

APR 08 1997

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

**JED G. WEINTRAUB
CLERK OF COURT
WESTERN DISTRICT OF TENN.**

IN RE

GEORGIA EDWARDS DANDRIDGE,

CASE NO. 94-31879-K

Debtor.

CHAPTER 13

**MEMORANDUM OPINION AND ORDER RE
CREDITOR'S MOTION TO LIFT STAY AND
THE DEBTOR'S OBJECTION THERETO**

This is a case arising under 28 U.S.C. § 1334(a). This is a core proceeding under 28 U.S.C. § 1570>)(2)(G) in which the creditor-movant, Parent Funding Corporation, seeks relief from the automatic stay (11 U.S.C. § 362(a)) pursuant to 11 U.S.C. § 362(d) in order to require the debtor-respondent, Georgia Edwards Dandridge, to pay in full the outstanding mortgage balance which is secured by her principal residence or to pursue the remedies provided in the corresponding deed of trust.

This matter is before the court on the creditor's motion for relief from stay; briefs of the creditors and debtors; and the evidence and arguments presented at the hearing on the motion. For the reasons hereinafter cited, this Court denies the relief sought by Parent Funding Corporation. The following shall serve as this Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTS

This Court finds the following relevant facts in this case. In June, 1991, Parent Funding Corporation (“PFC”) and Georgia Dandridge (“Dandridge”) entered into a note, deed of trust and rider to finance the purchase by Dandridge of real property which was to be her personal residence. The rider allows the beneficiary of the deed of trust and holder of the promissory note to “call” the note after five (5) years on a quarterly basis, provided that notice is given to Dandridge prior to the quarter in which PFC exercises the call option.

On November 17, 1994, Dandridge filed the current Chapter 13 proceeding. A sixty (60) month plan was confirmed on January 5, 1996, requiring Dandridge to cure the arrearage due PFC as a secured class and appointing the Chapter 13 trustee as the disbursing agent to pay the ongoing mortgage. PFC did not file an objection to the plan and neither Dandridge nor PFC provided the court with information concerning the “call” provision contained in the rider prior to this proceeding.

On June 1, 1996, the five year period of the rider’s “call” provision ended. PFC, through its counsel, gave notice to Dandridge on September 24, 1996, through her counsel, that it was making November 30, 1996, the exercise date of the call, thus giving the debtor until the end of February, 1997, to pay off the mortgage debt.

PFC then filed a motion to lift the automatic stay on November 4, 1996. This Court conducted a hearing on January 16, 1997, at which time the Chapter 13 Trustee announced that the plan payments were current, on going mortgage payments were

current, and payments on the arrearage to PFC were current. Both PFC and Dandridge submitted memorandums in support of their respective positions.

II. ISSUE PRESENTED

Whether this Court should grant PFC relief from the automatic stay, pursuant to 11 U.S.C. § 362(d), in order to require Dandridge to pay in full the outstanding mortgage balance which is secured by her principal residence or to pursue the remedies provided in the corresponding deed of trust?

III. ARGUMENTS OF THE PARTIES

PFC contends that it has the right to demand full payment notwithstanding the automatic stay because the confirmation order does not alter its right to demand payment in full and that the plan cannot be modified post-petition to cure the payment in full provision of the rider. PFC argues that a clear distinction exists between a debtor's right to "cure" an arrearage or default and the right to "modify" the terms of a note. They further argue that the Bankruptcy Code protects lenders who deal exclusively in consumer long term real estate loans by not allowing payments to be modified under 11 U.S.C. § 1322(b)(2). PFC directs this Court to the case of *In the Matter of Clifford and Kathy Bosteder*, 59 B.R. 878 (Bankr. S.D. Ohio 1986), for additional support of its motion.

Dandridge argues that relief from the stay should be denied because monthly payments are current under the plan, that the creditor did not object to the sixty (60)

month term of the plan, and that the creditor's "call" rights have been effectively waived due to their lack of objection. The debtor also contends that it has equity in the property and that the property is necessary to an effective reorganization and for those reasons the stay can not be lifted under 11 U.S.C. § 362(d). Finally, Dandridge points out that PFC has violated the stay by counsel's letter stating that they were calling the note under 11 U.S.C. § 362(a)(1), (3), (4), (5), and (6).

IV. OPINION OF THE COURT

11 U.S.C. § 362(a) provides for an automatic stay against certain judicial and non-judicial acts against the debtor, property of the debtor, or property of the estate. The stay arises automatically upon the filing of a petition by or against the debtor without the necessity of a request by any party in interest. Specifically, the foregoing sections of Section 362(a) are relevant:

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- (3) any act to obtain possession of property or the estate or of property from the estate;
- (4) any act to create, perfect, or enforce any lien against the property of the estate;
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
- (6) any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title against any claim against the debtor.

11 U.S.C. § 362(a). The Historical and Revision Notes provide as follows:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collections efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or organization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

See House Report No. 95-595, 95th Cong. 2d Sess. (1978) 54, U.S. Code Cong. & Admin. News 1978 at 5840.

Section 362(d) sets forth the circumstances upon which the Court may grant relief from the automatic stay and provides as follows:

On request of a party in interest and after notice and hearing, the Court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay

- (1) for cause, including the lack of adequate protection of an interest in property or such party in interest; or
- (2) with respect to a stay of an act against property, if (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d).

If a party seeks relief only with respect to an act against property, relief may be given if the debtor has no equity in the property and the property is not necessary to an effective reorganization. **See** 11 U.S.C. § 362(d)(2); ***Heritage Savings & Loan Ass'n v. Rogers Development Corp.***, 2 B.R. 676 (Bankr. E.D.Va. 1980) (relief from automatic stay denied even though property had no equity because property was necessary for an effective reorganization). The party seeking relief has the burden of proof on the issue of

debtor's equity in the property and the party opposing the relief has the burden on all other issues. See 11 U.S.C. § 362(g).

PFC in its brief discussed the differences between "cure" and "modify" under 11 U.S.C. § 1322 and §1329. This Court is aware of the differences between the two terms and does not consider the automatic stay to be a modification on the terms of the note.

PFC also referred this Court to the case of *In the Matter of Clifford and Kathy Bosteder*, 59 B.R. 878 (Bankr. S.D.Ohio 1986). This Court has reviewed that case and does not consider it to be controlling or even similar in its facts mainly because *Bosteder* dealt with a balloon payment rather than a "call" provision. In that case the note provided that the Bosteders were to pay twelve (12) monthly installments and then the balance of the principal was due, constituting a balloon payment. After the Bosteder's failed to make the balloon payment they filed Chapter 13. The secured creditor agreed to extend the due date for the balloon payment for two years. The court granted relief **from** the stay after the balloon payment wasn't paid for a second time. In that case, the debtors had adequate notice of the need to arrange for alternate financing prior to the filing of the Chapter 13. PFC argues that this Court should consider their "call" provision like the balloon payment in *Bosteder*. But there are differences. A balloon payment becomes due upon a mutually agreed upon date or after a certain amount of time. It is a natural event that takes place regardless of extenuating circumstances. Because of this fact, the Bosteder's were well aware of their obligation under the terms of the note. As for Dandridge, the call provision after the five year period was solely at the option of PFC and their subjective intentions. If the five year period had expired prior to the Chapter 13

filing, then they would have been free to explore their options under the rider. But once Dandridge filed bankruptcy, she was entitled to all of the protections of the automatic stay, and at that point PFC was limited to remedies afforded them under the Bankruptcy Code and more specifically § 362. Further, PFC failed to object to confirmation of the plan and by failing to do so is bound by the terms of the plan. 11 U.S.C. § 1327(a).

PFC had three opportunities before this Court (their motion, the hearing, and memorandum in support) to discuss § 362 and the reasons why this Court should grant relief from the automatic stay. But PFC has not given this Court any reason to lift the stay. PFC has failed in its burden to convince this Court that the debtor has no equity in the property which is one of the requirements of § 362. In addition, the debtor has successfully argued that she has equity in the property and it is necessary for an effective reorganization.

Because this Court concludes that PFC did not meet its burden in showing why the stay should be lifted, their motion is denied.

ORDER

It is therefore **ORDERED** that creditor's motion to lift the stay is **DENIED**.


G. Harvey Boswell
United States Bankruptcy Judge

Date: April 08, 1997

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Mailed on 4-8-97 to
 Debtor, debtor's attorney and trustee
 above listed parties
Sandy Beck, Administrative Secretary
United States Bankruptcy Court