

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re: Case No. 9:12-bk-17750-FMD
Chapter 13

Cynthia A. Balterman,

Debtor.

**ORDER DENYING DEBTOR'S MOTION TO
REIMPOSE STAY, DENYING VERIFIED
EMERGENCY MOTION FOR REIMPOSITION
OF AUTOMATIC STAY, AND CANCELLING
DECEMBER 20, 2012 HEARING**

THIS CASE came on for consideration, without a hearing, of Debtor's Motion to Reimpose Stay (Doc. No. 7), and Debtor's Verified Emergency Motion for Reimposition of Automatic Stay (Doc. No. 22). Upon review of the motions and the record, the Court finds as follows:

1. On November 27, 2012, Cynthia A. Balterman ("Debtor") filed her voluntary petition pursuant to Chapter 13 of the Bankruptcy Code. Debtor also filed her Chapter 13 Plan (Doc. No. 2) (the "Plan"). The Plan states that Debtor will make direct payments (i.e., not through plan payments paid to the Chapter 13 Trustee) to Wells Fargo Bank ("Wells Fargo"), the holder of a claim secured by a mortgage on Debtor's property at 3361 5th Avenue, SW, Naples, Florida (the "Property"). Debtor also filed her Schedules I and J (Doc. No. 1). These state that Debtor has average monthly income of \$1,551.00 per month (wages of \$1,488.00 and alimony or support of \$215.00), and expenses of \$1,468.00 per month, not including any mortgage or rent expense.

2. On November 28, 2012, the Court entered its Order Establishing Duties of Trustee and Debtor (Doc. No. 5) (the "Chapter 13 Order"). Paragraph 6 of the Chapter 13 Order permits the Debtor to make post-petition payments directly to secured creditors on claims that are not in default, for which no arrearages are being paid through the Plan, and which the Plan does not modify. Paragraph 6 also provides that the automatic stay as to those claimants being paid outside the Plan is terminated as set forth in Paragraph 7. Paragraph 7 grants *in rem* relief from stay to secured creditors whose claims are being paid directly by the Debtor, and permits those creditors to pursue their remedies against the property that is security for the claim.

3. On November 29, 2012, Debtor filed an Amended Chapter 13 Plan (Doc. No. 6) (the "Amended Plan"). In the Amended Plan, Debtor stated that she intended to seek a modification of her mortgage with Wells Fargo, and that she would pay adequate protection payments of \$462.00 per month to Wells Fargo (based upon 31% of her income) to be included in her monthly plan payments. Debtor also filed her Motion to Reimpose Stay (Doc. No. 7) (the "First Motion"). In her First Motion, Debtor stated that her ex-husband had agreed to pay her child support of \$1,500.00 per month, that the Property had been sold at foreclosure sale on June 27, 2012, that Debtor contested the foreclosure, and that to her knowledge, a certificate of title had not been issued. The First Motion was not filed on an emergency basis and was set for hearing on December 20, 2012.

4. On December 2, 2012, Tarp Properties #1, LLC ("Tarp") filed an objection to the First Motion (Doc. No. 11) (the "Objection"). In the Objection, Tarp stated that pursuant to a final judgment of foreclosure, a foreclosure sale was conducted on June 27, 2012, that Tarp was the successful bidder at the foreclosure sale, and that a Certificate of Sale was issued and filed on June 28, 2012. Tarp argued that because the Certificate of Sale had been issued, under Florida law, the foreclosure sale was final, Debtor's right of redemption had terminated, and the Property was no longer property of the estate. Tarp also advised the Court that Debtor had litigated the validity of the foreclosure sale in the state court from July 3, 2012 to November 29, 2012.

5. On December 12, 2012, Debtor filed a Second Amended Plan (Doc. No. 21) (the "Second Amended Plan"). This time, Debtor proposed to make plan payments of \$4,347.00 per month, which includes adequate protection payments to Wells Fargo of \$2,088.00 per month, and although not clearly stated, to cure arrearages to Wells Fargo in the amount of \$96,990.00. Debtor also filed Amended Schedules I and J (Doc. No. 20). Schedule I states that Debtor's gross monthly wages are \$3,250.00 (not \$1,488.00 per month stated on her original Schedule I (Doc. No. 1)), and that she receives \$2,500.00 per month in alimony or support payments (not \$215.00 per month as stated on her original Schedule I, and not the \$1,500.00 per month that she represented her ex-husband had agreed to pay in her First Motion).

6. Also on December 12, 2012, Debtor filed the Verified Emergency Motion for Reimposition of Automatic Stay (Doc. No. 22) ("the Second Motion"). In the Second Motion, Debtor stated that she now had the ability to cure the arrearages to Wells Fargo, and

that the judgment purchaser "Tarp Properties" had received an order for issuance of title, and an order directing issuance of a writ of possession. Debtor did not contest Tarp's statement in the Objection that the Certificate of Sale had been issued prior to the filing of her bankruptcy. Tarp has filed an objection to the Second Motion (Doc. No. 23).

DISCUSSION

A borrower's default under a mortgage loan triggers the lender's right to accelerate the total amount due. In Florida, the property owner has the right to redeem property at any time before the later of the filing of a certificate of sale or the time stated in the judgment "by paying the amount of moneys specified in the judgment, order, or decree of foreclosure." Fla. Stat. § 45.0315 (2011).

The Bankruptcy Code provides an alternative to redemption under state law. 11 U.S.C. § 1322(c) permits a debtor to reinstate or redeem a mortgage by curing the default that gave rise to the foreclosure judgment through a Chapter 13 plan. But, as outlined by the court in *In re Jaar*, 186 B.R. 148, 153-154 (Bankr. M.D. Fla. 1995), the debtor's ability to reinstate a mortgage terminates upon the filing of the certificate of sale:

A mortgagor's equity of redemption now expires with the filing of the certificate of sale. Objections may be made to the regularity of the sale, or the amount of the deficiency, but after the filing of the certificate of sale the mortgagor no longer has the ability to redeem the property. Any objection to the amount of the bid (which must be served within 10 days after filing of the certificate of sale, prior to the filing or recording of the certificate of title), does not affect or cloud the title of the purchaser in any manner. The certificate of sale must be set aside for the mortgagor to have any right to acquire the property. Accordingly, for the purpose of the mortgagor/debtor paying off the mortgage, through a chapter 13 plan or otherwise, the residence has been sold at the foreclosure sale at the time of the filing of the certificate of sale. (emphasis supplied)

In the First Motion, by stating that the Certificate of Title had not been issued, Debtor implicitly acknowledged that the Certificate of Sale was filed prior to the filing of this Chapter 13 case. Therefore, the Property is not property of the estate pursuant to 11 U.S.C. § 541, and Debtor did not have any interest in

the Property on the date she filed her bankruptcy petition.

As a practical matter whether Debtor chose to make direct payments to Wells Fargo (the Plan), to make adequate protection payments based upon 31% of her income (the Amended Plan), or to make regular payments and cure arrearages to Wells Fargo (the Second Amended Plan), none of these alternatives were available to her. The foreclosure sale was completed upon the June 28, 2012 filing of the Certificate of Sale, and Tarp is now the owner of the Property.

Accordingly, it is

ORDERED:

1. Debtor's Motion to Reimpose Stay (Doc. No. 7) and Debtor's Verified Emergency Motion for Reimposition of Automatic Stay (Doc. No. 22) are **DENIED**; and

2. The hearing on Debtor's Motion to Reimpose Stay scheduled for December 20, 2012 at 2:15 is **CANCELLED**.

DONE and ORDERED in Chambers at Tampa, Florida, on December 13, 2012.

/s/
Caryl E. Delano
United States Bankruptcy Judge