

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions

Will this opinion be published? No

Bankruptcy Caption: In Re: Annie Ruth Newburn

Bankruptcy No.: 00 B 18249

Adversary Caption:

Adversary No.:

Date of Issuance: February 6, 2001

Judge: Carol A. Doyle

Appearance of Counsel:

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In Re:)	Chapter 13
)	
ANNIE RUTH NEWBURN,)	No. 00 B 18249
)	
Debtor.)	

MEMORANDUM OPINION AND ORDER

This case is before the court on the motion of Beneficial Mortgage/Household Finance Company to lift the automatic stay with respect to property on which the debtor, Annie Newburn, had given Beneficial a mortgage. Beneficial filed a mortgage foreclosure action in state court. The debtor's property was sold at a foreclosure sale to Beneficial, and the sale was confirmed by the state court. The debtor filed this Chapter 13 bankruptcy case on the day the mortgage foreclosure sale was confirmed, but after the order confirming the sale was entered. In her plan, the debtor provided that she would pay Beneficial her monthly mortgage payments, as well as arrearages due under the mortgage. The plan was confirmed. Beneficial then moved to lift the automatic stay to evict the debtor.

The debtor asserts that Beneficial did not object to the plan, and that it is therefore bound by the terms of the plan under the doctrine of res judicata. She contends that the plan reinstates her mortgage to Beneficial, and that Beneficial cannot now move to lift the stay on the basis that the debtor had no right to reinstate the mortgage. The court finds that Beneficial did assert its rights at the confirmation hearing, and did not waive its right to have the stay lifted to evict the debtor. The court also concludes that the doctrine of res judicata does not allow the debtor to reinstate her mortgage and

deprive Beneficial of its right to the property.

Factual Background

The facts in this case are not contested. As noted above, Beneficial filed a mortgage foreclosure action against the debtor. The property was sold at the foreclosure sale to Beneficial, and the sale was confirmed by the state court. After the sale was confirmed, the debtor filed this Chapter 13 case. The debtor filed a plan that provided in Paragraph 4(G) that “Debtor, and not the Trustee, shall be the disbursing agent for the regular monthly payments due to the following creditor(s): BENEFICIAL ILLINOIS, INC.” The plan also provided in Paragraph 4(D) for the trustee to pay “secured creditors not provided for in paragraphs 4B and 4C, pro rata.” The debtor’s Schedule D listed secured debts, including a mortgage arrearage owed to Beneficial in the amount of \$10,000, which presumably would be paid by the Trustee under Paragraph 4(D).

At the September 11, 2000 hearing on confirmation of the debtor’s plan, Beneficial’s counsel expressed concern that the plan included payments to Beneficial, even though the property was not property of the estate because it had been sold in the mortgage foreclosure case and the sale was confirmed before the debtor filed her petition. Beneficial’s counsel stated that Beneficial had filed a motion to lift the automatic stay under 11 U.S.C. § 362(d) with respect to the property, that would be heard by the court at a later date. The debtor’s counsel then stated that he thought that the case could be confirmed at that time (on September 11), and that the court could decide Beneficial’s motion in the future. The court stated that there did not appear to be any valid basis for objecting to the plan, and

that it believed that Beneficial's motion to lift the stay raised an issue that was independent of confirmation issues (i.e., that confirmation of the plan would not prejudice Beneficial's rights to proceed on its motion). Debtor's counsel agreed, and requested that the court address the issue raised in Beneficial's motion when that motion was presented to the court. The court then confirmed the plan. No party appealed the confirmation order.

One week later, on September 18, 2000, Beneficial brought its motion for relief from the automatic stay. It alleged, among other things, that the automatic stay should be lifted because the property had been sold at a foreclosure sale that had been confirmed before the debtor filed her bankruptcy petition. The debtor responded that Beneficial was barred under the doctrine of res judicata from seeking relief from the automatic stay because it did not object to the plan at the confirmation hearing on September 11. She contended that the confirmed plan allowed her to reinstate her mortgage, and that Beneficial was barred from attacking that confirmed plan through a motion to lift the stay alleging that she had no legal right to reinstate the mortgage. In essence, the debtor argues that if Beneficial did not want to be bound by the terms of the plan calling for repayment of the mortgage, it should not have allowed the plan to be confirmed containing those provisions.

