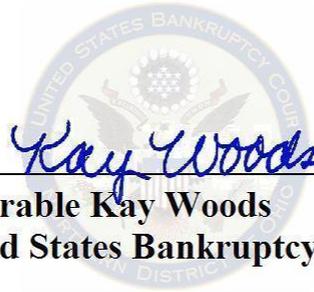


IT IS SO ORDERED.



Dated: November 22, 2006
11:58:54 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
JEFFREY J. MOFFIE,	*	
	*	CASE NUMBER 02-44486
Debtor.	*	
	*	
*****	*	
	*	
RICHARD G. ZELLERS, Trustee,	*	ADVERSARY NUMBER 06-4146
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
CITIMORTGAGE, INC., et al.,	*	
	*	THE HONORABLE KAY WOODS
Defendants.	*	
	*	

M E M O R A N D U M O P I N I O N

This matter is before the Court upon the Motion to Dismiss filed on behalf of Defendant Lerner Sampson & Rothfuss ("Lerner Sampson") on September 22, 2006. Plaintiff Richard G. Zellers, Chapter 7 Trustee ("Trustee") filed his response brief on October 10, 2006.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409.

I. Facts

Debtor Jeffrey J. Moffie filed his Chapter 11 petition on October 7, 2002. Approximately two years later, on September 7, 2004, the Court confirmed Debtor's Modified Plan of Reorganization ("Plan").

Debtor's Disclosure Statement, filed on October 3, 2003, summarized the intent of the Plan: "The Plan proposes to pay to creditors the full value of the only significant asset owned by [Debtor], his residence [located at 8670 White Tail Lane, Streetsboro, Ohio]." ("Real Property") (Disclosure Statement at p. 10.) According to the Disclosure Statement, the Real Property was valued at \$300,000.00 in 2001 and was subject to a lien held by First Nationwide Mortgage Corp. ("First Nationwide") in the amount of \$202,779.52. (*Id.* at p. 13.)

In the Plan, Debtor agreed to make quarterly payments over the course of five years and to assume the existing mortgage lien in order to retain the Real Property. Subsection 6.4 of the Plan, captioned "Funding," reads, in its entirety:

The Plan shall, as set forth in detail above, be funded from the following sources:

6.4.1. the retainer paid to counsel for Debtor

6.4.2. Sale of the [Real Property] to [Debtor] for \$100,000.00 payable in twenty equal quarterly installments of \$5,000.00 and the assumption of the first mortgage to First Nationwide Mortgage Company in the approximate amounts [sic] of \$202,779.52.¹ [Debtor] shall have the right to accelerate payment of the purchase price or any remaining balance due before the final payment is made.

(*Id.* at p. 12.)

Subsection 8.1, captioned "Discharge," reads, in pertinent part, "Upon the Effective Date of the Plan, and except as otherwise provided herein, [Debtor] is discharged from any debt that arose before the Confirmation Date . . . provided that such Claim is not excepted from discharge under 11 U.S.C. § 523." (*Id.* at p. 13.)

Furthermore, Subsection 8.2, captioned "Injunction," reads in its entirety, "Upon the Effective Date of the Plan, all Claimants and Interest Holders shall be enjoined and permanently barred from pursuing any Claim or Interest against [Debtor] and/or the [Real] Property, unless such Claim is excepted from discharge under 11 U.S.C. § 523." (*Id.*)

Subsection 9.4, captioned "Revest Title," reads, in its entirety, "Confirmation will revest title in the [Real] Property to [Debtor]." (*Id.* at p. 14.) This Court's continuing jurisdiction is governed by Article 11, captioned, "Retention of Jurisdiction," which reads, in its entirety:

¹The Plan does not indicate whether the \$202,779.52 is principal only, or whether it also includes pre-petition and/or post-petition/pre-confirmation arrearages.

The Bankruptcy Court shall retain jurisdiction to hear and decide (i) objections to Claims; (ii) avoidance actions under §§ 522, 544, 545, 548, and 549; (iii) turnover actions under §§ 542 and 543; (iv) revocation of an order of confirmation under § 144; (v) dismissal under § 1112; (vi) modification of the Plan under § 1127(b); (vii) enforcement of the permanent injunction under § 524(a); and (viii) any other matter subject to this Court's jurisdiction pursuant to applicable law.

(*Id.*)

According to the Amended Complaint, following confirmation, Debtor made mortgage payments of \$1,873.79 per month pursuant to the Plan. (Am. Compl. ¶ 15.) However, in June 2005, Trustee asserts that CitiMortgage, without justification, refused to accept further mortgage payments. (*Id.*)

On August 8, 2005, CitiMortgage, acting through Defendant Mortgage Electronic Registration Systems, Inc. ("MERS"), (CitiMortgage's servicing agent), and Lerner Sampson, (CitiMortgage's legal counsel) commenced a foreclosure action against Debtor in the Portage County Court of Common Pleas. (*Id.* ¶ 18.) In the Foreclosure Complaint, CitiMortgage sought to collect the principal balance of the mortgage, alleged to be \$199,604.17, "together with interest at a rate of 6.875% per year from December 1, 2003 plus court costs, advances, and other charges, as allowed by law." (Complaint in Foreclosure, Case No. 2005CV964 at p. 3 (attached as Exhibit E to the Response)).² In the Amended Complaint, Debtor asserts that CitiMortgage sought to recover

²A court may consider exhibits to a motion to dismiss where the exhibits are referred to in the plaintiff's complaint or are public records. *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999) overruled on other grounds by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 n.2. (2002).

\$199,604.17 from December 1, 2003 "even though it had received payments from [Debtor] after that date." (Am. Compl. ¶ 19.) Therefore, Trustee contends that the foreclosure action constituted an unfair practice in violation of § 1692f of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, *et seq.* (*Id.* ¶ 26.)

On March 2, 2006, Debtor filed a Motion to Convert Case to Chapter 7 based upon his inability to make payments under the Plan. The Court conducted a hearing on the matter on March 29, 2006. On March 30, 2006, the Court entered an Order converting the case to Chapter 7.

On April 14, 2006, MERS filed Motion for Relief from Stay³ in which MERS claimed that Debtor owed CitiMortgage \$218,441.77. (Am. Compl. ¶ 22.) Approximately two months later, on June 15, 2006, Lerner Sampson sent a letter to Trustee's legal counsel, which stated that the payoff amount of the loan was \$254,340.62. (*Id.* ¶ 22.) Trustee asserts that the payoff amount was grossly in error in that it showed no payments on the loan after December 1, 2003, and added charges not permitted under Ohio law. (*Id.* ¶ 23.) Therefore, Trustee contends that the payoff demand constituted a false or misleading representation and an unfair practice in violation of §§ 1692e and 1692f of FDCPA. (*Id.* ¶ 26.)

³According to the Motion for Relief from Stay, MERS is the nominee of First Nationwide. At a hearing on the Motion conducted on August 17, 2006, the Court agreed to hold the Motion in abeyance pending the outcome of the above-captioned adversary proceeding.

Finally, Trustee asserts that Lerner Sampson's attempts to enforce the claim against the Real Property violated the Injunction section of the Plan because Lerner Sampson sought to recover interest, fees, and assessments that had accrued prior to confirmation.

Trustee concludes that CitiMortgage, MERS and Lerner Sampson are liable jointly and severally for the actual damages caused by the foreclosure complaint and the payoff demand, plus statutory damages of \$1,000.00 for each violation, attorney's fees and costs. (*Id.* ¶ 27.)

Lerner Sampson argues in its Motion to Dismiss that Trustee does not have standing to pursue the FDCPA claims and the breach of Plan claim, and, consequently, this Court does not have subject matter jurisdiction over those claims. Lerner Sampson contends that the Real Property revested in Debtor at confirmation and did not become property of the Chapter 7 estate upon conversion. In other words, Lerner Sampson contends that the claims asserted by the Trustee in the above-captioned case belong to Debtor rather than the Chapter 7 estate.

Trustee counters that the specific language of the Plan and the Agreed Order Confirming Debtors [sic] Modified Plan of Reorganization ("Agreed Confirmation Order") prohibited the Real Property from revesting in Debtor until Debtor had completed all of the payments under the Plan, or, in the alternative, that the Real Property vested in the Chapter 7 estate upon conversion as a matter of law.

II. Standard of Review

The question of standing goes to the heart of subject matter jurisdiction. *Stupak-Thrall v. Glickman*, 346 F.3d 579, 583 (6th Cir. 2003) ("Failure to establish standing is a jurisdictional defect."); see also *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 2435 (1995) ("Standing is perhaps the most important of the federal jurisdictional doctrines.") The party invoking federal jurisdiction has the burden of establishing the elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2137 (1992).

The standing doctrine encompasses both constitutional and prudential requirements. *National Solid Wastes Management Ass'n. v. Daviess County, Ky.*, 434 F.3d 898, 901 (6th Cir. 2006). In order to meet its burden to satisfy Article III standing requirements, a plaintiff must show:

- (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Cleveland Branch, N.A.A.C.P. v. City of Parma, Ohio, 263 F.3d 513, 523-524 (6th Cir. 2001), *cert. denied*, 535 U.S. 971, 122 S.Ct. 1438 (2002) (citations omitted).

Prudential standing considerations require the court to consider:

- (1) whether the alleged injury to plaintiff falls within the "zone of interests" protected by the statute or constitutional provision at issue; (2) whether the complaint raises nothing more than abstract questions

amounting to generalized grievances that are more appropriately resolved by the legislative and executive branches; and (3) whether the plaintiff is asserting its own legal rights and interests rather than those of a third party.

Stevenson v. J.C. Bradford Futures, Inc. (In re Cannon III), 277 F.3d 838, 853 (6th Cir. 2002).

Therefore, Trustee must demonstrate that the claims asserted in the Amended Complaint are property of the Chapter 7 estate in order to demonstrate his standing to pursue those claims. See *Spartan Tube and Steel, Inc. v. Himmelspach (In re RCS Engineered Products Co.)*, 102 F.3d 223, 225 (6th Cir. 1996).

III. Analysis

Trustee makes two arguments for denial of the Motion to Dismiss: First, Trustee asserts that the plain language of the Plan and the Agreed Confirmation Order prevented the Real Property from reverting in Debtor upon confirmation, and, as a consequence, the Real Property remained in the Chapter 11 estate. In the alternative, Trustee posits that the Real Property vested in the Chapter 7 estate upon conversion as a matter of law.

Trustee's first argument, that the language of the Plan prohibited the Real Property from reverting in Debtor on the date of confirmation, is not persuasive. Trustee contends that the Plan and the Agreed Confirmation Order required Debtor to make all of the scheduled payments before the Real Property reverted in Debtor. Trustee further argues that Lerner Sampson's decision to send the payoff demand to Trustee instead of Debtor on June 15, 2006 is

clear evidence that the parties believed that the Real Property was property of the Chapter 7 estate upon conversion.

Section 1141 of the Bankruptcy Code, captioned "Effect of confirmation," reads, in pertinent part, "*Except as otherwise provided in the plan or the order confirming the plan*, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. § 1141 (West 2006)(Emphasis added). Rather than providing an exception to the statutory language in § 1141, the Plan in this case actually tracks the language of the statute. See *supra*. p. 3.

Moreover, even the most liberal reading of the Funding section of the Plan and the Agreed Confirmation Order does not support Trustee's conclusion that Debtor intended that title in the Real Property would not revert in him until he completed all payments under the Plan. As a matter of fact, nothing in the Plan indicates that Debtor even contemplated the effect of conversion on the Plan.

Finally, based upon the clear and unambiguous language of the Plan, the fact that Lerner Sampson sent the payoff demand to Trustee instead of Debtor appears to be a clerical error rather than an admission that Lerner Sampson believed that the Real Property had vested in the Chapter 7 estate upon conversion.

Having concluded that the language of the Plan does not provide an exception to § 1141, the Court must determine whether the Real Property at issue in this case vested in the Chapter 7 estate upon conversion as a matter of law.

At least four bankruptcy courts in this Circuit have considered the issue before this Court and concluded that post-confirmation conversion does not create a new estate or convert property of the reorganized debtor into property of the Chapter 7 estate. See *Harker v. Troutman (In re Troutman)*, 244 B.R. 761, (Bankr. S.D. Ohio 2000), *rev'd on other grounds* 253 B.R. 1 (B.A.P. 6th Cir. 2000)⁴; *appeal vacated and judgment affirmed* 286 F.3d 359 (2002); *In re Brown*, 178 B.R. 722, 727 (Bankr. E.D. Tenn. 1995); *In re Winom Tool & Die, Inc.*, 173 B.R. 613 (Bankr. E.D. Mich. 1994); *State of Ohio, Dep't of Taxation v. H.R.P. Auto Ctr., Inc. (In re H.R.P. Auto Ctr.)*, 130 B.R. 247, 256 (Bankr. N.D. Ohio 1991).

Each of the foregoing bankruptcy courts recognized the interplay of four Bankruptcy Code sections in their analysis of post-confirmation conversion: Section 541, captioned "Property of the estate," reads, in pertinent part:

The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, *all legal or equitable interests of the debtor in property as of the commencement of the case.*

11 U.S.C. § 541 (West 2006)(Emphasis added).

⁴The conclusion of law in *Troutman* upon which this Court relies was not disturbed by the Bankruptcy Appellate Panel for the Sixth Circuit:

The bankruptcy court held that all property of the estate revested in the reorganized debtor on confirmation of the plan and that the subsequent conversion did not bring the property back into the estate. The Trustee does not challenge this conclusion.

Troutman, 253 B.R. at 5.

Section 1141, as stated earlier, provides that confirmation of a plan vests all of the property of the estate in the debtor.

Section 1112, captioned "Conversion or Dismissal," reads, in pertinent part:

(b)(1) Except as provided in paragraph (2) of this subsection, subsection (c) of this section, and section 1104(a)(3), on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause.

11 U.S.C. § 1112 (West 2006). For the purposes of this case, "cause" includes the inability to effectuate substantial consummation of a confirmed plan, or a material default by the debtor with respect to a confirmed plan. See 11 U.S.C. § 1112(b)(7) and (8).

Finally, Section 348, captioned "Effect of conversion," reads, in pertinent part:

(a) *Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief . . .*

11 U.S.C. § 348 (West 2006)(Emphasis added).

In *In re Troutman, supra*, a Chapter 7 trustee in a converted case sought to compel turnover of the proceeds of two life insurance policies that the debtor-corporation had purchased on the

lives of two of its officers; one policy was purchased pre-petition but was not disclosed in the Chapter 11 petition, and the other policy was purchased post-confirmation.

The *Troutman* Court first recognized that "the all-encompassing nature of § 541(a) is often significantly limited when a confirmed Chapter 11 case is subsequently converted to a Chapter 7." *In re Troutman*, 244 B.R. at 764. The bankruptcy court explained that "the entity created upon confirmation and operating post-confirmation pursuant to a confirmed plan - the Reorganized Debtor - is legally distinct from the entity which existed pre-confirmation and whose assets will be administered in the converted Chapter 7 - the Converted Debtor." *Id.*

As a consequence, the *Troutman* Court rejected the argument that conversion invalidates the confirmed plan or in any way affects property that had vested in the reorganized debtor. *Id.* at 764; see also *In re Winom*, 173 B.R. at 616 (noting that revocation of an order confirming a plan of reorganization is only appropriate under the Bankruptcy Code upon a showing of fraud). The *Troutman* Court concluded that, unless a plan of reorganization provides to the contrary, § 1141 establishes a "default rule" that "property of the estate vests in the reorganized debtor upon confirmation of the plan of reorganization." *In re Troutman*, 244 B.R. at 768; see also *In re Brown*, 178 B.R. 722, 727) (" . . . [W]here property leaves the bankruptcy estate and vests in the debtor, courts have had no difficulty in recognizing that conversion does nothing to recapture the property.").

In addition to the plain language of § 1141, the *Troutman* Court contrasted Chapter 11 with the expanded definition of "property of the estate" in a Chapter 13 case to support its conclusion that property acquired after confirmation of a Chapter 11 case does not become a part of the post-conversion Chapter 7 estate. Section 1306(a)(1) reads, in pertinent part:

Property of the estate includes, in addition to the property specified in section 541 of this title[,] all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

11 U.S.C. § 1306 (West 2006). The *Troutman* Court recognized that the differences between Chapter 11 and Chapter 13 demonstrated Congress' intent that reorganized debtors could hold assets separate and apart from the original property of the Chapter 11 estate, and also that such assets are not included as property of the converted debtor's estate. *In re Troutman*, 244 B.R. at 766.

Moreover, although a number of courts that have scrutinized the effect of post-confirmation conversion have taken general policy concerns into consideration, see *Lacy v. Stinky Love, Inc.* (*In re Lacy*), 304 B.R. 439, 446 (Bankr. D. Colo. 2004) and *Smith v. Lee* (*In re Smith*), 201 B.R. 267, 274 (D. Nev. 1996), *aff'd* 141 F.3d 1179 (9th Cir. 1998), this Court adopts the rationale first articulated in *In re Winom, supra*, that policy concerns are not relevant when applying § 1141.

In *In re Winom*, the bankruptcy court rejected the invitation of the United States trustee to undertake a policy analysis in

interpreting § 1141 for two reasons. First, the Court found that "§ 1141(b) is relatively straightforward, does not lead to any absurd results if literally applied, and is not contradicted by § 348 or any other Code provision." *In re Winom*, 173 B.R. 613, 621. Next, the bankruptcy court reasoned that, because § 1141(b) does not mandate revesting of property in the debtor, but, rather, allows the parties to circumvent the default effect of the statute, the statute is "essentially policy-neutral." *Id.* This Court agrees.

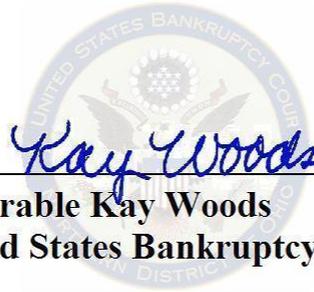
Pursuant to the plain language of § 1141(b), the Real Property revested in Debtor at confirmation. The subsequent conversion of this case from Chapter 11 to Chapter 7 had no effect on the property of Debtor.

Accordingly, this Court finds that the FDCPA claims and the breach of Plan claim belong to the Debtor rather than the Chapter 7 estate. As a consequence, Trustee does not have standing to pursue the claims asserted in the Amended Complaint. Therefore, Lerner Sampson's Motion to Dismiss is well-taken.

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: November 22, 2006
11:58:54 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
JEFFREY J. MOFFIE,	*	
	*	CASE NUMBER 02-44486
Debtor.	*	
	*	
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RICHARD G. ZELLERS, Trustee	*	ADVERSARY NUMBER 06-4146
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Plaintiff,	*	
	*	
vs.	*	
	*	
CITIMORTGAGE, INC., et al.	*	
	*	THE HONORABLE KAY WOODS
Defendants.	*	
	*	

O R D E R

For the reasons set forth in this Court's memorandum opinion entered on this date, the Motion to Dismiss filed on behalf of Defendant, Lerner Sampson & Rothfuss is granted. This matter is dismissed.