UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

PATRICIA E. MOORE,

Debtor.
_____/

Case No. DG 14-04745
Chapter 13
Hon. Scott W. Dales

MEMORANDUM OF DECISION AND ORDER

PRESENT: HONORABLE SCOTT W. DALES
Chief United States Bankruptcy Judge

I. INTRODUCTION

In an earlier chapter 7 proceeding, Ronald and Patricia Moore each obtained a discharge in 2011 without reaffirming their debt to Commercial Bank (the "Bank") secured by their home. Instead, they continued to make monthly payments on a "Balloon Note," despite the discharge, until the maturity date on February 1, 2014. Post-discharge, they attempted to refinance the debt, but their lender was unwilling, and commenced foreclosure proceedings.

In an effort to save their home, Patricia Moore filed a petition for relief under chapter 13, and a plan in which she proposed to continue making regular monthly payments. The Bank objected to the plan, and filed a motion for relief from the automatic stay (the "Motion," DN 18) under 11 U.S.C. § 362(d)(1) and (d)(2).[1] Mr. and Mrs. Moore oppose the Motion. The court held a final hearing on September 18, 2014, in Grand Rapids, Michigan, at which both sides appeared through counsel. For the following reasons, the court will grant the Motion.

[1] The court will refer to the various sections of Title 11 of the United States Code simply by citing the section number, as in "§ 362."

II. FACTS

The following facts are taken from the docket and from representations of counsel at the hearing. Prior to filing their first bankruptcy petition, the Moores signed a Balloon Note and a mortgage encumbering their residence located at 12587 Blue Lagoon, Shelbyville, Michigan (the "Property").[2] The parties agree that the Moores' chapter 7 discharges preclude the Bank from enforcing the Balloon Note as a personal obligation, but the Bank's *in rem* rights survived the earlier bankruptcy proceedings. Precedent from the Sixth Circuit and the Supreme Court establish that, despite the discharge, the Bank has a "claim" within the meaning of § 101(5). *Johnson v. Home State Bank*, 501 U.S. 78, 84-85 (1991); *In re Glance*, 487 F.3d 317, 320-21 (6th Cir. 2007). In effect, the Bank has a non-recourse claim against the Property securing a home loan that matured, at the latest, on February 1, 2014.

At the final hearing on the Motion, the parties agreed that the Property is worth approximately $135,000.00. Although the Motion does not recite the current balance of the debt, Mrs. Moore's Schedule D in her current bankruptcy case lists the amount of the debt as $141,024.31, without indicating that the debt is in any way "contingent, unliquidated, or disputed."

In the first version of her plan, Mrs. Moore proposed to continue making regular monthly payments as well as payments on a $6,478.26 arrearage, initially failing to appreciate the fact that the Balloon Note matured earlier in the year. After the Bank objected to the original plan,

[2] The parties apparently agree, and the documents show, that the Bank is the assignee of the Moores' original lender's interest in the Balloon Note and the Mortgage, evidently in connection with an FDIC receivership. *See* Motion at Exh. C.

Mrs. Moore filed an amendment in which she proposes to pay the Bank in full by refinancing the debt in the fifth year of the plan.

The Bank seeks relief from the automatic stay for "cause" because the Moores have not made a payment in over seven months. In addition, the Bank contends that the Moores lack equity in the Property, and the Property is not necessary to an effective reorganization. The court will address the Bank's argument based on absence of equity, rather than missed payments.[3]

III. ANALYSIS

In every stay relief motion, "(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and (2) the party opposing such relief has the burden of proof on all other issues." 11 U.S.C. § 362(g). Here, the Bank must establish the absence of Mrs. Moore's equity in the Property, and Mrs. Moore must establish that the Property is necessary to an effective reorganization. The Supreme Court explains:

> What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect.

United Sav. Ass'n. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 375–76 (1988).

As for the Bank's burden on the equity question, the court finds that the Bank has established the absence of equity. The parties agreed that the Property is worth approximately $135,000.00 and the schedules, which Mrs. Moore's counsel candidly stated he could not

[3] Many, if not most, home-owning chapter 13 debtors come to court having missed one or more house payments. If prepetition contractual defaults, standing alone, warranted stay relief, the stay would hardly serve its purpose of giving debtors breathing room, and giving creditors the benefits of a collective proceeding. The court regards the Bank's argument under § 362(d)(2) as its strongest argument.

disavow, show the debt, though discharged, exceeds that amount. Outside of bankruptcy, the Bank would not be obliged to release its mortgage until it received at least $141,024.31, which means that if the Moores were successful in selling the Property for what it is worth, they would receive nothing. Therefore, there is no equity in the Property under the circumstances, and the court so finds.

Regarding her burden of proof on the Property's role in the reorganization under chapter 13, Mrs. Moore simply referred to her recent plan amendment, which (as noted above) proposes to give her five years to refinance. She did not favor the court with any evidence of her efforts to refinance, other than her failure to refinance through the Bank before the petition date. That attempt failed in part because the Property's actual value of $135,000.00 would not support a loan in the amount of $141,024.31. Moreover, the court would likely be constrained to withhold confirmation of Mrs. Moore's proposed amended plan for failure to comply with chapter 13 and title 11. *See* 11 U.S.C. § 1325(a)(1). Because the Balloon Note is secured only by Mrs. Moore's principal residence, she may not modify the Bank's rights except as authorized under § 1322(b)(5). *See* 11 U.S.C. § 1322(b)(2). Section 1322(b)(5), which applies to the Balloon Note under § 1322(c)(2) despite the fact that the note matured prepetition, only allows her to cure the default "within a reasonable time." *See* 11 U.S.C. § 1322(b)(5) (cure and maintain exception to anti-modification rule of § 1322(b)(2)) & 1322(c)(2) (exception making § 1322(b)(5) applicable to home loans that matured before filing). The default in this case, under the terms of the Balloon Note, is not simply the Moores' failure to make installment payments before maturity, but their non-payment of $141,024.31 on February 1, 2014.[4] Mrs. Moore's amended plan

[4] Although Mr. and Mrs. Moore's January 2011 bankruptcy discharges preclude the Bank from enforcing the Balloon Note "as a personal obligation," they do not extinguish, invalidate, or otherwise affect the terms of the Balloon Note, including the maturity date. *See* 11 U.S.C. § 524(a)(2) (effect of discharge).

effectively re-writes the Balloon Note by changing the maturity date from February 1, 2014 to July 14, 2019. Because the Balloon Note is protected from modifications (other than the cure of defaults within a reasonable time), the court could not likely confirm Mrs. Moore's plan over the Bank's objection without trampling on § 1322(b)(2) and (b)(5). Given the plan that Mrs. Moore proposed and the absence of any evidence regarding the prospect of timely refinancing, the court finds she has not met her burden of establishing that the Property is necessary to an effective reorganization that is "in prospect."

On this record, the court need not accept the Bank's argument that the possibility of renting an apartment or other residential structure means that the Property itself is not necessary to Mrs. Moore's reorganization. In the court's experience, the preservation of a debtor's home and other property is, in most cases, the very purpose of the chapter 13 reorganization —debtors frequently file chapter 13 plans to "save the home." This seems to be part of the Congressional design of chapter 13, and is most likely true in the present case. Here, however, the undisputed absence of equity and the dearth of any evidence tending to show that refinancing is possible in a reasonable time provide the grounds upon which the court will lift the automatic stay.

IV. CONCLUSION & ORDER

The Bank has established a right to relief from the automatic stay, and the court will therefore grant the Motion. Because Mrs. Moore opposed the Motion, however, and because the court perceives no urgency, it will not waive the 14 day stay that presumptively applies under Fed. R. Bankr. P. 4001(a)(3).

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion (DN 18) is GRANTED and the Bank may pursue its rights and remedies under applicable law.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Patricia E. Moore, Robert J. Pleznac, Esq., Scott A. Chernich, Esq., and Brett N. Rodgers, Esq., chapter 13 trustee.

IT IS SO ORDERED.

Dated September 23, 2014

Scott W. Dales
United States Bankruptcy Judge