

(Cite as: 1998 WL 470410 (Bankr.D.Vt.))

In re Randall L. MUNGER, Debtor.

Bankruptcy No. 98-10884.

United States Bankruptcy Court,

D. Vermont.

July 23, 1998.

C.R. Tetzlaff, Esq., and C.B. Baril, Esq., United States Attorney's Office, Rutland, for the United States and the Farm Service Agency ("United States").

M. Palmer, Esq., Palmer Legal Services, Middlebury, for Randall L. Munger ("Debtor").

MEMORANDUM OF DECISION GRANTING MOTION FOR RELIEF FROM STAY

CONRAD, Bankruptcy J.

*1 The United States, on behalf of the Farm Service Agency, moves [FN1] for relief from stay under 11 U.S.C. § 362(d) with respect to all real and personal property subject to a pre-petition foreclosure judgment. The issue before us is, whether, by filing a Chapter 12 petition, Debtor maintains an interest in the subject property sufficient to permit him to redeem after both the expiration of the redemption period and the recording of the certified copy of the judgment for foreclosure in the land records. We hold that Debtor did not possess such a right upon filing the Chapter 12 petition, because Debtor's rights in the subject property were extinguished upon the pre-petition recording of the certified copy of the judgment. It follows that Debtor may not redeem, and we grant the motion for relief from stay.

FACTUAL BACKGROUND

On November 14, 1996, the United States filed a foreclosure complaint in the United States District Court seeking to foreclose Debtor's real and personal property. Debtor acknowledged service of process but failed to answer, and on April 7, 1997, a default judgment was entered, triggering Debtor's statutory six-month redemption period. On December 26, 1997, the redemption period expired and, at that point, Debtor had not redeemed or attempted to cure the default. The certified copy of the foreclosure judgment was recorded in the Shoreham Land Records on January 28, 1998. Sale of the subject property was set for June

16, 1998.

On May 18, 1998, Debtor moved for relief from judgment, which the District Court denied on June 9, 1998. Debtor filed a Chapter 12 petition on June 12, 1998, and the automatic stay became effective to prevent the scheduled sale. United States filed for relief from the stay to proceed with the sale.

DISCUSSION

[1] Debtor argues that by virtue of filing a Chapter 12 petition, he has the right to cure until his property is sold at foreclosure sale, basing his contention on a specific provision found only in Chapter 13 and, in the alternative, on his power as hypothetical lien creditor under § 544(a) and § 1203. We disagree with both applications.

While the provisions of Chapter 12 were closely modeled after the provisions of Chapter 13, they are not identical. A debtor filing under Chapter 12 is not afforded all the same benefits as a debtor under Chapter 13. The purpose of Chapter 12 is to give family farmers "a fighting chance to reorganize their debts and keep their land." *In re Beard*, 134 B.R. 239, 247 (Bkrcty. S.D.Ohio 1991) (citing *In re Overholt*, 125 B.R. 202, 207 (S.D.Ohio.1990) and 132 Cong. Rec. H 8986-9002 (daily ed. Oct. 2, 1986), reprinted in App. 4 Collier on Bankruptcy at XXII-5). "It offers family farmers the important protection from creditors that bankruptcy provides, while, at the same time, ensuring that farm lenders receive a fair payment." *Beard*, supra, 134 B.R. at 247. To ensure that farm lenders receive fair payment, this "fighting chance" must inevitably expire if the Chapter 12 debtor does not get in the ring.

*2 Though the redemption period has terminated, Debtor insists that his right of redemption continues until the sale of the property. This argument is premised upon Debtor's comparison between Chapter 12 and Chapter 13 and our recent decision *In re Donahue*, 221 B.R. 105 (Bkrcty.D.Vt.1998). By the clear language of 11 U.S.C. § 1322(c)(1), [FN2] a default may be cured in a Chapter 13 until a debtor's principal residence is sold at a foreclosure sale. No such provision exists in Chapter 12. [FN3] Section 1222 permits a Chapter 12 debtor to cure a default, but this section does not extend the time to cure until the sale. Debtor would have us infer from this silence that Congress intended to permit a Chapter 12 debtor to cure until a foreclosure sale. We believe it would be more logical to infer that Congress specifically excluded this provision because it does not apply in Chapter 12. Debtor's Chapter 13 and *Donahue* one-two punch fails to make contact.

