

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

IN RE:

ARNETTA BRENGETTCY,

Debtor.

BK #94-24784-WHB
Chapter 13

ARNETTA BRENGETTCY,

Plaintiff,

v.

Adversary Proceeding
No. 94-1002

NATIONAL MORTGAGE COMPANY,
RAY-LEE INVESTMENT COMPANY,
and T. R. SMITH,

Defendants.

**MEMORANDUM OPINION AND ORDER
ON COMPLAINT TO SET ASIDE FORECLOSURE SALE**

This adversary proceeding has a history of prior hearings and rulings by both the Bankruptcy Court and the United States District Court. On January 6, 1995, the Honorable Bernice Bouie Donald, former United States Bankruptcy Judge and now United States District Judge, entered a Memorandum Opinion and Order vacating her earlier August 25, 1994, Order, which had denied the debtor's original motion to set aside a foreclosure. Moreover, the January 6, 1995, Opinion and Order enjoined National Mortgage Company,¹ Ray-Lee Investment Company, and other parties, from taking any further steps to evict the debtor from the property, conditioned upon the debtor

¹ National Mortgage Company's successor is Boatman's National Mortgage, Inc. In all instances,

posting a bond in the amount of \$1,000. In that Memorandum Opinion, Judge Donald recited background facts of this chapter 13 case and this adversary proceeding. This Court will not repeat those facts but refers to them for an explanation of the history of this case and proceeding. The gravamen of the dispute before Judge Donald was the effect to be given an Order entered in the debtor's prior chapter 13 case, number 92-30773, which had contained what is popularly known as "a drop dead" clause² As the history of this case reveals, the debtor's 1992 chapter 13 case was dismissed on January 25, 1994, and the debtor refiled the present chapter 13 case on May 17, 1994, at 9:59 a.m. On May 17, 1994, at 12:00 noon, National Mortgage Company held a foreclosure sale of the debtor's residence. In her Memorandum Opinion, Judge Donald held that the Bankruptcy Court had the authority under FED. R. CIV. P. 60(b) to give relief from a prior Order of the Court for appropriate reasons as recited in that Rule. And, Judge Donald granted relief from her earlier August 25, 1994, Order. National Mortgage Company filed a motion for leave to appeal Judge Donald's Memorandum Opinion and Order to the United States District Court, and by an Order dated August 9, 1995, Chief United States District Judge Julia Smith Gibbons denied National Mortgage Company's leave to appeal. In that Order, Judge Gibbons stated: "A single, threshold issue remains to be decided by the bankruptcy court: whether debtor can demonstrate a change of circumstances." At the trial on January 25, 1996, before this Court, counsel for the parties agreed that this was the only issue remaining for determination by this Court, and a trial proceeded on the issue of whether the debtor had enjoyed a favorable change of circumstances between the

references in this opinion to National Mortgage Company shall include its successor company.

² In this Court's recent Memorandum Opinion concerning such clauses, this Court has suggested a more appropriate terminology referring to such orders as "last opportunity" orders. In re Friend, submitted for publication, Case No. 95-28362-B, Adversary Proceeding No. 95-1133 (Jan. 24, 1996).

dismissal of her prior chapter 13 case on January 25, 1994, and the filing of the present case on May 17, 1994. After taking this issue under advisement and having considered all of the evidence presented at the trial, the Court is prepared to enter the following Memorandum Opinion and Order pursuant to FED. R. BANKR. P. 7052, which opinion contains findings of fact and conclusions of law.

First, this Court reaffirms Judge Donald's Memorandum Opinion of January 6, 1995 and finds no reason to alter its findings or conclusions in any way. In fact, this Court has cited with approval Judge Donald's Brengettcy opinion on at least two occasions. See Norwest Financial Tennessee, Inc. v. Coggins (In re Coggins), 185 B.R. 762 (Bankr. W.D. Tenn. 1995) and Friend v. Chemical Residential Mortgage Corp. (In re Friend), submitted for publication, Case No. 95-28362-B, Adversary Proceeding No. 95-1133 (Bankr. W.D. Tenn. 1996) (both citing Brengettcy v. National Mortgage Co. (In re Brengettcy), 177 B.R. 271 (Bankr. W.D. Tenn. 1995)). In this Court's Coggins and Friend opinions, this Court discussed "drop dead" or "last opportunity" orders that had been entered in prior chapter 13 cases, and this Court discussed the requirement for the Bankruptcy Court in each case to make a factual determination as to whether the debtor had enjoyed a "sufficient change in circumstances to justify a refiling notwithstanding such a last opportunity order's entry in a prior case." In re Coggins, 185 B.R. at 765. Rather than repeat the Court's discussion in its prior opinions, the Court will incorporate its discussion found in the In re Friend decision by adopting that opinion and attaching it as Exhibit 1 to this Opinion and Order. It is clear from the discussion in the Friend opinion that the case law within this Circuit requires this Court to make a determination of change of circumstances in order to determine if a debtor, such as this one, has filed her case in good faith and if the case may be filed even though an Order from a prior case appears to prohibit such a refiling.

As to changes of circumstances in this case, the proof at the January 25, 1996, trial established that the debtor was employed at the time her prior case was dismissed but her husband was unemployed at that time. Mr. Brengettcy had been unemployed from August, 1993, to December, 1994; therefore, there was no significant change of financial circumstance as a result of his unemployment between dismissal of the prior case and the refiling of this case. The financial focus, therefore, is upon the debtor Arnetta Brengettcy. When the prior case was dismissed she was employed but she had undergone a history of some illness and of adjustment to her husband's lack of employment. As a result of the family's financial problems and her personal adjustments to those problems, the debtor fell behind in her chapter 13 plan payments, and she gave at least one check to the chapter 13 trustee that was returned for insufficient funds. The delinquencies in her plan payments and this returned check led to the dismissal of her prior chapter 13 case.

Subsequent to that dismissal, the debtor received a raise in her salary as a result of a promotion. Her promotion was received on November 7, 1993, prior to the dismissal of her chapter 13 case. However, this promotion was conditioned upon a probationary period, and her employer did not sign the authorization to give the debtor a retroactive pay increase until March 14, 1994. At that point, her increase in pay was retroactive to November 7, 1993, and the employer's policy was to pay a lump sum increase for the probationary period. Thus, the proof established that the debtor did not receive a pay increase until March 14, 1994, after her completion of the probationary term and after the dismissal of her chapter 13 case. The defendants in this adversary proceeding point to the relative smallness of her increase, representing \$1,186 in annual increase or approximately 57 cents per hour. There is some factual dispute about her 1994 salary, and the Court finds that the best evidence is that in 1994, based upon her W-2, referred to by a witness, the debtor earned \$25,797.65

compared to her 1993 salary of \$23,733, an approximate \$2,000 increase in 1994. Whichever amount of increase one looks to, this Court is not prepared to say that the increase was trivial or insignificant. Any increase in pay may be significant to a debtor operating under marginal cash flow conditions.

The debtor testified that her financial change in circumstance subsequent to her prior case dismissal was the increase in pay as a result of her job promotion. Moreover, the debtor testified that there had been another intangible change in circumstance in that she had come to a realization of what she was facing insofar as her husband's unemployment status: she knew what she had to "work with." This Court is not persuaded that changes in circumstances are always merely financial; rather, changes in circumstances may involve financial, psychological, family, or other changes that are sometimes difficult to measure. But, in the present case, the Court is persuaded that the debtor had sufficient changes in circumstances after her prior chapter 13 case was dismissed in that the debtor received an increase in pay and she reexamined her financial condition in such a manner that she put herself in the position of making plan payments in her refiled chapter 13 case.

As the debtor's attorney expressed it, the best proof of a change of circumstance may be that the debtor has been successful in making plan payments in the present case as compared to her failure to make plan payments in the prior case. There was no dispute that the debtor has made all required plan payments in this case, had posted the bond required by Judge Donald, and had made other payments, including increased plan payments to the Internal Revenue Service. Put simply, the debtor is in compliance with her present chapter 13 requirements. The Court, of course, is aware that the mere fact that a debtor makes plan payments in one case while failing to make payments in a

prior case does not necessarily represent a change in circumstance, but it is one factor the Court may weigh in evaluating whether the debtor's change in circumstance is sufficient to justify a refiling.

Thus, it is the final finding and conclusion of this Court that the foreclosure conducted after the filing of this present bankruptcy case was void as being in violation of the automatic stay and it must be set aside; that the debtor was eligible to file this chapter 13 case, notwithstanding any orders entered in her prior chapter 13 case, as the debtor was entitled to an opportunity to demonstrate to the Court whether she had a sufficient change in circumstance to justify this filing; and that the debtor has persuaded this Court that she had sufficient favorable changes in circumstances subsequent to the dismissal of her prior case and prior to the filing of this case to justify the filing of this case as being one filed in good faith and with a feasible plan.

In the present case, National Mortgage Company proceeded with its postpetition foreclosure at great risk. As the Court pointed out in its Friend opinion, the automatic stay attaches upon the filing of every bankruptcy case by operation of law. 11 U.S.C. §362(a). The Court having found that the foreclosure was conducted in violation of the automatic stay and having concluded that the effect of that violation is to void the foreclosure, the Court also concludes that the sale of the subject property by National Mortgage Company to Ray-Lee Investment Company and/or to Mr. T. R. Smith was void and must be set aside. National Mortgage Company or its successor is required to reinstate the mortgage between the debtor and National Mortgage Company and to take such steps as are necessary to reverse its postpetition foreclosure, execution of and recording of a trustee's deed, and sale to third parties. National Mortgage Company may file proofs of claims for its ongoing mortgage payments and any arrearages in this case, and the debtor may move to modify her plan to provide for the satisfaction of the ongoing mortgage payments and the arrearage claims filed by

National Mortgage Company. The Court is informed that the debtor has been paying into escrow or into the chapter 13 trustee's office plan payments that include projected payments to National Mortgage Company; however, apparently payments have not been made to National Mortgage Company until a determination of the issues in this adversary proceeding. Should the parties need further hearings before this Court to determine the amount of National Mortgage Company's claims or to determine any objections the debtor may have to National Mortgage Company's claims, the parties may move for such hearings.

The issues of what obligations are owing from National Mortgage Company to Ray-Lee Investment Company or Mr. T. R. Smith are not properly before the Court, and the Court at this time is not prepared to say whether those matters would be core proceedings. There may be available state law remedies should those parties be unable to resolve any disputes.

In her complaint, the debtor also asked for monetary damages from National Mortgage Company and for attorney's fees. No proof has been presented to this Court on these damage claims and should the plaintiff desire to pursue damage claims, the plaintiff should move the Court for further hearings on those issues.

IT IS THEREFORE ORDERED that

1. The debtor established sufficient changes in circumstances to justify this case being filed and the case is found to have been filed in good faith with the good faith proposal of a feasible plan.
2. The postpetition foreclosure conducted by National Mortgage Company on May 17, 1994 is void as being in violation of the automatic stay.

3. National Mortgage Company and its successor shall reinstate the prepetition mortgage with the debtor and shall reverse any documents, transfers or recordings that consummated the void foreclosure.

4. Any issues concerning the amount of National Mortgage Company's claims, the debtor's objections thereto, or the debtor's damage claims are reserved for such future hearings, if necessary, as the parties may move.

5. As soon as practicable after the filing and allowance of claims by National Mortgage Company, the chapter 13 trustee shall begin disbursements on those claims, and the debtor should amend promptly, if necessary, her plan to provide for those claims as allowed.

SO ORDERED this 31st day of January, 1996.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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