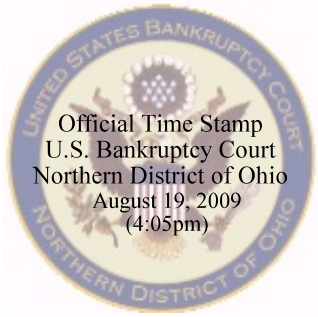
NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 08-15168
	)	
MARYBELLE L. THOMPSON,	)	Chapter 13
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**[1]

Litton Loan Servicing LP filed a proof of claim on behalf of The Bank of New York Trust Co., N.A., as successor to JPMorgan Chase Bank N.A. as indenture trustee, its successors and assigns, outside the time limit set by bankruptcy rule 3002(c). The chapter 13 debtor Marybelle Thompson objected to the claim as untimely, and Litton responded that a secured claim may be filed at any time.[2] For the reasons stated below, the debtor's objection is sustained and the claim is disallowed.

I. 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).

II. ISSUE

May a secured creditor participate in chapter 13 plan distributions, over the debtor's objection, if the creditor files its claim outside of bankruptcy rule 3002(c)'s time limit?

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[1] This opinion is not intended for commercial publication, either print or electronic.

[2] Docket 34, 36, 37, 40, 41, 42.

III. FACTS

These undisputed facts are drawn from the parties' filings and the case docket:[3]

The debtor Marybelle Thompson filed this chapter 13 case on July 6, 2008 and scheduled Litton as a secured creditor. The clerk's office issued a notice informing all creditors (except for governmental units) that the deadline for filing proofs of claim was November 12, 2008.[4] The debtor filed a modified plan on August 19, 2008 which was confirmed on September 18, 2008. Litton did not object to the plan or appeal from the confirmation order. The plan, which is a form plan adopted for use in the Cleveland division of the United States Bankruptcy Court for the Northern District of Ohio, requires creditors to file a proof of claim in order to receive a distribution under the plan.[5]

On December 22, 2008, Litton filed a secured claim on behalf of The Bank of New York Trust Company, N.A. as successor to JP Morgan Chase Bank N.A. as indenture trustee, its successors and/or assigns (Bank of New York Trust Company) in the total amount of $85,715.94, including an arrearage amount of $35,011.13.[6] The debtor objected to it as untimely.

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[3] This matter came on for hearing on June 9, 2009 and was submitted for decision on the parties' briefs. On review, the court found there was an issue as to whether the entity filing the proof of claim had standing to do so, and directed the parties to make additional filings. The parties were unable to stipulate to the facts regarding standing, and so each filed a factual statement and brief addressing the standing issue. The court will further address this issue below.

[4] Docket 5.

[5] *See* docket 27. Article 3A of the plan provides for Litton with an estimated arrearage claim in the amount of $11,870.00.

[6] Claims register, claim 6. The proof of claim states that the claim amount is estimated and cannot be relied on as a payoff statement.

IV. DISCUSSION

A. The Debtor's Objection

In a chapter 13 case, the claims allowance process begins with the filing of a claim. *In re Jones*, 238 B.R. 338, 341 (Bankr. W.D. Mich. 1999), *aff'd*, 2000 WL 1175717 (W.D. Mich. June 28, 2000). The claim may be filed by a creditor, *see* 11 U.S.C. § 501(a), or, if a creditor does not file a timely claim, the claim may be filed by the debtor on behalf of the creditor. *See* 11 U.S.C. § 501(c); *see also* FED. R. BANKR P. 3004. A proof of claim filed under bankruptcy code § 501 is deemed allowed unless a party in interest objects to it. 11 U.S.C. § 502(a).

The time limit for filing claims in chapter 13 cases is set by bankruptcy rule 3002. That rule provides in relevant part, and with exceptions not applicable here, that:

> (c) Time for Filing. In a . . . chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code . . . .

FED. R. BANKR. P. 3002(c). Litton filed its proof of claim later than 90 days after the first date set for the meeting of creditors, as a result of which the debtor argues that the claim should be disallowed in any amount greater than the amount listed in the plan. Litton contends that the deadline only applies to unsecured claims, and that a secured claim may be filed at any time.[7]

The parties' disagreement as to whether rule 3002(c) applies to all claims, or only to unsecured claims, mirrors a split in the case law. One line of cases holds that rule 3002(c) sets the bar date for all chapter 13 claims, including secured claims. *See, for example, In re Hogan,* 346 B.R. 715, 721 (Bankr. N.D. Tex. 2006) (concluding in the chapter 13 context that the rule

[7] The debtor's objection does not challenge any lien that the secured creditor may hold, only the right to receive payment through the chapter 13 plan in the amount of the proof of claim. *See* docket 37 at 1.

3002(c) bar date applies to secured claims); *In re Mickens*, No. 04-1342, 2005 WL 375661, at *1 (Bankr. D.D.C. Feb. 14, 2005) (noting that "the deadline of Rule 3002(c) is not limited to unsecured creditors"); *In re Kelley*, 259 B.R. 580, 584-85 (Bankr. E.D. Tex. 2001) (stating that proper construction of the bankruptcy code, rules, and policy considerations require the conclusion that secured claims in a chapter 13 case must be filed within the rule 3002(c) bar date); *see also In re Boucek*, 280 B.R. 533, 537 (Bankr. D. Kan. 2002) (stating that the rule 3002(c) time limit governs every proof of claim in a chapter 12 case). Another line of cases holds that the bar date does not apply to secured claims. *See, for example, In re Mehl*, No. 04-85570, 2005 WL 2806676, at *2 (Bankr. C.D. Ill. Oct. 25, 2005); *Strong v. United States (In re Strong)*, 203 B.R. 105, 112-13 (Bankr. N.D. Ill. 1996); *In re Harris*, 64 B.R. 717, 719-20 (Bankr. D. Conn. 1986); *see also In re Lundy*, 110 B. R. 300, 303 (Bankr. N.D. Ohio 1990) (noting that "[i]t does not follow that a secured claim filed in a chapter 13 case after the bar date is not timely filed."). Having considered both views, this court concludes that rule 3002(c) establishes the deadline for filing all claims–including secured claims–in chapter 13 cases.

By its plain terms, rule 3002(c) sets the timeline for filing claims in a chapter 13 case and does not distinguish between secured and unsecured claims. Courts which hold that rule 3002(c) does not control secured claims generally focus on a different part of the rule, that is rule 3002(a), which states that only an *unsecured* creditor *must* file a proof of claim. *See, for example, In re Harris*, 64 B.R. at 719. Those courts reason that because a secured creditor is not required to file a proof of claim under rule 3002(a), a secured creditor is not bound by the deadline set in rule 3002(c). This, however, is not a fair reading because subsection 3002(c) does not "refer back to subsection (a) or otherwise limit the time requirements to proofs of claim filed pursuant to subsection (a)." *In re Boucek*, 280 B.R. at 537. Moreover, 3002(c) provides six

specific exceptions to the filing deadline, and there is no stated exception for secured claims. "To import the silence of Rule 3002(a) into the carefully-crafted exceptions in Rule 3002(c) would defeat the very purpose of the claims bar date, which is to provide the certainty necessary to the practical administration of a chapter 13 plan." *In re Arnold*, No. 06-10671, 2007 WL 634242, at *4 (Bankr. E.D. Va. Feb. 26, 2007).

There are other bankruptcy rules that govern the filing of chapter 13 claims, and reading rule 3002(c) to apply to all claims is consistent with those other rules. Specifically, rules 3004 and 3005 allow other parties to file a proof of a claim within 30 days of the expiration of the rule 3002(c) bar date when a creditor has failed to file a claim on its own behalf. They do not differentiate between secured and unsecured claims. *See* FED. R. BANKR. P. 3004, 3005.

This interpretation is also consistent with the provisions of the bankruptcy code governing claims. The term "claim" is defined as a right to payment whether or not such right is secured or unsecured. 11 U.S.C. § 101(5)(A). Together, §§ 501 and 502 provide that a claim must be filed to be allowed. 11 U.S.C. §§ 501, 502. And, § 502(b)(9) provides for the disallowance of an untimely claim upon objection and "reveals Congress' intent to demand that claims be timely filed." *United States v. Chavis (In re Chavis)*, 47 F.3d 818, 823 (6th Cir. 1995). These provisions have two common characteristics: they do not distinguish between secured and unsecured claims and they contemplate that all claims must be timely filed.

Policy considerations also favor this result. It is important that creditors seeking payment in chapter 13 "file their claims on a timely basis so that the efficacy of the plan may be determined in light of the debtor's assets, debts and foreseeable earnings." *Id.* at 824. Additionally, as one court noted,

> the chapter 13 trustee must know, reasonably early in the case, whom he must pay and in what amounts if he is to begin making distributions. To allow secured claims to be filed at any time during the plan period (perhaps even in the last month of a 60-month plan) for the purpose of receiving payments from the trustee would throw distributions to other creditors into complete turmoil except in those instances in which the secured claim came in at an amount identical or very close to the amount estimated in the plan and the trustee had reserved the funds specified in the plan for payment of the claim.

In re Arnold, 2007 WL 634242, at *4.

In this case, the proof of claim was filed more than 90 days after the first meeting of creditors. The claim is, therefore, disallowed.

The debtor suggests that the claim should be allowed in a reduced amount, rather than disallowed entirely, but fails to provide any legal support for that result. Bankruptcy code § 502(b)(9) does not contemplate partial allowance of a untimely filed claim; instead, it provides that if the debtor objects to an untimely proof of claim, the claim shall be disallowed. And while § 502(b)(9) sets out exceptions to disallowance for late filing, those exceptions do not apply here. If the debtor wanted to avoid this result, she could have waived the issue of timeliness and objected to the claim on different grounds. Alternatively, she could have filed a proof of claim in the amount she deemed appropriate when the creditor failed to timely do so. *See* 11 U.S.C. § 501(c); FED. R. BANKR. P. 3004.

B. Standing

The court's initial review showed that the record had conflicting or incomplete evidence about whether Bank of New York Trust Company, through Litton, had standing to file the proof of claim. As a matter of prudential standing, a claimant is required to show that it is " a proper proponent, and the action a proper vehicle, to vindicate the rights asserted." *In re Foreclosure*

Cases, 2007 WL 3232430 at *1 (N.D. Ohio, Oct. 31, 2007). "A creditor's standing to file a proof of claim for a prepetition debt must exist at the time the claim is filed." *In re Wells,* 407 B.R. 873, 882 (Bankr. N.D. Ohio 2009). The court, therefore, ordered the parties to file briefs and stipulations of fact (or separate factual statements if they were unable to stipulate) to address these points:[8]

1. The proof of claim names the creditor as The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank NA as indenture trustee, its successors and assigns. The proof of claim is signed by Alice Blanco, as "agent for Litton Loan Servicing, L.P. its successors and/or assigns." No power of attorney is attached showing the authority of Litton to act for the creditor or of Blanco to act for Litton.

2. The documents attached to the proof of claim show that the debtor signed a note in favor of Equity One Credit Corporation (Equity One). According to the documentation, that note was not endorsed to any other entity. The note on its face, therefore, is payable to Equity One and not to Bank of New York Trust Company.

3. The debtor also signed a mortgage in favor of Equity One to secure the debt reflected in the note. The documentation attached to claim 6 shows that Equity One signed an assignment of mortgage with respect to the property identified as exhibit A, but no exhibit A is attached, at least to the copy filed with the court. That document was recorded on May 9, 2005. Homecomings Financial Network, Inc. then signed a document that purported to assign the mortgage to The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank N.A. as indenture trustee. That assignment, as executed by "Richard Williams, Vice President of Litton Loan Servicing, LP, Attorney in Fact for Homecomings Financial Network, Inc.," was filed on December 5, 2008. There is no power of attorney attached to the assignment and no evidence that any such power of attorney was recorded. *See* OHIO REV. CODE § 1337.04. The documents filed do not show an unbroken chain of title for the mortgage that ends with The Bank of New York Trust Company.

[8] Docket 38.

In sum, although the proof of claim was filed on behalf of Bank of New York Trust Company, the documents attached did not show that the chain of title to the note and mortgage that are the subject of the alleged debt end with the claimant.

The parties were not able to stipulate to the facts, so each filed its own factual statement on this issue. The debtor denied that Litton had standing to file the proof of claim and did not agree to Litton's version of the facts.[9] Litton's supplemental brief addressed, among other things, the chain of title to the note and the power of Litton to take certain actions regarding the note and mortgage.[10] With respect to the note, Litton attached a document titled "Allonge to Note" that purports to transfer the note on an unspecified date first from "Charter One Mortgage Corp., successor by merger to Charter One Credit Corporation, f/k/a Equity One Credit Corp." to Residential Funding Corporation; and then on an unspecified date from Residential Funding Corporation to "JP Morgan Chase Bank, as trustee." Litton claims in its brief that Bank of New York Trust Company is in possession of the note and that J.P. Morgan Chase Bank transferred possession of the note with the intent that Bank of New York Trust Company would be entitled to enforce it.

With respect to Litton's authority to file the proof of claim, its brief states that Alice Blanco is an attorney at the law firm of McCalla, Raymer, Padrick, Cobb, Nichols & Clark LLC, which law firm is an agent for Litton, which in turn is an agent for Bank of New York Trust Company.[11] Litton claims that Residential Funding Corporation is the master servicer for the

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[9] Docket 41, 42.

[10] Docket 40.

[11] Docket 40 at 5. Although Blanco is a lawyer and her employer is a law firm, the proof of claim does not state this relationship, instead identifying her only as an agent for Litton.

debt and that Litton is a subservicer for Residential Funding Corporation.[12] Litton then addresses the source of its power to act as agent for Bank of New York Trust Company by attaching four documents recorded in Cuyahoga County, Ohio titled Limited Power of Attorney granting certain enumerated powers to Litton. *See* OHIO REV. CODE § 1337.01 (a power of attorney to convey any interest in real estate must be signed, acknowledged, and certified); OHIO REV. CODE § 1337.04 (such a power of attorney must be recorded in the county where the property is located before the document conveying an interest in the real estate is recorded).

