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ADV. NUMBER: None

JUDGE: M. A. Mahoney

PARTIES: Sallie Moton

CHAPTER: 13

ATTORNEYS:

DATE: 12/19/95

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

SALLIE MOTON,

Case No. 95-11773-MAM-13

Debtor.

**ORDER GRANTING MOTION TO ALTER AND AMEND JUDGMENT,
GRANTING RELIEF FROM THE STAY, AND DENYING CONFIRMATION**

This matter is before the Court upon the motion of the United States of America, specifically the Department of Agriculture, Rural Housing and Community Development Service (“RHCDS”), formerly The Farmers Home Administration, to alter and amend judgment. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L). For the reasons indicated below, the Court is granting RHCDS’s motion.

On September 22, 1995, this Court denied RHCDS’s motion for relief from automatic stay. This motion to alter and amend requests that this Court: (1) grant the relief from the automatic stay and permit it to deliver a deed of foreclosure; and (2) deny confirmation of the Chapter 13 plan to the extent it purports to attempt to “cure” the default.

FACTS

On April 17, 1992, RHCDS made a loan to the Debtor in the amount of \$20,000 to buy a residence in Wilcox County, Alabama. The loan was secured by a mortgage executed by the Debtor on the same date in favor of RHCDS. On June 28, 1993, the Debtor’s account was first accelerated by RHCDS. At that time, the Debtor was three months in arrears. The Debtor was

notified of her right to appeal the acceleration decision and an appeal was taken. The Debtor lost this appeal.

The first foreclosure sale of the Debtor's residence was scheduled for September 7, 1994. This proceeding was stayed when the Debtor filed a petition under Chapter 7 on September 6, 1994. There was no reaffirmation of the RHCDS debt. This Chapter 7 case was discharged on December 29, 1994. A second foreclosure sale was scheduled for February 8, 1995; however, the Debtor filed a petition under Chapter 13 on the same day, prior to the time of the actual sale. The Debtor failed to make any payments under the plan and the case was dismissed on May 9, 1995.

A third foreclosure sale was scheduled for July 19, 1995 at 12:00 noon. The sale took place as noticed and the Debtor's residence was purchased by an unrelated third party at 12:04 p.m. Twelve minutes later, at 12:16 p.m., the Debtor filed a Chapter 13 bankruptcy petition. This Chapter 13 filing occurred prior to money actually being paid for the property, before a deed was delivered to the purchaser, and before recordation took place. Consequently, the Debtor alleges that title did not pass and the foreclosure "sale" was not complete prior to her bankruptcy filing. At the time of the foreclosure sale, the total debt to RHCDS was \$23,753.80, with the payment delinquencies totaling \$4,161.81.

The Debtor filed an amended Chapter 13 plan on September 21, 1995. This plan was confirmed by this Court on October 3, 1995. This plan proposes to make a direct mortgage payment to RHCDS of \$148.00 monthly, with the arrearage being paid 100% through the plan on a pro rata basis. The Debtor made a timely payment to the Chapter 13 Trustee for her October 1995 obligation, but has failed to make her November or December payments.

LAW

The question before this Court is whether the Debtor's right to cure the default and reinstate the mortgage has been terminated as a result of the foreclosure sale which occurred just minutes before the Chapter 13 filing. *See, In re Jaar*, 186 B.R. 148, 149 (Bankr. M.D. Fla. 1995). If the foreclosure sale was final, Ms. Moton's plan cannot be confirmed and relief from stay is warranted. If the sale was not complete, then Ms. Moton's plan should be confirmed and stay relief denied.

RELIEF FROM STAY

11 U.S.C. § 1322(c)(1) allows the curing of a home mortgage through the Chapter 13 plan up until the point "such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law." The immediate case presents the issue of what constitutes a conclusion of foreclosure sale within § 1322 sufficient to pass title to the purchaser. If the sale in this case is final, the homestead, although legally property of Ms. Moton's estate, is equitably in the hands of the buyer. RHCDS then needs relief from the stay "to obtain possession of property of the estate"—legal title to the residence. 11 U.S.C. § 362(a)(3).

