conclude that appellant's argument that  
2 the filing of the certificate of non-redemption is stayed by §  
3 362 fails for the following reasons. First, under Vermont law,  
4 which cabins the creditor rights that a trustee (and a debtor-in-  
5 possession standing in the shoes of a trustee) may exercise, the  
6 mortgagee has the right to perfect its interest vis-a-vis  
7 "subsequent purchasers, mortgagees or attaching creditors." 12  
8 VT. STAT. ANN. §§ 4529, 4530. A subsequent attaching creditor  
9 simply has no right to redeem unless and until a mortgagee fails  
10 to record the certificate on time. *Id.* Second, as discussed  
11 above, the mortgagee automatically perfects its interest vis-a-  
12 vis the mortgagor because strict foreclosure leaves the mortgagor  
13 without any right or interest in the property. Finally, to  
14 exercise "strong arm" powers under § 544, a trustee must file an  
15 adversary proceeding, see Fed. R. Bankr. P. 7001 et seq., and it  
16 does not appear based on the record before us that any such  
17 proceeding was initiated.

Therefore, we hold that the act of recording the certificate of non-redemption is not barred by § 362.<sup>17</sup>

<sup>17</sup> In reaching our conclusion, we need not, and therefore do not, decide whether filing the certificate of non-redemption constitutes a ministerial or affirmative act. See In re Carver, 828 F.2d at 463-64 (holding that certification of non-redemption by the clerk of the court, where the debtor failed to comply with a contract for deed within a redemption period, was not an affirmative act required to complete the running of the redemption period but was (continued...))

1           2. The Writ of Possession

2           Under Vermont law, when a mortgagor fails to redeem within  
3           the allotted time and full title vests with the mortgagee, the  
4           mortgagee is entitled as of right to obtain a writ of possession  
5           from the clerk of the court in order to secure the assistance of  
6           the sheriff in removing any occupants from the property. See  
7           Vermont Tenants, Inc. v. Vermont Hous. Fin. Agency, 742 A.2d 745,  
8           748 (Vt. 1999) ("Under § 4528, the mortgagee need not bring a  
9           separate ejectment action to evict the tenant. The clerk can  
10          issue a writ of possession based on the foreclosure judgment and  
11          the failure to redeem, and the writ allows removal of any  
12          tenants, as well as the mortgagor."); Dieffenbach v. Attorney  
13          Gen. of Vt., 604 F.2d 187, 194 (2d Cir. 1979) ("[T]o obtain  
14          possession after the equity of redemption has expired the  
15          creditor must obtain from the clerk of the court a writ of  
16          possession which the sheriff must execute."). According to  
17          statute, a writ of possession obtained after strict foreclosure  
18          "shall have the same force and effect and be executed in the same  
19          manner as similar writs issued after judgment by a court of law  
20          in ejectment proceedings." 12 VT. STAT. ANN. § 4528. Despite this  
21          language, there is (at least) one crucial distinction between  
22          such writs: In an ejectment proceeding, a debtor may redeem and

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17       (...continued)  
20       instead merely a ministerial act not stayed by § 362).

1 thereby avoid ejectment if the clerk of court has not issued the  
2 writ of possession; issuance of the writ in an ejectment  
3 proceeding extinguishes the debtor's right to redeem.<sup>18</sup> By  
4 contrast, in a strict foreclosure proceeding, a debtor may not  
5 redeem after the period of redemption lapses, regardless of  
6 whether the clerk of court has issued the writ of possession;  
7 issuance of the writ has no effect whatsoever on the debtor's  
8 rights because, as discussed above, once the redemption period  
9 has lapsed, the debtor's equity of redemption extinguishes and  
10 the debtor has no legally cognizable right or interest in the  
11 property. See supra II.A. Accordingly, we hold that the  
12 issuance of the writ of possession after strict foreclosure is a  
13 ministerial act that is not tolled by the automatic stay  
14 provision.

15 We conclude that appellant's remaining arguments are without  
16 merit.

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18       <sup>18</sup> 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

### III. CONCLUSION

2 We affirm the judgment of the district court.