Three of the limited powers of attorney provided by Litton are irrelevant because they were given to Litton by Residential Funding Real Estate Holdings, LLC and Homecomings Financial Real Estate Holdings, LLC, neither of which has any demonstrated connection to this case.[13] The fourth is given to Litton by "Residential Funding Company, LLC f/k/a Residential Funding Corporation and its subsidiary, Homecomings Financial, LLC f/k/a HomeComings Financial [N]etwork, Inc."[14] Litton argues without factual or legal support that a limited power of attorney granted by the alleged "parent corporation of Homecomings Financial Network, Inc." to Litton somehow authorizes Litton to act on behalf of the parent's subsidiaries. A parent corporation and its corporate subsidiaries are, however, separate legal entities. *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 861 N.E.2d 109, 117 (Ohio 2006); *Mut. Holding Co. v. Limbach*,

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[12] Litton attached a June 1, 2006 document titled Pooling and Servicing Agreement between and among Residential Asset Mortgage Products, Inc., Residential Funding Corporation, and JP Morgan Chase Bank, N.A. There is nothing in the agreement that shows that the debtor's note and mortgage were included in the assets subject to the PSA. The same is true of a December 23, 1998 document titled Special Servicing Agreement between and among Residential Funding Corporation, Credit-Based Asset Servicing and Securitization LLC, and Litton Loan Servicing LP. Docket 40, exhibits H and I.

[13] Docket 40, exhibits D, E, and F

[14] Docket 40, exhibit C.

641 N.E.2d 1080, 1081 (Ohio 1994). Additionally, a limited power of attorney is to be strictly construed. *See, e.g. Dayton Monetary Assocs. v. Becker*, 710 N.E.2d 1151, 1156 (Ohio Ct. App. 1998) *citing Layet v. Gano*, 17 Ohio 466 (1848) (distinguishing the authority given by a general power of attorney from a limited power of attorney).

The factual situation is complicated by the existence of a state court judgment. A state court complaint for a money judgment and foreclosure was filed in the name of Equity One Credit Corporation on December 31, 2001. *See Equity One Credit Corp. nka Charter One Credit Corp. v. Marybelle Thompson, et al.*, case no. CV-01-457896. On July 7, 2005, the court granted a motion to substitute Homecomings Financial Network as the plaintiff and, on April 23, 2008, granted judgment in favor of that entity.

Under the present posture of this case, the court does not need to resolve the questions posed by the conflicting versions of the facts presented by the parties and by Litton's own documents. Regardless of whether the filer had standing to file the claim, the proof of claim is disallowed as untimely.

C. Additional Issues

The parties' briefs raise additional issues.

(1) As discussed above, the debtor argues that the claim should be partially allowed by limiting it to the amount of the state court judgment, and she points out that her confirmed plan provides for payment to Litton consistent with that judgment. However, as the confirmed plan only provides for payment by the trustee on *allowed* secured claims for mortgage arrearages and the claim has been disallowed, that argument is moot.

(2) Litton questions how the debtor calculated the arrearage amount listed in the plan and argues that the plan impermissibly modifies the creditor's rights under 11 U.S.C. § 1322(b)(2).

Litton could have raised these issues before confirmation by objecting to the plan. Litton did not, however, do so and it is now too late because the plan has been confirmed and its provisions are binding under 11 U.S.C. § 1327(a).

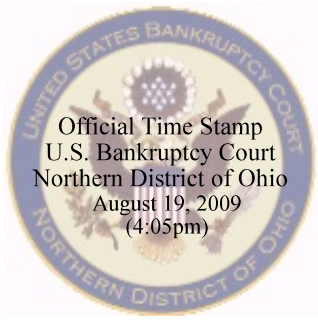
(3) Litton also argues "that the remaining debt incurred is non-dischargeable in the bankruptcy under 11 U.S.C. § 1328(a)(1)" and requests a ruling to that effect. The issue of whether a debt is dischargeable is not properly raised or resolved in this claim proceeding. *See* FED. R. BANKR. P. 7001 (providing that a proceeding to obtain a determination as to the dischargeability of a debt or to obtain a declaratory judgment on that issue must be brought by adversary proceeding).

CONCLUSION

For the reasons stated, the debtor's objection to the claim is sustained and the claim is disallowed. A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 08-15168
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MARYBELLE L. THOMPSON,	)	Chapter 13
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion entered this same date, the debtor's objection to the claim of The Bank of New York Trust Co., N.A. as successor to JPMorgan Chase Bank N.A. as indenture trustee, its successors and assigns filed by Litton Loan Servicing LP[1] is sustained and the claim is disallowed in its entirety. (Docket 34).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

[1] Claim 6 on the case claims register.