

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

ENTERED
DEC 15 2004
U.S. BANKRUPTCY COURT
MDNC - MEL

IN RE:)
)
Delores High Threatt,) Case No. 04-82082C-13D
)
Debtor.)
)

ORDER

This case came before the court on November 24, 2004, for hearing upon a motion by RBC Centura Bank for relief from the automatic stay in order to proceed with foreclosure against the real property located at 1000 West Garden Street, Sanford, North Carolina. Edward C. Boltz appeared on behalf of the Debtor, James S. Livermon, III appeared on behalf of RBC Centura Bank and Richard M. Hutson, II appeared as Chapter 13 Trustee. Having considered the matters of record in this case and the arguments of counsel, the court finds and concludes as follows:

FACTS

In the motion for relief from stay, RBC Centura Bank ("RBC") seeks relief from the automatic stay in order to exercise its rights under a deed of trust which encumbers a residence located at 1000 West Garden Street, Sanford, North Carolina ("the Residence"). The Debtor resides in the Residence with her children. However, the Residence is owned by her non-debtor spouse pursuant to a deed which names only the husband as grantee. While the Debtor did not sign the promissory note secured by the RBC deed of trust and is not liable on the promissory note, she did join her husband in

executing the RBC deed of trust.¹

ANALYSIS

The first issue raised by the motion now before the court is whether the Debtor has an interest in or related to the Residence that constitutes property of the estate in this case. Although the Debtor has no ownership interest in the Residence and the Residence itself is not property of the estate, she nonetheless does have a recognizable interest related to the Residence which is property of the estate in this case pursuant to § 1306 of the Bankruptcy Code.²

As the spouse of the owner of the Residence, the Debtor has a right to redeem the property pursuant to N.C. Gen. Stat. § 45-45, which provides as follows:

"Any married person has the right to redeem real property conveyed by his or her spouse's mortgages, deeds of trust and like security instruments and upon such redemption, to have an assignment of the security instrument and the uncanceled obligation secured thereby."

A right of redemption such as that granted by N.C. Gen Stat.

¹The deed of trust provides that "any Grantor who executes this Deed of Trust but does not execute the Note hereby secured has executed the Deed of Trust only to subject whatever interest such Grantor has or may hereafter have in the Property and Improvements and Collateral to the lien and security interest created by this Deed of Trust."

²Under § 1306, property of the estate in a Chapter 13 case includes the types of property and property interests specified in § 541, and under § 541 property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."

§ 45-45 falls within the scope of "all legal or equitable interest of the debtor in property" and constitutes property of the bankruptcy estate pursuant to §§ 541 and 1306 of the Bankruptcy Code. See In re Thompson, 894 F.2d 1227, 1230 (10th Cir. 1990) ("The concept of property of the bankruptcy estate is broad enough to include statutory or equitable rights of redemption."). See generally 5 COLLIER ON BANKRUPTCY ¶ 541.05[2] (15th ed. rev. 2004) ("An equity of redemption comes within the scope of 'all legal or equitable interests of the debtor in property' and as such, becomes property of the estate pursuant to section 541(a)(1)."). Hence, Debtor's statutory right to redeem the Residence constitutes property of the bankruptcy estate in this Chapter 13 case.

The next issue presented is whether RBC's proposed foreclosure under the deed of trust that encumbers the Residence is subject to and stayed by the § 362 automatic stay. The answer to this question is in the affirmative. Under N.C. Gen. Stat. § 45-45, prior to any foreclosure occurring, the Debtor is granted the right to redeem the Residence, i.e., the right to pay off the debt secured by the RBC deed of trust and prevent the Residence being foreclosed upon and sold at a public auction sale. A foreclosure by RBC necessarily would extinguish Debtor's right to redeem and remove such property interest from the bankruptcy estate. The broad reach of § 362 includes a stay of any act which would extinguish and remove property from the bankruptcy estate. See In

re 48th Street Steakhouse, Inc., 835 F.2d 427, 430-31 (2d Cir. 1987) (where the court held that a landlord's notice of termination to a lessor who had subleased to the debtor violated the automatic stay since termination of the main lease would have terminated or extinguished the debtor's sublease); In re Cardinal Industries, Inc., 105 B.R. 834, 855 (Bankr. S.D. Ohio 1989) ("The Court finds that the provisions of 11 U.S.C. § 362(a)(3) stay the Defendants' actions to foreclosure their first mortgage liens where such foreclosures necessarily risk extinguishment of valid, but unrecorded, second mortgages held by the either of these Debtors."). Hence, RBC is not entitled to proceed with foreclosure without first obtaining relief from the automatic stay.

The final issue presented by RBC's motion is whether the automatic stay should be modified in order to permit a foreclosure by RBC. The answer to this question also is in the affirmative because the record reflects that there is no reasonable likelihood of an effective plan involving RBC or the Residence. Chapter 13 permits individual debtors to deal comprehensively with their creditors by means of a plan that meets the requirements of §§ 1322 and 1325 of the Bankruptcy Code. A "creditor" in a particular bankruptcy case is an entity that has a pre-petition claim against the debtor or a claim against the estate of the type described in

§ 101(10).³ "The debtor owes a 'debt' to the creditor, who has a 'claim' against the debtor." See 8 COLLIER ON BANKRUPTCY ¶ 1300.12[5] (15th ed. rev. 2004). Even if an entity has no in personam rights against the debtor, such entity nonetheless is a creditor in the case and may be dealt with under a Chapter 13 plan if such entity has an enforceable claim against property of the estate. See Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991). However, in the present case, RBC has no "claim" against the Debtor or against any property of the bankruptcy estate. Hence, there is no "debt" owed to RBC and RBC is not a "creditor" in this case. RBC therefore is not subject to cure or other plan treatment altering its rights under any plan that could be confirmed in this case. See In re McKinney, 174 B.R. 330, 335 (Bankr. S.D. Ala. 1994) ("Section 1322(b)(5) only allows the cure of defaults of 'secured claims' which exist at the time of the bankruptcy case and Jim Walter Homes, Inc. had none."). It follows that RBC is entitled to relief from the automatic stay in order to proceed with the exercise of its rights under the deed of trust referred to in the motion. See In re Finizie, 184 B.R. 415 (Bankr. D. Conn. 1995) (relief from automatic stay is appropriate

³Section 101(10) provides that "'creditor' means (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor; (B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(I); or (C) entity that has a community claim"

where there is no reasonable probability of a successful reorganization); McKinney, supra (same).

IT IS SO ORDERED.

This 13th day of December, 2004.



WILLIAM L. STOCKS
United States Bankruptcy Judge

PARTIES IN INTEREST

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