

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
HOT SPRINGS DIVISION**

**IN RE: NORMA JEAN COLE, Debtor**

**CASE NO. 6:14-bk-71968  
Chapter 13**

**NORMA JEAN COLE**

**PLAINTIFF**

**v.**

**6:17-ap-7014**

**ROBERT AND CAROL ARTHUR and  
BANK OF AMERICA, N.A.**

**DEFENDANTS**

**ORDER**

Before the Court are (1) the debtor's Complaint filed on March 2, 2017; (2) the defendant Arthurs' letter response filed on March 14, 2017; and Bank of America, N.A.'s [Bank of America] answer filed on June 8, 2017. The Court held a trial on the merits on June 29, 2017, at which time the debtor; her attorney, Lyndsey D. Dilks; and Judy Simmons Henry on behalf of Bank of America appeared. The Arthurs were not present. At the conclusion of the trial, the Court took the matter under advisement. The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b). The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

In her complaint, the debtor is asking the Court, *inter alia*, to use Arkansas's Uniform Declaratory Judgments Act<sup>1</sup> to quiet title to the debtor's residence in the debtor's name and determine the debtor's ownership interest in the property, subject to Bank of America's mortgage.<sup>2</sup> Before looking at the relief requested by the debtor in detail, a

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<sup>1</sup> Ark. Code Ann. §§ 16-111-101 to 16-111-114.

<sup>2</sup> Although Bank of America is not a creditor of the debtor, Bank of America filed the only Proof of Claim in the debtor's current chapter 13 case in the amount of \$45,730.97. The debtor does not dispute that Bank of America has an interest in the property.

review of some of the history of the debtor's three bankruptcy cases is instructive.

In support of her position, the debtor testified under oath that her Exhibit A, introduced at trial, was a true and correct copy of the Contract for Deed that she entered into with the Arthurs. The critical terms of the contract are that the Arthurs agreed to sell to the debtor the house located at 1508 7th Street, Hot Springs, Arkansas, for a total price of \$60,000.00. The sale was conditioned upon the debtor obtaining financing within twelve months after closing. The monthly payment during the one-year period while the debtor obtained financing was to be \$599.67 a month due on the first day of each month.<sup>3</sup> If the debtor made the required payments during that year and obtained independent financing, the Arthurs were required to convey title to the property in fee simple clear of all encumbrances.

The contract is dated July 24, 2005, and is signed by the debtor; her fiancé, Fabious Cole; and Robert and Carol Arthur. The contract also includes the notary signature of Dianna Silence dated November 21, 2006, below Carol Arthur's signature, and was filed for record on November 22, 2006, approximately sixteen months after the parties entered into the contract and only two weeks after the debtor filed her first bankruptcy petition on November 8, 2006. At the bottom of the page is what appears to be a phone number—625-3841—and a statement that reads: "Contract entered into July 24, 2005." Page two of the contract consists of an Acknowledgment signed by the notary acknowledging the signatures of Carol and Robert Arthur and dated November 21, 2006.

The debtor also testified that within five or six months of "us staying there," the Arthurs attempted to evict the debtor from the house for not making payments. According to the debtor, she set up a checking account at Summit Bank and was depositing her monthly check into that account for the benefit of the Arthurs. Despite making her payments, she

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<sup>3</sup> This monthly payment appears to be based on a fifteen-year amortization that includes an interest rate of 8.75%.

testified that the Arthurs were not getting the money and started an eviction action against the debtor as a result.<sup>4</sup> The debtor testified under oath that she first filed for bankruptcy protection because of the Arthurs' actions and to protect the home. Kathy Cruz was the debtor's attorney when she filed her first bankruptcy case on November 8, 2006. Since that filing, the debtor has been in a chapter 13 bankruptcy case for 129 consecutive months, almost eleven years running.

In her first chapter 13 case, the debtor scheduled the nature of her interest in the property in which she and Mr. Cole had apparently been residing for a year (based on the contract date) as "buying" in Schedule A subject to a "mortgage" lien in favor of the Arthurs on Schedule D. In her first chapter 13 plan of reorganization, the debtor identified the interest as an executory contract (contract for deed) and assumed the contract. Her confirmed plan proposed to treat the debt as a long term debt that, upon completion of the plan, would revert "to the terms of the original agreement." However, approximately 64 months later, on March 1, 2012, and prior to receiving her discharge, the debtor, through her attorney, filed a motion to voluntarily dismiss the debtor's case, which the Court granted on April 30, 2012.

Four days later, on May 4, 2012, the debtor's counsel, Kathy Cruz, filed the debtor's second chapter 13 petition. Like her first petition, the debtor scheduled the nature of her interest in the subject property as "buying" in Schedule A subject to a "mortgage" lien in favor of the Arthurs on Schedule D. In her first plan of reorganization, the debtor again identified the interest as an executory contract (contract for deed) and assumed the contract. Her confirmed plan proposed to pay the Arthurs "\$600.00 per month, along with a \$600.00 per month pre-confirmation, adequate protection payment, creditor will also receive an additional \$40.83 per month to cure the arrearage of \$2450.00." Again,

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<sup>4</sup> Even though the debtor testified that she had been making her payments, her confirmed modified plan in her first bankruptcy case included an arrearage to the Arthurs in the amount of \$5639.21, which was later modified to reflect an arrearage of \$8255.11.

prior to receiving a discharge, the debtor, through her attorney, filed a motion to voluntarily dismiss her second chapter 13 case May 16, 2014. The Court granted the motion on May 19, 2014.

The following month, on June 27, 2014, with her current attorney now representing her, the debtor filed her third chapter 13 case, the case currently before the Court. In this case, on Schedule A, the debtor identifies the nature of her interest in the subject property as a Contract for Deed and states that she has a “1/2 interest in property valued at \$62,370.” The only codebtor she lists on Schedule H is Fabious Cole, presumably the person who holds the other “1/2 interest in property.” On Schedule D, she specifically identifies the agreement of the parties as a Contract for Deed held by the Arthurs, rather than simply a “mortgage” lien as previously claimed. In her initial plan in this case, which was filed on June 27, 2014, she proposed a payment of \$599.67 to the Arthurs as a long term debt rather than payment on an executory contract. Approximately two years later, the debtor filed an amendment to her proposed plan (which remained unconfirmed at the time) in which she assumed the contract for deed with the Arthurs and disputed the amount owed under the contract for deed. She also proposed to make no payments to Bank of America, the entity that holds a first mortgage on the subject property and the only entity to file a claim in the debtor’s case. The amended plan was confirmed on March 13, 2017.

It is against this background that the debtor is now asking the Court to find that the Arthurs have acted with fraudulent intent such that the Court should quiet title to the subject property in the debtor’s name. Specifically, in her complaint the debtor wants the Court to:

- (1) find and declare that the Contract for Deed is an equitable mortgage;
- (2) determine “the extent and validity of the lien pertaining to the Plaintiff’s Real Property”;
- (3) find that the Arthurs have breached the Contract for Deed “by failing to apply the payments received to the amount due under the contract” and by “failing to pay

- the Note and Mortgage loan serviced by Bank of America”;
- (4) find that the Arthurs made material misrepresentations to defraud the debtor;
  - (5) find and declare that the debtor has “an ownership interest in the Real Property according to the Contract for Deed”;
  - (6) order the Arthurs to “provide clear title to the Real Property upon payment of the Contract for Deed”;
  - (7) award the debtor actual and punitive damages; and
  - (8) award the debtor her attorney fees and costs.<sup>5</sup>

The Court will address each count below.

After the trial and the Court’s further review of the exhibits and the debtor’s testimony, the Court entered an Order to Show Cause why the Court should not abstain or why the debtor’s bankruptcy case and related adversary proceedings should not be dismissed or suspended pursuant to 11 U.S.C. § 305. The Court asked the debtor and her counsel to address the following issues relating to abstention under § 305:

1. No creditors have filed a proof of claim in the debtor’s current case. Although Bank of America filed a claim, it is not a creditor of the debtor.
2. According to the debtor’s confirmed plan, “no payment shall be made to Bank of America” pending the filing of an amended plan. The modification of the debtor’s plan to include this provision was filed on June 1, 2016, and confirmed on March 13, 2017.
3. With the exception of \$151, all unsecured debt listed on the debtor’s petition is disputed by the debtor based on a statute of limitations argument. The total unsecured debt is approximately \$4000.
4. The only secured debt listed on the debtor’s petition is owed to Robert and Carol Arthur. The Arthurs have not filed a claim in the debtor’s current case.
5. The chapter 13 trustee has over \$17,000 on hand in the current case.

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<sup>5</sup> The debtor also requested injunctive relief against Bank of America to prevent the bank from foreclosing its interest in the property but withdrew that request at trial.

6. The debtor and Bank of America have asked this Court to quiet title of the Arthurs' property in the name of the debtor. The Court is not aware of a federal statute that permits the bankruptcy court to take such an action.
7. There is no evidence before the Court that the state procedure for quieting title has been followed. Ark. Code Ann. § 18-60-501 et seq.
8. The Court can ascertain no benefit to the debtor or the creditors for the bankruptcy case to proceed at this time.

A hearing on the Court's Order was held on August 3, 2017. Based in part on the argument of counsel that the debtor is simply seeking to receive her discharge and resolve a dispute between the debtor and her largest creditor, the Court withdrew its Order to Show Cause. Now, for the reasons stated below, the Court denies the debtor's complaint in its entirety.

A. Declaratory Judgment: Equitable Mortgage

In her first count, the debtor asks the Court to find and declare that the Contract for Deed she entered into in July 2005 is a mortgage or mortgage substitute rather than the executory contract she had previously identified in her first two bankruptcy cases and which she has assumed in her confirmed plan in this case. In bankruptcy, property interests are determined by state law. *Butner v. United States*, 440 U.S. 48, 55 (1979). Under Arkansas law, some installment real estate contracts may be treated as equitable mortgages. According to one court, "the determinative issue is whether a land sales contract is an executory contract which must be assumed or rejected by the debtor or whether it should be treated as a security device, similar to a mortgage." *In re Jones*, 54 B.R. 697, 698 (Bankr. E.D. Ark. 1985). In each of the debtor's three confirmed plans, the debtor has assumed the Contract for Deed. Therefore, under *In re Jones*, the Court would more than likely find that the Contract for Deed is an executory contract and not a mortgage or mortgage substitute.

However, a more recent bankruptcy case in Arkansas identifies an additional provision a court should consider. If a land sale contract such as the Contract for Deed "contains a

valid forfeiture clause where time is of the essence (either expressly or by implication), the forfeiture clause may be enforced and the contract will not be considered a mortgage.” *In re Guido*, 345 B.R. 656, 661 (Bankr. E.D. Ark. 2006) (footnote omitted). The Contract for Deed before the Court contains such a clause: “And in case of the failure of the Purchaser to make any of the payments . . . this Contract shall, at the option of the Seller, be forfeited and all sums theretofore received shall be retained by the Seller . . . .” Later the contract states that “[t]he time of payment shall be of the essence of this contract . . . .”

Even so, a forfeiture clause may be waived by the conduct of the parties in some instances if the “seller” does not insist on strict compliance with the stated contract terms regarding prompt payment. *In re Guido*, 345 B.R. at 662 (citing *In re Hayes*, 101 B.R. 569, 571 (Bankr. E.D. Ark. 1989)). In this case, the Court has no evidence that the forfeiture clause was waived by the Arthurs. According to the debtor, after five or six months of staying in the house, the Arthurs attempted to evict the debtor from the house for not making payments. The debtor testified there was a bank error that caused the money she was depositing to not appear in the Arthurs’ account. According to the debtor, it was because of this error that the debtor filed her first bankruptcy petition—to protect her house. When asked whether the Arthurs accepted payments after the eviction attempt, the debtor said that she “can’t recall.” When the Arthurs attempted to remove the debtor from the house, she filed for bankruptcy protection and has been under that umbrella for almost eleven years.

Further, the debtor failed to explain what happened to the payments that were made during the first year after the debtor entered into the contract—from July or August 2005 until July 2006, well before her five or six months of being in the house prior to the attempted eviction. It appears more likely that the eviction that the debtor testified caused her to file bankruptcy was started not because of a bank error but rather because the debtor and codebtor did not obtain independent financing within the twelve months stated in the Contract for Deed and then did not move out at the end of the twelve month

term. Because of the lack of evidence regarding the payment of “rent” over the life of the contract, the Court cannot find that the Arthurs waived the contract’s forfeiture clause. The Contract for Deed is simply an executory contract that, but for the debtor’s three bankruptcy cases, would have expired by its terms at the end of July 2006. The debtor’s request that the Court find and declare that the Contract for Deed is an equitable mortgage is DENIED.

#### B. Extent and Validity of Lien

Under this count, it appears that the debtor is asking the Court to determine the balance that the debtor allegedly owes the Arthurs on the Contract for Deed. However, in the absence of an ownership interest in the property and a valid mortgage or other security device, the Court cannot determine what “lien” might exist.<sup>6</sup> The Contract for Deed is an executory contract that has apparently expired by its terms but which the debtor continues to assume; the Arthurs are still the legal title holders. According to the only claim that was filed in this case, Bank of America has a first mortgage security interest in the subject property. The Court is not aware of any other liens that might exist against the house or of any claims that any other party might have against the debtor, other than what the debtor has alleged or listed in her third petition. The Arthurs own the property and have no “lien” for which the Court can determine a balance owed by the debtor. The debtor’s request for the Court to determine the extent and validity of lien is DENIED.

#### C. Breach of Contract

In this count, the debtor has asked the Court to find that the Arthurs breached the Contract for Deed “by failing to apply the payments received to the amount due under the contract” and by “failing to pay the Note and Mortgage loan serviced by Bank of America.” The Court can find neither of those terms in the contract that the debtor

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<sup>6</sup> Even if the Court were to consider the evidence that was introduced concerning payments made during the debtor’s three bankruptcy cases, it has no evidence of the payments—if any—that were made during the fifteen months after the contract was entered into and before the debtor filed her first bankruptcy case.

introduced. To the extent the debtor is referring to the debtor's second bankruptcy case during which the Arthurs returned or refused payments, when the debtor voluntarily dismissed her second case prior to receiving a discharge all of the parties' property rights were restored "to the position in which they were found at the commencement of the case." *In re Mirzai*, 271 B.R. 647, 652 (D.C.D. Calif. 2001); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 979 (2017). The Arthurs did not file a Proof of Claim in the debtor's third case; hence, no payments have been proffered to the Arthurs.

In their letter response to the debtor's complaint, the Arthurs disputed the debtor's allegations that she was never told about the Bank of America mortgage. The Contract for Deed that the debtor introduced was entered into on July 24, 2005. One of the terms of the contract was for the debtor to obtain financing within twelve months. Another term was that "if the Purchaser shall first make the payments and perform the covenants," the Arthurs would convey the property in fee simple clear of any encumbrances. Regardless of Bank of America's mortgage, the Arthurs were under no obligation to provide clear title until the debtor had obtained alternative financing within twelve months and the parties had proceeded to closing.

Because the debtor did not obtain financing within twelve months as required by the Contract for Deed, it appears to the Court that the debtor breached the contract, not the Arthurs. To the extent the debtor's first chapter 13 case tolled the requirement to obtain financing within twelve months, when the debtor voluntarily dismissed her case after 64 months, the original contractual relationship between the parties was restored.<sup>7</sup> The debtor did not file her bankruptcy petition until November 2006, more than fifteen months after entering into the contract, and she has been in a bankruptcy case for every month since that time. It would be legal error and an abuse of discretion for the Court to

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<sup>7</sup> And even if the debtor had received a discharge in her first case, the terms of her confirmed plan stated that "[u]pon completion of the plan, the debtor will resume payments pursuant to the terms of the original agreement."

find that the Arthurs breached the contract when the debtor has remained in the house under the protection of the bankruptcy court for almost eleven years after she entered into the twelve month contract. The debtor's request for the Court to find that the Arthurs have breached the Contract for Deed is DENIED.

D. Fraud

The debtor asks the Court to find that the Arthurs made material misrepresentations to defraud the debtor; specifically, the debtor alleges that the Arthurs committed fraud by misrepresenting their authority to sell the subject property to the debtor when they knew the property was encumbered by a mortgage in favor of Bank of America. The debtor also alleges that the Arthurs misrepresented their ability to deliver clear title, despite the debtor's own failure to refinance the property according to the terms of the contract.<sup>8</sup>

The debtor included the Arthurs in her first, second, and third bankruptcy case with little apparent thought given to the terms of the Contract for Deed. In that contract, the Arthurs agreed to convey the property in fee simple clear of all encumbrances after the debtor first made all the payments and performed the covenants contained within the contract. The agreement to convey was necessarily conditioned on the debtor refinancing the property within the allowed twelve months. Rather than refinance, the debtor has remained in a bankruptcy case for eleven years, each time stating that the payments to the Arthurs were based on a long-term continuing debt. The Court has no evidence to suggest that the Arthurs did not intend to provide a fee simple title clear of all encumbrances when they entered into the contract in 2005, twelve years ago. The Court will certainly not speculate now about their intent. The debtor's request that the Court find that the Arthurs committed fraud twelve years ago is DENIED.<sup>9</sup>

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<sup>8</sup> The Court is not considering any statute of limitations argument under state law.

<sup>9</sup> It is disingenuous to argue that the debtor relied on the Arthurs' "misrepresentation" concerning their ability to provide clear title or their authority to sell the subject property while ignoring the debtor's own disregard of other terms of that

E. Declaratory Judgment: Ownership Interest

In this count, the debtor asks the Court to find and declare that the debtor has “an ownership interest in the Real Property according to the Contract for Deed.” As the Court found above, the debtor entered into a contract to rent the subject property for one year and to obtain financing within that year. Despite the debtor’s characterization in her three bankruptcy cases that her contract gives rise to a long-term continuing debt, each time the debtor voluntarily dismissed her case prior to receiving a discharge, all of the parties’ property rights were restored “to the position in which they were found at the commencement of the case.” *In re Mirzai*, 271 B.R. at 652; *Czyzewski*, 137 S. Ct. at 979. In other words, upon every dismissal, the Contract for Deed once again became simply a one-year agreement for the debtor to live in the property while she obtained financing; an agreement the debtor has breached, repeatedly.

The Court can do equity when there is proof of irreparable harm and no adequate remedy at law. *Wilson v. Pulaski Ass’n of Classroom Teachers*, 954 S.W.2d 221, 224 (Ark. 1997); *see also Arkansas State Med. Bd. v. Schoen*, 1 S.W.3d 430, 433 (Ark. 1999) (“It is axiomatic in our jurisprudence that if an adequate remedy at law exists, no irreparable harm can result so as to warrant equity jurisdiction . . .”). In this instance, there is an adequate remedy in law in the Arkansas Quiet Title statute: Ark. Code Ann. §§ 18-60-501 to 18-60-511. However, there is no evidence before the Court that the quiet title statute was followed and there is no federal quiet title action. If the debtor believes she is entitled to have the title to this property quieted in her name, despite her breach of the underlying contract eleven years ago, she may file a motion for relief from stay and proceed under that statute. However, this Court cannot, and will not, do what the debtor has requested. As stated earlier, the Arthurs are still the legal title holders to the subject property. The debtor’s request for the Court to find and declare that the debtor has “an ownership interest in the Real Property according to the Contract for Deed” is DENIED.

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same contract.

F. Specific Performance

The debtor asks the Court to order the Arthurs to “provide clear title to the Real Property upon payment of the Contract for Deed.” Based on the debtor’s own breach of the Contract for Deed, it would be legal error for the Court to order the Arthurs to perform their future obligations under the contract. *Stocker v. Hall*, 602 S.W.2d 662, 664 (Ark. 1980) (“failure of one party to perform its contractual obligations releases the other party from its obligations”). The debtor assumed a contract that she had breached prior to the assumption. The Court would be reluctant under such conditions to grant the debtor’s request for specific performance and order the Arthurs to provide clear title. The debtor’s request for specific performance is DENIED.

G. Actual and Punitive Damages

The debtor’s request for actual and punitive damages is DENIED. Neither actual nor punitive damages are warranted. Further, any relief that was granted, obtained, or taken in any of the debtor’s previous cases became moot when the debtor voluntarily dismissed her cases.

H. Award of Attorney Fees and Costs.

The debtor’s request for attorney fees and costs is also DENIED as unwarranted. The Court is not aware of any provision under the bankruptcy code that allows the award of attorney fees to the party that did not prevail at trial. Further, there is no basis under Arkansas law for an award of attorney fees unless the debtor had prevailed on her contract action, which she did not.

For the above stated reasons, the Court denies the debtor’s complaint in its entirety.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Ben Barry". The signature is written in a cursive style and is positioned above a horizontal line.

Ben Barry  
United States Bankruptcy Judge  
Dated: 08/29/2017

cc: Lyndsey D. Dilks  
Norma Jean Cole  
Robert J. and Carol Arthur  
Judy Simmons Henry  
Jack W. Gooding  
U.S. Trustee