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JUDGE: M. A. Mahoney

PARTIES: D. M. Thompson, Fidelity Savings Association

CHAPTER: 13

ATTORNEYS: E. T. Turner, B. M. Rouse

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

D. M. THOMPSON

Case No. 95-11159-MAM-13

Debtor.

**ORDER DENYING MOTION OF DEBTOR TO REOPEN
CHAPTER 13 CASE, TO DETERMINE MORTGAGE
ARREARAGE AND TO TAX COSTS**

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Beth McFadden Rouse, Mobile, Alabama, Attorney for Fidelity Savings Association

This matter is before the Court on the debtor's motion to reopen his Chapter 13 case, to determine debtor's mortgage arrearage and to tax costs. A hearing was held and appearances were as noted in the record. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. For the reasons indicated below, the Court is denying the motion.

FACTS

The parties stipulated to the facts at issue. Mr. Thompson executed a mortgage to Fidelity Savings Association with an original principal balance of \$18,100. The mortgage was secured by his homestead at 104 Esplanade Avenue, Mobile, Alabama 36606. He filed a Chapter 13 bankruptcy case on May 17, 1995. At that time, he was 11 payments behind on his mortgage. His Chapter 13 plan provided for payments of the prepetition arrearage on the mortgage over the 60 months of his plan and payment of the regular monthly mortgage payment directly to the mortgagee.

Fidelity filed a proof of claim which did not claim the prepetition arrearage as required by local order. It simply claimed the entire prepetition principal and interest amount.¹ The Chapter 13 Trustee therefore paid none of the mortgage arrearages through the plan since no claim was properly made.

The debtor was discharged on December 1, 1997 after 25 months of payments.

LAW

There are three separate legal actions sought in this motion: (1) a request to reopen the case; (2) a request to determine whether any pre-discharge mortgage arrearages exist; and (3) a request to tax the debtor's costs and attorney's fees for this motion to Fidelity. Each will be dealt with separately. To determine whether there is cause to reopen this case, it is appropriate to deal first with whether there are prepetition mortgage arrearages that remain after the debtor's discharge and then to determine costs and the need to reopen.

A.

A Chapter 13 discharge in bankruptcy "discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502." 11 U.S.C. § 1328(a). However, section 1328(a)(2) specifically states that the discharge does not discharge a debtor from debts provided for under section 1322(b)(5) of the Bankruptcy Code. Section 1322(b)(5) describes secured debts which will not be fully paid until after the end of the Chapter 13 case.

¹The proof of claim form does not have a place to separately claim prepetition arrearages. It only includes a line which requires the creditor to state the amount of such an arrearage. The Court therefore had a local general order in place which required secured creditors to file a second proof of claim specifically listing and claiming prepetition arrearages if the arrearages were to be paid in the plan (as in this case). Since the second claim was not filed, the Trustee paid none of the arrearages in the plan. (A local general order effective June 1, 1998, will change this procedure so that secured creditors will not be required to file two claim forms.)

Mr. Thompson's mortgage debt is such a debt. Section 1322(b)(5) also specifically mentions the "curing of any default" which would include prepetition mortgage arrearages such as Mr. Thompson's. Fidelity can seek to enforce its lien for its entire debt against the property which secured its mortgage before bankruptcy and which still secures its debt postbankruptcy discharge. *Federal Deposit Ins. Corp. v. Davis*, 733 F.2d 1083 (4th Cir. 1984); *In re Hagberg*, 92 B.R. 809 (Bankr. W.D. Wis. 1988); *Wilson v. Ripley County Bank*, 462 N.E.2d 263 (Ind. App. 1984).

The res judicata effect of the discharge is to protect the debtor. Even if the secured creditor did nothing in the bankruptcy case, or, as in this case, did something incorrectly, the lien of the secured creditor is not avoided, nor is any of the secured debt extinguished. It is the debtor's responsibility to insure the debt is paid in full or arrearages are cured to prevent postdischarge default problems. Section 1328(b) clearly reflects this in its exception of a discharge for mortgage debt. Therefore, the mortgage arrearage of the debtor at present includes prepetition and postpetition arrearages.

The debtor cited two cases to support his theory: *In re Rathe*, 114 B.R. 253 (Bankr. D. Idaho 1990) and *In re Ward*, 73 B.R. 119 (Bankr. N.D. Ga. 1987). The cases are distinguishable. *In re Rathe* holds that a creditor cannot determine that monies received through a Chapter 13 plan will be credited to items other than the prepetition arrearages to be cured through the plan if the plan payments are to cure the arrearage. The court also held that costs and fees incurred by the debtors pursuant to their mortgage postpetition but pre-discharge could not be added to the mortgage balance due postdischarge. Any inclusion of additional fees and costs during the bankruptcy case required bankruptcy court approval. The case did not hold that prepetition arrearages unpaid through a Chapter 13 plan did not survive it. *Rathe* only said that additional

arrearages could not be claimed. At best, it would mean that the late charges assessed should not be paid. However, in the *Rathe* case, the arrearage was paid; in this case, the prepetition (and some postpetition arrearages) still remain unpaid after discharge. Therefore, postbankruptcy late charges may be added.

In re Ward went solely to the issue of late charges. It did not address the survivability of the debt itself. In this case, late charges, if assessed prepetition, or, if assessed post discharge, are appropriate. If assessed during the Chapter 13 case, they are not.

The *Rathe* and *Ward* cases deal with new creditor charges in Chapter 13 cases. This case is about unpaid prepetition arrearages. The amounts are not new. They just remained unpaid during the debtor's case.

B.

The next issue to be addressed is the taxing of debtor's costs and attorney's fees to Fidelity. The request was made on the assumption that Fidelity had violated Mr. Thompson's discharge by attempting to collect prepetition mortgage arrearages postdischarge. Since the Court has found this action of Fidelity to be proper, no costs or fees are recoverable.

C.

A motion to reopen a case is to be granted if there are assets to administer, or the debtor needs relief or for other cause. 11 U.S.C. § 350. In this case, no relief can be given to the debtor unless the debtor seeks to reopen to propose a reinstatement of his plan to pay the arrearages. That was not proposed by the debtor. Therefore, the motion is due to be denied.

CONCLUSION

Fidelity may proceed to foreclose upon its mortgage after a debtor's Chapter 13 discharge. It may proceed based in prepetition defaults, as long as it only proceeds on an *in rem* basis. No fees or costs should be awarded and reopening is unnecessary.

THEREFORE, IT IS ORDERED that the debtor's motion to reopen Chapter 13 case, to determine debtor's mortgage arrearage, if any; and to tax costs and attorneys fees to Fidelity Savings Association is DENIED.

Dated: May 20, 1998

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE