UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

PAMELA U. LOTT, Case No. 99-30011-L
Chapter 13

Debtor.

MEMORANDUM AND ORDER

Before the Court is a motion for relief from the automatic stay filed by Brookfield Properties, Inc. ("Brookfield"). Brookfield seeks relief in order to recover property purchased at a foreclosure sale held prior to the filing of this Chapter 13 case by the debtor, Pamela U. Lott. For the reasons given below, the Court concludes that completion of the non-judicial foreclosure sale took place prior to the petition filing date and as such the motion should be granted. This is a core proceeding. 28 U.S.C. § 157(b)(2)(G).

The facts in this case are undisputed. On April 14, 1999, the debtor purchased property located at 1930 Clifford Avenue, Memphis, Tennessee, from Brookfield Properties for a purchase price of $48,500.00. Brookfield Properties agreed to finance the deferred purchase price of $47,000.00, as evidenced by two promissory notes secured by deeds of trust dated April 14, 1999. Both deeds of trust were properly recorded at the office of the Shelby County Register. Monthly payments to Brookfield Properties were to begin on May 1, 1999. No payments were ever made. Brookfield Properties declared a default and initiated foreclosure proceedings.

Although notice to the debtor was specifically waived in the deeds of trust, Brookfield Properties provided a courtesy notice of the foreclosure sale to the debtor. The sale was conducted

at the Shelby County courthouse on August 12, 1999, at 12:00 noon. Brookfield Properties was the only bidder. The Trustee struck off and sold the property to Brookfield Properties for the price of $35,000.00. Immediately thereafter, Brookfield paid the costs and expenses of sale to the attorney representing the Trustee and received a Trustee's Deed. The balance of the purchase price was applied as a credit to the outstanding balance owed to Brookfield Properties. The Trustee's Deed was recorded on August 31, 1999, but not before Ms. Lott filed her voluntary petition to initiate this Chapter 13 case on August 19, 1999.

The debtor argues that the foreclosure sale was not complete before she filed her petition, and thus that she retains the right to cure her default through her Chapter 13 plan. Ms. Lott stated that she received no notice of the pending sale before she visited her attorney, Mr. Fila, about filing a Chapter 13 petition. Brookfield Properties counters that the presence or lack of notice to the debtor is a red herring, because it fully complied with applicable Tennessee statutes and the provisions of the deeds of trust in conducting the foreclosure sale. Brookfield Properties further argues that the sale was complete upon payment of consideration and delivery of the Trustee's Deed. Thus, the creditor maintains that the debtor retained no rights in the property after delivery of the deed.

Brookfield Properties' position is correct. 11 U.S.C. § 1322(c), added by the Bankruptcy Reform Act of 1994, provides that "a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy

law." 11 U.S.C. § 1322 (1999). Prior to the enactment of § 1322(c), courts were divided as to the exact point during a foreclosure sale that a debtor lost his right to cure under § 1322(b). *In re Crawford*, 232 B.R. 92, 95 (Bankr. N.D. Ohio 1999). It was clear that a debtor could no longer cure once the property was sold at the foreclosure sale. *Federal Land Bank of Louisville v. Glenn (In re Glenn)*, 760 F.2d 1428, 1435-36 (6th Cir. 1985). Chief Bankruptcy Judge David S. Kennedy of this district held the requirement of *Glenn* was satisfied only when the foreclosure sale was complete pursuant to state law, that is, upon satisfaction of the statute of frauds and payment of consideration. *Ferrell v. Southern Fin., Inc. (In re Ferrell),* 175 B.R. 222, 227 (Bankr. W.D. Tenn. 1994), *rev'd* 179 B.R. 530 (W.D. Tenn. 1994). On appeal, however, Chief District Judge Julia S. Gibbons reversed, holding that federal law, as announced in *Glenn*, determines the point at which the debtor loses the opportunity to cure a mortgage default pursuant to a Chapter 13 plan, and that point was the date of the sale, "a measurable and identifiable event." *Ferrell v. Southern Fin.*, 179 B.R. 530, 531 (W.D. Tenn. 1994); *In re Johnson*, 171 B.R. 613, 614 (Bankr. M.D. Tenn. 1994).

