

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 3:12-bk-2052-PMG

Alfred Desmond Hooker,

Debtor.

Chapter 7

**ORDER ON MOTION TO ENFORCE CHAPTER 7 DEBTOR'S COMPLIANCE
WITH STATEMENT OF INTENTION TO SURRENDER PROPERTY**

THIS CASE came before the Court for final hearing to consider the Motion of the Bank of New York Mellon (the Bank) to Enforce Chapter 7 Debtor's Compliance with Statement of Intention to Surrender Property. (Doc. 36).

Section 521(a)(2) of the Bankruptcy Code requires an individual Chapter 7 debtor to file a statement of his intention with respect to any property of the estate that is encumbered by a lien, and to perform the intention within thirty days after his creditors' meeting.

In this case, the Debtor's statement indicated his intention to surrender certain non-homestead real property that secures a debt. According to the Bank, the Debtor relinquished all of his rights to the real property by electing to surrender the collateral. In its Motion to Enforce Compliance, therefore, the

Bank asks the Court to enjoin the Debtor from contesting the Bank's actions to foreclose the property in state court.

The Motion should be denied. Section 521(a)(2) is primarily a notice statute that does not affect a debtor's substantive rights. In the event that a debtor does not perform in accordance with his statement of intention, an affected creditor's remedy is to seek relief from the automatic stay. If the stay is modified, the debtor may continue to assert his substantive rights to the property in the creditor's nonbankruptcy litigation.

Background

The Debtor, Alfred Desmond Hooker, filed a petition under Chapter 7 of the Bankruptcy Code on March 28, 2012.

On his schedule of assets filed with the petition, the Debtor listed certain residential real property located in Orange Park, Florida, with a scheduled value of \$113,400.00, and a scheduled mortgage in the amount of \$264,718.00. He also listed separate residential property located in Jacksonville, Florida, with a scheduled value of \$66,300.00, and a scheduled mortgage in the amount of \$137,161.00.

On his Chapter 7 Individual Debtor's Statement of Intention, the Debtor stated that the Orange Park property and the Jacksonville property were not claimed as exempt, and that the property "will be surrendered."

The Bank claims that it holds the mortgages on the Orange Park property and the Jacksonville property. (Doc. 47, ¶¶ 5, 18).

On June 15, 2012, the Bank filed a Motion for Relief from the Automatic Stay in the bankruptcy case. (Doc. 18). In the Motion, the Bank requested modification of the stay to allow it to proceed with

a prepetition action to foreclose the Orange Park property. The Motion was granted on July 18, 2012. (Doc. 21).

After the automatic stay was modified, the Bank filed a Motion for Summary Judgment in the foreclosure action. (Doc. 36, p. 2). On November 19, 2012, the Debtor filed an Affidavit in Opposition to the Bank's Motion for Summary Judgment. In the Affidavit, the Debtor asserted that the Bank had not established (1) that it was the owner and holder of the mortgage, or (2) that it had provided specific notice prior to acceleration of the debt. (Doc. 36, Exhibit C).

The Debtor intends to continue to contest the Bank's foreclosure of the Orange Park property and the Jacksonville property. (Doc. 47, ¶¶ 9, 22).

Discussion

In the Motion presently under consideration, the Bank seeks the entry of an order compelling the Debtor to comply with "his stated intention to surrender secured property in his Chapter 7 Bankruptcy." According to the Bank, the Debtor "relinquished his interest in the secured property, but continues to interfere with and defend against [the Bank's] state court foreclosure rights." Consequently, the Bank asks the Court to compel the Debtor to perform his intention by surrendering the property, and to enjoin the Debtor from further defending the Bank's in rem claims against the property in the foreclosure actions. (Doc. 36, p. 1).

The Bank's Motion is filed pursuant to §105(a) and §521(a)(2) of the Bankruptcy Code. Section 521(a)(2) provides:

11 USC §521. Debtor's duties

(a) The debtor shall—

...

(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and

(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;

except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h).

11 U.S.C. §521(a)(2)(Emphasis supplied). Generally, the section establishes two duties of an individual Chapter 7 debtor: (1) within thirty days of the petition date, the debtor must file a statement of intention with respect to debts secured by property of the estate, and (2) within thirty days after the meeting of creditors, the debtor must perform the intention. In re Beard, 2012 WL 868962, at 2 (Bankr. M.D.N.C.).

In this case, the Debtor stated that he intended to surrender the Orange Park property and the Jacksonville real property. After the bankruptcy petition was filed, however, the Debtor has contested the Bank's actions to foreclose the properties, and intends to continue to defend the actions. (Doc. 47, ¶¶ 8, 9, 21, 22). In the Motion currently under consideration, the Bank asks the Court to compel the

Debtor to surrender the property in accordance with his stated intention, and to prohibit the Debtor from opposing the foreclosure actions.

The Motion should be denied. Section 521(a)(2) of the Bankruptcy Code is primarily a notice statute that does not affect a debtor's substantive rights. In the event that the debtor does not perform in accordance with his statement of intention, the affected creditor's remedy is to obtain relief from the automatic stay. If the stay is modified, the debtor may continue to assert his substantive rights to the property in the creditor's nonbankruptcy litigation.

A. Section 521(a)(2) is a notice statute.

Subsection (A) of §521(a)(2) requires individual Chapter 7 debtors “to file a statement of intent stating what he or she intends to do with any property of the estate that secures a debt.” In re Alvarez, 2012 WL 441257, at 2 (Bankr. N.D. Ill.).

The original purpose of §521(a)(2)(A) “is one of notice, to remedy creditors’ complaints to Congress that they could not reach debtors’ attorneys and were not permitted to contact pro se debtors at all.” Collier on Bankruptcy (16th ed.) ¶ 521.14[5] p. 521.51(quoted in Main Street Bank v. Hull, 2008 WL 783772, at 3 (D. Mich.), and In re Ervin, 2013 WL 1867989, at 2 (Bankr. D.S.C.)).

The purpose of the statute has been acknowledged and accepted in a number of recent decisions. In In re Ervin, 2013 WL 1867989, at 2, for example, the Court found that the function of the debtor's statement of intention is “to give notice to creditors of the debtor's intention without the need for communication with debtor's counsel or improper communication with the debtor in the event counsel is not responsive.” And in In re Rodale, 452 B.R. 290 (Bankr. M.D. Fla. 2011), this Court recognized the intended role of the statute:

If a Chapter 7 debtor schedules debts that are secured by property of the estate, §521(a)(2) of the Bankruptcy Code requires the debtor to file a statement of his intention with respect to retention or surrender of the property. 11 U.S.C. §521(a)(2). The reason for the requirement is to provide notice to the secured creditor of the debtor's intent regarding the creditor's collateral. *In re Rodgers*, 273 B.R. 186, 191 (Bankr. C.D. Ill. 2002). Section 521(a)(2) is designed to "give creditors information regarding their property without the hassle of having to reach the debtor's attorney or engage in unauthorized communications with a pro se debtor." *In re Irvine*, 192 B.R. 920, 921 (Bankr. N.D. Ill. 1996)(quoting *In re Bracamortes*, 166 B.R. 160, 162 (Bankr. S.D. Cal. 1994)).

In re Rodale, 452 B.R. at 297. In other words, §521(a)(2)(A) "requires Chapter 7 debtors to inform secured creditors as to whether they will retain or surrender encumbered collateral." In re Steinberg, 498 B.R. 391 (10th Cir. BAP 2013)(Emphasis supplied). It is a notice statute that serves an informational purpose.

B. Section 521(a)(2) does not affect the debtor's substantive rights.

The last unnumbered paragraph of §521(a)(2) clarifies that the statute is for notice purposes only, by providing that "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h)." 11 U.S.C. §521(a)(2).

Prior to BAPCPA, Courts generally found that §521 "clearly provided" that a debtor's rights with respect to the scheduled property were not altered by the section's requirements. In re Stephens, 2013 WL 1305576, at 3 (Bankr. N.D.N.Y.).

After BAPCPA, Courts have found that the amendments did not change the purpose of §521 from a notice statute to a statute that altered a debtor's substantive rights. Main Street Bank v. Hull, 2008 WL 783772, at 4.

Section 521(a)(2)(C) expressly provides that nothing in subparagraphs (A) or (B) alters the debtor's substantive rights as to the secured property other than that provided in subsection 362(h) which applies to personal as opposed to real property. Accordingly, by providing notice of intent as to her secured real property, Debtor Hull did not "surrender" any substantive rights provided by state law as to that secured real property. Secured creditors cannot use the bankruptcy laws to circumvent a debtor's substantive rights under state law.

Id. at 3. A debtor's failure to take the action identified in his statement of intention "does not affect the debtor's rights in the property." In re Ervin, 2013 WL 1867989, at 2 (quoting Collier on Bankruptcy (16th ed.) ¶ 421.14[5], p. 521.51).

In In re Steinberg, 498 B.R. 391 (10th Cir BAP 2013), for example, the Tenth Circuit Bankruptcy Appellate Panel recently found that a debtor's property rights had not been altered, and that she had the right to challenge a creditor's standing to seek relief from the stay, even though the debtor had filed a statement indicating her intent to surrender the property. In re Steinberg, 498 B.R. 391 (10th Cir. BAP 2013).

Stating one's intention to surrender property on the schedules is not the equivalent of an effective legal surrender of real property. Section 521(a)(2)(A) of the Bankruptcy Code requires Chapter 7 debtors to inform secured creditors as to whether they will retain or surrender encumbered collateral. Section 521(a)(2)(B) requires the debtor to perform such intention within a certain time frame. It also, however, provides that subparagraphs (A) and (B) do not alter a debtor's or a trustee's rights with regard to the property. We view §521(a)(2) as principally a notice statute, and not as one that alters the nonbankruptcy law rights of either the debtor or the lienholder.

In re Steinberg, 498 B.R. 391, 2013 WL 2351797, at 2 (10th Cir. BAP).

A debtor's statement of intention under §521(a)(2) does not alter the debtor's substantive property rights.

C. The affected creditor's remedy is to seek relief from the automatic stay.

As shown above, §521(a)(2)(A) requires an individual Chapter 7 debtor to file a statement of intention with respect to encumbered property. Section 521(a)(2)(B) requires the debtor to perform his intention within thirty days after the creditors' meeting. In the event that the debtor does not perform his intention by the prescribed date, the creditor's remedy is to seek relief from the automatic stay.

The Court reaches this conclusion for three reasons.

First, the Bankruptcy Code does not provide creditors with any direct method of compelling a debtor's compliance with his statement of intention. Instead, §704(a)(3) of the Bankruptcy Code provides that the duties of the Chapter 7 trustee include ensuring "that the debtor shall perform his intention as specified in section 521(a)(2)(B) of this title." 11 U.S.C. §704(a)(3).

Under §704(a)(3), the Bankruptcy Code appears to contemplate that the trustee, and not the affected creditor, is the proper party to enforce the debtor's duties under §521(a)(2). Prior to BAPCPA, for example, a number of Courts held that "the statutory mechanism for enforcement fell upon Chapter 7 trustees" with respect to a debtor's compliance with his statement of intention. In re Buerge, 2013 WL 4409698, at 6 (Bankr. D. Kan.). After BAPCPA, the result is the same. "[T]he statute gives the trustee, not the creditor, the duty to ensure compliance." Main Street Bank v. Hull, 2008 WL 783772, at 2.

Second, the last paragraph of §521(a)(2) currently provides that "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h)." 11 U.S.C. §521(a)(2)(Emphasis supplied).

Section 362, of course, is the section of the Bankruptcy Code that relates to the automatic stay. Section 362(h) applies to encumbered personal property of the estate, and generally provides that the

automatic stay of §362 is terminated with respect to such personal property if the debtor fails to file a timely statement of intention under §521(a)(2), and fails to timely take the action specified in the statement. 11 U.S.C. §362(h).

In other words, the last paragraph of §521(a)(2) provides that the section does not alter a debtor's substantive rights, and §362(h) appears in the paragraph as the "sole exception" to the provision. Accordingly, under the statute, the only specific effect of a debtor's noncompliance with §521(a)(2) is that the stay will be lifted "slightly earlier than would ordinarily occur" under certain circumstances. Main Street Bank v. Hull, 2008 WL 783772, at 3(quoting 5 Collier on Bankruptcy ¶ 521.10[5] (15th rev. ed. 2004)). See also In re Ervin, 2013 WL 1867989, at 3(Relief from the stay under §362(h) is the specific and limited remedy for a debtor's failure to comply with §521(a)(2)).

The last paragraph of §521(a)(2) contemplates relief from the stay as the appropriate solution to a debtor's failure to state or perform his intention with respect to encumbered property. Consequently, a creditor's "preferred remedy" should be seeking relief from the stay to pursue its collateral in state court. Main Street Bank v. Hull, 2008 WL 783772, at 4(quoting Collier, at ¶ 521.10[4]).

Third, as a matter of policy, §521(a)(2) was not intended to provide creditors with a shortcut to proving their claims against the property under applicable state law. "The statute was not designed to provide creditors with a mechanism to avoid obligations imposed by state law or to create substantive rights." In re Stephens, 2013 WL 1305576, at 3 (Bankr. N.D. N.Y.)(citing In re Theobald, 218 B.R. 133, 135-36 (10th Cir. 1998)). "Section 521(a)(2) does not allow a secured creditor to obtain a better result under bankruptcy law than that provided under state law with regard to real property." Main

Street Bank v. Hull, 2008 WL 783772, at 3. Creditors should not be permitted to use §521(a)(2) to avoid applicable state law requirements for enforcing their property interests. Id. at 5.

The Bankruptcy Code does not provide creditors with any direct method of compelling a debtor to perform his obligations under §521(a)(2). Additionally, relief from the automatic stay under §362(h) is the only remedy for noncompliance that specifically appears in the statute. Finally, as a matter of policy, creditors should not be permitted to use §521(a)(2) as a shortcut to proving their claims against the property under state law. For these reasons, the Court finds that a creditor's remedy is to seek relief from the automatic stay in the event that a debtor does not perform his intention by the date set forth in §521(a)(2) of the Bankruptcy Code.

D. The debtor may assert his substantive rights in the creditor's nonbankruptcy litigation.

In the event that a debtor fails to perform in accordance with his statement of intention, a creditor may seek relief from the automatic stay to pursue his claims against the property in state court. If the stay is modified, the debtor may assert his substantive rights to the property in the creditor's nonbankruptcy litigation.

In this case, the Bank obtained relief from the stay as to the Orange Park property. (Doc. 21). Additionally, the Jacksonville property was not claimed as exempt, the property was abandoned by the Chapter 7 trustee, and the bankruptcy case was subsequently closed. Accordingly, the stay terminated as to the Jacksonville property pursuant to §362(c) of the Bankruptcy Code.

Since the automatic stay has been terminated, the Bank was entitled to resume its prepetition actions to foreclose the property in state court.

The Bank acknowledges that the Debtor is not required to deliver possession of the property to the Bank in the foreclosure actions. Additionally, the Bank acknowledges that it is not entitled to “an automatic entry of final judgment in the cases,” but is instead required to prove its entitlement to the foreclosure judgments. The Bank contends, however, that it should be permitted to pursue the foreclosure actions “without interference from Debtor.” (Doc. 36, p. 5; Doc. 48, pp. 3-4).

To support its contention, the Bank primarily asserts that the Debtor relinquished his rights to the property by electing to “surrender” the collateral on his statement of intention. The decisions cited by the Bank, however, do not warrant the conclusion that the Debtor is prohibited from asserting his substantive rights to the property in the post-stay foreclosure litigation.

In re Cornejo, 342 B.R. 834, 835 (Bankr. M.D. Fla. 2005), for example, involved the debtor’s surrender of a vehicle that was located at a repair shop. The focus of the decision was the Court’s determination that the debtor was not required to deliver physical possession of the vehicle to the creditor in order to effectuate the surrender. Although the Court generally defined the term “surrender” as the relinquishment of the debtor’s rights in the collateral, the definition was derived from cases involving a Chapter 13 debtor’s “surrender” of property under §1325(a)(5)(C) of the Bankruptcy Code. A Chapter 13 debtor’s surrender of property under §1325 occurs in the context of a court order confirming his plan, and is therefore different from a Chapter 7 debtor’s statement under §521 that he intends to surrender encumbered property. “Stating one’s intention to surrender property on the schedules is not the equivalent of an effective legal surrender of real property.” In re Steinberg, 498 B.R. 391, 2013 WL 2351797, at 2.

Additionally, In re Rathbun, 275 B.R. 434, 439 (Bankr. D. R.I. 2001) involved a debtor's unperformed statement of intention to reaffirm a vehicle loan. The Court declined to enter an order compelling the debtor to surrender the vehicle to the creditor, finding that such injunctive-type relief is an extreme remedy that should only be applied in extraordinary cases. In re Rathbun, 275 B.R. at 442, 445. Instead, the Court found that modifying the stay is the "standard and preferred method of remedying noncompliance with §521(2)." Id. at 445.

Departure from the preferred remedy was not appropriate in Rathbun, because the creditor did not show that it would be unable to effectuate its state law rights after the stay was lifted. "The mere fact that ordering surrender might be more efficient for the Bank from a process standpoint, which is a debatable point, is not enough to warrant a more serious remedy." Id. at 446.

In this case, as in Rathbun, the Bank has not established any extraordinary circumstances that justify the entry of an order enjoining the Debtor from asserting his substantive property rights in the Bank's foreclosure litigation. The Bank has acknowledged that it is required to prove its right to a judgment in the foreclosure actions, and §521(a)(2) does not permit the Bank to circumvent the requirements of the applicable state law. Main Street Bank v. Hull, 2008 WL 783772, at 3.

Section 521(a)(2) of the Bankruptcy Code expressly provides that the debtor's duties regarding his statement of intention shall not alter his rights to the scheduled property. The Debtor may assert his substantive rights to the property in the Bank's nonbankruptcy litigation.

Conclusion

The Bank has filed a Motion to Enforce Chapter 7 Debtor's Compliance with Statement of Intention to Surrender Property. (Doc. 36).

Section 521(a)(2) of the Bankruptcy Code requires an individual Chapter 7 debtor to file a statement of his intention with respect to any property of the estate that is encumbered by a lien, and to perform the intention within thirty days after his creditors' meeting.

In this case, the Debtor's statement indicated his intention to surrender certain non-homestead real property. According to the Bank, the Debtor relinquished all of his rights to the real property by electing to "surrender" the collateral. In its Motion to Enforce Compliance, therefore, the Bank asks the Court to enjoin the Debtor from contesting the Bank's actions to foreclose the property in state court.

The Motion should be denied. Section 521(a)(2) is primarily a notice statute that does not affect a debtor's substantive rights. In the event that a debtor does not perform in accordance with his statement of intention, an affected creditor's remedy is to seek relief from the automatic stay. If the stay is modified, the debtor may continue to assert his rights to the property in the creditor's nonbankruptcy litigation.

Accordingly:

IT IS ORDERED that the Motion of the Bank of New York Mellon to Enforce Chapter 7 Debtor's Compliance with Statement of Intention to Surrender Property is denied.

DATED this 12 day of December, 2013.

BY THE COURT

PAUL M. GLENN
United States Bankruptcy Judge