SO ORDERED.

SIGNED this 4th day of December, 2020.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:	)	
	)	Case No: 15-80769
Kimley Long Gregory,	)	Chapter 13
	)	
Debtor.	)	

ORDER GRANTING AMENDED MOTION FOR RELIEF FROM STAY

THIS MATTER came before the Court on the Amended Motion for Relief from the Automatic Stay regarding 5216 Stardust Drive, Durham, NC, or in the Alternative Motion for Adequate Protection (Docket No. 49, the "Amended Motion") filed by Vantage Pointe Recreational Association, Inc. (the "Association") and the Response to Motion for Relief from Stay (Docket No. 51, the "Response") filed by Kimley Long Gregory (the "Debtor"). For the reasons stated below, the Court will grant the Association's Amended Motion.

Background

The Debtor filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code on July 15, 2015. The Debtor owns certain real property located at 5216 Stardust Drive, Durham, NC 27712 (the "Property"). Debtor's ownership interest in the Property is subject to the Association's restrictive covenants recorded in Durham County as follows: Book 1412, page 64 as Declaration of Covenants, Conditions and Restrictions; Book 1412, page 78 as Declaration of Covenants and

Restrictions; and Book 1908, page 786 as Supplemental Declaration of Protective Covenants, Conditions and Restrictions (collectively as the "Declaration")(Amended Motion, ¶ 4). The Debtor listed the Association in her Schedule D as a creditor of the Estate with a secured claim of $0.00. The Debtor also classified the Association's claim in her plan as a long-term secured debt to be paid directly by the Debtor. The Association did not file a proof of claim nor did it object to the proposed plan and, on October 26, 2015, the Court entered an order confirming the Debtor's chapter 13 plan (Docket No. 21, the "Plan"). Under the terms of the Plan, the Debtor was responsible for making all postpetition payments due to the Association.

On September 18, 2020, the Association filed a Motion for Relief from Stay (Docket No. 43, the "Motion") in which it alleged that the Debtor accrued a postpetition delinquency (including annual recreational fee, late penalty fees, and finance charges) of $684.90. The Association requests the Court modify the automatic stay provisions of 11 U.S.C. § 362 to allow the Association to take all action necessary to pursue its interest in the Property, or in the alternative, that the Association be provided adequate protection. The Debtor filed a response asserting that the Association was bound by the terms of the Plan and was subject to the requirements of Federal Rule of Bankruptcy Procedure 3002.1(c), and the Association had not timely noticed the fees itemized in the Motion. Nevertheless, the Debtor paid the entire balance then due on her account. But in the Association's Reply to the Debtor's Response (Docket No. 47), the Association then adjusted the total postpetition balance owed to $959.90 to include attorney's fees and costs of $275.00. At the time of the hearing, the Association asserted that the Debtor owed the Association a balance of $275.00.

The Court held a hearing on the Motion on October 8, 2020 at which Koury Hicks appeared on behalf of the Debtor, Richard Hutson appeared in his capacity as the Chapter 13 Trustee, and Cindy Oliver appeared on behalf of the Association. The parties discussed the application of Rule 3002.1, and the Debtor also objected to the Association's additional request of $275.00 being included in a reply, rather than an amended motion. At the conclusion of the hearing, the Court directed the

Association to file an amended motion to reflect the full postpetition arrearage amount and instructed both parties to file supplemental briefs on the issues presented. The parties agreed that no further hearing was necessary.

On October 20, 2020, the Association filed its Amended Motion and its Supplemental Memorandum of Law (Docket No. 50). On October 27, 2020, Debtor filed its Amended Response and Memorandum of Law (Docket No. 52). In its amended papers, the Association continues to seek relief from the automatic stay to proceed against the Property based on the additional amounts now owing on the account. Debtor argues that the Amended Motion should be denied as moot, as the amount listed as past due in the Motion has now been paid in full, and again asserting the Association failed to comply with the notice requirements of Rule 3002.1 of the Federal Rules of Bankruptcy Procedure.

Discussion

The question before the Court is whether Rule 3002.1 notice requirements regarding fees, charges, and expenses apply to a homeowners association. Rule 3002.1(a) applies in chapter 13 cases to claims "(1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments." Fed. R. Bankr. P. 3002.1. Specifically, Rule 3002.1(b) provides that a creditor must "file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in payment amount ... no later than 21 days before a payment in the new amount is due." The creditor must also file and serve "a notice itemizing all fees, expenses, or charges … that were incurred in connection with the claim after the bankruptcy case was filed" and such fees and expenses are "recoverable against the debtor or against the debtor's principal residence." Fed. R. Bankr. P. 3002.1(c). The creditor is required to provide notice "within 180 days after the date on which the fees, expenses, or charges are incurred." *Id.* When a creditor fails to provide the required notice pursuant to Rule 3002.1, a court may either preclude a creditor from "presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case . . . " or "award other appropriate relief,

including reasonable expenses and attorney's fees caused by the failure." Fed. R. Bankr. P. 3002.1(i).

As set forth above, for a creditor to be bound by the notice requirements of Rule 3002.1(a), a creditor must be a holder of a claim secured by the debtor's principal residence. In this case, the Association argues its claim is unsecured, and for that reason, the Association is not bound to the notice requirements as prescribed in Rule 3002.1. The question of whether the Association holds a secured claim in the Debtor's principal residence is governed by state law, as state law governs property rights, including the existence, validity and extent of a security interest. *Butner v. U.S.*, 440 U.S. 48, 54–55 (1979); *Ivester v. Miller*, 398 B.R. 408, 416 (M.D.N.C. 2008). Thus, bankruptcy courts look to applicable state law to determine whether a claim is secured or unsecured; and whether that interest is perfected or unperfected.

Section 47F-3-116(a) establishes the method for homeowners associations to perfect a lien against real property for unpaid dues. Section 47F-3-116(a) provides that:

> Any assessment attributable to a lot which remains unpaid for a period of 30 days or longer shall constitute a lien on that lot *when* a claim of lien is filed of record in the office of the clerk of superior court of the county in which the lot is located . . . . Once filed, a claim of lien secures all sums due the association through the date filed and any sums due to the association thereafter.

N.C. Gen. Stat. § 47F-3-116(a).

Applying N.C. Gen. Stat. § 47F-3-116(a), bankruptcy courts in North Carolina have found that a homeowners association's failure to perfect its claim by filing a claim of lien in the "superior court of the county where the real property subject to the lien is located" renders the homeowners association's claim unsecured. *In re Guillebeaux*, 361 B.R. 87 (Bankr. M.D.N.C. 2007). In *Guillebeaux*, the homeowners association unsuccessfully argued that it was the "holder of a lien that arose automatically under its Declaration and North Carolina law." *Id.* at 93. The court disagreed, holding that the homeowners association's prepetition arrearage claim was unsecured because the association never filed a claim of lien as

required by N.C. Gen. Stat. § 47F-3-116 and the perfection of any purported lien was governed by § 47F-3-116(a). *Id.* Similarly, in *Castell*, the court followed *Guillebeaux,* holding that a creditor's failure to perfect its lien by filing a claim of lien in the superior court of the county where the real property subject to the lien was located rendered any claim for unpaid prepetition assessment fees unsecured. *In re Castell*, No. 12-04562-8-JRL, 2012 WL 5880660, at *2–3 (Bankr. E.D.N.C. Nov. 20, 2012), *subsequently aff'd sub nom. Kingston at Wakefield Homeowners Ass'n, Inc. v. Castell*, 585 F. App'x 837 (4th Cir. 2014).

In this case, the Association did not file a claim of lien to perfect its security interest as required by N.C. Gen. Stat. § 47F-3-116, and accordingly, the Association's position is that it has an unsecured claim. Nevertheless, the Debtor contends that the Association's lien status is ambiguous. The Debtor correctly points out that since the Association was enacted on October 28, 1987, before the North Carolina Planned Community Act went into effect, § 47F-3-116 controls "unless the articles of incorporation or the declaration expressly provides to the contrary." N.C. Gen. Stat. § 47F-1-102. Article V, Section 1[1] of the Declaration provides,

> All such annual and special assessments, together with interests, costs, and reasonable attorney's fees for the collection thereof shall be a charge and lien upon the Lot and improvements of the respective Owners thereof, and the same shall be continuing lien upon the property … against which each such assessment is made.

Docket No. 49, Exhibit A. The Debtor argues this language in the Declaration takes this case out of the purview of N.C. Gen. Stat. § 47F-3-116 because it is expressly contrary.

The Court does not find the Declaration's language contradictory to § 47F-3-116, as the Declaration language does not provide a method for perfection. As the court held in *Guillebeaux*, where the declaration contained similar language, N.C. Gen. Stat. § 47F3-116 does not contradict the Declaration, it "merely provides

[1] The Debtor incorrectly identifies the applicable language in Declaration as being found in Article 7, Section 1 in her brief. Docket No. 52.

proper methods . . . to perfect its continuing lien on the Debtor's property and is therefore applicable to the Property and the Debtor." *In re Guillebeaux*, 361 B.R. at 93. The Association's Declaration contains no provision describing the method of perfection of such lien, leaving § 47F-3-116 applicable. Thus, in order for the Association to be perfected, it needed to file a claim of lien, which the Association has not filed.

The Debtor further argues that the Association is bound by the confirmed Plan, which classified the Association's claim as a long-term secured debt. As support for its argument, the Debtor cites § 1327(a) which provides that "[t]he provisions of a confirmed plan bind the Debtor and each creditor, whether or not the claim of such Creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). Indeed, the parties are bound by the treatment of the Association's claim as provided for in the Plan, but a chapter 13 plan cannot serve to perfect a previously unperfected security interest. And by its plain language, Rule 3002.1 applies to claims secured by a security interest in the debtor's principal residence—not to claims merely treated as secured. The Court concludes that the Association was not subject to the requirements of Federal Rule of Bankruptcy Procedure 3002.1, and therefore, the Association's failure to file 3002.1 notices is not a basis to deny the Amended Motion.[2]

Alternatively, the Debtor asserts that the additional $275.00 charge for "8-12-20 ROD search covenants re: Motion for Relief of stay" should be disallowed as improper given that the charge is related to the Motion, for which the Association also seeks fees. Having reviewed the pertinent papers in this case, including the Association's Motion, Reply, Amended Motion, and memorandum of law, the Court cannot find an additional $275.00 fee to be improper or unreasonable.

[2] Because the Court has found that the Association does not presently hold a secured claim, the Court need not decide whether the Association's assessments are contractual installment payments.

Lastly, given the procedural posture of this case—the plan was confirmed five years ago and is nearing completion—the Court finds relief from stay rather than some form of adequate protection to be the appropriate remedy.

Conclusion

For the reasons stated above, IT IS HEREBY ORDERED that the Amended Motion for Relief filed by the Association to lift the automatic stay is hereby GRANTED.

END OF DOCUMENT

PARTIES TO BE SERVED

Kimley Long Gregory (Ch.13)

15-80769

Kimley Long Gregory
5216 Stardust Drive
Durham NC 27712

Koury Hicks
6616-203 Six Forks Road
Raleigh, N.C. 27615

Richard M. Hutson, Trustee
via cm/ecf

Cindy G. Oliver
via cm/ecf

John T. Orcutt
via cm/ecf