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 OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

Appellant, Vitruvian Design, LLC ("Vitruvian") appeals from the Order Confirming Chapter 13 Plan ("Order Confirming Plan"), issued by the Honorable Brian D. Lynch ("Judge Lynch") of the United States Bankruptcy Court for the Western Bankruptcy District of Washington at Tacoma on December 28, 2023. (App. 1:1-2) The Bankruptcy Court had jurisdiction over the matter under 11 U.S.C. §§ 1334 and 157. The Order is a final order appealable under 28 U.S.C. § 158(a)(1).

Vitruvian timely filed its Notice of Appeal on January 2, 2024, within 14 days of the entry of the Order as prescribed by Fed. R. Bankr. P. 8002. (App. 2:1-2) No party elected to have the appeal heard by the district court, and therefore the United States Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") has jurisdiction under 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1).

II. STATEMENT OF ISSUES

1. Did the Bankruptcy Court err in confirming Debtor's chapter 13 plan when Debtor's right to cure the default on her property was cut off upon foreclosure sale of the property under 11 U.S.C. § 1322(c)(1)?

2. Did the Bankruptcy Court err in confirming Debtor's chapter 13 plan when the deadline for Debtor to redeem the property under 11 U.S.C. § 108(b) had expired?

III. STANDARD OF REVIEW

The decision to confirm a chapter 13 plan is reviewed under an abuse of discretion standard. *de la Salle v. U.S. Bank, N.A., (In re de la Salle*), 461 B.R. 593, 601 (9th Cir. BAP 2011). The abuse of discretion test involves two distinct determinations: first, whether the court applied the correct legal standard; and second, whether the factual findings supporting the legal analysis were clearly erroneous. *United States v. Hinkson*, 585 F.3d 1247, 1261-63 (9th Cir. 2009) (en banc.) Where the trial court failed to apply the correct legal standard, it has "necessarily abused its discretion." *Cooter & Gell v. Hartmarx Corp.* 946 U.S. 384, 405 (1990).

IV. STATEMENT OF THE CASE

A. Factual Background

Erin Sharp ("Debtor" or "Sharp") was the owner of real property commonly known as 391 East Rainier Drive, Allyn, Washington 98524 "Property"). The Property is part of the Lakeland Village Community Club ("Lakeland"), a homeowner's association in Mason County, Washington. On September 19, 2019, Lakeland recorded a lien on the Property following Debtor's failure to pay homeowner's dues. (App. 2:6-8)

On December 23, 2021, the Court entered a default judgment ("Judgment") and decree of foreclosure, ordering that the Property be foreclosed upon and sold

via Sheriff's sale. (App. 3:10-12) On July 15, 2022, Vitruvian bought the Property at a Sheriff's Sale ("Sale") to Vitruvian. (App. 3:14-15) The sale proceeds were sufficient to satisfy the amount owed to Lakeland under the Judgment, which at the time was $8,689.28, including interest and attorneys' fees and costs. (App. 3:17-19) Notice of the Sale, Return of Sale, and proof of filing of the Return of Sale were provided to Debtor and all parties in accordance with RCW 6.21 et. seq. There was no objection to the Sale. On August 9, 2022, an order confirming the Sale was issued. (App. 3:17-19) On June 5th, 2023, pursuant to RCW 6.23.030, Vitruvian sent notice to Sharp and occupants of the premises, by both certified and first-class mail, that the redemption period would expire on July 15, 2023 and included the amount necessary to effect redemption.

Since February 2023, Vitruvian has been making payments to Mason County Utilities and Waste Management for delinquent sewer charges totaling over $10,000. (App. 4:5) Vitruvian has made these payments to avoid lien and foreclosure of its interest in the Property. (App. 4:7)

RCW 6.23.020(1) provides for a redemption period of one year. On July 10, 2023, five days prior to the end of the statutory redemption period, Debtor filed a Chapter 13 petition ("Petition"). (App. 5)

B. Procedural History

Vitruvian objected to Debtor's Chapter 13 Plan ("Initial Plan") (App. 6) on September 15, 2023, requesting that the Bankruptcy Court deny confirmation of the Initial Plan, arguing that Debtor's right to cure the default on the Property ceased once the Property was sold via foreclosure sale under 11 U.S.C. § 1322(c)(1). (App. 7:2-4) Vitruvian further argued that Debtor's right to redeem the Property had expired under both state law and 11 U.S.C. § 108(b) (App. 7:3-4)

On October 3, 2023, Vitruvian filed a Motion for Relief from Automatic Stay ("Motion for Relief"). (App. 8) On October 17, 2023, Debtor responded, arguing that Debtor retained an interest in the Property pursuant to 11 U.S.C. § 1322(c)(1) under the "deed-delivery rule" at the time she filed the Petition and that Debtor therefore retained the right to redeem the Property under 11 U.S.C. § 1322. (App. 9:3-4)

On October 27, 2023, Debtor filed an Amended Plan ("First Amended Plan") along with a Motion for Order Approving Amended Plan ("Confirmation Motion"). (App. 10; App. 11) Vitruvian filed an objection on October 31, 2023. (App. 12)

On November 8, 2023, the Bankruptcy Court held a consolidated hearing on Debtor's Confirmation Motion and Vitruvian's Motion for Relief ("First Hearing"). (App. 13) Relying on the BAP's decision in *Wilmington Sav. Fund Soc'y FSB v. Fairbanks,* 2021 Bankr. LEXIS 2209 (9th Cir. Aug. 12, 2021), in response to

Debtor's counsel's contention that Debtor retained the right to cure the default through the Amended Plan, the Bankruptcy Court stated:

> But it [*Fairbanks*] also held that even though the recording of the deed affected the transfer of title, the foreclosure sale is the point at which you can—under 1322(c), you can no longer propose a cure and maintain plan. In fact, it referenced—if you look at the language, it referenced that the rights the debtor retained are the right to redeem, so our situation.
>
> But, clearly its saying you can't—absent the agreement of Vitruvian, you can't cure and maintain under 1322(b) and (b)(5).
>
> ***
>
> I don't think you can cure and maintain over the opposition of Vitruvian. Now, whether or not you can pay it in full, that kind of is where the rubber is meeting the road right now, from the Court's perspective.

(App. 13:12)

Based on *Fairbanks*, the Bankruptcy Court further postulated whether there was another way for Debtor to redeem the Property:

> The question I have for you [Debtor's counsel] and Mr. Muchinsky [Vitruvian's counsel] is, what if Dad comes in right now and says, I want to pay off—pay the advances, pay what was bid, pay the interest, pay whatever other amounts are owing right now—pay you off so that my daughter can retain the property for her and her kids?

(App. 13:17)

In response to a hypothetical question from debtor's counsel concerning whether § 108(b) could work to preclude a cure and maintain plan before a trustee sale, Judge Lynch stated, "that's not the kind of cure that 108(b) anticipates." He

then went on to add, "(w)hereas it—it probably is, at least a number of separate cases *applies in a redemption situation like we have here."* (App. 13:16-17) (emphasis added).

At the conclusion of First Hearing, the Bankruptcy Court appeared to urge settlement between the parties:

> I will give you [Debtor] a chance to try to work out the language that would be acceptable to Vitruvian, in terms of payment, which it seems to me ought not to await confirmation of a plan and ought to be paid ahead of time for the full amount of what they're owed, including anything they've advanced. Hopefully you can work out a number, and hopefully Ms. Sharp's father can pony it up, and hopefully Vitruvian will accept it.

(App. 13: 26-27)

On November 9, 2023, the Bankruptcy Court issued an order denying Debtor's Confirmation Motion and directing Debtor to file a feasible amended plan no later than 14 days from the date of entry of the order. (App. 14)

On November 14, 2023, Debtor filed another amended plan ("Second Amended Plan") proposing to pay Vitruvian a lump sum of $60,000, plus direct the release of the residual funds in the Mason County Superior Court registry to Vitruvian. (App. 15) Vitruvian objected to the Second Amended Plan on November 22, 2023. (App. 16)

On December 14, 2023, the Bankruptcy Court held a second consolidated hearing on the pending motions ("Second Hearing"). Reversing itself, the

Bankruptcy Court relied primary on *Fairbanks* in finding that Debtor could redeem the Property through the Second Amended Plan:

> 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.
>
> While the debtor may be prohibited from a cure and maintain provision after a foreclosure sale, she may not be prohibited from other options, including, under *Fairbanks*, paying off a bidder at the foreclosure sale.

(App. 17:22)

The Bankruptcy Court also dismissed comparisons to an analogous case of *In re Richter,* 525 B.R. 735 (Bankr. C.D. Cal. 2015), where the court found that debtor's right to redeem their property was cut off upon expiration of the time prescribed under § 108(b). The Bankruptcy Court stated: "*Fairbanks* pointed out that California law would've been more favorable to the creditor. Washington law wasn't." (App 17:13)

Ultimately, the Bankruptcy Court characterized the proposed payment to Vitruvian as a "pay off," orally holding that:

> The Court concludes that this is not a cure and maintain plan. The *Fairbanks* Court recognized that a plan can address a claim in other ways. The plan proposes to pay the full amount owed to Vitruvian and additional funds as part of a redemption from judicial foreclosure.

(App. 17:23)

On December 20, 2023, the Bankruptcy Court issued an order denying Vitruvian's Motion for Relief ("Order Denying Motion for Relief"). The Bankruptcy Court also denied Debtor's Confirmation Motion, but indicated that it would approve a Third Amended Plan if it included the provision discussed at the Second Hearing, allowing Vitruvian to seek relief from the automatic stay if Debtor's father failed to remit the lump sum payment proposed in the Second Amended Plan to Vitruvian within 10 days of the issuance of the order confirming the amended plan. (App. 1:2)

Debtor filed a third amended plan ("Third Amended Plan") including this provision on December 20, 2023. (App. 18) The Bankruptcy Court subsequently issued an order confirming the Third Amended Plan on December 28, 2023 ("Order Confirming Plan"). (App. 19)

Debtor's father remitted funds to Vitruvian, care of Vitruvian's counsel. Those funds were then routed to the trust account of Debtor's counsel. Debtor successfully moved for an order directing the release of the surplus funds held in the registry of the Mason County Superior Court. By agreement, those funds are being held in the trust account of Debtor's counsel pending resolution of this appeal.[1]

[1] These facts are stipulated, in a joint motion to supplement the record being filed contemporaneously with this Brief.

V. SUMMARY OF ARGUMENT

Debtor's right to cure the default on the Property lapsed pursuant to 11 U.S.C. § 1322(c)(1). As established in *Hurt*, the BAP has adopted the gavel rule to determine when "property is sold at foreclosure sale." Under the gavel rule, Debtor lost the ability to cure the default on the Property once the foreclosure sale took place. Thus, the Bankruptcy Court erred in confirming Debtor's chapter 13 plan when Debtor was no longer able to cure the default.

Under § 108(b), Debtor had 60 days from the date of filing the Petition to redeem the Property. She failed to do so and was thus unable to redeem the Property through the Third Amended Plan. Further, the Bankruptcy Court's reliance on the alternative options to cure a default outlined in *Fairbanks* is misplaced where § 108(b) acted as a firm deadline in which to redeem the Property.

VI. ARGUMENT

A. The Bankruptcy Court Erred in Denying Vitruvian's Motion for Relief When Debtor's Right to Cure Was Severed Upon Foreclosure Sale Under 11 U.S.C. § 1322(c)(1).

Under 11 U.S.C. § 1322(c)(1), the right to cure a default involving a lien on a debtor's principal residence is permitted only "until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy

law." Courts have developed two rules to determine when the cure provisions in § 1322(c)(1) cease to be available—the "gavel rule" and the "deed delivery rule."

Under the gavel rule, a debtor's right to cure ends upon foreclosure sale of the property. *See e.g., In re Connors*, 497 F.3d 314, 319-21 (3d Cir. 2007). In contrast, under the deed-delivery rule, debtor retains the right to cure until title passes to the purchaser as prescribed by state law, which is usually when a deed is delivered or recorded. *See, e.g., In re Jenkins*, 422 B.R. 175, 181-82 (Bankr. E.D. Ark. 2010); *In re Beeman*, 235 B.R. 519, 524-26 (Bankr. D.N.H. 1999).

BAP precedent in the 9th Circuit is clear that the debtor's right to cure terminates upon foreclosure sale of the property. *See Oregon v. Hurt (In re Hurt)*, 158 B.R. 154, 160 (B.A.P. 9th Cir. 1993). In determining that the foreclosure sale was the correct point at which to cut off the cure provisions in § 1322(c)(1), the Court in *Hurt* specifically considered the rights and interests of the third-party purchaser. The Court found that "[p]urchase by an independent third party at a foreclosure sale raises enough additional concerns to justify ending the right to cure in bankruptcy at that point." *Hurt*, 158 B.R. 154 at 158 (quoting *In re Thompson*, 894 F.2d 1227, 1231 (10th Cir. 1990).

A majority of jurisdictions have adopted the gavel rule. *See e.g., Connors*, 497 F.3d at 319-21 (holding that under § 1322(c)(1), a Chapter 13 debtor does not have the right to cure a default on a mortgage secured by debtor's principal

residence between the time the residence is sold at foreclosure sale and the time the deed is delivered); *Cain v. Wells Fargo Bank, N.A. (In re Cain)*, 423 F.3d 617, 620-21 (6th Cir. 2005) (quoting *In re Crawford*, 232 B.R. 92, 96 (Bankr. N.D. Ohio 1999) (finding that debtor's right to cure a home mortgage default terminates "when the gavel comes down on the last bid at the foreclosure sale."); *TD Bank, N.A. v. LaPointe (In re LaPointe)*, 505 B.R. 589, 597 (B.A.P. 1st Cir. 2014) (quoting *Barrows v. Boles*, 141 N.H. 382, 393, 687 A.2d 979 (1996) (emphasis included) (concluding that "the language of § 1322(c)(1) is clear, unambiguous and needs no interpretation. . . '[t]he phrase "sold *at* a foreclosure sale" refers to a sale that occurs *at* a foreclosure auction.'").

The Property was sold to Vitruvian at a foreclosure sale on July 15, 2022—almost one full year prior to the filing of Debtor's Petition. (App. 3:12-14) Since a foreclosure sale had already taken place, Debtor was barred from attempting to cure the default in her Plan. Debtor's inability to cure the default on the Property under § 1322(c)(1) is something that the Bankruptcy Court acknowledged at the First Hearing: "the foreclosure sale is the point at which you can—under 1322(c), you can no longer propose a cure and maintain plan. . . you can't—absent the agreement of Vitruvian, you can't cure and maintain under 1322(b)(3) and (b)(5)." (App. 13:12)

Consistent with this fact, the Initial Plan made no provision for Vitruvian; instead, it listed Lakeland as the creditor associated with the Property. (App. 6:3) Debtor's Third Amended plan attempts to do the same thing; Debtor just lists Vitruvian as the creditor instead of Lakeland and proposes to pay Vitruvian a lump sum amount instead of payments over the term of the Plan. This is a backdoor attempt to cure the default on the Property well after a foreclosure sale has taken place, which is barred under § 1322(c)(1).

B. The Bankruptcy Court Erred in Denying Vitruvian's Motion for Relief When the Deadline for Debtor to Redeem the Property Under 11 U.S.C. § 108(b) Had Expired.

The Bankruptcy Court erred in confirming Debtor's chapter 13 plan when Debtor failed to redeem the Property within the 60-day extension of time to do so under 11 U.S.C. § 108(b). § 108(b) specifically provides:

> (b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of-
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> (2) 60 days after the order for relief.

11 U.S.C. § 108(b).

In discussing the history of this provision, the BAP has stated that "[t]he purpose of section 108 is to permit the trustee [or debtor] an extension of time for filing an action or *doing some other act that is required to preserve the debtor's rights*." *See In re Santa Fe Development & Mortg. Corp.* (9th Cir. BAP) (1981) (citing House Report No. 95-595, 95th Cong., 1st Sess. (1977(emphasis added)). This includes exercising a right of redemption under state law. *See In re Richter, 525 B.R. at 749* (finding that exercising the right of redemption created under state law constitutes "cur[ing] a default" or "perform[ing] any other similar act," falling within the scope of §108(b)). *See also In re Connors*, 497 F.3d 314, 321 (3d. Cir. 2007); *Canney v. Merchants Bank* (*In re Frazer*), 284 F.3d 362, 372-73 (2d Cir. 2002); *Goldberg v. Tynan* (*In re Tynan*), 773 F.2d 177, 179 (7th Cir. 1985); *Johnson v. First Nat'l Bank of Montevideo*, Minn., 719 F.2d 270, 278 (8th Cir. 1983). Further, "[t]he debtor's state law right of redemption, to the extent that it exists when a bankruptcy petition is filed, extends for 60 days beyond the state law time frame, by operation of 11 U.S.C. § 108(b) upon the filing of a petition." *McCarn v. WYHY Fed. Credit Union (In re McCarn)*, 218 B.R. 154, 162 (10th Cir. BAP 1998) (quoting *In re Ross*, 191 B.R. 615, 618 (Bankr. D.N.J. 1996).

Under RCW 6.23.020, Debtor had one year from the Sale to redeem the Property:

> (1) Unless redemption rights have been precluded pursuant to RCW 61.12.093 et seq., the judgment debtor or any redemptioner may

redeem the property from the purchaser at any time (a) within eight months after the date of the sale if the sale is pursuant to judgment and decree of foreclosure of any mortgage executed after June 30, 1961, which mortgage declares in its terms that the mortgaged property is not used principally for agricultural or farming purposes, and in which complaint the judgment creditor has expressly waived any right to a deficiency judgment, or (b) otherwise within one year after the date of the sale.

(2) The person who redeems from the purchaser must pay: (a) The amount of the bid, with interest thereon at the rate provided in the judgment to the time of redemption, together with (b) the amount of any assessment or taxes which the purchaser has paid thereon after purchase, and like interest on such amount from time of payment to time of redemption, together with (c) any sum paid by the purchaser on a prior lien or obligation secured by an interest in the property to the extent the payment was necessary for the protection of the interest of the judgment debtor or a redemptioner, and like interest upon every payment made from the date of payment to the time of redemption, and (d) if the redemption is by a redemptioner and if the purchaser is also a creditor having a lien, by judgment, decree, deed of trust, or mortgage, prior to that of the redemptioner, other than the judgment under which such purchase was made, the redemptioner shall also pay the amount of such lien with like interest.

RCW 6.23.020(1)-(2).

Vitruvian purchased the Property on July 15, 2022. Thus, in order to redeem the Property, Debtor was required to pay Vitruvian the amount of its bid plus all other amounts owing under RCW 6.23.020(2), by July 15, 2023. (App. 4:10) Debtor did not do this; instead, Debtor filed the Petition on July 10, 2023. Under § 108(b), this gave Debtor an extension of 60 days, or until September 10, 2023, to redeem the Property. (App. 5) It is undisputed that Debtor did not redeem the Property within this time.

1. Debtor Could Not Redeem the Property After Expiration of the Redemption Period in § 108(b).

Since Debtor failed to redeem the Property under the timeline established in RCW 6.23.020 or the 60-day extension of time under § 108(b), she was barred from doing so in the Third Amended Plan. Despite this, the Bankruptcy Court characterized Debtor's proposed payment to Vitruvian in the Third Amended Plan as a "redemption" payment. Specifically, the Bankruptcy Court indicated that "[t]he plan proposes to pay the full amount owed to Vitruvian and additional funds *as part of a redemption from the judicial foreclosure*." (App. 17:23, emphasis added.) In support of its contention that Debtor retained the right to redeem the Property, the Bankruptcy Court stated that "[a]t 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. 17:22) The Bankruptcy Court, however, fails to address the fact that Debtor's right to redeem the Property under both state law and § 108(b) had already expired.

As discussed above, this failure to address the import § 108(b) is all the more unusual given the court's colloquy at the First Hearing on November 8, 2023. In discussing a possible cure and maintain plan before a trustee sale, Judge Lynch stated, "that's not the kind of cure that 108(b) anticipates." (App. 13:16-17) He

then said, "(w)hereas it—it probably is, at least a number of separate cases *applies in a redemption situation like we have here."* (App. 13:16-17) (emphasis added).

Courts interpreting § 108(b) have found it unambiguous in requiring the debtor to redeem the property before the original expiration date of such right under state law or 60 days after the petition date, whichever is later. *In re Richter,* 525 B.R. 735, 749 (Bankr. C.D. Cal. 2015). For instance, in *McCarn v. WYHY Fed. Credit Union* (*In re McCarn*), the Tenth Circuit BAP affirmed the bankruptcy court's order denying confirmation of debtor's chapter 13 plan that sought to redeem debtor's primary residence where the residence had already been sold at foreclosure sale and debtor's redemption rights had expired under both state law and § 108(b). The court ruled:

> [u]nder Wyoming law, the debtors had three months to redeem the property from the Credit Union by paying the amount bid by the Credit Union, plus interest and charges. Wyo. Stat. Ann. § 1-18-103. It is undisputed that the debtors did not exercise their right of redemption during the three-month period set forth under Wyoming law, or during any potential extension of that period under 11 U.S.C. § 108(b).

218 B.R. 154, 163 (10th Cir. BAP 1998).

Just as the debtor in *McCarn* failed to redeem their residence following foreclosure sale within the timeframes established under applicable state law and § 108(b), Debtor failed to do the same. Debtor did not pay Vitruvian the amount of its bid and other amounts owing under RCW 6.23.020 by the original deadline of

July 15, 2023; nor did Debtor redeem the Property within 60 days of filing the Petition.

Further, the United States Bankruptcy Court for the Eastern Bankruptcy District of Washington has definitively found § 108(b) to apply to the redemption period for other property. Specifically, in *In re York*, the court found that debtor's pawned property did not become part of the bankruptcy estate where debtor had failed to redeem the property under the time period set forth under Washington law or the extension of time under § 108(b). No. 16-01964-FPC13, 2016 Bankr. LEXIS 3795, 2016 WL 6157432 at *10. The court found the language of § 108(b) to be clear in giving debtor "the later of the redemption period set forth by state law or 60 days after the filing of the petition in which to redeem pawned collateral." The BAP has also found that pawned property is excluded from the bankruptcy estate unless debtor redeems the property within the time allowed under § 108(b). *See Schnitzel, Inc. v. Sorensen* (*In re Sorensen*) 586 B.R. 327 (9th Cir. BAP 2018).

The instant case concerns Debtor's principal residence rather than pawned property, but § 108(b) as outlined in *York* and *Schnitzel* is equally applicable. As established in both cases, in order for property subject to the redemption provisions under state law and § 108(b) to be included in the bankruptcy estate, the debtor must redeem the property within the timeframe provided under § 108(b). Just as the debtors in *York* and *Schnitzel*, Debtor failed to redeem the Property within the

required timeframe. Thus, Debtor's rights in the Property ceased upon expiration of the period set forth in § 108(b) and she was no longer able to redeem the Property.

2. The Automatic Stay Does Not Toll Redemption Periods.

The BAP has found that the automatic stay in 11 U.S.C. § 362 does not toll redemption periods. *See Schnitzel*, 586 B.R. at 336, n. 6. In making this determination, the BAP agreed with several other courts. *See, e.g., In re York*, 2016 WL 6157432 at *3 ("This court finds more persuasive courts finding that § 362(a) does not toll the running of the time period for redemption, and that the only available extension of time for such periods is the 60 days provided for in § 108(b). . . ."); *In re Mosher*, No. 07-60007-13, 2007 Bankr. LEXIS 4730, 2007 WL 1487399, at *7 (Bankr. D. Mont. May 17, 2007) ("Debtors' argument that their redemption period was tolled by the automatic stay is contradicted by the plain language of § 541(b)(8)(C) which specifically invokes § 108(b) for determining whether a debtor or trustee has exercised any right to redeem in a timely manner."); *see also Title Max v. Northington (In re Northington),* 876 F.3d 1302, 1313 (11th Cir. 2017) (rejecting the notion that "the automatic-stay provision applies to toll an as-yet-unexpired state-law redemption period indefinitely, thereby preventing the period from lapsing and (in effect) keeping pawned assets in the estate").

Notably, the Eighth Circuit reached the same conclusion in its extensive analysis of the issue in *Johnson v. First National Bank of Montevideo*. In *Johnson*, debtor defaulted on their mortgage concerning certain real property that was ultimately sold at a sheriff's auction. Three weeks prior to the expiration of the applicable state law redemption period, debtor filed for chapter 11 bankruptcy. Along with their petition, debtor filed an adversary complaint alleging, in part, that "they had substantial equity in the mortgaged property and were entitled to an order staying the expiration of the redemption period." 719 F.2d 270, 272 (8th Cir. 1983) *cert. denied*, 465 U.S. 1012, 79 L. Ed. 2d 245, 104 S. Ct. 1015 (1983).

The Court ultimately found that the grant of general equitable powers under 11 U.S.C. § 105(a) did not give the bankruptcy court authority to stay indefinitely the expiration of the statutory redemption period under state law and that the automatic stay provisions of § 362(a) did not toll the extension of time provision in § 108(b). *Id.* at 275-278. In support of the latter, the Court explained:

> An interpretation of § 362(a) as an indefinite stay of the statutory period of redemption would render § 108(b) superfluous. If § 362(a) automatically stays the running of the statutory right to redeem until the stay is lifted pursuant to § 362(c) or (d), the pertinent time allotments of § 108(b) are completely extraneous as statutory time periods designed to control the trustee's activity. Moreover, if § 362(a) is interpreted to provide for the automatic stay of time periods for an indefinite amount of time, then subsections (a) and (b) of § 108, which define minimum and maximum time periods for the trustee to act, directly conflict with § 362(a).

Id. at 278 (quoting *Bank of Commonwealth v. Bevan*, 13 B.R. 989, 994 (E.D. Mich. 1981).

This is relevant, as the Bankruptcy Court's reasoning for confirming Debtor's chapter 13 plan seems to rest on the notion that Debtor's right to redeem the Property had not expired at the time she filed the Petition. The Bankruptcy Court specifically noted that "[a]t 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: 22) However, this is simply not the correct interpretation of § 108(b). Filing did give her additional protection; 60 days from filing, to be precise. That right expired on September 10, 2023. Debtor failed to redeem the Property by this date or by the time period outlined in RCW 6.23.020. As such the Bankruptcy Court erred in finding that the Property was part of the bankruptcy estate at the time it issued its Order Confirming Plan.

3. The California Redemption Statute at Issue in *Richter* Is Analogous to the Redemption Statute at Issue

In finding that the debtor could not redeem their property under § 108(b), the court in *Richter* evaluated Cal. Civ. Code § 5715(b) ("California Redemption Statute"). The California Redemption Statute gives debtors 90 days to redeem their property following a nonjudicial foreclosure sale:

> A nonjudicial foreclosure by an association to collect upon a debt for delinquent assessment shall be subject to a right of redemption. The redemption period within which the separate interest may be redeemed from a foreclosure sale under this paragraph ends 90 days after the sale.

Cal. Civ. Code § 5715(b).

In *Richter*, the debtor did not redeem within the 90 days provided by state law, or the 60-day extension of time provided under § 108(b). *Richter,* 525 B.R. at 749. Based on this, the court ultimately concluded that "the § 108(b) option has expired for Debtor. . ." and debtor was no longer able to redeem their property under this provision of the Code. *Id.*

While the Bankruptcy Court contended that "California law would have been more favorable to the creditor" in dismissing comparisons of the instant case to *Richter*, a comparison of RCW 6.23.020 ("Washington Redemption Statute") to the California Redemption Statute shows that this is incorrect. While the California Redemption Statute pertains to the specific redemption period for non-judicial foreclosures concerning delinquent homeowner's association dues, this difference is superficial. Both statutes give a debtor a period of time to redeem property and § 108(b) extends the deadline in both by 60-days upon debtor's filing of a bankruptcy petition. Just as the debtor in *Richter*, Debtor failed to redeem the property within the time prescribed under state law or the extension of time in § 108(b). As such, Debtor's right to do so ended upon expiration of the 60-day

extension of time under § 108(b), and she was no longer able to redeem the Property through the Third Amended Plan.

4. The Bankruptcy's Court's Reliance on Fairbanks Is Misplaced Where the Central Issue Did Not Involve Application of 11 U.S.C. § 108(b).

The Bankruptcy Court relied heavily on *Wilmington Sav. Fund Soc'y FSB v. Fairbanks,* 2021 Bankr. LEXIS 2209 (9th Cir. Aug. 12, 2021), a decision that partially vacated *In re Fairbanks*, 2021 Bankr. LEXIS 169 (Bankr. W.D. Wash. Jan. 25, 2021), a prior decision issued by Judge Lynch. In *Fairbanks*, the debtor executed a deed of trust on a home and subsequently defaulted on mortgage payments. *Id.* at *3. *Wilmington* Savings Fund Society ("Wilmington") was the beneficiary of the deed of trust and proceeded with foreclosure of the property upon debtor's default. *Id.* at *3. On October 2, 2020, the property was sold at foreclosure sale; on October 8, 2020, debtor filed for chapter 13 bankruptcy. *Id.* The foreclosure trustee executed the Trustee's Deed of Sale three days later. *Id.* The Bankruptcy Court ultimately found that recordation of the deed violated the automatic stay and denied Wilmington's request for retroactive annulment of the automatic stay. *Id*. at *4.

Central to the appeal was whether the debtor retained an interest in the property sufficient for it to be included in the bankruptcy estate. In finding that the debtor retained an interest in the property, the BAP ruled:

> In this case, *Hurt* establishes that Ms. Fairbanks' property was "sold at a foreclosure sale" for purposes of § 1322(b)(5) when the auction concluded, even though Ms. Fairbanks retained an interest in the property under state law until a later date. The consequence is that Ms. Fairbanks cannot confirm a plan that provides for cure and maintenance of Wilmington's secured claim that Wilmington does not accept.
>
> * * *
>
> A cure and maintain plan is only one way in which a chapter 13 debtor can address a secured claim. Ms. Fairbanks might propose a plan that provides for her to pay off the secured claim by way of a new refinancing loan, that provides for a sale of the property, or that is based on another arrangement that Wilmington is willing to accept.

Id. at *16-17.

In denying the Motion for Relief and ultimately confirming Debtor's chapter 13 plan, the Bankruptcy Court relied heavily on this provision in *Fairbanks*. Specifically, the Bankruptcy Court found that "[w]hile the debtor may be prohibited from a cure and maintain provision after a foreclosure sale, she may not be prohibited from other options, including, under *Fairbanks*, paying off a bidder at the foreclosure sale." (App. 17:22)

However, the Bankruptcy Court erred by failing to acknowledge (as it had at the first hearing) the crucial differences that distinguish this case from *Fairbanks*. Vitruvian is a third-party purchaser of the Property, not a secured creditor. The availability of the alternative options outlined in *Fairbanks* for debtor to address Wilmington's secured claim turned on the fact that debtor retained an interest in the property. Here, Debtor's equitable rights in the Property ceased at the foreclosure

sale and her legal rights in the property ceased upon the expiration of the redemption period. As such, Debtor was unable to redeem the Property through the Amended Plan and the Bankruptcy Court erred in confirming Debtor's chapter 13 plan.

VII. CONCLUSION

Vitruvian followed the law in all respects. In *Fairbanks*, this Court had to overrule this judge's attempt to fashion an equitable remedy outside the language of the Code. This Court should do so again here.

The Court should reverse the Bankruptcy Court's denial of the Motion for Relief. The Court should reverse the Bankruptcy Court's confirmation of the Third Amended Plan. It should remand with instructions to direct the Bankruptcy Court to authorize Vitruvian to obtain possession of its property through state court process and authorize the release of the funds in Debtor's counsel's trust account to Debtor and/or Debtor's father.

Respectfully submitted this 4th day of March, 2024.

ILLUMINATE LAW GROUP

/s/ Brian M. Muchinsky
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CERTIFICATION OF INTERESTED PARTIES

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal:

1. Vitruvian Design, LLC – Buyer at Foreclosure Sale
2. Erin Sharp – Debtor
3. Midland Mortgage – Creditor
4. US Department of Housing and Urban Development – Creditor

Dated this 4th day of March, 2024.

ILLUMINATE LAW GROUP

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Attorneys for Appellant

CERTIFICATION REQUIRED BY BAP RULE 8015(a)-(1(b)

BAP DOCKET NUMBER WW-24-1002
Bankruptcy Case No. 23-41097-BDL

[Chapter 13]

In re ERIN SHARP

The undersigned certifies that the following are known related cases and appeals:

Bankruptcy Case No. 23-41097-BDL; In re: Erin Sharp

BAP Case No. WW-24-1001; Vitruvian Design, LLC v. Erin Sharp

Dated this 4th day of March, 2024.

ILLUMINATE LAW GROUP

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STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument in this matter.

Dated this 4th day of March, 2024.

ILLUMINATE LAW GROUP

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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 Opening Brief complies with the type-volume limitation and that the Appellant's Opening Brief contains 5,911 words (excluding the cover page, tables, signature blocks and required certificates) as counted by the computer program used to prepare the Opening Brief.

Dated this 4th day of March, 2024.

ILLUMINATE LAW GROUP

/s/ Brian M. Muchinsky
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Attorneys for Appellant

CORPORATE DISCLOSURE STATEMENT PURSUANT TO FRBP 8012

BAP Case No. WW-24-1002, *Vitruvian Design, LLC v. Erin Sharp*

Vitruvian Design, LLC is a nongovernmental limited liability company. There is no parent corporation or any publicly held corporation that owns 10% or more of its stock.

Dated this 4th day of March, 2024.

ILLUMINATE LAW GROUP

/s/ Brian M. Muchinsky
Brian M. Muchinsky, WSBA #31860
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 204, I electronically filed the APPELLANT'S OPENING 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.

The parties of record who are being served through the CM/ECF system are as follows:

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Dated this 4th day of March, 2024.

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