

2004 WL 2915331

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:**LAUREN JO CHASE,
Debtor**

**Chapter 13 Case
02-10582****JAN M. SENSENICH et al,
Plaintiffs****v.****ROBERT MOLLEUR,
Defendant.**

**Adversary Proceeding
03-1058****MEMORANDUM OF DECISION
GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS**

The Plaintiffs commenced this adversary proceeding under 11 U.S.C. § 548 and the corresponding state fraudulent conveyance statute to recover the excess value of certain real property the mortgagee took possession of in accordance with Vermont's strict foreclosure process. Defendant Robert Molleur (hereinafter, "Molleur") filed a Motion for Judgment on the Pleadings and Summary Judgment (doc. #15) seeking a determination that Debtor Lauren Jo Chase and Chapter 13 Trustee, Jan Sensenich (collectively, "Plaintiffs") fail to state a claim under § 548¹ and alternatively, cannot meet the required elements under § 548. The papers do not clearly delineate what relief Mr. Molleur seeks with respect to each argument and the Plaintiffs did not file a cross-motion for summary judgment. However, based upon the representations and joint request made by counsel at the status hearing held on October 7, 2004, the Court will treat this motion for summary judgment as a request that the Court rule as a matter of law on the question of when the subject transfer took place. Both parties aver that there is no issue of material fact with respect to this question and that they have provided the Court all of with their respective arguments on the law that applies. The Court finds that summary judgment is appropriate on this question, holds that the transfer of the property at issue occurred pre-petition, and grants summary judgment in favor of the Plaintiffs on this question.

This Court has jurisdiction over the subject motions pursuant to 28 U.S.C. §§ 157(b)(2)(E) and (H) and 1334.

¹ All references to specific statutory sections, unless indicated otherwise, refer to the United States Bankruptcy Code.

BACKGROUND FACTS

The pertinent facts are not in dispute. The Debtor owned a dwelling located in West Danville, Vermont (the “West Danville Property”), which has not at any time relevant to this proceeding been her primary residence. Mr. Molleur held a valid first mortgage on this property and filed a foreclosure complaint to enforce his rights against the property on or about November 15, 2000 (the “Foreclosure Action”). In the Foreclosure Action, Mr. Molleur alleged that the Debtor defaulted under the Note and Mortgage on or about April 18, 1999, by failing to make monthly payments of \$792.31. The Debtor did not contest the allegation of default; Mr. Molleur moved for and obtained a default judgment in the Foreclosure Action on or about April 12, 2001. On October 26, 2001, the Caledonia Superior Court entered a consolidated Judgment Order and Decree of Foreclosure.

The Debtor filed for bankruptcy protection on April 25, 2002 (the “Petition Date”), six months minus one day after the foreclosure judgment was entered in the Foreclosure Action. Under the Debtor’s confirmed chapter 13 plan, the Debtor was to obtain other financing and pay Mr. Molleur \$105,000 within sixty (60) days after the Petition Date. The Debtor stipulated in her confirmed plan that Mr. Molleur would be entitled to an order granting him relief from stay, enabling him to obtain and record a Certificate of Non-Redemption in the Foreclosure Action, if she did not successfully refinance the West Danville Property within the specified 60-day period. After the Debtor failed to obtain financing within that time frame, Mr. Molleur obtained the stipulated relief from stay order. He recorded the Certificate of Non-Redemption on or about July 25, 2002.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. A genuine issue exists only when “the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); See also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Anderson, 477 U.S. at 247. Factual disputes that are irrelevant or unnecessary are not material. Id. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. Id. In making its determination as to whether summary judgment is proper, the court’s sole function is to determine whether there is any material dispute of fact that requires a trial. Anderson, 477 U.S. at 249; see also Delaware & Hudson Ry. Co. v. Conrail, 902 F.2d 174, 178 (2d Cir. 1990).

