

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:)
)
Casey Clayton Sarver,) Case No. 10-81039C-13D
)
Debtor.)

OPINION AND ORDER

This case came before the court on August 26, 2010 for hearing on a motion filed on behalf of State Employees Credit Union seeking relief regarding the automatic stay as to property located at 4468 Ralph Winstead Road, Roxboro, North Carolina (the "Motion"). Craig S. Haskell appeared on behalf of State Employees Credit Union ("SECU"), Brent C. Wootton appeared on behalf of the Debtor and Richard M. Hutson, II appeared as Chapter 13 Trustee. Having considered the Motion, the matters of record in this case and the arguments of counsel, the court makes the following findings and conclusions pursuant to Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure.

FACTS

This chapter 13 case was filed on June 14, 2010 at 5:01:36 p.m. According to the Debtor's schedules, the Debtor was the owner of a one-half interest in the residential real estate located at 4468 Ralph Winstead Road, Roxboro, North Carolina (the "Property") on the petition date and the Property was subject to two deeds of trust securing indebtedness owed to SECU in the aggregate amount of \$255,769.

On the petition date, the Property was the subject of a foreclosure proceeding initiated by SECU. The Property had been sold at a foreclosure sale held on June 3, 2010. SECU was the highest bidder at the foreclosure sale and no upset bids were submitted following the sale. SECU's Motion was filed on August 10, 2010. SECU asserts in the Motion that it is entitled either to relief from the automatic stay or an adjudication that the automatic stay is not applicable to the Property.

According to SECU, under North Carolina law, the upset bid period would have expired on June 13, 2010, which was the tenth day following the sale. Instead, because June 13 was a Sunday, SECU says that the time for upset bids expired on Monday, June 14, 2010, at 5:00 p.m. Because this case was filed after 5:00 p.m. on June 14, 2010, SECU argues that the Debtor's "equity of redemption ran and title to the property vested in [SECU], subject only to the Substitute Trustee in the foreclosure proceeding conveying the deed to the property."

The Debtor contends that the upset bid period did not expire at 5:00 p.m. and that his filing on June 14, 2010 therefore occurred prior to the expiration of the upset bid period. The Debtor argues that he therefore still has an interest in the Property and should be allowed to cure the default in the SECU indebtedness pursuant to a chapter 13 plan of reorganization.

ANALYSIS

Matters involving the property rights of contesting parties in a bankruptcy case generally are controlled by state law in the absence of an overarching federal interest. See Butner v. United States, 440 U.S. 48, 54, 99 S.Ct. 914, 917-18, 59 L.Ed.2d 136 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."). There is no overarching federal interest that requires a departure from North Carolina law in resolving the dispute presented in this case regarding the respective interests of the Debtor and SECU in the Property. The court therefore will look to North Carolina law in determining the nature of the interests of the Debtor and SECU in the Property when this case was commenced.

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. N. C. Gen. Stat. § 45-21.27. No confirmation of a non-judicial foreclosure sale is required under North Carolina law and if no upset bid is filed during the ten-day period, the rights of the parties to the sale "become fixed" pursuant to

section 45-21.29A of the General Statutes.¹ "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 also is lost once the ten-day period following the sale expires. N.C. Gen. Stat. § 45-21.34. The result is that under North Carolina law a debtor's equity of redemption is lost upon the expiration of the ten-day period following the filing of the report of sale if during the ten-day period no upset bid is filed and no injunctive relief is obtained pursuant to section 45-21.34. Similarly, the right to cure a default in a home mortgage under federal bankruptcy law is tied to the expiration of the ten-day upset bid period. Under section 1322(c)(1) of the Bankruptcy Code, a debtor's right to cure a default in a home mortgage ends when a debtor's residence "is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law" In North Carolina, a property has been "sold at a foreclosure sale" for purposes of section 1322(c)(1) when the property has been auctioned at a sale

¹N.C. Gen. Stat. § 45-21.29A provides as follows:

No confirmation of sales or resales of real property made pursuant to this Article shall be required. If an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed.

that was conducted in accordance with state procedural requirements and the ten-day upset bid period has expired without any upset bids being filed. See In re Barham, 193 B.R. 229 (Bankr. E.D.N.C. 1996).

The decisive issue in the present case is whether the ten-day upset bid period had expired when the petition was filed. The same issue was presented in In re Figured, No. 09-06490-8-JRL, 2009 WL 2843320 (Bankr. E.D.N.C. Aug. 31, 2009), which involved facts very similar to the facts of the present case. In Figured, the debtor filed his petition at 5:01 p.m. on the tenth day of the upset-bid period which was one minute after the close of normal business hours in the clerk's office where the foreclosure proceeding was pending, raising the question of whether the filing had occurred prior to the expiration of the upset bid period. Judge Leonard concluded in Figured that because the petition was filed after the close of normal business, the filing did not occur during the upset bid period which meant that the upset bid period was not suspended by the bankruptcy filing and the ownership rights of the debtor therefore had ended before the bankruptcy case was filed. Judge Leonard noted that "[t]he result is the same whether the petition was filed one minute late or five days late." 2009 WL 2843320 at *3. This court agrees that a debtor's equity of redemption is lost if the bankruptcy petition is not filed by the close of normal business hours on the tenth day of the upset bid period. As

observed in Figured, N.C. Gen. Stat. § 45-21.27 specifies the time within which an upset bid must be made. The pertinent language of Section 45-21.27 provides:

The deposit required by this section shall be filed with the clerk of superior court, with whom the report of sale or the last notice of upset bid was filed by the close of normal business hours on the tenth day after the filing of the report of sale or the last notice of upset bid, and if the tenth day shall fall upon a Sunday or legal holiday when the courthouse is closed for transactions, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be filed on the day following when said office is open for the regular dispatch of its business. . . . When an upset bid is not filed following a sale, resale, or prior upset bid within the time specified, the rights of the parties to the sale or resale become fixed.

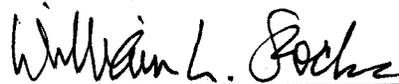
(Emphasis supplied).

Upset bids in the foreclosure proceeding involved in this case were required to be filed in Person County where the foreclosure proceeding was filed and where the foreclosure sale was conducted. SECU established at the hearing that the normal business hours at the office of the Clerk of Superior Court of Person County are Monday through Friday from 8:30 a.m. to 5:00 p.m. This means that the upset bid period in the foreclosure proceeding involving the Property expired at 5:00 p.m. on Monday, July 14, 2010. It is undisputed that this chapter 13 case was filed at 5:01:36 p.m. on Monday, July 14, 2010, which was after the expiration of the upset bid period. Because this case was filed after the time for filing

upset bids had expired in Person County, the rights of the parties involved in the foreclosure became fixed before the petition in this case was filed. This means that when the petition was filed, the Debtor had no right of redemption and no right to cure pursuant to section 1322 of the Bankruptcy Code. SECU, as the successful bidder for the Property, therefore is entitled to obtain and record a deed to the Property and to recover possession of the Property pursuant to an order obtained under N.C. Gen. Stat. § 45-21.29. Accordingly, the automatic stay, to the extent applicable, should be modified to allow SECU to enforce such rights.

IT IS SO ORDERED.

This 1st day of September, 2010.



WILLIAM L. STOCKS
United States Bankruptcy Judge