Alternatively, Debtor believes his property right survives because § 544(a) of the Bankruptcy Code gives a trustee in bankruptcy the same position as a hypothetical lien creditor, [FN4] and a debtor in possession in Chapter 12 concurrently holds that power. [FN5] We have held that in Vermont, under 12 V.S.A. 4530, a trustee, and therefore a debtor in possession, as lien creditor may redeem property until a decree of foreclosure is recorded in the land

records. [FN6] See *In re Shea Realty, Inc.*, 21 B.R. 790, 792 (Bkrtcy.D.Vt.1982). Debtor's power as a hypothetical lien creditor under § 544(a) is a property right sufficient to allow Debtor to redeem or cure a default, but only if that right exists on the date the petition is filed. Here, any right to redeem dissolved when the certified copy of the judgement was filed in the land records, as per Vermont law. The fact that a sale is to follow the completion of the foreclosure process has no bearing on Debtor's rights and is incidental to these proceedings.

[2] In further deference to the potential rights of Debtor, and despite the fact that we have taken the sometimes cynical position that the use of § 105 in the judicial exercise of equitable powers is the last refuge of "scoundrel" Bankruptcy Judges, we have explored our authority under § 105 to set aside a pre-petition foreclosure judgment. We note that several courts have required "unusual, compelling, or egregious" circumstances (such as bad faith) sufficient for the exercise of the court's equitable powers in order to set aside a foreclosure judgment. *In re Berg*, 152 B.R. 289, 292 (Bkrtcy.D.S.D.1993); *In re Bunke*, 173 B.R. 172, 174 (Bkrtcy.D. S.D.1994); *In re Easton*, 882 F.2d 312, 315-16 (8th Cir.1989) (Unless exceptional circumstances exist, Bankruptcy Court may not equitably extend the redemption period).

Here, there have been no "unusual, compelling, or egregious" or exceptional circumstances. The six-month redemption period expired without any attempt by Debtor to redeem or cure. While Chapter 13 permits cure until the foreclosure sale, there is no indication from Congress that in Chapter 12, any right to redeem or cure the default is maintained after the expiration of the redemption period. Thus, the final blow came when the certified copy of the foreclosure judgment was recorded. At that time, Debtor's right to redeem or otherwise cure the default vanished. Debtor did not file his petition until nearly five months after the expiration of the redemption period, when it was too late. Debtor sought to exercise his "fighting chance" long after the match was over.

CONCLUSION

***3** Debtor does not possess a property right such that he may redeem or cure the default because, upon the recording of the certified copy of the foreclosure judgment in the land records, Debtor's right of redemption terminated. Accordingly, we grant relief from stay to the United States. United States shall settle an order consistent with this Memorandum within 5 days.

FN1. Our subject matter jurisdiction over this controversy arises under 28 U.S.C. § 1334 (b) and the General Reference to the Court under Part V of the Local District Court Rules for the District of Vermont. This is a core proceeding under 28 U.S.C. § 157(b)(2) (A), (G), and (O), and this ruling shall constitute the Findings of Fact and Conclusions of Law as required by Federal Rule of Bankruptcy Procedure 7052.

FN2. Section 1322(c)(1) provides:

Notwithstanding subsection (b)(2) and applicable nonbankruptcy law--(a) 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 foreclosure sale that is conducted in accordance with applicable nonbankruptcy law

FN3. In *Donahue*, § 1322(c)(1) was employed to allow the Chapter 13 debtor to cure a default on his principal residence until a certified copy of the judgment for foreclosure had been recorded in the land records. In this case we held that the filing of the decree of foreclosure in the case of strict foreclosure is akin to a foreclosure sale as specified in the statute.

FN4. Section 544(a) reads as follows:

The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists, (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists, (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such a transfer to be perfected, that obtains the status of a bona fide purchaser at the time of the commencement of the case, whether or not such purchaser exists [and has perfected such transfer].

FN5. 11 U.S.C. § 1203 provides:

Subject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, ... and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm.

FN6. 12 V.S.A. § 4530 provides:

Such foreclosure shall not transfer the title to such lands as against subsequent purchasers, mortgagees or attaching creditors, unless such copy of record or such decree or copy thereof is thus left for record, or is afterwards and prior to the acquiring of any interest in or lien on the lands by a purchaser, mortgagee or attaching creditor, left for record in like manner. If not thus left for record, such lands shall be subject to

redemption by subsequent purchasers, mortgagees or attaching creditors, as though the time for redemption had not expired.

(Emphasis added.)

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