

IT IS SO ORDERED.

Dated: April 16, 2013
09:09:34 AM



Kay Woods
 Kay Woods
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

ERIC MATTHEW MULLENEX,

Debtor.

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CASE NUMBER 10-40194

CHAPTER 13

HONORABLE KAY WOODS

ORDER (i) SUSTAINING OBJECTION TO NOTICE OF MORTGAGE PAYMENT
CHANGE; AND (ii) STAYING COLLECTION OF INCREASED MONTHLY
MORTGAGE PAYMENT BY CITIMORTGAGE *NUNC PRO TUNC*

This cause is before the Court on Objection to Notice of Mortgage Payment Change ("Objection to Notice") (Doc. # 28) filed by Debtor Eric Matthew Mullenex on February 21, 2013. In the Objection to Notice, the Debtor objects to an increase in the amount of \$358.83 in his monthly mortgage installment payments as set forth in the Notice of Mortgage Payment Change and attached Disbursement Repayment Statement (collectively, "Notice") filed by creditor CitiMortgage, Inc. ("CitiMortgage")

on January 14, 2013. For the reasons set forth herein, the Court will sustain the Objection to Notice.

By way of background, the Debtor filed a voluntary petition pursuant to Chapter 13 of Title 11, United States Code, on January 22, 2010 ("Petition Date"). On August 24, 2010, CitiMortgage, as the holder of the Debtor's residential mortgage, filed a proof of claim denominated Claim No. 4-1 ("Claim 4"), in which it asserts a secured claim in the amount of \$99,100.91, including \$5,426.24 (eight mortgage payments of \$664.28 plus accrued late charges of \$112.00) for pre-petition arrearages owed by the Debtor as of the Petition Date.

The Debtor filed a Chapter 13 Plan ("Plan") (Doc. # 4) on January 22, 2010, which was confirmed by order of this Court on March 12, 2010 (Doc. # 16). Article 2 E of the Plan provides that the Debtor will directly pay CitiMortgage "outside" of the Plan pursuant to the underlying contract between the parties¹ and lists pre-petition arrearages in the amount of \$10,250.00.

Federal Rule of Bankruptcy Procedure 3002.1 applies in a chapter 13 case to claims that are (i) secured by a security interest in the debtor's principal residence; and (ii) provided for under § 1322(b)(5) of the Bankruptcy Code in the debtor's plan. FED. R. BANKR. P. 3002.1(a) (West 2013). Treatment of the claim of CitiMortgage comes within the purview of § 1322(b)(5)

¹ Pursuant to the Note, attached as an exhibit to Claim 4, the Debtor's monthly mortgage payment is \$664.28.

because the Plan provides for the "maintenance of payments while the case is pending on any . . . secured claim on which the last payment is due after the date on which the final payment under the plan is due." 11 U.S.C. § 1322(b)(5) (West 2013). Rule 3002.1(b) states:

The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

FED. R. BANKR. P. 3002.1(b). Rule 3002.1(i)(2) authorizes the court, after notice and hearing, to award appropriate relief caused by a party's failure to provide any information required by Rule 3002.1(b). *Id.* 3002.1(i)(2).

In accordance with Rule 3002.1(b), CitiMortgage filed the Notice. The Notice sets forth an outstanding "Disbursement Balance" of \$4,305.96 owed to CitiMortgage by the Debtor and divides the Disbursement Balance into equal installments of \$358.83 to be repaid over twelve months. Each installment increases the Debtor's monthly mortgage payment from \$664.28 to \$1,023.11, beginning March 28, 2013.

The Notice contains the following statement regarding the Disbursement Balance: "This 'Disbursement Repayment Statement' contains a 12-month schedule for you to repay the disbursement(s) that CitiMortgage made on your behalf for taxes

and/or insurance bills.” (Not. at 4.) The Notice does not further describe the Disbursement Balance or provide any additional basis for the increased monthly mortgage payments.

In the Objection to Notice, the Debtor asserts that the Disbursement Balance should have been included in Claim 4 filed by CitiMortgage. The Court held a hearing on the Objection to Notice on March 28, 2013 (“Hearing”), at which appeared (i) Dann S. Timmons, Esq. on behalf of the Debtor; and (ii) Joseph C. Lucci, Esq. on behalf of Michael A. Gallo, Chapter 13 Trustee (“Trustee”). No one appeared at the Hearing on behalf of CitiMortgage.

At the Hearing, Mr. Timmons represented that representatives of CitiMortgage told him the Disbursement Balance reflects pre-petition real estate taxes CitiMortgage purportedly paid on behalf of the Debtor. According to Mr. Timmons, CitiMortgage said the real estate taxes both accrued and were paid by CitiMortgage in 2009 – prior to the Petition Date – but were not included as pre-petition arrearages in CitiMortgage’s proof of claim. Mr. Timmons further represented that the pre-petition arrearages provided for in the Plan are consistent with the arrearages listed in Claim 4 as filed by CitiMortgage. Finally, Mr. Timmons stated that he asked CitiMortgage to amend its proof of claim to include the pre-

petition real estate taxes, but that CitiMortgage had not done so.

Additionally, Mr. Lucci represented that the Trustee is timely making payments on CitiMortgage's Claim 4, which includes past-due mortgage payments and late fees in the amount of \$5,426.24. Claim 4 does not include the pre-petition real estate taxes represented by the Disbursement Balance.

The Notice fails to identify the basis for the Disbursement Balance other than to characterize it as generally for "taxes and/or insurance bills." (*Id.*) The Notice does not state when the disbursement was made or the time period for the alleged "taxes and/or insurance bills." Based on the representations of Mr. Timmons, it appears that the Disbursement Balance relates to payment of pre-petition taxes that cannot be the basis for increasing the Debtor's current payment.

CitiMortgage failed to attend the Hearing. Based upon the information in the Notice, standing on its own, the Court could not ascertain whether CitiMortgage had a legitimate basis for increasing the Debtor's mortgage payment. As a consequence, on March 29, 2013, the Court issued Order Requiring CitiMortgage, Inc. to Appear and Show Cause ("Show Cause Order") (Doc. # 33), which stated, "[T]he Court requires additional information regarding the Notice and, thus, orders CitiMortgage, through its authorized or designated representative, to appear and show

cause." (Show Cause Order at 2.) CitiMortgage received notice of the Show Cause Order (Doc. # 35), which was set for hearing on April 11, 2013 ("Show Cause Hearing"). The Hearing on the Objection to Notice was continued to that same date.

The Court held the Show Cause Hearing, at which appeared (i) Mr. Timmons on behalf of the Debtor; and (ii) Scott Belhorn, Esq., telephonically, on behalf of the United States Trustee. No one appeared at the Show Cause Hearing on behalf of CitiMortgage. Mr. Timmons represented that he had not communicated with representatives of CitiMortgage following issuance of the Show Cause Order.

Rule 3002.1 provides that a Notice filed under subdivision (b) is not subject to Federal Rule of Bankruptcy Procedure 3001(f). FED. R. BANKR. P. 3002.1(d) and (g). Rule 3001(f) provides that a proof of claim executed and filed in accordance with the Federal Rules of Bankruptcy Procedure shall constitute *prima facie* evidence of the validity and amount of the claim. FED. R. BANKR. P. 3001(f) (West 2013). As a consequence, CitiMortgage's Notice is not entitled to a presumption regarding the validity and amount set forth therein. CitiMortgage bears the burden of proof to establish that the Disbursement Balance does not relate to pre-petition taxes or any payment made by CitiMortgage on behalf of the Debtor prior

to the Petition Date. CitiMortgage has wholly failed to meet this burden.

The instant case is similar to the facts in *In re Taylor*, Case No. 12-11463, 2013 WL 1276507 (Bankr. N.D. Miss. Mar. 27, 2013), wherein GMAC filed a notice of payment change for the costs of force-placed insurance in the escrow amount of the debtor's monthly payments. Judge Olack of the Bankruptcy Court for the Northern District of Mississippi stated:

Rule 3002.1 governs changes to on-going house payments. Unlike a proof of claim, however, a notice of a payment change filed under Rule 3002.1(d) does not enjoy a *prima facie* presumption of validity. The Debtor, therefore, has no evidentiary burden to overcome because the burden of proof remains with GMAC to establish the allowability of the amounts changed.

Id. at *9 (n.17 omitted). The court found that the record was not clear concerning when GMAC began adding insurance costs to the debtor's regular monthly payments and there was no evidence that the debtor had allowed insurance coverage to lapse. As a consequence, the court found that GMAC had failed to meet its burden of proving its entitlement to recover the costs of force-placed insurance and disallowed such costs.

Here, CitiMortgage was given three opportunities to provide a basis to substantiate the Disbursement Balance in the Notice: (i) in the Notice itself; (ii) at the March 28, 2013 Hearing on the Objection to Notice - which CitiMortgage failed to attend; and (iii) at the April 11, 2013 Show Cause Hearing - which

CitiMortgage again failed to attend. Despite ample opportunity to satisfy its burden of proof that it is entitled to recover the Disbursement Balance in the Notice, CitiMortgage has wholly failed to provide any evidence of such entitlement.

For the reasons set forth herein and on the record at the Show Cause Hearing, the Court finds that CitiMortgage has not met its burden of proof. CitiMortgage has failed to provide the Debtor and/or the Court with sufficient explanation to substantiate its entitlement to the Disbursement Balance in the Notice. Accordingly, the Court hereby sustains the Objection to Notice. CitiMortgage is hereby stayed from collecting the increased monthly mortgage payment in the amount of \$1,023.11 as set forth in the Notice. The stay shall apply *nunc pro tunc* to March 28, 2013 - *i.e.*, the effective date of the mortgage payment change set forth in the Notice.

