

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE

IN RE

DAVID P. SMALL,  
Debtor.

Case No. 96-35552-WHB  
Chapter 13

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MEMORANDUM OPINION AND ORDER SUSTAINING  
UNITED STATES DEPARTMENT OF AGRICULTURE'S OBJECTION  
TO CONFIRMATION AND GRANTING ITS MOTION FOR RELIEF FROM STAY

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The debtor filed his chapter 13 case on November 20, 1996, and in his proposed plan the debtor provided for ongoing mortgage payments of \$323 and a total mortgage arrearage of \$2,000 payable at \$37 per month. In his Schedule A, the debtor listed a fee simple ownership of a residence located on real property in Mansura, Louisiana with a current market value of \$25,000 and a secured debt of \$27,369.75. The secured creditor is listed as Farmers' Home Administration.

The actual secured creditor is the United States Department of Agriculture, Rural Development ("USRD"), and that creditor, through the United States Attorney for this judicial district, filed an objection to confirmation of the debtor's plan and a motion for dismissal of the case, or in the alternative, for relief from the automatic stay and authorization for the creditor to foreclose.

It is not disputed that this debtor resided in Shelby County, Tennessee at the time of the commencement of this case, and he continues to reside there. At the time of filing this case, the debtor was unemployed. He is drawing unemployment benefits, while seeking new employment. His wife, who is not a co-debtor, is employed in Memphis. The debtor's parents were living in the Louisiana residence at the time of the commencement of this case. His father is now deceased but his mother continues to reside in that residence. The debtor testified that his parents had paid him

some rent periodically, but he did not schedule this rent as an asset in his bankruptcy petition. The rent, which was \$300 per month when paid, was not enough to cover the ongoing mortgage payment.

The debtor testified that he intended at some uncertain point in the future to move back to Louisiana, presumably into this home, but there was no present plan for the debtor or his spouse to reside there. It is clear that the debtor's immediate goal is to preserve his mother's place of residence, and, of course, his mother is not a co-debtor in this bankruptcy case.

The debtor had filed bankruptcy before in Louisiana in 1991, and that case was dismissed. The debtor then filed again in this district, case number 92-21812, and that case was dismissed for non-payment in April, 1996. The debtor then filed the present case, in which he has made substantial payments. Notwithstanding those payments to the trustee, USRD objects to confirmation and seeks relief from the stay in order to complete its foreclosure efforts.

USRD has attempted foreclosure in Louisiana, which is a judicial foreclosure state. After monetary default in 1989, USRD obtained a monetary judgment in the amount of \$57,035.99, plus post-judgment interest. Before USRD could execute upon its judgment through a sheriff's foreclosure sale, the debtor has stopped the sale. In 1991 a state court injunction was obtained but ultimately dissolved. The second sale was stopped by the 1991 chapter 13 filing in Louisiana. The third sale was stopped by the 1992 chapter 13 filing in this district, and the fourth sale was stopped by the filing of the current case.

USRD alleges, and it is not disputed factually, that its debt has increased to \$63,220.46 by the continuing costs and interests, and USRD states that it has not received a payment since April, 1996. USRD did receive some payments in the prior chapter 13 case in this district.

As an explanation of his monetary default, the debtor points to major sewage problems that developed in 1988 in the subdivision where his house is located in Louisiana. A suit was filed by subdivision owners, and a settlement was reached. Notwithstanding this settlement, the debtor remains in monetary default on his mortgage obligation to USRD.

Several issues are raised in this contested matter, which is a core proceeding. 28 U.S.C. §157(b)(2)(A), (B), (G), and (L). The parties do not agree on whether the debt on the home continues to be a mortgage debt secured by the debtor's principal residence. If it is, the debtor may not modify the terms of that mortgage, except to cure the monetary default within a reasonable time. 11 U.S.C. § 1322(b)(2), (5). If, on the other hand, the mortgage has matured as a result of the state court monetary judgment and has merged into that judgment, the debtor may be required to pay the entire debt over the life of the proposed plan. 11 U.S.C. § 1322(c)(2). Because the creditor has not consummated its foreclosure sale prior to the filing of this case, it would appear that the persuasive authority would hold that the debt remains one that is secured by the residence, that the debt has not matured as a result of the state court monetary judgment, and that a debtor in the position of this one may have an opportunity to cure the default while resuming the ongoing mortgage payments. To hold that a mortgage cannot be cured beyond the entry of a foreclosure judgment, but before the completion of an actual foreclosure sale, would nullify the effect of § 1322(c), which was enacted by Congress as a part of the 1994 Bankruptcy Reform Act in order to clarify the last date for cure of a residential mortgage debt. See, e.g., In re Blair, 196 B.R. 477 (Bankr. E.D. Ark. 1996).

This conclusion, however, does not aid the present debtor. USRD has a motion for relief from the automatic stay. Section 362(d)(2) provides for relief from the stay as to property if "the debtor does not have an equity in such property; and such property is not necessary to an effective

reorganization.” Schedule A of the debtor’s chapter 13 petition places a value on this property of \$25,000, and in his testimony the debtor did not offer a different value. No other proof of value was offered. The debtor is, therefore, bound by his value. The creditor asserts in its pleading that its debt is in excess of \$63,000. It is not disputed that the monetary judgment in favor of USRD in the Louisiana state court was \$57,035.99. Exhibit A to USDA’s pleading. Assuming that the debtor’s petition placed that amount into dispute, his Schedule D shows a secured claim of \$27,000. Under either claim amount, or anywhere in between, there is no equity for the debtor above the debt.

Moreover, it is beyond dispute that the debtor does not need this house for an effective reorganization. The fact that the debtor wants to preserve the house for his mother’s residence and for his possible future residence is commendable; however, there is no proof that the debtor currently needs this home. In fact, the debtor resides in Tennessee, where his spouse is employed. The debtor has no employment income after his unemployment benefits expire in June, 1997. The debtor’s personal financial reorganization would be aided by deletion of the debt to USRD and by the dedication of his income to his other creditors and to the support of his dependents. Retention of this house and its secured debt is detrimental to the debtor’s unsecured creditors, who would receive less, if anything, while the debtor serviced the debt of USRD. Under the facts of this case, the Court can not find that the house in Louisiana is necessary to this debtor’s effective reorganization.

The Court will, therefore, grant relief from the automatic stay to USRD to allow that creditor to complete its foreclosure, including a sheriff’s sale, and to obtain possession of the property in Louisiana. USRD may take any necessary steps to obtain recourse against its collateral, but so long as this case is pending, this creditor may not attempt collection personally against the debtor. After completion of its foreclosure, USRD may file a claim for any unsecured deficiency in this case. The

Court notes that if the debtor should voluntarily dismiss this case, that dismissal would trigger § 109(g)(2), barring a bankruptcy refile by this debtor for 180 days from such a dismissal.

IT IS THEREFORE ORDERED that the motion filed by the United States Department of Agriculture, Rural Development, is granted to allow that creditor relief from the automatic stay so as to allow that creditor in rem relief to proceed under applicable nonbankruptcy law to realize upon its collateral, which relief includes but is not limited to any actions necessary to complete a foreclosure, foreclosure or sheriff's sale, and possession of the property in Louisiana.

IT IS FURTHER ORDERED that the objection to confirmation of the currently proposed plan is sustained. The plan that includes treatment of Rural Development's secured claim may not be confirmed as a result of the granting of the motion for relief from the stay. The debtor may amend his plan to provide for creditors other than Rural Development, which may file an unsecured claim for any deficiency remaining after the conclusion of its foreclosure. The debtor may, of course, object to the allowance of the deficiency claim, if it is filed.

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UNITED STATE BANKRUPTCY JUDGE

DATED: May 7, 1997

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