BURR ALERT

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Finally a Bankruptcy Order Worth Celebrating:
Obtaining Bankruptcy Court Orders Compelling Borrower's Surrender of Mortgaged Property

One of the common yet troubling phenomena encountered in foreclosure litigation is an action heavily defended by a borrower who represented to a bankruptcy court that she would surrender the property and who obtained a discharge from liability on the strength of that representation. For a chapter 7 debtor, this representation is made in a Statement of Intention prepared pursuant to 11 USC § 521(a)(2) of the Bankruptcy Code and which requires the borrower to elect between surrender of the mortgaged property, reaffirmation of the debt or redemption of the property. For a chapter 13 debtor, this representation of surrender is made as part of the debtor's plan of reorganization under 11 USC § 1325(a)(5)(C). It had become routine for borrowers to designate that the secured property would be surrendered, then vigorously defend the foreclosure action once the bankruptcy case was closed. This appeared to be the accepted wisdom among practitioners on both sides of the bar.

In a series of cases in Florida, Burr & Forman has challenged this premise with significant success. These challenges have taken the form of motions to reopen the bankruptcy case in which the borrower has represented that she would surrender the mortgaged property and to seek an order of the bankruptcy court compelling the surrender. The rationale of pursuing this in bankruptcy court rather than the underlying state foreclosure court is several-fold: first the state courts appear to have become indifferent to this shady practice, due in part to its commonality; secondly, the state judges are usually not as well-versed in the nuances of bankruptcy law and are reluctant to enforce bankruptcy principles with which they are unfamiliar; and finally, the underlying responsibility for ensuring that bankrupt debtors comply with the requirements and orders of the bankruptcy court primarily lies with the bankruptcy judge.

In a series of rulings, our firm has obtained positive rulings reopening the bankruptcy case and compelling compliance with a requirement to surrender property, including orders from Judge Hyman and Judge Kimball in the West Palm Beach Division of the Southern District of Florida, Judge Isicoff in the Miami Division of the Southern District of Florida, Judge Williamson in the Tampa Division of the Middle District of Florida, and Judge Briskman of the Orlando Division of the Middle District of Florida. In addition, Judge Jenneman of the Orlando Division of the Middle District of Florida, Judge Williamson of the Tampa Division of the Southern District of Florida, Judge Mark of the Miami Division of the Southern District of Florida, and Judge Specie of the Northern District of Florida have each authored an opinion suggesting they are favorably disposed toward this position, and Judge Jackson of the Orlando Division of the Middle District of Florida has made in court statements that are favorable. We have also successfully negotiated numerous consent foreclosure judgments based upon the arguments made in these actions.

To be sure there are at least two bankruptcy judges who do not adhere to this view, Judge May in Tampa and Judge Glenn in Jacksonville, and some judges who have yet to be heard from.

This strategy has provided a powerful tool to bringing a prompt conclusion to foreclosure cases which otherwise might have dragged on for months or even required refilling to correct deficiencies in the original filings, because several of the judges named above have been willing to enter orders compelling performance of the surrender upon threat of vacating the bankruptcy discharge or on threat of contempt of court. For example, in response to our motion for contempt, Judge Kimball issued an award of monetary sanctions against a recalcitrant debtor who violated an order compelling surrender. We successfully negotiated a full surrender of the property upon issuance of the sanctions. In addition, Judge Hyman has issued an order to show cause why a prominent foreclosure defense attorney should not be sanctioned for assisting the debtor in defending foreclosure of a surrendered property. No sanctions resulted from the show cause order, but the defense firm has been warned that future foreclosure defense in the Palm Beach Division of the Southern District of Florida may result in sanctions.

Despite a groundswell of judicial acceptance of this tactic, there are still hurdles. One of the orders entered by Judge Hyman in *In re Failla*, the first case of this type filed by our firm, and the first authored opinion from a bankruptcy judge specifically directing the cessation of foreclosure defense upon surrender in bankruptcy, is now on appeal to the District Court where it has been assigned to Judge Marra. Briefing is underway on this appeal. A decision by Judge Marra may not ultimately dispose of this issue and it may end up with the Eleventh Circuit Court for decision.

The Mechanics of Statement of Intention and Ensuing Litigation

Section 521(a)(2)(A) of the Bankruptcy Code requires a chapter 7 debtor to file a statement of intention to surrender or retain property of the estate that secures a debt, and if the debtor chooses to retain property, he must also elect to either reaffirm the secured debt or redeem the property. Section 521(a)(2)(B) requires the debtor to then perform his statement of intention "within 30 days after the first date set for the meeting of creditors." According to the Eleventh Circuit, a chapter 7 debtor is not permitted "to retain collateral without either redeeming the property or reaffirming the debt." *In re Taylor*, 3 F.3d 1512, 1517 (11th Cir. 1993).[1] In other words, if a chapter 7 debtor is unable to pay the secured creditor through a reaffirmation agreement or redemption of the property, she has only one option: to "surrender" the property. Similarly, in a chapter 13 case, a debtor "cannot retain collateral without paying for it," in which case, she must "surrender" the property to the secured creditor. *In re Metzler*, 2015 WL 2330131, at *3 (Bankr. M.D. Fla. May 13, 2015) (J. Williamson) (analyzing the provisions of 11 U.S.C. § 1325(a)(5)(C)).

The Bankruptcy Code does not define "surrender," and courts have been left to craft a definition that comports with the purposes of the Bankruptcy Code. For instance, "surrender" does not allow a mortgagee to bypass state law foreclosure requirements and does not require the execution of a deed to

[1] Other Circuit Courts have allowed a chapter 7 debtor, who is current on secured loan obligations but does not wish to reaffirm the debt, to retain collateral. *E.g., In re Boodrow*, 126 F.3d 43, 53 (2d Cir. 1997).

a particular lienholder, especially considering that multiple lienholders may stake a claim to the same property. *In re Plummer*, 513 B.R. 135, 143-44 (Bankr. M.D. Fla. 2014).

On the other hand, bankrupt debtors and their foreclosure defense firms have taken advantage of this uncertainty in the law by proceeding to vigorously defend or oppose foreclosure of the property in state court. Although secured creditors must abide by state law foreclosure requirements to repossess collateral in Florida, a debtor's active defense of the creditor's right to foreclosure seems contrary to an obligation to "surrender" the property, regardless of how that word is defined. Accordingly, bankruptcy courts in Florida have recently explored what "surrender" means in the context of a real property foreclosure action.

In *Plummer*, Judge Jenneman found that the meaning of "surrender," while not requiring delivery of possession or title to real property, involves the debtors' relinquishment of his rights in the collateral. 513 B.R. at 143. With regard to real property, Judge Jenneman determined that a debtor surrenders real property by allowing the mortgagee "to obtain possession by available legal means without interference," and that "the debtor cannot impede the creditor's efforts to take possession of its collateral by available legal means." *Id.* at 143-44. Taking the same approach, other bankruptcy judges have issued opinions directing debtors who "surrendered" property in a chapter 7 or chapter 13 bankruptcy case to cease defense or opposition to foreclosure and sale of real property. *See, e.g.*, *In re Cheryl L. Troutt*, No. 13-39869-EPK, ECF No. 30 (Bankr. S.D. Fla. September 10, 2014) (J. Kimball); *In re Failla*, 529 B.R. 786 (Bankr. S.D. Fla. 2014) (J. Hyman); *In re Metzler*, 2015 WL 2330131, at *3 (Bankr. M.D. Fla. May 13, 2015) (J. Williamson).

In *In re Failla*, the Chief Judge of the United States Bankruptcy Court for the Southern District of Florida was the first to issue a written opinion of this kind analyzing the arguments of the debtor and the secured creditor with regard to the obligation to surrender real property. The Faillas argued that the obligation to "surrender" real property does not affect their right to raise defenses to a state court foreclosure action. Incorporating much of Judge Kimball's oral ruling in the *Troutt* decision, Judge Hyman rejected the Faillas' argument, holding as follows:

> While the Debtors do not have to physically surrender the Property to CitiBank, they cannot continue to defend and/or contest the foreclosure in the State Court which is in effect resisting the surrender of the Property to CitiBank. The Debtors do not have an absolute “right” to defend in a foreclosure action because the Debtors explicitly admitted the validity of the debt and stated their intention before this Court to surrender the Property.

529 B.R. at 792. Judge Hyman further found that the Faillas' "discharge will be in jeopardy" if they refuse to surrender the real property because such refusal "could be considered not only a fraud on the Court, but also a violation of 11 U.S.C. § 521(a)(2)(B)." *Id.* at 793. The Faillas have appealed Judge Hyman's decision to the District Court, and the appeal is currently pending.

Judge Williamson, in the United States Bankruptcy Court for the Middle District of Florida has since issued an opinion equating a chapter 7 debtor's obligation to surrender real property under section 521(a)(2) with the obligation of a chapter 13 debtor under section 1325(a)(5)(C). *In re Metzler*, 2015 WL 2330131,

at *3. In *Metzler*, Judge Williamson's decision to compel surrender turned primarily on the Eleventh Circuit's pronouncement in *Taylor* that "a debtor cannot retain collateral unless he or she redeems it or reaffirms the debt it secures," as well as the decisions of the First and Fourth Circuits. *Id.*at *3-4.

Recommendations for Enforcing Borrower's Surrender in Bankruptcy:

We are recommending to our clients that they continue to prosecute these surrender motions aggressively whenever a review of the record suggests that it is in order. Here is the general strategy that we recommend in these cases:

- If a contesting borrower has filed a bankruptcy action, have your litigation counsel evaluate whether the borrower filed a statement of intention to surrender the property in a chapter 7 case, or in a chapter 13 case, whether the chapter 13 plan provides for surrender of the property.
- If the statement of intention or chapter 13 plan require surrender of the property, and the bankruptcy action is still open, move for relief from stay *and as part of that motion, ask the court to order the borrower/debtor to surrender the property by withdrawing all opposition to the foreclosure action*.
- If the bankruptcy action has closed, have litigation counsel with bankruptcy expertise file a motion to reopen the bankruptcy case and compel the debtor to surrender the property.
- Once you have obtained the order from the bankruptcy court compelling surrender, immediately send the order to the contesting borrower's foreclosure counsel and demand withdrawal of all motions, answers and defenses to foreclosure.
- If the borrower fails to withdraw those documents, file a motion to enforce the order, which could include a request to hold the debtor in contempt of court, to order monetary sanctions, and/or to vacate the discharge.

We are also in the process of developing case law precedent to compel surrender of property in the case of chapter 7 debtors who filed a statement of intention, *other than to surrender the property*, but have failed to perform that intention. We have obtained favorable results before Judge Hyman and Judge Jackson with this strategy.

If you have additional questions about the strategies outlined above or the developing case law, please contact:

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