

ORDERED.

Dated: March 08, 2018



Karen S. Jennemann  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
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In re	)	
	)	
ALLEN DANIEL HOLLAND,	)	Case No. 6:13-bk-14751-KSJ
	)	Chapter 13
Debtor.	)	
_____	)	

**ORDER GRANTING CREDITOR'S  
MOTION TO REOPEN AND COMPEL SURRENDER**

This case came before the Court for consideration of the Amended Motion by PNC Bank, N.A. to Compel Surrender of Property and for Sanctions.<sup>1</sup> Debtor failed to file any written opposition to the Motion but argued against PNC's requests in open court. The Motion is granted.

No facts are in dispute. In 2007, Debtor executed a promissory note and mortgage to purchase a home in Orlando, Florida.<sup>2</sup> Debtor filed this Chapter 13 case in 2013.<sup>3</sup> Debtor amended his Chapter 13 plan when he could no longer afford the mortgage payments and voluntarily chose

<sup>1</sup> Doc. Nos. 89, 112. (the "Motion"). The Court will refer to the creditor as PNC.

<sup>2</sup> The property address is: 3610 West Columbia Street, Orlando, Florida 32805 (the "Property"). Doc. No. 16-1, pp. 1-3 in Case No. 6:17-bk-04503-KSJ is the promissory note executed by the Debtor on January 30, 2007. Doc. No. 16-1, pp. 4-11 in Case No. 6:17-bk-04503-KSJ is the mortgage executed by the Debtor on January 30, 2007.

<sup>3</sup> Doc. No. 1, filed on December 4, 2013.

to surrender the Property.<sup>4</sup> PNC then asked for, and the Court granted, stay relief on the Property.<sup>5</sup> Debtor stopped making mortgage payments to PNC, and PNC promptly filed a foreclosure action.<sup>6</sup> Debtor opposed PNC's foreclosure action from the start, primarily making arguments about the service of the foreclosure complaint and raising issues of jurisdiction.<sup>7</sup> Debtor made all other payments and received a Chapter 13 discharge in 2017.<sup>8</sup>

Debtor then changed his mind about surrendering his interest in the home secured by PNC's mortgage. Debtor filed a new Chapter 13 case a few months after receiving his discharge.<sup>9</sup> In the Debtor's new case, he proposes to pay PNC's claim in full.<sup>10</sup> PNC moved for dismissal of the new case, or in the alternative, for stay relief, which the Court will address by separate order.

But, in this case, PNC seeks to reopen this case and to compel the Debtor to drop his foreclosure defenses consistent with his stated intent to surrender the Property.<sup>11</sup> Debtor argues his newest Chapter 13 plan proposes to pay PNC in full and that the Debtor is entitled to change his mind and keep his home.

Section 350(b) of the Bankruptcy Code<sup>12</sup> allows a bankruptcy court to reopen a case for "cause."<sup>13</sup> Bankruptcy courts use their discretion to determine whether the moving party<sup>14</sup> has demonstrated sufficient cause to reopen the case based on the circumstances and equities of the

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<sup>4</sup> Doc. Nos. 69, 71.

<sup>5</sup> Doc. Nos. 73, 75. The Order Granting Relief from Stay was entered on April 1, 2016.

<sup>6</sup> Case No. 2016-CA-33851-O in the Ninth Judicial Circuit Court, Orange County, Florida.

<sup>7</sup> PNC's Exhs. C-F. See also Doc. No. 112 and related exhibits.

<sup>8</sup> Doc. No. 97, entered May 23, 2017.

<sup>9</sup> Case No. 6:17-bk-04503-KSJ, filed July 6, 2017.

<sup>10</sup> Doc. Nos. 2, 30, 38 in Case No. 6:17-bk-04503-KSJ.

<sup>11</sup> Doc. Nos. 89, 112.

<sup>12</sup> References to the Bankruptcy Code refer to 11 U.S.C. § 101 *et seq.*

<sup>13</sup> Section 350 of the Code provides "(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case. (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."

<sup>14</sup> *In re Winburn*, 196 B.R. 894, 897 (Bankr. N.D. Fla. 1996) (The moving party has the burden of proof to demonstrate cause sufficient to reopen a bankruptcy case.)

case.<sup>15</sup> The decision to reopen a long closed bankruptcy case rests on a balancing test weighing the benefits and prejudices to the creditors and the debtors as well as many other equitable factors.<sup>16</sup>

The Eleventh Circuit Court of Appeals in *Failla*<sup>17</sup> recently addressed the issue of possible relief to grant a creditor when a debtor fails to perform his intent to surrender property in a Chapter 7 case. The Faillas owned a home, filed a Chapter 7 bankruptcy case, indicated they intended to surrender the home, and got a discharge. Yet, post-bankruptcy, they continued to fight their lender's foreclosure action. The Eleventh Circuit concluded that when a debtor says they intend to surrender property they must surrender it to *both* the trustee and to the creditor<sup>18</sup> and that "surrender" necessarily prohibits a debtor from contesting a foreclosure action post-bankruptcy.<sup>19</sup> The Eleventh Circuit affirmed the Bankruptcy Court's order under § 105 directing the Faillas to stop contesting the pending state court foreclosure action. When a debtor says he will surrender his home and then continues to fight a foreclosure action, in most cases, the appropriate remedy is for the bankruptcy court to squelch the debtor's defenses.<sup>20</sup>

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<sup>15</sup> *Mohorne v. Beal Bank*, S.S.B., 419 B.R. 488, 493 (S.D. Fla. 2009).

<sup>16</sup> *In re Apex Oil Co., Inc.*, 406 F.3d 538, 542 (8th Cir. 2005); *In re Shondel*, 950 F.2d 1301, 1304 (7th Cir. 1991).

<sup>17</sup> *Failla v. Citibank, N.A. (In re Failla)*, 838 F.3d 1170 (11th Cir. 2016).

<sup>18</sup> *Id.* at 1175.

<sup>19</sup> *Id.* at 1177.

<sup>20</sup> The general rule is that debtors who declare an intent to surrender a home in a bankruptcy case forfeit their defenses in pending state court foreclosure proceedings. *In re Failla*, 838 F.3d at 1179. Exceptions, however, exist to this general rule. *See, e.g., In re Kurzban*, No. 09-30656, 2017 WL 3141915, at \*1 (Bankr. S.D. Fla. July 24, 2017) (Bankr. S.D. Fla. 2017) (Creditor filed two foreclosure actions, attempted to modify the debt, and waited seven years to ask the Bankruptcy Court to compel surrender. Bankruptcy Judge Isicoff held, "A debtor's decision to surrender may be binding in a foreclosure action pending, or ripe for filing, at the time of the bankruptcy case in which the intent to surrender is made, but it certainly is not binding in a subsequent foreclosure action, which action, under applicable non-bankruptcy law, can only relate to defaults that did not even exist at the time the decision to surrender was made."); *In re Ayala*, 568 B.R. 870 (Bankr. M.D. Fla. 2017) (Creditor accepted mortgage payments post-petition and waited five years to ask the Bankruptcy Court to force the debtors to stop contesting the pending foreclosure action.); *In re Guerra*, 544 B.R. 707 (Bankr. M.D. Fla. 2016) (In a case decided shortly before *Failla*, Chief Bankruptcy Judge Williamson held that the state court was better able to resolve the dispute when a creditor allowed years to pass between the time a debtor indicates an intent to surrender and the time the debtor opposes a state court foreclosure.).

In *Failla*, the Eleventh Circuit affirmed the bankruptcy court's use of § 105(a) of the Bankruptcy Code, which gives me discretion to enter any order "necessary or appropriate to carry out the provisions of this title" and the "broad authority...to take any action that is necessary or appropriate 'to prevent an abuse of process.'"<sup>21</sup> Section 105 allows bankruptcy courts to fashion flexible remedies to implement bankruptcy laws. For example, in some cases, courts will dismiss a case thereby denying the debtor a discharge or merely lift the automatic stay.<sup>22</sup> The power granted to bankruptcy courts under § 105 is to use their discretion guardedly fashioning an appropriate remedy that preserves the integrity of the bankruptcy system but does not overreach.

Here, because a Statement of Intention was not required, the *Failla* analysis under §§ 105 and 521 is persuasive but does not control. *Failla* is tangentially related and analogous, but not exactly on point. The issue here is whether the Debtor can promise one thing in this case (i.e. he will surrender the Property), get a discharge, lure PNC to prosecute a foreclosure, defend the foreclosure, and *then* change his mind by filing a later Chapter 13 case.

Bankruptcy Courts in the Southern District of Florida have extended the reasoning of *Failla* to Chapter 13 cases. Bankruptcy Judge Ray in *In re Scott* found a debtor's continued opposition to a state foreclosure action violated that debtor's confirmed Chapter 13 plan that provided for the surrender of the same property.<sup>23</sup> The Court noted Chapter 13 plans provide for disposition of property that debtors own including whether debtors will surrender property.<sup>24</sup> Section 1327(a) of the Code provides that confirmed Chapter 13 plans bind each creditor and debtors to the terms

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<sup>21</sup> *In re Failla*, 838 F.3d at 1179 (citing *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007)).

<sup>22</sup> *See, e.g., In re Scott*, No. 14-38122-BKC-RBR, 2017 WL 2802714, at \*2 (Bankr. S.D. Fla. June 26, 2017) (dismissing a debtor's case under § 105 with a prejudice period of one year and without a discharge as a sanction); *In re Brown*, No. 17-10021-KKS, 2017 WL 3493101, at \*12 (Bankr. N.D. Fla. Apr. 19, 2017) (using § 105 to dismiss a debtor's case with prejudice and grant prospective relief against a property to "prevent a further abuse of process by the party who master-minded" an abusive scheme).

<sup>23</sup> *In re Scott*, 567 B.R. 847 (Bankr. S.D. Fla. 2017).

<sup>24</sup> *Id.* at 851.

outlined in those plans.<sup>25</sup> Judge Ray found the debtor's opposition to the foreclosure action an abuse of the bankruptcy process and commanded the debtor to comply with the stated intention to surrender the property (which included ceasing all opposition to the state court foreclosure action).<sup>26</sup> In a case issued before *Failla*, Bankruptcy Judge Mark in *In re Lapeyre* ordered two chapter 13 debtors to withdraw their foreclosure defenses and dismiss their counterclaim when the debtors' confirmed Chapter 13 plan provided for the surrender of the real property at issue in the foreclosure case.<sup>27</sup> Continued opposition to a foreclosure case related to the same real property was a "breach of the [d]ebtors' obligations under the [Chapter 13 plan and] a violation of the [c]onfirmation [o]rder."<sup>28</sup>

In the Middle District, pre-*Failla*, Chief Bankruptcy Judge Williamson discussed surrender in the context of a Chapter 13 plan in *In re Metzler*.<sup>29</sup> In *Metzler*, the debtor took overt acts to prevent the bank from foreclosing its mortgage,<sup>30</sup> but the debtor plainly chose to surrender the property subject to the mortgage in her Chapter 13 plan.<sup>31</sup> Chief Judge Williamson concluded that surrender must mean something, even in a Chapter 13 case.<sup>32</sup> Under § 1325 of the Code, the Court reasoned that "surrender" means a debtor has to relinquish the secured property and make that property available to the secured creditor "by refraining from taking any overt act that impedes a secured creditor's ability to foreclose its interest."<sup>33</sup> After *Metzler*, Chief Judge Williamson discussed part of the Court's rationale behind that decision in *In re Guerra*.<sup>34</sup> The Court noted that

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<sup>25</sup> *Id.* at 851 (citing 11 U.S.C. § 1327(a)).

<sup>26</sup> *Id.* at 852.

<sup>27</sup> *In re Lapeyre*, 544 B.R. 719, 723 (Bankr. S.D. Fla. 2016).

<sup>28</sup> *Id.* at 722.

<sup>29</sup> *In re Metzler*, 530 B.R. 894 (Bankr. M.D. Fla. 2015).

<sup>30</sup> *Id.* at 899.

<sup>31</sup> *Id.* at 896. Chief Judge Williamson's opinion in *Metzler* discusses one Chapter 13 case and one Chapter 7 case. The Court focused on the facts of the Chapter 13 case.

<sup>32</sup> *Id.* at 900.

<sup>33</sup> *Id.*

<sup>34</sup> *In re Guerra*, 544 B.R. 707, 709 (Bankr. M.D. Fla. 2016).

part of what went unstated in the *Metzler* decision was “the short time between the time the debtors received the relief they sought in bankruptcy, on the one hand, and opposed foreclosure contrary to their statement of intentions, on the other hand.”<sup>35</sup> This led the Court to infer that the debtor in *Metzler* had no intention of surrendering the property and that the debtor had misled the Court.<sup>36</sup>

Somewhat like the choices presented to a Chapter 7 debtor who owns property, § 1325 of the Code gives debtors three options for the treatment of secured creditors in a plan: (1) obtain approval of the plan by the secured creditor; (2) surrender the collateral to the secured creditor; or (3) the “cramdown option.”<sup>37</sup> In his Amended Chapter 13 Plan, the Debtor chose the second option, confirmed a plan, and received a discharge based on the terms in the confirmed plan, which required him to surrender his home to PNC. Like Chief Judge Williamson noted in *Metzler*, surrender must mean something in a Chapter 13 case.

After weighing the benefits and prejudices to the Debtor and PNC, the Court concludes sufficient cause exists to reopen this bankruptcy case for the limited purpose of granting PNC’s Motion. Debtor made a conscious choice to surrender the Property in this bankruptcy case but continued to oppose PNC’s foreclosure efforts. Opposing foreclosure entirely contradicts the Debtor’s Amended Chapter 13 plan and my confirmation order. Debtor forfeited his right to change his mind by filing a new Chapter 13 case. His actions to delay PNC’s foreclosure action until he received a discharge in this earlier Chapter 13 case is an abuse of the bankruptcy process and is not condoned. The Court has the authority under § 105 to compel the Debtor to follow through with the requirement to surrender his home to PNC, especially given the timing of the earlier discharge and the later filed Chapter 13 case. Much like Chief Judge Williamson noted in

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *In re Robinson*, 338 B.R. 70, 72-73 (Bankr. W.D. Mo. 2006). *See also In re Metzler*, 530 B.R. at 898 (discussing three options).

*Guerra*, the Court finds the Debtor here had no intention of surrendering the Property and has misled the Court and PNC. Debtor achieved the bankruptcy outcomes he wanted in the first case (a confirmed plan and a discharge) and shortly thereafter sought to change course in the second case. Like the bankruptcy court in *Failla* that ordered the debtors to stop contesting the foreclosure sale after they chose the surrender option and received their Chapter 7 discharge, the Court will order the Debtor to follow through on his surrender option and cease defense of the foreclosure action. The Court will grant PNC stay relief in the Debtor's new case to proceed with its foreclosure action.

Accordingly, it is

**ORDERED:**

1. PNC's Motion is **GRANTED**.
2. Debtor is compelled to surrender the Property.
3. Under § 105 of the Bankruptcy Code, the Debtor is directed to withdraw any defenses or answer in the foreclosure action and cease all discovery in the foreclosure action.
4. The Clerk is directed to close the case.
5. The Court reserves jurisdiction to hold the Debtor in contempt and to impose further sanctions if the Debtor fails to promptly comply with the Court's order.

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