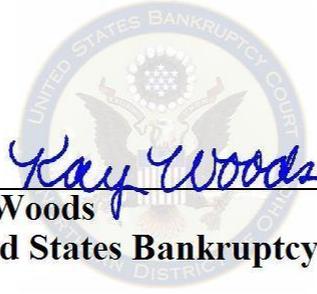


IT IS SO ORDERED.



Dated: April 28, 2010  
11:47:41 AM

Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	CASE NUMBER 09-43816
JERRY HALL and	*	
JUDY HALL,	*	CHAPTER 13
	*	
Debtors.	*	HONORABLE KAY WOODS

\*\*\*\*\*  
MEMORANDUM OPINION REGARDING DEBTORS' OBJECTION  
TO PROOF OF CLAIM NO. 3 FILED BY ONEWEST BANK, FSB  
\*\*\*\*\*

This cause is before the Court on Objection to Proof of Claim No. 3 Filed by OneWest Bank, FSB (Doc. # 16) filed by Debtors Jerry Hall and Judy Hall on October 26, 2009, in which Debtors seek disallowance of "foreclosure costs of \$1,836.00[.]" (Obj. at 2.) Debtors argue that OneWest did not have a contractual or other right to include the foreclosure costs in the proof of claim because OneWest began a foreclosure action in state court prior to obtaining rights to the note and mortgage through assignment. On November 13, 2009, OneWest Bank, FSB filed Response to Objection to Claim (Doc. # 23). OneWest contends that it had possession of the note and was

thus the holder of the note at the time it began the foreclosure proceedings. As a consequence, OneWest asserts the foreclosure costs should be allowed as part of its claim because it had the right to enforce the note. The Court held a hearing on the Objection on January 7, 2010, at which time the parties were directed to brief the issue of whether the foreclosure costs could be recovered by OneWest. Simultaneous briefs were timely filed on March 4, 2010 (Doc. ## 33 and 34).

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. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

#### **I. ISSUES TO BE DETERMINED**

There are two issues for this Court to decide. The first issue is whether OneWest has the contractual right to assert a claim for the costs it incurred in initiating the state court foreclosure proceeding prior to having the assignment of the underlying mortgage. Assuming the answer to the first question is in the affirmative, the second question is whether all of the costs included in Claim No. 3 are proper.

## II. FACTUAL BACKGROUND

Debtors executed a Note on February 16, 2007, which evidenced their obligation to repay a loan in the amount of \$133,000.00 from IndyMac Bank, F.S.B. (Ex. C to Debtors' Br.) Although the amounts and dates are not specified, Debtors apparently defaulted in making payments under the Note, which resulted in a pre-petition arrearage of \$9,463.67. (Obj. at 2.)

Pursuant to the terms of the Note, the lender had the right to transfer the Note. Prior to July 15, 2009, IndyMac endorsed the Note in blank and transferred physical possession of the Note to OneWest. (Resp. at 1.) On July 17, 2009, Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for IndyMac, assigned Debtors' mortgage to OneWest. OneWest recorded the assignment of mortgage on July 27, 2009, in Trumbull County, Ohio.

On October 8, 2009, Debtors filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code. OneWest filed Claim No. 3 on October 22, 2009, followed by Debtors' Objection thereto on October 26, 2009. Claim No. 3 includes an item designated: "Prior Foreclosure Costs" in the amount of \$1,836.00. Although there is no breakdown of the foreclosure costs in Claim No. 3 itself, Debtors state in their Brief that these costs are comprised of the following: "Title search \$696.00; complaint filing fee \$565.00; service/summons charge of \$375.00; title update \$160.00; assignment costs \$40.00." (Debtors' Br. ¶ 6.) Because OneWest failed to provide any contrary information about the foreclosure costs, the

Court will deem the amounts set forth in Debtors' Brief to be an accurate breakdown and itemization of such costs.

**III. ONEWEST HAS THE CONTRACTUAL RIGHT TO ENFORCE THE NOTE**

OneWest provided an affidavit of Dennis Kirkpatrick, Vice President, which states: "ONEWEST BANK, FSB had physical possession of the Note on the date the Complaint was filed, which was on July 15, 2009." (Ex. B. to Resp.) Because the mortgage is not property separate and distinct from the Note but is a mere incident of the debt, OneWest argues that assignment of the mortgage, which occurred on July 17, 2009, did not transfer ownership of the Note. (OneWest Br. at unnumbered 3.) Rather, OneWest relies on its status as a holder of the Note as the basis for its contractual right to enforce the Note and mortgage. (*Id.*)

Debtors do not dispute that OneWest had possession of the Note when the foreclosure complaint was filed. In fact, Debtors do not discuss possession of the Note at all. Instead, Debtors argue that OneWest did not acquire any right to enforce the Note and mortgage until MERS assigned the mortgage to OneWest on July 17, 2009. Debtors contend that "OneWest 'jumped the gun' and foreclosed on July 15, 2009, two days before it was the legal assignee to the mortgage and note and before it had a contractual right to foreclose let alone a contractual right to the costs of foreclosure." (Debtors' Br. at 2.)

OneWest argues that because it possessed the Note, which was endorsed in blank, it was a holder of the Note and had all rights

to enforce the Note and mortgage. Ohio law, which governs the enforceability of the Note and mortgage, supports the position of OneWest.

For nearly a century, Ohio courts have held that whenever a promissory note is secured by a mortgage, the note constitutes the evidence of the debt, and the mortgage is a mere incident to the obligation. *Edgar v. Haines*, [141 N.E. 837 (Ohio 1923)]. Therefore, the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered. *Kuck v. Sommers*, [100 N.E.2d 68, 75 (Ohio 1950)].

Various sections of the Uniform Commercial Code, as adopted in Ohio, support the conclusion that that [sic] the owner of a promissory note should be recognized as the owner of the related mortgage. . . . Further, "subsection (G) [of OHIO REV. CODE § 1309.203] codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." [OHIO REV. CODE ANN. § 1309.203, Official Comment 9 (LexisNexis 2010)].

*U.S. Bank Nat'l Assoc. as Trustee for the BNC Mort. Loan Trust 2006-2 v. Marcino*, 908 N.E.2d 1032, 1038-39, 2009 Ohio 1178, ¶¶ 52-53 (Ohio Ct. App. 2009). *Accord*, *The Gen'l Excavator Co. v. Judkins*, 190 N.E. 389 (Ohio 1934) (Syllabus No. 3: "An equitable assignment requires no particular form. It is accomplished where there is an intention on one side to assign and an intention on the other to accept, supported by a sufficient consideration and disclosing a present purpose to make an appropriation of a debt or fund.")

There is no dispute that OneWest had physical possession of the Note, endorsed in blank, prior to initiating the foreclosure action in state court. Physical possession of the Note also provided

OneWest with an equitable assignment of the mortgage. Consequently, OneWest had the contractual right to enforce the Note and mortgage when it began the foreclosure action.

#### IV. PROPRIETY OF ONEWEST'S FORECLOSURE COSTS

Although OneWest had the right to enforce the Note when it initiated the state court foreclosure action, OneWest is bound by the terms of the Note and mortgage. In addition, OneWest's claim is limited to the amounts that are recoverable pursuant to the terms of the Note and mortgage. As set forth in the Factual Background, above, OneWest failed to provide any details about the amounts included in the "Foreclosure Costs." As a consequence, this Court accepts Debtors' statement of what is included in this part of Claim No. 3.

Section 6(E) of the Note states, "If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law." (Ex. C to Debtors' Br.) The mortgage provides at Section 22, as follows:

If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, costs of title evidence.

(*Id.*)

Thus, if Debtors received proper notice of default, OneWest may be entitled to collect certain foreclosure costs. The Court has no information concerning OneWest's provision or lack thereof of proper notice of default prior to commencing the foreclosure action. As a consequence, the Court cannot determine whether OneWest is entitled to collect the pre-petition "Foreclosure Costs" included in Claim No. 3.

Nevertheless, this Court will disallow the \$40.00 "assignment charge." Although the Note and mortgage are assignable, there is absolutely no provision in either document that permits the assigning lender or the assignee to charge the Debtors for any costs in connection with such assignment. Accordingly, the \$40.00 assignment cost is not recoverable by OneWest from the Debtors even if OneWest can establish that it complied with all terms of the Note and mortgage in its attempt to enforce the Note.

#### **V. CONCLUSION**

For the foregoing reasons, this Court will overrule Debtors' Objection to the extent such Objection is based on OneWest's inability to enforce the Note because the mortgage was not assigned to OneWest until two days after the foreclosure action was initiated. The Court will sustain the Objection to the extent of disallowing \$40.00 of the "Foreclosure Costs."

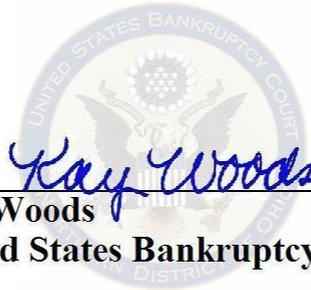
Since OneWest's right to recover its costs associated with the foreclosure action depends on OneWest's compliance with the terms and conditions of the Note and mortgage prior to commencing the

foreclosure action, this Court will require OneWest to provide Debtors with evidence of OneWest's compliance with the terms of the Note and mortgage. If the parties do not submit an agreed order resolving the remainder of the Objection within thirty (30) days, this Court will set the matter for further evidentiary hearing.

An appropriate order will follow.

# # #

**IT IS SO ORDERED.**



**Dated: April 28, 2010  
11:47:41 AM**

**Kay Woods  
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO**

**IN RE:**

**JERRY HALL and  
JUDY HALL,**

**Debtors.**

\*  
\*  
\* **CASE NUMBER 09-43816**  
\*  
\* **CHAPTER 13**  
\*  
\* **HONORABLE KAY WOODS**  
\*

\*\*\*\*\*  
**ORDER SUSTAINING, IN PART, AND OVERRULING, IN PART, DEBTORS'  
OBJECTION TO PROOF OF CLAIM NO. 3 FILED BY ONEWEST BANK, FSB**  
\*\*\*\*\*

This cause is before the Court on Objection to Proof of Claim No. 3 Filed by OneWest Bank, FSB (Doc. # 16) filed by Debtors Jerry Hall and Judy Hall on October 26, 2009.

For the reasons stated in the Court's Memorandum Opinion entered this date, this Court overrules Debtors' Objection to the extent such Objection is based on OneWest's inability to enforce the Note because the mortgage was not assigned to OneWest until two days after the foreclosure action was initiated. The Court sustains the Objection to the extent of disallowing \$40.00 of the

"Foreclosure Costs."

Moreover, because OneWest's right to recover its costs associated with the foreclosure action depends on OneWest's compliance with the terms and conditions of the Note and mortgage prior to commencing the foreclosure action, OneWest is hereby ordered to provide Debtors with evidence of such compliance within fourteen (14) days after entry of this order. If the parties do not submit an agreed order resolving the remainder of the Objection within thirty (30) days, this Court will set the matter for further evidentiary hearing.

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