There is no federal foreclosure law. This Court's determination of the status of the residence's title, therefore, is a state law question. The United States Supreme Court has long recognized the right of states to regulate property interests in the individual states. *Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979). Accordingly, Alabama state law is applicable. Alabama has been classified as a "title" state, with legal title passing with the execution of a mortgage. *In re Haas*, 31 F.3d 1081, 1085 (11th Cir. 1994); *citing, Trauner v. Lowrey*, 369 So. 2d 531 (Ala. 1979). Yet, when the power of foreclosure is exercised, execution

of a deed is not necessary to vest in the purchaser equitable title. *Ritter v. Moseley*, 148 So. 143 (Ala. 1933).

Debtor's counsel raises two points in his attack on the completeness of the July 19, 1995 foreclosure sale: No deed was actually delivered at the time of the sale, and no money changed hands on the sale date.¹ Neither argument is sufficient under Alabama law to uphold Ms. Moton's continued equitable ownership of the property after 12:04 p.m. on July 19, 1995.

There is longstanding legal precedent in Alabama that a foreclosure in this state is valid without a writing. *Wildman v. Means*, 94 So. 823 (Ala. 1922). For title to pass, no written instrument, be it a foreclosure deed or an auctioneer's certificate, is required. *Mallory v. Agee*, 147 So. 881 (Ala. 1932). The case of *Garrison v. Dickerson*, 631 So. 2d 255 (Ala. Civ. App. 1993), supports this proposition as well. A right of redemption only arises when a foreclosure has occurred. In the *Garrison* case, an incorrect deed started the running of the redemption period, establishing the lack of importance of the deed itself to the transfer of ownership.

The Code of Alabama is ambiguous and vague on practical foreclosure procedures. Seemingly, as long as proper notice of the sale has occurred, the place of the sale is known, the sale begins between 11:00 a.m. and 4:00 p.m. on the designated day, then the sale is considered valid and lawful. *See*, ALA. CODE § 35-10-1 through § 35-10-16 (1975). Although § 35-10-5 of the Alabama Code states that the foreclosure deed conveys legal title, the Alabama Supreme Court has consistently maintained that execution of a foreclosure deed is not essential for title to vest in the purchaser. *Wildman v. Means, supra; Ritter v. Moseley, supra; Penny v. Penny*, 24 So. 2d 912 (Ala. 1945).

¹Debtor's counsel waived the issue of recordation in his answer to this motion.

Next is the issue of consideration. Is it necessary that the purchase price be paid the exact moment the bid to purchase is accepted in order for the foreclosure sale to be binding? The Supreme Court of Alabama does not think so. In *Mewburn v. Bass*, 82 Ala. 622, 2 So. 520 (1887), the court specifically ruled that “the validity of the sale is not affected by the fact that time was allowed for payment.” *Id.* at 520. In fact, courts have endorsed the use of credit at foreclosure sales. In *Mahone v. Williams*, 39 Ala. 202 (1863), the court found that a foreclosure sale should not be invalidated on the basis that the purchaser was allowed time to satisfy the accepted bid. Credit is commonly extended in foreclosure sales in lieu of a cash bid. *See, Broadmoor Realty, Inc. v. First Nationwide Bank*, 568 So. 2d 779 (Ala. 1990); *Corbit v. Hotel Redmont*, 547 So. 2d 505 (Ala. 1989). It is impracticable to expect money, often very substantial amounts, to change hands the moment an offer is accepted.

In many respects, the Alabama foreclosure sale process mirrors the practice of a legal auction. According to Alabama law the clear, identifiable point in an auction when the sale is complete is the moment when the auctioneer so states, the hammer falls, or some other customary manner indicating finality. *Bradford v. Northwest Alabama Livestock Ass’n*, 379 So. 2d 609 (Ala. Civ. App. 1980); *citing*, ALA. CODE § 7-2-328(2) (1975). It is at this point a new contract is created. In part, § 7-2-106(1) of the Code of Alabama states:

“Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time. A “sale” consists in the passing of title from the seller to the buyer for a price (§ 7-2-401). A “present sale” means a sale which is accomplished by the making of the contract.

