UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:

Donald Warfield
Debtor.

In Proceedings Under Chapter 13
Case No.: 07-18454

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matter before this Court is the U.S. Trustee's Motion to Amend Agreed Order (the "Motion"). US Bank National Association, as Trustee for Securitized Asset Backed Receivables LLC Trust, 2006-NC1, by and through Wells Fargo Bank, N.A. its servicer opposes the relief sought. The underlying pleading that prompted the Motion was US Bank's Motion for Stay Relief, which resulted in an agreed order between US Bank and Donald Warfield (the "Debtor"). Core jurisdiction of this matter is acquired under provisions of 28 U.S.C. § 157(b)(2), 28 U.S.C. § 1334, and General Order No. 84 of this district. Upon a duly noticed hearing and an examination of the record, generally, the following factual findings and conclusions of law are herein made:

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The Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on November 5, 2007. Subsequently, US Bank filed a Motion for Stay Relief against the Debtor's residential property located at 6314 Oak Point Estates in Lorain, Ohio. The Debtor and US Bank entered into an agreed order. The Order stipulated that 1) the Debtor would repay the post-petition arrears of $3,985.26 over six equal payments of $664.21 and 2) the Debtor would pay US Bank's attorney's fees of $500 (associated with the Motion for Stay Relief) and court costs

of $150. US Bank would file a Supplemental Proof of Claim that would include the attorney's fees and court costs. The Court signed the Order on March 31, 2009. *See* Order dated March 31, 2009.

The U.S. Trustee filed the Motion to Amend Agreed Order regarding the $500 attorney's fees on April 6, 2009. In its Motion, the U.S. Trustee argues that the attorney's fees arise from a default provision of the Debtor's mortgage agreement. Relying upon Ohio law, the U.S. Trustee asserts that attorney's fees arising from mortgage defaults are void as being against public policy. He contends that Rule 59, Fed.R.Civ.P., permits the Court to amend an order that was the result of an error of law. He argues that the error of law arises out of the Court's approval of an agreed order that provided for the Debtor to pay US Bank attorney's fees without prior court approval of said fees. The U.S. Trustee also argues that the Court may not approve fees that are prohibited by law. Consequently, he seeks for the removal of the attorney fee provision from the Order.

US Bank raises several objections in its response opposing the relief sought by the U.S. Trustee. First, US Bank argues that the attorney's fees did not arise automatically from the default provisions in the Debtor's mortgage agreement. It asserts that the fees arose from a compromise between the parties attempting to resolve the underlying Motion for Stay Relief. Notwithstanding, US Bank contends that Ohio law permits attorney's fees under specific circumstances - under reinstatement and through open and free negotiations. It argues that the parties, herein, did not enter into a reinstatement agreement, but that the fees arose from open and free negotiations and therefore, are not void.

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The Court must determine whether the award of a creditor's attorney's fees, included in an agreed order arising from a motion for stay relief, are prohibited pursuant to Ohio law.

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Although unchallenged, the first issue this Court will address is whether the U.S. Trustee, herein, has the requisite authority to challenge the propriety of the agreed upon attorney's fees.

Standing of the U.S. Trustee

In his Motion, the U.S. Trustee relies on Rule 59, Fed.R.Civ.P., which provides that a motion to alter or amend a judgment must be filed no later than ten (10) days after the entry of the judgment. Fed.R.Civ.P. Rule 59. Rule 59(e) motions, incorporated by Bankruptcy Rule 9023, shall only be granted "if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice." *Gencorp, Inc. v. Am. Int'l Underwriters,* 178 F3d. 804, 834 (6th Cir. 1998). Although the motion was timely filed, the law is unclear as to whether a non-party movant may seek to amend judgments pursuant to Rule 59, Fed.R.Civ.P. Notwithstanding, a specific statutory basis exists to support the U.S. Trustee's standing to challenge the propriety of the agreed order.

Congress expressly gives "the U.S. Trustee standing to raise, appear and be heard on any issue in any case or proceeding under Title 11, except that the U.S. Trustee may not file a plan in a Chapter 11 case." 11 U.S.C. §307. Although broadly stated, the "language, legislative history, and judicial interpretation of §307 reveal that Congress intended to enhance the role of the United States Trustee by permitting direct involvement in bankruptcy proceedings." *Hayes and Son Body Shop, Inc. v. United States Trustee*, 124 B.R. 66,68 (Bankr.W.D. Tenn., 1990),

aff'd mem., 958 F.3d 371 (6th Cir. 1992). As "watchdog" over the administration of a bankruptcy case, the U.S. Trustee has no pecuniary interest but rather serves as a disinterested party. *In re Revco D.S., Inc.*, 898 F.3d 498 (6th Cir. 1990). The legislative history to §307 explains that this role is designed in this manner so that he or she may be given the right to be heard as any party in interest, but retains the discretion to decide when a matter of concern to the proper administration of the bankruptcy laws should be raised. H.R. Rep. No. 764, 99th Cong. 2d Sess. 27, *reprinted* in 1986 U.S. Code Cong. & Ad. News 5227, 5240. Furthermore, Congress intended for the U.S. Trustee to be responsible for "protecting the public interest and ensuring that bankruptcy cases are conducted according to law." H.Rep. 595 at 109, *reprinted* in 1978 U.S. Code Cong. & Admin. News at 6070. Title 28 U.S.C. §586 lists the specific duties of a U.S. Trustee. It provides in relevant part:

> **(a)** Each United States trustee, within the region for which such United States trustee is appointed, shall– **(1)** establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7 of title 11; **(2)** serve as and perform the duties of a trustee in a case under title 11 when required under title 11 to serve as trustee in such a case; **(3)** supervise the administration of cases and trustees in cases under chapter 7, 11, 12, 13, or 15 of title 11 by, whenever the United States trustee considers it to be appropriate – **(A)(i)** reviewing, in accordance with procedural guidelines adopted by the Executive Office of the United States Trustee (which guidelines shall be applied uniformly by the United States trustee except when circumstances warrant different treatment), applications filed for compensation and reimbursement under section 330 of title 11; and **(ii)** filing with the court comments with respect to such application and, if the United States Trustee considers it to be appropriate, objections to such application...**(C)** monitoring plans filed under chapters 12 and 13 of title 11 and filing with the court, in connection with hearings under sections 1224, 1229, 1324, and 1329 of such title, comments with respect to such plans; **(D)** taking such action as the United States trustee deems to be appropriate to ensure that all reports, schedules, and fees required to be filed under title 11 and this title by the debtor are properly and timely filed;...**(F)** notifying the appropriate United States attorney of matters which relate to the occurrence of any action

> which may constitute a crime under the laws of the United States and, on the request of the United States attorney, assisting the United States attorney in carrying out prosecutions based on such action; **(G)** monitoring the progress of cases under title 11 and taking such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress;...**(5)** perform the duties prescribed for the United States trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe[.]

28 U.S.C.A. § 586. Generally, rules of statutory construction gives precedence to a specific statutory provision over a general one. *Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 405 (6th Cir. 1998). In this case, the specific statute, 28 U.S.C. §586, would take precedence over the more general one, 11 U.S.C. §307. Several courts, however, have determined that the U.S. Trustee's authority is not limited to the enumerated duties listed in §586. *In re BAB Enterprises, Inc.,* 100 B.R. 982 (Bankr.W.D.Tenn. 1989); *Matter of Crosby,* 93 B.R. 798, 803 (Bankr.S.D.Ga. 1988)(stating that 28 U.S.C. §586(a)(5) provides a catch-all provision for the U.S. Trustee to "perform the duties prescribed for the United States Trustee under title 11[.]"). Accordingly, the Sixth Circuit, in reading §307 in conjunction with §586, interprets §307 as broadening the U.S. Trustee's authority. *Revco,* 898 F.2d at 498. In support of this interpretation, the Sixth Circuit relies on the fact that §307 was enacted several years after §586 and intentionally omits the limiting language found in the latter provision. *Id.*

Herein, the U.S. Trustee did not respond or otherwise object to the initial Motion for Stay Relief. Notwithstanding, the underlying Motion did not include attorney's fees. Without the inclusion of attorney's fees in said Motion, any objection to such fees would have been premature and could not have been contemplated by the U.S. Trustee. Additionally, to restrict the U.S. Trustee's right to seek amendment of the Agreed Order based solely on his lack of privity, unduly limits his authority. This is not to suggest that the U.S. Trustee's powers are

limitless. Though privity may be a factor, if there is just cause for the U.S. Trustee to rise and be heard on a matter pending in a bankruptcy proceeding, then the court should consider the issue, on a case-by-case basis.

The facts of this case shows, however, that the U.S. Trustee does not intend to contravene the parties' wishes nor is he serving as an advocate for either party. Instead, he questions the legality of a particular provision within the Agreed Order. Such effort is clearly within the scope of his statutory authority. This is analogous to fee agreements between a debtor and his or her attorney. Though the fee may be agreed upon between the parties, once the attorney attempts to collect the fee, the U.S. Trustee, though not a party to the agreement, has the authority to object to the fee. It is within the U.S. Trustee's supervisory authority to challenge orders granting rights that are prohibited by law or bankruptcy procedure. Thusly, the U.S. Trustee, herein, is cloaked with the requisite standing.

Ohio Law on Attorney's Fees

It is well-settled Ohio law that mortgage provisions allowing the mortgagee to recover attorney fees from proceedings arising out of a foreclosure action are void as against public policy. *Miller v. Kyle,* 85 Ohio St. 186 (1911); *Leavans v. Ohio National Bank,*50 Ohio St. 591(1893). The *Miller* court opined that the rationale behind this rule is that the "enforcement of such contracts would result in evasions of the usury of laws" and create "the obvious tendency of such contracts to encourage suit." *Id.* at 192-93. This rule, however, does not apply if the attorney's fees arise from the reinstatement of a mortgage agreement. The right to reinstate arises solely from the terms of the mortgage contract between the parties. Reinstatement is a consensual exercise by both parties to the transaction to re-enter into an agreement, thereby

foregoing the statutory protections arising from the foreclosure process. *See* Wilborn v. Bank One Corp., 121 Ohio St.3d 546, 551 (2009). A defaulted borrower is eligible for reinstatement if he or she can pay a lump-sum to bring the arrears current immediately. Since it is a voluntary election, any associated attorney's fees do not arise solely as a consequence of the creditor initiating a foreclosure action. *Id.; See* Chase Manhattan v. Tudor, 2007 WL 4322187 (S.D. Ohio, 2007). The defaulting borrower's promise to pay the lender's attorney's fees is a reasonable exchange for the right to require the lender to reinstate the defaulted mortgage. *Wilborn,* at 551. Under reinstatement, both the lender and the defaulted borrower forgo any legal rights they may have acquired through the foreclosure process.

The second exception, the "bargain-for-exchange," allows for attorney fees when the parties agree to the fee through negotiation. In 1987, the Ohio Supreme Court decided two cases that qualified, but did not overturn, the holding in *Miller. See Worth v. Aetna Casualty & Surety Co.,* 32 Ohio St.3d 238 (1987); *Nottingdale Homeowners' Assn., Inc. v. Darby,* 33 Ohio St.3d 32 (1987). In *Worth,* the Ohio Supreme Court unanimously upheld *Miller,* but found it inapplicable where an attorney fee provision in an indemnification agreement was arrived "through free and understanding negotiation" and where both parties "were able to protect their respective interests." 32 Ohio St.3d at 243. The *Worth* Court specifically distinguished negotiated agreements from ordinary debt instruments:

> When a stipulation to pay attorney fees is incorporated into an ordinary contract, lease, note or other debt instrument, it is ordinarily included by the creditor or a similar party to whom the debt is owed and is in the sole interest of such party. In the event of a breach or other default on the underlying obligation, the stipulation to pay attorney fees operates as a penalty to the defaulting party and encourages litigation to establish either a breach of the agreement or a default on the obligation. In those

> circumstances, the promise to pay counsel fees is not arrived at through free and understanding negotiation. *Id.* at 242-243.

Nottingdale, decided one month after *Worth,* allowed the payment of a creditor's attorney fees which was derived from the condominium association's declaration and bylaws. In that case, the condo owner contracted to pay association fees, which was a separate agreement from the mortgage contract. The association fees were collected in exchange for services provided by the association. The condo owner failed to pay the association fees, but continued to accept the benefit of the association's services. As in *Worth,* the court in *Nottingdale* distinguished the case from *Miller.* The court opined that "*Miller* is factually a far cry from the case now before us which involves a specific contractual provision that was assented to in a non-commercial setting by competent parties with equal bargaining positions and under neither compulsion or duress." *Id.* at 35.

Several Ohio and federal courts interpreted the holdings in *Worth* and *Nottingdale* as exceptions to *Miller*, in which parties have equal bargaining power and the promise to pay attorney's fees is arrived through free and understanding negotiation. *The Colonel's, Inc. v. Cincinnati Milacron Mktg. Co.,* 1998 WL 321061, at *4 (6th Cir.1998) (relying on *Miller* to hold, "[T]he attorney fees provision in the agreement was not the product of specific free and understanding negotiation. Instead, it was a preprinted clause that appeared in defendant's standard contract forms. Accordingly, the district court did not err when it concluded that the provision is void as against the public policy of Ohio."); *In re Petroff,* 2001 WL 34041797, at *2-3 (B.A.P. 6th Cir.2001) (*citing First Capital Corp. v. G & J Indus., Inc.,* 131 Ohio App.3d 106 (Ohio Ct.App.1999); *In re Lake,* 245 B.R. 282, 286 (Bankr.N.D.Ohio 2000); *Citfed*

Mortgage Corp. v. Parish, 1997 WL 156616, at *9 (Ohio Ct.App. Apr. 3, 1997); *Telmark, Inc. v. Schierloh,* 102 Ohio App.3d 801 (Ohio Ct.App.1995).

Herein, this case is distinguishable from *Miller*. The Debtor's obligation to pay US Bank's attorney's fees does not arise from a default provision within his mortgage agreement. This case, though analogous to reinstatement, falls into the latter exception whereby the parties voluntarily negotiated the terms of the agreed order.[1] It is the creditor's burden of proof to show that the attorney fee provision in the agreed order was the product of free and understanding negotiation between two equally sophisticated parties. *In re Tudor,* 342 B.R. 540 (Bankr.S.D. Ohio 2005).

Herein, there is a provision within the mortgage agreement that allows for attorney's fees to be paid by the Debtor, if the fees were for services arising from the Debtor's default. See Mortgage Agreement, para. 14. The Debtor also has the right to reinstate his mortgage under the mortgage agreement. See Mortgage Agreement, para. 19. Despite the fact that the right to reinstate is fully contemplated by the Debtor's mortgage agreement and is only exercised upon the Debtor's default, Ohio law has determined that associated attorney's fees are not prohibited because reinstatement is a voluntary election by the parties in which each party relinquishes certain rights. Herein, the agreed upon attorney's fees do not originate from the subject provision within the mortgage agreement because they do not arise solely from the Debtor's default. Instead, the attorney's fees arose from the Agreed Order, which is not a standard

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[1]This case is analogous to reinstatement because the Debtor and US Bank wish to re-enter into an agreement on the Debtor's mortgage. However, unlike reinstatement, the Debtor is not repaying the total arrearage claim in one lump sum, but will cure the arrears with six equal installment payments.

contract forced on the Debtor upon the filing of the Motion for Stay Relief or by the signing of the underlying mortgage agreement. As its name implies, the Order is a consensus by the parties for a voluntary resolution to the stay relief motion.

Firstly, the Agreed Order outlines the parties commitment to obligations not required under the mortgage agreement. Despite being delinquent on his mortgage by several thousands of dollars, the Debtor is able to keep his home. Additionally, the arrears will be paid over a period of time rather than one lump sum, as would be required in reinstatement. In exchange, the Debtor will pay US Bank's attorney's fees. Second, the fact that both parties were represented by counsel during negotiations tends to level any unequal bargaining power held by US Bank. Finally, neither party has filed any pleadings seeking relief from said Agreed Order, implying a sense of satisfaction with the outcome. Thusly, the subject attorney's fees did not arise from the underlying mortgage provision, but were apart of a negotiated agreement between the parties and, consequently, are not prohibited by law.

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Accordingly, the U.S. Trustee's Motion to Amend Agreed Order is hereby denied. US Bank's Objection is sustained. Each party shall bear its respective costs.

IT IS SO ORDERED.

Dated, this 6th day of August, 2009

JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT