IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

IN RE: ROBY CLIFTON DAVIS, Debtor **No. 2:18-bk-73125**
Ch. 13

ORDER AND OPINION DENYING AMENDED POST-SALE MOTION FOR RELIEF FROM STAY AND OVERRULING OBJECTION TO CONFIRMATION

Before the Court are PennyMac Loan Services, LLC's [PennyMac] *Objection to Confirmation* filed on January 2, 2019, and *Amended Post-Sale Motion for Relief from Automatic Stay* filed on January 3, 2019, and the debtor's *Response to Motion for Relief from the Automatic Stay* filed on January 3, 2019. The Court held a hearing on March 27, 2019. W. Waylan Cooper appeared on behalf of the debtor. H. Keith Morrison appeared on behalf of PennyMac. At the conclusion of the hearing, the Court took the matter under advisement. For the reasons stated below, the Court overrules PennyMac's objection to confirmation and denies PennyMac's motion for relief from the stay.

On November 21, 2018, the debtor filed a skeletal chapter 13 petition. On December 6, 2018, the debtor filed his schedules, statements, and chapter 13 plan. In his plan, the debtor proposed to cure an $11,000 arrearage owed to PennyMac on a debt secured by the debtor's residence located at 241 Lowder Road, Booneville, Arkansas, 72927 [the property]. On January 2, 2019, PennyMac filed an objection to the confirmation of the debtor's plan, and on January 3, 2019, PennyMac filed an *Amended Post-Sale Motion for Relief from Automatic Stay* [motion]. Although PennyMac's motion contained more detailed factual allegations than its objection to confirmation, both pleadings were premised upon PennyMac's contention that the debtor had no interest in the property when he filed his bankruptcy petition on November 21, 2018, and, therefore, the property is not property of the debtor's bankruptcy estate. Specifically, PennyMac alleged that a statutory foreclosure sale of the property was conducted in accordance with Arkansas law on November 8, 2018, and a mortgagee's deed transferring the property to PennyMac was

executed on November 12, 2018. Because the mortgagee's deed was recorded in Logan County, Arkansas, on November 15, 2018–six days before the debtor filed his petition–PennyMac argues that the debtor "no longer held a legal or equitable interest in the property at the time the bankruptcy petition was filed." As a result, PennyMac contends that the debtor should remove the property from his plan and the Court should lift the automatic stay to allow PennyMac to enforce its rights under the mortgagee's deed and take possession of the property. On January 3, 2019, the debtor filed a response to PennyMac's motion, alleging that the "purported foreclosure sale" was defective under Arkansas law and void as a result.

At the hearing held on March 27, 2019 [the hearing], the parties stipulated to the relevant facts–the debtor did not dispute that he fell behind on his mortgage payments and that an alleged foreclosure sale took place on November 8, 2018. Likewise, the debtor acknowledged that a deed purporting to transfer the property to PennyMac, the highest bidder at the alleged sale, was executed on November 12, 2018, and recorded on November 15, 2018. The debtor argued, however, that the property is property of his bankruptcy estate because PennyMac did not conduct the alleged foreclosure sale in accordance with the Arkansas Statutory Foreclosure Act, codified at Arkansas Code Annotated §§ 18-50-101 to -117. In particular, the debtor alleged that the sale did not comply with Arkansas Code Annotated § 18-50-104(b)(4).

Arkansas Code Annotated § 18-50-104 enumerates several prerequisites that must be satisfied in order for a statutory foreclosure sale to take place, including the following:

> (a) The trustee or mortgagee *may not sell the trust property unless*:
>
> (1) The mortgagee, trustee, or beneficiary has filed for record with the recorder of the county in which the trust property is situated a duly acknowledged *notice of default and intention to sell containing the information required by subsection (b) of this section*;
> ...
> (b) The mortgagee's or trustee's *notice of default and intention to sell shall set forth*:

> (1) The names of the parties to the mortgage or deed of trust;
>
> (2) A legal description of the trust property and, if applicable, the street address of the property;
>
> (3) The book and page numbers where the mortgage or deed of trust is recorded or the recorder's document number;
>
> (4) *The default for which foreclosure is made;*
>
> (5) The mortgagee's or trustee's intention to sell the trust property to satisfy the obligation, including in conspicuous type a warning as follows: "YOU MAY LOSE YOUR PROPERTY IF YOU DO NOT TAKE IMMEDIATE ACTION";
>
> (6) The time, date, and place of sale; and
>
> (7) The name, address, and telephone number of the party initiating foreclosure.

Ark. Code Ann. § 18-50-104 (emphasis added). On August 29, 2018, PennyMac filed a Notice of Default and Intention to Sell that stated in relevant part: "WHEREAS, default has been made with respect to a provision in the mortgage that authorizes sale in the event of the default of said provision and the same is now, therefore, wholly due."

At the hearing, the debtor contended that PennyMac's Notice of Default and Intention to Sell was defective because it did not set out the specific event that placed the debtor in default as, the debtor argues, is required by Arkansas Code Annotated § 18-50-104(b)(4). The debtor reasoned that identifying the default with specificity is required by the statute because mortgage documents generally recite several independent events that could trigger a default and potential purchasers at a foreclosure sale should be made aware of which event caused the default. The debtor directed the Court to the mortgage documents in this case, pointing to numerous events of default that are unrelated to payments, such as: damaging the property; allowing the property to deteriorate; committing waste on the property; giving materially false, inaccurate, or misleading information or statements to the lender in connection with obtaining the loan to purchase the property; instituting civil

or criminal proceedings that could result in the forfeiture of the property or other material impairment of the lender's interest; and, permitting hazardous substances on the property.

PennyMac disagreed with the debtor's analysis of the statute, arguing that such specificity is not required in the notice. The parties agreed that the interpretation of this particular Arkansas statute appeared to be one of first impression. On April 4, 2019, this Court certified the following question to the Arkansas Supreme Court pursuant to Rule 6-8 of the Rules of the Supreme Court and the Court of Appeals of the State of Arkansas: whether mere acknowledgment that a default has occurred is sufficient for the trustee's Notice of Default and Intention to Sell or does the Arkansas statute require disclosure of the specific default under the terms of the mortgage agreement. On May 7, 2020, the Arkansas Supreme Court answered the certified question, concluding that § 18-50-104(b)(4) requires the disclosure of the specific default under the terms of the mortgage agreement. *See Davis v. PennyMac Loan Servs. LLC*, 2020 Ark. 180 (2020).

In the light of the Arkansas Supreme Court's answer to the certified question, this Court finds that the foreclosure was not conducted in accordance with Arkansas law because PennyMac's August 29, 2018 Notice of Default and Intent to Sell did not cite the specific default that had occurred under the debtor's mortgage documents. As a result, the sale is subject to being set aside. *See In re Henson*, 157 B.R. 867, 869 (Bankr. W.D. Ark. 1993) (recognizing that irregularities in a statutory foreclosure proceeding may be grounds to set the sale aside under Arkansas law). Therefore, the Court finds that on the date the debtor filed his bankruptcy petition, he retained a legal or equitable interest in the property, making the property part of his bankruptcy estate. *See* 11 U.S.C. § 541(a)(1) (property of the estate includes all legal or equitable interests of the debtor in property as of the commencement of the case).

Because PennyMac's *Amended Post-Sale Motion for Relief from Automatic Stay* was premised entirely upon its erroneous contention that the debtor's interest in the property

was terminated by the foreclosure sale before the debtor filed his petition, the Court denies the motion. Further, the Court overrules PennyMac's *Objection to Confirmation*. Section 1322(c)(1) states that, "[n]otwithstanding . . . applicable nonbankruptcy law, a default with respect 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(c)(1). Because the sale was not conducted in accordance with Arkansas law, the Court finds that the debtor may cure the default through his chapter 13 plan.

IT IS SO ORDERED.

Ben Barry
United States Bankruptcy Judge
Dated: 05/28/2020

cc: W. Waylan Cooper, attorney for debtor
H. Keith Morrison, attorney for PennyMac
Joyce Bradley Babin, chapter 13 trustee