DOCKET NUMBER: 99-10660
ADV. NUMBER: None
JUDGE: M. A. Mahoney
PARTIES: Tony Lynn Elliot, Sr., Magnolia Federal Credit Bank, Union Planters PMAC, Inc.
CHAPTER: 13
ATTORNEYS: M. B. Smith, D. A. Boyett, III
DATE: 5/4/00
KEY WORDS:
PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

TONY LYNN ELLIOT, SR. Case No. 99-10660-MAM-13

Debtor.

ORDER DENYING MOTION OF DEBTOR TO SET ASIDE FORECLOSURE

Michael B. Smith, Mobile, Alabama, Attorney for the Debtor
David A. Boyett, III, Mobile, Alabama, Attorney for Union Planters PMAC, Inc.

This matter is before the Court on the motion of the debtor Tony Lynn Elliot, Sr. to set aside foreclosure sale. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the motion of Mr. Elliot is denied.

FACTS

Tony Lynn Elliot, Sr. and his wife Linda G. Elliot executed a promissory note with Magnolia Federal Credit Bank on April 5, 1995. The Elliots granted Magnolia a mortgage on their home to secure the note. Union Planters PMAC, Inc. (Union Planters) eventually became the servicing agent for this mortgage.

On February 23, 1999, Mr. Elliot filed for relief pursuant to chapter 13 of the Bankruptcy Code. In March 1999, Union Planters filed a motion for relief from stay. On May 17, 1999, the motion of Union Planters was denied with the following conditions: (1) Mr. Elliot pay his prepetition mortgage arrearage through his chapter 13 plan; (2) Mr. Elliot make all of his regular monthly mortgage payments directly to Union Planters in accordance with the terms of his promissory note and mortgage; and (3) Mr. Elliot pay $425.00 in fees and costs to Union

Planters within 90 days. The order also provided that in the event that Mr. Elliot defaulted on either the second or third condition and failed "to cure such default within 10 days after written notice from Union Planters, the stay . . . shall terminate automatically, without further order of this Court." This is commonly referred to as a "drop-dead" clause.

Mr. Elliot defaulted on making his regular monthly mortgage payment sometime in the summer of 1999. Union Planters sent Mr. Elliot's attorney a letter notifying him of the default on October 18, 1999. The debtor does not dispute that his attorney received this letter. The letter stated the amount Mr. Elliot must pay to cure his default and it indicated that it was intended to be the notice necessary to trigger the time permitted to cure before the stay automatically terminates pursuant to the "drop-dead" clause in the May 17, 1999 order. A copy of the letter was mailed to Mr. Elliot. The address on the letter incorrectly indicated that Mr. Elliot's zip code was 36616-2214, rather than 36606-2214. The address was otherwise correct. Mr. Elliot testified that he never received the October 18, 1999 letter.

On November 18, 1999, Union Planters mailed Mr. Elliot a letter notifying him that if his mortgage default was not cured, Union Planters might accelerate the loan or foreclose. The address on the letter was correct. Mr. Elliot testified that he never received this notice.

On January 11, 2000, Union Planters sent via regular and certified mail a notice of foreclosure to Mr. Elliot at his proper address. The letter sent certified mail was returned unclaimed. Mr. Elliot testified once again that he never received this letter. He stated that he spent periods of time in Mississippi. Mr. Elliot did recognize the figure in the letter representing the amount of his mortgage arrearage. He admitted that he stopped making his direct mortgage payments in October 1999.

A foreclosure sale of Mr. Elliot's home was held on or about February 22, 2000. On March 3, 2000, Mr. Elliot filed this motion to set aside the foreclosure sale.

LAW

Mr. Elliot contends that he never received notice of his right to cure under the terms of the "drop-dead" clause. Therefore, the stay applicable to his bankruptcy case never terminated and the foreclosure sale was void and/or should be set aside.

A.

Generally, a principal is chargeable with notice to his agent received while the agent is acting as such in reference to a matter over which his authority extends. 3 AM. JUR. 2D *Agency* § 281 (1986). For example, a creditor is generally considered to have notice of the debtor's bankruptcy if the attorney for the creditor has knowledge of the bankruptcy while representing the creditor in enforcing the creditor's claim against that debtor. *In re Land*, 215 B.R. 398 (B.A.P. 8th Cir. 1997); *In the Matter of Frankina*, 29 B.R. 983 (Bankr. E.D. Mich. 1983); *see also Pace v. Colonial Penn Insurance Company*, 690 So.2d 369, 372 (Ala. Civ. App. 1996) (mortgagees held to have knowledge of their attorney regarding information provided by insurance company). Similarly, this Court finds that written notice of default and the right to cure to the attorney representing the debtor in his or her bankruptcy case is generally imputed to the debtor. Mr. Elliot's attorney received notice of his default and right to cure in accordance with the May 17, 1999 "drop-dead order." The Court finds that this notice is imputed to Mr. Elliot.

Second, the Court did not find the testimony of Mr. Elliot to be conclusive regarding actual notice. He testified at one point that he never "saw" the notice and at another point that he did not receive the notice. The Court believes that he never physically saw the letter prior to

termination of the stay, but it is not convinced that his wife never received the letter of October 18, 2000 or that he was never put on actual notice of his need to cure to prevent automatic termination of the stay with respect to Union Planters.[1]

Third, the Court finds that this motion is barred by the doctrine of laches. Union Planters contends that the default occurred sometime in August or September 1999. Mr. Elliot admits that he did not make his regular monthly mortgage payments as of October 1999. Yet, he never inquired about why Union Planters was not enforcing its rights in accordance with the May 17, 1999 "drop-dead" order. He failed to do anything until at least five months after he admittedly stopped paying his mortgage. He finally filed this motion more than a week after his home was sold at foreclosure. Even assuming Mr. Elliot was not properly notified of his default and right to cure, his failure to act despite his admitted default until March 2000 is inexcusable. Based on the unreasonable delay of Mr. Elliot and his attorney in addressing this matter and the unlikelihood that Union Planters will recover its costs incurred in the foreclosure if it is set aside,[2] the Court finds that this motion is barred by the doctrine of laches. *See, Touchstone v.*

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[1]The facts in this case weaken the credibility of Mr. Elliot's statement that he never received the notice. His track record shows he never saw or picked up three notices. No one proved his wife did not receive at least the first two notices. Also, he should not be able to set aside a foreclosure when the evidence shows he failed to pick up notices.

In general, the Court is troubled by Mr. Elliot's request for this Court to establish as precedent that, if a debtor states he or she did not get a "drop-dead" notice, then there is no "drop-dead" effect to an order. If this were the rule, no reasonable creditor would be satisfied with an automatic termination provision. A debtor bears a heavy burden of proof when requesting a Court to set aside the effect of an order or to find the order is not effective. A simple statement of non-receipt of notice is insufficient. More proof is necessary. Creditors' attorneys may also rely on service on counsel unless debtor's counsel has specifically notified the creditor that the attorney no longer represents the debtor.

[2]The claim of Union Planters is a secured claim only to the extent of the mortgage according to Mr. Elliot's plan. Therefore, any costs added postpetition are unsecured.

Peterson, 443 So.2d 1219 (Ala. 1983) (laches requires prejudice and facts that make the delay culpable).

B.

Mr. Elliot contends that this situation is similar to *In re Wade*, Case No. 97-11764-WSS-13 (Bankr. S.D. Ala., March 2, 2000) in which Judge William S. Shulman ordered a stay of foreclosure based on the creditor's failure to give notice sufficient to comply with a "drop-dead" clause. The Court notes that unlike Mr. Elliot, the debtor in *Wade* brought his motion prior to the sale at foreclosure. Thus, relief was properly not found to be precluded in *Wade* based on laches.

In *Wade*, the creditor notified the debtor that if property taxes were not paid by the due date, then the creditor would foreclose on the property. This notice was made prior to a default by the debtor. It essentially warned the debtor that if he defaulted, the "drop-dead" clause would be invoked. Subsequently, the debtor defaulted and the creditor proceeded with foreclosure. Notice of the default was not sent to the debtor or his attorney. Judge Shulman found that the pre-default notice was not in compliance with the "drop-dead" order.

In this case, it is undisputed that Mr. Elliot's attorney received sufficient notice of default and right to cure. The only issue is whether receipt by his attorney can be imputed to Mr. Elliot, not whether a warning sent pre-default complies with a standard "drop-dead" order. Thus, the facts and issues presented in *Wade* are clearly distinguishable from this case.

THEREFORE IT IS ORDERED that the motion of Tony Lynn Elliot, Sr. to set aside foreclosure sale is DENIED.

Dated:

MARGARET A. MAHONEY

CHIEF BANKRUPTCY JUDGE