11 USC §1322(b)(3)
11 USC §541
ORS 312.120(2)
Comity
Preemption

In re Coultas, Ivory, Hollins, Rudolph

Case No. 392-34206/391-32714/392-37351/392-36256-H13
93-289-BE 93-207-BE 93-636-BE 93-594-BE 4-25-94 (EOD)

Reversing HLH

Before the chapter 13 petition was filed, Multnomah County foreclosed on the debtor's real property for failure to pay the property taxes when due. The debtor's plan treated Multnomah County as the holder of a secured claim and proposed to cure the default in the payment of the property taxes over the life of the plan.

The county objected to confirmation on the ground it was not a creditor of the estate and the debtor could only redeem the property by payment in full of the amount due within 2 years of the foreclosure in accordance with ORS 312.120(2).

The bankruptcy court overruled the objection and confirmed the plan on the ground that §1322(b)93) gives a chapter 13 debtor the right to cure "any" default. The only limit on this right is found, as a logical matter, in §541 which describes property of the estate. In this case, the debtor had an interest in the realty at the time she filed the petition by virtue of her statutory right of redemption. That interest became part of the estate. This fact and the fact that §1322(b)(3) allows a cure of any default, gave the debtor the right to cure the default in the payment of the tax debt by paying the taxes over the life of the plan notwithstanding the state law requirements for redemption.

The US District Court held that the Code does not preempt the state law redemption statutes and that the debtor must cure the default in the payment of real property taxes within the state law redemption period.

P92-28(2) = Coultas
P92-27(4) = Ivory
P93-8(4) = Hollins
P93-9(2) = Rudolph

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DISTRICT OF OREGON
PORTLAND, OREGON
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U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
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TERENCE H. DUNN, CLERK
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

IN RE: EILEEN LEONA HOLLINS, Debtor,	Civil No. 93-636-BE Bkcy No. 392-37351-H13
MULTNOMAH COUNTY, Appellant, vs. EILEEN LEONA HOLLINS, Appellee.	O P I N I O N

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(29)

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BELLONI, J.

Appellant, Multnomah County, appeals from an order of the United States Bankruptcy Court for the District of Oregon rejecting appellant's challenge to the Chapter 13 plan of the debtor, appellee Eileen Leona Hollins.

The order of the bankruptcy court is reversed.

BACKGROUND

Appellee was the owner of a parcel of real property located at 4813 NE 13th Avenue in Multnomah County, Oregon. She became delinquent in the payment of property taxes. Consequently, appellant filed a foreclosure action and, on September 23, 1992, took judgment by a decree of foreclosure.

On November 10, 1992, appellee filed a Chapter 13 bankruptcy petition. Appellant was listed as a creditor in the debtor's schedules and received notice concerning the pendency of the case, the proposed Chapter 13 plan, and the date of the confirmation hearing. Appellee failed to pay $4,180.50 in past due real property taxes and claimed that the property was worth at least $55,000.00. Appellant objected to the confirmation of the plan on the grounds that it was not a creditor of the estate. Appellant also contended that the plan was flawed because it did not provide for payment of the delinquent property taxes, interest, and related fees within the two-year redemption period established by ORS 312.120.

On January 25, 1993, the bankruptcy court entered an order confirming the proposed Chapter 13 plan despite appellant's objections. The plan, which extends past the expiration of the two-

year statutory redemption period, provides for the payment of delinquent taxes to appellant at an interest rate of 16 percent. Appellant now appeals from the order confirming the Chapter 13 plan.

STANDARDS

The district court acts as an appellate court when it reviews a bankruptcy court judgment. Daniels-Head & Assoc. v. William M. Mercer, Inc. (In re Daniels-Head & Assoc.), 819 F.2d 914, 918 (9th Cir. 1987). The district court reviews questions of law de novo. Id. Mixed questions of law and fact are also reviewed de novo. In re Woodson Co., 813 F.2d 266, 270 (9th Cir. 1987). The court may not set aside findings of fact unless they are clearly erroneous. Fed. R. Civ. P. 52(a); Bankr. R. 8013.

DISCUSSION

Appellant raises the following assignments of error:

(1) Whether the bankruptcy court erred in finding that appellant was a creditor of the bankruptcy estate;

(2) Whether the bankruptcy court erred in finding that the filing of the bankruptcy petition tolled the running of the two-year redemption period;

(3) Whether the bankruptcy court erred in finding that appellee had a right to cure her default under 11 U.S.C. § 1322(b); and

(4) Whether the bankruptcy court erred in finding that, by virtue of the Supremacy Clause of the United States Constitution, the provisions of the bankruptcy code supersede state law requirements for the redemption of tax foreclosed property.

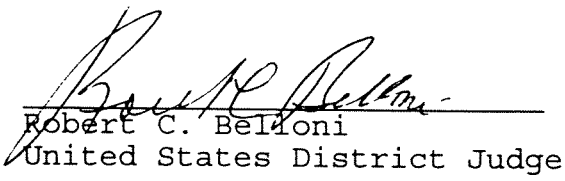
The same issues were raised in the recent decision in Multnomah County v. Rudolph, Civil No. 93-594-BE, slip. op. (D. Or. Feb. 7, 1994)(Belloni, J.). I find no significant distinction between the

facts in this case and those in the Rudolph case. Therefore, for the reasons stated in the Rudolph opinion, I conclude that: (1) the bankruptcy court correctly concluded that appellant is a creditor of the bankruptcy estate; (2) the bankruptcy court did not invoke the automatic stay provisions of the code; (3) the bankruptcy court correctly held that appellee's failure to pay property taxes was a default susceptible of a cure under the code; and (4) the bankruptcy court erred in holding that the provisions of the bankruptcy code supersede ORS 312.120.[1] Accordingly, the order confirming appellee's Chapter 13 plan must be reversed.

CONCLUSION

The order of the bankruptcy court is reversed. The case is remanded to the bankruptcy court for modification of the Chapter 13 plan in accordance with this opinion.

DATED this 19th day of April, 1994.



Robert C. Belloni
United States District Judge

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[1] The Rudolph opinion is hereby incorporated into this decision. A copy of the Rudolph opinion is attached.

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DISTRICT OF OREGON
PORTLAND, OREGON
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

IN RE: DAVID D. RUDOLPH, Debtor,	Civil No. 93-594-BE Bkcy No. 392-36256-H13
MULTNOMAH COUNTY, Appellant, vs. DAVID D. RUDOLPH, Appellee.	O P I N I O N

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BELLONI, J.

Appellant, Multnomah County, appeals from an order of the United States Bankruptcy Court for the District of Oregon filed on January 25, 1993, rejecting appellant's challenge to the Chapter 13 plan of the debtor, appellee David D. Rudolph.

The order of the bankruptcy court is reversed.

BACKGROUND

Appellee was the owner of a parcel of real property located at 3004 SE 8th Avenue in Multnomah County. He was delinquent in the payment of property taxes. Consequently, appellant filed a foreclosure action and, on September 30, 1991, took judgment by a decree of foreclosure.

On September 18, 1992, appellee filed a Chapter 13 bankruptcy petition. Appellant was listed as a creditor in the debtor's schedules and received notice concerning the pendency of the case, the proposed Chapter 13 plan, and the date of the confirmation hearing. Appellant objected to the confirmation of the plan on the ground that it was not a creditor of the bankruptcy estate. Appellant also contended that the plan was flawed because it did not provide for payment of the delinquent property taxes, interest, and related fees within the two-year redemption period established by ORS 312.120.

On January 15, 1993, the bankruptcy court entered an order confirming the proposed Chapter 13 plan. The plan, which will remain in effect after the two-year statutory redemption period has expired, provides for the payment of delinquent taxes to appellant

at an interest rate of 16%. In an opinion filed on January 25, 1993, the bankruptcy court rejected appellant's challenge to the plan. The opinion incorporates by reference the bankruptcy court's opinion in an analogous case, In re Hollins, 150 B.R. 53 (Bankr. D. Or. 1993).

STANDARDS

The district court acts as an appellate court when it reviews a bankruptcy court judgment. Daniels-Head & Assoc. v. William M. Mercer, Inc. (In re Daniels-Head & Assoc.), 819 F.2d 914, 918 (9th Cir. 1987). The district court reviews questions of law de novo. Id. Mixed questions of law and fact are also reviewed de novo. In re Woodson Co., 813 F.2d 266, 270 (9th Cir. 1987). The court may not set aside findings of fact unless they are clearly erroneous. Fed. R. Civ. P. 52(a); Bankr. R. 8013.

DISCUSSION

Appellant raises the following assignments of error:

(1) Whether the bankruptcy court erred in finding that appellant was a creditor of the bankruptcy estate;

(2) Whether the bankruptcy court erred in finding that the filing of the bankruptcy petition tolled the running of the two-year redemption period;

(3) Whether the bankruptcy court erred in finding that appellee had a right to cure his default under 11 U.S.C. § 1322(b); and

(4) Whether the bankruptcy court erred in finding that, by virtue of the Supremacy Clause of the United States Constitution, the provisions of the bankruptcy code supersede state law requirements for the redemption of tax foreclosed property.

/ / / / /

My analysis of these issues is set forth below.

I. The bankruptcy court correctly concluded that appellant is a creditor of the bankruptcy estate.

Under 11 U.S.C. § 1327(a), "[t]he provisions of a confirmed plan bind the debtor and each creditor ...." Appellant maintains that the judgment of foreclosure extinguished appellee's tax liability on the property and, for this reason, it can no longer be considered a creditor of the bankruptcy estate. I reject so narrow a reading of the code.

A "claim" for purposes of the code includes a "right to payment, whether or not such right is ... contingent ...." 11 U.S.C. § 101(5)(A). See also, Johnson v. Home State Bank, 111 S.Ct. 2150, 2154 (1991). In this case, the right to redeem the property passed from the debtor to the bankruptcy estate under 11 U.S.C. § 541. If the estate redeems the property in the manner prescribed by Oregon law, appellant would be entitled to collect taxes assessed against the property during the redemption period. Appellant's right to such a payment, although contingent on the redemption of the property, must nevertheless be considered a claim within the meaning of the code. Accordingly, appellant is subject to the plan under 11 U.S.C. § 1327(a).

II. The bankruptcy court did not invoke the automatic stay provisions of the code.

Appellant argues that, "[w]hile the ... Bankruptcy Judge failed to address the import of the expiration of the redemption period, by implication the Court found that the automatic stay provisions of 11

U.S.C. § 362 tolled the running of the redemption period." (Appellant's Brief, p. 6.) Although appellant correctly observes that a majority of the courts addressing the issue have found that § 362 does not toll the statutory redemption period established by state law, see, e.g., Matter of Roach, 824 F.2d 1370, 1372 n.1 (3rd Cir. 1987); In re Glenn, 760 F.2d 1428, 1440 (6th Cir.), cert. denied, Miller v. First Federal of Michigan, 474 U.S. 849 (1985), I disagree with appellant's characterization of the bankruptcy court's ruling. The court did not invoke § 362, but instead relied on the powers of the bankruptcy court under the Supremacy Clause in confirming the Chapter 13 plan. Accordingly, I reject appellant's assignment of error.

III. The bankruptcy court correctly held that appellee's failure to pay property taxes was a default susceptible of a cure under the code.

Pursuant to 11 U.S.C. § 1322(b), the contents of a Chapter 13 plan may:

> (3) provide for the curing or waiving of any default;
>
> * * *
>
> (5) ... provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

The bankruptcy court held that the protection available to debtors under Chapter 13 includes the right to cure a property tax default under § 1322(b). That holding was not improper.

Appellant argues that a "default" can occur only where a

contractual relationship exists between the parties. Observing that the obligation to pay property tax does not arise from a contractual relationship, it maintains that the failure to pay tax cannot be regarded as a default, nor is it susceptible of a cure. In support, appellant relies on In re Braker, 125 B.R. 798 (9th Cir. 1991). I disagree with appellant's reasoning.

First, the Braker court did not rule that a contractual relationship is an essential prerequisite to a default and cure under the bankruptcy code. Instead, it ruled only on one specific issue; namely, "whether a Chapter 13 plan may cure and reinstate a mortgage subsequent to a pre-petition foreclosure sale, but prior to the expiration of a statutory right of redemption." Id. at 799. The bankruptcy court had confirmed a Chapter 13 plan that allowed for the cure of a foreclosed mortgage. In its opinion reversing the bankruptcy court, the Ninth Circuit held that such a "cure" was improper because "[a] pre-petition foreclosure sale prevents the application of section 1322(b)(5) to cure the antecedent default." Id. at 801. Although the Braker court presumably had an opportunity to define the term "cure" more narrowly (e.g., as an act restricted exclusively to contract situations), it did not do so. In any event, the present case does not involve a mortgage, nor has a foreclosure sale taken place. Braker is therefore inapposite.

Secondly, appellant undercuts its own argument. In connection with its second assignment of error, appellant correctly observes that 11 U.S.C. § 108(b), which places time limits on the trustee's

ability to "cure a default, or perform any other similar act ...," can extend Oregon's two-year redemption period by up to 60 days under appropriate circumstances; however, no further extension of the redemption period is permissible under the code. Yet § 1132(b), which appellant contends does not apply in this case, also speaks to "curing ... any default." The code contains no indication that the meaning of the terms "cure" and "default" are to be defined differently in § 108(b) and § 1132(b). Further, under accepted rules of statutory construction, the definition of a term that appears in different parts of the same statutory scheme does not vary. Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986)(citations omitted). Therefore, if redemption under ORS 312.120 is a cure for purposes of § 108(b), as appellant urges, it must also be a cure within the meaning of § 1132(b).

For the foregoing reasons, the bankruptcy court properly ruled that redemption of the property qualifies as a cure under § 1132(b).

IV. The bankruptcy court erred in holding that the provisions of the bankruptcy code supersede ORS 312.120.

The parties agree the bankruptcy estate has the right to redeem the property under Oregon law. The main question to be decided on appeal is when that right terminates. Appellant contends that Oregon law is controlling. Appellee urges me to accept the reasoning of the bankruptcy court.

The bankruptcy court's opinion in this case incorporates by reference its decision in In re Hollins. In Hollins, the court stated:

> ... Thus, a cure of the pre-petition default through a chapter 13 plan is not the same as a redemption from the sale under state law. Therefore, the federal bankruptcy law does not change the time for redemption, as the County seems to argue. Rather, federal bankruptcy law offers the debtor a different mechanism to recover her interest in the property.
>
> To the extent the federal law changes the result that would obtain under state law, state law must yield. This conclusion is mandated by the United States Constitution which provides that federal law is the supreme law of the land. This concept is referred to as preemption.

Hollins, 150 B.R. at 54. Based on this reasoning, the Hollins court permitted the debtor to redeem her tax-foreclosed property under a plan that extended beyond the expiration of the two-year redemption period.

I disagree with the bankruptcy court's analysis. It is not disputed that state laws are subject to preemption when Congress intends a federal statute to be controlling. "[S]tate legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." Perez v. Campbell, 402 U.S. 637, 652 (1971). Nevertheless, preemption is not automatic. Instead, "state laws are ... suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act ...." Butner v. United States, 440 U.S. 48, 54-55 n.9 (1979). In this case, no such conflict exists.

Regulation of property interests is the province of the states. Butner, 440 U.S. at 55. In Braker, the Ninth Circuit recognized that the bankruptcy code "neither creates nor enhances the rights a debtor brings into the bankruptcy estate." Braker, 125 B.R. at 801 (citing 11 U.S.C. § 541(a)(1); In re Kaplan, 97 B.R. 572, 576 (9th

Cir. BAP 1989); In re Gull Air, Inc., 890 F.2d 1255, 1261 (1st Cir. 1989)). It follows that the code does not empower the bankruptcy court to alter or expand property rights created under state law. Accordingly, "[t]he cure contemplated by section 1322(b)(5) is a cure that provides both debtor and creditor with the equivalent of their state law rights." Braker, 125 B.R. at 801 (citing Butner, 440 U.S. at 54-55).

In this case, the Chapter 13 plan confirmed by the bankruptcy court is flawed because it fails to respect Oregon law pertaining to the redemption of tax foreclosed property. The right of redemption is an asset of the bankruptcy estate, but the scope of that right is determined by ORS 312.120. Any expansion of that right, e.g., as by an extension of the two-year redemption period, diminishes appellant's ownership interest in the property, a result not intended by the code. Therefore, it was error for the bankruptcy court to confirm a plan that extended the redemption period beyond the two years authorized by Oregon law.

In addition, I conclude that the plan as confirmed fails to take into account § 108(b) of the code. That provision places a definite time limit on the trustee's ability to cure a default or perform similar acts, such as the redemption of tax foreclosed property. Section 108(b) is the only extension of time available to debtors. See, e.g., Matter of Tynan, 773 F.2d 177, 179-80 (7th Cir. 1985); Johnson v. First Nat. Bank of Montevideo, Minn., 719 F.2d 270, 278 (8th Cir. 1983), cert. denied, 465 U.S. 1012 (1984). If the bankruptcy court were permitted to set its own timeline for

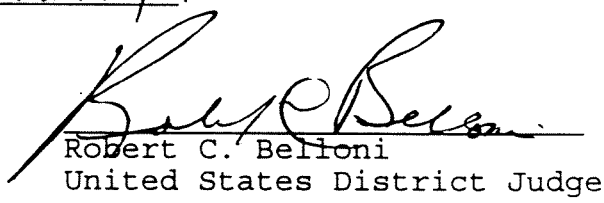
redemption of the property under § 1322(b), then § 108(b) would be rendered a nullity. I cannot interpret the bankruptcy code in a manner that ignores one of its provisions. Beisler v. C.I.R., 814 F.2d 1304, 1307 (9th Cir. 1987). I note that other courts confronting the issue have reached a similar conclusion. See, e.g., In re Farmer, 81 B.R. 857, 861 (Bankr. E.D. Pa. 1988); In Tabor Enterprises v. Illinois, 65 B.R. 42, 46 (N.D. Ohio 1986); Bank of Commonwealth v. Bevan, 13 B.R. 989, 994 (E.D. Mich. 1981). Based on the reasoning of those cases, I conclude that the bankruptcy court exceeded its authority under the code by granting the bankruptcy estate an extension of the redemption period in excess of that authorized under § 108(b).