The 1994 amendment unfortunately has not ended the discussion of when a foreclosure sale occurs thus cutting off a debtor's right to cure. It is clear from the legislative history that the right to cure is not cut off at any time prior to the actual auction sale, but courts continue to split over whether it is the auction itself or some later event required by state law that controls the finality of the sale *See, e.g., McCarn v. Wyhy Fed. Credit Union (In re McCarn),* 218 B.R. 154, 160 (B.A.P. 10th Cir. 1998) (finding the statute unambiguous, the court determined that once the gavel fell, the

debtor could no longer cure, although the court noted that the same result could be reached under state law); *Commercial Fed. Mortgage Corp. v. Smith (In re Smith),* 85 F.3d 1555, 1558 n.3 (11th Cir. 1996) (in dicta, the court noted that although § 1322(c) was inapplicable because the debtor filed his Chapter 13 prior to the 1994 amendment, had the amendment applied the opportunity to cure ended with the actual foreclosure sale); *In re Crawford*, 232 B.R. 92, 96 (Bankr. N.D. Ohio 1999) (finding that the cut-off period is the actual foreclosure sale, if the sale itself is properly conducted under state law); *Crawford v. First Nationwide Mortgage Corp. (In re Crawford)*, 217 B.R. 558, 559-60 (N.D. Ill. 1998) (by using the word "conducted" in § 1322(c) courts musts look to state law to determine the finality of a sale, until the time Congress amends the statute to specify the auction as the final point); *Cottrell v. United States (In re Cottrell),* 213 B.R. 33, 42 (M.D. Ala. 1997) (holding that Alabama law provides that the auction itself ends a foreclosure sale); *In re Tomlin*, 228 B.R. 916, 919 (Bankr. E.D. Ark. 1999) (holding that it is consistent with the history to hold that state law controls the point that a foreclosure sale is final.); *In re Faulkner*, 240 B.R. 67, 69 (Bankr. W.D. Okla. 1999) (requiring confirmation of the foreclosure as provided by state law in order to complete the sale); *In re Kane*, 236 B.R. 131, 132 (Bankr. Conn. 1999) (looking to Connecticut law to determine when a foreclosure sale is final); *In re Beeman*, 235 B.R. 519, 525 (Bankr. N.H. 1999) (holding that state law determines when a foreclosure sale is complete because the sale process is not just the single act of the auction).

Two major treatises agree that state law should determine when a foreclosure sale is final. 8 COLLIER ON BANKRUPTCY, ¶ 1322.15, p. 1322-50 (Lawrence P. King ed., 15th ed. rev. 1999) (both the statute and legislative history point to state law to determine the finality of a foreclosure sale even though each state could conceivably have a different point at which the sale was complete); KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY, § 4.54, pp. 371 (2d ed. 1997-98 Cumulative Supplement) (Congress's reference to "applicable nonbankruptcy law" in § 1322(c)(1) now mandates that state law controls when the foreclosure sale is final).

Bankruptcy Judge G. Harvey Boswell of this district has held that Tennessee law governs the point at which a non-judicial foreclosure sale became final. *In re Johnson*, 213 B.R. 134 (Bankr. W.D. Tenn. 1997). Judge Boswell approached the analysis not as a § 1322(c) matter, but from the standpoint of whether the property was actually property of the estate as of the date of the filing of the petition. *Id.* at 135-36. Looking to both § 541(a)(1) and the Supreme Court's holding in *Butner v. United States*, 440 U.S. 48, 99 S. Ct 914, 59 L. Ed. 2d 136 (1979), Judge Boswell held that absent any compelling federal interest, all legal or equitable interests in property of a debtor must be defined by state law. *Id.* Under Tennessee law, a foreclosure sale is complete upon satisfaction of the statute of frauds and payment of consideration. *Johnson,* 213 B.R. at 135-36. The recordation of the deed is not required to satisfy the statute of frauds. *In re Johnson,* 215 B.R. 988, 990 (Bankr. W.D. Tenn. 1997) (on rehearing).

This Court agrees that state law controls the point at which a non-judicial foreclosure sale becomes final, and thus whether a debtor retains any rights in property sold at foreclosure that may become property of the bankruptcy estate. The Court further agrees with Judge Boswell's holding that Tennessee law requires a writing and consideration, but not recordation, for finality. *See* The Tennessee Recording Statute, TENN. CODE ANN. § 66-24-101, et seq.

In this case, the petition was filed after the auction sale and after delivery of the Trustee's Deed. Under either the *Glenn* analysis or the more restrictive *Johnson* analysis which this Court today adopts, the foreclosure sale was complete upon the filing of the debtor's petition. Further, pursuant to the terms of the Deeds of Trust, the debtor expressly waived any right of redemption after sale, whether equitable, statutory or otherwise. Thus the debtor retained no ownership interest in the property that passed to the bankruptcy estate upon the filing of her petition. Accordingly, this Court concludes that Brookfield Properties' motion for relief from the automatic stay should be **GRANTED**.

IT IS SO ORDERED.

BY THE COURT:

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JENNIE D. LATTA
United States Bankruptcy Judge

Date: January 10, 2000

cc: Debtor
Attorney for Debtor
Attorney for Brookfield Properties
Chapter 13 Trustee