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IT IS SO ORDERED.

Dated: April 16, 2013
11:40:42 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

ERIC MATTHEW MULLENEX,

Debtor.

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* CASE NUMBER 10-40194
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* CHAPTER 13
*
* HONORABLE KAY WOODS
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ORDER (i) FINDING CITIMORTGAGE IN CONTEMPT; AND
(ii) SANCTIONING CITIMORTGAGE BY STAYING COLLECTION OF
INCREASED MONTHLY MORTGAGE PAYMENT *NUNC PRO TUNC*

This cause is before the Court on Order Requiring CitiMortgage, Inc. to Appear and Show Cause ("Show Cause Order") (Doc. # 33) issued by the Court on March 29, 2013. The Show Cause Order states, "[T]he Court requires additional information regarding the Notice and, thus, orders CitiMortgage, through its authorized or designated representative, to appear and show cause. . . . CITIMORTGAGE, INC., THROUGH ITS AUTHORIZED OR DESIGNATED REPRESENTATIVE, SHALL NOT FAIL TO APPEAR UNDER

PENALTIES OF CONTEMPT.” (Show Cause Order at 2, 6.) CitiMortgage, Inc. (“CitiMortgage”) received notice of the Show Cause Order (Doc. # 35), which was set for hearing on April 11, 2013 (“Show Cause Hearing”).

By way of background, on February 21, 2013, Debtor Eric Matthew Mullenex filed Objection to Notice of Mortgage Payment Change (“Objection to Notice”) (Doc. # 28). In the Objection to Notice, the Debtor objected to an increase in the amount of \$358.83 in his monthly mortgage installment payments as set forth in the Notice of Mortgage Payment Change and attached Disbursement Repayment Statement (collectively, “Notice”) filed by creditor CitiMortgage. The Notice set forth an outstanding “Disbursement Balance” of \$4,305.96 owed to CitiMortgage by the Debtor and divided the Disbursement Balance into equal installments of \$358.83 to be repaid over twelve months. Each installment increased the Debtor’s monthly mortgage payment from \$664.28 to \$1,023.11, beginning March 28, 2013.

The Court held a hearing on the Objection to Notice on March 28, 2013 (“Hearing”), at which appeared (i) Dann S. Timmons, Esq. on behalf of the Debtor; and (ii) Joseph C. Lucci, Esq. on behalf of Michael A. Gallo, Chapter 13 Trustee. No one appeared at the Hearing on behalf of CitiMortgage. Based upon the information in the Notice, standing on its own, the Court could not ascertain whether CitiMortgage had a legitimate basis

for increasing the Debtor's mortgage payment. As a consequence, the Court issued the Show Cause Order and continued the hearing on the Objection to Notice to the same date as the Show Cause Hearing.

The Court held the Show Cause Hearing, at which appeared (i) Mr. Timmons on behalf of the Debtor; and (ii) Scott Belhorn, Esq., telephonically, on behalf of the United States Trustee. No one appeared at the Show Cause Hearing on behalf of CitiMortgage. Mr. Timmons represented that he had not communicated with representatives of CitiMortgage following issuance of the Show Cause Order.

CitiMortgage was given three opportunities to provide a basis to substantiate the Disbursement Balance in the Notice: (i) in the Notice itself; (ii) at the March 28, 2013 Hearing on the Objection to Notice - which CitiMortgage failed to attend; and (iii) at the April 11, 2013 Show Cause Hearing - which CitiMortgage again failed to attend. Despite ample opportunity to satisfy its burden of proof that it was entitled to recover the Disbursement Balance in the Notice, CitiMortgage wholly failed to provide any evidence of such entitlement. As a consequence, on April 16, 2013, the Court entered Order (i) Sustaining Objection to Notice of Mortgage Payment Change; and (ii) Staying Collection of Increased Monthly Mortgage Payment by CitiMortgage *Nunc Pro Tunc* (Doc. # 36), which

sustained the Objection to Notice and stayed CitiMortgage from collecting the increased monthly mortgage payment in the amount of \$1,023.11 as set forth in the Notice. The stay applied *nunc pro tunc* to March 28, 2013 - *i.e.*, the effective date of the mortgage payment change as set forth in the Notice.

Based upon the failure of CitiMortgage to appear at the Show Cause Hearing, the Court hereby finds CitiMortgage in contempt of court. To sanction CitiMortgage for such contempt, the Court again stays CitiMortgage from attempting to collect the increased monthly mortgage payment as set forth in the Notice. The sanction applies *nunc pro tunc* to March 28, 2013. Any attempts to collect the increased monthly mortgage payment as set forth in the Notice may result in further sanctions and penalties of contempt.

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