THE TRANSFER OF THE WEST DANVILLE PROPERTY

In relevant part, § 548 provides that a “trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition . . .” Section 101(54) defines “transfer” to mean “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor’s equity of redemption.” According to the legislative history, the definition of ‘transfer’ is ‘as broad as possible.’ Glinka v. Bank of Vermont (In re Kelton Motors, Inc., 153 B.R. 417, 424 (Bankr. D. Vt. 1993) (citing S. Rep. No. 989, 95 Cong., 2d Sess. 27 (1978)).

“What constitutes a transfer and when it is complete” is a matter of federal law. McKenzie v. Irving Trust Co., 323 U.S. 365, 369-370 (1945). The Bankruptcy Code’s definition of “transfer” includes references to parting with “property” and “interests in property.” In the absence of any controlling federal law, both “property” and “interests in property” are creatures of state law. Id., at 370; Butner v. United States, 440 U.S. 48, 54, 99 S. Ct. 914, 918(1979) (“Congress has generally left the determination of property rights in the assets of a bankrupt’s estate to state law”). It is undisputed that Vermont strict foreclosure law is the controlling law in the instant proceeding.

It is important to note that the parties have focused on the transfer of the West Danville Property, not the transfer of the Debtor’s right of redemption which is a separate property interest under Vermont law. Canney v. Merchants Bank (In re Canney), 284 F.3d 362, 369 (2d Cir. 2002) (“A foreclosure judgment vests full and equitable title to the property with the mortgagee, subject only to the mortgagor’s ‘equity of redemption,’ which is a contingent equitable interest in the property, and limited rights to possession, rents, and profits of the property during the period of redemption.”) (citations omitted). As this Court recently observed in CUC Mortgage Corp. v. Cavacas, et al. (In re Cavacas), 2004 WL 1661008 (Bankr. D. Vt. July 22, 2004):

The interplay between the expiration of a mortgagor’s right to redeem under Vermont foreclosure law and the extent of that mortgagor’s interest in the subject property if he or she files for bankruptcy relief has been the subject of several federal court decisions since the enactment of the Bankruptcy Code in 1978. In making their determination of a mortgagor’s interest, the courts have consistently relied upon the plain language of the State’s foreclosure statute and the specific facts of each case. The result is that each time a new variation on the question is presented, the issue must be examined anew by comparing the facts presented against the State foreclosure statute and prior court decisions. The Vermont foreclosure statutes, see 12 V.S.A. Ch. 163, subch. 6, have not been amended to incorporate, or respond to, the federal court decisions interpreting a mortgagor’s rights. Hence, the only variables that change are the circumstances of the foreclosure action as of the date of the

bankruptcy filing and the universe of case law available for guidance.

Id. at *2. The universe of case law available for guidance in the instant case is not significantly larger than that available at the time this Court decided Cavacas. The relevant facts and circumstances that are presented here and that this Court must compare with prior case holdings in order to determine the outcome of the instant motion are:

1. when the Judgment of Foreclosure entered *vis a vis* the Petition Date;
2. when the Debtor's right of redemption expired; and
3. whether the subject property is the Debtor's primary residence.

The Court will address each in turn.

1. When the Judgment of Foreclosure was Entered Vis a Vis the Petition Date

The timing of the Petition Date *vis a vis* both the entry of the Judgment of Foreclosure and the expiration of the Debtor's right of redemption provides guidance as to what, if any, rights the Debtor had in the West Danville Property as of the Petition Date. We begin with an analysis of the impact of the entry of the foreclosure judgment. It is well settled that the filing of a bankruptcy case does not, and cannot, give a debtor greater rights in property than the debtor had prior to bankruptcy. In re Brown, 732 F.2d 119, 124 (2d Cir. 1984). The Plaintiffs argue that the Debtor's ownership rights in the West Danville Property transferred to Mr. Molleur prior to the Petition Date and thus that the Debtor had no ownership rights in the property as of the Petition Date.

