

In re Braker

Case No. 389-34593-H13 BAP No. OR-90-1193-OMeR 4-11-91

The BAP reversed Judge Hess and overruled his prior ruling in In re Ivory, 32 BR 788 (Bankr. D. Or. 1983), that a debtor may cure under §1322(b) (5) and reinstate a mortgage that was sold at a pre-petition foreclosure sale. The BAP ruled that, after the foreclosure sale, there is no claim against the debtor and no contractual relationship between the parties. Thus, the debtor's only remedy is to redeem under state law within the applicable time period.

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DISTRICT OF OREGON
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OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re

) BAP No. OR-90-1193-OMeR

) TIMOTHY OWEN BRAKER and
) GINGER KAY BRAKER,

) Bankr. No. 389-34593-H13

) Debtors.

)
) STATE OF OREGON, DEPARTMENT
) OF VETERANS' AFFAIRS,

) Appellant,

) -v-

) O P I N I O N

) TIMOTHY OWEN BRAKER and
) GINGER KAY BRAKER,

) Appellees.

Argued and Submitted on
September 13, 1990, at Portland, Oregon

Filed - APR 11 1991

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Henry L. Hess, Jr., Chief Bankruptcy Judge, Presiding

Before: OLLASON, MEYERS, and RUSSELL, Bankruptcy Judges

P 91-12(7)

1 OLLASON, Bankruptcy Judge:

2 The Department of Veterans' Affairs ("DVA") objected to
3 a Chapter 13 plan that proposed to cure a defaulted mortgage after
4 a foreclosure sale. The bankruptcy court confirmed the plan and
5 the DVA appealed. We reverse.

6 **FACTS**

7 The DVA held a mortgage on debtors' home and debtors
8 defaulted. A decree of foreclosure was thereafter entered in
9 Oregon state court on July 26, 1989, and a writ of execution
10 followed. The property was sold pursuant to the writ on October
11 3, 1989. Because Oregon law does not permit lenders to recover a
12 deficiency resulting from such a sale, the foreclosure sale
13 extinguished the DVA's entire claim against the debtors.

14 Two days later, debtors petitioned for relief under
15 Chapter 13 of the Bankruptcy Code. The bankruptcy court eventually
16 confirmed a Chapter 13 plan which allowed the debtors to recover
17 their home and make regular payments on their mortgage, while
18 curing their default through and during the course of the plan.

19 In support of its confirmation order, the bankruptcy
20 court found that debtors' petition was filed during the pendency
21 of their statutory redemption rights, and, relying on In re Ivory,
22 32 B.R. 788 (Bankr.D.Or. 1983), concluded that 11 U.S.C. section
23 1322(b)(5) permitted the cure contemplated in debtors' plan.

24 **ISSUE**

25 The sole question presented for review is whether a
26 Chapter 13 plan may cure and reinstate a mortgage subsequent to a
27

1 pre-petition foreclosure sale, but prior to the expiration of a
2 statutory right of redemption.

3 **STANDARD OF REVIEW**

4 The interpretation of the Bankruptcy Code and the
5 relevant Oregon statute is a question of law which we review de
6 novo. See In re Wade, 115 B.R. 222, 225 (9th Cir. BAP 1990).

7 **DISCUSSION**

8 When a petition in bankruptcy is filed, the resulting
9 estate possesses every legal and equitable right held by the
10 debtor. 11 U.S.C. section 541. The right of redemption can be
11 either legal or equitable.

12 Equitable redemption developed in the common law.
13 Originally, one who pledged realty to secure a debt gave title to
14 the lender, and the property could be recovered only if the debt
15 was fully paid when due. To ameliorate the harshness of default,
16 courts of equity allowed debtors with adequate cause to redeem a
17 defaulted mortgage. Equitable redemption rights were at first
18 open-ended in time, leaving title uncertain for years. To prevent
19 abuses of equitable redemption, courts of equity fashioned a
20 deadline for seeking such relief. That deadline was the time of
21 "foreclosure." To this day, Oregon law recognizes that the right
22 of equitable redemption is cut off by foreclosure.

23 To temper the harshness of foreclosure, the Oregon
24 legislature has provided a statutory redemption right. O.R.S.
25 section 23.560(1). Like equitable redemption, it allows redemption
26 of the property notwithstanding the debtor's default. Unlike
27

1 equitable redemption rights, which terminate upon foreclosure,
2 statutory redemption rights begin upon foreclosure. The statute
3 which creates the right of equitable redemption also stakes its
4 frontier. That statute provides, in part:

5 The mortgagor or judgment debtor whose right
6 and title were sold, or the heir, devisee or
7 grantee of the mortgagor or judgment debtor,
8 who has acquired by inheritance, devise, deed,
9 sale, or by virtue of any execution or by any
10 other means, the legal title to the property
11 sold, may, at any time within 180 days after
12 the date of sale, redeem the property; provided
13 that a transfer of the judgment debtor's
14 interest in the property, either before or
15 after sale, shall preclude the judgment debtor
16 from the right to redeem unless the proceeds
17 from the sale are insufficient to satisfy the
18 judgment, in which event the judgment debtor
19 shall have the right to redeem at any time
20 within 10 days after the 180 days herein
21 allowed for redemption, and not otherwise.

22 O.R.S. §23.560(1).

23 In re Ivory, 32 B.R. 788 (Bankr.D.Or. 1983), upon which
24 the court below relied, held that a Chapter 13 plan can cure post-
25 sale defaults so long as the chapter 13 petition is filed within
26 the statutory redemption period. The court said:

27 Thus, it is clear that a debtor retains an
28 interest in the property until the statutory
29 redemption period has run and legal title has
30 passed. Upon the filing of a petition under
31 the Bankruptcy Code, all legal and equitable
32 interests of the debtor in property as of the
33 commencement of the case become property of the
34 estate. 11 U.S.C. § 541. In the present case,
35 the one year statutory redemption period, which
36 began to run from the date of the sale on
37 September 22, 1982, had not yet expired when
38 the debtors filed their chapter 13 petition on
39 March 18, 1983. Thus, the debtor's right of
40 redemption became property of the estate at the
41 time of the debtors' filing. The fact that the
42 debtors still retain an interest in the sold

1 property gives them the right to effect a cure
2 under 11 U.S.C. § 1322(b)(5).

3 32 B.R. at 791. The Ivory court expressly rejected the notion that
4 the sale of the property affects the debtors' ability to cure under
5 the Bankruptcy Code. 32 B.R. at 791-792. The court reasoned that
6 state laws which limit the right to cure must yield to the
7 supremacy of federal bankruptcy law. Id.

8 The DVA asserts that the default cannot be cured and the
9 mortgage reinstated during the statutory redemption period, citing
10 Justice v. Valley National Bank, 849 F.2d 1078 (8th Cir. 1988)
11 (decided with reference to Chapter 13, upon which Chapter 12 was
12 modeled, In re Mann Farms, Inc., 917 F.2d 1210, 1214 (9th Cir.
13 1990)), In re Roach, 824 F.2d 1370 (3rd Cir. 1987), In re Glenn,
14 760 F.2d 1428 (6th Cir.), cert. denied, 474 U.S. 849 (1985), and
15 In re Tynan, 773 F.2d 177 (7th Cir. 1985). Those circuit courts
16 held that a foreclosure sale extinguishes the contractual
17 relationship between the debtor and the lender. An Oregon decree
18 of foreclosure also extinguishes the mortgage contract. Call v.
19 Jeremiah, 246 Or. 568, 571, 425 P.2d 502, 505 (1967). The circuit
20 courts concluded that the curing of a default under 11 U.S.C.
21 section 1322(b)(5) requires an existing contractual relationship.
22 Justice, supra, 849 F.2d at 1085; Roach, supra, 824 F.2d at 1377;
23 Glenn, supra, 760 F.2d at 1442; Tynan, supra, 773 F.2d at 178.
24 Section 1322(b)(5) provides that a Chapter 13 plan may:

25 Notwithstanding paragraph (2) of this
26 subsection, provide for the curing of any
27 default within a reasonable time and
28 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

1 on which the final payment under the plan is
2 due.

3 The circuit courts reasoned the need for a contractual relationship
4 from the common meaning of the words "cure" and "default." To have
5 a cure, there must be a default, and to have a default, there must
6 be a contract. Justice at 1085; Roach at 1377. Although the Ninth
7 Circuit Court of Appeals has not considered this question, it has
8 determined that a promissory note which had fully matured pre-
9 petition was not susceptible of a "cure":

10 We hold . . . that the "cure" provisions of
11 subsections (b)(3) and b(5) are inapplicable
12 when a debt has reached its maturity date in
the absence of acceleration, prior to the
filing of the Chapter 13 petition.

13 In re Seidel, 752 F.2d 1382, 1383 (9th Cir. 1985).

14 The DVA also points out that because it has no right to
15 a deficiency, it has no claim against the debtor. The default that
16 section 1322(b)(5) contemplates curing is "any default . . . on any
17 unsecured claim or secured claim" Since the DVA has no
18 claim, it argues that there can be no default, and that there is
19 nothing to cure.

20 Indeed, the record reveals no claim by the DVA against
21 the debtors. Instead, the DVA has a judgment arising from a
22 judicial mortgage foreclosure, and debtors have a claim against
23 the DVA based on their statutory redemption rights.

24 In Roach, the court found nothing in section 1322 to
25 suggest a Congressional intent for the curing of a default to
26 extinguish a creditor's judgment rights. Roach at 1378. Nor does
27 the Bankruptcy Code reveal any Congressional intent to modify the

1 claims of debtors against others. The plan confirmed by the court
2 below purports to do both--it would convert the debtors' statutory
3 redemption rights, and the DVA's judgment, into a mortgage.

4 Under the Oregon statute, redemption cannot revive the
5 mortgage, it can only pay the debt. See Call v. Jeremiah, supra,
6 246 Or. at 571. The code neither creates nor enhances the rights
7 a debtor brings into the bankruptcy estate. See 11 U.S.C. section
8 541(a)(1); In re Kaplan, 97 B.R. 572, 576 (9th Cir. BAP 1989); In
9 re Gull Air, Inc., 890 F.2d 1255, 1261 (1st Cir. 1989). The
10 debtors' plan, however, would have it do so.

11 CONCLUSION

12 The cure contemplated by section 1322(b)(5) is a cure
13 that provides both debtor and creditor with the equivalent of their
14 state law rights. Cf. Butner v. United States, 440 U.S. 48, 54-
15 55. The "cure" contemplated in debtors' plan, and prohibited by
16 Justice, Roach, Glenn, Tynan, and Seidel, is not a cure at all.
17 It would create new rights for the debtors while taking vested
18 rights from the DVA, a result not contemplated by the code. We
19 agree with the well-reasoned opinions of the circuit courts and
20 disapprove of In re Ivory. A pre-petition foreclosure sale
21 prevents the application of section 1322(b)(5) to cure the
22 antecedent default.

23 **Reversed.**