The Effect of Section 1322(c)(1) and the Illinois Mortgage Foreclosure Law

The debtor concedes that if Beneficial had objected to the plan at the confirmation hearing, it would have had a valid objection under 11 U.S.C. § 1322(c)(1). Section 1322(c)(1) provides that a debtor can cure a default on a mortgage on the debtor's principal residence "until such

residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law.” 11 U.S.C. § 1322(c)(1). There has been considerable disagreement among bankruptcy judges and district judges in this district regarding whether a debtor can cure a mortgage default after a mortgage foreclosure sale has occurred but before the sale has been confirmed by the state court. Compare In re Crawford, 217 B.R. 558, 559 (N.D. Ill. 1998) (Shadur, J.) (debtor’s residence is not “sold at a foreclosure sale” under 11 U.S.C. § 1322(c)(1) until the sale has been confirmed), rev’g In re Crawford, 215 B.R. 990 (Bankr. N.D. Ill. 1997) (Barliant, J.); Christian v. Citibank, F.S.B. (In re Christian), 214 B.R. 352, 354-55 (N.D. Ill. 1997) (Bucklo, J.) (same), rev’g In re Christian, 199 B.R. 382 (Bankr. N.D. Ill. 1996) (Wedoff, J.); McEwen v. Federal Nat’l Mortgage Ass’n, 194 B.R. 594, 596-97 (N.D. Ill. 1996) (Grady, J.) (same); and In re Jones, 219 B.R. 1013, 1016 (Bankr. N.D. Ill. 1998) (Katz, J.) (same); with In re Danaskos, 254 B.R. 416, 418-21 (Bankr. N.D. Ill. 2000) (Barliant, J.) (real property is “sold at a foreclosure sale” when sold at a foreclosure auction, and thus prior to sale confirmation); and In re Babington, Bankruptcy Case No. 00 B 23608 (Bankr. N.D. Ill. Oct. 17) (Barliant, J.) (same), aff’d, District Case No. 00 C 7555 (N.D. Ill. Dec. 12, 2000) (Andersen, J.). However, all judges in this district agree that once the sale of the property is confirmed by the state court, a debtor no longer has any right to cure a mortgage default under §1322(c)(1). Therefore, the debtor in this case clearly had no right under §1322(c)(1) to reinstate the mortgage in her plan.

In addition, §15-1404 of the Illinois Mortgage Foreclosure Law (“IMFL”) specifically provides that the interest in the mortgaged real estate of all parties to a foreclosure “shall be terminated by the judicial sale of the real estate, pursuant to a judgment of foreclosure, provided the sale is

confirmed in accordance with this Article.” 735 ILCS 5/15-1404. Thus, in this case, once the foreclosure sale was confirmed, the debtor had no remaining ownership interest in the property and no right under §1322 or state law to reinstate the mortgage.

The debtor contends, however, that her property rights were not terminated by the order confirming sale because the order specifically gave her two rights: (1) the right to possess the property for 30 days following entry of the order approving sale, and (2) the Special Right to Redeem pursuant to 735 ILCS 5/15-1604. Although the debtor may have been given each of these rights in the order confirming sale, neither of these rights gives her any ownership interest in the property or the right to reinstate her mortgage. First, the order approving sale provided that the purchaser (Beneficial) had a right to possess the premises beginning 30 days after entry of the order. It further directed the Sheriff of Cook County to evict Annie and Luther Newburn from the premises. Both of these provisions are consistent with §15-1701 of the IMFL, 735 ILCS 5/15-1701, and in effect gave the debtor 30 days to leave the property voluntarily after confirmation of the sale. This provision in the order does not convey any ownership interest in the property, nor does it revive the mortgage on the property.

Second, the order approving sale provided that “any Special Right to Redeem, if applicable, pursuant to 735 ILCS 5/15-1604, shall expire 30 days after entry of this Order.” Section 15-1604 of the IMFL creates a special right to redeem after confirmation of a sale if the mortgagee has purchased the property but has not paid the full amount of the foreclosure judgment as specified in §

15-1603(d). 735 ILCS § 5/15-1603(d), 1604(a). If the mortgagor pays all the amounts specified in § 15-1604(a) to the mortgagee within 30 days of entry of the order confirming sale, the mortgagee must assign to the mortgagor its right to the deed to the property. 735 ILCS § 5/15-1604(b).

The debtor asserted in a sur-reply brief (to which Beneficial did not respond) that the debtor had this special right to redeem under the order confirming sale in this case. Although the order does not specify the amount Beneficial paid for the property at the sale, the order states that Beneficial has waived its right to any deficiency judgment. The court therefore assumes that the amount paid by Beneficial was less than the amount owed under §15-1603(d), and that the debtor had this special right to redeem for 30 days. However, the special right to redeem does not give the debtor an ownership interest in the property or the right to reinstate Beneficial's mortgage on the property.

The only asset relating to this property that the debtor possessed at the time she filed her petition was the right to redeem. The real property sold at the foreclosure sale did not become property of the estate.¹ In In re Tynan, 773 F.2d 177, 179 (7th Cir. 1985), the Seventh Circuit held that real property sold at a foreclosure sale does not become property of the estate, even if there is a right to redeem. The court stated that the only right a Chapter 13 debtor held after a foreclosure sale

¹“Property of the estate” is defined in §541 of the Bankruptcy Code, and includes all legal and equitable interests in the property of the debtor “as of the commencement of the case.” 11 U.S.C. §541(a)(1). Under §301 of the Bankruptcy Code, a voluntary case is commenced by the filing of a petition with the bankruptcy court. 11 U.S.C. § 301. Thus, property rights extinguished prior to the filing of a bankruptcy petition are not property of the estate.

was a right to redeem, and that only this right to redeem became property of the estate. The court specifically held that “The real property sold at the sheriff’s sale did not become part of the estate.” Id. Although the court was applying the statutory predecessor to the current foreclosure statute and a different redemption provision, the principles are the same. A right to redeem is not an ownership interest in the property or a right to reinstate a mortgage. It is simply a right to pay the full amount owed within the specified time and obtain a right to a deed from the mortgagee. Only if the debtor exercises the right to redeem within the time frame allowed does the debtor acquire an interest in the real property. See In re Scheldt, 220 B.R. 362, 364 (Bankr. C.D. Ill. 1998) (“[A] debtor’s ownership interest in real property, if already terminated, is not reinstated or resurrected by the statutory right of redemption. Only if a debtor exercises the right of redemption does the debtor reacquire an interest in the real property.”) Therefore, the special right to redeem does not provide the debtor with any basis for reviving her mortgage, and cannot transform real property sold to Beneficial before the petition was filed into property of the estate.²

Even though the debtor had no right to reinstate the mortgage under §1322(c)(1), the order confirming the foreclosure sale discussed above, or any provision of the IMFL, she nevertheless asserts that Beneficial is required to accept reinstatement of the mortgage because it did not object to the plan. She contends that the plan reinstates the mortgage and allows her to pay the mortgage

²The court notes that the debtor did not exercise her special right to redeem within the 30 day period permitted in the order confirming the foreclosure sale, or under any 60-day extension of that period that may apply pursuant to section 108(b) of the Bankruptcy Code, 11 U.S.C. §108(b). See In re Tynan, 773 F.2d at 179.

arrearages as well as current mortgage payments during the course of the plan. The debtor's argument is flawed for several reasons. First, Beneficial did question the plan provisions regarding Beneficial at the confirmation hearing, and the parties agreed that Beneficial's rights could be addressed at a later hearing on the motion to lift the stay. Second, the plan does not expressly provide for the reinstatement of the mortgage, the restoration of the debtor's ownership rights in the property, and the termination of Beneficial's new ownership rights, so it cannot have the res judicata effect the debtor seeks. Third, the court will not apply the doctrine of res judicata to create property rights in one party and destroy the property rights of another party in direct contravention of Illinois law and the Bankruptcy Code.

Beneficial Raised the Relevant Issue at the Confirmation Hearing

Although the transcript of the September 11 confirmation hearing is somewhat confusing, it is clear that Beneficial did raise the issue of whether the court should confirm a plan that provides for payment of a debt that no longer existed when the petition was filed relating to real property that was never property of the estate. Beneficial specifically asked that the case be called to question the inclusion in the plan of provisions calling for payment to Beneficial.³

No one suggested at or before the confirmation hearing that Beneficial would be bound by the plan to accept a reinstatement of the mortgage and forego its right to the property. To the

³The Chapter 13 Trustee was recommending the case for confirmation, and the court typically calls only contested confirmations.

contrary, the debtor's counsel expressly agreed with the court that the issue raised in Beneficial's motion was independent of confirmation issues,⁴ i.e., that the court would be free to grant Beneficial's motion to lift the stay even if the debtor's plan contained a provision calling for payments to be made to Beneficial. The court confirmed the plan despite Beneficial's concerns because it believed that it could decide Beneficial's motion to lift the stay in Beneficial's favor when it was presented, based upon the undisputed facts and unanimous case law interpreting §1322(c)(1). The court therefore finds that Beneficial did not fail to object at the confirmation hearing. The court in effect concluded that Beneficial's concerns could be addressed through its motion to lift the automatic stay rather than denial of confirmation of an otherwise confirmable plan.

The Doctrine of Res Judicata Does Not Bar Beneficial's Motion

In addition, the doctrine of res judicata does not apply as a matter of law in this case to

⁴At the confirmation hearing, Beneficial's counsel stated that, if there would be an issue about the impact of confirmation, he wanted the references to Beneficial taken out of the plan (his sentence was cut off by the court but it is clear that this was his request). After some discussion, the court stated that it had not heard any valid basis for objecting to confirmation, and that the issue raised by Beneficial's motion was independent of confirmation issues. Debtor's counsel then stated, "Well, I think so. If we win [Beneficial's motion], then the plan is fine because the numbers are fine;" (Transcript of Sept. 11, 2000 at p. 4.) Thus, debtor's counsel was in agreement that Beneficial's motion could be decided on its own merits whether or not the plan was confirmed containing a provision for paying Beneficial.

Beneficial's counsel then said that he believed a confirmation issue was raised if the plan contemplated paying a claim in a certain manner when the property involved was not property of the estate. The court stated that it could not see how confirmation of the plan would impact Beneficial's right to file a motion to lift stay and the court's ability to grant the motion if Beneficial was correct that the foreclosure sale was confirmed before the case was filed. The court then confirmed the plan and decided to address the motion to lift stay when it was presented.

bar Beneficial from moving to lift the automatic stay and take possession of its property. In the context of a Chapter 13 plan, the doctrine of res judicata is applied to bar parties who fail to object to confirmation of a plan from later attacking a plan on the basis of an issue that could have been raised at confirmation. See, e.g., In re Harvey, 213 F.3d 318, 321 (7th Cir. 2000). It does not provide a basis for creating property of the estate by resurrecting an extinguished mortgage and stripping a former creditor of its ownership of real property without any statutory or other basis in the law for doing so.

The debtor relies on In re Andersen, 179 F.3d 1253, 1258 (10th Cir. 1999), to support her res judicata argument. In Andersen, the debtor included in her Chapter 13 plan a provision stating that only 10 percent of her student loans would be paid. The plan also included specific findings that the debtor would suffer undue hardship if her student loans were not discharged, and that the student loans were therefore dischargeable. 179 F.3d at 1254. The lender failed to object on a timely basis to confirmation, and then failed to appeal the order confirming the plan. The Tenth Circuit held that the lender was bound by the provisions of the plan because it failed to file a timely objection to confirmation, even though debtor had not met her burden of proving that the loan was dischargeable and the confirmed plan was therefore contrary to the Bankruptcy Code. The court reasoned that the compelling need for finality in confirmed plans outweighed the concern about plans containing provisions that contravene the Bankruptcy Code. 179 F.3d at 1258.

However, this case differs in two fundamental ways from Andersen. First, in Andersen, as noted above, the plan contained unambiguous language accomplishing a discharge of student loan

debt. In this case, the plan does not expressly reinstate the mortgage, nor does it contain any language resurrecting the debtor's ownership interest or terminating Beneficial's new ownership interest in the property. Instead, it provides only that unnamed secured creditors (presumably those listed in Schedule D, including Beneficial) will be paid by the trustee on a "pro rata" basis, and that the debtor shall be the disbursing agent for the "regular monthly payments due" to Beneficial. Thus, the plan merely states that the debtor apparently intends to pay a debt that she no longer owes. The court finds that the language of the plan is wholly insufficient to revive the debtor's terminated interest in the property, reinstate the mortgage, and strip Beneficial of its ownership of the property.

In addition, Andersen differs significantly from this case because the debtor was attempting to accomplish a discharge that could be obtained under the Bankruptcy Code had the debtor followed the proper procedures and provided the appropriate evidence. In this case, the debtor is not simply trying to short-cut the procedural and evidentiary requirements of the Bankruptcy Code. She is trying to create new property rights in herself and take away the property rights of Beneficial without any legal basis for doing so, in direct contravention of both state law and the Bankruptcy Code. The Andersen decision does not provide support for applying the doctrine of res judicata to obtain such drastic results.

The debtor also relies on In re Harvey, 213 F.3d 318 (7th Cir. 2000), to support her res judicata argument. In Harvey, the Seventh Circuit held that a party with adequate notice of a bankruptcy proceeding cannot ordinarily attack a confirmed plan. 213 F.3d at 321. The debtor in

Harvey filed two plans: a long-form plan that contained a specific provision for “stripping” the lien of a secured creditor, and a short form plan that did not contain this provision. The court held that the burden was on the creditor to clarify any ambiguity created by the two plans at the time of confirmation, and that the doctrine of res judicata barred a later attack on this provision of the plan.

As in Andersen, the debtor in Harvey was attempting to accomplish a goal that many courts have permitted in Chapter 13 plans under the Bankruptcy Code - stripping a creditor’s lien after only the secured portion of a claim is paid. Thus, the plan provision at issue in Harvey did not plainly violate the Bankruptcy Code or any other law. In contrast, in this case, the debtor seeks to accomplish through her plan a result that is directly contrary to both §1322(c)(1) of the Bankruptcy Code and IMFL. Nothing in the Harvey decision or any other Seventh Circuit decision of which this court is aware would require such a result. Cf. In re Escobedo, 28 F.3d 34 (7th Cir. 1994) (res judicata need not be applied to a plan that does not meet the mandatory requirements of §1322). It is one thing to say that a party can waive its right to object to a plan that does not comply with all of the requirements of the Bankruptcy Code, as did the courts in both Andersen and Harvey. It is quite another to try to create property of the estate by resurrecting a mortgage and an ownership interest in real property in one party and taking away the ownership interest of another party, all without any basis in the law or even any express provision in the plan to accomplish these feats. This court will not apply a plan provision that merely calls for the repayment of a debt that no longer exists to deprive Beneficial

of its right to own the property.⁵

CONCLUSION

For all of these reasons, the court grants Beneficial's motion to lift the automatic stay with respect to the debtor's former property.

SO ORDERED.

Dated this 6th day of February, 2001

⁵The debtor also asserts that Beneficial is bound by the plan to accept reinstatement of the mortgage under §1327(a) of the Bankruptcy Code, 11 U.S.C. §1327(a). Section 1327(a) provides that the provisions of a confirmed plan bind the debtor and each creditor, whether or not the creditor has objected to or accepted the plan. This provision essentially codifies the doctrine of res judicata. The debtor's argument is not persuasive for the same reasons that the court rejects the res judicata argument.

First, the plan does not expressly restore the debtor's rights in the property, nor does it reinstate the defunct mortgage. It simply lists Beneficial as a secured creditor to be paid under the plan. Second, Beneficial is not a "creditor" based on the extinguished mortgage. Beneficial expressly waived its right to any deficiency based on the mortgage foreclosure sale and therefore is not a creditor based on the former mortgage. Beneficial cannot be bound by the terms of a plan relating to a debt that did not exist when the petition was filed. The debtor correctly notes that Beneficial called itself a creditor in its motion to lift the stay, and that it alleged that it was a secured creditor by virtue of a mortgage on the debtor's real property, which was past due for many months. However, Beneficial clearly made an inadvertent error by including these allegations in its motion. Beneficial also alleged that the property had been sold at a foreclosure sale that had been confirmed, and requested that the stay be modified. The court will not give Beneficial's prefatory allegations undue significance, when Beneficial has otherwise consistently denied that the debtor's former property was property of the estate, and particularly when the debtor concedes that she had no right to reinstate her mortgage under §1322(c)(1). Finally, the court will not interpret §1327(a) in a manner that would divest a party of its ownership rights and recreate an extinguished mortgage and ownership rights in the debtor, all in direct contravention of Illinois law and §1322(c)(1).

CAROL A. DOYLE
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In Re:)	Chapter 13
)	
ANNIE NEWBURN,)	No. 00 B 18249
)	Honorable Carol A. Doyle
Debtor.)	

CERTIFICATE OF MAILING

I, Kathleen K. Wachtel, certify that I served the foregoing Memorandum Opinion and Order via First Class, U.S. Mail, postage prepaid, to the following individuals at their respective addresses:

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on this 7th day of February, 2001, prior to the hour of 5:00 P.M.

Kathleen K. Wachtel