

Bank, National Association (“PNC”) filed a proof of claim in the secured amount of \$58,284.13, including \$6,069.25 in pre-petition arrearages, which claim was denominated as Claim 2-1. PNC states that the basis for Claim 2-1 is a Mortgage Note¹ secured by the Debtor’s real property located at 150 Blossom Lane, Niles, Ohio 44446.

On May 23, 2013, the Debtor filed Adversary Complaint for Complaint [sic] for Improper and Unauthorized Fees, Violations of Federal and State Law and Objection to Proof of Claim (“Complaint”) (Doc. # 1). On July 30, 2013, PNC timely filed PNC Bank, National Association’s Answer to Plaintiff’s Adversary Complaint for Complaint [sic] for Improper and Unauthorized Fees, Violations of Federal and State Law and Objection to Proof of Claim (“Answer”) (Doc. # 11). The Debtor alleges that this adversary proceeding “is primarily a core proceeding and therefore the Bankruptcy Court has jurisdiction to enter a final order.” (Compl. ¶ 5.) PNC counters, “With the exception of [Debtor]’s First Claim for Relief – Improper Proof of Claim, [Debtor]’s claims are not core proceedings.” (Ans. at 9.)

On August 21, 2013, PNC filed Defendant’s Motion to Withdraw Reference to Bankruptcy Court (Doc. # 13).² On September 19, 2013, the Debtor filed Opposition to Defendant’s Motion to Withdraw the Reference (Doc. # 18). PNC filed Reply in Support of Defendant’s Motion to Withdraw Reference to Bankruptcy Court (Doc. # 19) on September 25, 2013.

On October 11, 2013, Judge James S. Gwin, United States District Court for the Northern District of Ohio, entered Opinion & Order [Resolving Doc. Nos. 1, 2, & 3] (“District Court

¹A copy of the Mortgage Note is attached to Claim 2-1.

²On August 29, 2013, PNC filed Appendix of Unreported Cases Cited in Defendant’s Motion to Withdraw Reference to Bankruptcy Court (Doc. # 14).

Order”),³ which denied the Motion to Withdraw Reference on the basis that it was premature because this Court had not yet determined if the Complaint involved core or non-core proceedings. In accordance with the District Court Order and pursuant to 28 U.S.C. § 157(b)(3),⁴ on October 17, 2013, this Court entered Order Setting Briefing Schedule on Issue of Core and Non-Core Status of Claims for Relief in Complaint (Doc. # 22).

On November 6, 2013, PNC filed Defendant’s Brief in Support of a Finding Determining that Counts II Through VI Constitute Non-Core Causes of Action (Doc. # 27).⁵ On November 7, 2013, the Debtor filed Brief in Support of a Finding that Adversary Proceeding Causes of Action Constitute Core Claims (“Debtor’s Brief”) (Doc. # 28). PNC filed Reply in Support of Defendant’s Brief in Support of a Finding Determining that Counts II Through VI Constitute Non-Core Causes of Action (“PNC’s Response”) (Doc. # 30) on November 20, 2013.

Having reviewed all of the pleadings and briefs filed in this proceeding, pursuant to 28 U.S.C. § 157(b)(3) and for the reasons set forth herein, this Court finds that Counts III and VI are core proceedings and Counts II, IV and V are non-core proceedings.⁶

I. COUNTS IN THE COMPLAINT

The Complaint sets forth six claims for relief, each of which alleges violations of federal or state law as a result of alleged improper pre-petition conduct by PNC. In Count I, styled Improper Proof of Claim, the Debtor objects to PNC’s proof of claim in its entirety. Count II

³The District Court Order is available on the docket in this adversary proceeding at Doc. # 21.

⁴28 U.S.C. § 157(b)(3) provides, “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.” 28 U.S.C. § 157(b)(3) (West 2013).

⁵On November 11, 2013, PNC filed Appendix of Unreported Cases Cited in Defendant’s Brief in Support of a Finding Determining that Counts II Through VI Constitute Non-Core Causes of Action (Doc. # 29).

⁶The Debtor and PNC agree that Count I is a core proceeding. (Ans. at 9) (“With the exception of [Debtor]’s First Claim for Relief . . . [Debtor]’s claims are not core proceedings.”)

alleges that PNC⁷ violated the Fair Debt Collection Practices Act (“FDCPA”) by charging and trying to collect unreasonable and excessive fees and over-inflating charges associated with foreclosing on the Debtor’s property. Count III alleges Breach of Contract and the Covenant of Good Faith and Fair Dealing when PNC failed to properly service the Mortgage Note by charging excessive fees for reinstatement. In Count IV, the Debtor alleges that PNC failed to comply with the Real Estate Settlement Procedures Act (“RESPA”). Count V, which is captioned Invasion of Privacy by Intrusion upon Seclusion, alleges that PNC intentionally interfered, physically or otherwise, with the solitude, seclusion or private concerns or affairs of the Debtor. Count VI, Fraudulent Misrepresentation, alleges that PNC made material misrepresentations regarding reinstatement fees that were grossly excessive, unreasonable and unnecessary, which improperly prohibited the Debtor from reinstating his Mortgage Note and stopping foreclosure.

II. ANALYSIS OF CORE V. NON-CORE CLAIMS

A non-comprehensive list of core proceedings is set forth in 28 U.S.C. § 157(b)(2). The Debtor’s Counts II through VI are based on (i) violation of the FDPCA; (ii) breach of contract; (iii) violation of RESPA; (iv) invasion of privacy by intrusion upon seclusion; and (v) fraud. None of these causes of action are specified in § 157(b)(2). Although breach of contract and the two tort causes of action depend on an analysis of Ohio law, “[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.” 28 U.S.C. § 157(b)(3) (West 2013).

⁷Counts II and VI also contain allegations against “Laurito & Laurito,” as PNC’s agent; however, PNC is the only defendant in this adversary proceeding.

On their face, subsections (A), (B), and (D) through (P) of § 157(b)(2)⁸ have no applicability to Counts II through VI of the Complaint, although such Counts fall within subsection (C) as counterclaims by the estate against persons filing claims against the estate. On Schedule B to the Petition, line 18, the Debtor states, “Debtor has claims against PNC for FDCPA [sic] CSPA, RESPA and Breach [sic] of Contract” in an unknown amount. (Main Case, Doc. # 1 at 10.) Likewise, on Schedule D to the Petition, the Debtor lists PNC as a secured creditor in the amount of \$53,279.00 with the notation “PNC estimates the arrearage to be \$. [sic] A dispute exists with PNC regarding various statutory violations, which may be applied and setoff to the claim of PNC.” (*Id.* at 13.) PNC does not dispute that Counts II through VI are all counterclaims by the Debtor against a creditor who has filed a proof of claim against the

⁸28 U.S.C. § 157(b) provides, in pertinent part:

(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(b)(1) and (b)(2) (West 2013).

Debtor's bankruptcy estate. "It is true that 28 U.S.C. § 157(b)(2)(C) provides that 'counterclaims by the estate against persons filing claims against the estate' are one of the enumerated core proceedings." (PNC's Resp. at 2.) Instead, PNC argues, "[A]ny ruling on Counts II-VI would require this Court to make legal and factual findings that, while perhaps tangentially related to the contractual relationship between the parties, go far beyond determining the existence of a contract and debt owed to PNC." (*Id.* at 5) (citing *Stern v. Marshall*, 131 S. Ct. 2594, 2617 (2011)).

All of the Debtor's allegations are based on PNC's conduct in servicing the Mortgage Note, which conduct occurred prior to the Petition Date.

"In determining whether this proceeding is core or non-core, both the form and the substance of the proceeding must be examined." *Hughes-Bechtol, Inc. v. Ohio (In re Hughes-Bechtol)*, 141 B.R. 946, 949 (Bankr. S.D. Ohio 1992) ("*Hughes-Bechtol I*") (citing *Michigan Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1144 (6th Cir. 1991)).

A non-core proceeding is identified by the following characteristics – a proceeding filed in the bankruptcy court alleging a cause of action which:

- 1) is not *specifically* identified as a core proceeding under § 157(b)(2)(B) through (N),
- 2) existed prior to the filing of the bankruptcy case,
- 3) 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.

Id. at 948-49 (citing *Hughes-Bechtol, Inc. v. Air Enters., Inc. (In re Hughes-Bechtol, Inc.)*, 107 B.R. 552, 556 (Bankr. S.D. Ohio 1989); [*In re*] *Walton*, 104 B.R. [861,] 864 [(Bankr. S.D. Ohio

1988)]; *Commercial Heat Treating of Dayton, Inc. v. Atlas Indus., Inc. (In re Commercial Heat Treating of Dayton, Inc.)*, 80 B.R. 880, 888 (Bankr. S.D. Ohio 1987)).

Based on the criteria set forth above, the Court examines each Count II through VI, below, to determine which Counts, if any, constitute core proceedings.

A. Count II – Fair Debt Collection Practices Act

Count II alleges that PNC violated § 1692d, e, e(1), e(2), f and f(1) of the FDCPA by “trying to collect unreasonable and excessive fees when its attorneys had just recently filed their [sic] Complaint in the foreclosure action” and “over-inflat[ing] the charges associated with foreclosing on [Debtor]’s property.” (Compl. ¶¶ 28-29.) The Debtor goes on to state that he “was harmed by PNC[’ s] . . . violations and is entitled to statutory damages, actual damages, and attorneys fees and costs pursuant to 15 U.S.C. § 1692k(a).” (*Id.* ¶ 31.)

Count II has all of the characteristics of a non-core proceeding; *i.e.*, it is not specifically identified as a core proceeding in § 157(b)(2)(B); the claim existed prior to the Petition Date; the claim would continue to exist independent of the provisions of Title 11; and the parties’ rights and obligations pursuant to this claim are not significantly affected as a result of the Debtor’s bankruptcy case. Moreover, the Debtor could have asserted a violation of the FDCPA as a counterclaim in the state court foreclosure action or in an independent lawsuit. As Judge Gwin has noted, “FDCPA claims have nothing to do with the bankruptcy petition and everything to do with a private right of action to contest unlawful debt collection practices.” *Duncan v. Deutsche Nat’l Bank Trust Co.*, Case No. 1:11-CV-2006, 2012 U.S. Dist. LEXIS 134914, *9 (N.D. Ohio Sept. 20, 2012).

As a consequence, this Court finds that Count II is a non-core proceeding.

B. Count III – Breach of Contract and the Covenant of Good Faith and Fair Dealing

The Debtor’s breach of contract claim fits within criteria 2 – 4 of the *Hughes-Bechtol I* standard, but it comes within the purview of § 157(b)(2)(B). PNC’s Claim 2-1 is specifically based on the Mortgage Note, which is the same contract the Debtor alleges was breached. Indeed, the Debtor’s breach of contract claim would be a compulsory counterclaim in any state court lawsuit.⁹ In Count I, Improper Proof of Claim, the Debtor “objects to the entirety of the monies sought in [Claim 2-1] as PNC[’s] . . . failure to properly reinstate the loan resulted in a breach of contract on the part of [PNC] and therefore, no additional installment payments are due at this time.” (Compl. ¶ 24.) The Debtor further objects to specific costs listed in Claim 2-1 because they “are unreasonable and therefore not authorized under the mortgage contract.” (*Id.*) In order to defend the amounts listed in Claim 2-1, PNC will have to refer to provisions of the Mortgage Note and argue that none of the provisions have been breached. Accordingly, determining whether or not PNC breached the Mortgage Note is central to allowance or disallowance of all or part of Claim 2-1. Determining the allowance or disallowance of claims against a bankruptcy estate is one of the specific enumerated core proceedings. *See* 28 U.S.C. § 157(b)(2)(B).

“A non-core claim will be 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.’” *Grochocinski*

⁹Federal Rule of Civil Procedure 13, which is incorporated into this adversary proceeding by Federal Rule of Bankruptcy Procedure 7013, states, in pertinent part:

(a) Compulsory Counterclaim.

