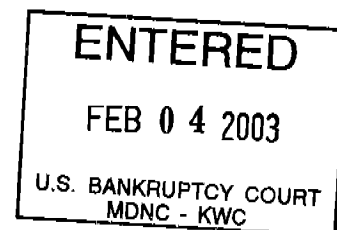


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



IN RE:)
)
Frances Marie Hodges,) Case No. 01-10255C-13G
)
Debtor.)
)

ORDER

This case came before the court on January 28, 2003, for hearing upon Debtor's objection to the claim of Irwin Mortgage Corporation ("Irwin"). Appearing at the hearing were John H. Boddie, attorney for the Debtor, Michael R. Stein, attorney for Irwin, and Anita Jo Kinlaw Troxler, the Chapter 13 Trustee. Having considered the proof of claim filed on behalf of Irwin, the objection to claim filed by the Debtor, the response to objection to claim filed on behalf of Irwin, the evidence offered at the hearing and the arguments of counsel, the court finds and concludes as follows:

1. The assets owned by the Debtor in this Chapter 13 case include a residence located at 3605 Country Ridge Road, Greensboro, North Carolina.

2. It is undisputed that Debtor's residential real property is subject to a deed of trust recorded in Book 4482 at page 1356 in the Guilford County Registry which secures a promissory note dated November 25, 1996, in the original principal amount of \$80,061.00.

3. On March 7, 2001, Irwin filed a proof of claim as the holder the aforesaid deed of trust and promissory note. The claim

asserted in the proof of claim is a secured claim of \$77,951.21. According to the proof of claim the \$77,951.21 claim includes an arrearage of \$12,159.20, which is itemized in an exhibit that is attached to the proof of claim.

4. After Irwin filed its claim, the Debtor filed an objection to Irwin's claim, asserting that the arrearage on the claim as of the date this case was filed was \$4,837.57, rather than \$12,159.20, as asserted in the proof of claim. In its response to Debtor's objection, Irwin disputes the accuracy of Debtor's figure for the arrearage and requests that the correct amount of the arrearage be determined by the court. Thus, the issue for determination is the correct amount of Irwin's arrearage claim in this case. In dealing with this issue, the initial point for consideration is the evidentiary effect of the proof of claim that was filed by Irwin.

5. The evidentiary effect of a proof of claim is described in Rule 3001(f) of the Federal Rules of Bankruptcy Procedure, which provides that a "proof of claim filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Therefore, if Irwin's proof of claim was filed in accordance with the applicable rules, it will constitute prima facie evidence of the arrearage claim that is included in the proof of claim.

6. Rule 3001(a) mandates that a proof of claim "shall conform substantially to the appropriate Official Form" which, in the case

of a pre-petition secured claim, is Official Form 10. The other requirements for such claims are that claims be signed by an authorized agent of the claimant (Rule 3001(b)), that claims based upon a writing include a copy of the writing (Rule 3001(c)), and that secured claims be accompanied by evidence that the security interest has been perfected (Rule 3001(d)).

7. The Irwin proof of claim was prepared and filed in accordance with the rules. The claim was prepared on Official Form 10. The proof is signed by a representative of Irwin whose authority has not been questioned. The proof also supplies all of the information called for under Official Form 10. Thus, the basis for the claim is shown as money loaned, the date the debt was incurred is shown as November 25, 1996, the total amount of the claim at the time this case was filed is shown as \$77,951.21 and the arrearage is shown as \$12,159.20, which is itemized in detail in an exhibit attached to the proof. Also attached to the proof of claim is a copy of the promissory note and deed of trust relied upon by Irwin in support of its secured claim. The copy of the deed of trust reflects that the claimed security interest was perfected by recording the deed of trust in the office of the Register of Deeds of Guilford County, North Carolina, on November 26, 1996. The filing of the proof also was in accordance with the rules, the proof having been timely filed in the office of the Chapter 13 Trustee as required by Local Rule 3002-1. Having been prepared and filed in

accordance with the Federal Rules of Bankruptcy Procedure, the Irwin proof of claim constitutes prima facie evidence of the validity and amount of Irwin's arrearage claim in this case. See In re Waterman, 248 B.R. 567 (8th Cir. BAP 2000); In re Blevins Concession Supply Co., Inc., 213 B.R. 185 (Bankr. M.D. Fla. 1997).

8. While Rule 3001(f) gives prima facie effect to a proper proof of claim, it does not shift the burden of proof. The burden of proof with respect to claims filed under § 502 rests initially and ultimately with the claimant. See In re Allegheny Int'l, Inc., 954 F.2d 167, 173 (3d Cir. 1992). However, the effect of a proof of claim qualifying as prima facie evidence of the claim under Rule 3001(f) is that "[t]he burden of going forward then shifts to the objector to produce evidence sufficient to negate the prima facie validity of the filed claim." Id. In order to satisfy this burden, "the objector must produce evidence equal in force to the prima facie case . . . which, if believed would refute at least one of the allegations that is essential to the claim's legal sufficiency." Id. at 173-74. If the objecting party produces such evidence, the burden of going forward reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. See id. at 174. In accord In re Weidel, 208 B.R. 848, 854 (Bankr. M.D.N.C. 1997); In re Waterman S.S. Corp., 200 B.R. 770, 774-75 (Bankr. S.D.N.Y. 1996); In re Custom Concepts, Inc., 150 B.R. 629, 631-32 (Bankr. W.D. Pa. 1993).

9. In the present case, the Debtor produced evidence that was sufficient to negate the prima facie effect of the Irwin proof of claim. In the itemization of its arrearage claim, Irwin included the monthly payments for December of 1999 through March of 2001 as not having been paid by or on behalf of the Debtor. These payments account for \$11,413.00 of the \$12,159.20 arrearage claim.¹ The evidence offered by the Debtor included a copy of a Detail Transaction History regarding Debtor's account which was supplied to the Debtor by Irwin. The account history contained in this document includes the period encompassed by the arrearage claim, i.e., December of 1999 through March of 2001, and reflects that, contrary to the proof of claim, a number of monthly payments were received by Irwin for months included in the period from December of 1999 through March of 2001. Debtor's evidence also established that Debtor was in a prior Chapter 13 case from September of 1997 until June 7, 2000. During this period (which overlapped six months of the period encompassed by the arrearage claim), the Chapter 13 Trustee made monthly payments to Irwin's predecessor² which totaled \$25,359.40. It is a fair and reasonable inference from Debtor's

¹The balance of the arrearage claim consists of late charges for the same period of time plus attorneys' fees and other fees and expenses that are itemized in the proof of claim.

²During Debtor's previous Chapter 13 case, the promissory note and deed of trust from Debtor were held by Inland Mortgage Corporation. Apparently, the note and deed of trust were assigned to Irwin prior to the filing of the present case.

evidence that Irwin, in fact, has received payments for some of the months between December of 1999 and March of 2001. The Debtor thus produced evidence that was equal in force to the Irwin's prima facie case which refuted the main component of the arrearage claim and, consequently, was sufficient to negate the prima facie effect of Irwin's proof of claim.

10. Once the prima facie effect of the proof of claim was negated, the burden of going forward with the evidence shifted to Irwin to prove the amount of its arrearage claim by a preponderance of the evidence. Irwin failed entirely to meet its burden of proof. In fact, Irwin produced no evidence in support of its arrearage claim other than the proof of claim. However, in the objection, Debtor admits that when this case was filed on January 31, 2001, there was an arrearage of \$4,837.57. In addition, under the plan that has been confirmed in this case, the monthly payments for February and March of 2001 were added to the arrearage, which increased the arrearage claim by \$1,424.00. Therefore, even though Irwin offered no evidence in support of its arrearage claim, Irwin nonetheless is entitled to an arrearage claim of \$6,261.57 based upon Debtor's admissions and the terms of the confirmed plan.

11. Irwin's argument that an order entered on November 6, 2000, in the prior case involving the Debtor establishes the amount of the arrearage in the present case is rejected because neither collateral estoppel nor res judicata is applicable with respect to

such order. In order to successfully invoke the doctrine of collateral estoppel, a party must establish the following: (1) the issue sought to be precluded must be the same as the one previously litigated; (2) the issue must have been actually litigated; (3) determination of the issue must have been necessary to the decision in the prior proceeding; (4) the prior proceeding must have resulted in a valid and final judgment on the merits; and (5) the party against whom the preclusion is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. See N.L.R.B. v. Thalbo Corp., 171 F.3d 102 (2d Cir. 1999); Ramsey v. U.S.I.N.S., 14 F.3d 206 (4th Cir. 1994). The order cited by Irwin was entered on November 6, 2000, after Debtor's prior case had been converted from Chapter 13 to Chapter 7. The order merely granted Irwin's motion for relief from the automatic stay in order to proceed with foreclosure. The issue of the arrearage referred to in the November 6 order is not the same as the issue now before the court involving the amount of the arrearage in a case filed months after period referred to in the November 6 order. Moreover, in granting the motion for relief from the automatic stay, it was not necessary for the court to determine the amount of the arrearage at that time and, as reflected in the transcript of the hearing, neither the parties nor the court attempted to do so. Hence, collateral estoppel has no application in this case. Nor does the doctrine of res judicata have any applicability in this case. The

doctrine of res judicata is applicable (1) where the same claim is involved in successive proceedings, (2) the parties to the subsequent proceeding are the same as, or in privity with, the parties to the earlier proceeding and (3) the earlier proceeding resulted in a final judgment on the merits. See Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240 (11th Cir. 1991). Obviously, the claim for relief from the automatic stay involved in Debtor's prior case is not the same claim as the one presented by Irwin's proof of claim in the present case wherein Irwin seeks to be paid amounts due under the promissory note from the Debtor. Hence, res judicata is not applicable in this case. Instead, the amount due Irwin must be determined in accordance with the evidence that was offered in this case which, for the reasons already stated, established an arrearage claim of \$6,261.57.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) Debtor's objection to the arrearage claimed by Irwin is sustained as to all amounts in excess of \$6,261.57; and

(2) Irwin is hereby allowed an arrearage claim in the case in the amount of \$6,261.57.

This 3rd day of February, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge