

**UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION**

IN RE:)	
)	
Kevin Foreman and)	06-81434
Donna Foreman,)	
)	
Debtors.)	
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**ORDER GRANTING MOTION BY TRUSTEE TO DEEM
MORTGAGE ACCOUNT CURRENT**

THIS MATTER came before the court on June 17, 2010, after due and proper notice, for a hearing on the Trustee's Motion to Deem Mortgage Account Current. Brent Wootton appeared on behalf of the Debtors, Joseph Vonnegut appeared on behalf of PNC Mortgage, successor to National City Mortgage (the "Creditor"), and Benjamin Lovell appeared on behalf of the Chapter 13 Trustee. Having considered the motion, the evidence offered at the hearing, and other matters of record, the court makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure:

FACTS

The Debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code on November 3, 2006 (the "Petition Date"). On Schedule A of their petition, the Debtors listed real property located at 2088 Meadowview Road in Creedmoor, North Carolina, with a value of \$90,000.00. The Creditor holds a first deed of trust on the real property securing an adjustable rate note dated January 28, 2003 with a balance as of the Petition Date in the approximate amount of \$99,167.00. On November 3, 2006, the Creditor filed a proof of claim indicating a monthly payment amount of \$513.82.

On December 14, 2006, the Chapter 13 Trustee filed a notice of proposed Chapter 13 plan providing for monthly plan payments to the Trustee in the amount of \$1,057.00 for a period of 60 months. The proposed plan provided that the Trustee would remit monthly mortgage payments to the Creditor in the amount of \$513.82 as well as payments on an arrearage claim totaling \$5,649.22. The proposed plan also provided the following provision regarding claims secured by a mortgage on real property:

Monthly payment change. If the monthly payment on the account changes, the creditor must inform the Trustee and the Debtor in writing either before the change or within 30 days after the change and must include an itemization of the payment change by principal, interest, escrow and any other costs. **Failure to provide such notice shall result in a waiver by the creditor of the right to collect any increase in the monthly payment for which notice thereof was not provided in accordance with this paragraph unless otherwise ordered by the Court.**

The Creditor was served with the notice of proposed plan and did not file an objection. The court entered an order confirming the Debtors' plan (the "Confirmation Order") on January 13, 2007. Accordingly, during the course of the plan, the Trustee made the following payments on the Creditor's continuing mortgage claim:

<u>Date</u>	<u>Payee Name</u>	<u>Amount Disbursed</u>
1/31/2007	National City Mortgage Co	513.82
2/28/2007	National City Mortgage Co	513.82
3/30/2007	National City Mortgage Co	513.82
4/30/2007	National City Mortgage Co	513.82
5/31/2007	National City Mortgage Co	513.82
6/30/2007	National City Mortgage Co	513.82
7/31/2007	National City Mortgage Co	513.82
8/31/2007	National City Mortgage Co	513.82
9/30/2007	National City Mortgage Co	513.82
10/31/2007	National City Mortgage Co	513.82
11/30/2007	National City Mortgage Co	513.82
12/31/2007	National City Mortgage Co	513.82
1/31/2008	National City Mortgage Co	513.82
2/29/2008	National City Mortgage Co	513.82

3/31/2008	National City Mortgage Co	513.82
4/30/2008	National City Mortgage Co	513.82
5/31/2008	National City Mortgage Co	513.82
6/30/2008	National City Mortgage Co	513.82
7/31/2008	National City Mortgage Co	513.82
8/31/2008	National City Mortgage Co	490.20
9/30/2008	National City Mortgage Co	537.44
10/31/2008	National City Mortgage Co	513.82
11/30/2008	National City Mortgage Co	513.82
12/31/2008	National City Mortgage Co	513.82
1/31/2009	National City Mortgage Co	513.82
2/28/2009	National City Mortgage Co	513.82
3/31/2009	National City Mortgage Co	513.82
4/30/2009	National City Mortgage Co	513.82
5/31/2009	National City Mortgage Co	513.82
6/30/2009	National City Mortgage Co	513.82
7/31/2009	National City Mortgage Co	513.82
8/31/2009	National City Mortgage Co	513.82
9/30/2009	National City Mortgage Co	513.82
10/31/2009	National City Mortgage Co	513.82
11/30/2009	National City Mortgage Co	513.82
12/31/2009	National City Mortgage Co	513.82
1/31/2010	National City Mortgage Co	513.82
2/28/2010	National City Mortgage Co	513.82
3/31/2010	National City Mortgage Co	44.44

The Trustee's records also reflect that the Creditor's prepetition arrearage claim of \$5,649.22 was paid in full, with the last disbursement on that claim being on September 30, 2009. All priority claims were paid in full, and unsecured creditors received in excess of a 30% dividend.

In preparation for closing the case, the Trustee wrote to the Creditor requesting that it verify that the mortgage account was current or inform the Trustee of any delinquency. Receiving no response, the Trustee filed the present motion to which the Creditor now objects. The Creditor concedes that while it did receive funds from the Trustee on a regular basis, the monthly payment amount increased on October 1, 2007, October 1, 2008, and November 1, 2009. As a result of these payment changes, the Creditor contends that the Debtors now have a

post-petition arrearage of approximately \$12,000.00.

ANALYSIS

In this district, it is the general practice in Chapter 13 cases for mortgages in default on the petition date to be paid through the Chapter 13 plan if the real property is being retained by the debtor. In such cases, the trustee disburses both ongoing payments as well as payments on any arrearage. For a plan to be successful, a trustee must be promptly advised of changes in the monthly payment amount so that payments can be adjusted accordingly. As a result, Chapter 13 plans in this district include the notice provision set forth in the facts above. Additional notice requirements imposed upon mortgage creditors by a Chapter 13 plan to aid in administration are permissible. *In re Armstrong*, 394 B.R. 794, 800 (Bankr. W.D. Pa. 2008); *In re Anderson*, 382 B.R. 496, 504 (Bankr. D .Or. 2008); *In re Wilson*, 321 B.R. 222, 225-26 (Bankr. N.D. Ill. 2005).

The Creditor does not dispute that the Confirmation Order requires it to inform both the Trustee and the Debtor in writing of any of the payment changes during the plan. The Creditor did send notices to the Debtors of the payment changes but failed to notify the Trustee. The Creditor argues that although it did not fully comply with the Confirmation Order, it did partially comply and should be allowed to maintain at least one half of the post-petition arrearage.

It is true that the Debtors received notice of payment changes. While the court might question the wisdom of the Debtors in not making inquiries as to why their Chapter 13 plan payment did not increase when their mortgage payments had increased, the Debtors were entitled to assume that the Trustee was receiving the same payment change notices given the unambiguous requirements of the Confirmation Order. Furthermore, the Debtors consistently

paid the Trustee \$1,0570.00 per month, which was in excess of any of the increased monthly mortgage payments.

The Creditor does not dispute that it received notice of the Confirmation Order and did not file an objection or appeal.¹ Instead, the Creditor watched the arrearage grow for approximately three years while it received a monthly reminder that the account was falling increasingly into arrears. It took no action to notify the Trustee despite both this court's order directing it to do so and the practical reality that it was receiving payments from the Trustee, not the Debtors. In fact, the Creditor did not even respond to correspondence by the Trustee requesting confirmation that the mortgage was current. The Trustee's records reflect that monthly plan payments were made by the Debtors to the Trustee without fail and that monthly mortgage payments were made by the Trustee to the Creditor like clockwork. The Debtors and the Trustee complied with the Confirmation Order completely and absolutely, while the Creditor did not.

After consideration of the foregoing, the court finds that the Creditor waived its right to collect the increase in the monthly payment for which notice was not provided in accordance with the Confirmation Order, and the Trustee's Motion is granted.

IT IS SO ORDERED.

¹ An order confirming a Chapter 13 plan is a final appealable order. Moreover, the Supreme Court recently held that even if a bankruptcy court enters a confirmation order that contains a legal error, it is still enforceable and binding if the court gave notice to the party of the order and the party failed to object or appeal. *See United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367 (2010).

SERVICE LIST

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Debtors

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