

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

IN RE:)

CLEVELAND MONROE, JR.)
and BESSIE MONROE,)

Debtors.)

CLEVELAND MONROE, JR., and)
BESSIE MONROE,)

Appellants,)

v.)

FIRST FEDERAL SAVINGS AND LOAN)
ASSOCIATION OF LINCOLN,)

Appellee,)

CV. 84-0-328

BK. 84-0-057

MEMORANDUM OPINION

FILED	
DISTRICT OF NEBRASKA	
AT _____	M _____
MAR 1 1985	
William L. Olson, Clerk	
By _____	Deputy

This matter comes on for determination with reference to an appeal from an order of the bankruptcy court granting appellee's motion for relief from the automatic stay and dismissal of appellants' petition and plan under Chapter 13. After consideration of the briefs of the parties and the applicable law, the Court reverses the order of the bankruptcy court and remands for further proceedings.

The facts are these. Cleveland and Bessie Monroe (the Monroes) purchased a personal residence subject to a note and mortgage held by First Federal Savings and Loan Association of Lincoln (First Federal). The note contained an "acceleration clause" in which the entire principal and accrued interest would become due

and payable upon the Monroes' failure to make a timely installment payment. The Monroes defaulted and First Federal accelerated the note and mortgage.

First Federal filed a foreclosure action in the District Court for Douglas County and on November 21, 1983, that court entered a decree foreclosing the mortgage. On March 23, 1984, before the foreclosed property had been sold, the Monroes filed a petition and plan under Chapter 13 of the Bankruptcy Code. The plan indicated that the Monroes were \$6,659.74 in arrears on the property and that they proposed to pay First Federal \$2,000 upon confirmation of the plan and \$200 each month over the course of the plan until the arrearage was paid in full. At the same time, the Monroes would continue to make their regular monthly mortgage payments to First Federal.

First Federal filed a motion for relief from the stay (Filing No. 4) and an objection to the Monroes' plan (Filing No. 5). First Federal's objection was sustained (Filing No. 9) and its motion for relief from the stay was granted (Filing No. 10). The bankruptcy court did not prepare a written opinion but the parties agree that the basis of the bankruptcy court's decision was its conclusion that Section 1322(b) of the Bankruptcy Code does not permit a debtor to "cure" defaults of a mortgage loan and that once the debt was accelerated, the debtors' only option was to pay off the entire debt.

Section 1322(b) of the Bankruptcy Code sets forth rules governing a debtor's plan of reorganization:

(b) . . . [T]he plan may --

(2) Modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principle residence

(5) Notwithstanding Paragraph (2) of this subsection, provide for the curing of any default within a reasonable time
11 U.S.C. 1322(b) (Emphasis added).

Under Section 1322(b)(2), the plan may not "modify" the security interest in a debtor's principle residence. Under Section 1322(b)(5), however, the plan may "cure" any default of the debtor, including debts involving a debtors' principle residence. The operation and interrelationship of these two provisions is at the heart of the dispute here. The Monroes and First Federal agree that the concepts of "modify" and "cure" are distinct under the Bankruptcy Code. The Monroes assert, however, that the power to cure a default in a home mortgage carries with it the power to "de-accelerate" an accelerated mortgage. First Federal, on the other hand, argues that to allow the Monroes to de-accelerate a mortgage contract is an "impairment" of the parties' contract. First Federal argues that in the absence of express language to allow for an "impairment" of contractual rights, no de-acceleration of the accelerated mortgage contract is allowed.

The issue presented here has been specifically addressed by the Second, Fifth and Seventh Circuit Courts of Appeals. In re Taddeo, 685 F.2d 24 (2d Cir. 1982); Grubbs v. Houston First American Savings Ass'n, 730 F.2d 236 (5th Cir. 1984)(en banc); Matter of Clark, 738 F.2d 869 (7th Cir. 1984). These courts have unanimously

held that the power to "cure" a default on a home mortgage under Section 1322(b)(5) of the Bankruptcy Code includes the power of the debtor to "de-accelerate" an accelerated mortgage.

Despite the opinions in *Taddeo*, *Grubbs* and *Clark*, First Federal argues that Section 1124 of the Bankruptcy Code supports its position. Section 1124 provides in pertinent part:

[A] class of claims or interests is impaired under a plan unless . . . the plan

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment . . . after . . . default . . .

(A) cures any such default

11 U.S.C. § 1124(2)(A) (Emphasis added).

First Federal argues that the language of Section 1124 indicates that it was the express intent of Congress to allow the curing of a default under Chapter 11 and that if Congress had intended to allow modification or impairment of contractual rights under Chapter 13, it could have provided it as it did in Section 1124. This argument, however, was squarely rejected by the Second Circuit in *Taddeo*:

[Plaintiff] asserts that Congress explicitly gave corporate debtors the power to cure defaults without regard to acceleration by passing 11 U.S.C. § 1124(2), and concludes that the absence of similar language in § 1322(b) indicates that the Chapter 13 debtors cannot cure defaults unless they also cure acceleration

[This] rational[e] mistake[s] the import of § 1124. That section determines who has the right to vote on a Chapter 11 plan.

First Federal did not have the benefit of the Seventh Circuit opinion in Clark, and as a consequence, First Federal has sought to distinguish only Taddeo and Grubbs. First Federal argues that a final judgment of foreclosure had not been entered in either Taddeo or Grubbs as it had in the instant case. Moreover, First Federal argues that under Nebraska law the Monroes may "cure" a final judgment of foreclosure only upon payment of the entire balance due. Neb.Rev.Stat. 25-1530 (Reissue 1979).

First, under Nebraska law a mortgagor retains legal title and a substantial interest in mortgaged premises until confirmation of sale and execution of deed, and may redeem the premises after a final judgment of foreclosure at any time before order of confirmation of sale becomes final. Neb.Rev.Stat. 25-2145 (Reissue 1979); *United States National Bank of Omaha v. Pamp*, 83 F.2d 493 (8th Cir. 1936).

Second, these arguments by First Federal were specifically addressed and rejected by the Seventh Circuit in Clark under a similar statute in Wisconsin. The Clark court first noted:

Despite the judgment of foreclosure, Clarks still had an interest in the property at the time they filed their petition in bankruptcy Under Wisconsin law, a mortgagee has only a lien on the mortgaged property, even after judgment of foreclosure is entered. Neither equitable nor legal title passes until the foreclosure sale is held. . . .

The Clark court then went on to hold:

[W]e conclude that the power to "cure" a default provided by Section 1322(b)(5) permits a debtor to de-accelerate the payments under a note secured by residential property mortgage. And though the Chapter 13 petitions in both Grubbs and Taddeo were filed before judgment of foreclosure was entered, we

are not persuaded that the existence of such a judgment in the present case alters the results of those cases. As we have noted, in Wisconsin a judgment of foreclosure does nothing but judicially confirm the acceleration. *Id.* at 874.

Cf. *Skelly*, 38 B.R. 1000 (D.C. 1984).

A similar conclusion to that drawn in *Clark* may be made here. Similar to Wisconsin law, Nebraska law gives a mortgagor a substantial interest in foreclosed property, allowing him to redeem the same at any time prior to the confirmation of sale. Accordingly, the Monroes power to "cure" a default pursuant to Section 1322(b)(5) carries with it the power to "de-accelerate" payments under a residential property mortgage. The bankruptcy court order sustaining First Federal's objections to the Monroes plan and granting First Federal's motion for relief from the automatic stay must, therefore, be reversed. A separate order will be entered accordingly.

BY THE COURT:

Alben G. Atlas

JUDGE, UNITED STATES DISTRICT COURT