UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

PATRICIA A. OWENS — CASE NO. 02-63751

Debtor — Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion filed by John D. Frankis ("Mortgagee") on August 21, 2002, seeking relief from the automatic stay pursuant to § 362(d) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") in order to proceed with the foreclosure sale of real property located at 616 Maple Street, Endicott, New York (the "Premises"). Mortgagee also seeks a determination by this Court that a deed, dated November 2, 2001, transferring the Premises to Patricia A. Owens

("Debtor") is a nullity. Objection to the motion was filed by the Debtor on September 5, 2002.

The motion was heard at the Court's regular motion term in Binghamton, New York, on September 10, 2002. Following oral argument, the Court adjourned the motion to October 8, 2002, to allow the parties to submit memoranda of law. The motion was taken under submission for decision following the hearing on October 8, 2002.[1]

JURISDICTION

The Court has core jurisdiction over the parties and the subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334 and 157(a), (b)(1), and (b)(2)(A), (G) and (O).

FACTS

On December 6, 1982, the Mortgagee loaned the Debtor's parents, Edward and Mildred Owens, $11,000, secured by a note and mortgage on the Premises. *See* Mortgagee's Exhibits A and B. According to the terms of the note, the entire balance of principal and accrued interest was due and payable December 6, 1986. *See* Mortgagee's Exhibit A. It is alleged that the Mortgagee attempted to accommodate the Owens by accepting sporadic payments. *See* Mortgagee's Memorandum of Law, filed October 4, 2002, at 9. It is further alleged that sometime in 1990 Edward Owens died, leaving

[1] Pursuant to Code § 362(e), the Court finds that the 30 day period set forth therein has been waived by virtue of the adjournment of the motion, as well as the inclusion of other relief in the motion.

Mildred Owens ("M. Owens") as the sole owner of the Premises. According to the Mortgagee, a foreclosure action was commenced in 1991, which was stayed as a result of the filing of a voluntary petition in bankruptcy by M. Owens. Allegedly, the case was dismissed and no further action was taken by the Mortgagee to foreclose on his mortgage until 1998. On February 24, 1998, the Mortgagee filed a Notice of Pendency of Action and served a Summons and Complaint on M. Owens. *See* Mortgagee's Exhibits C, D and E. On May 12, 1998, the Mortgagee obtained a Judgment of Foreclosure and Sale in the amount of $26,407.26 from the New York State Supreme Court. *See* Mortgagee's Exhibit F. The sale of the Premises was scheduled for June 18, 1998. *See* Mortgagee's Exhibit G.

On June 11, 1998, one week prior to the scheduled sale, M. Owens again filed a voluntary petition pursuant to chapter 13. Her plan was confirmed on December 4, 1998. Approximately two years later on December 28, 2000, the chapter 13 trustee filed a motion to dismiss the case pursuant to Code § 1307(c). Originally scheduled to be heard on January 16, 2001, the motion was adjourned to February 13, 2001. On February 15, 2001, the Court signed a conditional order which provided that the case would be dismissed unless M. Owens made payment of $1,200 to the Trustee on or before March 9, 2001. M. Owens died on March 12, 2001, apparently without having made the payment. *See* Mortgagee's Exhibit I. An Order dismissing the case was signed on March 26, 2001, and the case was closed by Order dated June 14, 2001.

On October 18, 2001, the Debtor was appointed Executrix of her mother's estate. *See id.* Debtor, in her capacity as Executrix of the Last Will and Testament of M. Owens, transferred the Premises to herself, individually, by deed dated November 2, 2001. *See* Mortgagee's Exhibit L. On

November 16, 2001, by Order of the Honorable Patrick D. Monserrate, Justice, New York State Supreme Court, Debtor, in her capacity as Executrix, was substituted as party defendant in the foreclosure action commenced in 1998 against M. Owens. *See* Mortgagee's Exhibit K.

Mortgagee alleges that on or about May 13, 2002, a Notice of Sale was issued and served on the Debtor in the pending foreclosure matter, scheduling a sale of the Premises for June 21, 2002. On June 19, 2002, Debtor filed a voluntary petition, along with a proposed plan, pursuant to chapter 13 of the Code. She identifies the Premises as her residence. In her schedules, she lists the Mortgagee has having a secured claim of $30,163,39, She also identifies $13,178.59. in property taxes owed to the Broome County Department of Finance.

Debtor lists $1,324.14 in monthly income and $790.00 in monthly expenses. *See* Debtor's Schedules I and J. As pointed out by the Mortgagee, Debtor does not list any expenses connected with homeowner, health or automobile insurance. Nor does she include any expense for water and sewer or telephone or home maintenance. In her plan Debtor proposes monthly payments of $535 per month for 6 months, increasing to $650 per month for an additional 6 months, $825 for 24 months and $925 for the final 24 months. The plan proposes to pay the Mortgagee, as well as the Broome County Department of Finance, through the plan payments. Debtor also estimates a 10% dividend to unsecured creditors, whose claims total $8,306.10, according to Debtor's Schedule F.

ARGUMENTS

Initially, the Mortgagee argued that the transfer of the Premises to the Debtor was "a nullity as

a matter of law as the Notice of Pendency was duly filed in the Office of the Broome County Clerk on February 24, 1998." *See* Mortgagee's Motion at ¶ 26. The Mortgagee argues that the Debtor does not have a valid legal interest in the property since, at the time she executed the deed as Executrix of her mother's estate, she knew of the mortgage, lis pendens, and judgment of foreclosure. The Mortgagee also asserts that there is no privity of contract between him and the Debtor and, therefore, he is not a creditor of the Debtor whose claim can be treated in the Debtor's plan. Furthermore, the Mortgagee contends that the Debtor's petition was filed in bad faith solely to stay the pending foreclosure action. It is also the Mortgagee's position that the Debtor's plan, which provides for accelerated payments over 60 months, is not feasible.

DISCUSSION

In seeking relief from the automatic stay, Mortgagee initially argued that the deed transferring the Premises to the Debtor was a nullity as a matter of law based on his having filed a Notice of Pendency on February 24, 1998. Section 6501 of the New York Civil Practice Law and Rules ("NYCPLR") provides that "[a] person whose conveyance or incumbrance is recorded after the filing of the notice [of pendency] is bound by all proceedings taken in the action after such filing to the same extent as if he were a party." NYCPLR § 6501 (McKinney 1980 & Supp. 2002). However, NYCPLR § 6513 provides that a notice of pendency is effective for only three years unless an extension is sought within that period. In this case, there is no evidence that an extension was ever sought. In fact, in his Memorandum of Law, filed October 4, 2002, the Mortgagee seeks authority, albeit in a

procedurally defective manner, to file another *lis pendens*. The transfer of the Premises by deed dated November 2, 2001, occurred beyond the effective three year period, which lapsed on February 24, 2001. Additionally, the filing of a notice of pendency does not prevent the sale or transfer of the property. *See In re American Motor Club*, 109 B.R. 595, 597 (Bankr. E.D.N.Y. 1990). Accordingly, the deed was not a nullity, and the Debtor holds legal title to the Premises.

The question the Court must then address is whether the Debtor can repay the note and mortgage under her plan even though no privity of contract ever existed between her and the Mortgagee. In support of his position that he holds no "claim" against the Debtor's estate for which payment under the Debtor's plan can be made to cure the arrears, the Mortgagee refers the Court to several cases, including *In re Wilkinson*, 99 B.R. 366 (Bankr. N.D. Ohio 1989) and *In re Kelly*, 67 B.R. 508 (Bankr. S.D. Miss. 1986).

Both of those decisions were rendered prior to the United States Supreme Court's ruling in *Johnson v. Home State Bank (In re Johnson)*, 501 U.S. 78, 111 S.Ct. 2150,115 L.Ed.2d 66 (1991). *Johnson* involved a debtor that had filed a chapter 7 case, resulting in his receiving a discharge from all personal liability on his mortgage debt. Subsequently, he filed a chapter 13 and the critical issue before the Supreme Court was whether the mortgagee held a "claim" in the second case. *Johnson*, 501 U.S. at 79-81, 111 S.Ct. at 2151-53. The Supreme Court concluded that despite the debtor's discharge in the chapter 7 case, the mortgagee held a "claim" as defined by Code § 101(5). *Id.* at 84, 111 S.Ct. at 2154.

Since the issuance of the decision in *Johnson*, several courts "have applied it to situations in which a transferee-debtor who is not the original obligor under a mortgage, and who is without any

personal liability on the mortgage note, may still treat the claim of the mortgage arrears in a Chapter 13 plan." *In re Rutledge*, 208 B.R. 624, 628 (Bankr. E.D.N.Y. 1997), citing *In re Allston*, 206 B.R. 297 (Bankr. E.D.N.Y. 1997) and *In re Hutcherson*, 186 B.R. 546 (Bankr. N.D.Ga. 1995); *see also In re Wilcox*, 209 B.R. 181 (Bankr. E.D.N.Y. 1996); *In re Trapp*, 260 B.R. 267, 271 (Bankr. D.S.C. 2001) (finding that bank held a claim against the debtor's estate even though there was no privity between the bank and the debtor.).

In *Hutcherson*, the mortgagor was the debtor's mother. Prior to the filing of the petition, First National Bank of Griffin ("First National") had accelerated the underlying debt and begun foreclosure proceedings against the real property. The debtor's mother died, leaving the debtor with a 1/4 interest in the real property. The debtor filed a chapter 13 petition and proposed to pay First National through the plan. Relying on *Johnson v. Home State Bank*, the court in *Hutcherson* determined that it was bound to apply the Supreme Court's reasoning in *Johnson* although the matter before it did not involve a "Chapter 20."[2] *See Hutcherson*, 186 B.R. at 550. Accordingly, it found that First National held a "claim" against the debtor's estate which could be treated in the debtor's plan even though it had no right to seek recovery from the debtor personally. *Id.* The court in *Hutcherson* concluded that the debtor could modify First National's rights as part of his plan. *Id.* at 551.

The Mortgagee directs the Court's attention to *In re Kizelnick*, 190 B.R. 171 (Bankr. S.D.N.Y. 1995), which was also rendered subsequent to the *Johnson* decision. The court in *Kizelnick*

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[2] In a "Chapter 20" the debtor files a chapter 7, receiving a discharge from all personal liability on his/her mortgage debt. The mortgage itself survives the chapter 7 liquidation and in a subsequent chapter 13, the mortgagee holds a claim against the debtor's real property.

opined that "*Johnson* should be limited to its peculiar facts and should only govern the resolution of 'Chapter 20' cases involving a single mortgagor whose Chapter 13 bankruptcy is preceded by one under Chapter 7." *Id.* at 179. To hold otherwise, the court indicated "offend[s] traditional commercial and contract law precepts . . . ." *Id.* The court in *Kizelnick* concluded that the mortgagor's daughter, as a tenant on the mortgaged property with an alleged option to purchase, could not invoke the automatic stay to prevent the mortgagee from foreclosing. In distinguishing its holding from that of *Hutcherson* and *In re Lumpkin*, 144 B.R. 240 (Bankr. D. Conn. 1992), it noted that the debtor was not "a child to whom property was transferred by devise or quitclaim deed" and pointed out that no case law had been found "which would support standing based upon this extended relationship." *Kizelnick*, 190 B.R. at 179.

In the case *sub judice*, the Debtor owns the Premises on which the Mortgagee holds a lien and that property is property of the estate. This Court finds the conclusion reached in *Kizelnick* inapplicable to the facts of the matter herein. Accordingly, the Court concludes that the Debtor can repay the Frankis mortgage through her chapter 13 plan even though no privity of contract exists between her and the Mortgagee.

The fact that the mortgage in this case matured prepetition in 1986 does not alter the Court's conclusion. In 1994 Congress amended the Bankruptcy Code by adding Code § 1322(c)(2). Courts have found that "the 1994 Amendments express a particular concern that debtors be afforded opportunity to save their homes . . . ." *In re Nepil*, 206 B.R. 72, 77 (Bankr. D.N.J. 1997); *see also Wilcox*, 209 B.R. at 183-84 (agreeing with the reasoning of *In re Escue*, 184 B.R. 287 (Bankr. M.D. Tenn. 1995) and concluding that a chapter 13 debtor may cure a default on a mortgage that fully

matured prepetition); *In re Ibarra*, 235 B.R. 204, 211 (Bankr. D.Puerto Rico 1999) (reviewing case law following the Bankruptcy Reform Act of 1994 and concluding that Code § 1322(c)(2) allows a debtor to provide a creditor with payment on a matured mortgage obligation over the life of the chapter 13 plan).

The Court notes that there still remain outstanding issues as to whether the Debtor's petition and plan were filed in good faith and whether the proposed plan is feasible. These are both factual issues which are more appropriately addressed at the hearing on confirmation. At the hearing, the Debtor will have the burden to establish that she has the ability to make the required payments, while remaining current with her other postpetition obligations. With respect to the issue of good faith, the Court will have to examine the totality of circumstances. *See In re Cornelius*, 195 B.R. 831, 836 (Bankr. N.D.N.Y. 1995). The fact that the Debtor filed her petition on the eve of foreclosure is only one such factor to be considered in this regard. *Id.* If the Mortgagee believes it has evidence to support a finding of bad faith, it may file an objection to confirmation of the Debtor's plan setting forth the basis for its assertion of bad faith, as well as lack of feasibility.

Based on the foregoing, it is hereby

ORDERED that the Mortgagee's motion for an Order vacating the automatic stay is denied based on his failure to demonstrate cause pursuant to Code § 362(d)(1) and that Mortgagee's request to declare the deed, dated November 2, 2001, a nullity is likewise denied, and it is further

ORDERED that Debtor's chapter 13 Plan be added to the confirmation calendar of this Court to be held at the U.S. Courthouse, Binghamton, New York, on February 11, 2003, at 1:00 p.m.

Dated at Utica, New York

this 29th day of January 2003

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge