Tagged Opinion

**ORDERED in the Southern District of Florida on July 12, 2016.**

**Laurel M. Isicoff, Judge**
**United States Bankruptcy Court**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: CASE NO. 16-14608-BKC-LMI

ANGEL ANTONIO RODRIGUEZ, Chapter 13

Debtor.
_____/

**ORDER HOLDING DEBTOR'S REAL PROPERTY WAS**
**PROPERTY OF THE ESTATE ON THE PETITION DATE**

This matter came before the me on the Debtor's Emergency Motion to Extend the Automatic Stay (ECF #14) (the "Motion"). Two objections were filed to the Motion – Response in Opposition to Debtor's Emergency Motion to Extend Stay filed by Ocwen Loan Servicing LLC (ECF #25) (the "Ocwen Objection") and SunTrust Bank's Response to Debtor's Emergency Motion to Extend the Automatic Stay (ECF #26) (the "SunTrust Objection"). The

Motion sought to extend the automatic stay primarily with respect to the real property located at 20922 S.W. 123rd Court, Miami, Florida 33177 (the "Property").[1]

The Property was sold at a foreclosure sale on March 31, 2016, at 10:10 a.m. The Property was purchased by a third party bidder. The Debtor filed his bankruptcy petition on March 31, 2016, at 10:58 a.m., after the sale was concluded but before the certificate of sale was issued.

At a hearing on April 25, 2016, I granted the Motion (ECF #28) but I asked the Debtor to address Ocwen's argument that the Property is not property of the estate anymore and thus post sale actions by Ocwen in the foreclosure case should not be stayed. I had previously held that, pursuant to Florida law, once a foreclosure sale takes place, a debtor only has the right to redeem the foreclosed property[2] or object to the sale[3] but otherwise the debtor's rights in the foreclosed property are terminated.[4]

I have reviewed the Ocwen Objection, the SunTrust Objection, the Debtor's Memorandum in support of Debtor's Motion to Extend the Automatic Stay (ECF #32) as well as applicable case law and statutes. Based on all of the foregoing I hold that if a debtor files bankruptcy after a sale but before a certificate of sale is issued, a debtor can, in a chapter 13 case, treat the mortgage under a chapter 13 plan notwithstanding the sale.

11 U.S.C. §1322(c)(1) provides "[n]otwithstanding subsection(b)(2) and applicable nonbankruptcy law – a default with respect to, or that gave rise to, a lien on the debtor's principal

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[1] It is not disputed that the Property is not the Debtor's primary residence. Ocwen is the servicer for the holder of the first mortgage lien on the Property. SunTrust holds the second mortgage lien.
[2] Fla. Stat. §45.0315.
[3] Fla. Stat. § 45.031.
[4] Order Denying in Part and Granting in Part Rivas' Emergency Motion for Determination That No Stay is in Effect or for Relief from Stay *Nunc Pro Tunc* to Petition Filing Date and for Prospective Relief, *In re Garcia*, No. 15-13836 (Bankr. S.D. Fla. Mar. 20, 2015), ECF #19. The District Court disagreed and reversed my ruling. *Garcia v. Rivas*, 2016 U.S. Dist. LEXIS 42550 (S.D. Fla. Mar. 30, 2016). However that ruling is only binding in that case.

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".

Florida Statutes §45.0315 states:

> At any time before the later of the filing of a certificate of sale by the clerk of the court or the time specified in the judgment, order, or decree or foreclosure, the mortgagor or the holder of any subordinate interest may cure the mortgagor's indebtedness and prevent a foreclosure sale by paying the amount of moneys specified in the judgment, order, or decree of foreclosure, or if no judgment, order, or decree of foreclosure has been rendered, by tendering the performance due under the security agreement, including any amounts due because of the exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor. Otherwise, there is no right of redemption.

Based on the statutory language, it would appear that all a debtor can do once a foreclosure sale takes place is exercise the right of redemption.

However, in the widely cited case of *In re Jaar*, 186 B.R. 148, 153-54 (Bankr. M.D. Fla. 1995), Judge Paul M. Glenn, held that a debtor could cure a default in a home mortgage and reinstate that mortgage through a chapter 13 plan until the clerk of the state court files a certificate of sale.

All Florida courts, federal and state[5], have followed *Jaar's* holding. In light of this uniform adherence to *Jaar's* holding over the past 20 years, I will defer to Judge Glenn's reasoning which I incorporate herein by reference, and will follow *Jaar's* holding, that a debtor's rights under section §1322(c)(1) are cut off only after the certificate of sale is issued.[6]

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[5] *See, e.g. Iskandar v. Carrera*, 550 B.R. 589, 590 (S.D. Fla. 2015); *In re Fothergill*, 293 B.R. 263, 264 (Bankr. S.D. Fla. 2003); *Shlishley the Best, Inc. v. CitiFinancial Equity Services, Inc.* 14 So.3d 1271, 1275 (Fla. 2d DCA 2009).

[6] If a debtor files a timely objection to sale after a certificate of sale is issued, a debtor may still have a right to the property if the objection to sale is sustained.

Accordingly I hold that the Property is property of the estate subject to treatment in the Debtor's chapter 13 case.[7]

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Copies to:

Aubrey Rudd, Esq.
Marian Kennady, Esq.
Mark E. Steiner, Esq.

*Attorney Rudd is directed to serve a copy of this Order upon all parties in interest and file a certificate of service with the clerk of court.*

[7] Nothing in this ruling is intended to address what are a chapter 7 debtor's rights in property after a foreclosure sale even if a certificate of sale has not been issued.