UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP No. MW 00-055

IN RE: NEVILLE E. ANGLIN AND CECILIA ANGLIN,
Debtors.

NEVILLE E. ANGLIN AND CECILIA ANGLIN,
Appellants,

v.

REGIONS MORTGAGE, INC.,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Henry J. Boroff, U.S. Bankruptcy Judge)

Before
HAINES, VAUGHN, CARLO, U.S. Bankruptcy Appellate Panel Judges

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L. Jed Berliner of Berliner Law Firm, on brief for the Appellants.

Deirdre M. Keady of Harmon Law Offices, P.C., on brief for the Appellee.

March 26, 2001

Per Curiam.

The Debtor-Appellants appeal from an order of the bankruptcy court granting relief from the automatic stay to Appellee Regions Mortgage, Inc., holder of a first mortgage on the Debtors' residence. Upon consideration of the briefs and oral arguments, we affirm the decision of the bankruptcy court.

JURISDICTION AND STANDARD OF REVIEW

This Panel has jurisdiction to hear an appeal from an order of the bankruptcy court pursuant to 11 U.S.C. §§ 158(a) and (c), and Rule 8001-1(d)(1) of the Local Rules for the Bankruptcy Appellate Panel for the First Circuit. The parties, pursuant to Rule 8001-1, have not elected to have their appeal heard by the District Court for the District of Massachusetts. 1st Cir. B.A.P. R. 8001-1(d)(1). An order granting relief from an automatic stay is a final appealable order. Tringali v. Hathaway Machinery Co., Inc., 796 F.2d 553, 558 (1st Cir. 1986). We review an order granting relief from the automatic stay for abuse of discretion. Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 973 (1st Cir. 1997).

BACKGROUND

The facts are not in dispute. The Debtors filed a Chapter 13 petition on March 16, 1997, one day prior to a scheduled foreclosure sale of their residence. Appellee Regions Mortgage,

Inc. ("Regions") is the successor-holder of a first mortgage on the residence. At the time of the filing the Debtors owed Regions more than $93,000, while the value of the house was less than one-half that amount. An amended plan was filed on August 12, 1997, and was ultimately confirmed on February 16, 1999. The confirmed plan allowed the Debtors to cure their prepetition mortgage arrearage through monthly payments to the Chapter 13 Trustee and required that postpetition mortgage payments be made directly to Regions "outside" of the plan.

The Debtors apparently remained current on their postpetition mortgage payments from the petition date until September of 1998, at which point they stopped making payments to Regions completely. Regions finally brought a motion to lift the automatic stay pursuant to § 362(d)(1) of the Bankruptcy Code[1] on March 6, 2000, which was heard on April 5, 2000. By this time, the Debtors had missed nineteen consecutive postpetition payments. Prior to the hearing on the motion to lift stay, the Debtors attempted to reach a settlement with Regions wherein they would pay a lump sum of $5,000 up front and file another amended plan to cure the remaining postpetition arrearage. Regions rejected the offer and pressed

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[1] Section 362(d)(1) provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay
>
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest . . . .

forth on its motion for relief.

At the hearing, counsel for the Debtors asked the bankruptcy court to accept an amended plan which would cure the postpetition arrearage over the life of the plan. Debtors conceded that they had substantial prepetition and postpetition arrearage, but argued that an amended plan would be feasible because Mr. Anglin had recently obtained full-time employment significantly increasing the Debtors' income. The bankruptcy court rejected the proposal, finding cause to grant relief from the automatic stay "for failure to make postpetition payments to the lender, threatening the adequate protection of the security interest under 362(d)(1)." See Appendix at 62. In granting relief, the bankruptcy court noted its disagreement with the proposition that a debtor may cure postpetition arrearages by way of a postconfirmation plan modification.

The Debtors sought a stay pending appeal from the bankruptcy court which was denied in a written opinion dated April 28, 2000. The Debtors then sought a stay from the bankruptcy appellate panel which was granted on August 1, 2000.

DISCUSSION

The Debtors assert that they should be able to cure their postpetition arrearage through a modification of their plan

pursuant to § 1329 of the Bankruptcy Code.[2] They argue that such a modification may cure any default, including a postpetition default, treated by § 1322(b)(5).[3] Because the Bankruptcy Code gives them the right to cure their postpetition default, they reason, the bankruptcy court abused its discretion (and erred as a matter of law) when it refused to permit such a modification and granted relief from stay. See Mendoza v. Temple-Inland Mortgage Corp. (In re Mendoza), 111 F.3d 1264, 1266 (5th Cir. 1997)("A court may abuse its discretion by erroneously concluding that the law does not afford it the discretion to do something.").

Although our own court of appeals has yet to address the point, the bare legal proposition advanced by the Debtors has substantial support in the cases. Both the Fifth and Eleventh Circuits have held that postpetition defaults may be cured through a Chapter 13 plan modification, see In re Hoggle, 12 F.3d 1008 (11th Cir. 1994)(holding that both the plain language and legislative history of § 1322(b)(5) favor permitting cure of any default, including postpetition defaults); In re Mendoza, 111 F.3d 1264 (following Hoggle's reasoning), and at least one bankruptcy court in our circuit agrees. In re Sidelinger, 175 B.R. 115 (Bankr.D.Me.1994). Moreover, leading commentators opine that §

[2] Section 1329(a) permits a debtor to seek modification of a plan "[a]t any time after confirmation of the plan but before the completion of payments under such plan."

[3] A plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due." 11 U.S.C. § 1322(b)(5).

1329 and § 1322 may work together so that a plan modification may operate to cure postpetition defaults. See King, 8 Collier on Bankruptcy ¶ 1322.09[2](15th Ed.)("[Section 1322(b)(5)] may be utilized to cure postpetition defaults as well as prepetition defaults."); Lundin, 3 Chapter 13 Bankruptcy, § 259.1 (3d Ed.)(§ 1329 permits modification to cure postpetition default whether payments are being made directly to creditor or within the plan). Unfortunately for the Debtors, their appeal does not present so neat a package as they would have it.

It is unnecessary to decide the issue squarely today. Although the lower court rejected the Debtors' position on legal principle, it went further. The record reveals that the court took into account the factors that would properly inform its discretion even if the rule were other than as it believed. The Debtors' Chapter 13 plan required them to make postpetition mortgage payments directly to Regions. However, they failed to make a single payment between September of 1998 and April of 2000. Assuming for the present purposes that the Bankruptcy Code does permit plan modification to cure postpetiton defaults, the opportunity is permissive, not vested. The bankruptcy court granted relief from the automatic stay based on the Debtors' failure to make nineteen consecutive mortgage payments as required by their confirmed plan. Under the circumstances, in the face of such a substantial, ongoing failure to satisfy the terms of a confirmed plan, there is no need to reach the precise legal issue the debtors posit or to remand for further proceedings. The court

properly exercised its discretion to grant stay relief. See Ellis v. Parr (In re Ellis), 60 B.R. 432, 435 (B.A.P. 9th Cir. 1985) (failure to make postpetition payments to a creditor may be cause for granting stay relief pursuant to § 362(d)(1)); In re Raymond, 99 B.R. 819, 822 (Bankr.S.D.Ohio 1989)(whether default in payment of postconfirmation obligations is cause for stay relief is determined on case by case basis). Unicor Mortgage Inc. v. James (In re James), 255 B.R. 837 (Bankr.M.D.Tenn.1999)(debtor failed to make four payments to mortgage holder); In re Gaines, 243 B.R. 221 (Bankr.N.D.N.Y.1999)(debtors displayed erratic payment history without sufficient assurance that future payments to mortgage holder would be timely); USA, Inc. v. Elmore (In re Elmore), 94 B.R. 670 (Bankr.C.D.Cal.1988)(debtor failed to make eighteen payments to mortgage holder); In re Ellis, 60 B.R. 432 (debtor failed to make seven payments to mortgage holder); cf. § 1307(c)(6)(case may be converted for material default under terms of a confirmed plan).

CONCLUSION

Finding no abuse of discretion in the bankruptcy court's ruling, we AFFIRM.