

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

FILED
U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF NC
MAR 22 1996
BARRY C. CASH
Clerk

In Re:

MICHAEL J. STITT and ROBIN
H. STITT,

Debtors.

Case No. 96-30029
Chapter 13

JUDGEMENT ENTERED ON MAR 22 1996

ORDER RECONSIDERING PREVIOUS ORDER

This matter comes before the Court upon the Motion for Rehearing filed by the Debtors on March 11, 1996. Previously, an Objection to Confirmation of Chapter 13 Plan was filed on January 19, 1996 by Mid-State Homes, Inc. ("Mid-State"), the holder of a note and deed of trust on the Debtors' principal residence. The Debtors filed a response to that Objection on February 7, 1996 and a hearing was held on the matter on February 13, 1996. On February 21, 1996, the Court entered an Order sustaining Mid-State's Objection to Confirmation. Subsequently, the Debtors submitted new law which has caused the Court to reconsider the previous Order. Based on the Court's records and the additional law provided by the Debtors, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On January 17, 1989, the Debtors delivered a promissory note in the amount of \$142,500 to Mid-State. That note is secured by a Deed of Trust recorded at Book A466, Page 519 in the Union County, North Carolina Public Registry.

2. The real estate described in the Deed of Trust is the Debtors' principal place of residence.

3. Subsequent to January 17, 1989, the Debtors fell into default on their obligation to Mid-State. Based upon that default, Mid-State properly obtained a foreclosure judgment in state court and a foreclosure "sale" under N.C. Gen. Stat. §§ 45-21.16 and 45-21.17 was held on December 29, 1995.

6. At the December 29, 1995 sale, Mid-State Trust III was the high bidder for the real estate.

7. On January 5, 1996, less than ten (10) days after the foreclosure sale was held, the Debtors filed for relief under Chapter 13 of the Bankruptcy Code.

8. The Debtors' proposed plan calls for the arrearages on the Mid-State debt to be cured and the mortgage to be reinstated over the course of the plan through payments of \$475.00 per month to Mid-State directly and payments of \$560.00 per month to the Trustee.

9. Mid-State objected to confirmation of the Debtors' plan based on the assertion that this type of cure was improper because a foreclosure sale had already taken place, leaving the Debtors with only a sixty (60) day period within which to redeem the property under 11 U.S.C. § 108(b).

10. The Debtors responded to Mid-State's objection asserting that they had a right to cure and reinstate the mortgage through their plan under 11 U.S.C. § 1322(c)(1) because a foreclosure sale

is not completed under North Carolina law until the ten (10) day upset period has run following the foreclosure sale.

CONCLUSIONS OF LAW

1. Prior to the enactment of the Bankruptcy Reform Act of 1994, there was a split among courts with regard to the issue of at what point, during the foreclosure process, a debtor loses his right to cure and reinstate his mortgage under Chapter 13 of the Code. The majority of courts held that the debtor maintained the right to cure and reinstate his mortgage until the actual foreclosure sale was held. See In re Glenn, 760 F.2d 1428 (6th Cir. 1985), cert. denied, 474 U.S. 849, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985). However, at least one Circuit Court held that a debtor's right to cure ended upon the entry of the foreclosure judgment. Matter of Roach, 824 F.2d 1370 (3rd Cir. 1987).

2. In an attempt to clear up this confusion, Congress enacted section 1322(c)(1) of the 1994 Bankruptcy Amendments. That section states:

a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured . . . until such residence is sold at a foreclosure sale that is conducted with applicable nonbankruptcy law.

11 U.S.C. § 1322(c)(1). Further, the House Report on the 1994 Bankruptcy Reform Act states, with regard to section 1322(c)(1) that, "[t]his section of the bill safeguards a debtor's rights in a chapter 13 case by allowing the debtor to cure home mortgage defaults at least through completion of a foreclosure sale under applicable nonbankruptcy law." (emphasis added). Therefore, under section 1322(c)(1) and the relevant legislative history, it is

clear that a debtor has until a foreclosure sale is completed under applicable state law to cure and reinstate his mortgage.

3. As a result, the next step is to determine when a foreclosure sale is complete under North Carolina law. North Carolina law provides for a ten day upset period, following the foreclosure sale, during which a higher bid by a different entity will defeat the highest bidder at the sale. N.C. Gen. Stat. § 45-21.27. Case law in North Carolina makes it clear that, until this period has run, the foreclosure sale is not complete and the high bidder at the foreclosure sale is merely a proposed purchaser and has acquired no rights in the property. Cherry v. Gilliam, 195 N.C. 233, 141 S.E. 594 (1928), Davis v. Central Life Ins. Co., 197 N.C. 617, 150 S.E. 120 (1929).

4. Further indication that a foreclosure sale is not complete until the ten day upset period has run is found in North Carolina General Statute section 45-21.22 as amended in 1993. This statute, which was not previously brought before the Court, states that if a bankruptcy petition is filed (1) after the notice and hearing provided for in section 45-21.16 has been completed (2) after the Clerk of Superior Court has authorized the foreclosure and (3) prior to the expiration of the upset bid period, then if the automatic stay of section 362 of the Bankruptcy Code is subsequently lifted with respect to the foreclosure, the foreclosing trustee need not comply with the notice and hearing procedure again, but may proceed to readvertise the property and sell it. N.C. Gen. Stat. § 45-21.22(c). This recently amended statute makes

it clear that a foreclosure sale is not final in North Carolina until the upset bid period has run.

5. Therefore, under section 1322(c)(1) of the 1994 Bankruptcy Code Amendments and the relevant legislative history, a debtor has the right to cure and reinstate his mortgage in North Carolina until the end of the ten day upset period, when the foreclosure sale becomes complete. While this is a case of first impression, under the 1994 amendments, in this court, other courts have applied section 1322(c)(1) in a similar fashion. For cases holding similarly, following the 1994 amendments, see In re Barham, Case Number 96-00007-5-ATS, (Bankr. E.D.N.C. 1996) and In the Matter of Ross, Bankr. Lexis 100 (Bankr. N.J. 1996). Faced with similar facts and law, both the Barham and Ross courts held that a debtor retained the right to cure his mortgage under 1322(c)(1) until a ten day upset period had run following the "sale" of the debtor's property.

6. It may seem inequitable to allow a debtor to cure and reinstate his mortgage during the upset bid period because, under North Carolina law, the debtor's only option would be to redeem the property and make a lump sum payment. However, this reasoning is not persuasive because it also true that, likewise, under North Carolina law, following the entry of a foreclosure judgment and before the actual foreclosure sale, a debtor only retains the right to redeem the mortgaged property by making a lump sum payment. N.C. Gen. Stat. § 45-21.19. There is no question that section 1322(c)(1) of the Code does not contemplate this result, rather,

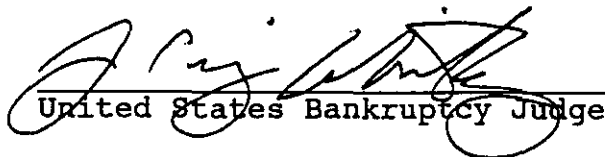
that section specifically allows a debtor to cure and reinstate his mortgage up until the completion of the foreclosure sale.

7. The Debtors in this case filed for Chapter 13 relief before the ten day upset period ran following the foreclosure sale of their property. Further, the automatic stay provision of section 362 of the Bankruptcy Code prohibits the filing of an upset bid and prohibits the ten day period from running. Therefore, under North Carolina law the foreclosure sale of the Debtors' principal residence is not complete and section 1322(c)(1) of the Bankruptcy Code allows the Debtors to cure and reinstate their mortgage.

THEREFORE, THE FOLLOWING IS ORDERED:

The Court's earlier Order of February 21, 1996 sustaining Mid-State's Objection is reconsidered and Mid-State's Objection to Confirmation of the Debtors' Chapter 13 Plan is OVERRULED and the Debtors' plan of reorganization, providing that the Debtors' cure and reinstate their mortgage with Mid-State through the plan, is confirmed as filed.

This is the 20th day of March, 1996.


United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In Re:)	Case No. 95-30029
)	Chapter 13
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ORDER

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and a foreclosure "sale" under N.C. Gen. Stat. §§ 45-21.16 and 45-21.17 was held on December 29, 1995.

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9. Mid-State objected to confirmation of the Debtors' plan based on the assertion that this type of cure was improper because a foreclosure sale had already taken place, leaving the Debtors with only a sixty (60) day period within which to redeem the property under 11 U.S.C. § 108(b).

10. The Debtors responded to Mid-State's objection asserting that they had a right to cure and reinstate the mortgage through their plan under 11 U.S.C. § 1322(c)(1) because a foreclosure sale is not completed under North Carolina law until the ten (10) day upset period has run following the foreclosure sale.

CONCLUSIONS OF LAW

Prior to the enactment of the Bankruptcy Reform Act of 1994, there was a split among courts with regard to the issue of at what point, during the foreclosure process, a debtor loses his right to

cure and reinstate his mortgage under Chapter 13 of the Code. The majority of courts held that the debtor maintained the right to cure and reinstate his mortgage until the actual foreclosure sale was held. See In re Glenn, 760 F.2d 1428 (6th Cir. 1985), cert. denied, 474 U.S. 849, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985). However, at least one Circuit Court held that a debtor's right to cure ended upon the entry of the foreclosure judgment. Matter of Roach, 824 F.2d 1370 (3rd Cir. 1987).

