

ELEVENTH CIRCUIT RULES THAT DEBTORS WHO SURRENDER REAL PROPERTY IN BANKRUPTCY CANNOT OPPOSE FORECLOSURE

On October 4, 2016, the Eleventh Circuit Court of Appeals ruled that **CHAPTER 7 DEBTORS WHO FILE A STATEMENT OF INTENTION TO SURRENDER REAL PROPERTY IN BANKRUPTCY CANNOT LATER CONTEST A FORECLOSURE ACTION**, and bankruptcy courts have broad power and authority to sanction violations. *Failla v. CitiBank, N.A.*, case no. 15-15626 (11th Cir. October 4, 2016). The bankruptcy court in *Failla* reopened a chapter 7 bankruptcy case several years after entry of discharge and ordered the debtors to cease their defense of the bank's foreclosure action, threatening to vacate the discharge order for failure to do so. The debtors appealed, the district court affirmed, and the debtors appealed to the Eleventh Circuit. The Court applied its twenty-three-year-old precedent in *In re Taylor*, 3 F.3d 1512 (11th Cir. 1993) and upheld the bankruptcy court's decision.

The Court began with the plain language of the statute, 11 U.S.C. § 521(a)(2), and citing to *Taylor*, again stated that a chapter 7 debtor must (1) "file a statement of intention about what he plans to do with the collateral for his debts," and (2) "perform the option he declared." *Failla*, at *5. The Court then moved to the primary issue on appeal: if a debtor elects to surrender collateral, *to whom* must he surrender the property. *Id.* at *6. The Court held that "section 521(a)(2) requires debtors who file a statement of intent to surrender to surrender the property both to the trustee and to the creditor." *Id.* "Even if the trustee abandons the property, debtors' duty to surrender the property to the creditor remains." *Id.*

The Court also agreed with both the bankruptcy and district courts that the statutory duty to surrender real property "requires debtors to drop their opposition to a foreclosure action." *Id.* at *13. The Court looked at the "contextually appropriate ordinary meaning" of the term surrender, and referencing dictionary definitions of the word, concluded that the word's meaning "describes a legal relationship" in which "debtors who surrender their property can no longer contest a foreclosure action." *Id.* at *9-10. Quoting from the Fourth Circuit's decision in *In re White*, 487 F.3d 199 (4th Cir. 2007), the Court makes two important points. First, a debtor who acts to preserve his rights to property "by way of adversarial litigation" has not relinquished it; the "retention of property that is legally insulated from collection is inconsistent with surrender." *Id.* at *11. Second, although Florida law still requires a foreclosure proceeding to obtain real property that has been surrendered in bankruptcy, the proceeding is to determine issues of priority between multiple lienholders and rights to surplus sale proceeds, not to

allow a debtor to contest the proceeding. *Id.* “Debtors who surrender property must get out of the creditor’s way.” *Id.*

The holding in *Failla* is simple but cannot be overstated: *a debtor who elects to surrender his home in bankruptcy “cannot contest the foreclosure action.”* *Id.* at *13. “In bankruptcy, as in life, a person does not get to have his cake and eat it too.” *Id.*

After concluding the Faillas violated § 521(a)(2) by contesting the bank’s foreclosure action, the Court then addressed the appropriateness of the bankruptcy court’s remedy. The Court rejected the Faillas’ argument that relief from the automatic stay is the only remedy available to the bankruptcy court for the Faillas’ violation of the statute. *Id.* at *15. The Court stated that *“[a] debtor who promises to surrender property in bankruptcy court and then, once his debts are discharged, breaks that promise by opposing a foreclosure action in state court has abused the bankruptcy process.”* *Id.* While the Court acknowledged that a creditor may raise judicial estoppel in state court for a debtor’s prior inconsistent statement to surrender in bankruptcy court, the Court concluded that judicial estoppel “does not affect the statutory authority of bankruptcy judges to remedy abuses that occur in *their* courts.” *Id.* “[T]here is nothing strange about bankruptcy judges entering orders that command a party to do something in a nonbankruptcy proceeding,” including ordering debtors to withdraw foreclosure defenses and dismiss counterclaims. *Id.* at *16.

The Eleventh Circuit’s opinion in *Failla* affirms a rapidly developing line of cases in bankruptcy and state courts in Florida holding that a debtor who surrenders real property in bankruptcy cannot defend foreclosure in state court. *Debtors who wish to discharge the personal liability for mortgage debt will also lose the right to contest a foreclosure action, and bankruptcy courts are authorized to sanction debtors who fail to comply.*

Click [here](#) to review the *Failla* decision from the Eleventh Circuit’s website.