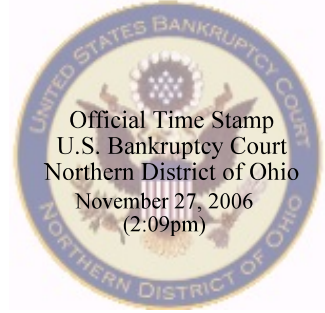


THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 02-19339
)
MELVIN PARRISH,) Chapter 13
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

Pioneer Savings Bank filed an amended proof of claim alleging that the debtor Melvin Parrish owes it a secured debt totaling \$62,310.04 (\$43,880.31 principal plus \$18,429.73 interest) for money loaned.¹ The debtor objected to the claim.² For the reasons stated below, the debtor did not meet his burden of proof and the objection is, therefore, overruled.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 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)(B).

ISSUE

Should Pioneer’s amended proof of claim be allowed as filed?

THE POSITIONS OF THE PARTIES

The debtor argues that Pioneer’s claim should not be allowed because Pioneer failed to follow the bankruptcy rules and also because Pioneer misapplied his payments. In particular, the

¹ Claim #17 on the case claims register.

² Docket 96.

debtor takes the position that if Pioneer's calculation of the amount owed on his mortgage note is correct, he will never pay the debt in full even if he makes his payments faithfully going forward, which means that the calculation must be incorrect; the principal amount claimed cannot be trusted because Pioneer incorrectly credited and then debited a payment made by a check that was returned for insufficient funds; Pioneer failed to make tax and insurance payments that it should have made; Pioneer raised the interest rate when the debtor defaulted without giving the debtor notice of the change; and the debtor paid through his chapter 13 plan most amounts needed to bring the account current.

Pioneer responds that it credited the debtor with all payments made and applied all payments in accordance with the note. The principal balance remains high, according to Pioneer, because of the debtor's early and frequent defaults in payment.

FACTS

The parties stipulated to certain facts and presented the balance of the evidence at an evidentiary hearing held on October 17, 2006.

The Stipulated Facts³

The parties stipulated to these facts:

1. Exhibit A is a true and exact copy of the Mortgage Note dated April 29, 1989.
2. Exhibit B is a recap of the Debtor's loan transaction with Pioneer Savings and Loan Company compiled by Joan Reali, V.P. of said bank.
3. Residential loan on Debtor's residence. [sic]
4. Original loan was \$47,500.00 at 12% interest.

³ Docket 118.

5. Default rate was 14% (Dispute as to when this becomes effective). [sic]
6. Original payment to amortize principal and interest was \$572.22.
7. Original payment \$670.00 included amounts to cover real estate taxes and insurance that was paid by the mortgage company.
8. The mortgage company did not maintain separate escrow accounts for amounts to be distributed to for [sic] real estate taxes and insurance.
9. Real estate taxes and insurance paid by Pioneer were simply added to the principal balance.
10. In 1994, Pioneer stopped paying real estate taxes.
11. And [sic] times when Debtor became more than thirty days delinquent in payments, Pioneer imposed an interest rate of 14%, the default rate.
12. Except as may have been apparent in Debtor's bank account, Pioneer did not notify Debtor that interest on the loan had been increased to the default rate.
13. According to Pioneer's spreadsheet, Debtor was 36 months delinquent in payments as of August 2000.
14. Pioneer's spreadsheet indicated that Debtor was 24 months arrears in August, 2002.
15. Debtor paid Pioneer paid [sic] funds outside the Chapter 13 plan from August, 2000 through August, 2002. (See Exhibit B)
16. At no time did Pioneer not accept payments from Debtor.
17. The loan matured by its own terms in May, 2004.
18. Debtor made payments outside the Chapter 13 plan from August, 2002 through March, 2004 as reflected on Exhibit B.

The Evidentiary Hearing

The debtor presented his case through his own testimony and the cross-examination of Joan Reali, a vice-president in charge of mortgage loans who has worked at Pioneer since 1961.

Pioneer presented its case through Ms. Reali and the cross-examination of the debtor. The parties also offered exhibits into evidence which were accepted without objection.

A. The Note and Mortgage

In 1989, the debtor signed a note for \$47,500.00 payable to Pioneer Savings Bank, which note was secured by a mortgage on property at 14806-08 Milverton Road, Cleveland, Ohio. The note provided that it would bear interest at the rate of 12% and would be paid in monthly installments of \$572.22 starting on June 15, 1989 and continuing through May 2004, at which time the note would be paid in full.

The note also had these provisions:

- (1) the debtor would, in addition to the monthly payments, pay a sum equal to 1/12 of the funds estimated to be needed to pay taxes and insurance on the property;
- (2) payments would be applied first to interest on the unpaid principal balance, then to reserves for taxes and insurance, then to late charges, and then to reduce the unpaid principal balance;
- (3) if any payment was not made within 30 days after it was due, then the interest rate would increase by 2%;
- (4) the interest was to be compound and would be calculated quarterly. Although the note called for compound interest, the undisputed evidence was that Pioneer calculated the interest as simple interest; and
- (5) any payment not made within 15 days of the due date would incur a late charge not to exceed 10% of the payment.

To accommodate the tax and insurance payments, the debtor's monthly payment amount was set at \$670.00.

The debtor's default under the note

The debtor made the first payment called for by the note in June 1989, but defaulted on the second payment. On default, Pioneer applied the 14% rate called for by the contract.⁴ Numerous defaults followed over the years, including failure to make payments large enough to permit Pioneer to pay the property taxes and insurance. In the absence of funds to make those payments, Pioneer advanced money for the insurance, only, and added the advances to the debtor's principal balance. Similarly, when the debtor gave Pioneer checks that were returned for insufficient funds, Pioneer corrected the credit that had been given by adding the check amount and the returned check fee to the principal. Pioneer followed the same practice for late charges incurred. By October 1999, the debtor was so far behind in his payments that the payment made that month was credited to the payment due October 1996.⁵

The debtor's first chapter 13 case 99-19775

The debtor filed his first chapter 13 case on December 20, 1999. At that time, Pioneer reverted to charging the 12% pre-default interest rate. Pioneer filed a proof of claim for \$44,179.64. The case was dismissed on July 11, 2000 for material default in filing papers required to prosecute the case. There was no confirmed plan and so the chapter 13 trustee did not make any payments to Pioneer.

The debtor's second chapter 13 case 00-16092

The debtor filed his second chapter 13 case on August 16, 2000. Pioneer filed a proof of claim for \$44,179.64. This time, a plan was confirmed and both the chapter 13 trustee and the

⁴ There is no dispute over Pioneer's actions in this regard. The dispute concerns whether Pioneer gave the debtor notice of the increase.

⁵ Debtor's exh. 21, line entry for 10/15/96 payment due date.

debtor made payments to Pioneer. On August 8, 2002, the case was dismissed for lack of funding.

The debtor's third chapter 13 case 02-19339

The debtor filed this, his third case, on August 23, 2002. Pioneer filed a proof of claim on October 1, 2002, stating that as of the case filing date, the debtor owed "\$44,738.64 plus interest at 14% from December 15, 2000" and had an arrearage of \$18,555.60. Pioneer filed an amended proof of claim on January 6, 2006 stating that as of the case filing date, the debtor owed \$62,310.04 with an arrearage as of the filing date of \$18,555.60. The note is attached to the proof of claim. The debtor was 36 payments in arrears at the time of this filing.

The case was confirmed and Pioneer received payments from the chapter 13 trustee and the debtor.

DISCUSSION

I.

An unsecured creditor who wishes to participate in a chapter 13 distribution must file a proof of claim. *See* FED. R. BANKR. P. 3002(a). This requirement also applies to a secured creditor trying to recover a deficiency balance. *See* 9 COLLIER ON BANKRUPTCY ¶ 3001.02 (15th ed. rev. 2005). It is common practice for secured creditors to file proofs of claim in chapter 13 cases so that they can receive payment through the chapter 13 plan on any arrearage due.

The bankruptcy rules govern the filing of proofs of claim. They provide that when a proof of claim is based on a writing, the writing must be filed with it. *See* FED. R. BANKR. P. 3001(c). A proof of claim based on a loan secured by a mortgage on the debtor's home substantially complies with the rules when it includes a copy of the promissory note. *See In re Shaffner*, 320 B.R. 870, 874 (Bankr. W.D. Mich. 2005).

A filed proof of claim is deemed allowed unless a party in interest objects to it. *See* 11 U.S.C. § 502(a). If an objection is made, “the court, after notice and a hearing, shall determine the amount of such claim . . . as of the date of the filing of the petition, and shall allow such claim in such amount,” except as provided under bankruptcy code § 502(b). 11 U.S.C. § 502(b).

On objection, a proof of claim filed in accordance with the rules is prima facie evidence that the claim is valid and in the amount stated. *See* FED. R. BANKR. P. 3001(f). The objecting party must produce evidence which rebuts the prima facie validity of the claim. *See In re Kemmer*, 315 B.R. 706, 713 (Bankr. E.D. Tenn. 2004) (quoting *In re Allegheny Int’l, Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992)). If the objector rebuts the validity of the claim, the burden reverts to the claimant to prove its claim by a preponderance of the evidence. *Id. Compare Raleigh v. Illinois Dep’t of Revenue*, 530 U.S. 15 (2000) (holding that when the substantive law creating a tax obligation puts the burden of proof on the taxpayer, the burden of proof remains with the taxpayer in the proof of claim context).

II.

In this case, Pioneer filed an amended proof of claim that included the note and mortgage signed by the debtor. It is, as a result, entitled to the statutory presumption that its claim is valid and in the amount stated. The burden then shifted to the debtor to show that the claim is legally deficient. The debtor failed to meet this burden.

The debtor’s case focused on his belief that Pioneer incorrectly applied his payments and/or incorrectly calculated the interest. The debtor argued that Pioneer was not entitled to raise the interest rate to 14% and in any event failed to notify him of the change; that Pioneer stopped making the real estate tax payments without telling him; that Pioneer incorrectly applied the payments to interest first rather than to reduce the principal; and that Pioneer should be required

to state its claim by identifying the number of payments that are missing and multiplying that by the payment amount to arrive at the arrearage. These arguments are unavailing.

First, the contract clearly provided that the interest rate would increase to 14% upon default and that Pioneer was not required to give any particular notice to the debtor upon this happening. The debtor has not made any legal argument that Pioneer had a duty to provide the debtor with a written notice to this effect or identified any legal damage suffered in any event. Second, Ms. Reali testified without contradiction that Pioneer paid the real estate taxes so long as the debtor made payments in an amount large enough to cover these payments. When the debtor failed to provide the funds, Pioneer notified the debtor that it would not advance the funds. At that point, the debtor had notice that he would have to make the payments himself and he failed to do so through no fault of Pioneer's. Third, the note, again clearly, permitted Pioneer to apply the payments first to interest— a common provision in such notes—and Pioneer did not violate the contract by applying the funds in this fashion. Fourth, Pioneer provided at hearing a detailed spread sheet that credited each payment received from or on behalf of the debtor, and stated the payment due date, the date the payment was received, the date through which interest was paid, the amount credited to interest, late charges, real estate taxes paid, insurance paid, checks returned for insufficient funds, miscellaneous charges for NSF fees, amount credited to principal, principal balance, and contractual delinquency amounts. The court finds Ms. Reali's testimony concerning the preparation of this document and the facts contained in it to be entirely credible. There is no requirement that Pioneer prove its case in a different fashion. Moreover, identifying the number of payments that the debtor was behind would not be the same as stating the amount due; in other words, multiplying the number of missed payments times the original payment amount would not result in the same number as the amount owed to pay off the loan or even to

bring it current. That number would only be the same if the debtor had made each payment on time and in full, without incurring additional interest or additional charges to principal, which he did not.

Finally, the debtor argues that the proof of claim cannot be correct because he borrowed \$47,500.00 in 1989 with a 15-year term that ended in 2004 and yet he still owes \$43,880.31 in principal, together with interest, even though he has paid a significant amount of money. The loan, however, could only be repaid in 15 years if the debtor made the required payments. If the debtor had timely made all principal and interest payments without incurring additional interest or charges, he would have paid a total of \$102,999.60 (\$572.22 a month times 180 months). That he owes more is a function of the debtor's frequent defaults over a period of years which resulted in additions to the principal balance and an increase in the interest rate.

This decision resolves the amount of Pioneer's claim as of the filing of this chapter 13 case. While the debtor failed to show that Pioneer's proof of claim is legally deficient, his contention that Pioneer is incorrectly applying payments which it receives in this chapter 13 case may be correct. The filing of a chapter 13 case serves as a dividing line, with payments received from the chapter 13 trustee being applied to prepetition arrearages and a debtor's regular monthly payments being applied to current payments. The issue of whether Pioneer properly applied postpetition payments was not directly raised in the debtor's objection to Pioneer's claim; however, as a practical matter, it is one that needs to be addressed by the parties.

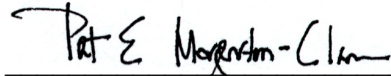
III.

As found above, the debtor did not rebut Pioneer's prima facie case that its proof of claim is valid. Assuming for the sake of argument, however, that the debtor's questioning of the account did so, Pioneer rehabilitated its case and met its burden through the testimony of Joan

Reali. Ms. Reali, an experienced loan officer and long-time employee of Pioneer, testified that Pioneer made the original loan, retained the servicing of it, and had all of the original records relating to it. Pioneer did not add any charges to the account that are not authorized by law. Ms. Reali prepared a flow chart—as described above—that accounted in detail for each payment made by or on behalf of the debtor. That flow chart fully supports Pioneer’s proof of claim.

CONCLUSION

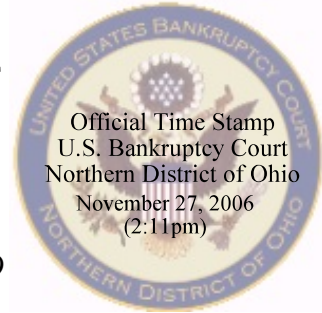
For the reasons stated, the debtor’s objection to the claim of Pioneer Savings Bank is overruled. A separate order will be entered reflecting this decision.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 02-19339
MELVIN PARRISH,)
Debtor.) Chapter 13
) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion entered this same date, the debtor's objection to amended proof of claim no. 17 filed by Pioneer Savings Bank is overruled. (Docket 96).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge