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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

IN RE: GREGORY IVORY, Debtor, _____ MULTNOMAH COUNTY, Appellant, vs. GREGORY IVORY, Appellee.	Civil No. 93-207-BE Bkcy No. 391-32714-H13 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 which enforced the Chapter 13 plan of the debtor, appellee Gregory Ivory.

The order of the bankruptcy court is affirmed.

BACKGROUND

Appellee was the owner of a parcel of real property located at 1317 S.E. Ivon Street in Multnomah County, Oregon. He became delinquent in the payment of property taxes. Consequently, appellant filed a foreclosure action and, on September 20, 1988, took judgment by a decree of foreclosure.

On April 23, 1991, 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 claimed to owe about $2,070.00 in past due real property taxes and claimed that the property was worth about $18,000.00. On September 11, 1991, the Chapter 13 plan in this case was confirmed. The plan includes provisions allowing the debtor to make monthly payments to appellant in order to cure the property tax default and redeem the real property. Appellant did not object to the confirmation of the plan because appellant believed that the debtor's rights to redeem the real property had expired on June 22, 1991, and therefore no interest in the real property remained in the estate.

Appellant did not appeal from the order confirming the Chapter

13 plan. The Chapter 13 trustee began sending payments to appellant pursuant to the confirmed plan. Appellant rejected the payments, citing its policy of accepting redemption payments only during the two-year statutory period set out in ORS 312.120, plus the 60-day period provided in bankruptcy cases under 11 U.S.C. § 108(b). Appellee filed a motion to compel appellant to accept the payments as provided in the plan. The bankruptcy court held a hearing on the motion and issued an order dated September 10, 1992, which required appellant to accept payments under the plan and which provided for a further order declaring the debtor to be the owner of the property once the payments were completed. The order of September 10, 1992, also restrained appellant from selling, encumbering or otherwise transferring any interest in the property.

On September 21, 1992, appellant filed a notice of appeal from the order of September 10, 1992.

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 the bankruptcy estate had an interest in the real property when the plan was confirmed;

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

(3) 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; and

(4) Whether the bankruptcy court erred in finding that 11 U.S.C. 1327(a) requires appellant to accept payments under a confirmed plan.

Appellee contends that appellant waived any objections it might have to the plan by failing to appeal the order confirming appellee's Chapter 13 plan. Appellee contends that the provisions of the plan are now res judicata and cannot be appealed at this late date.

Under 11 U.S.C. § 1327(a):

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

The only recourse for a creditor who objects to the provisions of a confirmed plan is to appeal the order confirming the plan. Failure to object to the confirmation of the plan, or to appeal from the confirmation order precludes a later attack on the plan in subsequent proceedings. Matter of Gregory, 705 F.2d 1118 (9th Cir. 1983). In Gregory, the Ninth Circuit noted that the plan's treatment of a creditor seemed "grossly unfair," but nonetheless affirmed the plan, stating that if a creditor ignores the bankruptcy

proceedings it does so at its peril. 705 F.2d at 1123.

Here, as in Gregory, appellant allowed the order confirming the Chapter 13 plan to become final before objecting to it. It would be improper to allow appellant to make a collateral attack on the validity of the plan by appealing a later order enforcing the plan. See In re Jarvis, 78 B.R. 288 (Bkrtcy. D. Or. 1987)(an order confirming debtors' Chapter 13 plan was binding and was not subject to later collateral attack).

Appellant argues, however, that the order confirming the Chapter 13 plan in this case does not bind it because the bankruptcy estate had no interest in the real property at the time of the confirmation order, and therefore the bankruptcy court did not have jurisdiction over the real property. I recently rejected a similar argument in Multnomah County v. Rudolph, Civil No. 93-594-BE, slip. op. (D. Or. Feb. 7, 1994)(Belloni, J.). In that case I held that the bankruptcy court correctly concluded that Multnomah County was a creditor of the bankruptcy estate because the right to redeem the property passed from the debtor to the bankruptcy estate under 11 U.S.C. § 541. Therefore, I found that Multnomah County was subject to the plan in that case.

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 find that the bankruptcy court correctly concluded that appellant is a creditor of the bankruptcy estate and that appellant is bound by the provisions of the Chapter

13 plan.[1] Appellant failed to appeal the order confirming the plan, allowing it to become final without objection. Accordingly, I find that appellant may not now reopen the issue of the validity of the plan. As the validity of the plan in this case is deemed to be res judicata, I must reject appellant's challenge to the subsequent order enforcing the provisions of the plan.

CONCLUSION

The bankruptcy court's order of September 10, 1992, is affirmed.

DATED this 19th day of April, 1994.

Robert C. Belloni
United States District Judge

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