Case Summary
***In re Bequir*, BK No. 12-10691**
Bench decision issued May 1, 2013

Facts:

Debtor made two requests to participate in loss mitigation with respect to a first and second mortgage against the same real property, both held by RBS Citizens Bank, N.A. ("RBS"). RBS objected to both of the Debtor's requests on the grounds that there was no privity between the Debtor and RBS, as the Debtor was not listed in the loan documents as the "borrower." The mortgagors on both loan documents were a living trust controlled by the Debtor's parents as trustees. The trust provided that upon the death of the surviving settlor (the Debtor's mother), the trust assets (including the real property at issue) were to be distributed to the trust beneficiaries (the Debtor and his brother). Thereafter, the Debtor's brother transferred his interest to the Debtor, who became the sole title owner of the property. The Debtor resided in the property and claimed it as exempt on his Schedule C.

Holding:

The Court held that despite a lack of privity between the Debtor and RBS in the mortgage and note documents, the Debtor was nonetheless eligible to participate in the Court's loss mitigation program: (1) where the loans and the property met the definitions provided in the program, and (2) where assumption and modification of a mortgage by a non-borrower occupant of such a property, who inherited the property from the original borrower, is contemplated by related federal law.

Reasoning:

The Court reasoned that the Debtor's interest in the property fell well within the Court's *Sixth Amended Loss Mitigation Program and Procedures* (which were in effect at the time the

case was decided). The program defined a "loan" as "any mortgage, lien or extension of money or credit secured by eligible Property" and eligible "property" as "any real property used as the principle residence of an eligible Debtor in which that Debtor owns an interest." Sections III(B)-(C). There was no dispute that both notes and mortgages met the definition of "loan" or that the Debtor's interest in qualified as "property," rendering him eligible for the loss mitigation program.

The Court found that RBS's characterization of the Debtor as a "stranger" to the loan documents was curious, as RBS conceded that a distribution of the trust assets was to occur upon the Debtor's mother's death. RBS therefore knew or should have known that the dissolution of the trust would result in a distribution of trust assets, and thus the property would pass to the Debtor and his brother as trust beneficiaries. Moreover, the terms of both notes and mortgages did not bar and even contemplated testate succession. With respect to the first mortgage, the promissory note only restricted terms pertaining to assumption by sale; it placed no restrictions on ownership by inheritance. With respect to the second mortgage, the promissory note only restricted assignment of rights; it made no mention of assumption. Furthermore, the terms under the second mortgage's promissory notes even attempted to bind the heirs of the borrower with the loan obligation.

Looking to federal law for further support, the Court cited certain provisions of the Home Affordable Mortgage Program ("HAMP") which mandate that when borrower dies prior to completing a trial loan modification, the only remaining occupant of the real property, though a non-borrower, still must receive an opportunity to assume and modify the loan of the deceased borrower. While not squarely on point, this provision indicates that HAMP will consider a non-borrower owner occupant for assumption and modification of a loan held by a deceased

borrower, particularly when the non-borrower owner is a relative of the borrower who inherited the home therefrom. Additionally, the Court cited to the Garn-St. Germain Act (the "Act"), codified at 12 U.S.C. § 1701j-3, for further evidence of the government's policy concern for a non-borrower occupant of the home of a deceased borrower. The Act bars a lender's enforcement of a due on sale clause when, *inter alia*, "a transfer to a relative result[s] from the death of a borrower," and it encourages lenders to permit assumption of the loan by such a relative at lower rates than the original contract rate, clearly stating that "nothing within the statute shall be interpreted to prohibit any such assumption." 12 U.S.C. § 1701j-3(b)(3). Viewed together, HAMP and the Garn-St. Germain Act reflect a policy that federally insured lenders consider in good faith the assumption and modification of a mortgage loan to an affordable rate by a non-borrower relative of a deceased borrower and occupants remaining in the property securing the mortgage.

The Court found that the Debtor was eligible under the loss mitigation program and required RBS to participate in loss mitigation with the Debtor. The Court noted its ruling was not without precedent and referenced the Southern District of New York's flagship loss mitigation program. The Court also emphasized the narrowness of its ruling, which only required RBS to *participate* in the loss mitigation program, *i.e.*, to engage in good faith negotiations with the Debtor and to conduct a good faith review of whether the Debtor financially qualified for a modification of the loans and mortgages on the property. The Court granted the Debtor's requests for loss mitigation and overruled RBS's objections.