The decision below is signed as a decision of the court.

Signed: November 18, 2008.

S. Martin Teel, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
S&H ASSOCIATES LIMITED PARTNERSHIP,	)	Case No. 07-00399 (Chapter 11)
	)	**Not for Publication in**
Debtor.	)	**West's Bankruptcy Reporter**

MEMORANDUM DECISION RE MOTION TO OBTAIN FINANCING AND TO SELL DEBTOR'S REAL PROPERTY

The debtor, S&H Associates Limited Partnership (S&H), owns an apartment building at 1107 11th Street, N.W., Washington, D.C. The United States Department of Housing and Urban Development ("HUD") holds a claim secured by a Deed of Trust against the apartment building. S&H filed a motion seeking to sell the apartment building, free and clear of all liens, pursuant to 11 U.S.C. § 363. HUD opposed that motion, contending that the parties' agreements precluded a sale without HUD having authorized the terms of the sale or the transferee, and that under In re EES Lambert Assocs., 62 B.R. 328, 334 (Bankr. N.D. Ill. 1986), and other decisions, S&H cannot utilize this bankruptcy case to circumvent that bar against a sale. In response, S&H filed a further motion that, if granted, would

eliminate HUD as a lienor prior to the sale of the apartment building, and eliminate HUD's rights to object to the sale. Specifically, S&H filed a motion seeking approval of post-petition financing pursuant to 11 U.S.C. § 364, and to compel HUD to accept payment of all outstanding amounts in full satisfaction of its secured claim. HUD has opposed that motion as well, contending that prepayment of the debt obligation is prohibited by the parties' agreements. The motions will be denied for the following reasons.

I

S&H filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (11 U.S.C.) on July 31, 2007. S&H continues to operate its business as a debtor in possession. Pursuant to 11 U.S.C. § 1107(a), it has (with an exception of no relevance here) the rights and powers of a trustee, including the power to sell property under 11 U.S.C. § 363, and the power to obtain credit under 11 U.S.C. § 364. S&H contends that it is entitled to borrow funds to pay off the debt to HUD and, upon paying HUD, to sell the apartment building.

The pertinent instruments governing the parties' rights, and whether S&H may proceed as it intends, are the Deed of Trust, a Deed of Trust Note ("Note"), and a Regulatory Agreement incorporated as part of the Deed of Trust. The Note was originally owed to James W. Rouse & Company, Inc., with HUD

(through the Federal Housing Commissioner, a HUD official) having insured the Note. HUD became the holder of the Note by way of assignment in February 2005.

The Deed of Trust contemplated that it would be released upon S&H's debt being fully paid.[1] The Regulatory Agreement provided that S&H could not convey the apartment building without the consent of HUD. (Regulatory Agreement at 2, para. 6(a).) The Regulatory Agreement was to expire, however, once the debt was fully paid, and the Deed of Trust was thereby eliminated.[2] Thus, upon full payment of the debt, the Regulatory Agreement would no longer be in force to bar S&H from conveying the apartment building without HUD's consent.

HUD contends that S&H cannot pay off the debt without

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[1] The Deed of Trust recites that it was entered into "to secure payment of a just indebtedness of [S&H] to James W. Rouse & Company, Incorporated . . . ." (Deed of Trust at 1.) It further provided that the apartment building was conveyed to the trustees under the Deed of Trust in fee simple, but subject to their obligations "to permit [S&H] to possess and enjoy [the apartment building] . . . until default be made" and "upon the full payment [of the monetary obligations secured by the Deed of Trust], to release and reconvey in fee unto and at the cost of [S&H], the said described land and premises." (Deed of Trust at 2, para. First.)

[2] The Regulatory Agreement recited that it was in consideration for insurance of the Note by HUD, and required S&H to comply with the terms of the Regulatory Agreement only "so long as the contract of mortgage insurance continues in effect, and during such further period of time as [HUD] shall be the owner, holder or reinsurer of the mortgage, or during any time [HUD] is obligated to insure a mortgage on the mortgaged property." (Regulatory Agreement at 1.)

running afoul of a bar against prepayment before maturity of the Note. The Note provided that the balance of the debt, after taking into account prior payments, "shall be due and payable on June 1, 2012." That was thus the maturity date of the note.

With exceptions of no relevance here, the Note provided that the debt "may not be prepaid either in whole or in part prior to the final maturity date hereof without the prior written approval of [HUD] . . . ." S&H concedes that but for HUD having accelerated the debt, this provision against prepayment would have barred S&H's paying the entire debt prior to the maturity date of June 1, 2012. It contends, however, that HUD's acceleration of the debt entitles S&H to pay off the debt without running afoul of the prepayment restriction.

The Deed of Trust provided three distinct remedies in the event of a default. First, it provided a mortgagee in possession remedy in the event of a monetary default.[3] Second, it provided for appointment of a receiver in the event of any default in complying with an obligation under the Deed of Trust (which included making timely payments of the Note and maintaining the

[3] In the event of a monetary default, the Deed of Trust provided that the trustees under the Deed of Trust "shall be entitled to immediate possession of said land and premises and to receive and collect the rents, issues, and profits thereof" and provided a procedure for the trustees' obtaining possession if S&H failed to turn over possession after default and after a demand by the trustees for possession. (Deed of Trust at 3, para. 15.)

apartment building in good repair and condition).[4] Third, it provided a foreclosure remedy in the event of any such default.[5]

S&H defaulted in making payments on the Note when due and in maintaining the apartment building in good repair. Rather than pursue the remedy of the trustees under the Deed of Trust of becoming a mortgagee in possession or the remedy of obtaining appointment of a receiver, HUD elected to accelerate the Note and to give notice of a foreclosure. HUD declared the entire amount of the indebtedness secured by the Deed of Trust "to be immediately due and payable." (Notice of Default and Foreclosure

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[4] The Deed of Trust provided that "upon default hereunder the holder of the note shall be entitled to the appointment of a receiver by any court having jurisdiction, without notice, to take possession and protect the property described herein and operate same and collect the rents, profits and income therefrom." (Deed of Trust at 2, para. 5.) This would apply to both monetary defaults and a default in maintaining the apartment building in good repair and condition. The Regulatory Agreement (which was incorporated by the Deed of Trust) required S&H promptly to make all payments due under the Note and the Deed of Trust. (Regulatory Agreement, para. 1.) It further required S&H to maintain the mortgaged premises in good repair and condition. (Regulatory Agreement, para. 7.)

[5] The Deed of Trust provided that, upon a default by S&H in making any required payment or to perform any other covenants, the trustees "shall have power . . . to sell . . . at public auction, for cash, in one parcel" (meaning, obviously, to sell at public auction the apartment building as one parcel). (Deed of Trust at 2, para. Second.)

Sale dated July 3, 2007, at 2.)[6] The parties' agreements

[6] There apparently was at least one earlier notice of acceleration as a letter dated September 27, 2006, refers to the debt having been accelerated (see Debtor's Hearing Ex. 5), and another exhibit dated June 20, 2005, refers to the debt having been accelerated (see Debtor's Hearing Ex. 4). But the record does not include a copy of any such notice. Accordingly, the relevant acceleration of the debt is contained in the Notice dated July 3, 2007, pursuant to which HUD is now seeking to foreclose.

permitted such acceleration.[7]

The Notice of Default and Foreclosure Sale further gave notice that HUD had designated a Foreclosure Commissioner pursuant to a Designation of Foreclosure Commissioner. The Notice of Default and Foreclosure Sale, which was issued by the Foreclosure Commissioner, stated that the notice of the

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[7] The Note, the Deed of Trust, and the Regulatory Agreement all contain provisions that upon a default by the debtor in its obligations under the instruments, the debt could be declared "due and payable":

- The Note provides that "[i]f default be made in the payment of any installment under this note, and if such default is not made good prior to the due date of the next such installment, the entire principal sum and accrued interest shall at once become due and payable without notice, at the option of the holder of this note." (Note at 1.)

- The Deed of Trust provides that "[u]pon default under the Regulatory Agreement and upon the request of the Federal Housing Commissioner, the holder of the note, at its option, may declare the whole of the indebtedness secured hereby to be due and payable." (Deed of Trust at 2, para. 3.)

- The Deed of Trust further provides that upon a default in making required payments of the debt "then at the option of the holder, the entire indebtedness hereby secured shall become due, payable, and collectable then and thereafter as the holder of the said note may elect, **regardless of the date of maturity**" (Deed of Trust at 3, para. 19) (emphasis added).

- The Regulatory Agreement provides that if HUD holds the Note, then upon a default under the Agreement, HUD may "declare the whole of said indebtedness immediately due and payable and then proceed with the foreclosure of the mortgage." (Regulatory Agreement at 4, para. 11(a)(1).)

foreclosure sale was given "pursuant to the powers vested in me by the Multifamily Mortgage Foreclosure Act of 1981, 12 U.S.C. Section 3701, *et seq.*, [and] by 24 C.F.R. Part 27," and gave notice of the Foreclosure Commissioner's intention to conduct a foreclosure sale on August 1, 2007.[8]

S&H's bankruptcy ensued on July 31, 2007, and the automatic stay of 11 U.S.C. § 362(a) prevented the foreclosure sale from going forward. The motions at issue then ensued, and were heard on October 22, 2008, after efforts at settlement failed.[9]

II

The Deed of Trust, the Note, and the Regulatory Agreement did not specify the law under which they would be enforced. But because the apartment building is located in the District of Columbia, the law of the District of Columbia would govern the rights of HUD as the current holder of the Note unless certain federal statutes (discussed in part III, below) alter those rights.

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[8] The Designation (attached as an exhibit to the Notice) recited that the Foreclosure Commissioner was designated as such "to conduct a nonjudicial foreclosure" of the apartment building "to be conducted pursuant to the [Multifamily Mortgage Foreclosure Act of 1981], the regulations promulgated thereunder, and the instructions given to [the Foreclosure Commissioner] by the Secretary or the Secretary's designee."

[9] This decision supplants the court's oral decision of October 28, 2008, which was vacated pursuant to a subsequent order of this court (Docket Entry No. 131).

HUD's acceleration of the debt would, under District of Columbia law, permit S&H to pay the debt despite the bar against prepayment that would otherwise exist. The reported decisions addressing the effect of acceleration on provisions addressing prepayment most commonly involve the effect of acceleration on a note provision imposing a penalty if the note is paid before maturity. With respect to that issue, there is no reason to believe that the District of Columbia Court of Appeals would not agree with the observation in In re LHD Realty Corp., 726 F.2d 327, 330-31 (7th Cir. 1984), that "acceleration, by definition, advances the maturity date of the debt so that payment thereafter is not prepayment but instead is payment made after maturity." In an accompanying footnote to this sentence, the decision noted:

> Even after acceleration, a lender may be able to regain its right to a premium by revoking its acceleration and reinstating the mortgage prior to detrimental reliance by the borrower on the acceleration. Berenato v. Bell Savings & Loan Ass'n, 276 Pa. Super. 599, 419 A.2d 620, 622 (1980).

In re LHD Realty Corp., 726 F.2d at 331 n.4.

The reasoning of In re LHD Realty Corp. would lead to the conclusion that an acceleration results in a waiver of a note provision barring payment before the maturity date, and there is no reason to believe that the District of Columbia Court of

Appeals would not so hold.[10] This leads to two conclusions here. First, the acceleration of the debt, *unless a statute altered the consequences of such acceleration*, would result in the entire debt being matured and payable by S&H despite the Note's provision against paying the entire debt prior to the original maturity date. Second, if acceleration *did* entitle S&H to pay off the debt despite the Note provision barring prepayment before the original maturity date, an attempt by HUD to de-accelerate the debt might be barred by S&H's detrimental reliance on the acceleration, the detrimental reliance being that S&H has incurred substantial attorney's fees in pursuing a declaration that it has the right to pay the accelerated debt.

Although HUD emphasizes that there were nonmonetary defaults, as well as monetary defaults, that triggered HUD's foreclosure efforts, HUD nevertheless plainly accelerated the

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[10] But the payment may still trigger a penalty for paying a debt before the original maturity date. Parties may agree that a penalty for such early payment will still be owed even when the payment arises upon an acceleration of the debt. See Westmark Commercial Mortgage Fund IV v. Teenform Assocs., 827 A.2d 1154, 1158 (N.J. 2003). It is a matter of semantics: if the penalty is construed as applying to payment before the original maturity date, then the "prepayment" penalty is owed; if it applies to payment before the debt matures, then the prepayment penalty is not owed. Moreover, the prepayment penalty may be owed if the default was intentional. Fla. Nat'l Bank v. Bankatlantic, 589 So.2d 255, 258-59 (Fla. 1991). By reason of acceleration, however, the debt becomes matured, and the debt is due and payable, with any prohibition against prepayment deemed waived, regardless of whether a penalty is owed for payment before the original maturity date.

debt. Indeed, the statutory foreclosure procedure HUD has invoked expressly requires acceleration of the debt as a condition to pursuing foreclosure, even when it is based on nonmonetary defaults. See 12 U.S.C. § 3706(a)(4). Having accelerated the debt, HUD must suffer the usual consequences of acceleration, unless some federal statute protects HUD from the usual consequences.

III

HUD's only hope in its efforts to preclude S&H from paying off the debt is that some federal statute has undone the ordinary consequences of acceleration of the debt. HUD can look to two statutes as touching on foreclosures by HUD, 12 U.S.C. § 1701z-11 and the Multifamily Mortgage Foreclosure Act of 1981, 12 U.S.C. Section 3701, *et seq.*

A.

At oral argument, HUD contended that the applicable statute was 12 U.S.C. § 1701z-11 and that the applicable regulations are found in 24 C.F.R. Part 290. However, as demonstrated below, 12 U.S.C. § 1701z-11 only briefly touches on foreclosure sales in § 1701z-11(c)(3)(B), and does not deal with the critical issue S&H has raised. Although 24 C.F.R. Part 290 supplements the requirements of 12 U.S.C. § 1701z-11, it does not address foreclosure sales; instead, it addresses dispositions of HUD-owned multifamily housing projects or sales of HUD-owned

mortgages on multifamily housing projects.

Under 12 U.S.C. § 1701z-11(c)(3)(B), the Secretary of HUD shall:

> dispose of a multifamily housing project through a foreclosure sale only to a purchaser that the Secretary determines is capable of implementing a sound financial and physical management program that is designed to enable the project to meet anticipated operating and repair expenses to ensure that the project will remain in decent, safe, and sanitary condition and in compliance with any standards under applicable State or local laws, rules, ordinances, or regulations relating to the physical condition of the housing and any such standards established by the Secretary.

This provision evidences an intent that HUD sell a HUD-owned property at foreclosure sale only to a purchaser who will be able to meet federal goals regarding multifamily housing projects. It might also suggest that HUD should avoid invoking the foreclosure remedy if acceleration of the debt would lead to the property owner's paying off the accelerated debt, thereby disabling HUD from assuring that the property's owner will meet federal goals regarding multifamily housing projects. That HUD perhaps ought to avoid accelerating the debt in such circumstances, however, does not alter a mortgagor's rights arising from acceleration. Section 1701z-11 contains no language altering the usual consequence of a mortgagee's acceleration of the mortgage debt on a proscription against payment before the original maturity date. Nothing in § 1701z-11, standing alone, negates the waiver of that proscription, which would apply if HUD accelerated the debt

incident to procedures under District of Columbia law for foreclosure.

B.

Nevertheless, the foreclosure statute that HUD has invoked in proceeding with foreclosure efforts, and that requires the debt to be accelerated incident to such efforts, must be read as altering the consequences of an acceleration. HUD's Foreclosure Commissioner proceeded under the Multifamily Mortgage Foreclosure Act of 1981, 12 U.S.C. Section 3701, *et seq.*, in issuing the Notice of Default and Foreclosure Sale, and although that statute does not expressly address the consequences of acceleration, it contemplates that a foreclosure sale can be stopped, in the case of a monetary default, only via a cure of the default, not a full payment of the debt.

The statute directs that when foreclosure is to proceed pursuant to the statute, a notice of default and foreclosure sale shall be served describing the "defaults upon which foreclosure is based, and the acceleration of the secured indebtedness[.]" 12 U.S.C. § 3706(a)(4). The statute contemplates that foreclosure shall not go forward only if defaults are cured, and that upon such cures resulting in a cancellation of the foreclosure sale, the mortgage debt will be treated as not having been accelerated. Specifically, under 12 U.S.C. § 3709(a), with exceptions of no relevance here, the foreclosure commissioner shall withdraw the

security property from foreclosure and cancel a foreclosure sale only if certain cures are effectuated. In the case of a monetary default, the property may be withdrawn from foreclosure only if "there is tendered to the foreclosure commissioner before public auction is completed the entire amount of principal and interest which would be due if payments under the mortgage had not been accelerated." 12 U.S.C. § 3709(a)(3)(A). In the case of a nonmonetary default, the property may be withdrawn from foreclosure only if "the foreclosure commissioner, upon application of the mortgagor before the date of foreclosure sale, finds that such default is cured[.]" 12 U.S.C. § 3709(a)(3)(B). Significantly, upon such cancellation of the foreclosure, "the mortgage shall continue in effect as though acceleration had not occurred." 12 U.S.C. § 3709(c). The statute thus contemplates that the mortgagor can cause a cancellation of foreclosure by curing defaults, and that upon such cures being made and the foreclosure being canceled, the mortgage is treated as not having been accelerated.

The statute does not expressly address the effect of acceleration, pursuant to its foreclosure provisions, on a prohibition against prepayment of the mortgage debt before the original maturity date of the mortgage debt. However, by providing that foreclosure will be canceled only upon a cure of defaults, with the mortgage to be treated as not having been

accelerated upon such a cure and cancellation, the statute contemplates that HUD may insist that the debtor stop a foreclosure sale only by making a cure, not a full payment of the debt, with the cure to result in reinstatement of the mortgage debt as though acceleration had not occurred (with the bar against prepayment of the entire debt before maturity still intact). The apparent purpose of acceleration under the statute is to permit the entire debt to be collected if a foreclosure sale is completed, but not to treat the debt as matured short of a foreclosure sale being completed: the mortgage debtor is entitled to prevent foreclosure only via a cure, not via paying off the entire debt.

The statute must be interpreted in this fashion because of Congress's findings in enacting the statute. First, 12 U.S.C. § 3701(a)(1) demonstrates that the foreclosure procedures of the statute are intended to displace disparate state foreclosure laws, and thereby to avoid the burden those laws impose on the programs that HUD is administering and the detriment those laws cause for the residents of the affected projects and the

community generally.[11] Second, 12 U.S.C. § 3701(a)(3) sets forth the finding of Congress that without the statute, disparate State foreclosure laws would frustrate the "national housing goal of 'a decent home and a suitable living environment for every American family[.]'" The prohibition in the Note against prepayment was likely intended to keep the apartment building subject to the terms of the Regulatory Agreement for the full term of the Note in order to assure that the apartment building remained at least that long as part of the federal housing program. It makes no sense that HUD would lose that protection of the Note upon invoking foreclosure pursuant to a statute, the Multifamily Mortgage Foreclosure Act of 1981, that was designed to further the purposes of the federal housing program.[12]

The Multifamily Mortgage Foreclosure Act of 1981 was enacted after S&H executed the Note, Deed of Trust, and Regulatory

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[11] Specifically, § 3701(a)(1) provides that Congress finds that:

> disparate State laws under which the Secretary of Housing and Urban Development forecloses multifamily mortgages burden the programs administered by the Secretary pursuant to these authorities, and cause detriment to the residents of the affected projects in the community generally[.]

[12] Indeed, 24 C.F.R. § 27.20(c) recognizes the right of HUD to insist that the purchaser at a foreclosure sale be subject to terms of a duration no longer than the earliest date on which the mortgagor could have prepaid the mortgage debt without HUD's consent, or the maturity date of the mortgage, whichever is earlier.

Agreement in this case, and applies retroactively. Retroactive application of the Act has been held to be constitutional. See Lisbon Square v. United States, 856 F. Supp. 482, 490 (E.D. Wis. 1994). In any event, there is no issue of unfairness in applying the statute retroactively to S&H. Under the Deed of Trust, HUD could have proceeded under District of Columbia law to engage in a nonjudicial foreclosure sale without accelerating the debt, and accordingly the Multifamily Mortgage Foreclosure Act of 1981 does not make S&H worse off.

The Deed of Trust provided that in the event of a monetary or nonmonetary default, the trustees were to have the power to sell in one parcel (meaning, obviously, the power to sell the apartment building in one parcel) at public auction for cash, and directed that they:

> shall apply the proceeds of said sale . . . THIRDLY, to pay whatever may then remain unpaid of the principal of the said note **whether the same shall be due or not**, and the interest thereon to date of payment, it being agreed that said note shall, upon such sale being made before the maturity of said note, be and become immediately due and payable, at the election of the holders thereof[.]

(Deed of Trust at 2, para. Second) (emphasis added). Nothing in the Deed of Trust or District of Columbia law required HUD to accelerate the debt before proceeding with foreclosure. Accordingly, HUD could have given notice under District of Columbia law that it was proceeding to foreclosure based upon S&H's missed monthly payments and based on S&H's failure to

maintain the apartment building in good condition, without accelerating the debt and insisting that the entire debt be paid if S&H were to avoid foreclosure. A partial foreclosure (meaning a foreclosure without the entire debt having been accelerated) often presents problems for the mortgagee. See 4 Richard R. Powell, Powell on Real Property, § 37.37[4] at 38-252 (Michael Allan Wolf ed., 2000); Grant S. Nelson and Dale A. Whitman, Real Estate Finance Law, § 7.8 at 484-86 (3d ed. 1994) (hereinafter "Real Estate Finance Law"). But here the Deed of Trust avoids any such problem by permitting the proceeds of a sale to be applied to the entire debt even if the entire debt is not yet due, with acceleration occurring only after the sale was made. Alternatively, HUD could announce that it was selling the apartment building for only the monthly payments that had been missed, and sell the apartment building subject to its Deed of Trust for the remaining balance of the debt. See Real Estate Finance Law § 7.8 at 486 n.10.

The Multifamily Mortgage Foreclosure Act of 1981 affirmatively requires acceleration of the debt upon HUD pursuing foreclosure, but at the same time makes evident that a foreclosure will be canceled only upon a cure of defaults, not a payment of the entire debt, with the mortgage debt to be reinstated as though acceleration had not occurred. S&H is no worse off than if HUD had proceeded under District of Columbia

law to foreclose based on the defaults at issue without accelerating the debt.

S&H might argue that its right to cause a foreclosure to be canceled by curing its defaults is in addition to its right to prepay the entire debt by reason of acceleration. Under District of Columbia law, the right to stop foreclosure by curing a default is distinct from the right to stop foreclosure by paying the entire debt. For example, in the District of Columbia, a residential mortgage debtor would be entitled to avoid foreclosure by paying off the entire accelerated debt even if the mortgagor had failed to cure by the deadline set by D.C. Code § 42-815.01. See Bank-Fund Staff Fed. Credit Union v. Cuellar, 639 A.2d 561, 576 (D.C. 1994) ("the cure statute was designed to prevent lenders from putting borrowers in the position of having to make payment of the note in full or forfeit their homes"). But the Multifamily Mortgage Foreclosure Act of 1981 foreclosure procedures displace District of Columbia foreclosure law, and the consequences that acceleration of the debt would have had under District of Columbia law are rendered inapplicable, with the right to pay the entire debt in order to stop foreclosure replaced with the limited right to cure all monetary and nonmonetary defaults in order to stop foreclosure.

S&H has a facially appealing argument that acceleration means acceleration in its ordinary sense pursuant to which the

full debt is now due and payable, and that an acceleration ought to carry with it the consequence of permitting full payment of the accelerated debt. As S&H points out, HUD had other remedies available to address S&H's defaults that would not have entailed acceleration of the debt. Nevertheless, I view the Multifamily Mortgage Foreclosure Act of 1981 as limiting S&H to curing defaults if it wishes to avoid foreclosure under that statute, and as barring S&H from using payment of the entire debt as a way to avoid foreclosure. Because the debt was accelerated for purposes of proceeding to foreclosure under the Act, the consequences of acceleration on the Note's prohibition against payment of the entire debt prior to the Note's maturity date in 2012 must be addressed in the context of what S&H is permitted to do in order to avoid foreclosure under the Act, not what S&H would be permitted to do if the debt were accelerated under an attempt at foreclosure under District of Columbia law.

S&H's position is consistent with a position that HUD embraced early on. S&H received a Statement of Multifamily Mortgage Account dated June 20, 2005, from the HUD Field Office after an earlier notice of foreclosure that apparently was withdrawn after issuance of the Notice. The Statement showed the entire debt owed as of July 1, 2005, and then stated:

> This loan is in FORECLOSURE and has been ACCELERATED. The total amount currently due and payable on this loan is the amount shown in the TOTAL AMOUNT DUE column. . . . Payment of any amount less than the TOTAL DUE will

> not stop the FORECLOSURE. This bill is sent to you for INFORMATION ONLY.

That Statement is inconsistent with HUD's position with respect to its current foreclosure efforts pursuant to the Notice of Default and Foreclosure Sale dated July 3, 2007. S&H, however, has not shown any reason to bind HUD to any prior erroneous interpretation by its Field Office of the parties' rights. Prior to the commencement of this bankruptcy case, HUD made clear that it would not accept a payoff of the entire debt. Although the Statement does illustrate that acceleration is *ordinarily* viewed as conferring on the obligor the right to pay the entire debt, the Multifamily Mortgage Foreclosure Act of 1981 displaces the ordinary effect of acceleration, and permits foreclosure to be avoided only via a cure, not via a full payment of the debt.

Because S&H has no right to pay off the entire debt prior to the maturity date in 2012, its motion to borrow, if granted, would serve no purpose. Accordingly, I will deny S&H's motion to borrow.

IV

HUD argues that the federal multifamily housing laws at issue and the Bankruptcy Code must be harmonized, and that a sale with no Regulatory Agreement in place would be an impermissible circumvention of the federal housing laws at issue, citing In re EES Lambert Assocs., 62 B.R. 328, 334 (Bankr. N.D. Ill. 1986), and other decisions. S&H has not attempted to rebut that

argument, opting instead to bypass that issue via its unsuccessful motion for a decree that it is entitled to pay off the entire debt based on the debt having been accelerated. Accordingly, I will deny S&H's motion to sell the apartment building without the Regulatory Agreement being binding on the purchaser.[13]

I need not address at this juncture whether procedures can be adopted for approving a sale in the bankruptcy case despite HUD's right under the Regulatory Agreement to insist on approving any purchaser, and the parties have not adequately briefed that issue. As discussed next, S&H *has* asked that the court determine the limits on HUD's imposing conditions on a purchaser at foreclosure (and implicitly on any sale that could be accomplished through a sale motion in this case), but the issue has not been framed in a procedurally correct fashion.

V

S&H's papers seek a ruling that HUD may not insist at any foreclosure sale that the purchaser enter into a new Regulatory Agreement lasting longer than the existing Regulatory Agreement, or insist that the purchaser make other commitments to which S&H was not obligated. The debt under the Note here is a non-

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[13] Although S&H suggested that the purchaser might be willing to agree to the Regulatory Agreement continuing for its current duration, the sale motion was never amended to so provide.

recourse obligation, but the terms of a sale could have an impact on S&H if they depress the amount received at a foreclosure sale and prevent the sale's resulting in excess proceeds or lessen such excess proceeds.

It appears that 12 U.S.C. § 3706(b) governs what terms may be imposed upon a purchaser at a foreclosure sale under the Multifamily Mortgage Foreclosure Act of 1981. In turn, 24 C.F.R. § 27.20 elaborates on the statutory provision. The parties have failed specifically to address the statutory provision and the provisions under the regulation. My reading of the regulation, without having the benefit of briefing by the parties, suggests that the debtor is correct. Specifically, 24 C.F.R. § 27.20(c) provides:

> Terms which the Secretary may require to be agreed to by the purchaser pursuant to this section [which implements 12 U.S.C. § 3706(b), the provision pursuant to which HUD issued its Notice of Default and Foreclosure Sale] shall generally not be more restrictive, or binding for a longer duration, than the terms by which the mortgagor was bound prior to the foreclosure.

The difficulty is that HUD was presented with motions seeking specific relief that it has successfully defeated. It was not presented with a motion (or complaint) for a declaratory judgment, or a motion for a sale on terms that continued in place the terms of the existing Regulatory Agreement. Accordingly, HUD was not required to address whether it could insist upon different terms than those contained in the Regulatory

Agreement.[14] Moreover, S&H did not cite 24 C.F.R. § 27.20(c) in its papers.[15]

The debtor may propose a sale on the terms that it believes HUD properly insisted upon in the Notice of Default and Foreclosure, dropping any terms that it believes HUD could not properly have insisted upon. Then, upon HUD objecting to the sale, the court can address more thoroughly whether the debtor's position is correct, and whether the national housing laws at issue and the Bankruptcy Code can be harmonized in a fashion that permits a sale to be authorized by this court. Alternatively, S&H may seek formally to obtain a declaratory judgment as to its rights (although I do not commit at this juncture whether such declaratory relief would be appropriate despite any procedural defenses that HUD might attempt to raise).

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[14] Nor did S&H's motions put directly at issue whether the debtor could reject the Regulatory Agreement as an executory contract, even though S&H suggested in oral argument that it could reject it. The Regulatory Agreement was made part of the Deed of Trust, and S&H has not addressed whether a lien, or to be more precise, mortgage obligations, can be treated as an executory contract.

[15] One of the conditions of the foreclosure sale bid terms imposed by HUD was that the purchaser be a nonprofit entity. The record does not reveal whether S&H was a nonprofit entity, and thus whether this condition was a new requirement for an entity to be allowed to own the apartment building. Even if that term could not be imposed in a foreclosure sale, HUD had the right not to consent to a sale by the debtor, and so an issue exists as to whether (regardless of what it could do incident to a foreclosure sale) HUD would be entitled to insist that any sale by the debtor be to a nonprofit entity.

VI

Orders follow denying S&H's two motions, without prejudice to S&H's seeking to sell the apartment building anew on different terms.[16]

[Signed and dated above.]

Copies to: Debtor; Debtor's attorney; Office of United States Trustee; Fred E. Haynes, Assistant United States Attorney; Scott R. Robinson, Esq.; Christopher Jones, Esq.; Nancy L. Alper, Esq., Assistant Attorney General for the District of Columbia.

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[16] S&H is free as well to pursue an appeal to the District Court to obtain review of this court's decision regarding whether the acceleration of the debt did not result in a waiver of the prepayment prohibition. Although I do not believe that Congress intended that acceleration of the debt under the Multifamily Mortgage Foreclosure Act of 1981, 12 U.S.C. Section 3701, *et seq.*, would result in a waiver of any bar in the debt instrument against prepayment, the issue is not free from doubt. S&H is free as well to file a motion requesting this court to certify the appeal for the Court of Appeals to consider allowing a direct appeal to the Court of Appeals pursuant to 28 U.S.C. § 158(d)(2)(A) on the basis that the judgment involves questions of law as to which there is no controlling decision of the Court of Appeals or of the Supreme Court, and that an immediate appeal may materially advance the progress of S&H's bankruptcy case.

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