

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 08-11304  
)  
NEIL R. BOWER and ) Chapter 7  
BETTE A. BOWER, )  
) Judge Pat E. Morgenstern-Clarren  
Debtors. )  
) **MEMORANDUM OF OPINION**<sup>1</sup>

**I. INTRODUCTION**

Richard Baumgart, chapter 7 trustee for the bankruptcy estate of Neil and Bette Bower, filed this adversary proceeding to determine the interest of the defendants in the debtors' real property, located at 31214 Lake Road, Bay Village, Ohio. All issues have been resolved except for one:<sup>2</sup> whether defendant Pramco CV7, LLC is entitled to include in its secured claim attorney fees and costs incurred by Pramco to enforce its two mortgage liens. For the reasons stated below, the court finds that Pramco proved that it is entitled to recover its attorney fees incurred in enforcing its mortgages in this forum, to the extent that the fees are reasonable.

**II. 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), (B), (K), and (O).

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<sup>1</sup> This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

<sup>2</sup> See agreed orders at docket 42, 50, 57.

### III. FACTS

Pramco's claim arises out of two judgments and two mortgages against the property in Pramco's favor. Pramco and the trustee have reached agreement as to the principal and interest owed to Pramco.<sup>3</sup> They submitted the attorney fees issue on these stipulated facts:<sup>4</sup>

1. Pramco, as assignee of FirstMerit Bank, N.A., obtained a money judgment against the Debtors on March 31, 2006 in *FirstMerit Bank, N.A. v. Neil R. Bower, et al.*, Cuyahoga County Common Pleas Court Case No. CV 06 588120 (the "Judgment"). A true and accurate copy of the Judgment is attached hereto as Exhibit A and incorporated herein by this reference.
2. The Judgment relates to the following two promissory notes:
  - a. a January 15, 2000 Open End Promissory Note for Builder Line of Credit executed by Debtors in the original amount of \$900,000 (the "\$900,000 Note"). The \$900,000 Note, as amended and modified, was reduced to judgment in the amount of \$655,918.33 plus interest at 14.75% per annum. A true and accurate copy of the \$900,000 Note is attached hereto as Exhibit B and incorporated herein by this reference;
  - b. a September 18, 2000 Fixed Interest Rate Open-End Mortgage Note for Builder Construction Loan executed by Debtors in the original amount of \$1,280,000 (the "\$1,280,000 Note"). The \$1,280,000 Note, as amended and modified, was reduced to judgment in the amount of \$494,346.88 plus interest at 14.50% per annum. A true and accurate copy of the \$1,280,000 Note is attached hereto as Exhibit C and incorporated herein by this reference.

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<sup>3</sup> Docket 57.

<sup>4</sup> Docket 58, 62.

3. Page 2 of the \$1,280,000 Note provides: “The loan evidenced hereby is for commercial or business purposes, and is not intended and will not be used for personal, family, household, educational, consumer or agricultural purposes.”
4. Pramco is the holder of two mortgages on 31214 Lake Road, Bay Village, Ohio 44140, the property that is the subject of this adversary proceeding (the “Property”):
  - a. a January 15, 2000 Open-End Mortgage and Security Agreement for Revolving Construction Loan to Builder executed by Debtors in the original amount of \$900,000 and recorded on January 18, 2000 in the Cuyahoga County Recorder’s Office as Instrument No. 200001181136 (the “\$900,000 Mortgage”). A true and accurate copy of the \$900,000 Mortgage is attached hereto as Exhibit D and incorporated herein by this reference;
  - b. a February 26, 2004 Open-End Mortgage executed by Debtors in the original amount of \$1,280,000 and recorded on March 2, 2004 in the Cuyahoga County Recorder’s Office as Instrument No. 20040302789 (the “\$1,280,000.00 Mortgage”). A true and accurate copy of the \$1,280,000 Mortgage is attached hereto as Exhibit E and incorporated herein by this reference.
5. Section 29 of the \$900,000 Mortgage provides: “[i]f the Mortgagee should incur expenses in connection with the enforcement of this Mortgage, the Note, the Agreement or any other instrument or document collateral thereto, the Mortgagor shall reimburse the Mortgagee for any and all such costs or expenses (including attorneys’ fees), together with interest thereon at the Default Rate from the date such costs and expenses are incurred, on demand, and all of said amounts, including interest, shall constitute indebtedness secured by this Mortgage to the extent permitted by law.”
6. Page 6 of the \$1,280,000 Mortgage provides: “If Lender institutes any suit or action to enforce any of the terms of this Mortgage, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys’ fees at trial and upon any appeal.

Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph, include, without limitation, however subject to any limits under applicable law, Lenders's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveyors' reports, and appraisal fees and title insurance, to the extent permitted by applicable law. Grantor also will pay any court costs, in addition to all other sums provided by law."

7. Pramco has not commenced legal proceedings seeking the foreclosure of the \$900,000 Mortgage or the \$1,280,000 Mortgage.
8. Attached hereto as Exhibit F are statements of attorneys' fees and costs requested by Pramco, through October 31, 2008.

On review of the stipulated documents, the court finds this additional fact:

Page 2 of the \$900,000 Note provides that:

the loan and this Note evidencing same are made for business purposes, specifically to construct improvements on the real property described in the Mortgage, and that none of the proceeds of this loan or this Note will be used for personal, family or household purposes of any person.

The parties did not stipulate to the reasonableness of the attorney fees requested.

#### **IV. OHIO REVISED CODE § 1301.21**

Ohio Revised Code § 1301.21 provides, in relevant part:

- (A) As used in this section:

(1) “Contract of indebtedness” means a note, bond, mortgage, conditional sale contract, retail installment contract, lease, security agreement, or other written evidence of indebtedness, other than indebtedness incurred for purposes that are primarily personal, family, or household.

(2) “Commitment to pay attorneys’ fees” means an obligation to pay attorneys’ fees *that arises in connection with the enforcement of a contract of indebtedness.*

(3) “Maturity of the debt” includes maturity upon default or otherwise.

- (B) If a contract of indebtedness includes a commitment to pay attorneys’ fees, and *if the contract is enforced through judicial proceedings or otherwise* after maturity of the debt, a person that has the right to recover attorneys’ fees under the commitment, at the option of that person, may recover attorneys’ fees in accordance with the commitment, to the extent that the commitment is enforceable under divisions (C) and (D) of this section.
- (C) A commitment to pay attorneys’ fees is enforceable under this section only if the total amount owed on the contract of indebtedness at the time the contract was entered into exceeds one hundred thousand dollars.
- (D) A commitment to pay attorneys’ fees is enforceable only to the extent that it obligates payment of a reasonable amount. . . .

OHIO REV. CODE § 1301.21 (emphasis added).

Stated somewhat differently, the statute permits a creditor to recover attorney fees from a borrower where the parties have entered into a transaction:

1. that is a contract of indebtedness (including a mortgage);
2. exceeding \$100,000.00;
3. that was not incurred for primarily personal, family, or household purposes;

4. that contains a commitment to pay attorney fees incurred in enforcing the contract;
5. when the contract is enforced through judicial proceedings or otherwise; and
6. where the amount of fees sought is reasonable.

## **V. POSITIONS OF THE PARTIES**

Pramco contends that it is entitled to recover attorney fees under the terms of the mortgages and Ohio Revised Code § 1301.21. Specifically, Pramco asserts that the mortgages provide for fees, and that the mortgages are still enforceable even though the notes were reduced to a judgment that did not include an award of attorney fees. With that established, Pramco claims that the attorney fee agreement in the mortgages is enforceable under § 1301.21 because the underlying transaction was commercial, the principal amount exceeds the statutory minimum, and the mortgages are now being enforced through a judicial proceeding, all as required by the statute.

The trustee counters that the amount of Pramco's secured claim is limited to the amount of its judgment because Pramco obtained judgment on the *notes* in state court, but did not obtain judgment on the mortgages. Because the *mortgages* provide for the payment of attorneys' fees, and Pramco has not foreclosed on the mortgages, the trustee argues that Pramco has not sought to enforce the mortgages through "judicial proceedings" as required by Ohio Revised Code § 1301.21(B). Therefore, according to the trustee, Pramco is not entitled to recover its attorney fees under that statute.

## **VI. DISCUSSION**

### **A. The Notes and the Mortgages are Separate Obligations**

The right to sue on a promissory note and the right to sue on a mortgage are two separate and distinct causes of action under Ohio law. *Carr v. Home Owners Loan Corp.*, 148 Ohio St. 533, 76 N.E.2d 389 (1947). Even if a creditor obtains judgment on the note, the only way the mortgage can be discharged is by actual payment of the debt or express release. *Riegel v. Belt*, 119 Ohio St. 369, 378-79, 164 N.E. 347, 350 (1928); *see also Miller v. MIF Realty L.P. (In re Perrysburg Marketplace Co.)*, 208 B.R. 148, 159 (Bankr. N.D. Ohio 1997) (citing *Carr* and *Riegel*). Thus, when the debt underlying a note is reduced to judgment, the creditor may satisfy the judgment by foreclosing the mortgage. *Economy Savings & Loan Co. v. Lindsey*, 96 Ohio App. 400, 400, 122 N.E.2d 36, 37-38 (Ohio Ct. App. 1954).

That the note became merged in the judgment, which was a higher form of the same debt, is clear enough upon both principle and authority. But it is not made to appear how it could affect the lien of the mortgage, which, according to the established view in this state, is only a security for the debt. Why should not that which was a security before the recovery of judgment be a security after it? Plaintiff did not, in any way, change his position in consequence of the recovery of that judgment, nor was he, in any way, affected by it. No reason appears why the case should not be governed by the general rule that a security continues until the discharge of the obligation.

*Green v. Bass*, 83 Ohio St. 378, 384, 94 N.E. 742, 743 (1911). Otherwise, the later-in-time judgment could reduce the creditor's priority, or extinguish a security interest in personal or other real property serving as additional security for the loan.

In this case, judgment was not rendered on the mortgages, which means that Pramco's rights under the mortgages remain intact until the judgments are paid or released. Therefore,

Pramco may recover its attorney fees as provided for by the mortgages to the extent permitted by Ohio law.

**B. Attorney Fees: Ohio Revised Code § 1301.21**

Pramco argues that it is entitled to recover attorney fees under Ohio Revised Code § 1301.21. The parties agree that the mortgages are “contracts of indebtedness” as defined by the statute, that they contain a commitment to pay attorneys’ fees, and that the amount at issue exceeds the statutory minimum of \$100,000.00. The parties did not expressly stipulate that the debts were not incurred for primarily personal, family, or household purposes, but the trustee does not contest this and both notes support such a finding.

The point of contention between Pramco and the trustee is whether Pramco proved that it incurred fees in connection with enforcing the mortgages through “judicial proceedings or otherwise.” The trustee argues that this language limits the statute’s applicability to cases where the creditor forecloses on its mortgage in a lawsuit. Because Pramco reduced the notes to judgment in state court but did not foreclose on the mortgages, argues the trustee, Pramco has not brought itself within the statutory terms.

The statutory language is broader than the reading suggested by the trustee. The fees must be incurred in enforcing a mortgage through “judicial proceedings or otherwise,” but there is no requirement that those judicial proceedings be to foreclose the mortgage. This adversary proceeding is a judicial proceeding brought in the federal court by the trustee to determine liens against the property, including the mortgage liens held by Pramco. Pramco has answered the complaint, asserted an interest in the property by virtue of the mortgages, and continued to defend the action. As a result, the court finds that Pramco is attempting to enforce its mortgages



through a judicial proceeding or otherwise, satisfying that element of the statute. Pramco is, therefore, entitled to recover its attorneys fees incurred in enforcing its mortgages, subject to the statutory requirement that the fees be reasonable.

The parties included fee statements from Pramco's attorneys to Pramco, but they did not (1) identify the portion of the bill that relates to enforcing the mortgages in this forum, or (2) stipulate to the reasonableness of the fees. The court will address this remaining issue by separate order.

## **VII. CONCLUSION**

For the reasons stated above, the court finds that Pramco CV7, LLC is entitled to recover its attorney fees under Ohio Revised Code § 1301.21, to the extent that they relate to enforcing the mortgages in this forum and to the extent that they are reasonable. The court will enter a separate order consistent with this opinion.



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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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NEIL R. BOWER and ) Chapter 7  
BETTE A. BOWER, )  
Debtors. ) Judge Pat E. Morgenstern-Clarren  
)  
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the court finds that Pramco CV7, LLC is entitled to recover its attorneys fees incurred in enforcing its mortgages in the bankruptcy court forum, to the extent that the fees are reasonable.

On or before **February 25, 2009**, the parties are instructed to file a joint report stating if they are able to reach agreement on the amount of the fees to be included in Pramco's proof of claim according to the standards set forth in Ohio Rev. Code § 1301.21(D). After review of that report, the court will set such further hearings as are necessary.

IT IS SO ORDERED.

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge