THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 01-11026
	)	
ROY HENRY SCHRAMM and DALPHA LOUISE SCHRAMM,	)	Chapter 13
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
ROY HENRY SCHRAMM, et al.,	)	Adversary Proceeding No. 05-1613
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
TMS MORTGAGE, INC.,	)	**MEMORANDUM OF OPINION**
	)	
Defendant.	)	

The debtor-plaintiffs Roy and Dalpha Schramm move for summary judgment as to liability only on counts two, four, and five of their complaint.[1] The defendant TMS Mortgage, Inc., dba The Money Store kna HomeEq Servicing Corp. (TMS) opposes the motion on the ground that there are genuine issues of material fact that preclude entry of judgment at this point in the case.[2] For the reasons stated below, the motion is denied.

[1] Docket 32, 33, 34, 35, 36, 37, 38, 39, 40, 48. The debtors' reply brief withdraws the request with respect to count three because the court dismissed this count after the motion was filed. Docket 41, 42.

[2] Docket 45, 46.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O).

SUMMARY JUDGMENT

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056). *See also Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . ." *Celotex Corp. v. Catrett,* 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment may be granted when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Northland Ins. Co. v. Guardsman Prods., Inc.,* 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)). The court must evaluate each summary judgment motion on its merits and "draw all reasonable inferences

against the party whose motion is under consideration." *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994) (quoting *Taft Broad Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991)).

THE RELIEF SOUGHT BY DEBTOR-PLAINTIFFS

The debtors move for summary judgment as to liability only on counts two, four, and five which raise these causes of action:

Count Two	This count alleges that TMS violated the automatic stay, the discharge order, the confirmation order, and other orders.
Count Four	This count alleges that TMS violated 11 U.S.C. §§ 105 and 506, and also violated federal rule of bankruptcy procedure 2016.
Count Five	This count alleges that TMS violated 11 U.S.C. § 506 by charging attorney fees in violation of Ohio law.

DISCUSSION[3]

There is a fundamental problem with the debtors' motion that prevents entry of summary judgment and that is a lack of evidence establishing a connection between the debt provided for in the debtors' plan and TMS. As this court noted in its memorandum of opinion addressing TMS's motion to dismiss, there is no clear evidence in the record as to who originated the loan at issue or who owns it or how and when TMS came to be involved with these debtors.[4]

In their bankruptcy petition, the debtors scheduled a debt owed to the Bank of New York, Trustee in the amount of $100,830.00 secured by a mortgage on the debtors' residence at 43641

[3] The underlying dispute is described in detail in this court's memorandum of opinion and order resolving TMS's motion to dismiss, which the court incorporates. Docket 41, 42.

[4] Memorandum of Opinion at n. 2. Docket 41.

Oberlin-Elyria Road, Oberlin, Ohio.[5] The debtors' confirmed plan called for them to make monthly payments to the Bank of New York, Trustee on this debt.[6] TMS is not listed as a creditor or servicer of any note.

The complaint in this adversary proceeding alleges that the debtors' plan included "a debt to Defendant [TMS] in the amount of $100,830.00 secured by a first mortgage on the Oberlin property."[7] In its answer, TMS admits that:

> Debtors['] confirmed Chapter 13 Plan and Schedules included a debt to Defendant. Defendant further admits those allegations of paragraph 10 of the complaint that are matters of public record, and denies each and every remaining allegation contained therein for want of knowledge or information sufficient to form a belief as to the truth thereof.[8]

This answer, which just says that a debt to TMS is included in the plan and schedules, is too vague to be an admission that the debt scheduled and owed to the Bank of New York, Trustee is the same debt that TMS says is owed to it. The main difficulty is that there is no reference to TMS in the debtors' plan or schedules. While TMS goes on in its answer to admit allegations that are "matters of public record," this does not say anything because the complaint does not refer to anything as being in the public record.

The lack of clarity is further seen when one looks to the motion for relief filed by "TMS Mortgage Inc. dba The Money Store" in which it alleged that it was the maker and holder of a

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[5] Case 01-11026, docket 1. The court takes judicial notice of the debtors' schedules filed with the court.

[6] Case 01-11026, docket 13.

[7] Docket 1.

[8] Docket 47.

note secured by a mortgage on the debtors' Oberlin property and that the note and mortgage had not been transferred. The note attached to the motion is in the principal amount of $95,200.00.[9] If the debt that the parties are talking about is the debt originally owed to the Bank of New York, trustee, how can that be the same debt that TMS says it originated and did not transfer?

One possibility is that TMS did not make the loan but instead serviced it for the Bank of New York, trustee. Paragraph 15 of the complaint, however, alleges on information and belief that "TMS is a mortgage servicer who obtained servicing rights to the subject mortgage loan after [the] loan had gone into default." TMS denies this in its answer.[10]

The genuine issue of material fact that exists is, then, this: if the confirmed plan does not list any debt owed to TMS and if TMS is not the servicer of a loan made by a third-party who is listed in the plan, what is the legal and factual relationship between TMS and these debtors? The existence of that issue precludes entry of summary judgment in favor of the debtor-plaintiffs.

CONCLUSION

For the reasons stated, the debtor-plaintiffs' motion for summary judgment as to liability only on counts two, four, and five is denied. A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

[9] Case 01-11026, docket 18, 19 at ¶ 10.

[10] Docket 47 at ¶ 15.

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Plaintiffs,	)	
	)	
v.	)	
	)	
TMS MORTGAGE, INC.,	)	**ORDER**
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, the plaintiffs' motion for summary judgment is denied. (Docket 32).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge