

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE: §
HAROLD RAY REDD II, § Case No. 14-40138
Debtor. § (Chapter 13)
§

MEMORANDUM OPINION AND ORDERS

This case is before the Court following a hearing on a motion for relief from the automatic stay. Athabasca Falls Trust filed the motion, seeking to lift the stay so that it can evict the debtor, Harold Ray Redd II, from the house where he resides. Harold Ray Redd opposes the motion. The Court exercises its core jurisdiction over this matter, 28 U.S.C. § 157(A), (G) and (O), and makes the following findings of fact and conclusions of law.

BACKGROUND

The debtor failed to pay assessments as and when due to the Falls Homeowners Association (the “HOA”). As a result, the HOA conducted a foreclosure sale on the debtor’s home on August 6, 2013. At the foreclosure sale, Athabasca Falls Trust purchased the property. HOA presented the Trust with a Substitute Trustee’s Deed on August 14, 2013, which the Trust duly perfected pursuant to Texas law.

The Trust filed a forcible entry and detainer suit in the Justice of the Peace Court in Collin County, Texas. The Trust obtained a Default Order of Eviction.

The debtor appealed, and, on January 9, 2014, the Trust obtained a Judgment that awarded it possession of the property.

The debtor filed a petition for relief under chapter 13 of the Bankruptcy Code on January 20, 2014. The debtor continues to reside in the home. The debtor lists his right of redemption under the Texas Residential Property Owners Protection Act, *see* TEX. PROP. CODE §§ 209.011 – 209-015, as an asset in his bankruptcy schedules.¹

The debtor estimates that the current value of the home is \$135,000. He also discloses that Wells Fargo Home Mortgage has a secured claim against the property in excess of its value. The debtor was in arrears on his monthly payment obligations to Wells Fargo when he filed for bankruptcy.

The debtor filed a proposed plan of reorganization on the same date he filed his bankruptcy petition. In his plan, which the Court has not confirmed, the debtor proposes to pay the Trust an estimated redemption amount of \$7,000 over 55 months. He also plans to make monthly payments to Wells Fargo Home Mortgage to satisfy his monthly mortgage obligation and to cure the pre-bankruptcy arrearage. The debtor states in his plan that, after he completes the proposed payments to the Trust, the Trust will execute all documents necessary to vest title to the home back in the debtor.

¹ This case does not involve redemption under § 722 of the Bankruptcy Code. Section 722 enables a chapter 7 debtor to “redeem” narrow classes of exempt or abandoned personal property from “a lien securing a dischargeable consumer debt.”

DISCUSSION

The parties dispute whether the debtor's proposed plan of reorganization operates as an exercise of his statutory right of redemption under Texas law.² The debtor argues that it does, and that he need only file a chapter 13 reorganization plan within the statutory redemption period that proposes to repay HOA in full over the life of the plan. The Trust argues that the time for the debtor to exercise his statutory right of redemption has expired.

A. The Trust's Motion for Relief from the Automatic Stay

As an initial matter, § 362(a) operates as a stay of certain post-petition actions that affect "property of the estate," defined as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 362(a); 11 U.S.C. § 541(a). The HOA foreclosed on the debtor's home prior to bankruptcy. At the time he filed his bankruptcy petition, however, the debtor had the option to redeem his foreclosed house because the statutory redemption period had not yet expired. It was this interest in the house, rather than the house itself, that became the property of his bankruptcy estate.

The debtor opposes the Trust's motion for relief from the stay on the grounds that § 1322(b) of the Bankruptcy Code allows him to remain in possession of his home, and eventually re-acquire title to it, by paying the Trust over time through a

² There are two types of redemption under the law of mortgages. Prior to foreclosure, a mortgagor possesses a common-law "equitable right of redemption" whereby he may redeem the property within a reasonable time upon full payment of the mortgage lien. *See Scott v. Dorothy B. Schneider Estate Trust*, 783 S.W.2d 26, 28 (Tex. App. – Austin, 1990). After foreclosure, the mortgagor has statutory "rights of redemption" in some instances. In this case, for example, § 209.011 of the Texas Residential Property Owners Protection Act grants the "owner of property in a residential subdivision" certain rights of redemption after a foreclosure sale on a "property owners' association's assessment lien." *See* TEX. PROP.CODE. § 209.011.

chapter 13 plan of reorganization. Section 1322(b)(2) and (c)(1) provide consumer debtors with the right to reverse the acceleration of a home loan that resulted from default and “catch up” on the defaulted payments over time.³ In particular, subsection (b)(2) provides that, subject to subsection (c)(1), a plan may “modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims” Subsection (c) provides that, “[n]otwithstanding 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”

The debtor cites *In re Francis*, 489 B.R. 262 (Bankr. N.D. Ga. 2013), and *In re Martin*, 496 B.R. 323 (Bankr. S.D. N.Y. 2013), in support of his argument that he can pay the Trust through his plan. The *Francis* case did not involve a personal residence and was not subject to the considerations of § 1322(c). 489 B.R. at at 270. Likewise, in *Martin*, the debtor was not living in the residential real property that was at issue, and, therefore, the limited right to cure a default with respect to a residential real property was not before the court. 496 B.R. at 326.

