

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

In re)	
)	
CAROL LAYE GOAD)	Case No. 94-20250
)	Chapter 13
)	
Debtor)	

M E M O R A N D U M

This matter came before the court for hearing on June 6, 1994, upon the motion for relief from the automatic stay filed by First American National Bank ("Bank"), on April 29, 1994, and the objection thereto filed by the debtor, Carol Laye Goad, on May 9, 1994. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(G).

I.

The facts of this case are largely undisputed. The debtor filed her petition for relief under Chapter 13 on February 23, 1994. At the time of the filing, the debtor was indebted to the Bank as evidenced by three promissory notes which notes are secured by deeds of trust on three parcels of real property. The Bank's motion for relief from the automatic stay asserts that the debtor is in default under all three of the notes and requests that the stay be lifted with respect to the three parcels of real property so that the Bank may proceed with foreclosure proceedings, which were commenced prior to the bankruptcy filing. At a preliminary hearing on

the motion on May 17, 1994, the parties announced that with respect to one of the parcels of property, the 3.92 acre tract in Hawkins County, Tennessee, the parties agree that the stay should be lifted, the debtor having provided in her Chapter 13 plan filed February 23, 1994, that the property would be surrendered. The final hearing on June 6, 1994, was held with respect to the Bank's request that the stay be lifted with respect to the remaining two parcels of real property, which the debtor disputes.

The evidence establishes that the Bank holds a properly perfected first deed of trust on the principal residence of the debtor located at 3541 Fort Henry Drive in Kingsport, Tennessee. An officer of the Bank, Darrell Broadwater, testified that the current payoff on the Fort Henry property is \$46,156.39 which sum includes six monthly payments in arrears of \$3,092.34. A real estate appraiser, J. D. Overbay, testified that the property was worth \$85,700.00 and the debtor testified that in her opinion the property, if sold, would bring between \$80,000.00 and \$85,000.00.

The Bank also holds a properly perfected first deed of trust on the house and lot located at 157 West Sevier Avenue, Kingsport, Tennessee, which property was given as security for a loan to debtor and her husband at the time, David Goad, on September 21, 1987, in the amount of \$48,000.00. Subsequent to the Bank obtaining a mortgage on the property, the Debtor and her husband, unbeknownst to the Bank, sold the 157 West

Sevier Avenue property to James and Rhonda Albright for \$56,000.00 on August 3, 1992. The Debtor received \$2,500.00 in cash from the sale and the Albrights executed a promissory note to the debtor for the balance with the sale being subject to the first mortgage of the Bank. Thereafter, the debtor continued to make the monthly payment to the Bank out of the Albrights' monthly payment to her. However, at the time of the bankruptcy filing, the debtor was five months behind in her payments on this property for a total arrearage of \$1,566.45. The debtor testified that this property is presently worth \$61,500.00 and the parties agree that the current payoff is \$41,851.77.

The debtor proposes in her Chapter 13 plan to cure the defaults on the two notes and then make maintenance payments throughout the life of the plan at the contract amounts. The arrearages totaling \$4,658.79 are to be cured with the proceeds from the sale of debtor's real property located at 609 Branch Street, Kingsport, Tennessee. The debtor testified that after payment of liens and costs of sale, she would receive in excess of \$9,900.00 from the sale of the property which sum would be turned over to the Chapter 13 trustee for immediate payment of all arrearages owed to the Bank with any remaining sums to be distributed to creditors in accordance with the terms of the plan. A motion to sell the Branch Street property was filed by the debtor on May 9, 1994, and was approved by the court after hearing on June 6, 1994. The

debtor testified that the closing on the sale would be held on the afternoon of June 6, 1994.

The Bank maintains that the debtor's sale of the West Sevier Avenue property to the Albrights without the Bank's prior consent violated the terms of its deed of trust and establishes that the debtor is not acting in good faith with respect to the Bank. The Bank asserts that its interests in the parcels of real property are not adequately protected, and that the debtor's sale of the property and her failure to remit to the Bank the proceeds from the sale constitute good cause for the lifting of the stay.

The debtor denies that cause exists for the lifting of the stay and asserts that all times she has acted in good faith. She maintains that the deed of trust contains no prohibition on sale, and that even if there were, she is an unsophisticated businesswoman who did not understand the terms of the deed of trust and did not realize that her actions were wrongful. The debtor testified that an attorney and a realtor handled the sale for her and neither advised her that the sale violated the Bank's deed of trust. The debtor further maintains that the bank is adequately protected because the properties are insured and all property taxes have been paid, the arrearages under the notes will be immediately cured from the proceeds of the Branch Street property, there are sufficient equity cushions in the properties to adequately protect the Bank's interests and the Bank will be adequately

protected because it will receive its contract payments during the life of the plan from the Chapter 13 trustee out of the debtor's plan payments. The court agrees.

II.

11 U.S.C. § 362(d) provides in part the following:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest¹;....

The provision in the deed of trust which the Bank maintains the debtor violated when she sold the property without the Bank's consent is paragraph number 17 of the deed of trust which provides in part the following:

17. **Transfer of the Property or a Beneficial Interest in Borrower.** If all or any part of the Property or any interest in it is sold or

¹The Bank initially alleged in its motion that the stay should be lifted with respect to the property located at 157 West Sevier Avenue based on the provisions of 11 U.S.C. § 362(d)(2) which provide that relief from the stay shall be granted if the debtor does not have equity in the property and the property is not necessary to the debtor's reorganization. The Bank asserted that because the debtor had sold the property she no longer had any interest in the property and therefore the property was not property of the estate. However, at the hearing on this matter, the Bank conceded that the debtor does have a property interest in the property because she holds a second mortgage deed of trust as security for the Albrights' indebtedness to the debtor. See *In re Patterson*, 143 B.R. 961, 963 (Bankr. M.D. Fla. 1992); *In re Capitol Mortgage and Loan, Inc.*, 35 B.R. 967, 970 (Bankr. E.D. Cal. 1983).

transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by the Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

The Bank admits that it never gave notice to the debtor of an acceleration of the loan. However, the Bank asserts that this is because it did not learn that the debtor had conveyed the property until the Bank conducted a title search on the property when the debtor filed for Chapter 13 relief.

The court concludes that the debtor's act of selling the property to the Albrights without the Bank's prior written consent was not a violation of the terms of the deed of trust. Contrary to the Bank's assertion, paragraph 17 of the deed of trust does not prohibit a transfer of the property without the Bank's prior written consent. Instead, the deed of trust merely states that if such a transfer occurs, the Bank has the option of accelerating the debt. Because the Bank did not exercise this option before the debtor filed her bankruptcy petition, the automatic stay of § 362 of the Bankruptcy Code precluded the Bank from exercising the option postpetition. The court does note that the Bank was at a disadvantage because it did not even have knowledge of the transfer until after the bankruptcy was filed and therefore was unable to accelerate the debt. However, not only does the deed of trust

not require that the debtor obtain the Bank's approval to any transfer of the property, it also does not require that the debtor give notice to the Bank of any transfer or that any proceeds from a transfer be remitted to the Bank. Accordingly, the debtor's sale of the property to the Albrights without the Bank's approval and her failure to remit the sale proceeds to the Bank provide no basis for the Bank's assertion that the Debtor has acted in bad faith.

As conceded by the debtor, the debtor is in default with respect to the payments required to be made under the terms of the lease; however, contrary to the Bank's assertions, a mere delinquency in note payments does not provide a basis for cause for a lifting of the automatic stay. See *In re Kerns*, 111 B.R. 777, 790 (S.D. Ind. 1990). Nor does the filing of bankruptcy immediately before foreclosure in and of itself establish bad faith. *Cann-Alta Properties, Inc.*, 87 B.R. 89 (Bankr. 9th Cir. 1988); *In re North Indianapolis Venture*, 113 B.R. 386, 389 (Bankr. S.D. Ohio 1990); EPSTEIN, NICKLES, WHITE, *Bankruptcy* § 3-29 p. 307 (1992). The Sixth Circuit Court of Appeals has held that the critical issue in ruling on whether a Chapter 13 has been filed in good faith is whether there is "a sincerely intended repayment of prepetition debt consistent with the debtor's available resources." *In re Barnett*, 964 F. 2d 588, 592 (6th Cir. 1992). Although the statement arose in the context of ruling on a motion to dismiss, the same principle is applicable to a motion for relief from stay where

a bad faith filing is alleged. In the present case, all the evidence establishes that the debtor sincerely intends to repay her debts through her Chapter 13 plan. The plan provides that the default in payments to the Bank will be immediately cured and the undisputed evidence is that the debtor has the means to cure this arrearage out of the proceeds from the sale of the Branch Street property. 11 U.S.C. § 1322(b)(5) states that a plan may provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending. Many Chapter 13 debtors like the debtor in this case take advantage of this provision and use Chapter 13 to cure a default and maintain payments on long term debts such as a mortgage debt on a residence. See EPSTEIN, NICKLES, WHITE, *Bankruptcy* § 9-17, p. 664 (1992). In fact, even if the Bank had had notice of the sale prior to the bankruptcy filing and had exercised its right to accelerate the note, debtor's plan may have provided for a curing of the default notwithstanding the acceleration. See *In re Glenn*, 760 F. 2d 1428 (6th Cir. 1985); 5 COLLIER ON BANKRUPTCY, paragraph 132.09, page 1322-27 (1992). Therefore, based on the evidence presented, this court is unable to conclude that the debtor has acted in bad faith or that cause exists for the lifting of the automatic stay.

In addition, there is no evidence that the Bank's interests are not adequately protected; the properties are insured, property taxes are current, all arrearages owed to

the Bank will be paid immediately and the Bank will receive its contract payments during the life of the plan. There are also substantial equity cushions in the properties to protect the Bank's secured positions and there is no evidence that the Bank's lien positions are eroding in excess of the contract payments. See *In re Colonial Center, Inc.* 156 B.R. 452, 460 (Bankr. E.D. Pa. 1993). Accordingly, the court finds no grounds for granting the Bank's motion.

The foregoing constitutes findings of fact and conclusions of the law pursuant to FED. R. BANKR. P. 7052. An appropriate order will be entered granting the Bank's motion for relief from the automatic stay with respect to the property located in Hawkins County, Tennessee and denying the motion with respect to the properties located at 3541 Fort Henry Drive, and 157 West Sevier Drive in Kingsport, Tennessee.

SO ORDERED.

ENTER: June 17, 1994

BY THE COURT

A handwritten signature in cursive script, reading "Marcia P. Parsons".

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE