THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: May 20, 2016

Beth E. Hanan
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

IN RE: John J. Denil, Sr. and Kimberly R. Denil, Case No. 15-31218-beh

Debtors. Chapter 13

Woodsman LLC, Adv. Case No. 15-2567

Plaintiff,

v.

John J. Denil, Sr. and Kimberly R. Denil,

Defendants.

DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

Woodsman LLC and the defendant-debtors, John and Kimberly Denil, dispute each other's rights and ownership interests in property located 4451 E. Whitefish Bay Road in Sturgeon Bay, Wisconsin (the "Property"), which is the subject of a land contract dated August 31, 2009, between Woodsman and Denil Auto and Trucking LLC. Woodsman filed this adversary proceeding seeking a

declaratory judgment regarding those rights and interests, and has also moved for relief from stay in the Denils' main bankruptcy case and objected to plan confirmation on the basis that the Denils do not have the ability to cure their pre-petition default under the land contract through their chapter 13 plan.

Woodsman has moved for summary judgment in this adversary proceeding on two grounds. Woodsman first argues that the Property is not property of the Denils' bankruptcy estate. Alternatively, Woodsman argues that if the Property is property of the Denils' bankruptcy estate, the state court's entry of an order finalizing Woodsman's judgment of strict foreclosure under Wisconsin Statutes section 846.30 would be a ministerial act not subject to the automatic stay of 11 U.S.C. section 362(a).

Following briefing and oral argument, and for the reasons stated below, the court denies Woodsman's motion for summary judgment and grants summary judgment in favor of the Denils.

I. JURISDICTION

This Court has jurisdiction under 28 U.S.C. section 1334 and the Eastern District of Wisconsin's July 16, 1984, order of reference entered pursuant to 28 U.S.C. section 157(a). This is a core proceeding under 28 U.S.C. section 157(b)(2)(A), thus the Court may enter a final judgment. 28 U.S.C. § 157(b)(1). The following constitute the court's findings of fact and conclusions of law. Fed. R. Civ. P. 52(a) (incorporated by Fed. R. Bankr. P. 7052).

II. FACTUAL BACKGROUND

The facts central to this adversary proceeding are not in dispute. CM-ECF, Doc. No. 7, at 1.

On August 29, 2009, Woodsman and Denil Auto entered into a land contract. CM-ECF, Doc. No. 9, at 18–22. Denil Auto, the vendee, agreed to pay Woodsman, the vendor, the sum of $135,000 for the Property. *Id.* at 18. Denil Auto paid Woodsman $8,500 upon execution of the land contract and agreed to pay the balance of the purchase price, $126,500, at 3% per annum by way of monthly payments of $500 starting on October 1, 2009, and a balloon payment consisting of the balance of the outstanding principal and interest due on or before September 1, 2011. *Id.*

Denil Auto defaulted under the land contract and failed to make the balloon payment by September 1, 2011. CM-ECF, Doc. No. 1, ¶9; CM-ECF, Doc. No. 6, ¶1; CM-ECF, Doc. No. 9, at 3; CM-ECF, Doc. No. 10, at 2. Thereafter, Denil Auto agreed to make monthly payments of $700. CM-ECF, Doc. No. 9, at 3. In the summer of 2014, Denil Auto ceased making monthly payments to Woodsman and failed to pay the real estate taxes for which it was responsible under the land contract. *Id.*; CM-ECF, Doc. No. 1, ¶11; CM-ECF, Doc. No. 6, ¶1. Woodsman served Denil Auto notice of its default under the land contract on October 17, 2014. CM-ECF, Doc. No. 9, at 23. Denil Auto failed to cure the defaults enumerated in the notice, so Woodsman commenced a state court action seeking a judgment of strict foreclosure on February 5, 2015. *Id.* at 28.

On July 6, 2015, the state court granted Woodsman a judgment of strict foreclosure. *Id.* at 27–29. The judgment was in the amount of $99,271.02, and provided that Denil Auto had until October 4, 2015, to redeem the property by paying Woodsman the entire amount due under the judgment. *Id.* at 28. The judgment further provided that:

> 9. If the defendant fails to redeem the property within the time period established in paragraph 5, all right, title, and interest in the subject premises shall vest in the plaintiff and the court shall issue an order to that effect upon application by the plaintiff and the plaintiff shall be entitled to a money judgment in the amount of attorney fees and costs.
>
> 10. If the defendant fails to redeem the property within the time period provided in paragraph 5, the defendant and all persons claiming under him shall be forever barred and foreclosed of all right, title, interest, and equity of redemption in the premises.

Id. at 29. The judgment was final for purposes of appeal. *Id.*

On October 1, 2015, the Denils dissolved Denil Auto and transferred all of the LLC's assets and liabilities to themselves personally. CM-ECF, Doc. No. 1, ¶14; CM-ECF, Doc. No. 6, ¶1; CM-ECF, Doc. No. 9, at 34. Neither the Denils nor Denil Auto redeemed the Property on or before October 4, 2015. CM-ECF, Doc. No. 1, ¶15; CM-ECF, Doc. No. 6, ¶1. On October 5, 2015, Woodsman applied to the state court for an order pursuant to Wisconsin Statutes section 846.30 to finalize the strict foreclosure, averring that neither the Denils nor Denil Auto redeemed the Property by the October 4, 2015, redemption date. CM-ECF, Doc. No. 9, at 30–33.

The Denils filed for bankruptcy relief under chapter 13 on October 7, 2015.

The state court had not entered an order pursuant to section 846.30 of the Wisconsin Statutes by that date. CM-ECF, Doc. No. 1, ¶18; CM-ECF, Doc. No. 6, ¶1; CM-ECF, Doc. No. 9, at 4; CM-ECF, Doc. No. 10, at 2.

III. LEGAL ANALYSIS

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (incorporated by Fed. R. Bankr. P. 7056). The party pursuing summary judgment must make an initial showing that the agreed-upon facts support judgment in its favor, and where the movant fails to do so, the court is obligated to deny the motion. *Hotel 71 Mezz Lender LLC v. Nat'l Retirement Fund*, 778 F.3d 593, 601 (7th Cir. 2015). The court also can enter summary judgment in favor of a non-moving party where the agreed-upon facts support such a judgment. *Jones v. Union Pacific R.R. Co.*, 302 F.3d 735, 740 (7th Cir. 2002); *Goldstein v. Fid. & Guar. Ins. Underwriters, Inc.*, 86 F.3d 749, 750 (7th Cir. 1996). The party against whom summary judgment is entered, however, must be on notice of the possibility and had the opportunity to respond. Fed. R. Civ. P. 56(f) (incorporated by Fed. R. Bankr. P. 7056); *Hotel 71*, 778 F.3d at 603 (the opportunity to respond "includes the chance to marshal evidence and argument in opposition to summary judgment, even where, as here, the party already sought and failed to obtain summary judgment in its favor."); *Goldstein*, 86 F.3d at 750 ("the entry of summary judgment is inappropriate when it takes a party by surprise."). Where there is no right to a jury trial and parties agree to the

relevant facts and only disagree as to how those facts are characterized under law, a court granting summary judgment in favor of a non-movant is appropriate. *See Hotel 71*, 778 F.3d at 603–04; *Goldstein*, 86 F.3d at 751.

Because the Denils are entitled to judgment as a matter of law, and Woodsman was on notice and had the opportunity to respond to the Denils' arguments in its reply brief and during oral argument, entering summary judgment in favor of the Denils is appropriate.[1] *See Hotel 71*, 778 F.3d at 603–04; *Goldstein*, 86 F.3d at 751.

A. Property of the Estate

The filing of a bankruptcy case creates an estate that is comprised of "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "Property interests are created and defined under state law." *Butner v. United States*, 440 U.S. 48, 55 (1979). Section 541 does not create property interests that do not exist under state law at the time of the commencement of the case. *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984).

Woodsman argues that under Wisconsin law when a judgment of strict foreclosure is entered, the only right a vendee possess is the right to redeem the property by the date provided in the judgment. CM-ECF, Doc. No. 9, at 6–8. It

1 Woodsman waived its right to a jury trial in this adversary proceeding by filing a proof of claim in the Denils' main bankruptcy case. *Langenkamp v. Culp*, 498 U.S. 42, 44–45 (1990). Generally, the right to a jury trial in bankruptcy proceedings is limited because most disputes involve equitable relief. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40–42 (1989).

follows, according to Woodsman, that when the date of redemption passes without payment in full, the vendee has no rights in the property under Wisconsin law. *Id.* at 7–8. Under this reading of Wisconsin law, the Denils' failure to redeem the Property by the redemption date meant that there was no interest that could pass into their bankruptcy estate. *Id.*

Woodsman relies primarily on *Exchange Corp. of Wis. v. Kuntz*, 56 Wis. 2d 555, 202 N.W.2d 393 (1972), and *Kallenbach v. Lake Publications, Inc.*, 30 Wis. 2d 647, 142 N.W.2d 212 (1966), for its interpretation of Wisconsin strict foreclosure law, and *Matter of Tynan*, 773 F.2d 177 (1985), for its interpretation of what interests under state law pass into the bankruptcy estate.

Kuntz and *Kallenbach* state that once a redemption period ends, it cannot be extended and any interest that a vendee had under a land contract is cut off. 56 Wis. 2d at 561–63; 30 Wis. 2d at 656. While *Kuntz* and *Kallenbach* remain good authority on the inability to extend a redemption period after it has passed, the other proposition that Woodsman uses *Kuntz* and *Kallenbach* to advance—that a vendee holds no interest in property after the redemption period when it fails to redeem—has been superseded by the 1995 amendment to Wisconsin Statute section 846.30. *See Steiner v. Wis. Am. Mut. Ins. Co.*, 2005 WI 72, ¶¶40–55, 281 Wis. 2d 395, 412–19, 697 N.W.2d 452, 461–64; *see also In re Johnson*, 513 B.R. 364, 368 (Bankr. W.D. Wis. 2014) (recognizing *Steiner* as controlling under Wisconsin strict foreclosure law for the date of transfer of equitable title).

In 1995, the Wisconsin legislature amended Wisconsin Statute section 846.30 to include the following sentence: "No judgment of strict foreclosure is final until the court enters an order after the expiration of the redemption period confirming that no redemption has occurred and making the judgment of strict foreclosure absolute." Wis. Stat. § 846.30 (2013–14). The *Steiner* court had occasion to examine this addition to section 846.30 in a dispute over who owned property subject to a land contract when the redemption period had expired, but the state court had yet to enter a final order under section 846.30. *Steiner*, 2005 WI 72, at ¶¶15–18. During this pivotal time period, an injury on the property had occurred and whoever held equitable title likely would be liable. *Id.* at ¶4.

The Wisconsin Supreme Court examined the development of strict foreclosure law in Wisconsin and observed that the 1995 amendment to section 846.30 came at the behest of title companies and was designed to provide certainty as to the date of transfer of equitable title from vendee back to vendor. *Id.* at ¶¶51–54. Given the importance of having a date certain for the transfer of equitable title, the Wisconsin Supreme Court held that entry of a final order under section 846.30 was a significant component of the strict foreclosure process, not just confirmation of something that everyone already knew. *Id.* at ¶¶49–50. Consequently, the *Steiner* court held that equitable title remained with the vendee at the time of the injury because a final order under section 846.30 had not been entered. *Id.* at ¶¶61 & 69.

Steiner resolves the present matter in favor of the Denils. Although the redemption period provided in the judgment of strict foreclosure had passed, the state court had not entered an order under section 846.30, something necessary to finalize the strict foreclosure process. Therefore, equitable title remained with the Denils on the petition date and became property of the bankruptcy estate under the broad language of 11 U.S.C. section 541(a)(1).

This result is not inconsistent with *Tynan*. The Seventh Circuit held in *Tynan* that it is the right of redemption, if any, and not the real property itself that passes into the bankruptcy estate following a sheriff's sale of real property. 773 F.2d at 179. While the *Tynan* decision may limit a debtor's ability to cure a default in bankruptcy vis-à-vis her state law redemption rights, it does not limit the interests that a debtor has in property under state law for purposes of 11 U.S.C. section 541. *See Butner*, 440 U.S. at 55.

Moreover, the Seventh Circuit in *Tynan* examined judicial foreclosure under Illinois law. 773 F.2d at 178. The Property at issue in this case is subject to strict foreclosure under Wisconsin law. And Wisconsin law provides that the Denils hold equitable title until the court enters a final order under Wisconsin Statute section 846.30. Woodsman essentially conceded this in its reply brief and at oral argument by recognizing that the Denils retain equitable title, at least in the sense that they have a possessory interest in the Property. *See, e.g.,* CM-ECF, Doc. No. 11, at 6 ("the debtors do retain the 'stick' of possession in a non-wasteful manner"). Woodsman's efforts to separate out the "sticks" of equitable

title by parsing through decades of the common law are unavailing where the Wisconsin Supreme Court has more recently held that a vendee holds equitable title—not just certain sticks which constitute equitable title—until the state court enters an order under section 846.30. *Steiner*, 2005 WI 72, at ¶61.

Now that the court has determined that the Property is property of the Denils' bankruptcy estate, it must determine if the entry of an order by the state court under Wisconsin Statute section 846.30 is subject to the automatic stay.

B. Applicability of 11 U.S.C. § 362(a)

The filing of a bankruptcy petition operates as a stay against the "continuation . . . of a judicial, administrative, or other action or proceeding against the debtor," the "enforcement, against the debtor or against property of estate, of a judgment obtained before the commencement of the case," and "any act to obtain possession of property of the estate or of property from the estate," among other things. 11 U.S.C. § 362(a)(1)–(3). The automatic stay is a broad provision that encompasses most actions that could be taken against a debtor or a debtor's property as it is designed to preserve the debtor's estate. *See Midlantic Nat'l Bank v. New Jersey Dep't of Environ. Protection*, 474 U.S. 494, 503 (1986). Certain actions are expressly excepted from the stay under 11 U.S.C. section 362(b), but these exceptions are read narrowly. *Hillis Motors, Inc. v. Hawaii Auto Dealers' Ass'n*, 997 F.2d 581, 590 (9th Cir. 1993). If a party wishes to pursue an act not expressly defined in section 362(b), that party must generally seek relief from stay before taking action. *See* 11 U.S.C. § 362(d). A

party that fails to obtain relief from stay prior to taking action, which does not qualify as an exception to the automatic stay, risks the act being held void, and risks being sanctioned. *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984); 11 U.S.C. § 362(k).

Notwithstanding section 362(b) and (d), some courts view purely ministerial acts taken after the filing of a bankruptcy petition as not subject to the automatic stay. *See, e.g., Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 973–74 (1st Cir. 1997) (citing to Second and Fourth Circuit cases to recognize the existence of a ministerial acts exception, but holding that the exception did not apply to the act taken). Ministerial acts are described as clerical in nature and occur where "nothing is left to the exercise of the official's discretion or judgment." *Id.* at 974. Ministerial acts are the antithesis of judicial acts where discretion and judgment are exercised by an official. *Id.* For example, the *Soares* court distinguished a clerk entering judgment on the docket post-petition where the court already so-ordered pre-petition, with the court issuing a decision on summary judgment post-petition where the issues were briefed and argued pre-petition; the former was clerical in nature and a ministerial act, while the latter was a judicial exercise of judgment, and in that case, an action taken in violation of the automatic stay. *Id.*

Woodsman argues that the Seventh Circuit recognizes the ministerial acts exception, and that entry of an order under Wisconsin Statute section 846.30 is

a ministerial act because the language in the judgment of strict foreclosure says that "the court *shall* issue an order [that all right, title, and interest in the Property shall vest in Woodsman] upon application by [Woodsman]." *See* CM-ECF, Doc. No. 9, at 10–12. According to Woodsman, the "state court has no discretion as to whether or not to issue the order vesting title in Woodsman" and "the only act that [the] state court has to do is put pen to paper and sign the Order Confirming Title itself." *Id.* at 12. Aside from *Soares*, Woodsman cites to *In re Lamont*, 740 F.3d 397 (7th Cir. 2014), *Bass v. Fillion (In re Fillion)*, 181 F.3d 859 (7th Cir. 1999), and *First Nat'l Bank v. Gruber (In re Gruber)*, No. 13-31898, Adv. No. 13-2797, 2014 WL 1584204 (Bankr. E.D. Wis. April 17, 2014), to support its ministerial acts argument.

The court disagrees with Woodsman's contention that the Seventh Circuit definitively recognizes the ministerial acts exception. None of the Seventh Circuit cases that Woodsman cites involve the court actually finding a ministerial acts exception. *See Lamont*, 740 F.3d at 410 (applying Illinois law, and holding that a post-petition act to obtain a tax deed where a right of redemption existed is subject to the automatic stay); *Fillion*, 181 F.3d at 861 n.2 (stating that some courts recognize a ministerial acts exception, but that a request to the state court for entry of a default judgment post-petition was a violation of the automatic stay); *Gruber*, 2014 WL 1584204, at *8 n.2 (stating that a ministerial acts exception would not apply even if it was a legitimate construct). Additionally, the following quote, which Woodsman argues supports its position, does the

opposite:

> "[S]ubsequent to a foreclosure sale "the only property interest which the debtors have in the real estate after the foreclosure sale is the statutory right of redemption, the real property did not become part of the estate. Under those circumstances, it is appropriate *to lift the automatic stay* so that the purchaser may pursue the ministerial steps to obtain legal title to property that he already has the right to own."

Lamont, 740 F.3d at 405–06 (internal citation omitted) (emphasis added). The *Lamont* court's mention of lifting the automatic stay shows that, if anything, the Seventh Circuit views ministerial acts as being subject to the automatic stay—not an exception from it. Judge Halfenger opined the same in *Gruber*, and further questioned whether inferring an additional exception to the automatic stay, where numerous particular exceptions were already enumerated by Congress, was a sensible course. 2014 WL 1584204, at *8 n.2. This court, too, questions whether a ministerial acts exception is a permissible construct, but, for the purpose of summary judgment, accepts that the ministerial acts exception is recognized in this Circuit.

Woodsman's request to have the state court enter a final order under Wisconsin Statute section 846.30 does not qualify as a ministerial act under the case law. Entering such an order is precisely the type of action that the *Soares* court recognized as judicial, and thus, subject to the automatic stay. *See Soares*, 107 F.3d at 974–75. An order under section 846.30 requires the state court judge, not the clerk, to take action in the first instance. This requires the judge

to examine the record and determine whether it supports entry of the order. Woodsman conceded at oral argument that there was more to the process than the judge merely affixing his signature to the order. The proposed order Woodsman submitted to the state court demonstrates this: "the plaintiff *having provided adequate documentation* that the defendants failed to redeem the property within such a time." CM-ECF, Doc. No. 9, at 31 (emphasis added). To enter the order, the state court would have to determine that Woodsman provided adequate documentation, which requires the judge to analyze the documents and apply the law; this necessarily requires the exercise of judgment. *Soares*, 107 F.3d at 975 ("it is readily apparent that the state court's actions in ordering a default and directing the entry of judgment possess a distinctly judicial, rather than a ministerial, character."). The judicial nature of the order is further supported by the *Steiner* court's understanding that an order under section 846.30 "performs a much more significant role than just reaffirming something everyone already knows." 2005 WI 72, at ¶49.

Woodsman's attempt to distinguish its situation from that of the creditor in *Gruber* also is unavailing. In *Gruber*, Judge Halfenger concluded that a creditor's demand on a sheriff to execute a deed in its favor was not a ministerial act and was subject to the automatic stay. 2014 WL 1584204, at *8. Woodsman focuses on the demand and argues that it is not an act subject to the automatic stay because Woodsman made its demand pre-petition when it applied to the

state court for an order under section 846.30. CM-ECF, Doc. No. 9, at 11–12. While it is true that Woodsman's pre-petition demand on the state court for an order under section 846.30 was not subject to the automatic stay, the state court's post-petition entry of the order would, at the very least, constitute a continuation of a judicial proceeding against the debtor in violation of the automatic stay. *See* 11 U.S.C. § 362(a)(1). The timing of Woodsman's demand is not determinative because a judicial act is still required. *See Soares*, 107 F.3d at 973 ("The date on which the creditor asked the state court to act, while material to an assessment of the creditor's good faith (which is not seriously questioned here), does not bear on whether the activities themselves constitute the forbidden continuation of a judicial proceeding.").

In sum, even if the ministerial acts exception is a permissible construct within the Seventh Circuit, Wisconsin case law shows that the entry of an order under Wisconsin Statute section 846.30 is judicial in nature, not ministerial, and thus, subject to the automatic stay.

IV. CONCLUSION

For the reasons stated above, the Property constitutes property of the Denils' bankruptcy estate and the state court's entry of an order under Wisconsin Statute section 846.30 would be a judicial act subject to the automatic stay in the Denils' bankruptcy proceeding.

Accordingly,

IT IS ORDERED that Woodsman's motion for summary judgment is **DENIED**, and summary judgment in favor of the Denils is **GRANTED**.

IT IS FURTHER ORDERED that the clerk enter judgment accordingly, and close this adversary proceeding.

The court will notice a status conference in the Denils' main bankruptcy case to schedule further proceedings on Woodsman's motion for relief from stay and objection to plan confirmation.

It is so ordered.

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