(1) In General. A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

FED. R. CIV. P. 13(a)(1) (West 2013) (emphasis added); FED. R. BANKR. P. 7013 (West 2013).

v. LaSalle Bank Nat'l Assoc. (In re K&R Express Sys., Inc.), 382 B.R. 443, 447 (N.D. Ill. 2007) (quoting *CDX Liquidating Trust v. Venrock Assocs.*, [Case No. 04 C 7236,] 2005 U.S. Dist. LEXIS 16704, *6-7 (N.D. Ill. [Aug. 10,] 2005)). Count III arises out of the same transaction as PNC's Claim 2-1.

In *Fokkena v. Countrywide Home Loans, Inc. (In re O'Neal)*, the District Court for the Northern District of Ohio cited the four *Hughes-Bechtol I* criteria for non-core proceedings and stated, "Further, 'since Congress intended to interpret core proceeding broadly, those proceedings which do not contain all the characteristics of a non-core proceeding will be determined to be core.'" Case No. 5:08-MC-00043, 2008 U.S. Dist. LEXIS 64437, *9-10 (N.D. Ohio Aug. 20, 2008) (quoting *Hughes-Bechtol I* at 948-49). Here, Count III does not fit within all of the non-core characteristics because its resolution is necessary to the allowance or disallowance of Claim 2-1, which is an enumerated core proceeding in § 157(b)(2)(B). As a consequence, even though Count III is based on a pre-petition breach of contract, this Count must be considered core because it is essential to the allowance or disallowance of PNC's Claim 2-1.

C. Count IV – Real Estate Settlement Procedures Act

The Debtor's RESPA claims in Count IV, like the FDPCA claims in Count II, are based on a federal statute. Count IV alleges that PNC failed to comply with 12 U.S.C. § 2605(f) when it responded to the Debtor's qualified written request made pursuant to RESPA. The Debtor asserts that, as a result, he is entitled to "actual damages including, but not limited to, out-of-pocket expenses, attorneys fees and costs, aggravation, frustration, embarrassment, loss of time, loss of enjoyment of life, and stress." (Compl. ¶ 39.)

The Debtor cites to this Court's prior decision in *Bennett v. Countrywide Home Loans, Inc. (In re Bennett)*, Adv. No. 09-4075 (Bankr. N.D. Ohio Aug. 21, 2008) (unpublished), for the proposition that "the outcome of the adversary [proceeding] will affect the amount of any claim and ultimately the objection to confirmation." (Debtor's Br. at 5.) The instant proceeding is distinguishable from the *Bennett* case in one significant regard – the *Bennett* complaint did not contain a separate cause of action as an objection to the defendant's proof of claim.¹⁰ As the Court stated:

[T]he 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.

Bennett at 9. This Court finds that the *Bennett* decision is limited to the facts of that case. Indeed, the Court may have been overly-inclusive in its determination that the alleged violations of RESPA in the *Bennett* case came within that debtor's objection to Countrywide's proof of claim. In the instant proceeding, however, the Debtor states his objection to PNC's proof of claim in a separate count. Resolution of the RESPA Count is not necessary for allowance or disallowance of PNC's Claim 2-1, which is based on amounts allegedly due pursuant to the terms of the Mortgage Note.

Count IV meets all of the *Hughes-Bechtol I* characteristics of a non-core proceeding. Although resolution of Count IV may result in damages that could be used as a setoff to Claim 2-1,¹¹ Count IV essentially alleges tort damages that, if awarded, would inure to the benefit of the debtor – rather than the bankruptcy estate. Indeed, the alleged "actual damages"

¹⁰Mr. Zuzolo, who is counsel for the Debtor in the instant proceeding, also drafted the *Bennett* complaint.

¹¹11 U.S.C. § 553 provides that, except as provided in 11 U.S.C. §§ 362 and 363, the Bankruptcy Code does not affect a creditor's right to offset a mutual debt owing by such creditor to the debtor that arose prior to the petition date. This section says nothing about a debtor's setoff rights.

for this Count are not traditional breach of contract damages and are not capable of being quantified by examining the Mortgage Note. As a result, the Court finds that Count IV is a non-core proceeding.

D. Count V – Invasion of Privacy by Intrusion Upon Seclusion

Count V is purely a tort claim, which appears to be based on the factual allegations in paragraph 18 of the Complaint. The Debtor alleges that he has a “very debilitating disease that seriously impairs his function [sic] on a daily basis and threatens his life” and that, despite knowing of this condition, PNC called him “incessantly.” (Compl. ¶ 18.) The Debtor alleges that, because he utilizes a lifeline that requires his telephone to be free, PNC’s calls caused him stress and anxiety. The alleged damages relating to Count V are “non-economic damages for mental anguish” and attorney fees and costs. (*Id.* ¶ 45.)

Count V also meets all of the characteristics of a non-core proceeding under the *Hughes-Bechtol I* test. Like Count IV, resolution of Count V could result in damages that might offset Claim 2-1, but the damages are not related to the Mortgage Note and cannot be determined by examining the Mortgage Note. Count V is a non-core proceeding.

E. Count VI – Fraudulent Misrepresentation

Count VI alleges that, after PNC initiated the foreclosure action, PNC falsely stated that certain fees and costs were necessary for the Debtor to reinstate the Mortgage Note, which fees are described by the Debtor as “grossly excessive, unreasonable, and unnecessary.” (Compl. ¶ 47.) The Debtor states, “The mortgage contract only requires the [Debtor] to pay reasonable fees and expenses that were actually incurred and installments that are actually owed in order to reinstate the mortgage.” (*Id.* ¶ 15.) Thus, a determination of whether PNC correctly or falsely

represented the amounts necessary to reinstate the Debtor's Mortgage Note requires an examination of the provisions of the Mortgage Note.

Count VI appears to meet most of the *Hughes-Bechtol I* characteristics for a non-core proceeding. However, the Debtor states that PNC's representations were false because such statements were not supported by or in compliance with the terms of the Mortgage Note. As a consequence, Count VI is closely aligned with Count III – breach of contract – and relates to the allowance or disallowance of PNC's Claim 2-1. Accordingly, this Court finds that Count VI is a core proceeding.

III. CONCLUSION

As set forth above, Counts II through VI are all counterclaims against PNC, a creditor that filed a claim in this bankruptcy case. As a consequence, all of these Counts fall within the definition of a core proceeding in 28 U.S.C. § 157(b)(2)(C). Despite each Count being a counterclaim against PNC, only Counts III and VI deal with the same contract, *i.e.*, the Mortgage Note, that forms the basis for the amounts asserted in Claim 2-1. Accordingly, resolution of Counts III and VI is necessary to the allowance or disallowance of Claim 2-1, which is an enumerated core proceeding in § 157(b)(2)(B). The Court finds that Counts III and VI are core proceedings, but Counts II, IV and V have all of the indicia of non-core proceedings, as set forth in *Hughes-Bechtol I*. Counts II, IV and V are non-core proceedings.

An appropriate order will follow.

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Proof of Claim (“Complaint”) (Doc. # 1). On July 30, 2013, PNC timely filed PNC Bank, National Association’s Answer to Plaintiff’s Adversary Complaint for Complaint [sic] for Improper and Unauthorized Fees, Violations of Federal and State Law and Objection to Proof of Claim (“Answer”) (Doc. # 11). On October 17, 2013, this Court entered Order Setting Briefing Schedule on Issue of Core and Non-Core Status of Claims for Relief in Complaint (Doc. # 22).

On November 6, 2013, PNC filed Defendant’s Brief in Support of a Finding Determining that Counts II Through VI Constitute Non-Core Causes of Action (Doc. # 27).¹ On November 7, 2013, the Debtor filed Brief in Support of a Finding that Adversary Proceeding Causes of Action Constitute Core Claims (Doc. # 28). PNC filed Reply in Support of Defendant’s Brief in Support of a Finding Determining that Counts II Through VI Constitute Non-Core Causes of Action (Doc. # 30) on November 20, 2013.

For the reasons set forth in the Court’s Memorandum Opinion Regarding Core and Non-Core Status of Claims for Relief in Complaint entered on this date, the Court hereby:

1. Finds that Counts III and VI are core proceedings; and
2. Finds that Counts II, IV and V are non-core proceedings.

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¹The Debtor and PNC agree that Count I is a core proceeding. (Ans. at 9) (“With the exception of [Debtor]’s First Claim for Relief . . . [Debtor]’s claims are not core proceedings.”)