

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

IN RE: NATHANIEL KENT

**CASE NO. 3:03-bk-11277
CHAPTER 13**

**ORDER GRANTING MIDLAND MORTGAGE COMPANY'S MOTION FOR RELIEF
FROM AUTOMATIC STAY AND SUSTAINING THE OBJECTION TO
CONFIRMATION**

On May 23, 2003, the Court heard Midland Mortgage Company's ("**Midland**") Motion for Relief From Automatic Stay After Foreclosure Sale and Midland's Objection to Confirmation of the Plan. Midland appeared through its attorney, Kimberly D. Burnette of Wilson & Associates, P.L.L.C. Debtor appeared through his attorney, Joe C. Barrett. Debtor was also present. This is a core proceeding under 28 U.S.C. § 157(b)(2)(G) and (L), and the Court has jurisdiction to enter a final judgment in this case.

According to the documentary evidence and testimony in this case, Midland was the holder of the deed of trust and deed of trust note originally executed by Debtor on March 2, 1990, securing payment in the principal sum of \$38,300.00 to First Commercial Mortgage Company. This deed of trust covers the real property located at 513 Southwest Parkway, Blytheville, Arkansas 72315 ("**the Blytheville Property**"). As a result of a default in the terms of the deed, Midland appointed Wilson & Associates, P.L.L.C. as its Substitute Trustee to initiate foreclosure action to sell the property in accordance with the Arkansas Statutory Foreclosure Act, Ark. Code Ann. § 18-50-101, *et seq.* ("**the Statutory Foreclosure Act**"). The foreclosure sale was conducted on January 29, 2003, by Statewide Trustee Services, L.L.C. at the Mississippi County Courthouse, Blytheville, Arkansas, and the property was sold to Midland. The Trustee's deed was executed on January 29, 2003, and was filed on February 10, 2003, in the Office of the Mississippi County Circuit Court Clerk. Debtor filed

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a voluntary Chapter 13 bankruptcy petition on January 31, 2003, two days after Midland had purchased the property at the foreclosure sale.

At the hearing in the case at bar, Debtor testified that he received no notice of the foreclosure sale until the day of the sale. However, Midland presented evidence that it mailed what it termed “acceleration” letters, both by certified mail and regular mail¹ separately to Debtor and his wife at their last known address. The certified acceleration letters were returned unclaimed. Midland also presented evidence that notice of foreclosure sale letters, along with the notice of default and intention to sell, were sent by certified mail and regular mail, one addressed to Debtor at his last known address, one addressed to his wife at her last known address, and one addressed to the tenants at the address of the Blytheville Property. All three of these letters sent by certified mail were returned unclaimed. Midland posted notice at the Mississippi County Courthouse and published notice in a newspaper and on the Internet. Midland also entered into evidence an affidavit of mailing and compliance with the statutory notice requirements.

Midland requests relief from the automatic stay and objects to confirmation of Debtor’s Chapter 13 plan, arguing that the Blytheville Property is not “property of the estate” as defined by 11 U.S.C. § 541, since Debtor no longer held a legal or equitable interest at the time the bankruptcy petition was filed. Determining whether Debtor has an interest in the Blytheville 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 the 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

¹ According to Ms. Burnette and Thad Carter, an employee and witness for Wilson & Associates, all letters sent by ordinary mail entered into evidence were copies of the form letters that would have been sent, since Wilson & Associates did not make copies of those letters after they were signed. Therefore, there were no dates or signatures on those letters. All letters that were sent by certified mail, however, were copies of the originals actually sent.

not been delivered or possession transferred. *In re Cook*, 253 B.R. 249, 252 (Bankr. E.D. Ark. 2000). The Statutory Foreclosure Act also requires that the mortgagee's notice of default and intention to sell be mailed by certified mail, postage prepaid, and by first class mail, postage prepaid, to the address last known to the mortgagee within thirty (30) days of its recording in the county records. Ark. Code. Ann. 18-50-104(b).

In this case, the sale of the Blytheville Property occurred on January 29, 2003. Although Debtor filed the bankruptcy petition on January 31, 2003, prior to the filing of the deed on February 10, 2003, it is clear that under Arkansas law as referenced above, the sale of the Blytheville Property was final on January 29, 2003. Therefore, since the sale was final under state law, under federal bankruptcy law, Debtor has no further rights in the Blytheville Property, and he may not include it in his reorganization case. *See In re Cook*, 253 B.R. at 252.

Debtor argued, through counsel, that since he did not receive actual notice of the foreclosure sale, Midland's Motion and Objection should be denied. Debtor's argument raises a due process question, even though Debtor's counsel did not specifically use this term. Although none of the letters sent by certified mail were claimed and Debtor testified that he did not receive actual notice of the foreclosure until the day of the sale, "it is well settled that actual notice of a foreclosure sale is not required if the statutory requirements are adhered to." *Young v. 1st American Financial Services*, 992 F.Supp. 440, 445 (D.D.C. 1998) (citing *S & G Investment, Inc. v. Home Fed. Sav. & Loan Ass'n*, 505 F.2d 370, 376 (D.C.Cir. 1974)); *see also Mildfelt v. Circuit Court of Jackson County, Mo.*, 827 F.2d 343 (8th Cir. 1987) (upholding dismissal of civil rights complaint stemming from foreclosure sale under Missouri extrajudicial foreclosure law, despite Petitioners' claim they did not receive notice until after foreclosure sale); *Dusenbery v. United States*, 534 U.S. 161 (2002) (holding that procedure used by government, in which notice of forfeiture was sent by certified mail

to federal prison where claimant was incarcerated, residence where arrest occurred, and address in town where his mother lived, satisfied due process requirements, even though Petitioner claimed he never actually received notice).

The evidence in this case clearly demonstrates that Midland adhered to the requirements of the Statutory Foreclosure Act, as detailed in the uncontradicted affidavit presented by Midland. Since Midland was in compliance with the Statutory Foreclosure Act, Debtor's lack, if any, of actual notice of the foreclosure proceeding does not constitute a violation of due process. Although Midland requested that it be awarded attorneys' fees and costs, that Federal Rule of Bankruptcy Procedure 4001(a)(3) not apply, and that Debtor be barred from refiling for bankruptcy for 180 days if this case is dismissed, no evidence on these matters was entered; therefore, these requests are denied. Accordingly, for the reasons explained above, it is hereby

ORDERED that the Motion for Relief from Automatic Stay after Foreclosure Sale is **GRANTED**. It is also

ORDERED that the Objection to Confirmation after Foreclosure Sale is **SUSTAINED**. It is also

ORDERED that Midland's requests that it be awarded attorneys' fees and costs, that Federal Rule of Bankruptcy Procedure 4001(a)(3) not apply, and that Debtor be barred from refiling for bankruptcy for 180 days if this case is dismissed, are **DENIED**.

IT IS SO ORDERED.



HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATE: July 1, 2003

cc: Joe C. Barrett, attorney for Debtor
Kimberly D. Burnette, attorney for Midland
David D. Coop, Standing Chapter 13 Trustee
U.S. Trustee