UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

United States Bankruptcy Appellate Panel No. **WW-24-1002**
Chapter 13 Bankruptcy Case No. 23-41097-BDL

In re:
ERIN SHARP,

Debtor.

VITRUVIAN DESIGN, LLC,

Appellant,

v.

ERIN SHARP,

Appellee.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellee does not identify a single case in which a court was confronted with the same issues as present in the instant case and ruled the same way as the Bankruptcy Court did here. When a bankruptcy petition is filed post foreclosure, but prior to the expiration of a state law redemption period, the debtor's right to redeem is extended 60 days pursuant to § 108(b). The Bankruptcy Court completely disregarded and avoided § 108(b), ruling that the Debtor was allowed to effectuate a redemption and confirm a Chapter 13 Plan which redeemed the Property five months after the petition date and more than ninety days after the Debtor's redemption rights expired under the extension provided under § 108(b). This was error. The Bankruptcy Court abused its discretion, and this Court should reverse.

A. The Bankruptcy Court and Appellee Misconstrue *Fairbanks.*

The chief error made by the Bankruptcy Court was a misapplication of the BAP's decision in *Wilmington Sav. Fund Soc'y FSB v. Fairbanks,* 2021 Bankr. LEXIS 2209 (9th Cir. Aug. 12, 2021). *Fairbanks* held that a bankruptcy petition filed after a trustee sale (post-sale but before recording of a trustee's deed) includes the debtor's legal title interest, and that interest could allow a debtor to address a secured claim. *Id*. at *16. A single sentence in *Fairbanks* promulgates different actions that a debtor might take in lieu of a cure and maintain to address a secured

claim in that situation, including proposing a plan that "provides for her [debtor] to pay off the secured claim by way of a new refinancing loan, that provides for the sale of the property, or that is based on **another arrangement that Wilmington is willing to accept**."[1] *Id.* at *17 (emphasis added).

At the Second Hearing, the Bankruptcy Court clearly stated: "[t]he Court concludes that this is not a cure and maintain plan." (App. 17:23.) The Bankruptcy Court further ruled, "[t]he plan proposes to pay the full amount owed to Vitruvian and additional funds as **part of a redemption from the judicial foreclosure.**" *Id.* (emphasis added.)

The Court used the "other arrangements" dicta in *Fairbanks* to circumvent a clear statutory scheme that grants appropriate respect to state law. But *Fairbanks* didn't change anything about how a redemption right is treated in a bankruptcy case; *Fairbanks*, notably, did not involve the issue of redemption.

While redemption rights were not at issue in *Fairbanks,* the disposition of a redemption right in bankruptcy cases has been addressed by other courts, all of which have repeatedly reached the same conclusion: when a debtor's redemption right expires, through state law expiration or its extension under § 108(b), the

[1] There is significant context attending these "other arrangements" proposed in Fairbanks. One is that the secured claim was a creditor of the debtor with a contractual relationship (in Fairbanks the creditor was a bank who was the beneficiary of the debtor's mortgage). Another is that the creditor be "willing to accept the arrangement".

debtor cannot revive this right in bankruptcy to confirm a plan or cure a default. *See e.g., McCarn v. WYHY Fed. Credit Union (In re McCarn)*, 218 B.R. 154, 162 (10th Cir. BAP 1998); (Bankr. C.D. Cal. 2015); *In re Richter*, 525 B.R. 735 (Bankr. C.D. Cal. 2015).

Appellee attempts a workaround by conflating the *Fairbanks* holding with respect to non-judicial trustee sale procedure with a judicial foreclosure sale and a statutory redemption right. Appellee argues that since a deed is needed to pass title to real property in Washington State, the transfer to the purchaser is not completed until that time, and the owner retains some rights in the property. (Appellee Response Brief, p. 11.) Thus, they further argue, those rights (envisaged in *Fairbanks*) provide a debtor with a potential window to cure a claim. (*Id.* at 13.) Therefore, since Appellee's bankruptcy petition prevented the Mason County Sheriff from issuing a Sheriff's Deed after the expiration of debtor's redemption period, the same relief is applicable here. This is not correct.

Appellee takes "completion of a foreclosure sale" in a non-judicial setting and incorrectly applies it to a judicial foreclosure sale. This is error because the expiration of the redemption period is the material event that irrevocably terminates the debtor's legal ownership rights in the property. The purchaser here already obtained equitable title to the property at the date of the sale; at the

expiration of the redemption period the sale has been completed. That is the point when the debtor loses legal interest in the property.

The issuance of a Sheriff's deed after the expiration of the redemption period is purely ministerial. RCW 6.21.120 provides, "[t]he deeds **shall** be issued upon request … immediately after the time for redemption from such sale has expired in those instances in which there are redemption rights, as provided in RCW 6.23.060." RCW 6.21.120 (emphasis added). The statute leaves no room for the Sheriff to exercise discretion in the issuance of the deed and therefore the act is simply ministerial. *See Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 974 (1st Cir. 1997) ("[W]hen an official's duty is delineated by, say, a law or a judicial decree with such crystalline clarity that nothing is left to the exercise of the official's discretion or judgment, the resultant act is ministerial.").

Appellee spends considerable time advocating for the proposition that Washington State follows a "deed delivery rule" rather than a "gavel rule." (*See* Appellee Response Brief, pp. 10-13.) While Vitruvian disagrees with Appellee's conclusion that Washington is a "deed delivery" state (*see* Appellant's Opening Brief at 13-14), the question is not material to the disposition of this case. The relevant question instead is: "Did Debtor possess a right of redemption at the time her bankruptcy plan was confirmed and redemption was effectuated?" The answer is no. Debtor's 12-month statutory redemption right was set to expire on July 15,

2023. Her petition filed on July 10, 2023, extended that right into the bankruptcy estate for an additional 60 days under § 108(b). The right of redemption or ability to cure is not linked to whether a Sheriff's Deed had been recorded, as Appellee proposes.

The Bankruptcy Court was correct in identifying that "at the time the bankruptcy was filed, the redemption period under the judicial foreclosure of the HOA lien had not expired. The debtor retained, not only legal title, but the rights in the property and the right to redeem the property." (App. 17:23.) When Debtor filed her petition, the bankruptcy estate did acquire a right to redeem the property from Vitruvian. However, this right was subject to the provisions of § 108(b).

A closer examination of the interplay between the property of a bankruptcy estate that is created at the commencement of a case and how those rights temporally evolve is found in *Title Max v. Northington (In re Northington)*, 876 F.3d 1302, 1313 (11th Cir. 2017). *Title Max* explained that:

> Under Section 541(a), "[t]he commencement of a case"—*i.e.*, the filing of a petition—"creates an estate," which includes, among other things, "all legal or equitable interests in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). But Section 541 neither clearly says nor unambiguously implies, *see BFP*, 511 U.S. at 544-45, 114 S.Ct. 1757, that a bankruptcy estate, once created, necessarily remains static. The textual indicators, in fact, point in the opposite direction, and suggest that an estate is not necessarily "frozen in time," but rather can, in certain circumstances, expand or contract in accordance with the operation of underlying state-law property rules. *Cf., e.g.,* 11 U.S.C. §§ 541(a)(6)-(7), 541(b)(8) (specifying instances in which property may

> be added to or excluded from the bankruptcy estate based on post-petition events).

Id. at 1314.

As explained in *Title Max*, the bankruptcy estate is not static. While Debtor's right of redemption entered the bankruptcy estate upon her petition and remained through § 108(b)'s 60-day extension, that right expired on September 10, 2023. After September 10, the right of redemption was no longer part of the estate and the Bankruptcy Court erred by permitting redemption when the estate no longer possessed that right.

B. A Closer Examination of *Pellegrino* Undermines Appellee's Argument and Supports Appellant's Position.

Appellee cites to *In re Pellegrino*, a Connecticut case which analyzed a "non-sale" or "strict foreclosure" sale in which there is no sale date. (Appellee Response Brief, p. 7.) Instead, the judge set "law days" for the debtor and creditors. *In re Pellegrino*, 284 B.R. 326, 328 (Bankr. D. Conn. 2002). A law day is a period of time to pay off the debt, analogous to a redemption period in Washington. *Id*. *Pellegrino* first makes note of *In re Canney*, 284 F.3d 362 (2d Cir. 2002), which held that the automatic stay provision of § 362(a) of the Bankruptcy Code does not toll the passing of the deadline by which a debtor is required to exercise his right of redemption under Vermont state law. *In re Pellegrino*, 284 B.R. at 327. *Canney* was specific when it instructed that:

> Such a redemption deadline was in fact tolled by Section 108 of the Bankruptcy Code for a fixed and limited period of time. Consequently, an expansive reading of Canney could lead one to believe that all debtor-mortgagors who file their bankruptcy petitions after the entry of a judgment of strict foreclosure irretrievably forfeit their mortgaged property interest, absent timely redemption during the bankruptcy case, after the later of (i) the passing of the state law redemption deadline or (ii) 60 days after the bankruptcy order for relief.

Id (citing *Canney*, 284 B.R. at 372-73).

Pellegrino initially sidestepped the holding of *Canney* by concluding that since *Carney* was a chapter 7 case, it was not dispositive to a chapter 13 case. *Id.* at 329. *Pellegrino* then analyzed the impact of § 1332(c)(1) in the context of a strict non-sale foreclosure. The court was tasked with deciding what point defines "is sold at foreclosure sale" for purposes of § 1322(c)(1). *Id*. at 330. The court relied on Second Circuit precedent to answer the question of when a mortgagee's title becomes "absolute," finding that it was upon expiration of the redemption period. *See e.g.*, *New Milford Saving Bank v. Jajer*, 244 Conn. 251, 256 n. 11, 708 A.2d 1378 (1998) (". . . the mortgagee's title does not become absolute until all eligible parties have failed to exercise their rights to redeem the property"); *First Bank v. Simpson*, 199 Conn. 368, 373, 507 A.2d 997 (1986) ("A judgment of strict foreclosure vests absolute title in the foreclosing plaintiff upon the failure of other parties to redeem the property"); *Barclays Bank of New York v. Ivler*, 20 Conn. Appl. 163, 166, 565 A.2d 252 (Conn. App. 1989) ("The question . . . is whether the

law days have run so as to extinguish the defendant's equity of redemption and vest title absolutely in the plaintiff.").

The *Pellegrino* Court held: "Accordingly, for purposes of Section 1332(c)(1), a Connecticut property interest is "sold" in a strict foreclosure only after all the law days have passed." *In re Pellegrino*, 284 B.R. at 331. This is analogous to the expiration of the redemption period under Washington law. Adopting the *Pellegrino* holding here would adjust when a property is "sold" for purposes of 1332(c)(1) to the end of the redemption period instead of the foreclosure sale date. Thus, even if *Pellegrino's* holding regarding when a property is "sold" is applied here, it does not help Appellee's position because in a statutory redemption context, the expiration of the redemption period is the point where the debtor's legal title interests are lost – not the recordation of a deed.

C. *In Re Beeman* Does Not Support the Appellee's Position and is Factually Inapposite to the Instant Case.

Appellee's reliance on *In re Beeman* fares no better. The facts of *In Re Beeman* mirror those of *Fairbanks*. The Bank of New York in *Beeman* conducted a non-judicial foreclosure sale and was the purchaser at the sale. *In re Beeman*, 235 B.R. 519, 520 (Bankr D.N.H. 1999). After the sale date, but before recording of the deed, the debtors filed their chapter 13 petition. *Id.* The court held that the debtors retained their rights to cure and reinstate their mortgage pursuant to 1332(c)(1) because the debtors retained an interest that became property of the estate. *Id.* at

526-27. There was no redemption period in *Beeman* and its holding does not help to decide this case.

D. The Instant Case is Distinguishable from the Facts at Issue in *In Re Frazer*.

Appellee's attempts to diminish the import of § 108(b) in favor of § 1332 rests squarely on the BAP's decision in *Frazer v. Drummond* (*In re Frazer*), 377 B.R. 621 (B.A.P. 9th Cir. 2007). (Appellee Response Brief, p. 14.) The issue presented in *Frazer* was "[w]hether the bankruptcy court erred in finding that a debtor's ability to cure a default under an installment land sale contract for the purchase of the debtor's residence is governed by § 108(b) rather than by § 1322." *Id*. at 625.

The BAP ultimately reversed the bankruptcy court, which ruled that the debtors had 60 days from the petition to cure pursuant to § 108(b) and that the seller was entitled to terminate the debtor's equitable interest in the property. *Id.* at 632. The BAP agreed with the bankruptcy court on the inapplicability of § 1322(c)(1), but permitted cure and maintain payment on the contract:

> Because no foreclosure sale is required to be held prior to forfeiture of a contract for deed, we agree with the bankruptcy court that § 1322(c)(1) does not apply. Our analysis, however, does not end there. The fact that § 1322(c)(1) does not apply in this situation does not deprive Debtors of the ability to employ a chapter 13 plan to cure the default on the contract for deed. Section 1322(c)(1) simply governs the time within which to cure a default that is within its terms. When § 1322(c)(1) does not apply, the debtor nevertheless is left with the other cure provision of § 1322(b), which provide that a debtor may cure a

> default and maintain payments on a debt payable beyond the expiration of the plan, so long as that cure is made within a reasonable time. 11 U.S.C. § 1322(b)(3)-(b)(5).

Id. at 630.

However, unlike in *Frazer*, the instant case does involve a foreclosure sale and the applicability of § 1322(c)(1). Appellee latches on to *Frazer*'s dialogue concerning the interplay between § 108(b) and § 1322 generally; however, *Frazer* does not support Appellee's position. The BAP's analysis in *Frazer* focused specifically on the interplay between § 108(b), § 1322, and executory contracts. *Id*. at 632; *see also*, *Coleman Oil Co. v. Circle K Corp. (In re Circle K Corp.)*, 127 F.3d 904, 909 n.4 (9th Cir. 1997) ("The curing of default in an executory contract or unexpired lease is governed by section 365, not by the . . . provisions of section 108(b)"); *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1215-16 (7th Cir. 1984) (same); 2 Collier on Bankruptcy ¶ 108.03[3] (15th ed. Rev. 2007).

The BAP in *Frazer* concluded that the debtor's equitable interest in the property had not been terminated. *In re Frazer* at 632. This interest gave them the right to de-accelerate the contract and cure any default related to it under § 1322(b)(3) and maintain payments pursuant to it under § 1322(b)(5) through their chapter 13 plan. *Id*.

Tellingly, the import (or lack thereof), of the *Frazer* decision was reached in the First Hearing where the Bankruptcy Court appropriately determined its relevance to this case:

> But, for instance, here, you don't actually have a sale in a contract forfeiture. So it's not really a very apposite setting. I mean, yes, there may be some law in there that's helpful to your case, but it's certainly not a factually apposite case.

(App. 13:15.)

Because Appellee's equitable interest transferred to Vitruvian on the date of the foreclosure sale, this authority affords no basis to affirm the Bankruptcy Court.

E. *In re Richter* is Factually On-point and Instructive to the Instant Case on the Similarity Between Washington and California Redemption Law.

1. California Redemption Law Is Similar to Washington's.

In trying to distinguish *In re Richter*, Appellee's Response Brief incorrectly advances the idea that California redemption law is fundamentally different than Washington redemption law. Appellee specifically asserts, "[i]n contrast to California law, ownership of Washington real property continues to vest in the titled owner until a foreclosure deed is issued." (Appellee Response Brief, p. 12.) This is not correct. In California, just like Washington, the debtor retains legal title to the property through the end of the redemption period. *See* Cal Code Civ. Proc § 729.080; *Multani v. Witkin & Neal* (2013) 215 Cal. App. 4th 1428 [155 Cal. Rptr.

3d 892]; *Barry v. OC Residential Properties* (2011) 194 Cal. App. 4th 861 [120 Cal. Rptr. 3d 727].

This is crucial because Appellee, as well as the Bankruptcy Court, appear to distinguish *Richter* solely on the ownership rights held by the debtor during the redemption period. But a debtor under California law retains title ownership during the redemption period, just like in Washington. Superficial differences between California and Washington law regarding redemption procedures are not a basis to distinguish *Richter* from the very similar facts of the instant case.

Appellee's misunderstanding appears to originate in a misinterpretation of language in *Richter*. Appellee contends, "[i]n California, once the sale occurs, the debtor loses ownership of the real property, but retains the ability to '**regain ownership** of the property by paying the foreclosure sale price.'" (Appellee Response Brief, p. 12 (quoting *In re Richter*, 525 B.R. at 747 (quoting *Alliance Mortg. Co. v. Rothwell*, 10 Cal. 4th 1226, 44 Cal. Rptr. 2d 352 P.2d 601 (1995))) (emphasis added by Appellee.). This appears to simply be inarticulate dicta, as the case *Richter* is quoting, *Alliance Mortgage*, had nothing to with a judicial sale or redemption period. *Richter* does not stand for the proposition advanced by Appellee. *Richter* states:

> Property is still sold (i.e., equitable title is transferred to the purchaser) at the foreclosure auction *Cf. Foorman v. Wallace*, 75 Cal. 552, 556, 17 P. 680 (1888) (stating that certificate of sale is "evidence of a sale, whereby . . . the entire equitable title is conditionally vested in the

> purchaser, subject to be defeated by a redemption"). By redeeming, the prior owner has effectively terminated the sale (i.e., transferred equitable title back) and "restored [himself] to the estate therein sold at the sale. Cal. Civ. Proc. Code § 729.080(d); *cf. Bagley v. Ward*, 37 Cal. 121, 129 (1869) ("The redemption is virtually a transfer of the certificate of sale.").

In re Richter, 525 B.R. 735 at 745.

This is materially the same redemption procedure as provided under RCW 6.23. The purchaser obtains equitable title to the property on the date of the foreclosure sale and the debtor retains legal title. As observed in *W.T. Watts, Inc. v. Sherrer*, "[A] sheriff's certificate of purchase does not pass title but is only evidence of an inchoate interest which may or may not ripen into title." 89 Wn.2d 245, 248, 574 P.2d 203 (1997).

Appellee's contention is even more puzzling when the main thrust of her position is that only a recorded deed will terminate a debtor's legal interest. However, accord this with Cal Code Civ. Proc § 729.080(a)-(b), which states:

> (a): If the redemption price is not deposited pursuant to Section 729.060 before the expiration of the redemption period … the levying officer who conducted the sale shall promptly execute and **deliver to the purchaser a deed of sale** … or the nonjudicial foreclosure trustee pursuant to Section 729.035 **shall deliver an executed trustee's deed.**
>
> (b): If the person seeking to redeem the property deposits the redemption price pursuant to Section 729.060 or 729.070 during the redemption period… the levying officer or trustee shall promptly execute and deliver a **certificate of redemption to the person seeking to redeem**.

Cal. Code Civ. Proc. § 729.080(a)-(b) (emphasis added).

A certificate of redemption does not transfer legal title, only a deed does. Redemption terminates the effect of the sale, but it does not vest title since title is still held by the debtor/owner. *See* Cal. Code Civ. Proc. § 729.080(d) ("[U]pon redemption the effect of the sale is terminated and the person who redeemed the property is restored to the estate therein sold at the sale).

2. *Richter* Is Binding Ninth Circuit Precedent in this Case.

In *Richter*, the Court framed the question before it as follows: "When a foreclosure sale of a debtor's principal residence has occurred prepetition and the debtor then files a Chapter 13 petition before his statutory right to redeem expires, what are his options under the Bankruptcy Code to save his residence?" *In re Richter*, 252 B.R. at 742. *Richter* is on all fours with the issues presented in this appeal. The Bankruptcy Court briefly described *Richter* as: "a well-reasoned decision about California law in the bankruptcy context, [but] it is not the last word about Washington law." (App. 17:13.) However, the Bankruptcy Court did not explain why a redemption right in California entering a bankruptcy estate would be treated any differently in Washington.

Fairbanks articulated a difference in Washington and California law with regard to a non-judicial trustee sale and the recording of a trustee's deed. The specific issue in *Fairbanks* was whether the "relation back" provision in RCW

61.24.050(1) and California's analogous statute, Cal. Civ. Code § 2924h(c), were materially different. *Fairbanks* held that they were. *In re Fairbanks*, 2021 Bankr. LEXIS 2209 at *9. But again, that is not the issue here, and those are not the statues being interpreted in this case.

II. CONCLUSION

Clearly unhappy with the equities of the case, the Bankruptcy Court committed error in conflating the rights provided to a debtor after a trustee sale as promulgated in *Fairbanks* and the redemption rights a debtor brings into a bankruptcy estate. The Bankruptcy Court never analyzed or discussed the applicability of § 108(b) to the debtor's redemption rights and when it expired.

This was an abuse of discretion. Therefore, the Bankruptcy Court should reverse the Bankruptcy Court's denial of Vitruvian's Motion for Relief and confirmation of Debtor's Third Amended Plan. This Court should remand and instruct the Bankruptcy Court to authorize Vitruvian to obtain possession of the Property through state court process and authorize release of the funds in Debtor's counsel's trust account to Debtor and/or her father. Because the funds directed to be paid to Vitruvian are in the possession of Debtor's counsel, nothing further will be needed to unwind the effects of the initial rulings below.

Respectfully submitted this 4th day of April, 2024.

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CERTIFICATE OF COMPLIANCE

Federal Rule of Bankruptcy Procedure 8015(a)(7)

Pursuant to Federal Rule of Bankruptcy 8015(a)(7), the undersigned certifies that the Appellant's Reply Brief complies with the type-volume limitation and that the Appellant's Reply Brief contains 3,791 words (excluding the cover page, tables, signature blocks and required certificates) as counted by the computer program used to prepare the Reply Brief.

Dated this 4th day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2024, I electronically filed the APPELLANT'S REPLY BRIEF with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system.

I certify that all parties of record to this appeal either are registered CM/ECF users, have registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

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