

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	)	
	)	
EDIBERTO SEGUINOT and DAMARIS	)	Case No. 6:10-bk-05336-KSJ
SEGUINOT,	)	Chapter 7
	)	
Debtors.	)	
	)	

**ORDER GRANTING MOTION TO REOPEN AND COMPEL SURRENDER**

This case came before the Court for a trial on the Motion by U.S. Bank to Reopen Chapter 7 Case, to Compel Surrender, and for Sanctions.<sup>1</sup> Debtors opposed the Motion at the hearing but filed no written opposition. The Motion is granted.

No facts are disputed. In 2006, the Debtors executed a promissory note and mortgage to purchase a house in Kissimmee, Florida.<sup>2</sup> Debtors filed this Chapter 7 bankruptcy case in 2010.<sup>3</sup>

<sup>1</sup> Doc. No. 24 (the "Motion"). The creditor's complete name is U.S. Bank National Association, not in its individual capacity but solely as Trustee for the RMAC Trust, Series 2016-CTT. The Court will refer to creditor as U.S. Bank.

<sup>2</sup> The property address is 1350 Woodcrest Blvd, Kissimmee, Florida, 34744 (the "Property"). Doc. No. 24-, pp. 2-4 is the promissory note executed by Mr. Seguinot on July 21, 2006. Doc. No. 24-1 is the mortgage executed by Mr. and Mrs. Seguinot on July 21, 2006. The mortgage has been assigned over the years. The most recent assignment to U.S. Bank occurred on June 2, 2016. Doc. No. 24-1, p 21. A corrective assignment was executed on July 7, 2017. Doc. No. 24-1, pp. 22-23.

<sup>3</sup> Doc. No. 1 is the bankruptcy petition and was filed on March 31, 2010.

In their statement of intentions, the Debtors elected to surrender the Property.<sup>4</sup> U.S. Bank's predecessor in interest moved for, and the Court granted, stay relief on the Property.<sup>5</sup> Debtors then received their Chapter 7 discharge.<sup>6</sup> The parties agreed that the Debtors were not current on the mortgage payments at the time of the bankruptcy and have not made a mortgage payment since March 2010. Due to nonpayment, a foreclosure complaint was filed in 2014.<sup>7</sup> Debtors asserted several affirmative defenses in the foreclosure action.<sup>8</sup>

Debtors argue that the affirmative defenses in the foreclosure action relate to post-discharge defenses and post-petition actions of the creditors. U.S. Bank argues the Debtors may not oppose foreclosure because they surrendered the property during the bankruptcy case. U.S. Bank now seeks to reopen this case to compel the Debtors to perform their stated intentions to surrender the home.

Section 350(b) of the Bankruptcy Code<sup>9</sup> allows a bankruptcy court to reopen a case for "cause."<sup>10</sup> Bankruptcy courts use their discretion to determine whether the moving party<sup>11</sup> has demonstrated sufficient cause to reopen the case based on the circumstances and equities of the case.<sup>12</sup> The decision to reopen a 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>13</sup>

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<sup>4</sup> Doc. No. 1, p. 37.

<sup>5</sup> Doc. Nos. 11, 14. The Order Granting Motion for Relief from Stay was entered on May 19, 2010.

<sup>6</sup> Doc. No. 19, entered July 20, 2010.

<sup>7</sup> Doc. No. 24-2, p. 5. Case No. 2014-CA-002734-MF in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida.

<sup>8</sup> Doc. No. 24-2, pp. 6-22.

<sup>9</sup> References to the Bankruptcy Code refer to 11 U.S.C. § 101 *et seq.*

<sup>10</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>11</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.)

<sup>12</sup> *Mohorne v. Beal Bank*, S.S.B., 419 B.R. 488, 493 (S.D. Fla. 2009).

<sup>13</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).

Under § 521(a)(2)(A) of the Bankruptcy Code, a Chapter 7 debtor who owes money to a secured creditor with a lien must decide whether they want to surrender the property secured by a lien or, if they would like to retain the property, whether they want to reaffirm or redeem the debt.<sup>14</sup> Debtors must choose one of these three options.<sup>15</sup> Here, the Debtors surrendered the Property.

The Eleventh Circuit Court of Appeals in *Failla*<sup>16</sup> recently addressed the issue of possible relief to grant a creditor when a debtor fails to perform his intent to *surrender* property. 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, just as in this case, 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>17</sup> and that "surrender" necessarily prohibits a debtor from contesting a foreclosure action post-bankruptcy.<sup>18</sup>

The authority of bankruptcy courts to craft appropriate remedies when debtors fail to perform their intentions under § 521(a)(2) is found in § 105(a) of the Bankruptcy Code giving bankruptcy courts the 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>19</sup> The Eleventh Circuit then affirmed the Bankruptcy Court's order directing the Faillas to stop contesting the pending state court foreclosure action. The power granted to bankruptcy courts under § 105 is to use their discretion guardedly fashioning

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<sup>14</sup> Debtors make this election in the Statement of Intentions filed in every Chapter 7 bankruptcy case. Section 521(a)(2)(A) provides: "[I]f an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—(A) ...[the debtor] shall file... a statement of his intention with respect to the retention or surrender of such property and... that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property."

<sup>15</sup> *Taylor v. Age Federal Credit Union (In re Taylor)*, 3 F.3d 1512 (11th Cir. 1993).

<sup>16</sup> *Failla v. Citibank, N.A. (In re Failla)*, 838 F.3d 1170 (11th Cir. 2016).

<sup>17</sup> *Id.* at 1175.

<sup>18</sup> *Id.* at 1177.

<sup>19</sup> *Id.* at 1179 (citing *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007)).

an appropriate remedy that preserves the integrity of the bankruptcy system but does not overreach.<sup>20</sup> 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. The debtor is doing the exact opposite of what he promised.

After weighing the benefits and prejudices to the Debtors and U.S. Bank, the Court concludes sufficient cause exists to reopen this bankruptcy case for the limited purpose of granting U.S. Bank's Motion. Debtors have not made a mortgage payment since 2010. They elected to surrender the Property in this Chapter 7 case but then continued to oppose PNC's foreclosure action. Opposing foreclosure entirely contradicts the Debtors' stated intention. They are seeking an impermissible "head start," not the fresh start they are entitled to receive. Here, the Debtors have lived for free in a home they should have surrendered years ago.

Accordingly, it is

**ORDERED:**

1. U.S. Bank's Motion is **GRANTED**.
2. Debtors are compelled to surrender the Property.
3. Under § 105 of the Bankruptcy Code, the Debtors are directed to withdraw any defenses or answer in the foreclosure action and cease all opposition in the foreclosure action.
4. The Clerk is directed to re-close the case.

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<sup>20</sup> Section 105 of the Bankruptcy Code 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. *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).

5. The Court reserves jurisdiction to hold the Debtors in contempt and to impose further sanctions if the Debtors fail 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.