

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
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In re )  
 )  
DENNIS GAYNOR, ) Case No. 6:14-bk-00059-KSJ  
 ) Chapter 13  
Debtor. )  
 )  
\_\_\_\_\_ )

**ORDER GRANTING DEBTOR'S VERIFIED MOTION FOR  
REHEARING OF DEBTOR'S VERIFIED MOTION TO STRIP LIEN  
OF HANCOCK BANK AND FOR DETERMINATION THE CLAIM IS UNSECURED**

Debtor, Dennis Gaynor, wants to strip off a junior lien encumbering his home (the "Property").<sup>1</sup> At the initial hearing, the Court denied the motion without an evidentiary hearing.<sup>2</sup> Mr. Gaynor, who now is represented by a lawyer, asks the Court to reconsider this denial in order to give him an opportunity to present evidence.<sup>3</sup> The Court will grant this request.

Chapter 13 debtors generally may strip off *wholly unsecured* junior mortgages pursuant to the Eleventh Circuit's decision in *In re Tanner*.<sup>4</sup> The circumstances here are complicated because the Debtor conveyed the Property, encumbered by a first and second mortgage,<sup>5</sup> to a

<sup>1</sup> The property located at 379 Kapok Court, Longwood FL 32779. The legal description of the property is: Lot 6, Pecan Cove as per plat thereof, recorded in Plat Book 44, Page 42, of the Public records of Seminole County, Florida. Mr. Gaynor, then acting *pro se*, filed his Verified Motion to Strip Lien and for Determination that Claim is Unsecured on February 28, 2014. (Doc. No. 25).

<sup>2</sup> Doc. No. 54. The hearing was held on April 8, 2014.

<sup>3</sup> Doc. No. 60. The Debtor promptly filed his Motion for Rehearing of Debtor's Motion to Strip Lien and for Determination that Claim is Unsecured on April 24, 2014.

<sup>4</sup> 217 F. 2d 1357 (11th Cir. 2000).

<sup>5</sup> The Property apparently is subject to two encumbrances: (i) a first mortgage in the amount of \$650,000.00 executed in favor of Peoples First Community Bank ("Peoples First"); and (ii) a second mortgage in the amount of \$100,000.00 executed in favor of Peoples First. Peoples First went into receivership on December 18, 2009, and Hancock purchased certain assets of Peoples First including the note and mortgage secured by the second mortgage in the Property on April 15, 2010 (Doc. No. 23, Ex. D). According to the Debtor, the value of the Property is \$265,000.00 (Schedule D).

land trust<sup>6</sup> years prior to seeking bankruptcy relief. So, in addition to the factual issue of whether Hancock Bank's second mortgage is wholly unsecured, the Debtor, who is the mortgagor but not the title owner of the Property, also must establish that he has a sufficient interest in the Property to allow him to strip off the lien. Debtor merely seeks the opportunity to present evidence on these two issues in his motion for rehearing.

Hancock Bank opposes this request.<sup>7</sup> The Bank argues that the Debtor lost the right to value the Property and to strip the Bank's junior lien because neither the bankruptcy estate nor the Debtor has an interest in the Property where the Property was abandoned by the Chapter 7 Trustee,<sup>8</sup> and the Debtor conveyed title in the Property to the land trust.

A debtor clearly must have a legal interest in real property to strip off a junior lien. At a minimum, the debtor must have a right to redeem real property to take advantage of Bankruptcy Code provisions permitting use or possession of real property or to otherwise alter a creditor's interest in real property.<sup>9</sup> Thus, where a debtor has an equitable right to redeem real property, the debtor may use 11 U.S.C. Section 506 to avoid a lien on the property.<sup>10</sup> In Florida, the right of redemption belongs both to the mortgagor and those who claim under or through the mortgagor.<sup>11</sup> Florida's judicial foreclosure procedures provide the right of redemption is not extinguished until the filing of a certificate of sale.<sup>12</sup>

This Court simply cannot make the factual determination as to whether the Debtor has such an interest or not without an evidentiary hearing. Debtor, as the alleged sole obligor on the

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<sup>6</sup> Debtor conveyed the Property to TRSTE, LLC, a Florida limited liability company, as Trustee ("TRSTE") of the 379 Kapok Court Land Trust dated March 7, 2008 (the "Land Trust") pursuant to a Trustee's General Warranty Deed on March 7, 2008 (Doc. No. 23, Ex. C)(the "Trust Deed").

<sup>7</sup> Doc. No. 74. The Response indicates that Hancock Bank is now known as Whitney Bank. For consistency, the Court will continue to refer to mortgagee as Hancock Bank.

<sup>8</sup> Doc. No. 38.

<sup>9</sup> *In re Catalano*, 510 B.R. 654, 658-59 (Bankr. M.D. Fla. 2014).

<sup>10</sup> *Id.*(citing *In re Israel*, 112 B.R. 481, 485 (Bankr. D. Conn. 1990)).

<sup>11</sup> *See Vaughan v. First Union Nat. Bank of Florida*, 740 So. 2d 1216 (Fla. Dist. Ct. App. 1999); *Engels v. Valdesuso*, 497 So.2d 698 (Fla. 3d DCA 1986).

<sup>12</sup> Fla. Stat. §45.0315 (2014).

first and second mortgages encumbering the Property, should have the opportunity to prove his interest. Conveyance of title of the Property to the land trust does not directly affect the Debtor's right of redemption as the Debtor remains liable for the mortgages.<sup>13</sup> Further, the Trust Deed seems to provide that the Debtor has "not less than a beneficial interest for life and is entitled to a homestead tax exemption..." "[T]he beneficiary of a land trust is the 'equitable owner of real property' within the meaning of the [Bankruptcy Code]" such that if the beneficiary is a debtor, the *res* of the trust is property of the debtor's bankruptcy estate where the trustee acts with the permission or direction of the beneficiary pursuant to the terms of the recorded instrument or the trust agreement.<sup>14</sup> On a preliminary basis, the Property appears subject to the Debtor's right of redemption which, in turn, affords the Debtor the right to strip off Hancock Bank's lien, if it is wholly unsecured. Accordingly, it is

**ORDERED:**

1. The Motion for Rehearing is granted.
2. The Order Denying Debtor's Motion to Strip Lien is vacated.
3. Debtor and Hancock Bank are directed to obtain and to file formal value appraisals of the Property no later than October 31, 2014.
4. A final evidentiary hearing on the Debtor's Verified Motion to Strip Lien of Hancock Bank and for Determination that Claim is Unsecured<sup>15</sup> is scheduled for **10:30 a.m. on November 13, 2014.**

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<sup>13</sup> *Alabama-Florida Co. v. Mays*, 111 Fla. 100, 106, 149 So. 61, 63-65 (1933) (explaining where a mortgagor conveys mortgaged property to one who assume the mortgage pursuant to explicit language to that effect, the initial mortgagor remains liable to the mortgagee, and, where the mortgagor conveys mortgaged property to one who takes the property subject to the mortgage, the grantee assumes no liability for the obligation secured by the mortgage).

<sup>14</sup> *In re Saber*, 233 B.R. 547, 553 (Bankr. S.D. Fla. 1999); *See also Begier v. Internal Revenue Service*, 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) (ordinary trust); *United States v. Petersen Sand & Gravel, Inc.*, 806 F.Supp. 1346, 1359 (N.D.Ill.1992) (Illinois Land Trust).

<sup>15</sup> Doc. No. 25.

5. The confirmation hearing previously scheduled for October 7, 2014, is continued until 10:30 a.m. on November 13, 2014. The Chapter 13 Trustee is directed to renote the continued confirmation hearing.

DONE AND ORDERED in Orlando, Florida, on September 5, 2014.



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KAREN S. JENNEMANN  
Chief United States Bankruptcy Judge

The Clerk is directed to serve a copy of this order on all interested parties.