

11 U.S.C. § 1327(a)
11 USC § 101(5)
11 U.S.C. § 1322(b)(3)

In re O'Neal

Case No. 390-36620-H13

7/10/92

The court held that failure to pay property taxes as they became due constituted a "default" which could be cured under § 1322(b)(3) even after the county had foreclosed on the property because the debtor's plan provided for cure and the county failed to object and was therefore bound by the terms of the plan under § 1327(a) and because the debtor retained a statutory right of redemption from the sale which became property of the estate. This property interest allowed the debtor to "cure any default" under § 1322(b)(3).

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

Re)
) Case No. 390-36620-H13
MORCELL O'NEAL)
) MEMORANDUM OPINION
Debtor.)

This matter came before the court upon the debtor's motion to compel Multnomah County ("County") to accept certain payments under a confirmed chapter 13 plan. The debtor is represented by Willis Anderson and the County is represented by Sandra Duffy, Assistant County Counsel.

The debtor suffered a pre-petition foreclosure judgment on her residence, which she values at \$30,000, for failure to pay approximately \$4,520 in real property taxes. The County filed a claim for the delinquent taxes and the debtor's plan proposed to pay the County's claim in full as a secured claim at the rate of \$85 monthly. At this rate, the default would be cured in 53

1 months. The plan was confirmed without objection.

2 The chapter 13 trustee began sending payments to the County
3 pursuant to the confirmed plan. The County rejected the payments
4 and wrote a letter explaining the rejection to the trustee. The
5 County's letter to the trustee states that the County considers the
6 debtor's only option is to redeem the property within 2 years
7 [pursuant to O.R.S. 312.120(2)] plus 60 days (under 11 U.S.C. §108)
8 of foreclosure and that the County does not accept partial
9 redemption payments during that time.

10 The debtor filed a motion to compel the County to accept the
11 payments as provided in the plan. The County filed a memorandum of
12 law in which the County takes the position that the County owns the
13 property subject to the debtor's redemption rights and that the
14 County holds no claim against the estate.

15 The court held a hearing on the motion and gave the County two
16 weeks to file a further memorandum of law and the debtor two weeks
17 thereafter to respond. Neither the County nor the debtor has filed
18 a subsequent memo, both parties apparently submitting the matter to
19 the court on the record as of the hearing on the debtor's motion.

20 Pursuant to 11 U.S.C. §1327(a):

21 "The provisions of a confirmed plan bind the
22 debtor and each creditor, whether or not the
23 claim of such creditor is provided for by the
24 plan, and whether or not such creditor has
25 objected to, has accepted, or has rejected the
26 plan."

1 The County was listed as a creditor in the debtor's schedules
2 and was notified of the case, the provisions of the proposed plan
3 and the date of the confirmation hearing. The County does not deny
4 any of these facts.

5 The debtor's plan clearly shows the County as a secured
6 creditor to be paid \$85 monthly to cure the default in the real
7 property taxes. With a default of \$4,520, the debtor's plan will
8 require 53 months to cure the default. This is considerably more
9 than the 2 years and 2 months the County contends is available to
10 the debtor to redeem the property.

11 In spite of the fact that the County was aware of the
12 bankruptcy case and the provisions of the proposed plan, the County
13 failed to object to confirmation or file any documents with the
14 court. Pursuant to 11 U.S.C. §1327(a), the County is bound by the
15 plan and cannot now refuse to accept the payments under the plan.
16 Even if the court erred in confirming the plan, the County's remedy
17 was to appeal the order of confirmation. Since this was not done,
18 the issue is res judicata and cannot now be raised.

19 Even if the County had timely raised an objection to
20 confirmation, however, the court would have overruled the objection
21 on the merits.

22 Contrary to the implicit premise in the County's memorandum of
23 law, the question is not who owns the property. The pivotal

1 question is whether the debtor had an interest in the property that
2 became property of the estate pursuant to 11 U.S.C. §541. The
3 County concedes that the debtor had an interest in the property at
4 the time the petition in bankruptcy was filed by virtue of her
5 statutory right of redemption. The estate succeeded to the
6 debtor's interest in the property at the time the petition was
7 filed. Thereafter, pursuant to the Supremacy Clause of the United
8 States Constitution, the Bankruptcy Code controls the
9 debtor's/estate's rights vis-a-vis the County regardless of
10 contrary state law. See In re Hurt, 136 B.R. 859 (Bankr. Or. 1992)
11 for a detailed discussion of this concept.

12 The fact that the debtor has no personal liability for the
13 taxes and the County apparently now makes no claim against the
14 estate does not change the result.¹ 11 U.S.C. §101(10)(A) states
15 that "creditor" means an "entity that has a claim against the

¹ It should also be noted that the County's assertion that it holds no claim against the estate is flatly contradicted by the proof of claim filed on its behalf which states, in part, the following:

"[T]hat the above named bankrupt, was at and before the filing by (or against) him/her of the petition for adjudication of bankruptcy, and still is, justly and truly indebted to Multnomah County, State of Oregon, in the sum of \$4,682.70, with interest accruing at 1-1/3% per month."

Thus, the County has admitted in prior pleadings that it holds a claim against the estate.

1 debtor."

2 The United States Supreme Court recently instructed, in the
3 case of Johnson v. Home State Bank, 111 S. Ct. 2150 (1991), that a
4 lien on a debtor's property is a "claim" under 11 U.S.C. §101(5)
5 that can be dealt with in a chapter 13 plan even though the debtor
6 has no personal liability to the lienholder.

7 The Supreme Court was very clear in its opinion that the
8 definition of the term "claim" was intended by Congress to be as
9 broad as possible and includes a right to payment or a right to a
10 contingent, equitable remedy.

11 Here, the County had foreclosed on the property before the
12 case was filed but, under Oregon law, the debtor could redeem the
13 property within 2 years. O.R.S. 312.120(2). Thus, the prepetition
14 foreclosure did not complete the tax collection process and the
15 County still had a "right to payment" or, at least, a contingent
16 right to permanently foreclose the debtor's interest in the
17 property. The County's right to clear title to the property was
18 contingent on the debtor's failure to redeem within the allotted
19 time.

20 Had the debtor's right to redeem within 2 years expired before
21 the filing of her petition in bankruptcy, she would have been
22 permanently foreclosed of any interest in the property and her
23 subsequent filing of a petition in bankruptcy would have been to no

1 avail. However, at the time the petition in bankruptcy was filed
2 in this case, the debtor still had an interest in the property
3 because the redemption period had not expired and, as the County
4 recognized when it filed its proof of claim, the County still held
5 a "claim" that could be dealt with in a chapter 13 plan.

6 Pursuant to 11 U.S.C. §1322(b)(3), the debtor's plan may
7 "provide for the curing or waiving of any default."² (Emphasis
8 added). A detailed analysis of the relevant statutory language
9 follows.

10 The meaning of the word "cure" has been discussed by many
11 courts. One of the seminal cases discussing this issue is In re
12 Taddeo, 685 F.2d 24 (2nd Cir. 1982). In Taddeo, the court
13 explained that "cure," as used in Bankruptcy Code, relates to the
14 event which triggered a default. By providing for a cure of this
15 event, the debtor restores the status quo ante as if the default
16 had never occurred. In Taddeo, the debtor's cure restored his pre-
17 default interest in the real property in question. If the debtor
18 is able to cure in the instant case, the same result will obtain.

19 The word "any" in the emphasized language from the statute
20 would allow a debtor to cure "any" default regardless of the

² It is worthy of note that 11 U.S.C. §§1322(b)(2) and (5) do not apply in this case since the County does not hold a "security interest" as defined in 11 U.S.C. §101(51).

1 consequences of such cure to the estate. It would be pointless,
2 however, to allow a debtor to cure a default that related to
3 property in which the estate has no interest. Thus, it would be
4 absurd to interpret §1322(b)(3) to allow a debtor to cure a non-
5 debtor's default where such cure will result in no benefit to the
6 debtor or the creditors of the estate. If the statute were
7 interpreted in this manner, none of the goals of bankruptcy would
8 be accomplished and the statute might raise constitutional issues.

9 Thus, by reading §1322(b)(3) in a vacuum, one encounters great
10 difficulties. It is axiomatic that statutes which are part of a
11 related code of law should not be construed in isolation and that
12 no statute should be read in a manner as to render it
13 unconstitutional if another, constitutional construction is
14 reasonable.

15 It seems reasonable to read §1322(b)(3) with reference to §541
16 which defines property of the estate. Such a reading would lead to
17 a logical limit on the word "any" in the phrase "cure any default."
18 The limit would be that a debtor may cure any default as long as
19 the default relates to property in which the estate holds an
20 interest. This limit would prohibit a debtor or trustee from
21 curing a default that affected an interest in property that did not
22 become property of the estate. This interpretation does no harm to
23 the statutory language and is consistent with the goals of

1 bankruptcy and the limits of the Constitution.

2 Given the above, the only remaining question is the meaning of
3 the word "default" in §1322(b)(3). "Default" is not defined in the
4 Code. The word should, therefore, be given its ordinary meaning.
5 See, for example, Helvering v. Hammel, 311 U.S. 504 (1941).
6 Black's Law Dictionary (revised fourth edition) defines the term
7 default as "a failure" or an "omission." The Bankruptcy Appellate
8 Panel recently concluded that the term "default" in this context
9 necessarily implies the existence of a contractually-imposed duty
10 on one party. In re Braker, 125 B.R. 798 (9th Cir. BAP 1991).
11 While the term "default" may imply the existence of an agreement,
12 such is not necessarily the case.

13 The term "default" does not necessarily contemplate any legal
14 duty to act. For example, a defendant who fails to timely file an
15 answer has "defaulted" even though the defendant had no legal duty
16 to appear.

17 The term "default" does, however, contemplate that a loss of
18 some kind may be suffered by the party failing to act. Hence, any
19 failure to act where that failure results in adverse consequences
20 to the non-acting party is a default.

21 In this case, the debtor failed to pay the taxes on her
22 property as they became due. Her failure to do so will result in
23 a loss to her estate of approximately \$25,000 (approximate value of

1 the property = \$30,000, less taxes of approximately \$5,000 =
2 \$25,000) if it cannot be cured. Thus, even though the debtor had
3 no personal liability for the taxes (no legal duty to pay the
4 taxes), the debtor "defaulted" by failing to timely do so.

5 As previously stated, however, the debtor's default did not
6 deprive her of all interest in the property. In fact, at the time
7 the case was filed, the debtor still held an interest in the
8 property by virtue of her right of redemption. This interest in
9 the property became property of the bankruptcy estate under
10 §541(a). Pursuant to §1322(b)(3), the debtor's plan proposes to
11 cure the default that resulted in her present, diminished interest
12 in the property by paying the taxes in full, including interest,
13 within the life of the plan. Such a cure will reinstate the
14 debtor's pre-default interest in the property. In re Taddeo, 685
15 F.2d 24 (2nd Cir. 1982).

16 Since the County is bound by the terms of the debtor's
17 confirmed plan, the County would seem well-advised to accept the
18 payments tendered by the debtor through the trustee's office. The
19 County shall inform the trustee within 30 days hereof whether
20 payments by the trustee will be accepted. If payments are to be
21 refused, the trustee shall retain the payments that would have been
22 tendered to the County in a separate account until he has
23 accumulated sufficient funds to pay the claim in full. (Interest

1 shall be calculated as if payments were accepted by the County as
2 they are received by the trustee.) When the trustee has sufficient
3 funds to pay the claim in full as just indicated, the trustee shall
4 again tender payment to the County. If the tender is refused, the
5 trustee or debtor may seek an order, declaring the debtor to be
6 owner of the property free and clear of the claim for taxes set
7 forth in the proof of claim of the County. The County shall be
8 restrained from selling, encumbering or otherwise transferring the
9 property without order of this court.

10 DATED this _____ day of July, 1992.

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Henry L. Hess, Jr.
Bankruptcy Judge

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cc: Sandra Duffy
Willis Anderson
Robert Myers

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