

IT IS SO ORDERED.

Dated: December 1, 2014
02:52:20 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JOHN ROBERT WOOD and
KELLY ELIZABETH WOOD,

Debtors.

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CASE NUMBER 10-44127
CHAPTER 13
HONORABLE KAY WOODS

ORDER DENYING MOTION TO STRIKE

This cause is before the Court on Motion to Strike Notice of Witness List, Notice of Debtors' Exhibits and Supplement to Notice of Debtors' Exhibits and Disallow Presentation at Evidentiary Hearing ("Motion to Strike") (Doc. 75) filed by Nationstar Mortgage LLC ("Nationstar") on November 26, 2014. On December 1, 2014, Debtors John Robert Wood and Kelly Elizabeth Wood ("Debtors") filed Response of Debtors to Motion to Strike ("Response") (Doc. 76).

The Motion to Strike seeks to prevent the Debtors from presenting witness testimony and exhibits at the evidentiary

hearing scheduled for December 2, 2014 ("Hearing") on the basis that the Debtors did not timely file their witness list or disclose their exhibits.

I. PROCEDURAL AND FACTUAL BACKGROUND

The Debtors filed a voluntary chapter 13 case on November 2, 2010. The Debtors scheduled BAC Home Loans as having a secured claim in the amount of \$152,100.00, secured by a mortgage on their residence located at 2384 Kennedy Drive, Salem, Ohio ("Residence"). (Doc. 1, Sched. D.) Their chapter 13 plan (Doc. 2), which was confirmed on December 15, 2010 (Doc. 18), provides for the Debtors to make post-petition mortgage payments directly to BAC Home Loans and for the Chapter 13 Trustee to distribute payments to BAC Home Loans on a pre-petition arrearage claim in the amount of \$13,908.00. (Plan, Art. 2 E.)

On February 22, 2011, BAC Home Loans Servicing, LP fka, Countrywide Home Loans Servicing, LP ("BAC Home Loans"), through Laurito & Laurito, L.L.C., filed a one page proof of claim, which was denominated Claim No. 7-1, in the total amount of \$148,016.14, of which \$20,610.52 was listed as a pre-petition arrearage. On that same date, BAC Home Loans, through Laurito & Laurito, L.L.C., filed amended Claim No. 7-2, which consisted of the original one-page claim plus supporting documentation. Attached to Claim No. 7-2 was a Note, Mortgage and Assignment of Mortgage regarding the Residence.

On December 14, 2011, the Debtors filed Objection to Claim of BAC Home Loans Servicing, LP, Claim #7, Filed 2/22/2011 and Amended 2/22/2011 ("Objection to Claim") (Doc. 31), which sought to reduce the arrearage claim amount from \$20,610.52 to \$13,908.00. BAC Home Loans did not respond to the Objection to Claim. The Court sustained the Objection to Claim by Order dated January 17, 2012 (Doc. 32).

On April 30, 2012, BAC Home Loans filed Notice of Mortgage Payment Change, which increased the escrow amount from \$228.08 to \$285.71. On December 14, 2012, Bank of America, N.A. filed amended Claim No. 7-3, which asserts a total secured claim of \$160,920.55 and a pre-petition arrearage claim of \$13,908.00. On April 25, 2013, BAC Home Loans filed Notice of Mortgage Payment Change increasing the escrow amount from \$228.08 to \$258.08.

On June 27, 2013, Transfer of Claim Other than for Security (Doc. 40) was filed, which transferred Claim No. 7-3 from Bank of America, N.A. to Nationstar effective June 4, 2013.

On December 27, 2013, Nationstar filed Motion of Nationstar Mortgage, LLC for Relief from Stay ("Motion for Relief") (Doc. 43), which seeks relief from stay regarding the Debtors' Residence on the asserted basis that (i) the value of the Residence is \$142,700.00; (ii) as of November 8, 2013, the Debtors owed a principal balance of \$140,541.96 on the Note, with interest accruing at the rate of \$23.58 per day; (iii) the amount alleged

to be due did not include a credit for \$310.54, which was being held in suspense; and (iv) the Debtors had failed to make periodic payments on the Note for the months of June 2013, July 2013, August 2013, September 2013, October 2013 and November 2013.

The Debtors filed Response of Debtors to Motion for Relief from Stay and Abandonment [sic] Filed by Nationstar Mortgage, LLC ("Response") (Doc. 45) on January 3, 2014. As a consequence, the Motion for Relief was set for hearing on February 6, 2014. Nationstar filed a Notice (Doc. 48) that continued the hearing until March 6, 2014. The Court held a hearing on March 6, 2014, at which counsel for the Debtors and counsel for Nationstar represented that they were exchanging documents in an attempt to resolve the Motion for Relief. The Court continued the hearing until March 20, 2014.

On March 20, 2014, the Court again continued the hearing until May 1, 2014 on the basis that the parties were trying to resolve their differences. On May 1, 2014, the Court granted a final continuance until June 12, 2014 so that the parties could finalize an agreement. On June 12, 2014, the parties reported that they had reached an agreement and would submit an agreed order.

After several months, when the parties failed to submit an agreed order, the court entered a Notice of Hearing (Doc. 59), which set the Motion for Relief for hearing on September 4, 2014. At the September 4 hearing, counsel for the Debtors stated that

the parties had not been able to finalize an agreement. He represented that (i) the Debtors - husband and wife - were separated and that each had made payments during the post-petition period; (ii) the Debtors disputed Nationstar's assertion that the Debtors had missed six post-petition payments; and (iii) the Debtors were attempting to obtain a post-petition payment history from Nationstar.

The Court continued the hearing until October 2, 2014. At the October 2, 2014 hearing, counsel for Nationstar stated that she had just received the post-petition payment history from her client. As a consequence, the Court continued the hearing one final time until October 23, 2014, at which time the Court would set the Motion for Relief for an evidentiary hearing if the parties had not entered into an agreed order.

After the parties reported that they had not reached an agreement, on October 22, 2014, the Court entered Order Setting Evidentiary Hearing (Doc. 68), which scheduled the Hearing. Pursuant to the Order Setting Evidentiary Hearing, the parties were to exchange exhibits and file witness lists two weeks prior to the Hearing - *i.e.*, on or before November 18, 2014. Nationstar filed Witness List (Doc. 71) on November 17, 2014, listing Karen Monroy of Nationstar as its only witness. On November 20, 2014, the Debtors filed Notice of Witness List (Doc. 72), which listed Debtor John Wood as the only witness. On that same date, the

Debtors filed Notice of Debtors' Exhibits (Doc. 73), which listed five exhibits. On November 24, 2014, the Debtors filed Supplement to Notice of Debtors' Exhibits (Doc. 74), which added two exhibits. The Order Setting Evidentiary Hearing specifies that exhibits that are not timely exchanged may not be used or introduced into evidence unless the Court orders otherwise and that witnesses not timely identified may not testify unless the Court orders otherwise.

II. MOTION TO STRIKE AND RESPONSE

The Motion to Strike urges the Court to prohibit the Debtors from presenting any witnesses and exhibits at the Hearing on the basis that the Debtors did not comply with the time for disclosure, as set forth in the Order Setting Evidentiary Hearing. The Court will deal with each of these components, in turn.

First, the Court will determine if the Debtors should be prohibited from presenting witness testimony. Although Nationstar is correct that the Debtors were two days late in identifying one of the Debtors as their sole witness, Nationstar does not contend that it was prejudiced in any way by the two-day delay. Indeed, it is difficult to imagine that Nationstar could be prejudiced by such delay. Given the nature of the dispute - *i.e.*, whether the Debtors made all post-petition payments on the Note, it is likely that Nationstar assumed one or both of the Debtors would testify at the Hearing. Despite not being in complete compliance with the

Order Setting Evidentiary Hearing, the Debtors have substantially complied by identifying Debtor John Wood as a witness. The Court will permit this witness to testify.

Nationstar also argues that the Debtors should be prohibited from presenting any exhibits at the Hearing. Nationstar asserts that it received "partial exhibits by mail on November 25." (Mot. to Strike at 2.) The Debtors assert that the documents that comprise Exhibits 1 and 3 were sent to Nationstar's counsel on September 11, 2014 and January 13, 2014, respectively. (Resp. at 1.) Nationstar states that it is "substantially prejudiced" because it has not had an "opportunity to fully review the proposed exhibits in advance." (Mot. to Strike at 2.) Nationstar asserts that "[h]ad they been timely provided as ordered by this Court, [Nationstar] would have had a reasonable opportunity to review any such proof, and compare it to [Nationstar's] records and see if there was a basis to discuss a compromise or other resolution." (*Id.*)

Given that (i) the Motion for Relief has been pending for nearly one full year; (ii) the Court held five hearings on the Motion for Relief, which were all continued so that the parties could attempt to resolve their differences; (iii) the parties' reported agreement in June 2014 could never be finalized; and (iv) Nationstar failed to provide a post-petition payment history to the Debtors until after the hearing on October 2, 2014, the

Court finds that the assertion of substantial prejudice to Nationstar based on a limited opportunity to compromise the Motion for Relief is disingenuous.

The true punitive nature of Nationstar's Motion to Strike is seen in its opening paragraph, wherein Nationstar "requests that the presentation of said Exhibits and Witnesses referenced in the Debtors' filing be disallowed from presentation at the Evidentiary Hearing scheduled to be heard on December 2, 2014 at 9:30 a.m., or any subsequently scheduled hearing." (*Id.* at 1 (emphasis added).) If Nationstar truly believed itself to be prejudiced by not having enough time to review all of the exhibits, then the request to strike would pertain only to the December 2, 2014 Hearing. If the evidentiary hearing were to be rescheduled, there would be no prejudice and, consequently, no reason to prohibit the presentation of such exhibits and witnesses.

The Debtors were two days late in complying with the Order Setting Evidentiary Hearing, but this is not a game of "gotcha." If the Court were to grant Nationstar's Motion to Strike, it would be tantamount to granting the Motion for Relief because the Debtors would be prohibited from presenting any evidence in their defense. The equities favor allowing the Debtors to use and seek to introduce the exhibits they have identified and provided to Nationstar.

As a consequence, the Court hereby denies the Motion to Strike.

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