

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re: Case No. 9:08-bk-12383-FMD
Chapter 13

Rowland T. Townsend and
Lisa A. Townsend,

Debtors.

**ORDER DENYING
MOTION TO REOPEN
BANKRUPTCY CASE AND
TO COMPEL DEBTORS TO
COMPLY WITH INTENTION TO
SURRENDER REAL PROPERTY**

THIS CASE came on for consideration, without a hearing, of the *Motion to Re-open Bankruptcy Case, to Compel Debtors to Comply with Intention to Surrender Real Property, and for Other Relief, and Incorporated Memorandum of Law* (Doc. No. 63) (the “Motion”) filed by Bank of America, N.A. (the “Bank”). The Motion asserts that Debtors, despite having elected in their Chapter 13 Plan to surrender certain real property (the “Property”) to the mortgage holder (the Bank), have continued, together with a non-debtor third party to whom Debtors allegedly transferred the Property, to vigorously defend against the Bank’s foreclosure suit in state court.

The record reflects that Debtors filed their Chapter 13 case on August 16, 2008.¹ Debtors’ Chapter 13 Plan proposed to surrender the Property to the Bank. But the surrender provision of the Plan also stated that “[n]othing herein is intended . . . to abrogate Debtor’s state law contract rights.”² The Plan was confirmed in April 2009.³ Debtors completed all payments under the Plan, and their discharge was entered on April 24, 2014.⁴ The docket in the state court foreclosure

action indicates that the Bank filed its foreclosure complaint on March 26, 2014.⁵

Over one year after Debtors received their discharge and their bankruptcy case was closed, the Bank seeks to reopen Debtors’ bankruptcy case and asks this Court to find that Debtors and the alleged third-party purchaser of the property (over whom this Court has no jurisdiction) are estopped from defending the state court foreclosure case and to compel them to withdraw all pleadings and papers in the foreclosure case and to dismiss a pending appeal.

The Bank relies on a line of cases published in 2014 and 2015.⁶ In *Metzler*, the bankruptcy court addressed what it referred to as the “relatively novel question” of how a debtor is to surrender real property in bankruptcy. The court determined that by actively opposing the state court foreclosure actions, a Chapter 7 debtor and a Chapter 13 debtor had failed to “surrender” their property.⁷ In *Plummer*, the bankruptcy court found that a Chapter 7 debtor who intended to surrender his property to the secured lender was not required to execute a deed in favor of the lender.⁸ And in *Failla*, the bankruptcy court held that the “[d]ebtors’ active defense of the foreclosure action in the State Court does not comport with the definition of ‘surrender’ for purposes of the Bankruptcy Code.”⁹

But the courts in *Metzler*, *Plummer*, and *Failla* did not address the legal effect of the specific language included in the Debtors’ Plan: “[n]othing herein is intended . . . to abrogate Debtor’s state law contract rights.”¹⁰ Debtors’ defense of the state court foreclosure action—a foreclosure case that the Bank did not initiate until

¹ Doc. No. 1.

² Doc. No. 2, p. 3, § G.

³ Doc. No. 38.

⁴ Doc. Nos. 54, 61.

⁵ Doc. No. 63, p. 18.

⁶ *In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla. 2015), *In re Plummer*, 513 B.R. 135 (Bankr. M.D. Fla. 2014), and *In re Failla*, 529 B.R. 786 (S.D. Fla. 2014). (Note: although the Westlaw citation to *Failla* indicates that it is a decision of the district court, it was rendered by the Chief Judge of the Bankruptcy Court for the Southern District of Florida, not by the district court.)

⁷ *Metzler*, 530 B.R. at 896.

⁸ *Plummer*, 513 B.R. at 144.

⁹ *Failla*, 529 B.R. at 793.

¹⁰ Doc. No. 2, p. 3, § G.

nearly six years after Debtors filed their Plan—is consistent with their reservation of their state law contract rights. And, the rationale of *Metzler*, *Plummer*, and *Failla*—with which this Court concurs—should not be applied retroactively to a case filed in 2008.

Accordingly, it is

ORDERED that the Motion is DENIED.

DATED: September 1, 2015.

/s/ Caryl E. Delano

Caryl E. Delano
United States Bankruptcy Judge

The Clerk's Office is directed to serve a copy of this Order on interested parties via CM/ECF.