Id. “Auction” is a public sale of property to the highest bidder, conducted by one who is authorized for that purpose. *Adair v. Alabama Real Estate Commission*, 303 So. 2d 119 (Ala. Civ. App. 1974).

The Debtor's property was sold in the same way. A properly noticed foreclosure sale occurred, a third party was the highest bidder, this bid was accepted, and a "present sale" was completed. A recent decision described a similar situation this way:

There is no surprise. There need be no race to the courthouses. A foreclosure action must be prosecuted, a judgment must be obtained, and the sale must be set and advertised. The mortgagor has a considerable amount of time to seek refinancing, negotiate, defend the foreclosure, and decide whether or not to seek the protections of bankruptcy.

In re Jaar, 186 B.R. at 154.

Therefore, the Court believes it is appropriate for real estate foreclosure law and practice to mirror the auction process. Then relief from the stay is appropriate because all Ms. Moton owned at filing was bare legal title to the residence. The debtor had no equity in the property, but it was necessary to her reorganization since it is her homestead, so relief is not appropriate under Section 362(d)(2). However, in light of her lack of equity and the history of her dealings with RHCDS and her prior filings, there is "cause" for lifting of the stay under Section 362(d)(1).

CONFIRMATION ISSUES

In this case, RHCDS seeks to overturn confirmation of the Debtor's plan as well as seeking relief from stay, based upon the fact that the mortgage, once foreclosed, cannot be cured and Ms. Moton's plan provides for a cure of the mortgage arrearages over time. The present version of 11 U.S.C. § 1322(c)(1), a part of the Bankruptcy Reform Act of 1994, allows a defaulted home mortgage to be cured in a Chapter 13 plan until the property is sold at foreclosure. Before the adoption of the 1994 Act, there was a wide divergence among the circuits as to what moment the right to cure was irretrievably lost. Congress has now mandated, and this Court had previously determined, that the foreclosure sale is the defining moment. *In re*

McKinney, 174 B.R. 330 (Bankr. S.D. Ala. 1994); *In re Sims*, 185 B.R. 853 (Bankr. N.D. Ala. 1995). The question still remained as to when the sale was complete. This Court defines the end of the foreclosure sale and, therefore, the cure period under Section 1322(c)(1), as the moment the bid is accepted. Since the mortgage cannot be cured, Debtor's plan cannot be confirmed.

Section 1322(c)(1) serves to add uniformity and an end point to the foreclosure sale process. At some point, the rights of the Debtor must end and the purchaser must be allowed to take clear title. That moment, based on the Bankruptcy Code and applicable nonbankruptcy law, is when the most appropriate bid is accepted on the steps of the courthouse. It is at that point that the debtor loses his or her own right to cure and only enjoys the limited statutory right of redemption.

The Court therefore holds that the plan allowing cure should not have been confirmed. Section 1322(c) marks the endpoint of the cure rights as the sale at foreclosure. It did not say the endpoint was the receipt of the deed by the purchaser, the exchange of consideration, or the recordation of the foreclosure deed. Under Alabama law, the sale was complete when the auction was completed. Other actions, according to Alabama law, are ancillary to acceptance of the bid.

CONCLUSIONS

The Court concludes that the Debtor's residence was properly sold at the July 19, 1995 foreclosure sale at 12:04 p.m., before the filing of the latest bankruptcy petition. Consequently, the Debtor is prohibited from curing, reinstating, or redeeming the RHCDS mortgage through the proposed Chapter 13 plan.

Therefore, the motion to alter and amend the judgment is GRANTED.

It is further ORDERED that RHCDS's motion for relief from stay is GRANTED and confirmation of the proposed Chapter 13 plan is DENIED.

Dated: December 19, 1995

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE