

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

IN RE:

CASE NO. 3:12-bk-1495-JAF

Chapter 11

JOE'S PROPERTIES, LLC,

Debtor.

**ORDER DENYING DEBTOR'S EMERGENCY MOTION TO COMPEL
SECURED CREDITOR, FIRST ATLANTIC BANK, TO COMPLY WITH THE
ORDER CONFIRMING DEBTOR'S PLAN OF REORGANIZATION**

This case came before the Court upon Debtor's Emergency Motion to Compel Secured Creditor, First Atlantic Bank, to Comply with the Order Confirming Debtor's Plan of Reorganization (the "Motion to Compel")(Doc. 76). The Court conducted a hearing on the matter on June 12, 2013 and took the matter under advisement. The Court finds it appropriate to deny the Motion to Compel.

Background¹

On March 7, 2012 Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On August 24, 2012 First Atlantic Bank ("First Atlantic") filed Amended Motion for Relief from the Automatic Stay or, in the Alternative for Adequate Protection (the "Motion for Relief") seeking relief from the automatic stay as to property located at 5522 Commonwealth Avenue, Jacksonville, FL 32254 (the "Property"). The Court scheduled a hearing on the Motion for Relief for October 15, 2012.

On October 4, 2012 Debtor filed its Disclosure Statement and Chapter 11 Plan of Reorganization (the "Plan"). Although the Plan provided for payment of the full amount of First Atlantic's claim, it treated the claim as a re-amortized mortgage contract and

¹ While neither party offered documentary or testimonial evidence, the following factual findings are based upon the parties' proffers, which were not disputed by either party.

required a closing between the parties to prepare and close the new terms of the associated note. The Court scheduled a confirmation hearing for November 14, 2012.

On October 19, 2012 the Court entered Order Denying First Atlantic Bank's Motion for Relief from Stay and Granting Adequate Protection. On November 7, 2012 First Atlantic filed Motion to Lift the Automatic Stay and for Relief from the Order Granting Adequate Protection based upon Debtor's failure to make the November 1, 2012 adequate protection payment. On November 9, 2012 the Court entered Order Granting Relief from the Automatic Stay permitting First Atlantic to pursue a foreclosure action against the Property.

First Atlantic did not file an objection to confirmation of the Plan and voted to accept the Plan. On November 21, 2012 the Court entered Order Confirming Debtor-in-Possession's Plan of Reorganization (the "Confirmation Order"). The Plan provided for monthly payments to First Atlantic in the amount of \$3,600.00. The payments were to commence on January 1, 2013.

On December 10, 2013 First Atlantic instituted a foreclosure action (the "Foreclosure Action") as to the Property. For the following four and a half months Debtor did not object to the Foreclosure Action on the basis that the Confirmation Order provided for payment of First Atlantic's claim, instead allowing the litigation to proceed unimpeded. On April 29, 2013 the court in the Foreclosure Action entered a summary judgment order against Debtor. Debtor did not appeal that order.

On May 30, 2013 Debtor filed the Motion to Compel. On May 31, 2013 a sale of the Property was conducted, with First Atlantic purchasing the Property. Although Joe Joseph, Debtor's managing member, did not testify at the hearing, Debtor's attorney

represented that Mr. Joseph waited until the eve of the foreclosure sale to bring the matter to his attorney's attention because he was under the impression that the Foreclosure Action was against the guarantor. The Court does not find this explanation to be credible.

In addition to Debtor's inaction in the Foreclosure Action, Debtor has made no payments to First Atlantic despite collecting rent on the Property. Debtor's attorney theorized that Debtor has failed to make any payments because Mr. Joseph is waiting on a new closing date. The Court does not find this explanation to be credible.

Debtor seeks to have the Court enter an order compelling First Atlantic to comply with the terms of the Confirmation Order, set aside the foreclosure sale as to the Property, and schedule a closing date with Debtor to prepare and close the new terms of the note.

Discussion

Section 1141 of the Bankruptcy Code provides that:

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

11 U.S.C. § 1141(a). A creditor can protect itself from being bound by a plan by "filing either an objection to the treatment of its claim in the plan or by filing a timely appeal to the order confirming the plan." In re Hileman, 451 B.R. 522, 525 (Bankr. C.D. Cal. 2011).

The Court has previously held that a Chapter 13 confirmation order, which provides for payments to a creditor, is binding upon that creditor notwithstanding the fact that the creditor obtained relief from the automatic stay prior to confirmation of the plan.

In re Sullivan, 321 B.R. 306, 308 (Bankr. M.D. Fla. 2005). In that case, the creditor, debtor's mortgagee, obtained relief from the automatic stay. Thereafter, it did not object to confirmation of the debtor's Chapter 13 plan, which provided for payments to the creditor. The debtor made his confirmed plan payments in compliance with the confirmation order. Approximately six months after confirmation of the debtor's Chapter 13 plan, the creditor sought an order directing the Chapter 13 trustee to suspend the disbursement of mortgage payments to it on the basis that the automatic stay was lifted prior to confirmation of the Chapter 13 plan.

Ordinarily the Court would find that a creditor is bound by a confirmation order to which it failed to object, despite having previously obtained stay relief. However, such a finding would be inappropriate in the instant case. First, while Debtor could have raised the Confirmation Order as a defense in the Foreclosure Action or brought the matter to this Court's attention prior to the entry of the summary judgment of foreclosure, Debtor opted to simply sit on its rights, taking no action whatsoever until over a month after the entry of the summary judgment of foreclosure and only a day before the foreclosure sale. The Court has no authority to revisit the summary judgment of foreclosure. Secondly, Debtor failed to make any payments to First Atlantic for six months and made no effort to consummate a new closing. Upon the foregoing, it is

ORDERED:

Debtor's Emergency Motion to Compel Secured Creditor, First Atlantic Bank, to Comply with the Order Confirming Debtor's Plan of Reorganization is denied.

DATED this 17 day of July, 2013 at Jacksonville, Florida.

/s/

JERRY A. FUNK

United States Bankruptcy Judge

Attorney Joshua B. Dawes is directed to serve a copy of this Order on interested parties and file a proof of service within 3 days of entry of the Order.