IT IS SO ORDERED.

Kay Woods

Kay Woods
United States Bankruptcy Judge

Dated: February 04, 2011
02:15:37 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	**CASE NUMBER 09-41910**
MEGEN CRISPIN,	*	**CHAPTER 13**
Debtor.	*	**HONORABLE KAY WOODS**

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MEMORANDUM OPINION REGARDING THE DEBTOR'S OBJECTION TO CLAIM NO. 2-2 FILED BY FIRSTMERIT BANK

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Debtor Megen Crispin filed Objection to Claim of FirstMerit Bank (Claim Number: 2-2) ("Objection to Claim") (Doc. # 35) on September 8, 2010. The Objection to Claim seeks disallowance of an amended proof of claim filed by FirstMerit Bank ("FirstMerit"). FirstMerit filed Claim No. 2-1 on June 3, 2009, and amended the claim on August 31, 2010 ("Claim No. 2-2").

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 Federal Rule of Bankruptcy Procedure 7052.

I. FACTS

The Debtor filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code on May 26, 2009 ("Petition Date"). The first meeting of creditors pursuant to 11 U.S.C. § 341 ("341 Meeting") was scheduled for June 17, 2009. As a consequence, when FirstMerit filed Claim No. 2-1 on June 3, 2009, it was within the time period specified in Federal Rule of Bankruptcy Procedure 3002(c) — *i.e.*, within 90 days after the first date set for the 341 Meeting. Claim No. 2-1 was filed as a secured claim in the amount of $11,983.55, secured by "real estate." Claim No. 2-2 was filed on August 31, 2010, to assert an unsecured claim in the amount of $11,666.34.

On the Petition Date, the Debtor filed Chapter 13 Plan (Doc. # 2), which utilized the uniform chapter 13 plan adopted by this Court pursuant to Administrative Order No. 08-12, dated December 18, 2008. Article III of the Chapter 13 Plan provides:

> Debtor will surrender property to the creditor(s) listed below and the creditor may file a claim for the deficiency, which will be treated as a non-priority general unsecured claim. Any unsecured deficiency claim must be filed the <u>later</u> of: (i) the time period provided for filing proofs of claim, or (ii) ninety (90) days after entry of a final Order directing the surrender or abandonment of the collateral. If the creditor does not timely file a claim, such creditor shall be deemed to have accepted the surrendered property in full satisfaction and discharge of the debt and shall be barred from participating in any payment for such debt

under Debtor's Plan.

(Chapter 13 Plan at 4 (emphasis in original).) Within Article III, the Debtor listed two creditors with respect to residential real estate located at 1048 Dietz Avenue, Akron, Ohio 44301 ("Debtor's Residence"): (i) Chase Mortgage; and (ii) FirstMerit.

On June 10, 2009, Chase Home Finance, LLC ("Chase") filed Objection to Debtor's Plan by Chase Home Finance, LLC. [sic] (Property Address: 1048 Dietz Avenue, Akron, Ohio 44301) ("Confirmation Objection") (Doc. # 12). Chase objected to the Chapter 13 Plan "to preserve its right to file a deficiency balance Proof of Claim within 180 days of obtaining relief in the event a deficiency results from the sale of the property at a judicial foreclosure sale." (Conf. Obj. at 2.) The Court held a hearing on the Confirmation Objection on July 16, 2009, at which time the Court explained the reason for the provision limiting the time to file unsecured deficiency claims in Article III of the uniform chapter 13 plan. The Court included the bar date for filing deficiency balance claims in the uniform plan to prevent a creditor (which determines when to file a motion for relief and subsequent foreclosure) from filing a claim for a deficiency balance so late in the plan process that a debtor cannot complete the plan and obtain a discharge. The Court further explained that, if the collateral is not liquidated in the 90-day period referenced in Article III, the creditor is required to file a proof of claim based on the creditor's good faith estimate of the deficiency balance and amend such proof of claim

when the exact amount of the deficiency balance is known. On August 18, 2009, Chase withdrew the Confirmation Objection (Doc. # 26).

On October 21, 2009, Chase filed Motion of Chase Home Finance, LLC for Relief from Stay (Property Address: 1048 Dietz Avenue, Akron, Ohio 44301) ("Motion for Relief") (Doc. # 27).[1] The Court entered Order for Relief from Stay of Chase Home Finance, LLC (Property Address: 1048 Dietz Avenue, Akron, Ohio 44301) ("Order Granting Relief") (Doc. # 29) on November 23, 2009, which provided:

> 2. The Chapter 13 Trustee shall discontinue payments to Movant on its claim under the Chapter 13 Plan filed by the Debtor(s). Movant is directed to file a report of sale promptly following liquidation of the Collateral if any excess proceeds have been received and Movant is given leave to file an unsecured deficiency claim within 60 days after liquidation of the Collateral, if such claim exists.

(Order Granting Relief at 2.) The language of the Order Granting Relief (which provided Chase with 60 days after liquidation of the collateral to file an unsecured deficiency claim) is at odds with Article III of the Chapter 13 Plan, but nevertheless, it applied only to Chase, as the party that moved for relief from stay.

The Chapter 13 Plan was confirmed by Confirmation Order dated December 2, 2009 (Doc. # 32). As set forth above, the Chapter 13 Plan called for surrender of the Debtor's Residence, which served

[1] Chase previously filed a motion for relief from stay (Doc. # 14), which was deficient and subject to Order Concerning Motion for Relief from Stay (Doc. # 17). Chase withdrew the first motion for relief from stay on July 2, 2009 (Doc. # 21).

as collateral for the secured claims of Chase[2] and FirstMerit. The Confirmation Order, which incorporated the terms of the Chapter 13 Plan, required FirstMerit to file a general unsecured claim for the deficiency balance, if any, based on surrender of the Debtor's Residence ("Deficiency Claim") no later than 90 days after entry of the Confirmation Order — *i.e.*, by March 2, 2010.

As set forth above, FirstMerit failed to amend Claim No. 2-1 until August 31, 2010, which was almost six months after the deadline provided in the Chapter 13 Plan. The Debtor objected to Claim No. 2-2 on the basis that "[t]he period of time creditor had to file such claim has since expired." (Obj. to Claim at 1.) Although FirstMerit did not respond to the Objection to Claim, the Court held a hearing on the matter on December 2, 2010. At the hearing, the Court requested counsel for the Debtor and Michael A. Gallo, Standing Chapter 13 Trustee ("Trustee"), to brief the issue of the timeliness of FirstMerit's claim. On December 8, 2010, the Trustee timely filed Standing Chapter 13 Trustee's Memorandum in Support of Objection (Doc. # 45). On January 3, 2011, the Debtor timely filed Debtor's Memorandum in Support of Objection (Doc. # 46).

II. LEGAL ANALYSIS

Generally, a timely filed proof of claim may be amended to

[2] Although the Chapter 13 Plan stated that Chase Mortgage held a security interest in the Debtor's Residence, the exhibits attached to the Motion for Relief established that Chase Home Finance, LLC was the holder of the secured claim.

assert new theories — but not new claims — with the amendment relating back to the original filing date. *See Mingus v. Lombardo (In re Lombardo*), 2005 Bankr. LEXIS 692, *17 (B.A.P 6th Cir. Apr. 28, 2005) ("A creditor can amend its claim after the claims bar date to assert a new theory based on the operative facts that support the original claim.") Some courts allow amendment to claims in chapter 13 cases after the collateral has been surrendered. *See In re Brooks*, 407 B.R. 429 (Bankr. M.D. Fla. 2009) (Court overruled objection and allowed amended unsecured deficiency claims where (i) original secured claims were filed prior to confirmation, and (ii) creditor objected to debtor's surrender of the collateral in full satisfaction of debt.). Other courts provide for distribution of the deficiency balance through modification of the chapter 13 plan. *See In re Brown*, 2007 Bankr. LEXIS 1544 (Bankr. E.D. Va. May 1, 2007) (Court allowed amended deficiency claim and ordered debtors to file a modified chapter 13 plan, finding no prejudice to other unsecured creditors.)*; In re Matthews*, 313 B.R. 489 (Bankr. M.D. Fla. 2004) (Court disallowed amended deficiency claim, but modified confirmation order so that creditor's original secured claim was allowed as a general unsecured claim to the extent the value of the collateral, as stated in the plan, was less than the secured claim.). These cases all weigh the equities between the undersecured creditor and other unsecured creditors.[3]

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[3] Allowance of amendment to claims in the chapter 7 context differs from amendment to a claim in chapter 13, but still requires a balancing of the equities. One such chapter 7 case from this Circuit is *In re Spurling*, 391

A case with facts similar to the instant case is *In re George*, 426 B.R. 895 (Bankr. M.D. Fla. 2010), wherein an amended claim for an unsecured deficiency balance was found to be untimely. In the *George* case, National City Bank ("NCB"), which held the second mortgage on the debtors' residence, timely filed a claim indicating that it was fully secured. Notwithstanding NCB's knowledge from the start of the case that the debtors intended to surrender their home, NCB sought no payments for any unsecured deficiency claim. After the debtors had made substantial payments to their unsecured creditors, the first mortgage holder foreclosed. NCB then amended its claim, "transforming the character of its debt from secured to unsecured, contending this belated claim 'relates back' to its original claim." *Id.* at 897. The court found that it would be inequitable to treat NCB as a belated unsecured creditor. "The plan, treating NCB as a fully secured creditor, was confirmed in March 2008. To change that characterization at this juncture [more than one year afer confirmation] would cause substantial prejudice to the debtors and to their unsecured creditors. NCB had the

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B.R. 783 (Bankr. E.D. Tenn. 2008). In that case, four creditors amended proofs of claim to assert claims for deficiencies that remained after the creditors foreclosed on their collateral during the course of the bankruptcy case. Each of the original proofs of claim asserted that the value of the claim was "to be determined" or "unknown" and was secured by collateral. The four creditors thereafter amended their claims, recharacterizing them from secured to unsecured. The chapter 7 trustee objected to the amended proofs of claim as untimely.

The *Spurling* court found it significant that the secured creditors filed claims in the chapter 7 case, because it showed that they wished "to share in the estate as an unsecured creditor. Otherwise, the secured creditor would not have filed a proof of claim and would simply have relied upon its security." *Id.* at 789. The court noted, however, that a court "may well bar the amendment as inequitable" if a proof of claim is not amended until just before the distribution is made. *Id.* at 790.

opportunity to establish it was or was not secured, but NCB failed to timely act." *Id.* at 900. In determining whether the amended claim related back to the original claim, the court considered the equities of the situation.

> Courts consider five equitable factors in determining whether a late filed claim will "relate back" as an amendment to a timely, earlier filed claim: (1) whether the debtor and creditors relied on the earlier proof of claim or had reason to know that a subsequent proof of claim would be filed; (2) whether other creditors would receive a windfall if the court refused to allow amendment; (3) whether the claimant intentionally or negligently delayed in filing the amendment; (4) the justification for the failure to file for an extension to the bar date; and (5) whether other equitable considerations exist that compel amendment.

Id. (citing *In re Matthews*, 313 B.R. 489, 494 (Bankr. M.D. Fla. 2004)).

In the instant case, the Court cannot evaluate all of the five factors referenced in *In re Matthews* because FirstMerit did not file a response to the Objection to Claim. Thus, the Court cannot know whether FirstMerit intentionally or negligently delayed in filing Claim No. 2-2 or whether there was any justification for FirstMerit's failure to seek an extension of the bar date. However, based on the facts in this case, the Court finds that equitable factors 1, 2 and 5, above, all favor disallowance of Claim No. 2-2.

The instant case is governed not just by the bar date in the Bankruptcy Rules, but also by the specific bar date for Deficiency Claims in the confirmed Chapter 13 Plan. The purpose of the bar date in the Chapter 13 Plan is to prevent a creditor from amending a secured claim to assert an unsecured deficiency balance late in

the plan process.[4] In the cases cited above that permitted amendment of a timely filed secured claim to assert an unsecured deficiency balance, there was no bar date provision in the chapter 13 plan or the confirmation order. In the instant case, the Debtor's confirmed Chapter 13 Plan provided for surrender of the Debtor's Residence in full satisfaction of FirstMerit's debt unless FirstMerit filed an unsecured deficiency claim "the <u>later</u> of: (i) the time period provided for filing proofs of claim, or (ii) ninety (90) days after entry of a final Order directing the surrender or abandonment of the collateral." (Chapter 13 Plan at 4 (emphasis in original).) FirstMerit was expressly notified that if it did not timely file a claim, FirstMerit would be deemed to have accepted the surrendered property in full satisfaction and discharge of the debt and would be barred from participating in any payment for such debt under the Debtor's Chapter 13 Plan. Despite these express provisions, FirstMerit did not (i) object to the Debtor's Chapter 13 Plan, or (ii) timely file a Deficiency Claim.

As a consequence, this Court finds that Claim No. 2-2 is untimely. The Debtor's Objection to Claim is well taken. The Court will sustain the Objection to Claim and disallow Claim No. 2-2. An appropriate Order will follow.

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[4] This is similar to the circumstance cited by the *Spurling* court where an amendment to a proof of claim could be barred as inequitable in a chapter 7 case.

IT IS SO ORDERED.

Kay Woods

Kay Woods
United States Bankruptcy Judge

Dated: February 04, 2011
02:15:58 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	**CASE NUMBER 09-41910**
MEGEN CRISPIN,	*	**CHAPTER 13**
Debtor.	*	**HONORABLE KAY WOODS**

****

ORDER SUSTAINING THE DEBTOR'S OBJECTION TO CLAIM NO. 2-2 FILED BY FIRSTMERIT BANK

****

Debtor Megen Crispin filed Objection to Claim of FirstMerit Bank (Claim Number: 2-2) ("Objection to Claim") (Doc. # 35) on September 8, 2010. The Objection to Claim seeks disallowance of Claim No. 2-2 filed by FirstMerit Bank ("FirstMerit") on August 31, 2010. Although FirstMerit did not respond to the Objection to Claim, the Court held a hearing on the matter on December 2, 2010. On December 8, 2010, Michael A. Gallo, Standing Chapter 13 Trustee, filed Standing Chapter 13 Trustee's Memorandum in Support of Objection (Doc. # 45). On January 3, 2011, the Debtor filed

Debtor's Memorandum in Support of Objection (Doc. # 46).

For the reasons set forth in this Court's Memorandum Opinion Regarding the Debtor's Objection to Claim No. 2-2 Filed by FirstMerit Bank entered on this date, the Court hereby (i) finds that Claim No. 2-2 is untimely; (ii) sustains the Objection to Claim; and (iii) disallows Claim No. 2-2.

IT IS SO ORDERED.

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