

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

**IN RE: FORIEST AND KATHY McADOO, Debtors**

**No. 5:15-bk-72690  
Ch. 13**

**ORDER DENYING MOTION FOR SUMMARY JUDGMENT,  
DENYING MOTION FOR RELIEF FROM STAY,  
AND OVERRULING OBJECTION TO CONFIRMATION**

Before the Court are the following pleadings, which are set for hearing on December 7, 2016:

- *Motion For Summary Judgment*, filed by M&T Bank, as servicer for Lakeview Loan Servicing, LLC [movant] on November 3, 2016, including a *Brief in Support of Motion For Summary Judgment* and a *Statement of Undisputed Material Facts Supporting Motion For Summary Judgment*;
- The debtors' *Response to Motion For Summary Judgment*, filed on November 15, 2016;
- *Motion For Relief From Automatic Stay* filed by the movant on November 25, 2015, and an *Amended Response to Motion For Relief From Automatic Stay* filed by the debtors on February 12, 2016, both of which have been continued six times at the request of the parties; and an
- *Objection to Confirmation* filed by the movant on November 25, 2015, which has also been continued six times.

Each of the pleadings relates specifically to the debtors' residence located in Washington County, Arkansas [the subject property]. The Court has jurisdiction over these matters under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and they are core proceedings under 28 U.S.C. § 157(b)(2)(G) and (L). For the reasons stated below, the Court denies the movant's motion for summary judgment as a matter of law, denies the movant's motion for relief from stay without prejudice, and overrules the movant's objection to confirmation of the debtors' plan.

The relevant facts in this case come primarily from the movant's statement of undisputed material facts, to which the debtors neither objected nor added to. On May 6, 2010, Foriest McAdoo executed a promissory note in favor of Embrace Home Loans, Inc. [Embrace] and, concurrently with execution of the note, both debtors executed and

delivered a Deed of Trust to Embrace's nominee, the Mortgage Electronic Registration Systems, Inc. The Deed of Trust was recorded on May 18, 2010, and created a first priority lien on the subject property.

Subsequently, the debtors failed to make the July 2012 payment and defaulted on their obligations under terms of the note and Deed of Trust. The movant, through its substitute trustee,<sup>1</sup> initiated a foreclosure action under the Arkansas Statutory Foreclosures Act, 18-50-101 to -117. Pursuant to section 107 of the statute, a foreclosure sale was conducted on October 19, 2015, at which time the property was sold to the movant in accordance with the foreclosure statute. Three days later, on October 22, and before the Trustee's Deed from the sale was executed, the debtors filed their voluntary chapter 13 bankruptcy petition. Four days after the debtors filed their petition, on October 26, 2015, the Trustee's Deed was executed.<sup>2</sup>

On November 25, 2015, the movant filed its objection to confirmation of the debtors' proposed plan, arguing that the debtors should not have listed the movant as a secured creditor because the subject property was not property of the estate. Also on November 25, the movant filed its motion for relief from stay, again arguing that the subject property was not property of the estate. The movant also argued that it was entitled to "immediate possession of the property." Although the debtors' responses to the pleadings filed by the movant are meager, the debtors do state unequivocally in their response to the movant's motion for summary judgment that "the deed for this property was not recorded until after the filing of this bankruptcy." Neither side has offered proof

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<sup>1</sup> When "trustee" is used in this opinion, the Court is referring to the trustee as defined in the Arkansas Statutory Foreclosures Act: "any person or legal entity to whom legal title to real property is conveyed by deed of trust or his or her successor in interest." Ark. Code Ann. § 18-50-101(12).

<sup>2</sup> The movant did not attach a copy of the Trustee's Deed to its motion for summary judgment. However, the Court was able to locate a copy attached as Exhibit B to the movant's November 25, 2015 motion for relief from stay.

that the Trustee's Deed has ever been recorded; however, an unrecorded copy of the Trustee's Deed was attached to the movant's November 25, 2015 motion for relief from stay.

Federal Rule of Bankruptcy Procedure 7056, which is incorporated through Federal Rule of Bankruptcy Procedure 9014, provides that Federal Rule of Civil Procedure 56 applies in the contested matter before the Court. Rule 56 states that summary judgment shall be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden is on the moving party to establish the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Canal Ins. Co. v. ML & S Trucking, Inc.*, No. 2:10-CV-02041, 2011 WL 2666824, at \*1 (W.D. Ark. July 6, 2011) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, (1986); *Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co.*, 165 F.3d 602 (8th Cir.1999)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citing to former Fed. R. Civ. P. 56(c)). The burden then shifts to the non-moving party, who must show "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B). The non-moving party is not required to present a defense to an insufficient presentation of facts by the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) (quoting 6 J. Moore, Fed. Prac. 56.22(2), pp. 2824-25 (2d ed. 1966)). If the non-moving party fails to address the movant's assertion of fact, the court may consider the fact undisputed. Fed. R. Civ. P. 56(e)(2). When ruling on a summary judgment motion, the Court must view the facts in the light most favorable to the non-moving party and allow that party the benefit of all reasonable inferences to be drawn from the evidence. *Canada v. Union Electric Co.*, 135 F.3d 1211, 1212-13 (8th Cir. 1997); *Ferguson v. Cape Girardeau Cty.*, 88 F.3d 647, 650 (8th Cir. 1996).

The movant's motion for summary judgment, motion for relief from stay, and objection to confirmation all involve both bankruptcy law and state law. The movant's primary

and ultimate argument to the Court is that the debtor's residence was not property of the debtor's estate when the debtors filed their bankruptcy petition on October 22, 2015, based on a prepetition "sale" under the Arkansas Statutory Foreclosures Act that occurred three days earlier on October 19, 2015. The debtors acknowledge that the sale process began before the debtors filed their voluntary petition but state in their response to the movant's motion for summary judgment that the trustee's deed was not recorded until after the bankruptcy petition was filed. The movant's argument is based on its belief that, under Arkansas law, the foreclosure sale was completed prior to the debtors filing their bankruptcy petition and the debtors lost their rights of redemption when the property was sold at auction.

If the Court were to consider only Arkansas law, the movant may be correct. Arkansas law provides that a "sale" is defined as "the public auction conducted pursuant to § 18-50-107." Ark. Code Ann. § 18-50-101(10). Under section 107, "[t]he sale is concluded when the highest bid is accepted by the person conducting the sale." Ark. Code Ann. § 18-50-107(d). Unless other arrangements are made, the purchaser is required to pay the bid price at the time of the sale and the trustee must execute and deliver the trustee's deed to the purchaser within 10 days. Ark. Code Ann. § 18-50-107(e). "A sale shall terminate all rights of redemption, and no person shall have a right to redeem the trust property after a sale, notwithstanding that the deed to and possession of the trust property have yet to be delivered." Ark. Code Ann. § 18-50-108(b); *see also In re Cook*, 253 B.R. 249, 252 (Bankr. E.D. Ark. 2000) (stating that even though creditor may have to take additional steps, sale is final).

In the case before the Court, there are two additional provisions of the statutory foreclosure law that are particularly relevant. First is a provision that addresses the purchaser's possessory rights in the property. According to the movant's motion for relief from the automatic stay, the movant is entitled to immediate possession of the property "pursuant to Ark. Code Ann. § 18-50-107(e), which provides that 'the purchaser

at the sale shall be entitled to immediate possession of the property.”<sup>3</sup> The movant did not, however, include the second part of that subsection: “Possession may be obtained by filing a complaint in the circuit court of the county in which the property is situated and attaching a copy of the *recorded trustee’s or mortgagee’s deed*, whereupon the purchaser shall be entitled to an ex parte writ of assistance.” Ark. Code. Ann. § 18-50-107(f)(2)(A). The second relevant provision provides that

[a]t any time prior to the delivery of the trustee’s or mortgagee’s deed, the trustee or mortgagee shall be authorized to set aside a sale conducted pursuant to this chapter by declaring the sale null and void and returning the purchase price to the highest bidder without any further liability to the bidder.

Ark. Code Ann. § 18-50-116(e).

While the movant may be correct that under the applicable nonbankruptcy law the debtors may have lost their rights of redemption, the movant has failed to consider the debtors’ federal right to cure a mortgage default under § 1322(c)(1). *In re Ausburn*, 524 B.R. 816, 823 (Bankr. E.D. Ark. 2015) (finding debtors’ state law property rights enhanced and expanded by federal right to cure home mortgage default under § 1322(c)(1)). Section 1322(c)(1) states unambiguously 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). In other words, if the residence was not “sold” prior to the filing of the debtors’ petition or the sale was not conducted in accordance with state law, the debtors may have a legal or equitable interest in the property at the time they filed their voluntary petition. If so, the subject property is property of the estate.

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<sup>3</sup> The statute was amended in 2011 and the subsections were redesignated. Section 18-50-107(e), to which the movant refers, is now section 18-50-107(f).

In this instance, the Court finds that the sale was conducted in accordance with state law. Paragraph 10 of the movant's *Statement of Undisputed Material Facts Supporting Motion For Summary Judgment* states that “[p]ursuant to Ark. Code Ann. Sec. 18-50-107, the foreclosure sale was conducted October 19, 2015 on at [sic] 10:00 A.M. by Statewide Trustee Services, L.L.C. at the Washington County Courthouse, Fayetteville, Arkansas.” The debtors did not contest this statement, which reflects compliance with that part of § 1322(c)(1) that requires a sale to be conducted in accordance with applicable nonbankruptcy law. However, simply determining that the foreclosure sale itself was conducted in accordance with state law is not determinative as to when the residence was sold for purposes of § 1322(c)(1).

Under Arkansas law, as noted above, the sale is concluded when the highest bid is accepted by the person conducting the sale. This is typically referred to as the “gavel rule.” *In re Ausburn*, 524 B.R. at 823; *see also In re Jenkins*, 422 B.R. 175, 177-78 (Bankr. E.D. Ark. 2010). Under the gavel rule, a debtor’s right to cure is terminated when the gavel falls at the sale auction. *In re Ausburn*, 524 B.R. at 823. In contradiction to the gavel rule is the “sold rule.” Under the sold rule, the debtor’s right to cure is only terminated when the entire sales transaction is complete under state law. *Id.* In considering the expanded federal right to cure under § 1322(c)(1) and *notwithstanding applicable nonbankruptcy law*, the Court finds that the debtor’s right to cure a default depends upon the date the foreclosure sale process was completed—the sold rule.

In Arkansas, even after the auction sale under Arkansas law, the successful bidder may not have an enforceable right to either purchase or possess the property. First, the trustee has the right to set aside the sale simply by declaring the sale null and void. Ark. Code Ann. § 18-50-116(e)(1). If the trustee takes this action, “all terms and provisions of the mortgage or deed of trust shall be revived and reinstated *as if no sale had occurred.*” Ark. Code Ann. § 18-50-116(e)(2) (emphasis added). Second, the purchaser cannot enforce its “immediate right of possession” unless it files a complaint in state court and

attaches a copy of the *recorded* Trustee's Deed to the complaint.<sup>4</sup> After the debtor files for bankruptcy protection, the automatic stay may prevent the purchaser from either recording the Trustee's Deed or filing a complaint to obtain possession of what may be property of the estate, even though it holds an "illusory" immediate right of possession. *In re Jenkins*, 422 B.R. at 181.

Because of the possibility of a sale being null and void *after* the auction, plus the purchaser's "immediate right of possession" being unenforceable without a recorded trustee's deed, the Court finds that in the context of § 1322(c)(1), "sold" means the date on which the property has been irrevocably transferred and the foreclosure process concluded. In so finding, the Court adopts Judge Mixon's reasoned opinion regarding the meaning of "sold" in the context of § 1322(c)(1):

Under the Foreclosure Act, the acceptance of the bid is, in fact, not the final act required by the state statute to sell the debtor's residence, and at the conclusion of the auction the seller is not even bound by contract to sell at some future date. Because other statutory requirements are yet to be accomplished, labeling the sale as "concluded" when the highest bid is accepted attributes a meaning to the word "sold" that is inconsistent with the common understanding of the word and will not satisfy the provisions of 11 U.S.C. § 1322(c)(1). *See Burgess v. United States*, 553 U.S. 124, 128 S.Ct. 1572, 170 L.Ed.2d 478 (2008) (holding that state statute classifying crime as misdemeanor punishable by a maximum two-year prison sentence is still a felony for purposes of federal law because of common understanding of the word "felony").

The Court concludes that the debtor's principal residence is "sold" for purposes of Section 1322(c)(1) of the bankruptcy code when, under the Foreclosure Act, the consideration is paid and the Trustee's Deed is delivered to the purchaser so that the purchaser's rights cannot be unilaterally avoided and the purchaser has the right to legally enforceable possession. At that point, the debtor is no longer entitled to cure the default as permitted by section 1322(b)(2) of the bankruptcy code.

*In re Jenkins*, 422 B.R. at 182.

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<sup>4</sup> Alternatively, a purchaser may bring an action for forcible entry and detainer, *under state law*. Ark. Code. Ann. § 18-50-107(f)(2)(B).

For these reasons, the Court denies the movant's motion for summary judgment as a matter of law and denies the specific relief that was requested almost a year ago—the granting of relief from stay. The Court finds that the debtors' residence—the subject property—is property of the debtors' estate despite the movant's argument to the contrary. Further, the movant is not entitled to immediate possession of the subject property. The movant may not proceed in state court to complete its interrupted foreclosure action without first proving to this Court the movant's entitlement to relief from the automatic stay under § 362(d). Should that relief be granted, the movant would then have to follow the provisions of the state foreclosure statute before being entitled to “immediate possession.”

The Court also overrules the movant's objection to confirmation of the debtors' plan. The only reason given for the objection was that the debtors' property was not property of the estate. Because the Court finds otherwise, the objection cannot be sustained. The debtors are currently subject to the Court's *Chapter 13 Order to Modify Chapter 13 Plan*. Depending on the forthcoming modification, the movant may be able to present additional issues to the Court for consideration in the form of either an objection to the modified plan or another motion for relief from stay.

IT IS SO ORDERED.



Ben Barry  
United States Bankruptcy Judge  
Dated: 11/21/2016

cc: Esther M. White, attorney for the debtors  
Leslie Fryxell, attorney for the movant  
H. Keith Morrison, attorney for the movant  
Joyce B. Babin, chapter 13 trustee