

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION**

IN RE: BETTY FAYE BROWN

**CASE NO. 3:05-bk-12403E
CHAPTER 13**

ORDER GRANTING MOTION FOR RELIEF FROM AUTOMATIC STAY

Now before the Court is the *Motion for Relief From the Automatic Stay* filed by U.S. Bank on June 2, 2005. U.S. Bank's motion was set for hearing for August 10, 2005, but prior to the hearing, counsel for the Debtor and U.S. Bank reported to the Court that they wished to submit stipulated facts and briefs in support of their respective positions. The Court has reviewed the parties' stipulated facts and briefs, and grants U.S. Bank's Motion for Relief for the reasons set forth in this Order. This is a core proceeding under 28 U.S.C. § 157(b)(2)(G), and the Court has jurisdiction to enter a final judgment in this case.

FACTS

The parties' stipulated facts are as follows:

1. On September 19, 2001, Betty Faye Brown (the "**Debtor**") executed a Note (hereinafter referred to as such) payable to First Home Mortgage, Inc. ("**First Home**") in the original principal amount of \$32,683.00, which such Note was subsequently assigned in due course to U.S. Bank. A true and correct copy of the Note was attached to the parties' Joint Stipulation as Exhibit "A" and incorporated therein by reference.

2. Concurrently with the execution of the Note and in order to secure payment of the indebtedness outstanding under and evidenced by the Note, the Debtor executed and delivered to First Home a Deed of Trust (hereinafter referred to as such) dated September 19, 2001, conveying to First Home certain real property located in Poinsett County, Arkansas and all improvements and fixtures located thereon, such property being described more particularly as follows:

Lot Four (4) in Block One (1) of W.C. Dawson's First Addition to the Town of Lepanto, Arkansas, Subject to easements, restrictions, and set back lines as shown on the plat of record in Plat A-23 in the records of Poinsett County, Arkansas, such property having the address of 123 Booker Street, Lepanto, Arkansas 72354 (hereinafter referred to as the "**Property**").

3. Prior to the delivery of the Deed of Trust to and for the benefit of First Home, the execution of the Deed of Trust was acknowledged before a notary public in the manner prescribed by law as evidenced by the certificate of acknowledgment attached to the Deed of Trust.

4. After being duly executed and acknowledged, the Deed of Trust was filed of record in the office of the Circuit Clerk and Ex-Officio Recorder of Poinsett County, Arkansas on September 19, 2001, and appears of record there as Instrument Number 20013864. A true and correct copy of the Deed of Trust was attached to the parties' Joint Stipulation as Exhibit "B" and incorporated therein by reference.

5. Subsequently, First Home transferred and assigned all of its rights and powers under the Deed of Trust to U.S. Bank pursuant to an Assignment of Deed of Trust/Mortgage dated September 21, 2001, a true and correct copy of which was attached to the parties' Joint Stipulation as Exhibit "C" and incorporated therein by reference. As a result of the transfer by First Home of all of its rights and powers under the Note and Deed of Trust to U.S. Bank, U.S. Bank possesses all of the rights and powers of First Home as the original lender and mortgagee under the Note and Deed of Trust.

6. In addition, U.S. Bank holds a secured claim against the Debtors in the approximate amount of \$2,000.00 pursuant to a Note (ADFA Downpayment Assistance Program) and Subordinate Mortgage (ADFA Downpayment Assistance Program) (hereinafter referred to as the "**ADFA Note**" and "**Second Mortgage**," respectively) executed by the Debtor on September 19,

2001, which ADFA Note and Second Mortgage are currently serviced by U.S. Bank on behalf of the Arkansas Development Finance Authority. The ADFA Note and Second Mortgage constitute a second lien on the [Property].¹

7. As a result of a default by the Debtor under the terms of the Note and Deed of Trust, U.S. Bank appointed Pender, McCastlain & Ptak, P.A., as agent for U.S. Bank, to initiate a foreclosure action and sell the Property in accordance with the Arkansas Statutory Foreclosure Act of 1987, which is codified as amended at Ark. Code Ann. §§ 18-50-101 to -117 (Repl. 2003).

8. The Trustee's Notice of Default and Intention to Sell (hereinafter referred to as the "**Notice of Default**") was filed in the office of the Circuit Clerk and Ex-Officio Recorder of Poinsett County, Arkansas on November 19, 2004, and appears of record there as Instrument Number 2004-4779. The subject foreclosure sale was scheduled for January 21, 2005, at or about 2:00 p.m. at the Poinsett County Courthouse located in Harrisburg, Arkansas.

9. The Notice of Default was mailed to the Debtor by certified mail, postage prepaid, and first class mail, postage prepaid, within thirty (30) days from the date on which the Notice of Default was recorded in accordance with Ark. Code Ann. § 18-50-104(b) (Repl. 2003).

10. Pursuant to Ark. Code Ann. § 18-50-105(1) (Repl. 2003), the Notice of Default was published in the Arkansas Democrat Gazette, a newspaper of general statewide daily publication in the State of Arkansas, on December 24, 2004; December 31, 2004; January 7, 2005; and January 14, 2005. In addition, on or about December 6, 2004, U.S. Bank, utilizing a third-party posting provider, caused notice of the subject foreclosure sale to be posted at the Poinsett County Court

¹The parties' Joint Stipulation stated "Debtor's primary residence" here; according to the Debtor's brief in opposition to U.S. Bank's Motion for Relief, the Property is the Debtor's residence.

Courthouse at the place where foreclosure sales are customarily advertised and conducted in accordance with Ark. Code Ann. § 18-50-105(2) (Repl. 2003). Furthermore, U.S. Bank employed a third-party Internet foreclosure sale notice information service provider to post notice of the subject foreclosure sale on the Internet in accordance with Ark. Code Ann. § 18-50-105(3) (Repl. 2003).

11. On January 21, 2005, at or about 2:00 p.m., the foreclosure sale of the Property was conducted by First National Title Company at the Poinsett County Courthouse, Harrisburg, Arkansas.

12. At such foreclosure sale, the Property was sold to U.S. Bank for the price of \$40,864.00, such amount being the best and highest bid for the Property. A Trustee's Deed conveying title to and possession of the Property to U.S. Bank was filed of record in the office of the Circuit Clerk and Ex-Officio Recorder of Poinsett County, Arkansas on January 21, 2005, and appears of record there as Instrument Number 2005-0000336. A true and correct copy of the Trustee's Deed was attached to the parties' Joint Stipulation as Exhibit "D" and incorporated therein by reference.

13. On February 24, 2005, thirty-four (34) days after the subject foreclosure sale was conducted and concluded, the Debtor filed a Voluntary Petition under Chapter 13 of the United States Bankruptcy Code. In the Debtor's bankruptcy schedules, the Debtor scheduled the Property as an asset of the Debtor's bankruptcy estate.

14. Also on February 24, 2005, the Debtor filed her Chapter 13 Narrative Statement of Plan (hereinafter referred to as the "**Plan**"). In the Debtor's Plan, the Debtor proposed to pay U.S. Bank's claim pursuant to the Note and Deed of Trust and ADF A Note and Second Mortgage through

her Plan by making payments to the Chapter 13 Trustee in the amount of \$498.13 per month.

15. At the time the Debtor filed her Voluntary Petition, the Debtor listed U.S. Bank's mailing address on the creditor mailing matrix as P.O. Box 468002, Bedford, Ohio 44146. This address was reflected on a statement sent to the Debtor by U.S. Bank in August 2004.

16. In September 2004, all foreclosure and bankruptcy operations of U.S. Bank were moved from Bedford, Ohio to Owensboro, Kentucky. Effective September 20, 2004, the correct address for notices and payments to U.S. Bank became 4801 Frederica Street, Owensboro, Kentucky 42301.

17. Notice of the Debtor's bankruptcy filing was not mailed to U.S. Bank in Owensboro, Kentucky, because the address listed for U.S. Bank in the Debtor's bankruptcy schedules and statement of financial affairs was the Bedford, Ohio address.

18. The Debtor's Plan was confirmed by an Order Confirming Chapter 13 Plan entered by the Court on April 19, 2005.

19. Subsequently, in May 2005, U.S. Bank first learned that the Debtor had filed a Voluntary Petition under the United States Bankruptcy Code during the course of eviction proceedings relating to the Property.

20. Upon learning that the Debtor had filed a Voluntary Petition under Chapter 13 of the United States Bankruptcy Code, U.S. Bank, by and through counsel, filed a Motion for Relief from the Automatic Stay (hereinafter referred to as the "**Motion**") seeking an order of this Court modifying the automatic stay imposed by 11 U.S.C. § 362(a) and allowing U.S. Bank to protect its interests and enforce its rights in and to the Property. As the basis for U.S. Bank's Motion, U.S. Bank asserts that the Debtor's interest and redemption rights in the Property were terminated at or

about 2:00 p.m. on January 21, 2005, at the time the foreclosure sale of the Property was conducted and U.S. Bank's bid for the Property was accepted.

In addition to these stipulated facts, the Court takes judicial notice of the Debtor's schedules,² and finds that the Debtor listed U.S. Bank's unlawful detainer action pending in the Circuit Court of Poinsett County styled as *US Bank, N.A. v. Jeffrey Brown and Betty F. Brown* (CV-2005-024 (JF)).

ANALYSIS

Pursuant to the parties' joint stipulation, the issues to be resolved by the Court are:

1) whether the Debtor's interest and redemption rights in the Property were terminated at or about 2:00 p.m. on January 21, 2005, at the time the foreclosure sale of the Property was conducted and U.S. Bank's bid for the Property was accepted;

2) whether the Property constitutes an asset of the Debtor's bankruptcy estate in light of the foreclosure sale of the Property conducted and concluded on January 21, 2005;

3) whether U.S. Bank is entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1); and

4) whether U.S. Bank is bound by the terms of the Debtor's confirmed Plan, notwithstanding the foreclosure sale of the Property conducted and concluded on January 21, 2005, in light of the fact that notice of the Debtor's bankruptcy filing was sent to U.S. Bank at the address of P.O. Box 468002, Bedford, Ohio 44146.

²The Court takes judicial notice of all documents in Debtor's current case, previously filed bankruptcy petitions, and state court pleadings, including any court orders. *See* Fed. R. Evid. 201; *In re Henderson*, 197 B.R. 147, 156 (Bankr. N.D. Ala. 1996) ("The court may take judicial notice of its own orders and of records in a case before the court, and of documents filed in another court.") (citations omitted); *see also In re Penny*, 243 B.R. 720, 723 fn.2 (Bankr. W.D. Ark. 2000).

It is U.S. Bank's position that, when the Debtor's Voluntary Petition was filed on February 24, 2005, the Debtor did not possess any rights with regard to the Property and that the Property should not be considered an asset of the Debtor's bankruptcy estate. The Debtor asserts that, notwithstanding the foreclosure sale of the Property conducted and concluded on January 21, 2005, U.S. Bank is bound by the terms of the Debtor's confirmed Plan, which proposes to cure the Debtor's default under the Note and Deed of Trust and ADFa Note and Second Mortgage as well as maintain payments to U.S. Bank under the Note and Deed of Trust and ADFa Note and Second Mortgage during the pendency of the Debtor's bankruptcy case. The Court agrees with U.S. Bank that the Debtor had no rights in the Property at the time she filed bankruptcy, and accordingly, the Property is not property of the estate and is not affected by the Order confirming the Debtor's chapter 13 plan.

Property of the estate is defined as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). State law determines the nature and extent of a debtor's interest in property. *See Butner v. United States*, 440 U.S. 48, 55 (1979). Determining whether the Debtor had an interest in the Property at the time the petition was filed depends on state law. *See In re Crime Free Inc.*, 196 B.R. 116, 118 (Bankr. E.D. Ark. 1996) (citations omitted). Under Arkansas' Statutory Foreclosure Act, the sale of property is complete when the highest bid is accepted by the person conducting the sale, even if the deed has not been delivered or possession transferred. *In re Cook*, 253 B.R. 249, 252 (Bankr. E.D. Ark. 2000) ("The fact that the creditor may be required to take further steps under Arkansas law to actually obtain possession, *i.e.*, forcibly evict the debtor, does not grant any substantive rights in the property or otherwise reduce the effect of the finality of the sale."). The parties concede that the requirements

of the Statutory Foreclosure Act were met, and accordingly, under State law, the sale was final and Debtor had no rights in the Property at the time she filed bankruptcy. Therefore, the Property is not property of Debtor's bankruptcy estate.

The next question presented is whether U.S. Bank had sufficient notice such that it is bound by the terms of the Debtor's confirmed plan under principles of *res judicata* and 11 U.S.C. § 1327.³ However, the Court need not reach the issue of whether U.S. Bank had sufficient notice of the Debtor's plan, because this Court had no jurisdiction to revest a property right in the Debtor through an order confirming a chapter 13 plan where no such property right existed under State law. As the Fifth Circuit Court of Appeals has explained: "Although the plan was confirmed without objection, a plan confirmation cannot magically revest Boyd with property that was never property of Boyd's bankruptcy estate." *In re Boyd*, 11 F.3d 59, 60 (5th Cir. 1994). Because the Debtor's rights in the Property were extinguished under the Statutory Foreclosure Act prior to Debtor's bankruptcy filing, the Property was not property of the Debtor's bankruptcy estate, and this Court had no jurisdiction to alter U.S. Bank's rights in the Property.

For the reasons described herein, the Property is not property of the Debtor's estate, and the Order confirming the Debtor's chapter 13 plan is void to the extent it treats the Property as property

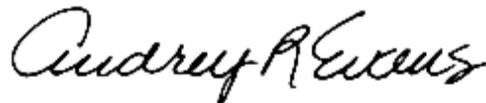
³The issues of *res judicata* and the binding effect of a confirmed plan under § 1327 normally arise where there is a conflict between an order confirming a plan and an order allowing a claim. *See e.g., In re Ramey*, 301 B.R. 534, 539 (Bankr. E.D. Ark. 2003) ("The issue of whether it is appropriate to apply the doctrine of res judicata to an order confirming a plan frequently arises when a secured claim is modified or eliminated by the plan, the plan is confirmed without objection, and subsequently the same claim is allowed or deemed allowed because no timely objections to it are filed."). *See also In re Grammar*, 310 B.R. 423 (Bankr. E.D. Ark. 2004). This is not the issue presented in this case.

of the estate and proposes to pay U.S. Bank as a secured creditor.⁴ Further, the automatic stay of 11 U.S.C. § 362 is not applicable to the Property, and the automatic stay is hereby lifted as to the Debtor to the extent necessary for U.S. Bank to proceed with its unlawful detainer action in State court. Further, the Debtor must modify her plan to remove the Property and U.S. Bank as a secured creditor within twenty days of this Order. It is hereby

ORDERED that the *Motion for Relief from the Automatic Stay* is **GRANTED**; and it is further

ORDERED that Debtor must modify her plan to remove the Property and U.S. Bank as a secured creditor within twenty days of this Order.

IT IS SO ORDERED.



HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATE: October 17, 2005

cc: Charles Gardner, attorney for Debtor
Michael Ptak, attorney for U.S. Bank
David D. Coop, Standing Chapter 13 Trustee
U.S. Trustee

⁴See e.g., *In re Rice*, 42 B.R. 838 (Bankr. S.D. 1984) (“[I]t is axiomatic that orders entered by a court without jurisdiction are void.”).