CONCLUSION

The order of the bankruptcy court is reversed. The case is remanded to the bankruptcy court for modification of the Chapter 13 plan in accordance with this opinion.

IT IS SO ORDERED.

DATED this 7th day of February, 1994.



Robert C. Belloni
United States District Judge

Published ✓
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re	)	
	)	Case No. 392-37351-H13
EILEEN LEONA HOLLINS	)	
	)	OPINION
	)	
Debtor.	)	

This matter came before the court upon an objection to confirmation of the chapter 13 debtor's proposed plan. The objection was filed on behalf of Multnomah County. The County is represented by Sandra Duffy and the debtor by Kent V. Snyder, both of Portland, Oregon.

The debtor was the owner of certain real property located in Multnomah County. The debtor contends the property is worth $55,000. This contention has not been disputed. The debtor failed to pay property taxes totaling $4,180.50 on the property and the County foreclosed on the property before this case was filed. The debtor's state law redemption period expires on

P93-8 (4)

September 26, 1994. See ORS 312.120(2).

The debtor's plan proposes to pay the County $210 monthly (after administrative expenses are paid) including interest at 16%. The County objects to confirmation on the ground it is not a creditor and that the plan fails to provide for payment in full of the amount due within the two year redemption period provided under state law.

The facts in this case are nearly identical to those that resulted in this court's opinions in In Re Desrosiers, 145 B.R. 671 (Bankr. Or. 1992); In re O'Neal, 142 B.R. 671 (Bankr. Or. 1992); In re Coultas, Case No. 392-34206-H13, slip op. dated October 13, 1992, and the supplemental opinion in In Re Ivory, 146 B.R. 411 (Bankr. Or. 1992).

The County seems to proceed from the assumption that the debtor's only option is to redeem the property from the foreclosure sale in accordance with applicable state law. While this may be the debtor's only option under state law, the debtor is also entitled to exercise her rights under federal bankruptcy law. One of those rights is the right to "cure" the default under 11 U.S.C. §1322(b)(3).

As discussed at length in the opinions cited above, such a cure will result in the debtor regaining her pre-default interest in the property. Thus, a cure of the pre-petition default through a chapter 13 plan is not the same as a redemption from the sale under state law. Therefore, the federal bankruptcy law does not change the time for redemption,

as the County seems to argue. Rather, federal bankruptcy law offers the debtor a different mechanism to recover her interest in the property.

To the extent the federal law changes the result that would obtain under state law, state law must yield. This conclusion is mandated by the United States Constitution which provides that federal law is the supreme law of the land. This concept is referred to as preemption.

It is not necessary that Congress explicitly state in each (or any) section of the Bankruptcy Code that "this section is intended to change the result that would obtain under the laws of the states of ... ." The U.S. Constitution itself specifies that Congress may enact "uniform" laws of bankruptcy. If the Bankruptcy Code did not preempt contrary state law, uniformity would be impossible.

In fact, one of the primary components from which the foundation of the Bankruptcy Code is built is that once a petition in bankruptcy is filed, the debtor and all his creditors are governed by federal bankruptcy law regardless of contrary state law. Nowhere is this more evident than in the provisions of 11 U.S.C. §362, the automatic stay, which prevents creditors from exercising their otherwise valid state law rights to collect a valid debt. There are many such examples in the Bankruptcy Code.

Thus, although neither 11 U.S.C. §1322(b)(3) nor any other code section expressly states that it preempts contrary state

law, such is the case.

For these reasons and all the reasons stated in Desrosiers, Coultas, O'Neal and Ivory, which reasons are incorporated herein by reference, this court overrules the County's objections and will enter an order confirming the debtors' plan.

DATED this 25th day of January, 1993.

/s/ HENRY L. HESS, JR.
Henry L. Hess, Jr.
Bankruptcy Judge

cc: Sandra Duffy
Kent V. Snyder
Robert W. Myers, Trustee