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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:

Deborah F. Wellington

Debtor.

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Case No. 00-81391 C13

ORDER

THIS MATTER came on for hearing before the undersigned bankruptcy judge on October 31, 2000, in Durham, North Carolina upon the Motion by Travelers Bank and Trust, F.S.B. ("TB&T"), servicing agent for Commercial Credit Loans, Inc. nka Citifinancial Services, Inc. ("CCL") for relief from the automatic stay. Robert E. Whitfield appeared on behalf of the Debtor, Shawna Y. Staton appeared on behalf of TB&T (the "Creditor"), and Benjamin E. Lovell appeared on behalf of the Chapter 13 Trustee. After hearing the arguments of counsel and reviewing the file, the court makes the following:

FINDINGS OF FACT

1. On or about August 28, 1996, the Debtor executed a Deed of Trust Note ("Note") in the original principal amount of \$63,306.58.
2. The Note was secured by a Deed of Trust on real property known as 202 Peachtree Street, Creedmoor, North Carolina and more particularly described in a Deed of Trust recorded in Book 0699, Page 0379, in the Granville County Registry, North Carolina.
3. On or about June 7, 2000, the Debtor filed a petition with the United States Bankruptcy Court for the Middle District of North Carolina for relief under Chapter 13 of the United States Bankruptcy Code bearing case number 00-81391¹.

¹The Debtor signed the petition on May 30, 2000. The petition was delivered to the Clerk of Court on May 31, 2000; however, the petition was not stamped "received" or "filed" because it was not accompanied by the full filing fee or an application for permission to pay the filing fee in installments. Bankruptcy Rule 1006 (a) states that "[e]very petition *shall* be accompanied by the filing fee except as provided in subdivision (b) of this rule." [emphasis added]. Rule 1006 (b) (1), entitled "Payment of Filing Fee in Installments" provides as follows:

A voluntary petition by an individual shall be accepted for filing if accompanied by the debtor's signed application stating that the debtor is unable to pay the filing fee except in installments. The application shall state the proposed terms of the installment payments and that the applicant has neither paid any money nor transferred any property to an attorney for services in connection with the case.

4. A foreclosure action was initiated by CCL and a foreclosure sale was authorized by the Clerk of Court for Granville County (hereinafter "Clerk") and scheduled for May 23, 2000.

5. The foreclosure sale was held May 23, 2000 wherein CCL became the last and highest bidder. The ten (10) day upset period expired on June 5, 2000, and the sale became complete and final at the close of normal business hours on that date.²

6. On June 21, 2000 the Final Report and Account was filed with the Clerk and on July 3, 2000 the Substitute Trustee recorded the Trustee's Deed conveying the property to CCL which will appear of record in Book 816, Page 792, Granville County Registry, North Carolina.

7. Neither TB&T, CCL nor the Substitute Trustee conducting the foreclosure proceeding were aware of the Debtor's bankruptcy filing at the time the Final Report and Account was filed with the Clerk and at the time of the recording of the Trustee's Deed.

8. On October 6, 2000, TB&T/CCL filed a Motion for Relief from Stay Applying 11 U.S.C. § 362(e) and for Ratification of Foreclosure Sale.

DISCUSSION

Under the Bankruptcy Code, Chapter 13 debtors are entitled to cure mortgage arrearages on a principal residence. 11 U.S.C. §1322. Section 1322(b)(3) states that a Chapter 13 plan may "provide for the curing or waiving of any default." Furthermore, § 1322(b)(5) provides that the plan may:

... provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

However, a debtor's right to cure a mortgage arrearage on a principal residence is limited. The debtor can only exercise its right to cure the default before the residence is sold at

The Clerk's office immediately contacted Debtor's counsel and advised him that the filing fee was incomplete. Rather than having the Debtor complete an application to pay in installments or advancing the rest of the filing fee, counsel's office called the Debtor and asked her to send in the remainder of the fee. The full fee was received by the Clerk's office on June 7, 2000, and the Debtor's petition was filed on that day. A debtor does not have a common-law right to proceed in bankruptcy without payment of filing fees. United States v. Kras, 409 U.S. 434, 440 (1973)(right to a discharge in bankruptcy is not a fundamental right; there is no constitutional right to obtain a discharge of one's debts in bankruptcy). Bankruptcy courts are not empowered to waive filing fees for debtors commencing a bankruptcy case. 28 U.S.C. § 1930 (a); McGinnis v. McGinnis (In re McGinnis), 155 B.R. 294 (Bankr. D.N.H. 1993).

²The Debtor is not residing at the property and has not been residing at the property for several months.

a foreclosure sale. Section 1322(c) provides in part:

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) or subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law[.]

Property is "sold at a foreclosure sale" for purposes of 11 U.S.C. § 1322(c)(1) only when the foreclosure sale is "completed." In re Barham, 193 B.R. 229, 232 (Bankr. E.D.N.C. 1996). In this case, North Carolina foreclosure law determines when a foreclosure sale is completed for purposes of § 1322(c). Id. In North Carolina, any person may purchase real property after a foreclosure sale by bidding a minimum of 5%, but at least \$750.00, more than the sale price or the last upset bid within ten days after the sale or the last upset bid. N.C. Gen.Stat. § 45-21.27 (1999). Furthermore, the North Carolina General Statutes provide that "[w]hen 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." N.C. Gen.Stat. § 45-21.279(a); N.C. Gen.Stat. § 45-21.29A (1999). Thus, in North Carolina, property has not been "sold at foreclosure sale" for purposes of 11 U.S.C. § 1322(c)(1) until all of the statutory procedural requirements for completion of sale have been satisfied, including the expiration of the upset bid period. In re Barham, at 232; see also Shelby Bldg. & Loan Ass'n v. Black, 215 N.C. 400, 2 S.E.2d 6 (1939)(foreclosure sale cannot be consummated until the expiration of the upset bid period).

In this case, the foreclosure sale was held on May 23, 2000. The upset bid period following the foreclosure sale expired on June 5, 2000. Therefore, according to North Carolina law, the property was "sold at foreclosure sale" within the meaning of 11 U.S.C. § 1322(c)(1) at the close of normal business hours on June 5, 2000. When the Debtor filed her petition on June 7, 2000, she no longer had any right to cure the default under the Bankruptcy Code.

CONCLUSION

The court finds that the property located at 202 Peachtree Street, Creedmoor, North Carolina was "sold at foreclosure sale" on June 5, 2000, prior to the Debtor's bankruptcy filing. Accordingly, the court finds that TB&T/CCL should be granted relief from the automatic stay and that the foreclosure resulting in the sale of the property should be ratified and affirmed and TB&T/CCL should be permitted to take possession of the property.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED that the foreclosure sale held on May 23, 2000 and completed on June 5, 2000 is in all respects ratified and confirmed notwithstanding the Debtor's bankruptcy filing on June 7, 2000. It is further ORDERED, ADJUDGED AND DECREED that TB&T/CCL is granted relief from the automatic stay and may take possession of the property located at 202 Peachtree Street, Creedmoor, North Carolina.

This the 7 day of November, 2000.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge