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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE ) CASE NO. 99-52649  
 )  
FRANCES J. FORT ) CHAPTER 13  
 )  
DEBTOR(S) ) JUDGE MARILYN  
SHEA-STONUM )

**MEMORANDUM DECISION RE: DEBTOR'S  
OBJECTION TO CLAIM OF COUNTRYWIDE HOME LOANS**

This matter came before the Court on debtor's "Objection to the Claim of Countrywide Home Loans," filed on November 1, 1999 (the "Objection") and the response to the Objection (the "Response") filed by Countrywide Home Loans, Inc. ("Countrywide") on December 10, 1999. A hearing on the matter was held on December 16, 1999. Appearing at that hearing was Sheldon Stein, counsel for debtor. No one appeared on Countrywide's behalf and debtor was also not present at the December 16<sup>th</sup> hearing. The Court heard oral argument from debtor's counsel and at the conclusion of the hearing the matter was taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the pleadings filed herein, the Court makes the following findings of fact and conclusions of law.

**FACTS**

The relevant facts in this case, as set forth in the Objection, were not disputed by Countrywide in the Response. Debtor owns and resides at property located at 1270

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Apache Pass, Streetsboro, Ohio (the "Property"). The Property is subject to a first mortgage in favor of Countrywide, having an outstanding balance of approximately \$95,000.00.<sup>1</sup> Debtor is obligated to pay real estate taxes and insurance on the Property directly to the Portage County Treasurer and the insurance company.

Debtor fell behind in her mortgage payment obligation to Countrywide and, to forestall the institution of foreclosure proceedings, debtor commenced this chapter 13 case on August 31, 1999. No foreclosure action was pending at the time debtor filed her bankruptcy. Debtor's chapter 13 plan was confirmed on October 20, 1999.

On October 14, 1999, Countrywide filed a proof of claim in debtor's chapter 13 case, asserting a fully secured claim of \$95,278.14. Of that amount, Countrywide asserted that \$5,326.11 was in arrears. Countrywide's proof of claim broke down the arrearage amount as follows:

1. Three missed mortgage payments of \$865.57 per month totaling \$2,596.71,
2. Foreclosure fees totaling \$492.00,
3. Property inspection fees totaling \$46.00,
4. Uncollected late charges totaling \$129.84,
5. Accrued late charges totaling \$129.84, and
6. Delinquent taxes for 1998 totaling \$1,931.72.

Debtor does not dispute that she owes missed mortgage payments totaling \$2,596.71, as well as uncollected late charges totaling \$129.84. As for delinquent property taxes,

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<sup>1</sup> The note and mortgage at issue, which were originally entered into between debtor and Full Spectrum Lending, Inc., were assigned to Countrywide in August, 1998. No one challenged the validity of that assignment.

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debtor does not dispute that such taxes are due and owing but does dispute that payment for those taxes should be made to Countrywide as Countrywide did not attach any documentation to its proof of claim that it paid those taxes to the Portage County Treasurer on debtor's behalf. As for the other items (foreclosure fees, property inspection fees, and accrued late charges), debtor disputes that those fees are due and owing to Countrywide or any other entity.

**DISCUSSION**

Once filed, a proof of claim constitutes prima facie evidence of the validity and amount of the claim and such claim is deemed allowed, unless a party in interest objects. 11 U.S.C. §502(a); Fed. R. Bank. P. 3001(f). The objecting party bears the initial burden of producing sufficient evidence to rebut the claimant's prima facie case. *See In re Forte*, 234 B.R. 607, 617 (Bankr. E.D.N.Y. 1999). If the objecting party does so, the burden shifts back to the claimant to then prove its claim by a preponderance of the evidence. *Id.* It is ultimately for the claimant to prove its claim and not for the objector to disprove it. *Id.*

***Delinquent Property Taxes:*** Debtor listed the Portage County Treasurer on her Schedule E as a creditor holding an unsecured priority claim for unpaid real estate taxes and, on September 1, 1999, the Portage County Treasurer filed a proof of claim for those taxes. During the hearing on this matter, debtor's counsel indicated that he has been in contact with both Countrywide and the Portage County Treasurer regarding which of those entities is owed these back taxes. Once that determination is made, debtor's counsel indicated that debtor would make the necessary payments according to the terms of her chapter 13 plan.

Because Countrywide did not attach any documentation to its proof of claim or to

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the Response to evidence that it, and not the Portage County Treasurer, should be paid for back taxes, and because debtor is not attempting to escape payment of those taxes, the Court finds that debtor has produced sufficient evidence to rebut the prima facie validity of this portion of Countrywide's proof of claim and that the burden to affirmatively prove the matter shifted to Countrywide. Because Countrywide failed to appear at the December 16<sup>th</sup> hearing to explain the lack of documentation or to otherwise prosecute the Response, the Court finds that Countrywide failed to meet that burden. Accordingly, debtor's objection regarding these taxes is well taken. However, because debtor does not dispute that Countrywide should, if it in fact made payment, be reimbursed for back taxes paid on her behalf, Countrywide will be given leave to amend its proof of claim to account for this otherwise disallowed amount.

*Accrued Late Charges:* In its proof of claim, Countrywide lists a fee of \$129.84 for what it identifies as "uncollected late charges" as well as a fee of \$129.84 for what it identifies as "accrued late charges." Neither in its proof of claim nor in the Response does Countrywide explain how these seemingly duplicative items are for different charges. Debtor does not dispute she owes late charges of \$129.84 but is unwilling to pay those late charges twice.

Because Countrywide failed to attach any documentation to its proof of claim or to the Response explaining the difference between and the justification for the two charges at issue, the Court finds that debtor has produced sufficient evidence to rebut the prima facie validity of this portion of Countrywide's proof of claim and that the burden to affirmatively prove the matter shifted to Countrywide. Because Countrywide failed to appear at the December 16<sup>th</sup> hearing to explain the lack of documentation or to otherwise prosecute the Response, the Court finds that Countrywide failed to meet that burden.

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Accordingly, debtor's objection regarding duplication of these fees is well taken.

***Property Inspection Fees:*** In its proof of claim, Countrywide lists a fee of \$46.00 for what it identifies as "property inspection fees." Neither in its proof of claim nor the Response does Countrywide explain when or for what purpose that inspection was made. Countrywide also fails to reference any provision in the promissory note or mortgage that would justify claiming these fees as part of its secured claim or passing through such costs to debtor in this bankruptcy case. *Cf. In re Burwell*, 107 B.R. 62 (Bankr. E.D. Pa. 1989) (disallowing pass through of inspection costs from mortgagee to debtor-mortgagor and addressing appropriateness of including those fees in secured portion of claim).

Because Countrywide failed to attach any documentation to its proof of claim or to the Response explaining when the "property inspection fees" were incurred or why those costs should be borne by debtor, the Court finds that debtor has produced sufficient evidence to rebut the prima facie validity of this portion of Countrywide's proof of claim and that the burden to affirmatively prove the matter shifted to Countrywide. Because Countrywide failed to appear at the December 16<sup>th</sup> hearing to explain the lack of documentation, to justify pass through of these costs to debtor or to otherwise prosecute the Response, the Court finds that Countrywide failed to meet that burden. Accordingly, debtor's objection to the "property inspection fees" is well taken.

***Foreclosure Fees:*** In its proof of claim, Countrywide lists a fee of \$492.00 for what it identifies as "foreclosure fees." In the Objection, debtor disputes the inclusion of the whole of this amount because Countrywide failed to attach any documentation to its proof of claim to justify that amount. As to the portion of the "foreclosure fees" that are comprised of attorney fees, debtor disputes that Countrywide may include that amount

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arguing first, that a stipulation in a mortgage contract requiring payment of attorney fees upon default is against public policy in Ohio and second, that Countrywide is bound by the provision of her confirmed plan that specifically precludes secured creditors from collecting such fees.

Countrywide's proof of claim does not include any documentation regarding what constitutes the charge for "foreclosure fees." However, in the Response Countrywide does set forth that it "conducted a title examination in preparation for foreclosure in this case prior to receiving notice of the filing of the bankruptcy petition accounting for costs in the amount of \$392.00 and attorney fees of \$100.00." A copy of the referenced title report was attached but no bill for or itemization of costs for that title report was provided. Countrywide also did not provide a bill for or itemization of the \$100.00 in attorney fees that it claims was incurred or proof that those fees were paid. During the hearing on this matter, debtor advanced her objection only as it related to the portion of "foreclosure fees" attributable to attorney fees. She did not otherwise object to the documentation provided by Countrywide in the Response regarding the \$392.00 balance of that charge.

Given that debtor did not object to Countrywide's explanation regarding the \$392.00 balance of the "foreclosure fee" charge, the Court finds that debtor did not successfully rebut the prima facie validity of this portion of Countrywide's proof of claim. Accordingly, debtor's objection in this regard is not well taken. As to the \$100.00 portion of the "foreclosure fees" charge that Countrywide claims is attributable to attorney fees, debtor did successfully rebut the prima facie validity of this portion of Countrywide's proof of claim given her proof of the lack of documentation regarding that charge. Because Countrywide failed to appear at the December 16<sup>th</sup> hearing to offer evidence

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regarding the attorney fees charge or to otherwise prosecute the Response, Countrywide failed to meet its burden of proving that that portion of its proof of claim was justified.<sup>2</sup>

**CONCLUSION**

Based upon the foregoing, **IT IS HEREBY ORDERED:**

1. That Countrywide's proof of claim for \$2,596.71 in delinquent mortgage payments is hereby allowed;
2. That Countrywide's proof of claim for \$129.84 for "uncollected late charges" is hereby allowed;
3. That Countrywide's proof of claim for \$129.84 for "accrued late charges" is hereby disallowed;
4. That Countrywide's proof of claim for \$46.00 in "property inspection fees" is hereby disallowed;

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<sup>2</sup> In the Objection, debtor set forth two other grounds for objecting to the attorney fees portion of the "foreclosure fees" provision of Countrywide's proof of claim. The Court need not rule on either of these matters given that debtor's objection to these fees was sustained on other grounds. However, as to debtor's contention regarding the effect of Ohio law, the Court notes the following. In the Objection, debtor did not dispute that the promissory note and mortgage provide that, upon default, she could be required to pay attorney fees incurred by Countrywide to enforce the parties' agreement but instead argued that pursuant to Ohio law, a stipulation in a mortgage contract requiring payment of attorney fees upon default is against public policy and void unless such stipulation was, *inter alia*, specifically the product of free and understanding negotiation between the parties. See *Miller v. Kyle*, 97 N.E. 372, 85 Ohio St. 186 (Ohio 1911); *Worth v. Aetna Casualty & Surety Co.*, 513 N.E.2d 253, 32 Ohio St. 3d 238 (Ohio 1987). The only evidence debtor presented to support her argument were self-serving and unsubstantiated statements that the attorney fees provisions in the promissory note and mortgage were not the product of a free and understanding negotiation. Debtor did not attach a verified statement to the Objection and debtor did not appear at the hearing on the matter to testify regarding the parties' negotiations. Therefore, although debtor's argument may be correct, the Court could not have ruled upon the matter.



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5. That Countrywide's proof of claim for \$1,931.72 in delinquent property taxes is hereby disallowed but that, by not later than January 21, 2000, Countrywide may supplement its proof of claim with supporting documentation to establish this otherwise disallowed portion of its claim;
6. That \$392.00 of Countrywide's proof of claim for \$492.00 in "foreclosure fees" is hereby allowed; and
7. That \$100.00 of attorney fees included in Countrywide's proof of claim for \$492.00 for "foreclosure fees" is hereby disallowed.

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MARILYN SHEA-STONUM  
Bankruptcy Judge

**DATED: 1/10/00**