UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

IN RE:		
PETER A. MEDAGLIA	:	**BK No. 1:08-bk-12804**
Debtor	:	**Chapter 13**

ROBERT BUONANNO'S MEMORANDUM IN REPLY TO DEBTOR'S MEMORANDUM

NOW COMES, Party-In-Interest, Robert Buonanno ("Buonanno"), and hereby files the within Memorandum in response to Debtor, Peter A. Medaglia's ("Medaglia") Opposition to Buonanno's Motion for Relief from Automatic Stay to Record Deed and to Take Possession.

Quite simply, Medaglia is *rewriting the statute.*

Statutory Language

Section 1322(c)(1), provides in pertinent part:

> (c) Notwithstanding subsection (b)(2) and applicable non-bankruptcy law –
>
> (1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) **until such residence is sold at a foreclosure sale** that is conducted in accordance with applicable non-bankruptcy law.

Medaglia's "Proposed" Statutory Language

In effect, Medaglia *re-writes* § 1322(c)(1) to provide:

> (c) Notwithstanding subsection (b)(2) and applicable non-bankruptcy law –
>
> (1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until ~~such residence is sold~~ ***[the deed for the residence is delivered to the prevailing bidder pursuant to]*** ~~at~~ a foreclosure sale ***[process]*** that is ~~conducted~~ ***[completed]*** in accordance with applicable non-bankruptcy law.

The fact is that § 1322(c)(1) does not read as Medaglia wishes it would. Instead, the statute unambiguously states that the debtor has a right to cure until the "residence is sold at a foreclosure sale." Congress enacted §1322(c)(1) to establish a "uniform time-'the foreclosure sale'- for expiration of a debtor's federal right to cure." *See In re Connors*, 497 F.3d 314, 322 (3rd Cir. 2007); *In re Crichlow*, 322 B.R. 229, 234 (Bkrtcy. D. Mass. 2004) ("To define the word "sold" as the point at which a deed is transferred to the prevailing bidder subsequent to the date of the auction likewise removes the words "foreclosure sale" from the statute.").

This bright line rule or "Gavel Rule", in which the debtor has until the foreclosure sale to redeem, is what Congress intended when it enacted § 1322(c)(1). *See 140 Cong. Rec. S14,462 (1994)* (Senator Grassely, speaking on behalf of the bill that was enacted stated that § 1322(c)(1) "will preempt conflicting State laws, and permit homeowners to present a plan to pay off their mortgage debt until *the foreclosure sale actually occurs*.")(emphasis supplied).

Policy Considerations Support the Gavel Rule

Further, from a policy prospective, the Gavel Rule, makes the most sense for a number of reasons. *See In re Connors*, 497 F.3d at 322-323; *In re Crichlow*, 322 B.R. at 234. First, the foreclosure sale, unlike the delivery of the deed, must be preceded by notice to the debtor, which therefore provides the debtor with ample opportunity in a predictable and defined time period within which to file a bankruptcy petition. *See In re Connors*, 497 F.3d at 322-323

Secondly, the Gavel Rule protects bidders by avoiding an interpretation of §1322(c)(1) which would turn it into a "federal vehicle for divesting [bidders] of property rights acquired at foreclosure sales." *Id.* The subsequent increased uncertainty of ownership that would accompany a potential divestment of winning bids would certainly chill foreclosure bids, thus

negatively impacting the bankruptcy process. *See In re Connors*, 497 F.3d at 322-323; *In re Crichlow*, 322 B.R. at 234.

Accordingly, the Gavel Rule, which establishes a bright line under which debtors have ample opportunity to cure a mortgage default while at the same time providing a predictable and stable process for foreclosure sales is the correct interpretation of § 1322(c)(1)'s plain language. *See id.*

Therefore, in the instant matter, since it is undisputed that the foreclosure sale has taken place, this Court should grant Buonanno's Motion for Relief from Automatic Stay to Record Deed and to Take Possession.

Respectfully submitted,

Movant, Robert Buonanno

By his Attorneys,

/s/ Joseph P. Ferrucci
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Dated: December 1, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the within was served electronically to the following participants on this 1st day of December, 2008

John Boyajian john@bhrlaw.com; martha@bhrlaw.com
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/s/Joseph P. Ferrucci

UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

IN RE: Peter A. Medaglia	
National City Real Estate Services, LLC successor by merger to National City Mortgage, Inc. f/k/a National City Mortgage Co. VS. Peter A. Medaglia	CHAPTER 13 CASE NO. 08-12804-ANV

NATIONAL CITY REAL ESTATE SERVICES, LLC SUCCESSOR BY MERGER TO NATIONAL CITY MORTGAGE, INC. F/K/A/ NATIONAL CITY MORTGAGE CO.'S MEMORANDUM OF LAW IN SUPPORT OF THIRD PARTY PURCHASER, ROBERT BUONANO'S MOTION FOR RELIEF FROM STAY

Now comes National City Real Estate Services, LLC successor by merger to National City Mortgage, Inc. f/k/a National City Mortgage Co. (hereinafter "National City"), which hereby joins in the Third Party Purchaser, Robert Buonano's Motion for Relief from Stay and submits this Memorandum of Law in further support of his request that the Court grant the movant relief to pay the proceeds and accept and record the foreclosure documents relating to the foreclosure sale that was conducted prior to filing of the present petition on the grounds that pursuant to applicable state law the debtor's right of redemption ended upon the completion of the foreclosure auction. As such, the debtor's real property did not become part of the bankruptcy estate.

Statement of Facts

On August 19, 2002, Peter A. Medaglia (hereinafter, "the debtor") gave a mortgage to

National City Mortgage Co. in the amount of $250,000.00. The mortgage contained a statutory power of sale. See Exhibit A. Pursuant to the terms of the note and mortgage and RIGL 34-11-22, National City conducted a lawful foreclosure sale on September 9, 2008 wherein Robert Buonano (hereinafter "Buonano") was the highest bidder with a bid of $312,000.00. *See Memorandum of Terms and Conditions of sale* (hereinafter "the Memorandum of Sale") attached hereto as Exhibit B. Buonano signed the Memorandum of Sale and provided the deposit of $5,000.00 per the terms of the sale.

On September 11, 2008, prior to Buonano recording the foreclosure documents, the debtor filed a petition under Chapter 13 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Rhode Island.

Argument

I. THE BANKRUPTCY COURT MUST FOLLOW STATE COURT PROCEDURE, UNLESS THE FEDERAL LAW UNAMBIGIOUSLY PRE-EMPTS STATE LAW

In *BFP v. Resolution Trust Corporation, as Receiver of Imperial Federal Savings Association, ET AL.*, 511 U.S. 531 (U.S. 1994), the United States Supreme Court determined, among other issues, that Bankruptcy Courts cannot override long standing state law without unambiguous language by Congress. The court stated, "The Bankruptcy Code can of course override by implication when the implication is unambiguous. But where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation." *Id.* at 546.

In *BFP v. Resolution Trust Corporation*, the debtor in possession attempted to set aside a conveyance of property conveyed at a foreclosure sale because the value received for the property was less than a "reasonably equivalent value". *Id.* at 531. The Bankruptcy Court entered

summary judgment in favor of Resolution Trust Corporation. The United States Bankruptcy Appellate Panel for the Ninth Circuit and the United States Court of Appeals for the Ninth Circuit affirmed the Bankruptcy Court's decision. On Certiorari, the United States Supreme Court affirmed the lower courts ruling, stating,

> Surely Congress has the power pursuant to its constitutional grant of authority over bankruptcy, U.S. Const., Art I. § 8, cl. 4, to disrupt the ancient harmony that foreclosure law and fraudulent conveyance law, those two pillars of debtor-creditor jurisprudence, have heretofore enjoyed. But absent clearer textual guidance than the phrase, "reasonably equivalent value" - - we will not presume such a radical departure. *Id.* at 544.

The clear implication of the Supreme Court ruling in BFP was to make clear that Bankruptcy Courts should not displace state law on foreclosure issues absent clear congressional intent.

A. Under Rhode Island Foreclosure Law, a mortgagor's right of equitable redemption ends at the fall of the gavel at a foreclosure sale.

Rhode Island is a title theory state. Under title theory, "the granting of a mortgage vests title in the mortgagee to the land placed as security for the underlying debt. *In re D'Ellena,* 640 A.2d 530, 533 (R.I.1994) The mortgage splits the title in two parts: the legal title, which becomes the mortgagee's, and the equitable title, which the mortgagor retains." *Peter A. Maglione v. BANCBOSTON MORTGAGE CORPORATION,* 557 N.E. 2d 756 (1990).[1] In other words, the mortgagor retains what is known as the equity of redemption, which requires the mortgagee to reconvey the property upon complete performance of the conditions of the mortgage.

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[1] *See also In re Carmine J. D'Ellena*, 640 A.2d 530, 533 (Supreme Court of Rhode Island, 1994)(A mortgagee not only obtains a lien upon the real estate by virtue of the grant of the mortgage deed but also obtains legal title to the property subject to defeasance upon payment of the debt.

Under title theory, a mortgage foreclosure sale extinguishes the equitable right of redemption of the mortgagor. The Supreme Court of Rhode Island in *140 Reservoir Avenue Associates v. Sepe Investments, LLC et al*, 941 A.2d 805, clearly states this principal. In 104 Rewservoir Associated, Arnold Kilberg executed a quitclaim deed conveying his interest in the property he owned to his wife, Joan Kilberg. This property was encumbered by a first mortgage. The holder of the first mortgage conducted a foreclosure sale on the property at which a third party was the highest bidder. The third party eventually sold the property to Sepe Investments, LLC which then mortgaged the property to Slade's Ferry Trust Company. Two days after the mortgage foreclosure sale, but prior to the recording of the foreclosure documents, the City of Providence conducted a tax sale. Slade's and Sepe challenged the validity of the tax sale for failure to give notice to Joan Kilberg. The Supreme Court of Rhode Island determined that because the foreclosure sale[2] had occurred prior to the tax sale, Joan Kilberg had no interest in the property and, therefore, there was no defect in the notice given by the city. The court citing the RI foreclosure statute stated,

> Significantly, § 34-11-22 provides that a foreclosure conducted by statutory power of sale "shall forever be perpetual bar against the mortgagor and his, her or its heirs, executors, administrators, successors and assigns, and all persons claiming the premises, so sold, by, through or under him or her, them or any of them." Thus, any interest that may have reposed in Joan Kilberg was forever barred by the foreclosure sale because she was the successor in interest to Arnold Kilberg, the mortgagor. At the time of the tax sale, she no longer held an interest in the property and could not have claimed a right to notice under § 44-9-10. *See* 4 Richard R. Powell, *Powell on Real Property, § 37.46* at 37-317 (2007) ("[T]he mortgagor has an opportunity to redeem down to the time of the [mortgage foreclosure] sale * * *, but this opportunity comes to an end with such sale * * *.

[2] The Supreme Court held that the foreclosure auction and sale was the significant event for determining the parties rights and not the recording of the deed.

Id. at 811-812.

The sequence of the dates in this *104 Reservoir Associates* case are highly significant. The foreclosure sale was held on June 23, 2003, the tax sale that Joan Kilberg did not receive notice of was June 25, 2003, but the foreclosure deed was not recorded until August 22, 2003. Clearly, the foreclosure sale, concluding with the falling of the auction gavel, extinguished under state law any right of redemption the owner of the property had in the property. See, *104 Reservoir Associates*, 941 A.2d at 807.

B. Under Rhode Island Law, the Right to Redeem Property is Extinguished at the Foreclosure Sale and, Bankruptcy Courts Can Not Extend a Mortgagors Right to Redeem.

In *In re Burns*, 183 B.R. 670 (Bankr. D.R.I. 1995) and *In re Glenwood*, 134 B.R. 1012 (Bankr. D.R.I. 1991), this Court held that a mortgagor had the right to redeem their interest in property after a foreclosure sale had occurred on the grounds that the debtor stands in the shoes of the trustee and that since the foreclosure deed had not yet been conveyed it was a race to the bankruptcy court or the registry. The movant request that the Court overturn its earlier rulings as they are contrary to Rhode Island State Law. The Rhode Island Supreme Court is in accord with other title theory jurisdictions and the Bankruptcy Courts that this issue has come before which have recognized the requirement to follow the foreclosure law of the state. After the foreclosure auction, there is nothing left for the trustee or the debtor to preserve. The foreclosure deed evidences the completion of the foreclosure sale and it is recorded with an affidavit that recites that property was sold in accordance with the requirements of the power of sale as required by the Rhode Island foreclosure statute.

In *In re Joanne A. BoBo*, 246 B.R. 453 (Bankr. D. of Columbia, 2000), the court would not

expand a debtor's right of redemption after a foreclosure sale as it was contrary to its state law. The court stated,

> "The states' interest in the integrity of their foreclosure sale process, as *BFP* demonstrates, is an important interest, and this court will not interpret §1322(c)(1) in a manner that impinges on the states' interests in the efficiency and clarity of that process-by altering the rights acquired under state law by the highest bidder at a prepetition foreclosure auction sale-absent a reasonably explicit congressional expression of intent." *BoBo*, 246 B.R. 458.

In *Burns* and *Glenwood*, this Court held that under the race notice doctrine, the filing of a bankruptcy petition prior to the recording of a mortgagee's deed subordinates the foreclosure sale to the rights of the Trustee. *Burns*, 183 B.R. at 670. In essence, this Court altered state foreclosure law by expanding the right of redemption of a mortgagor to the date of the recording of the foreclosure documents. As stated by the United States Supreme Court in *BFP*, a Bankruptcy Court is not permitted to override state law, unless it is explicit in the statute.

Under Rhode Island State Law, if a foreclosure sale has occurred, but prior to the recording of the documents, the former mortgagor files bankruptcy, he/she has no equitable rights or legal title in that property.

C. Under 11 U.S.C. §1322(c)(1) and Rhode Island State Law a Debtor Would Not Have the Right to Cure the Default After the Foreclosure Auction.

It is well settled that when interpreting a statute, a court must look to the plain meaning of the statute.[3] In addition, due weight must be given to the words of the statute so that none are rendered superfluous. *Duncan v.Walker*, 533 U.S. 167, 174, (S.Ct. 2001).

The debtor in his Memorandum of Law argues that in order to give meaning to the words

[3] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (U.S.Conn 1992) ([C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there) See also *Hartford Underwriters Ins. Co. v Union Planters Bank*, N.A. 530 U.S. 1, 6 (U.S. Mo. 2000).

used in § 1322, a court must turn to applicable nonbankruptcy state law to determine when a property is "sold" at a foreclosure sale. In support of his argument, the debtor argues that the term "foreclosure sale" is a process that "unfolds in several stages". *See debtor's Memorandum of Law page 8.* The debtor uses *RIGL § 34-11-22* to support his argument. However, *RIGL §34-11-22* is not in reference to just a foreclosure sale, but describes the process in which the power of sale is exercised and what happens after the foreclosure sale occurs, including the delivery of the funds the recording of the deed, an accounting and payment of the surplus if any to the mortgagor. Clearly, it is contemplated that certain activities will follow the foreclosure, but it is the sale at auction that makes the foreclosure final. This point was reiterated by the Rhode Island Supreme Court in *Greenwood Credit Union v. Fleet National Bank,* 675 A.2d 415 (RI 1996), where the Rhode Island Supreme Court held that Fleet could not rescind its own sale when it made a mistake in its bid even though the foreclosure documents were not on record.

If Congress had intended the right to cure to go beyond the point of the foreclosure sale, it would have eliminated the word "sale" from the statute. The Courts in both *In re Marie Maud Crichlow*, 322 B.R. 229 (Bankr. E.D. Mass., 2004 and *In re Joanne BoBo,* 246 B.R. 453 (Bankr. D. of Columbia, 2000), thoroughly examined the statutory language and determined the language to be unambiguous with regards to the words "sold" and "foreclosure sale". The Court in *Crichlow* stated, "I conclude that the words of the statute are sufficiently clear and, as such, I need not look for guidance into resources such as the conflicting legislative history." *Crichlow*, 322 B.R. 234. The Court went on to state,

> The phrase "sold at a foreclosure sale" refers to the sale that occurs at a foreclosure auction not pursuant to or after. To define the word "sold" as

> the point at which a deed is transferred to the prevailing bidder subsequent to the date of the auction likewise removes the words "foreclosure sale" from the statute." *Id.* at 234.[4]

Both courts concluded that the debtor lost the equity of redemption pursuant to a foreclosure sale. As such, the debtor no longer had the ability to cure the default under the mortgage. *Crichlow*, 322 B.R. 229, *BoBo*, 246 B.R. 453. This is the same conclusion the Rhode Island Supreme Court recently reached in the *140 Reservoir Avenue Associates* case and the Greenwood Credit Union cases.

The *Crichlow* Court went further in its analysis and determined that even under Massachusetts state law, the property would be "sold" at a foreclosure sale at the time the Memorandum of Sale was signed. The Memorandum of Sale is evidence of the completion of the sale at auction. It sets the terms for proceeding for the parties to the auction. The mortgagor is not a party to the Memorandum of Sale. This is because he or she no longer has any rights in the property. In *Crichlow*, the Court relied on previous Massachusetts state cases, specifically the Appeals Court of Massachusetts in *Outpost Café, Inc. v. Fairhaven Savings Bank*, 3 Mass.App.Ct 1 (App. Mass, 1975) and the principal that Massachusetts is a title theory state. The Court stated,

> In accordance with *Outpost Café*, it is uniformly held that the proper execution of the memorandum of sale terminates a mortgagor's equity of redemption. In other words, what is sold at a foreclosure sale is the equity of redemption and that is sold as of the execution of the memorandum of sale. *Crichlow*, 322 B.R. 237.

The Rhode Island Supreme Court reasoning in *140 Reservoir Avenue Associates* parallels the reasoning of the Court in Crichlow. Both courts determined that the foreclosure sale terminated the mortgagor's right to redeem. If the debtor no longer has an interest in the property via the

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[4] See also *In re Bobo* 246 B.R. 453, *"Once a residence has been sold in conformance with District of Columbia law at a regularly conducted auction to the highest bidder, that purchaser possesses the equitable right to legal title upon payment of the amount bid*

foreclosure sale, there can no longer a default for the debtor to cure.

The debtor states in his Memorandum that there is a distinction between the debtor's right to redeem and the debtor's right to cure a default. The debtor is correct. The right to cure a default is the right to reinstate a loan by paying the contractual payments and other charges due prior to a foreclosure and thus de-accelerating the mortgage. This right is contractual and contained in the mortgage at paragraph 19. This right ends five days prior to the foreclosure sale. The right to redeem is the right to pay the mortgage in full prior to the exercise of the power of sale. As discussed herein, once the foreclosure sale is conducted, the right is extinguished.

II. Conclusion

For all the foregoing reasons, this Honorable Court should grant the relief requested by the the movant Buonano and determine that the debtors right of redemption ended at the foreclosure sale.

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at the auction. Congress gave no indication that it intended to undo such a significant right via enactment of §1322(c)(1).

Respectfully submitted,

National City Real Estate Services, LLC successor by merger to National City Mortgage, Inc. f/k/a National City Mortgage Co
By its Attorneys

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In re Peter A. Medaglia
CHAPTER 13
CASE NO. 08-12804-ANV

UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

IN RE: Peter A. Medaglia	CHAPTER 13 CASE NO. 08-12804-ANV

CERTIFICATE OF SERVICE

I, Elizabeth A. Lonardo, Esquire, state that on December 2, 2008, I electronically filed the foregoing Memorandum of Law with the United States Bankruptcy Court for the District of Rhode Island using the CM/ECF System. I served the foregoing document on the following CM/ECF participants:

Office of the US Trustee
John Boyajian, Esquire Chapter 13 Trustee
Edward J. Gomes, Esquire for the Debtor
Joseph P. Ferrucci, Esquire for Robert Buonano

I certify that I have mailed by first class mail, postage prepaid the documents electronically filed with the Court on the following non CM/ECF participants:

/s/ Elizabeth A. Lonardo
Elizabeth A. Lonardo, Esquire
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

IN RE:		
PETER A. MEDAGLIA	:	BK No. 1:08-bk-12804
Debtor	:	Chapter 13

PARTY-IN-INTEREST, ROBERT BUONANNO'S POST HEARING MEMORANDUM

NOW COMES, Party-in-Interest, Robert Buonanno ("Buonanno"), and hereby files the within post-hearing memorandum in support of his motion for relief from the automatic stay.

In the instant matter, Buonanno is entitled to relief from the automatic stay under 11 U.S.C. §1322(c)(1) whether it is analyzed through a straightforward reading of the statute or whether the statute is analyzed using Rhode Island law. Additionally, Rhode Island foreclosure law regarding redemption entitles Buonanno to relief from the automatic stay.

I. **Congress intended to establish a discreet event as the point where the debtor's cure rights are terminated.**

Congress, by enacting 11 U.S.C. §1322(c)(1) created a discreet event at which a debtor's cure rights would be terminated. This discreet event occurs when the residence is "sold at a foreclosure sale". *In re Cain*, 423 F.3d 617, 620 (6th Cir. 2005) ("a foreclosure sale is a single, discreet event – typically an auction at which the highest bidder purchases the property.") See *In re Bobo*, 246 BR 453, 456 (Bkrtcy. D. Dist. Col. 2000). Section 1322 uses the term sale and not auction because "not all foreclosure sales under non-bankruptcy law occur at an auction," rather, the event of sale occurs "once rights and obligations vest in an entity to acquire the property as a result of making the highest bid." See *In re Bobo*, 346 B.R. at 456.

The fact that there may be remaining ministerial acts such as recording of the deed does not mean that the property has not been sold at a foreclosure sale under §1322. *Id.*; *In re Crichlow*, 322 B.R. 229, 234 (Bkrtcy. D. Mass. 2004) ("to define the word 'sold' as the point at which a deed is transferred to the prevailing bidder subsequent to the date of the auction likewise removes the words 'foreclosure sale' from the statute.")

Accordingly, Congress did not intend the terms "at a foreclosure sale" to refer to the time at which the sale process is completed by delivery of the deed, rather Congress intended that under § 1322(c)(1) the point at which the "foreclosure sale" occurs is the point at which the highest bidder obtains rights to the property, which in most cases is the auction. *In re Connors*, 497 F.3d 314, 323 (3rd Cir. 2007); *In re Cain*, 423 F.3d at 620; *In re Crichlow*, 322 B.R. at 234; *In re Bobo*, 346 B.R. at 456. Therefore a plain reading of § 1322(c)(1) clearly mandates that Buananno is entitled to relief from the automatic stay.

II. Under Rhode Island law, the discreet event at which a foreclosure sale occurs is the foreclosure auction.

If § 1322 is analyzed under Rhode Island law, it is indisputable that the "foreclosure sale" occurs at the foreclosure auction.

First, the Rhode Island General Laws sections that governs foreclosure auctions clearly use the word sale to refer to the auction itself. *See e.g.* R.I. Gen. Laws §34-27-4 ("the first publication of the notice shall be at least twenty-one (21) days before the day of sale" (emphasis added)); *see also In re Connors*, 497 F.3d at 320 (finding that New Jersey law refers to the auction as the "foreclosure sale").

Secondly, the Rhode Island Supreme Court recently clearly established the foreclosure auction as the foreclosure sale. See *140 Reservoir Avenue Associates v. Sepe Investment, LLC, et al*, 941

A.2d 805, 812 (RI 2007) (despire the fact that the foreclosure deed was not yet recorded during the time period at issue in the case the court stated that "Joan Kilberg **was forever barred by the foreclosure sale** because she was the successor in interest to Arnold Kilberg, the mortgagor" (emphasis added)); *see also In re Connors*, 497 F.3d at 320 *(3rd Cir. 2007)* (finding that the New Jersey Supreme Court refers to the auction as the "foreclosure sale").

Further, under Rhode Island statutory law as well as Rhode Island case law it is clear that the foreclosure auction is the point at which the debtor loses the equitable right of redemption and the high bidder obtains rights to the property. R.I. Gen. Laws §34-11-22 states that the sale "shall **forever be a perpetual bar** against the mortgagor and all persons claiming the premises" (emphasis added).

Additionally, the Rhode Island Supreme Court in 2007 ruled in the *Sepe* case that under §34-11-22 the mortgagor loses rights to the property at the foreclosure sale regardless of whether the deed has been recorded. In this case, an issue arose as to whether the mortgagor was entitled to notice of a tax sale subsequent to a foreclosure sale but before the foreclosure deed had been recorded. The Court found that the mortgagor was not entitled to notice because under § 34-11-22,

> Joan Kilberg was forever barred by the foreclosure sale because she was the successor in interest to Arnold Kilberg, the mortgagor. At the time of the tax sale, she no longer held any interest in the property . . . ." *See* 4 Richard R. Powell, *Powell on Real Property, §37.46 at 37-317 (2007)* ("the mortgagor has the opportunity to redeem down to the time of the [mortgage foreclosure] sale . . ., but this opportunity comes to an end with such sale . . . . From that point on the equity court ceases to be concerned with the mortgagor in relation to the land.").

In re Sepe 941 A.2d at 812.

Accordingly, it is clear that under Rhode Island law that the "foreclosure sale" referred to in §1322 (c)(1) is in fact the foreclosure auction. *In re Sepe* 941 A.2d at 812; R.I. Gen. Laws §34-27-4; *In re Connors*, 497 F.3d at 320; *In re Crichlow*, 322 B.R. at 235-238. Additionally, it is clear that under Rhode Island law the equitable right of redemption is lost at the foreclosure auction. *In re Sepe* 941 A.2d at 812; R.I. Gen. Laws §34-11-22. Therefore, in the instant matter, Medaglia lost both his right to cure and his right of redemption prior to the filing of the instant bankruptcy. Accordingly, Buonanno's motion for relief from stay should be granted.

Respectfully submitted,

Party-In-Interest, Robert Buonanno

By his Attorneys,

/s/ Joseph P. Ferrucci
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Dated: January 14, 2009

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the within was served via electronically to the following participants on this 14th day of January, 2009.

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/s/Joseph P. Ferrucci

FERRUCCI RUSSO P.C.

COUNSELLORS AT LAW

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March 30, 2009

The Honorable Arthur N. Votolato
US Bankruptcy Court Judge
District of Rhode Island
380 Westminster Street - Room 619
Providence, RI 02903

Re: ***Peter A. Medaglia***
Chapter 13 BK No. 1:08-bk-12804

Dear Judge Votolato:

We are in receipt of the correspondence from Edward J. Gomes, Esq. dated March 19, 2009 and proffer this letter in reply thereto.

Mr. Gomes' acknowledgment as to the misreading of the *Sepe* case gets to the critical point which Buonanno argued in its Motion for Relief: that the Rhode Island Supreme Court has concluded that the right of redemption was forever foreclosed and cut off on the date of the sale not on the date that documents were recorded in the public record. Therefore, the debtor's argument that the right of redemption was foreclosed on the auction day because the deed was delivered on that date is clearly incorrect.

Accordingly, under Rhode Island decisional law, it is now uncontested that the right of redemption is foreclosed on the sale date. This is completely consistent with the cure language contained in Section 1322(c)(1) of the Bankruptcy Code, wherein a default respecting a lien on a debtor's principal residence may be cured "until such residence is sold at a foreclosure sale" thereby cutting off cure rights. Clearly, if a debtor's right of redemption has been cut off pursuant to state law then there is nothing to "cure" in a bankruptcy proceeding filed subsequent to the foreclosure sale.

Respectfully,

JOSEPH P. FERRUCCI

JPF:ljv

cc: John Boyajian, Esq. (via facsimile)
Edward J. Gomes, Esq. (via facsimile)
Moshe S. Berman, Esq. (via facsimile)
Catherine A. Fyans (via facsimile)
Elizabeth A. Lonardo, Esq. (via facsimile)
Sandra Nichols, Esq. (via facsimile)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

In re:	:	
PETER A. MEDAGLIA Debtor	:	BK No. 08-12804 Chapter 13

DECISION

APPEARANCES:

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BEFORE ARTHUR N. VOTOLATO, United States Bankruptcy Judge

Today's decision will overrule this Court's prior rule and practice as to how to determine the winner of the frequently-run race between home-mortgage debtors and foreclosure sale purchasers of their real estate.

This dispute arises from Robert Buonano's (the "Buyer") "Motion for Relief from Automatic Stay in Order to Record a Deed and to Take Possession" of property at 142 South Kilingly Road in Foster, Rhode Island (the "Property"). Buonano purchased the Property at a (pre-petition) foreclosure auction on September 9, 2008, a Memorandum of Sale was executed on the same day, and the Buyer paid the required deposit of $5,000. On September 11, 2008, *before* the Buyer recorded his deed, the Debtor (Medaglia) filed the instant Chapter 13 case.

The Buyer argues that, under 11 U.S.C. § 1322(c)(1), the Debtor's right to cure the mortgage default terminated at the moment when the Memorandum of Sale was signed, that thereafter, the Debtor no longer had any interest in the Property, and that 142 South Killingly Road never became *property of the estate*. The Debtor objects to relief from stay, arguing that the foreclosure sale did not terminate his right to cure the loan default, and that such right stays "alive and well" until the foreclosure deed is recorded and delivered to the purchaser. The issue - *when the right to cure a loan default on the Debtor's principal residence*

terminates under Section 1322(c)(1) - has generated conflicting results in the bankruptcy arena. This Court has not been called upon to address the question since the enactment of 1322(c)(1), and there is no post-enactment controlling authority in the First Circuit.[1]

DISCUSSION

Under Section 1322(b)(5), the Debtor may provide in his plan for the curing of any default on any unsecured or secured claim on which the last payment is due after the date on which the final payment under the plan is due. Section 1322(c)(1) states: "Notwithstanding subsection (b)(2) and applicable nonbankruptcy law ... a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured ... *until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law*...." (emphasis added.) It is clear, to me at least, that the *notwithstanding* clause in Section 1322 trumps nonbankruptcy law regarding the cure of mortgage defaults on

[1] We have dealt with this same fact scenario at least twice, but in cases that were commenced prior to October 22, 1994, the effective date of Section 1322(c)(1). *See In re Burns*, 183 B.R. 670 (Bankr. D.R.I. 1995), and *In re Glenwood Associates*, 134 B.R. 1012 (Bankr. D.R.I. 1991). In those cases, when Section 544(a)(3) of the Bankruptcy Code was the law, we ruled that "the filing of the bankruptcy petition prior to the recording of the mortgagee's deed subordinates the status of the foreclosure sale purchaser to the rights of the trustee, or the debtor standing in the trustee's shoes." *Burns*, 183 B.R. at 670. Since the enactment of Section 1322(c)(1), our old analysis is no longer applicable.

a debtor's primary residence. *See In re Beeman*, 235 B.R. 519, 524 (Bankr. D.N.H. 1999). And the statute itself would seem to leave no doubt that, in bankruptcy, the right to cure exists only until the property is sold at a (valid) foreclosure sale. Nevertheless, judicial disagreement has emerged over the meaning of the phrase "sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law." In preparing this decision, we have identified three different interpretations of Section 1322(c)(1).

The majority view (and the one I like), known as the "gavel rule," is that Section 1322(c)(1) is clear and unambiguous, and that the debtor's right to cure is cut off at the foreclosure sale. *See e.g. In re Connors*, 497 F.3d 314 (3d Cir. 2007); *In re Cain*, 423 F.3d 617 (6th Cir. 2005); *In re Smith*, 85 F.3d 1555, 1558 n.3 (11th Cir. 1996) (dictum); *In re McCarn*, 218 B.R. 154 (B.A.P. 10th Cir. 1998); *In re Crichlow*, 322 B.R. 229 (Bankr. D. Mass. 2004). Based on our research, every appeals court, with one exception described below, and every bankruptcy appellate panel that has considered the issue, has adhered to the gavel rule.

A second line of cases focuses on the word "sold" in Section 1322(c)(1), holding that a foreclosure sale is not an event, but instead, is part of a process culminating in the delivery and recordation of the deed, with the debtor's right to cure surviving

until title to the property passes to the purchaser under the relevant state law. *See e.g. Beeman*, 235 B.R. at 525.

And, finally, a solitary Court of Appeals has construed Section 1322(c)(1) to mean that the right to cure a default exists "*at least* up to the date of the foreclosure sale," and that if state law provides a redemption period that extends beyond the date of the foreclosure sale, then bankruptcy law defers to such state law, with the right to cure extended accordingly. *Colon v. Option One Mortgage Corp.*, 319 F.3d 912, 918 (7th Cir. 2003)(emphasis added).

This Court is most comfortable adopting the majority view on the ground that the language of the statute is clear, unambiguous, and needs no interpretation. I also agree that the term "foreclosure sale" describes a single, discrete event, and not merely a step in a process culminating in the recordation and delivery of a deed. *Connors*, 497 F.3d at 320; *Cain*, 423 F.3d at 620. It is not, I think, an extreme position to take, i.e., that the property is *sold* at the foreclosure sale, and that the deed is customarily not delivered to the purchaser until after the foreclosure sale. *Connors*, at 320-321. The delivery of a foreclosure deed has been described as a "ministerial act, routinely performed, which does not affect the redemption rights of the parties." *Id.* at 321 (citation omitted). Further, the words

"conducted in accordance with applicable nonbankruptcy law" do not expand the cure period according to state-law redemption rights, but rather describes a foreclosure sale conducted in compliance with (and not in violation of), relevant state law. *Connors*, 497 F.3d at 319; *Cain*, 423 F.3d at 620.

Nowhere does the statute require that the cure rights under Section 1322 terminate only upon the recordation and delivery of the foreclosure deed. Such language is not part of the statute, and it is not within the Court's authority to read the statute as though it were in there. "To define the word 'sold' as the point at which a deed is transferred to the prevailing bidder subsequent to the date of the auction ... removes the words 'foreclosure sale' from the statute." *Crichlow*, 322 B.R. at 234. Therefore, if the foreclosure sale did not violate applicable state law, it follows that when the gavel falls, the right to cure no longer exists. There is no suggestion in this case of any violation of, or noncompliance with applicable state law.

We reject the third view, also without difficulty, as nothing in Section 1322(c)(1) requires deference to whatever expansive cure rights may exist under state law. The *Colon* court finds support for its view in the legislative history and scholarly texts. *Colon*, 319 F.3d at 917-918. However, the statute does not provide or suggest that the right to cure exists *at least* until such residence

is sold at a foreclosure sale. On the contrary, Section 1322(c)(1) states unequivocally: "[n]otwithstanding ... any nonbankruptcy law...." If Congress intended to place federal bankruptcy law beneath, or subject to, certain state created rights, it could have chosen a better way to do so.

Finally, even if we were to look to state law in this case, the result would be the same because under its statutory power of sale, Rhode Island law does not provide for any post-foreclosure right of redemption. In fact, R.I. Gen. L. § 34-11-22 states "... which sale or sales ... shall forever be a perpetual bar against the mortgagor." R.I. Gen. Laws § 34-11-22 (2008). *See also, Holden v. Salvadore*, 964 A.2d 508, 516 (R.I. 2009) (noting that it was not within the power of the defendant to prevent or postpone the foreclosure sale, because the sale and foreclosure had already taken place, the plaintiff herself was the highest bidder, and plaintiff and auctioneer had executed all the appropriate documents); *140 Reservoir Avenue Associates v. Sepe Investments, LLC*, 941 A.2d 805, 811-812 (R.I. 2007) (concluding that any interest of mortgagor's successor in real estate was forever barred by the foreclosure sale, where no party challenged the validity of the sale).

Based on the foregoing discussion, the authorities cited, and the arguments of the parties, Relief From Stay is **GRANTED**.

Enter Judgment consistent with this opinion.

Dated at Providence, Rhode Island, this 1st day of April, 2009.

Arthur N. Votolato
U.S. Bankruptcy Judge

Entered on docket: 4/1/09