IT IS SO ORDERED.

Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

Dated: August 21, 2009
08:53:53 AM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
FLORA BENNETT	*	**CASE NUMBER 09-40024**
Debtor.	*	
* * * * * * * * * * * * * * * * * *	*	
FLORA BENNETT,	*	**ADVERSARY NUMBER 09-04075**
Plaintiff,	*	
v.	*	
COUNTRYWIDE HOME LOANS, INC.,	*	**HONORABLE KAY WOODS**
Defendant.	*	

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MEMORANDUM OPINION REGARDING MOTION FOR ORDER DETERMINING ADVERSARY PROCEEDING IS NON-CORE

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This cause is before the Court on Defendant Countrywide Home Loans, Inc.'s Motion for Order Determining Adversary Proceeding is

Non-Core and Memorandum in Support of Defendant Countrywide Home Loans Inc.'s Motion for Order Determining Adversary Proceeding is Non-Core ("Motion") (Doc. # 13) filed on August 3, 2009, by Defendant Countrywide Home Loans, Inc. ("Countrywide").[1] The Motion seeks a determination that all of the causes of action in the instant adversary proceeding constitute non-core proceedings. Debtor/Plaintiff Flora Bennett ("Debtor") did not file a response to the Motion.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. Pursuant to 28 U.S.C. § 157(b)(3), this Court is authorized to determine whether or not a proceeding is a core proceeding. The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

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[1] Based on the documentation attached to proof of claim no. 7 in this case, the original lender on the note at issue was Full Spectrum Lending, Inc. The Allonge to Note dated 06/26/2000, is from Full Spectrum Lending, Inc. to Countrywide Home Loans, Inc. The Allonge to Deed of Trust/Mortgage Note dated June 26, 2000 is to Countrywide Home Loans Servicing, L.P. The exact nature of the relationship between Countrywide Home Loans, Inc. – the defendant in this adversary proceeding – and Countrywide Home Loans Servicing, L.P. – the party that filed the Objection to Confirmation and Claim No. 7 – is not clear, but both entities assert rights regarding the note and mortgage on Debtor's principal residence. In the Agreed Order, (defined *infra*), Countrywide Home Loans Servicing, L.P. is defined as "CHL." One of the provisions of the Agreed Order is that "Debtor filed an Adversary Proceeding on August [sic] 2, 2009 naming CHL as a Defendant; the adversary case pertains to issues regarding the claim of CHL[.]" (Agreed Order at 2.) Thus, it appears that, at least for purposes of Debtor's case, Countrywide Home Loans, Inc. and Countrywide Home Loans Servicing, L.P. consider themselves to be and are acting as one entity. As a consequence, the Court will refer to both entities as "Countrywide."

I. PROCEDURAL BACKGROUND

Debtor filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code on January 6, 2009, at which time Debtor also filed a chapter 13 plan ("Plan"). Countrywide filed Objection to Confirmation of Chapter 13 Plan of Debtor ("Objection to Confirmation") (Main Case Doc. # 13) on January 27, 2009. Countrywide objected to confirmation of Debtor's Plan on the grounds that the Plan failed to provide for payment of the arrearage on a mortgage in the approximate amount of $30,822.55. Countrywide further objected to the interest rate in the Plan because it was less than the contract rate of interest.

The Court scheduled a hearing on the Objection to Confirmation for February 26, 2009. That hearing was continued until March 19, 2009. At the March 19 hearing, Debtor stated that the claim of Countrywide (denominated Claim No. 7 on the Claims Docket), which provided the basis for the Objection to Confirmation, was overstated and that Debtor had defenses and/or counterclaims to the amount of the claim. Debtor's counsel represented that Debtor intended to file an adversary proceeding within two weeks that would object to Countrywide's claim and assert such counterclaims. Michael A. Gallo, Standing Chapter 13 Trustee, stated that the confirmation process could not go forward absent resolution of the issues to be asserted in the adversary proceeding. As a consequence, the Court adjourned the hearing on the Objection to Confirmation until May 28, 2009. The Court indicated that the Objection to Confirmation would

be sustained if the adversary proceeding was not filed.

Debtor filed Complaint for Improper and Unauthorized Fees, Violations of Federal and State Law ("Complaint") (Doc. # 1), which commenced the instant adversary proceeding on April 2, 2009.

On August 17, 2009, this Court entered Agreed Order Resolving Objections to Confirmation of Chapter 13 Plan ("Agreed Order") (Main Case, Doc. # 24). The Agreed Order expressly provides that (i) Countrywide filed a proof of claim "evidencing a pre-petition arrearage claim of $30,822.55;" (ii) Debtor filed the instant adversary proceeding against Countrywide, which "pertains to issues regarding the claim of [Countrywide];" and (iii) the Objection to Confirmation "shall be held in abeyance pending the outcome of the adversary proceeding." (Agreed Order at 2.)

II. DEBTOR'S CAUSES OF ACTION

The Complaint (Doc. # 1), which alleges that "[t]his matter is primarily a core proceeding[,]" (Compl. at 3.) contains five claims for relief, as follows:

1. First Claim for Relief (Real Estate Settlement Procedures Act) ("RESPA");
2. Second Claim for Relief (Negligent Loan Servicing and Breach of Fiduciary Duty);
3. Third Claim for Relief (Ohio Consumer Sales Practices Act)("OCSPA");
4. Fourth Claim for Relief (Breach of Contract and the Covenant of Good Faith and Fair Dealing); and

5. Fifth Claim for Relief (Intentional Infliction of Emotional Distress).

The prayer for relief seeks (a) actual damages, (b) statutory damages, (c) punitive damages, (d) Debtor's reasonable attorney's fees and legal expenses, and (e) other relief as the Court may deem just and proper.

III. CORE VS. NON-CORE CLAIMS

Proceedings are categorized as core or non-core based upon 28 U.S.C. § 157, which provides:

> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> (2) Core proceedings include, but are not limited to --
>
> (A) matters concerning the administration of the estate;
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
> (C) counterclaims by the estate against persons filing claims against the estate;
> (D) orders in respect to obtaining credit;
> (E) orders to turn over property of the estate;
> (F) proceedings to determine, avoid, or recover preferences;
> (G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;
(I) determinations as to the dischargeability of particular debts;
(J) objections to discharges;
(K) determinations of the validity, extent, or priority of liens;
(L) confirmations of plans;
(M) orders approving the use or lease of property, including the use of cash collateral;
(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

28 U.S.C. § 157 (West 2009). The bankruptcy court, in the first instance, is authorized to determine whether or not a proceeding is core.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

Id.

Countrywide asserts that Debtor's "claims are based upon a contractual relationship that was entered into long before the Petition Date and alleged conduct that occurred long before the Petition Date. Her claims do not invoke a substantive right

provided by Title 11 of the Bankruptcy Code and this is not a proceeding that could arise only in the context of a bankruptcy case." (Mot. at 3.) Countrywide argues that Debtor's "claims are based solely on state law contract and tort theories, as well as state and federal statutory rights, which could have been brought in the absence of the bankruptcy petition." *Id.*

Countrywide is correct that Debtor's Complaint is based on alleged statutory breaches that constitute breach of contract, other breach of contract claims, and tort claims. These types of claims are generally deemed to be non-core. However, that is not always the case.

Non-core proceedings are those proceedings not specifically identified as core proceedings.