³ Congress added subsection (c)(1) to the Bankruptcy Code to make explicit that a debtor’s right to cure a default on a mortgage secured by his or her principal residence continues at least until the “foreclosure sale,” and may continue beyond that date if state law provides additional cure rights. H.R. Rep. 103-835, at 52 (1994), *reprinted in* 1994 U.S.S.C.A.N. 3340, 3361.

Here, the property at issue is the debtor's home, and his ability to modify claims with respect to his home is limited by § 1322. The debtor is not seeking to cure a default in his payment obligations in accordance with §§ 1322(b) and (c)(1). Rather, the state law right of redemption that the debtor is seeking to exercise exists separate and apart from the limited federal right to cure under § 1322(c). *See Martin*, 496 B.R. at 327 (discussing the interplay between § 108 and § 1322). The Court concludes that the debtor may not use § 1322 to extend his non-bankruptcy right of redemption with respect to his home.

Furthermore, there is a temporal element to § 1322(c). Section 1322(c) supersedes state law and tolls the redemption period until “a foreclosure sale is conducted in accordance with nonbankruptcy law.” 11 U.S.C. § 1322(c)(1). In this case, a foreclosure occurred prior to bankruptcy, and it is too late for the debtor to cure his defaults through § 1322(c) of the Bankruptcy Code.

B. The Debtor's Statutory Right of Redemption

As to the amount of time the debtor has to redeem his home from the Trust, § 209.011(b) of the Texas Property Code states that a property owner may redeem property from any purchaser at a sale foreclosing a property owners' association's assessment lien “not later than the 180th day after the date the association mails written notice of the sale to the owner.” Anyone who purchased the property may not transfer ownership (other than to the redeeming property owner) during the 180-day redemption period. TEX. PROP. CODE § 209.011(c). If a lot owner sends by certified mail, return receipt requested, a written request to redeem the property on or

before the last day of the redemption period, the right of redemption is extended until the tenth day after the date the purchaser provides written notice to the redeeming party of the amounts that must be paid to redeem the property. TEX. PROP. CODE § 209.011(m).

To redeem the property, the lot owner must pay the association all amounts due, plus interest and costs, and must pay the purchaser of the property the purchase price paid at the foreclosure sale, plus other amounts, fees, and costs specified in the statute. *See id.*, § 209.011(e). If the lot owner successfully redeems the property during the redemption period, the purchaser at the foreclosure sale must immediately execute and deliver to the owner a deed transferring the property. *Id.*, § 209.011(f). If the owner attempts to redeem the property, but only makes a partial payment of the amounts due by the time the redemption period expires, the association must refund those partial payments to the owner not later than the 30th day after the period expired. *Id.*, § 209.011(l). If the redemption period expires without a redemption of the property, the association or third party foreclosure purchaser must record an affidavit in the real property records of the county in which the property is located stating that the lot owner or a lienholder did not redeem the property. TEX. PROP. CODE Ann. § 209.011(n).

The debtor concedes that § 362(a) does not toll state statutory redemption periods such as those prescribed by the Texas Residential Property Owners Protection Act. Section 108(b) provides the only extension for such periods. *E.g.*, *Cash Am. Pawn, L.P. v. Murph*, 209 B.R. 419, 422–23 (E.D. Tex. 1997) (listing cases

and summarizing majority view). Courts have articulated several reasons for this holding: (1) allowing § 362(a) to prevail over § 108(b) would enlarge property rights granted and circumscribed by state law, thus rendering the pertinent time allotments of § 108(b) a nullity, (2) section 108(b) specifically addresses redemption periods, and it controls over the more general provisions of section 362(a); and (3) the running of a statutory right of redemption is not the kind of “act” that triggers the application of section 362(a). *See Cash America Advance, Inc. v. Prado*, 413 B.R. 599, 605-606 (S.D. Tex. 2008) (collecting authority).

Section 108(b) of the Bankruptcy Code provides as follows:

Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of--

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 60 days after the order for relief.

11 U.S.C. § 108(b).

Here, it is unclear from the record when the HOA sent the notice of sale to the debtor. The debtor asserts that the notice could not have been sent any earlier than August 14, 2013, when the HOA presented the Trust with a Substitute Trustee’s Deed. The 180th day after August 13, 2013 was February 9, 2014. The debtor filed

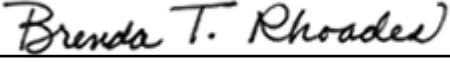
for bankruptcy on January 20, 2014. Thus, his statutory right of redemption had not yet expired as of the bankruptcy petition date.

March 21, 2014, was 60 days after the debtor filed for bankruptcy. Pursuant to § 108(b), since the state law redemption period had not yet expired when the debtor filed for bankruptcy, he had until the later of February 9, 2014 or March 21, 2014, to redeem his home.⁴ The redemption period has now expired.

IT IS THEREFORE ORDERED that the property located at 2004 Athabasca Falls, Anna, Texas 75059, is not property of the bankruptcy estate and that the Trust's motion for relief from the automatic stay imposed by 11 U.S.C. § 362(a) is **GRANTED**;

IT IS FURTHER ORDERED that the Trust's request for its attorney's fees with respect to his matter is **DENIED**.

Signed on 5/20/2014

 MD

HONORABLE BRENDA T. RHOADES,
CHIEF UNITED STATES BANKRUPTCY JUDGE

⁴ The commencement of a voluntary bankruptcy case constitutes an order for relief. 11 U.S.C. § 301(b).