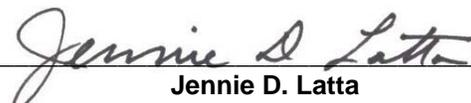


**Dated: June 01, 2005**  
**The following is ORDERED:**



  
\_\_\_\_\_  
**Jennie D. Latta**  
**UNITED STATES BANKRUPTCY JUDGE**

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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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In re

EVELYN A. ROBINSON,

Case No. 05-24085-L

Debtor.

Chapter 13

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**ORDER ANNULING AUTOMATIC STAY**

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THIS MATTER came on for trial on May 24, 2005, upon the “Motion For Relief From Automatic Stay and to Ratify and Confirm Recording of Substitute Trustee’s Deed Nunc Pro Tunc” filed on behalf of Rapheal Mitchell (“Mitchell”) as to property located at 800 Red Leaf Lane, Memphis, Tennessee (the “Property”). The motion seeks relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2) on the basis that sale of the property to Mitchell was complete before the filing of the Debtor’s bankruptcy petition. Mitchell seeks relief from the automatic stay to permit him to complete his action to obtain possession of the Property in the General Sessions Court of

Shelby County, Tennessee. The motion also seeks payment of reasonable attorneys fees. No written objection to the motion was filed, but an appearance was made on behalf of the Debtor by William Gosnell, attorney. After considering the testimony of Mitchell, the only witness, and reviewing the exhibits introduced at trial, the court is of the opinion that the motion should be granted in part and denied in part. This is a core proceeding. 28 U.S.C. § 157(b)(2)(G).

#### **FINDINGS OF FACT**

Mitchell, an investor with no prior association with the Debtor, was the successful bidder on the Property at a non-judicial foreclosure sale conducted on March 10, 2005. On that day, he paid \$44,000 for the purchase of the Property to the Substitute Trustee for Aurora Loan Services, and received a written receipt for his payment. A Substitute Trustee's Deed conveying the Property to Mitchell was prepared, signed and acknowledged on March 10, 2005, but was not delivered to Mitchell until March 21, 2005. Mitchell caused the deed to be recorded on that day. The Debtor had been the owner of the Property prior to the sale and lives in the Property as her residence. On March 18, 2005, before the receipt and recording of the Substitute Trustee's Deed, the Debtor filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code. The Debtor seeks to remain in possession of the Property and cure the default in her home mortgage through her Chapter 13 plan. Prior to learning of the filing of the Debtor's Chapter 13 petition, Mitchell filed a forcible entry and detainer warrant in the General Sessions Court of Shelby County, Tennessee, seeking to obtain possession of the Property. At the hearing on his motion, Mitchell produced

copies of the checks he gave as payment for the Property, the receipt given to him for his payment, and the Substitute Trustee's Deed.

At issue is whether the non-judicial foreclosure sale was complete prior to the filing of the Debtor's Chapter 13 petition even though the deed was not delivered until after the filing.

### **CONCLUSIONS OF LAW**

Mitchell seeks relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2), which provides:

On request of a party in interest and after notice and a 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—

\* \* \*

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

The party requesting relief from the automatic stay has the burden of proof on the issue of the debtor's equity in property. The party opposing relief has the burden of proof on all other issues. 11 U.S.C. § 362(g). Mitchell asserts that the Debtor has no equity in the Property because it was conveyed to him prior to the filing of the Debtor's bankruptcy petition. The Debtor maintains that the sale was not complete prior to the filing of her petition because the Substitute Trustee's Deed was not delivered to Mitchell or recorded prior to filing.

Pursuant to 11 U.S.C. § 1322(b)(5), a Chapter 13 debtor may cure defaults and maintain payments on a claim secured by the debtor's residence in a Chapter 13 plan. The court of appeals has made clear, however, that the right to cure defaults pursuant to section 1322(b)(5) is cut off by the sale of mortgaged premises. *See Federal Land Bank v. Glenn (In re Glenn)*, 760 F.2d 1428, 1435 (6th Cir. 1985). The Debtor argues that the foreclosure sale was not complete prior to the filing of her bankruptcy petition, and thus that she may cure her default and make ongoing payments through her Chapter 13 plan.

In Tennessee, a non-judicial foreclosure sale is complete when consideration is given for the transfer and the statute of frauds is satisfied in accordance with Tennessee Code Annotated § 29-2-101. *See In re Comes*, No. 99-23175-L, slip op. at 2, (Bankr. W.D. Tenn. June 30, 1999); *In re Johnson*, 213 B.R. 134 (Bankr. W.D. Tenn. 1997), *modified on reh'g by* 215 B.R. 988 (Bankr. W.D. Tenn. 1997). Section 29-2-101 provides:

**29-2-101. Writing required for action.** (A) No action shall be brought:

\* \* \*

(4) Upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one (1) year

\* \* \*

unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party.

Tenn. Code Ann. 29-2-101.

Mitchell has produced evidence that consideration was given by him for the purchase of the Property on March 10, 2005. He has also shown that a memorandum of the oral sale was made on March 10, 2005, in the form of the Substitute Trustee's Deed. Under Tennessee law, the statute of frauds may be satisfied with regard to the sale of real estate by a deed executed by the seller showing the fact of the sale, the consideration for the sale, and the description of the property conveyed. *Vaughn v. King*, 1998 WL 205146, at \*2 (Tenn. Ct. App. Apr. 29, 1998). The Substitute Trustee's Deed satisfies each of these requirements. It recites that "the sale was held on March 10, 2005, at the Southwest Corner, Adams Avenue Entrance in Memphis, Shelby County, Tennessee, in bar of the equities of redemption, dower, and homestead." It recites that "Raphael Mitchell, being the highest, best and last bidder, became the purchaser of said property at and for the sum of \$44,000.00." It contains the legal description of the Property. The Substitute Trustee's Deed was signed by Priority Trustee Services of TN, L.L.C., as Substitute Trustee, and the signature was acknowledged by a notary public on March 10, 2005. A deed may serve as a memorandum of an oral sale of real estate where the deed recites each of the terms of a binding contract, as opposed to merely reflecting negotiations for the sale. *Black v. Black*, 202 S.W. 2d 659, 662 (Tenn. 1947). Further, it is not necessary that a deed be delivered to take the contract out of the statute of frauds. *Id.* at 663.

In summary, a debtor's statutory right to cure a default in a mortgage secured by the debtor's residence is cut off by the sale of the mortgaged premises. A non-judicial foreclosure sale is an oral

contract for the sale of land. It is complete when consideration is given and the statute of frauds is satisfied. The statute of frauds requires that a contract for the sale of land be evidenced by a written memorandum. A deed may serve as a memorandum of an oral contract for the sale of land if it contains the necessary terms of sale, meaning that it contains evidence of the fact of the sale, the consideration for the sale, and a description of the land, and if it is signed by the party to be charged, i.e., the seller. In order for a deed to serve as a memorandum of a contract for the sale of land, it is not necessary that the deed be delivered to the purchaser.

In this case, Mitchell has shown that the sale of the Property was complete before the Debtor's Chapter 13 petition was filed. Consideration was given and a memorandum of the sale was prepared prior to filing. Therefore, the Debtor's right to retain the property and cure the default in her home mortgage was lost prior to the filing of her petition. Following the sale, the Debtor retained no rights with respect to the Property that were subject to the protection of the automatic stay. The Debtor had no equity in the Property and the Property was not subject to use in her reorganization efforts at the time her petition was filed. Accordingly, the automatic stay should be annulled.

Mitchell also seeks the recovery of reasonable attorney fees in this matter, but points to no statute or contract that would entitle him to recover attorney fees. Under the "American Rule," attorney fees are not recoverable by the prevailing party to litigation absent specific statutory authority. *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). The

Bankruptcy Code does not make provision for the award of attorney fees to a party prevailing on a motion for relief from the automatic stay. Accordingly, Mitchell's request for reimbursement of attorney fees should be denied.

**CONCLUSION**

For the foregoing reasons, the motion of Mitchell for relief from the automatic stay is GRANTED in part and DENIED in PART. The automatic stay is ANNULLED as to Mitchell and any acts of his to obtain possession of the Property. The request for attorney fees is DENIED.