> A non-core proceeding has four characteristics: (1) it is not specifically identified as a core proceeding under 28 U.S.C. §§ 157(b)(2)(B)-(N); (2) it existed prior to the filing of the bankruptcy case; (3) it would continue to exist independent of the provisions of Title 11; and (4) the parties' rights, obligations, or both are not significantly affected as a result of the filing of the bankruptcy case. *In re Hughes-Bechtol*, 141 B.R. 946, 948-49 (Bankr. S.D. Ohio 1992). Further, "since Congress intended to interpret core proceedings broadly, those proceedings which do not contain all the characteristics of a non-core proceeding will be determined to be core." *Id.*

Fokkena v. Countrywide Home Loans, Inc. (*In re O'Neal*), 2008 U.S. Dist. LEXIS 64437, at *9-10 (N.D. Ohio 2008). In the present case, the causes of action pled as the First through Fourth Claims do not have all four characteristics of a non-core proceeding, as defined in *In re Hughes-Bechtol*. The First through Fourth Claims meet the

first three characteristics of being a non-core proceeding because each such claim: (i) is not specifically identified in §§ 157(b)(2)(B)-(N); (ii) existed prior to Debtor filing the bankruptcy case; and (iii) would continue to exist independent of the provisions of Title 11. However, each of these Claims lacks the fourth characteristic of a non-core proceeding in that the parties' rights, obligations, or both are significantly affected as a result of filing the bankruptcy case.

The rights and obligations of Debtor and Countrywide are significantly affected by the instant adversary proceeding. The adversary proceeding must be resolved in order to determine (i) the amount of any claim Countrywide has against Debtor's bankruptcy estate;[2] and (ii) whether the Objection to Confirmation should be sustained or overruled.

> As the Trustee has voluntarily dismissed the fraudulent transfer claim, all of the Trustee's remaining claims are ones that have generally been deemed non-core. *See In re Coe-Truman Tech.*, 214 B.R. [183] at 187 [(N.D. Ill. 1997)] (stating that breach of contract claims have consistently and traditionally been found to be non-core); *In re Iridium Operating L.L.C.*, 285 B.R. 822, 832 (S.D.N.Y. 2002) (stating that breach of fiduciary duty, and aiding and abetting breach of fiduciary duty claims are "traditionally labeled non-core"); *Massey v. Baker O'Neal Holdings, Inc.*, 2004 U.S. Dist. LEXIS 2003 (S.D. Ind. 2004) (parties concede and agree that unjust enrichment is non-core). A non-core claim will be

[2] Countrywide's proof of claim is based on an alleged arrearage owed by Debtor on a loan secured by Debtor's principal residence. Each of the first four claims in the Complaint alleges violations of statutes – *i.e.*, RESPA in the First Claim and OCSPA in the Third Claim – or breach of contract – *i.e.*, negligent loan servicing and breach of fiduciary duty in the Second Claim and breach of contract in the Fourth Claim. An award of damages under one or more of these causes of action would affect the validity of Countrywide's debt and/or reduce or eliminate amounts asserted by Countrywide in its proof of claim.

> considered core if it "arises out of the same transaction as the creditor's proofs of claim . . . or . . . [its] adjudication . . . would require consideration of issues raised by the proofs of claim . . . such that the two claims are logically related." *CDX Liquidating Trust v. Venrock Assocs*., 2005 U.S. Dist. LEXIS 16704, *6-7 (N.D. Ill 2005).

Grochocinski v. LaSalle Bank Nat'l Assoc. (*In re K&R Express Systems, Inc*.), 2007 U.S. Dist. LEXIS 62878, at *8-9 (N.D. Ill. 2007). The claims asserted by Debtor in the instant adversary proceeding arise out of the same transaction upon which Countrywide bases its proof of claim. As a consequence, the First through Fourth Claims of the Complaint come within the purview of 28 U.S.C. §§ 157(b)(2)(B) and (C). Moreover, the outcome of the adversary proceeding will affect confirmation, which is a core proceeding pursuant to § 157(b)(2)(L).

The Fifth Claim in the Complaint alleges a tort and seeks monetary damages, which, if awarded, could also be used as a set-off against amounts Debtor owes to Countrywide. Debtor would not be limited to setoff, however, if the Court were to award damages in excess of any allowed claim in favor of Countrywide.

The Court notes that the Complaint is inartfully drafted. Despite its technical deficiencies, this Court reads the Complaint as Debtor's objection to Countrywide's proof of claim. This is consistent with Debtor's intent, expressed at a hearing before this Court, when counsel for Debtor described the adversary proceeding as (i) an objection to Countrywide's claim; and (ii) the assertion of counterclaims against Countrywide. Indeed, the parties expressly

recognize the relationship and inter-relatedness by, between, and among: (i) the adversary proceeding; (ii) Countrywide's Claim No. 7; and (iii) the Objection to Confirmation in the Agreed Order, which expressly holds in abeyance Countrywide's Objection to Confirmation pending resolution of this adversary proceeding. The amount and validity of the charges comprising Countrywide's arrearage claim must first be determined before the Court can rule on the Objection to Confirmation.

As indicated above, Debtor's counsel described the adversary proceeding as an objection to Countrywide's proof of claim. Based upon (i) the claims in the Complaint; and (ii) the Agreed Order, the First through Fourth Claims in the adversary proceeding deal with the allowance or disallowance of Countrywide's claim against the estate, as set forth in § 157(b)(2)(B). All of the claims in the Complaint constitute counterclaims by the estate against Countrywide, as a person filing a claim against the estate, as set forth in § 157(b)(2)(C). In addition, the adversary proceeding is closely aligned with confirmation of Debtor's Plan since the Objection to Confirmation is being held in abeyance until this adversary proceeding is resolved. *See* § 157(b)(2)(L) and Agreed Order.

Countrywide postulates that "numerous courts have held a debtor's complaint based in contract and tort constitutes a non-core proceeding." (Mot. at 3.) The cases cited by Countrywide in support of this proposition, however, are distinguishable from the

claims asserted in the instant adversary proceeding. None of the cases cited by Countrywide involved an adversary proceeding that constituted an objection to the non-debtor party's proof of claim. In contrast, Debtor's adversary proceeding was filed in response to Countrywide's (i) Claim No. 7; and (ii) Objection to Confirmation. The Complaint's First through Fourth Claims attack the validity of the basis for Countrywide's proof of claim and seek to reduce or eliminate the amount of the debt asserted by Countrywide. As a consequence, the alleged causes of action in the instant adversary proceeding constitute core proceedings despite being based on contract and tort. As the parties expressly recognize in the Agreed Order, Debtor's case cannot proceed to confirmation absent resolution of the causes of action asserted in this adversary proceeding.

IV. CONCLUSION

Based upon the foregoing, this Court concludes that the First through Fourth Claims asserted by Debtor in the Complaint are core proceedings. The Fifth Claim may be non-core, but because it is substantially related to the other claims in the Complaint, the Court would have ancillary jurisdiction over it. Accordingly, the Complaint is primarily, if not entirely, a core proceeding.

An appropriate order will follow.

# # #

IT IS SO ORDERED.

Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

Dated: August 21, 2009
08:53:53 AM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
FLORA BENNETT	*	**CASE NUMBER 09-40024**
Debtor.	*	
* * * * * * * * * * * * * * * * * *	*	
FLORA BENNETT,	*	**ADVERSARY NUMBER 09-04075**
Plaintiff,	*	
v.	*	
COUNTRYWIDE HOME LOANS, INC.,	*	**HONORABLE KAY WOODS**
Defendant.	*	

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ORDER DETERMINING ADVERSARY PROCEEDING IS CORE PROCEEDING
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For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby finds and holds that: (i) the First through Fourth Claims asserted by Debtor in Complaint for

Improper and Unauthorized Fees, Violations of Federal and State Law ("Complaint") (Doc. # 1) are core proceedings; (ii) the Fifth Claim asserted by Debtor in the Complaint may be non-core, but because it is substantially related to the other claims in the Complaint, the Court would have ancillary jurisdiction over it; and (iii) the Complaint is primarily, if not entirely, a core proceeding.

# # #