

## BANKRUPTCY, MORTGAGES and REAFFIRMATION

### Recent cases

#### 1. Ch. 7 debtor has option to decline to reaffirm but keep house as long as payments are kept current

Here, plaintiff took advantage of a procedure sanctioned in the Second Circuit, known as the “ride through option” under which a debtor may retain possession of real property without being required to reaffirm or redeem under 11 U.S.C. § 521(a)(2)(A)-(C) so long as the payments to the creditor remain current. *See In re Caraballo*, 386 B.R. 398, 401–02 & n. 5 (D.Conn.2008); *In re Sosa*, 443 B.R. 263, 268–69 (D.R.I.2011) (confirming availability of the ride through option for real property, but leaving open the question “whether debtors can force a permanent ride through on their homes without reaffirming the underlying debt”). *See also, BankBoston, N.A. v. Suarez*, 198 F.3d 234, 1999 WL 753381 (2d Cir. Summary Order, September 20, 1999) (involving real property);

St. Martin v. St. Martin, 2009/07533, 2013 WL 1457050 (S.Ct. Monroe Co. Apr. 9, 2013)

For the reasons discussed above, the court amends the Second Finding and concludes that the Reaffirmation Agreements are not in the best interest of the Debtor because she could retain the subject real property without reaffirming the Debt.

In re Caraballo, 386 B.R. 398, 402 (Bankr. D. Conn. 2008)

However, to the extent the subject property is real property and the debtor is current on her obligation to the creditor, retention of the property does not require \*709 the debtor to specify redemption or reaffirmation on her statement of intentions. Of course, the debtor is not prohibited from redeeming her real property or reaffirming her obligation on the property. Nor is the creditor precluded from requesting and obtaining relief from the automatic stay if the creditor has an interest in real property and believes the provisions of § 362(d) providing relief from the automatic stay have been met. The amendments to the code under BAPCPA simply eliminated the requirement to move for relief from the automatic stay with regard to personal property. In this instance, Benefit Bank did not request relief from the automatic stay.

The Court appreciates that Benefit Bank does not want its current recourse obligation to become a nonrecourse obligation, but in most instances, a debtor's personal liability is discharged from all debts that arose before she filed her bankruptcy petition. 11 U.S.C. § 727(b). Benefit Bank is still entitled to the value of its collateral; if the debtor fails to fulfill the terms of her agreement with the bank after she receives her discharge and her

case is closed, the bank can proceed with whatever remedies it has in state court against the property.

For the reasons stated above, the Court holds that with regard to real property that is collateral for a consumer debt, in addition to the three options set forth in § 521(a)(2)—surrendering the property or retaining the property by either reaffirming the debt secured by the property or redeeming the property under § 722—if the debtor is current on her obligation to the creditor, she also has the right to retain the property and continue to make payments to the secured creditor. Accordingly, the Court denies Benefit Bank's *Motion For Order Requiring Debtor to Complete Reaffirmation, Redemption or Surrender*.

In re Covell, 474 B.R. 702, 708-09 (Bankr. W.D. Ark. 2012)

## **2. If debtor has erratic payment history and does not reaffirm, bank can make a motion to lift automatic stay**

SBU contends that it has satisfied its burden of establishing a “factual and legal right to the relief it seeks” pursuant to Code § 362(d)(1). It directs the Court to the fact that the Debtors have elected not to reaffirm the debt, surrender the Property to SBU, or redeem it in violation of Code § 521(2).<sup>6</sup> In addition to the alleged violation of Code § 521(2), SBU argues that the Debtors' erratic payment history over the life of the Mortgage and the fact that their monthly income exceeds their monthly expenses by only \$16.66, increases the risk that their erratic payment history will continue and that the remaining equity cushion in the Property will be consumed by late charges and accruing interest. Thus, SBU contends, the violation of Code § 521(2), in conjunction with the increased risk of the Debtors' falling behind on their payments, constitutes “cause” pursuant to Code § 362(d)(1).

In re Gaines, 243 B.R. 221, 224 (Bankr. N.D.N.Y. 1999)

## **3. Clients in bankruptcy are eligible for HAMP modification even if they do not reaffirm the mortgage**

Borrowers in active Chapter 7 or Chapter 13 bankruptcy cases are eligible for HAMP at the servicer's discretion in accordance with investor guidelines, but servicers are not required to solicit these borrowers proactively for HAMP. Notwithstanding the foregoing, such borrowers must be considered for HAMP if the borrower, borrower's counsel or bankruptcy trustee submits a request to the servicer. However, if the borrower is also unemployed, the servicer must evaluate the borrower for UP, subject to any required bankruptcy court approvals, before evaluating the borrower for HAMP.

**4. Can I be considered for a HAMP modification if I am in bankruptcy?**

Yes, if you are in an active (open) chapter 7 or chapter 13 bankruptcy case, you must be considered for a HAMP modification if you, your attorney, or the bankruptcy trustee submits a request to the servicer. With your permission, the bankruptcy trustee may contact the servicer to request a HAMP modification.

**12. Am I eligible for HAMP if I have received a chapter 7 bankruptcy discharge?**

Yes, even if you have received a chapter 7 bankruptcy discharge, you are eligible for HAMP. If you did not reaffirm your mortgage debt, the following language must be inserted in the Home Affordable Modification Agreement:

“I was discharged in a chapter 7 bankruptcy proceeding subsequent to the execution of the Loan Documents. Based on this representation, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement.”

HAMP FAQ - 9/16/10

Debtor testified at the hearing that he is current on his mortgage, but wished to take advantage of HAMP in order to reduce his monthly payments. This Court has previously ruled that chapter 7 debtors current on real property debts have a “ride-through” option in addition to their options of surrender, reaffirmation, and redemption.

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[As to] Supplemental Directive 10–02, Home Affordable Modification Program–Borrower Outreach and Communication, at 8, *available at* [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd1002.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1002.pdf) (March 24, 2010).

This directive makes clear that debtors who file bankruptcy were intended to be eligible for HAMP post-bankruptcy, without being required to reaffirm their mortgage debt. Debtor does not have to sign a reaffirmation agreement with PNC to be eligible for a HAMP modification after his bankruptcy, and PNC cannot force him to do so. Debtor can attempt to take advantage of HAMP post-bankruptcy, without signing a reaffirmation agreement during his chapter 7 case. Based on the various other options available to Debtor, as well as the fact that his expenses exceed his income, the reaffirmation agreement is not in Debtor's best interest and cannot be approved.

In re Tincher, CA 11-01164-DD, 2011 WL 2650569 (Bankr. D.S.C. July 5, 2011)

