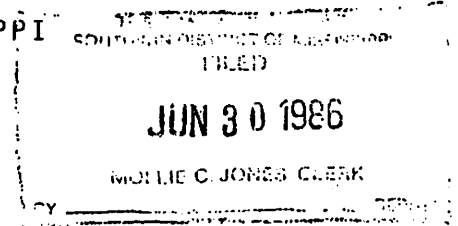


IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE:

JAMES A. COLE

CASE NO. 8501036JC

OPINION ON "MOTION TO REINSTATE CHAPTER 13
PETITION AND MOTION TO SET ASIDE FORECLOSURE SALE"

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Edward Ellington, Bankruptcy Judge

The Debtor filed separate motions to set aside a foreclosure sale of his home which had been conducted by the Federal National Mortgage Company (FNMA) and to be allowed to reinstate his Chapter 13 petition. Written answers and objections were filed by FNMA to both motions. Both motions then came on for determination by the Court. No testimony was offered

by either party. Oral arguments, certain written documents and written briefs were presented by counsel for both parties and the Court has also considered the court file in making its decision.

FINDING OF FACTS

James A. Cole, the Debtor, filed his Chapter 13 petition on July 8, 1985. Charles A. Brewer was thereafter appointed Trustee and subsequently filed a Motion to Dismiss the Debtor's petition for failure to provide the correct number of plans pursuant to Local Rule #21. Notice was given to the Debtor's attorney, Larry Stamps, as a Certificate of Service prepared by the Trustee appears in the court file dated July 24, 1985. No response was received by the Court or the Trustee and as a result the petition was dismissed on August 3, 1985.

The Debtor and his wife owned a home located at 146 Galvez Street in Jackson, Mississippi. There was an indebtedness to FNMA which was secured by a deed of trust on the property. The mortgage was in default at the time the Debtor filed his petition as the Debtor intended to attempt to cure the default under his Chapter 13 plan.

After the petition was dismissed, a foreclosure proceeding was commenced by FNMA according

to the laws of Mississippi. Notice of the foreclosure sale was published in a county newspaper and the sale was conducted on November 4, 1985. The Deed to the sale was subsequently recorded the next day, the 5th of November.

Prior to the foreclosure, John C. Underwood, the attorney representing FNMA and also the substitute trustee for the foreclosure, mailed a certified letter to Mr. and Mrs. James A. Cole on October 3, 1985. This letter informed the Cole's of the public sale set for November 4th and instructed them on how to reinstate their loan before the sale date. An acknowledgment of receipt was requested and the return receipt was submitted to the Court by Mr. Underwood showing the delivery date of this letter to be October 8, 1985.

After the foreclosure, Commerce McGehee Mortgage, Inc. received two money orders from the Debtor on November 7, 1985, totaling \$553.53 in partial payment of the default. The two money orders were returned to the Debtor as being unacceptable due to the November 4th sale and the Debtor no longer owning the home.

On November 8, 1985, Mr. Underwood again sent the Cole's a certified letter requesting them to vacate the premises as the foreclosure had been completed and

FNMA now owned title to the property. An acknowledgment of receipt was requested and the return receipt was submitted to the Court by Mr. Underwood showing the delivery date of this letter to be November 13, 1985.

Warren L. Conway, appearing for the attorney of record, Larry Stamps, filed a notice of a Motion to Reinstate Chapter 13 Plan with this Court on November 13, 1985. Due to some inadvertence the motion was not filed at this time, but was later filed on January 29, 1986. This appears to be just an oversight. The notice shows all creditors were notified of the motion. Therefore, for the limited purpose of the matter presented before the Court at this time, the motion will be accepted and treated as if filed at the time the notice was filed on November 13, 1986.

An objection to the Debtor's motion to reinstate was filed by John C. Underwood, Jr., on behalf of FNMA on December 2, 1985. FNMA's objection requested the Court to deny the Debtor's motion on the grounds that Section 109(f)(1) of the Bankruptcy Code barred the Debtor from being reinstated for 180 days from the dismissal for failure to file necessary schedules required by the Court. The objection also stated the Court lacked jurisdiction over the indebtedness and over the property in which FNMA had previously concluded a foreclosure sale.

Also on November 13, 1985, Mr. Conway filed a Motion to Set Aside Foreclosure Sale on behalf of the Debtor. FNMA also objected to this motion again stating that the Court lacked jurisdiction since the foreclosure sale was concluded and title was perfected in FNMA after the dismissal of the petition.

The two motions and objections came on for hearing on January 30, 1986 at 10:00 A.M. Warren L. Conway appeared for the Debtor and John C. Underwood, Jr. appeared for FNMA. Discussion was had at the hearing and it was agreed that each party would submit a brief for the Court's examination. Mr. Conway's and Mr. Underwood's briefs were subsequently received by the Court.

STATEMENT OF ISSUES

A) Should the Debtor's motion to reinstate be granted after dismissal for failure to provide the correct number of plans according to a local rule?

B) Does Section 109(f) of the Bankruptcy Code preclude the reinstatement for 180 days?

C) If the petition is reinstated, should the Debtor's motion to set aside a foreclosure sale be granted after the sale has been concluded during the interim time between dismissal and reinstatement?

DISCUSSION

Section 1307 of the Bankruptcy Code provides that on request of a party in interest and after notice and a hearing, the court may dismiss a case under Chapter 13, for cause, including "failure to file a plan timely under section 1321 of this title." Section 1321 provides only that "The debtor shall file a plan." Thus, section 1321 must be considered in conjunction with the Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court in the Southern District of Mississippi. Rule of Bankruptcy Procedure 3015 provides,

"The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 15 days thereafter and such time shall not be further extended except for cause shown and on notice as the court may direct. Every proposed plan and any modification thereof shall be dated. The clerk shall include the plan or a summary of the plan with each notice of the hearing on confirmation pursuant to Rule 2002(b). If required by the court, the debtor shall furnish a sufficient number of copies to enable the clerk to include a copy of the plan with the notice of the hearing."

Local Rule 21 provides,

"In accordance with Rule of Bankruptcy Procedure 3015, the debtor shall furnish to the Court a sufficient number of copies of the summarized Chapter 13 Plan to enable the Court to furnish copies to creditors upon request. These copies shall be furnished with the filing of the schedules."

Pursuant to section 1307, section 1321, Rule 3015 and Local Rule 21, the Trustee filed his motion to dismiss for failure to file the correct number of plans. After notice and no response, this Court dismissed the Chapter 13 petition.

The Debtor has made a motion to reinstate his Chapter 13 petition contending that he has caused to be filed the correct number of plans according to Local Rule 21. FNMA has made its objection that the motion should be denied pursuant to section 109(f) of the Bankruptcy Code.

Section 109(f) provides in part,

"Notwithstanding any other provision of this section, no individual may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--

(1) the case was dismissed by the court for wilful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; . . ."

Subsection (f) was added to the Bankruptcy Code by the 1984 Amendments and is aimed at repetitious filings. An individual debtor cannot be eligible to re-file under the Code until the expiration of 180 days after dismissal of a case for failure to abide by court orders or failure to appear.

Considering now the case before the Court, the Debtor did not fail to abide by a court order or fail to appear before the Court in proper prosecution of the case. The Debtor simply did not comply with Local Rule 21 and as a result the case was dismissed. Thus, section 109(f), the 180-day rule, does not apply to the Debtor's dismissal. However, examination of the court file reveals that the Debtor still has not complied with Local Rule 21 as was alleged in his motion and therefore this Court cannot be persuaded to reinstate this Chapter 13 petition. The Debtor's motion is not well taken, not due to the objection of FNMA, but for the continued failure to comply with the Local Rule of this Court.

The Court now considers the Debtor's Motion to Set Aside Foreclosure Sale. It is clear that since the Court has denied the Debtor's motion to reinstate, the motion to set aside FNMA's foreclosure sale has subsequently become a moot issue. However, had the petition been reinstated, the foreclosure sale would have remained final and would not have been set aside.

The automatic stay of Section 362 of the Bankruptcy Code does not become effective until the Debtor's petition is filed with the Court. Thus, the stay is not in effect at the time of any foreclosure sale prior to Debtor filing his petition. In the case

at hand, the automatic stay went into effect at the date of filing, July 8, 1985, but no longer remained in effect after the dismissal. Section 362(c)(2) provides,

"Except as provided in subsections (d), (e), and (f) of this section--

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, or 13 of this title, the time a discharge is granted or denied."

Subsections (d), (e) and (f) of section 362 are in regard to granting relief from the stay, which is not applicable to this case.

Therefore, when the case was dismissed on August 3, 1985, the automatic stay was discontinued. The Court concludes that the effect of the foreclosure sale subsequent to the dismissal of the case has the same effect as if the sale had been prior to the filing of the Debtor's petition.

FNMA cites a line of cases in which a petition under the Bankruptcy Code was filed within a short time after a foreclosure sale was conducted.

These cases conclude that once there is a final foreclosure sale, the debtor no longer has legal rights or title to the property that is sold. Therefore, the property cannot become part of the debtor's estate upon filing a petition under the Bankruptcy Code.¹

This Court believes that these cases cited have been correctly decided and are consistent with the intent and meaning of the Bankruptcy Code. Thus, FNMA acquired the rights to the property upon the foreclosure sale and is therefore out of the jurisdiction of this Court.

Also in support of the Court's decision, the Court notes that jurisdictions which have concluded that a debtor may cure a default on his home mortgage notwithstanding acceleration clauses may only do so prior to a final foreclosure sale.

¹ In re Kleitz, 2 CBC 2d 332 (Bk.D.Nev. 1980) (petition completed 30 minutes after foreclosure sale);
In re Butchman, 2 CBC 2d 174 (Bk.S.D.N.Y. 1980) (sale concluded at 10:05 A.M. and petition filed 12:04 P.M.);
In re Cretella, 42 B.R. 526 (Bkrtcy. 1984),
47 B.R. 382 (D.C. 1984);
In re Gray, 37 B.R. 532 (Bkrtcy. 1984);
In re Foster, 37 B.R. 537 (Bkrtcy. 1984);
In re Weiser, 44 B.R. 244 (Bkrtcy. 1984).

See:

In re Taddeo, 685 F.2d 24 (2d Cir. 1982),
-Chapter 13 debtor may cure defaults and reinstate
monthly payments despite pre-bankruptcy
acceleration where no final judgment has been
entered.

Federal Land Bank of Louisville v. Glenn, 760 F.2d
1428 (6th Cir. 1985),
-may cure default notwithstanding acceleration and
judgment of foreclosure but not after foreclosure
sale has occurred.

In re Clark, 738 F.2d 869 (7th Cir. 1984),
-can deaccelerate and cure the default where
petition was filed after a judgment of foreclosure
but before sale of the property.

Mid-State Homes, Inc. v. Cheeks, 24 B.R.477 (Bk.M.D.
Ala. 1982),
-may cure defaults notwithstanding acceleration
where foreclosure has not become final.

In the present case, the Court concludes
that since the foreclosure sale was properly conducted
and there is no redemption period for the debtor's
benefit under Mississippi Law, the foreclosure sale is
final and the rights and title to the property has
vested in FNMA. Thus, if this case had been
reinstated, the debtor's motion to set aside the
foreclosure sale would not have been well taken and
would have been denied.

CONCLUSION

For all of the reasons set forth, the Court
finds that the Debtor's Motion to Reinstate Chapter 13
Petition should be denied and the Debtor's Motion to
Set Aside Foreclosure Sale should be denied.

Counsel for FNMA shall prepare an order consistent with this Opinion, submit to counsel opposite for reading and comment, and then submit it to the Court for approval and entry.

DATED this the 30 day of June, 1986.


U. S. BANKRUPTCY JUDGE