In an attempt to clear up this confusion, Congress enacted section 1322(c)(1) of the 1994 Bankruptcy Amendments. That section states:

a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured . . . until such residence is sold at a foreclosure sale that is conducted with applicable nonbankruptcy law.

11 U.S.C. § 1322(c)(1). Therefore, under section 1322(c)(1) and the relevant legislative history, it is clear that until the foreclosure sale the Debtor may cure and reinstate his mortgage.

The present case addresses the related question of the Debtors' right to cure and reinstate the mortgage using the plan after the foreclosure sale but prior to the expiration of the Debtors' equity of redemption. Under North Carolina law, after a foreclosure sale is conducted, a ten day upset bid period exists during which time the mortgagor/debtor retains an equitable right of redemption. N.C.G.S. § 45-21.29(a). That right of redemption allows the debtor to "regain complete title by paying the mortgage debt, plus any interest and any costs accrued." In re Antley, Case No. 93-30807, August 20, 1993, Bankr. W.D.N.C. (unpub.).

Prior to the 1994 Act, in the Antley case, this Court addressed this issue. Judge Hodges, after a review of a similar case decided by the Bankruptcy Court in the Eastern District of North Carolina entitled In re DiCello, 80 B.R. 769 (Bankr. E.D.N.C. 1987), adopted DiCello's view that the debtor could not cure under 1322(b)(5) because, after the foreclosure sale had been held, "there had been sufficiently serious alterations of (the) security holder's rights" so that the right to cure the default under 1322(b)(5) had been terminated. Antley, pg. 4, citing DiCello, 80 B.R. 769 at 772 (quoting In re Roach, 824 F.2d. 1370, 1376 (3rd Cir. 1987); C.F., In re Glenn, 760 F.2d 1428, 1435 (6th Cir.) cert. denied, 474 U.S. 849 (1985). Although unpublished, Antley has been the rule in this District since its entry. The question then becomes did the 1994 Act change this result?

As noted above, the purpose of the 1994 Act was to reverse cases such as In re Roach which held that the debtor's right to cure had ended upon entry of a foreclosure judgment and prior to any foreclosure sale. It does not appear that Congress in enacting the '94 Reform Act intended to extend this right to cure beyond the sale date and into any redemption period. Rather, the legislative history clearly indicates the opposite was intended. The House Report, cited above with regard to this section, confirms this. It states, with regard to section 1322(c)(1) "[t]his section of the bill safeguards a debtor's rights in a chapter 13 case by allowing the debtor to cure home mortgage defaults at least through completion of a foreclosure sale under applicable nonbankruptcy

law." The Report then says "however, if the State provides the debtor more extensive 'cure' rights (through, for example, some later redemption period), the debtor would continue to enjoy such rights in bankruptcy." House Report 103, 834, 103rd Cong., 2nd Sess. 33-34 (October 4, 1994); 140 Cong. rec. H 10769 (October 4, 1994).

The North Carolina equity of redemption is such a redemption right. From the legislative history, it appears that the debtor continues to enjoy a right to exercise his equity of redemption post bankruptcy. However, nothing in that history suggests that Congress intended to extend that cure right into the redemption period.

In another case under the 1994 Act, the Bankruptcy Court for the Middle District of North Carolina stated, "Thus, as a matter of federal bankruptcy law a Chapter 13 debtor . . . now has a right to cure a default in a home mortgage if the Chapter 13 case is filed before the hammer falls at the foreclosure sale." In re Johnson, Case No. B-95-11702-C-13G, September 6, 1995, M.D.N.C. Based upon the legislative history and the reasoning in Johnson, this Court believes that the 1994 Act did not change the existing law in this report and this Court believes that the holdings in Antley and DiCello remain good law.

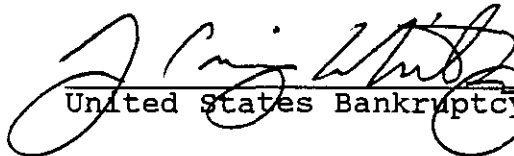
Over what period then may these debtors exercise their equitable right of redemption? This Court is of the opinion that 108(b) rather than Section 362 of the Bankruptcy Code governs the time limits for a Chapter 13 debtor to exercise that right of

redemption. Section 108(b) allows the debtor a minimum of sixty (60) days from the petition date to exercise its right of redemption provided for under "applicable nonbankruptcy law." 11 U.S.C. § 108(b), Antley at pg. 4. In this case, the sixty (60) days have not run since the Debtor filed the bankruptcy petition. Therefore, the Debtors are entitled to exercise the equitable right of redemption through March 5, 1996.

THEREFORE, THE FOLLOWING IS ORDERED:

Mid-State's Objection to Confirmation of the Debtors' Chapter 13 Plan is SUSTAINED and Confirmation of the Debtors' Chapter 13 Plan as currently proposed is DENIED.

This is the 20th day of Feb., 1996.


United States Bankruptcy Judge