

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED

AUG 23 '00

U.S. Bankruptcy Court
Greensboro, NC
SD

IN RE:)
)
Carolyn Dillard,) Case No. 00-11636C-13G
)
Debtor.)
)

ORDER

This case came before the court on August 15, 2000, for hearing upon a motion filed on behalf of ContiMortgage Corporation for relief from automatic stay. Appearing at the hearing were Kenneth M. Johnson on behalf of the Debtor, John W. Wall, Jr. on behalf of ContiMortgage Corporation and Anita Jo Kinlaw Troxler, the Standing Trustee.

FACTS

The facts relied upon by the parties in support of their respective positions are a matter of record and are not in dispute. Prior to July of 2000, Debtor owned a house and lot ("the Residence") located on Forest Brook Drive in Greensboro, North Carolina. The residence was subject to a deed of trust securing a promissory note held by ContiMortgage in the original sum of \$76,800.00. Debtor failed to make the payments required by the promissory note and ContiMortgage instituted a foreclosure proceeding in the Superior Court of Guilford County. This

foreclosure proceeding resulted in a foreclosure sale which was held on June 29, 2000, at the courthouse in Guilford County. The highest bidder at the sale was ContiMortgage. No upset bid was filed during the ten days following the filing of the report of sale and the ten-day upset bid period expired on July 10, 2000. On July 12, 2000, which was twelve days after the report of sale was filed, Debtor filed this Chapter 13 case. At the time this case was filed, the Trustee under the deed of trust had not delivered a Trustee's deed to ContiMortgage transferring the Residence to ContiMortgage. Debtor proposes to cure the default under the ContiMortgage note and deed of trust through periodic payments under a Chapter 13 plan. ContiMortgage contends that Debtor may not do so because Debtor's right of redemption expired before this case was filed and Debtor has no right to cure defaults pursuant to § 1322. ContiMortgage concludes that the stay, therefore, should be lifted.

ANALYSIS

Section 1322(b)(5) of the Bankruptcy Code provides that a chapter 13 plan may provide for the curing of defaults on secured claims on which the last payment is due after the date on which the final payment under the plan is due. In arguing that she is entitled to utilize this provision to cure the default under the

ContiMortgage note and deed of trust, the Debtor relies upon § 1322(c)(1) of the Bankruptcy Code, which provides as follows:

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law;

Debtor argues that because no deed had been delivered by the trustee, her Residence had not been "sold at a foreclosure sale" and, therefore, she still had the right to cure the default in the ContiMortgage loan documents pursuant to § 1322(c)(1) when this case was filed. This argument requires an examination of § 1322(c)(1).

Even before the enactment of § 1322(c)(1) in 1994, a majority of the cases held that a debtor could cure defaults in a home mortgage if the chapter 13 case were filed before the foreclosure sale. E.g., In re Glenn, 760 F.2d 1428 (6th Cir.), cert. denied, 474 U.S. 849, 106 S. Ct. 144, 88 L. Ed.2d 119 (1985). However, some cases, looking to state law, held that the right to cure was extinguished even before a foreclosure sale was held. See In re Roach, 824 F.2d 1370 (3d Cir. 1987) (holding that the debtor's

right to cure was extinguished at the time of the foreclosure judgment, which occurs prior to the foreclosure sale under New Jersey law). It appears from the legislative history that the 1994 Amendment which added § 1322(c)(1) was intended to overrule cases such as Roach and to "safeguard 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." H.R. Rep. No. 103-835, 103d Cong., 2d Sess., 52 (1994). However, the exact meaning of "foreclosure sale" as used in § 1322(c)(1) is not clear and neither is the legislative history regarding § 1322(c)(1). The result is a lack of uniformity in the decisions involving § 1322(c)(1).

Some cases have concluded that the term "foreclosure sale" as used in § 1322(c)(1) refers to the auction sale itself and have concluded that the right to cure therefore expires when the highest bid is accepted and the "hammer falls" at the foreclosure sale, provided that the sale was conducted in accordance with applicable nonbankruptcy law. See e.g., In re Denny, 35 Bankr. Ct. Dec. (CRR) 99 (Bankr. Md. 2000); In re Simmons, 202 B.R. 198 (Bankr. D.N.J. 1996); In re Christian, 29 Bankr. Ct. Dec. (CRR) 694 (Bankr. N.D. Ill. 1996). Other cases have concluded that "a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law",

as used in § 1322(c)(1), is broader than just referring to the event of sale at the courthouse and includes additional steps in the foreclosure process that may be required before a "sale" is complete. See e.g., In re Ross, 191 B.R. 615 (Bankr. D.N.J. 1996); In re Rambo, 29 Bankr. Ct. Dec. (CRR) 754 (Bankr. W.D. Okla. 1996); In re Sims, 185 B.R. 853 (Bankr. N.D. Ala. 1995). Under these latter cases, applicable state law must be examined in order to determine when the foreclosure sale is complete.

Under either of the foregoing lines of authority, the Debtor's right to cure in the present case expired before this Chapter 13 case was filed. This is obviously true under the cases looking to the auction sale as being the decisive event, since the foreclosure sale was conducted on June 29, 2000, thirteen days before this case was filed. The same result follows under the cases which look to state law to determine when a foreclosure sale is complete and thus has been "conducted" for purposes of § 1322(c)(1). Under North Carolina law, an upset bid may be submitted following a non-judicial sale under a deed of trust for a period of ten days following the filing of the report of sale with the Clerk of Superior Court. G.S. § 45-21.27. No confirmation of sale is required and if no upset bid is filed during the ten-day period, the rights of the parties to the sale "become fixed" pursuant to

G.S. § 45.21.29A. "It is at this point in time that the Debtor loses his right to the equity of redemption he had in the Real Estate." In re Smith, 24 B.R. 19, 23 (Bankr. W.D.N.C. 1982). Moreover, the right of a debtor to seek an injunction against the sale becoming final pursuant to G.S. § 45-21.34 also is lost once the ten-day period following the sale expires. The result is that under North Carolina law, a debtor's equity of redemption is gone upon the expiration of the ten-day period following the filing of the report of sale if no upset bid is filed and no injunctive relief is obtained pursuant to G.S. § 45-21.34 during the ten-day period. At that point, the rights of the parties involved in the foreclosure have become fixed, the debtor can neither redeem nor cure under North Carolina law and the sale is regarded as complete for purposes of § 1322(c)(1). See In re Barham, 193 B.R. 229, 232 (Bankr. E.D.N.C. 1996) ("a property is 'sold' at a foreclosure sale only when the foreclosure sale is 'completed'. And in North Carolina, a foreclosure sale is not completed at the auction, but rather only after the expiration of the ten day upset bid period."). Measured by this standard, as well, the Debtor no longer has the right to cure the ContiMortgage default since this case was filed after the ten-day upset bid period had expired.

Because the Debtor is not entitled to propose a plan under which the ContiMortgage default would be cured, ContiMortgage is entitled to relief from the automatic stay. Accordingly, the motion for relief will be granted and the stay lifted as to the Residence described in the ContiMortgage deed of trust.

IT IS SO ORDERED.

This 22nd day of August, 2000.

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge