

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

IN RE: ROBIN LYNN KEATING, Debtor

**No. 3:18-bk-72870
Ch. 13**

ORDER

Before the Court are a *Motion For Relief From Automatic Stay* filed by Federal Home Loan Mortgage Corporation [FHLMC] on November 5, 2018; the debtor's *Response to Motion For Relief From the Automatic Stay* filed on November 27, 2018; the debtor's *Amended Response to Motion For Relief From the Automatic Stay* filed on March 25, 2109; and FHLMC's *Reply to Amended Response to Motion For Relief* filed on April 1, 2019. The Court held a hearing on the motion for relief from stay and related pleadings on April 3, 2019. At the conclusion of the hearing, the Court took the matter under advisement. When asked by the litigants whether the Court would like them to brief the issues, the Court declined any post-hearing briefs.

Regardless, on April 7, 2019, counsel for the debtor provide the Court with citation to an Arkansas statute he believed to be "on point and relevant for the Court." FHLMC then responded asking the Court whether the Court would like FHLMC to address the debtor's submission. In fairness, the Court believed it only proper to allow FHLMC to address the debtor's post-hearing submission. On April 10, 2019, FHLMC provided the Court with its response, which included argument and a case citation. Also on April 10, it filed its *Amended Reply to Amended Response to Motion For Relief*, including an additional affidavit of mailing, one week after the hearing had concluded and been taken under advisement. Apparently this is a case that begs a conclusion.

On October 3, 2006, the debtor executed a mortgage with First National Bank and Trust to secure a note on the debtor's residence in Clarkridge, Arkansas. After the debtor defaulted on the note, FHLMC initiated a foreclosure action under the Arkansas Statutory

Foreclosure Act of 1987, Ark. Code Ann. § 18-50-101 to § -117 (Repl. 2015).¹ A foreclosure sale took place on October 29, 2014, and the Mortgagee's Deed was filed of record on November 12, 2014, thus completing the sale. On October 13, 2015, FHLMC filed an unlawful detainer action in Baxter County, which resulted in an Order of Possession on March 24, 2017.² On December 5, 2017, the debtor, without the aid of counsel, filed a motion to vacate the court's Order of Possession. On October 4, 2018, the state court denied the debtor's motion, ordered a Writ of Possession to be issued by the Clerk of the Court, and stated that execution of the writ should not occur sooner than October 25, 2018. On October 23, 2018, the debtor filed her voluntary bankruptcy petition now before this Court.

As noted above, FHLMC filed its motion for relief from stay on November 5, 2018, which precipitated the additional filings and (supposedly) concluded on April 3, 2019, when the Court heard the motion and counsels' arguments. FHLMC contends that the debtor's interest in the subject property was terminated when the Mortgagee's Deed was filed on October 29, 2014. FHLMC argues that because the property is no longer property of the debtor's estate, relief from the automatic stay should be granted to allow it to obtain possession of the property under state law. While the debtor filed an initial general denial to FHLMC's motion, on March 25, 2019, she filed an amended response in which she argues for the first time that because FHLMC did not strictly comply with the Statutory Foreclosure Act, the sale was "void ab initio" and the property remains property of the estate.³

¹ FHLMC's interest was established by Special Warranty Deed from Wilson and Associates, PLLC, Substitute Trustee. Although the Court does not know the history of the original note and mortgage, the parties did not contest FHLMC's right to foreclose.

² Current counsel in this case, Waylon Cooper and Keith Morrison, also represented their respective parties in the state court action.

³ Although debtor's counsel used the term "void ab initio" throughout the hearing, the Court believes that an action in violation of the statutory provisions would be voidable subject to proof of a violation, not void ab initio.

One of FHLMC's arguments is that the doctrine of res judicata is applicable in this case based on the history of litigation in state court and the resulting final judgment that was rendered.⁴ The Court is not privy to the pleadings that were filed in state court but according to the Case Summary that FHLMC introduced at the April 3 hearing, the state court case was opened in October 2015 and finally resolved in October 2018. FHLMC argued that at no time during the state court litigation did the debtor challenge the alleged non-compliance with the Arkansas Statutory Foreclosure Act and that she is now barred by the doctrine of res judicata. To prevail, FHLMC would have to prove that the issue of non-compliance with the statutory foreclosure statute was either "raised and determined or that it was necessarily within the issues which might have been litigated in the previous action." *Martin v. Citizens Bank of Beebe*, 671 S.W.2d 754, 755-56 (Ark. 1984); *see also Hooten v. Mobley Law Firm, P.A.*, 387 S.W.3d 298, 307 (Ark. Ct. App. 2011) (claims that were or could have been litigated are barred by res judicata).

The debtor's argument is directly related to the statute that the debtor's counsel provided to the Court after the conclusion of the hearing. More specifically, the debtor argues that the only issues before the state court were

the validity of the notice and other provisions regarding the attempts at eviction of the Debtor, as well as the true legal description of the property subject to the mortgage. *The validity of the foreclosure sale was not challenged in state court and thus was not before the Court and was not ruled on by the state court and was not referenced in the state court order.*

(emphasis added). The statute provided by the debtor's counsel states that in unlawful detainer actions such as was before the state court, title to the premises may not be adjudicated except to show entitlement to possession. *See Ark. Code Ann. § 18-60-308 (Repl. 2015)*. As a result of this limitation, the debtor apparently now contends that she was (or would have been) precluded from raising non-compliance with the Statutory

⁴ FHLMC also argues that it complied with the Arkansas Statutory Foreclosure Act, in contradiction to the debtor's assertions.

Foreclosure Act as a defense to FHLMC's unlawful detainer action in state court.⁵

Therefore, according to the debtor, *res judicata* can not apply because the issue could not have been litigated without violating section 18-60-308 of the Arkansas Code. The Court agrees that the debtor could not have raised non-compliance *as a defense* to the state court unlawful detainer action. *See Henry v. Citibank, N.A.*, No. CA 07-1109, 2008 WL 1812965 (Ark. Ct. App. April 23, 2008). However, both parties seem to overlook the procedural rule concerning compulsory counterclaims.

Arkansas Rule of Civil Procedure 13(a)– Compulsory Counterclaims states that:

[a] pleading shall state as a counterclaim any claim which, at the time of filing the pleading, the pleader has against any opposing party, *if it arises out of the transaction or occurrence* that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.


Ark. R. Civ. P. 13(a) (emphasis added). A compulsory counterclaim is a separate cause of action; even if the initial complaint were dismissed, the counterclaim would proceed. According to the Arkansas Supreme Court, “the reason for this rule is to require parties to present all existing claims simultaneously to the court or be forever barred, thus preventing a multiplicity of suits arising from one set of circumstances.” *Estate of Goston v. Ford Motor Co.*, 898 S.W.2d 471, 474 (Ark. 1995). Although section 18-60-308 may prohibit the adjudication of title within an unlawful detainer suit, section 18-60-308 has no relevance to a separate cause of action that is—or should have been—brought as a compulsory counterclaim.

⁵ It appears to the Court that the debtor's counsel is suggesting that the reason the validity of the sale was not challenged earlier was because of a statute that appears to have come to counsel's attention three and a half years after the state court case was commenced.

In October 2013, FHLMC initiated a foreclosure action utilizing the Arkansas Statutory Foreclosure Act of 1987, which resulted in a Mortgagee's Deed that was filed of record in November 2014. There is no question that (1) the debtor's argument that FHLMC did not strictly comply with the foreclosure statute and (2) FHLMC's unlawful detainer action both arose from this "transaction or occurrence." Hence, under Rule 13(a), the debtor was required to plead her counterclaim or waive it. *Estate of Goston*, 898 S.W.2d at 706. In this instance, the Court finds that the debtor waived her counterclaim and is now barred from raising for the first time the alleged deficiencies in FHLMC's compliance with the Arkansas Statutory Foreclosure Act.

Based on the foregoing, the Court finds that the subject property is not property of the debtor's estate and grants FHLMC's motion for relief from stay.

IT IS SO ORDERED.


Ben Barry
United States Bankruptcy Judge
Dated: 04/16/2019

cc: W. Waylon Cooper
Robin Lynn Keating
H. Keith Morrison
Joyce B. Babin