Mr. Molleur presents alternative arguments as to the date of transfer. His first argument is that title to the West Danville Property transferred to him upon the Debtor's default of the mortgage's terms which was more than a year prior to the Debtor's Petition Date. The Court finds this to be inconsistent with settled law. While the granting of a mortgage in Vermont conveys legal title to a mortgagee, the mortgagor retains equitable title to the property while the mortgage debt is outstanding. In re Canney, 284 F.3d at 369. Only upon default does the mortgagee become entitled to assert possession of the property. If there is a default, the mortgagee may pursue his right of possession by peaceable entry, by eviction, or through a strict foreclosure action. See id. It is undisputed that Mr. Molleur chose to pursue his right to possess the West Danville Property through a strict foreclosure action. Unless the mortgagor willingly relinquishes her possession of the property, possession through a strict foreclosure action is actually a two step process: (1) the mortgagee must obtain equitable title, which occurs upon entry of the foreclosure judgment; (2) then, once the mortgagor's right of redemption – and the limited rights of possession that accompany the right of redemption – has expired, the mortgagee may obtain actual possession. As recognized by the Second Circuit in Canney, the foreclosure judgment vests “full and equitable title to the property with the mortgagee, subject only to the

mortgagor's 'equity of redemption,' which is a contingent equitable interest in the property, and limited rights to possession, rents and profits of the property during the period of redemption." 284 F.3d at 369 (citing Stowe Ctr., Inc. v. Burlington Sav. Bank, 141 Vt. 634 (1982)).

The Court finds that Mr. Molleur obtained full and equitable title in the West Danville Property, subject only to the Debtor's right of redemption, as of October 26, 2001, the date the Superior Court entered the consolidated Judgment Order and Decree of Foreclosure. The Debtor's right of redemption is a separate property interest from the ownership interest in the West Danville Property itself. See Mortgage Lenders Network, USA v. Sensenich, et al (In re Potter), No. 2002-564, slip op. at 3 (Vt. October 18, 2004) (After entry of foreclosure decree, mortgagor retains only contingent equitable right to redeem property, not full legal title) (internal citations omitted). The Debtor, as the mortgagor, retained limited rights to possession, rents and profits of the property during the redemption period, even though full legal and equitable title had already vested in Mr. Molleur. "Curing the default within the [redemption] time period specified in the foreclosure judgment vests equitable title with the mortgagor; failure to do so, however, extinguishes [the mortgagor's] contingent interest." In re Canney, 284 F.3d at 370 (citations omitted). Once the period of redemption lapses, the debtor's equity of redemption is extinguished, the debtor has no legally cognizable right or interest in the property, and the mortgagee has legal and equitable title as well as the right to possess the property.

2. When the Debtor's Right of Redemption Expired

A mortgagor in Vermont has six months from the date the judgment of foreclosure is entered to redeem the property, unless the judgment dictates otherwise. 12 V.S.A. § 4528. There is no evidence before the Court that the October 26, 2001 Judgment Order and Decree of Foreclosure altered the Debtor's statutory right to redeem within six months. The Superior Court entered the foreclosure judgment on October 26, 2001, and the Petition Date was April 25, 2002, one day shy of the end of the redemption period. Consequently, as of the Petition Date, the Debtor retained her contingent right of redemption.

The Court finds In re Canney, to be the controlling authority for determining when the Debtor's right of redemption expired. In that case, the Second Circuit held that a debtor's right of redemption is tolled for sixty (60) days upon the debtor's filing for bankruptcy protection under § 108. Id. at 366. Much like the instant case, the debtor in Canney filed his bankruptcy petition just prior to the expiration of his right of redemption. The Second Circuit held that the filing of bankruptcy extended the debtor's redemption period by sixty (60) days. The facts of the instant case are identical on this point. Hence, under the reasoning in Canney, the Debtor's right of redemption did not expire until sixty (60) days after the Petition Date. It is undisputed that the sixty (60) day redemption period expired without the Debtor exercising her right to redeem.

3. Whether the Subject Property is the Debtor's Primary Residence

Whether the property subject to a foreclosure judgment is the Debtor's primary residence is of paramount importance both in defining the Debtor's rights to modify the underlying debt in her chapter 13 case, and for determining the extent to which the chapter 13 case enhances the rights the Debtor would otherwise have under the Vermont foreclosure statute. This issue was illuminated, and the rights of a debtor who files chapter 13 within sixty (60) days of a Vermont foreclosure judgment were significantly expanded, by the District Court in Taylor v. Vermont Housing Finance Agency (In re Taylor), 286 B.R. 275 (D. Vt. 2002).² Taylor instructed that if a debtor files for chapter 13 relief before the expiration of the redemption period AND the subject property is the debtor's primary residence, then the debtor has the right to reinstate the mortgage and cure the default under § 1322(c)(1). Hence, the debtor may be entitled to more than the sixty (60) day extension period of § 108 which was conferred by Canney. In re Taylor, 286 B.R. at 282.

Taylor explained the impact of Canney on chapter 13 practice within this District, making clear that the sixty (60) day restriction that Canney imposed did not limit a chapter 13 debtor's right to reinstate a mortgage and then cure the mortgage defaults pursuant to § 1322. In Taylor, the District Court specifically addressed the question of whether the § 1322(c)(1) right to cure expires in a strict foreclosure regime since no "sale" takes place and held that it did not. Id. at 280-82. However, in Taylor, the subject property was the debtor's primary residence. Therefore, the District Court did not address whether § 1322(c)(1) would apply if the property were not the debtor's primary residence. Since the plain language of § 1322(c)(1) unequivocally applies to only the debtor's principal residence, the Court finds no legal support in the statute or case law for concluding that Taylor expanded the rights of a debtor who filed for chapter 13 bankruptcy relief before her right to redeem expired if the subject property was not his or her principal residence. It is undisputed that the West Danville Property was not the Debtor's principal residence. Therefore, this Court holds that the Debtor does not have the expanded rights articulated in Taylor and that she lost her contingent -- and only -- interest in the property when she failed to redeem within sixty (60) days of the Petition Date.

Mr. Molleur argues alternatively that since the Debtor failed to redeem within that 60-day period, as required by both Canney and the terms of the confirmed plan, the property was effectively transferred to him post-petition, barring the Plaintiffs' asserted cause of action under § 548. The Court finds this alternative argument unpersuasive. While § 108 affects when the Debtor's contingent right to redeem expires, it does not alter the vesting of full and equitable title in the West Danville Property that occurred on October 26, 2001. In re Cavacas, 2004 WL 1661008, at *6.

² It is axiomatic that in order for this determination to have any impact, the Debtor must retain a right of redemption as of the date of filing bankruptcy.


The Court appreciates that a mortgagee cannot exercise all *indicia* of ownership, particularly the ability to transfer the subject property, until the redemption period has run its course. However, under Vermont's strict foreclosures, full legal and equitable title is vested in the mortgagee upon entry of the foreclosure judgment. The only limitation upon the legal title at that point in time is the mortgagor's contingent right to redeem the property. Id. The contingent right to redeem is just that - contingent. Unless the debtor takes affirmative steps to redeem the property by paying the mortgagee, the debtor's contingent right to redeem expires. While a very valuable right, the contingent right to redeem is wholly distinct from legal and equitable title to property. It is this Court's determination that while the Debtor's chapter 13 filing extended her contingent right to redeem the property until sixty (60) days post-petition, neither the chapter 13 filing *per se* nor operation of § 108 rescinded the pre-petition transfer of all of the Debtor's legal and equitable interest in the West Danville Property to the mortgagee. That transfer occurred, under operation of Vermont law, upon entry of the foreclosure judgment.

CONCLUSION

For the reasons set forth above, the Court holds that the transfer of the West Danville Property occurred pre-petition, on October 26, 2001. Thus, summary judgment is granted on the question of when the operative transfer occurred and it is found to have occurred within one year of the Petition Date. The matter shall proceed to trial on the remaining fraudulent transfer issues according to the time frame set out in the accompanying Order.

This memorandum constitutes the Court's findings of fact and conclusions of law.

October 25, 2004
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge