

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

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KENNETH JORDAN, CLERK
U.S. BANKRUPTCY COURT
COLUMBUS, OHIO

In re: Case No. 05-55729

Chad W. Forker :
Tara D. Forker f.k.a. :
Tara D. Tracy, : Chapter 7
Debtors. : Judge Caldwell
Clyde Hardesty, :
Plaintiff. : Adversary No. 05-2390
v. :
National City Mortgage Co. d.b.a. :
Accubanc Mortgage and GE Money :
Bank, :
Defendants. :

MEMORANDUM OPINION AND ORDER

The Chapter 7 Trustee, Clyde Hardesty ("Trustee"), seeks damages from National City Mortgage Company ("Creditor") based upon actions taken by it in this Court and the Court of Common Pleas in Muskingum County, Ohio. These actions involved real estate owned by Chad W. Forker and Tara D. Forker f.k.a. Tara D. Tracy ("Debtors"). Based upon the evidence, statements of counsel and review of the record, the Court finds and concludes that a limited award is appropriate. A brief history illustrates the bases.

On March 23, 2001, a Warranty Deed was recorded in Muskingum County, Ohio from Marjorie Ellen Payne to the Debtors. The legal description in the Deed included 35.045 acres in Hopewell Township ("35 acres"). Approximately two years later, on April 3, 2003, a Mortgage was recorded between the Debtors and the Creditor in exchange for a loan in the amount of \$134,900.00.

The legal description attached to the Mortgage, however, only included a reference to 5.01 acres (“5 acres”). Approximately one month later, on May 7, 2003, a Survivorship Deed was recorded in which the Debtors transferred to Wade A. and Tina M. Moore (“Moore”) a 10 acre parcel from the original 35 acres. Ms. Moore is the sister of the Debtor, Tara D. Forker, according to the Statement of Affairs.

Nearly a year later, on March 17, 2004, a second mortgage was recorded between the Debtors and G.E. Capital Consumer Card Company (“G.E. Capital”) for a maximum loan amount of \$20,807.15. The legal description attached to the G.E. Capital mortgage referred to the 35 acres, excluding the 10 acre parcel sold to the Moore.

As a result of all these events, the parties and the Court are faced with a real estate transaction that originally involved the 35 acres. The acreage, however, appears to have only been subject to the first mortgage of the Creditor to the extent of the 5 acres. On the other hand, the second mortgage appears to have covered all of the 35 acres, excluding the 10 acres conveyed to the Moore. That transfer was accomplished between the execution of the first and second mortgages. These events are at the heart of the dispute between the parties.

Unfortunately, more confusion was generated by the Debtors’ chapter 7 bankruptcy filing on April 8, 2005. On “Schedule A. Real Property” the Debtors only referred to their property by using a street address (1290 Asbury Chapel Road, Hopewell, Ohio 43746) and with no indication of the acreage. The Debtors valued the property in the amount of \$135,000.00 and indicated that it was subject to secured claims in the amount of \$154,446.01. In response to “Question 10. Other Transfers” contained in the Statement of Affairs, the Debtors disclosed, without any reference to the acreage involved, that there was a sale of real estate to the Moore in 2003 for the sum of

\$25,000.00. On "Schedule D. Creditors Holding Secured Claims", the Debtors disclosed that their property was subject to the Creditor's first mortgage and a second mortgage to Green Tree.

On April 27, 2005, the Creditor filed an Amended Motion for Relief from Stay that included a copy of the Note, the Mortgage and a legal description that only referred to the 5 acres. The Amended Motion was not opposed by the Trustee, and on May 28, 2005, an Order granting relief from stay was entered. The meeting of creditors was conducted on June 8, 2005, and one day later on June 9, 2005, the Trustee filed a Report of No Distribution.

On June 13, 2005, the Creditor filed a three-count foreclosure complaint. Count One sought to foreclose on the Note, but recognized the impact of the bankruptcy filing upon the Debtors' personal liability. Count Two sought a determination of the relative interests of G.E. Capital, by virtue of its second mortgage, and the Moores, with reference to the 10 acres they purchased from the Debtors. Count Three requested reformation based upon the fact that the legal description attached to the Creditor's mortgage only included the 5 acres. Seven days later, on June 20, 2005, the Trustee's Abandonment of Property was filed that included a legal description only for the 5 acres.

After not opposing either the relief from stay or abandonment requests and filing a Report of No Distribution, the Trustee forwarded this case to his Counsel, Brent A. Stubbins ("Counsel"), for the conduct of a title examination. The Trustee testified that this is his normal procedure. In this process Counsel discovered the foreclosure complaint filed on behalf of the Creditor that included the reformation count and a reference to additional acreage not disclosed to the Trustee when relief from stay and abandonment were requested. As a result, on August 10, 2005, the Trustee withdrew his Report of No Distribution and issued a Notice of Assets. On August 12, 2005, the Trustee

filed an Application to retain the services of Counsel, and on August 17, 2005, Counsel commenced the instant adversary proceeding that was captioned as a "Complaint to Determine Trustee's Right to Sell Real Estate, and to Stop Reformation Action by Mortgagee."

This adversary proceeding is the basis for the Trustee's request for damages, and was filed without any discussion with the Creditor or its Counsel, Lerner, Sampson & Rothfuss ("LSR"). The record indicates there was no contact until nearly a month later when there was a September 6, 2005, telephone conversation between Mr. Stubbins and Ms. Cynthia M. Roselle of LSR. What followed was a flurry of communication of different settlement proposals between September 9, 2005, and November 1, 2006.

In this correspondence the Creditor acknowledged that the reformation count was filed in error, and it proposed means to end the litigation. On September 14, 2005, the Creditor dismissed the reformation Count, and dismissed the Moores from the foreclosure proceeding. The record indicates that efforts of the Trustee to market the real estate were not impeded, as the sale was concluded on April 3, 2006, for the sum of \$42,500.00 minus the sum of \$3,048.60 in sale expenses.

The issues raised by these events is what action was taken by the Creditor and whether sanctions should be imposed, including actual and punitive damages. To explain its actions the Creditor provided statements and testimony from LSR. According to Mr. Rick D. DeBlasis, from LSR, title searches are not performed until after relief from stay and abandonment are obtained but prior to the commencement of foreclosure proceedings. According to Mr. DeBlasis, all prior actions are based upon mortgage documents supplied by creditors. His statements were supplemented by the testimony of two other attorneys at LSR, Ms. Jill L. Fealko ("Ms. Fealko") and

Mr. Michael R. Proctor ("Mr. Proctor").

Ms. Fealko has been employed as an attorney with LSR for six years, and her practice is confined to foreclosures. She performs approximately 1,000 foreclosures per year. Ms. Fealko testified that she has received some bankruptcy training in the firm and has been assigned a bankruptcy mentor. She understands the need for relief from stay and abandonment, has access to the bankruptcy data in each file, and is able to view Pacer. The Forker case was assigned to Mr. Proctor, but he was out of the office on the day the foreclosure complaint was due to be filed.

Ms. Fealko reviewed the title work to determine whether a complaint should be prepared, and if so what forms should be used. The Title Exam contained a notation that the legal description for the Creditor's mortgage was wrong, and that the correct legal description should be for the entire 35 acres, apparently without taking into account the 10 acres sold to the Moores. This information caused her to review the deed to the Forkers, and she found that it referred to the 35 acres. She then reviewed the legal description for the Creditor's mortgage, and observed that it only referred to the 5 acres. Ms. Fealko also reviewed the second mortgage and noted that it referred to the 35 acres.

Based upon all this information Ms. Fealko concluded that reformation was needed, and she estimated about 20 % of her foreclosures have this problem. Ms. Fealko testified that although she was aware of the chapter 7 proceeding and that relief from stay had been obtained, she did not understand that the reformation count would impact the rights of the Trustee. She did not review the relief from stay motion to determine what property it included, and did not ask her bankruptcy mentor to assist. Ms. Fealko testified that she did not intend her actions to cause harm, and acknowledged the mistake.

Mr. Proctor testified that for the last three years he has done foreclosures, and is not licensed in federal court. He also testified that he handles about 1,000 foreclosures per year. Mr. Proctor understands that in chapter 13 a creditor needs to obtain relief from stay, and that in chapter 7 abandonment is also required. He first became acquainted with the Forker file when the counterclaim for slander of title was asserted by the Moores regarding their 10 acre portion of the 35 acres.

This prompted him to order the Creditor's loan origination file and the title policy. He noticed that the Title Commitment contained the 35 acre legal description. He was confused by this information, and he sent a letter to the title company asserting a claim against the policy in view of the Moore's Counterclaim. He testified that the Title Exam indicated to him that the Debtors owned the other 25 acres, and on this basis he concluded that the reformation count remained viable regarding that acreage.

Mr. Proctor testified that he did not recognize that the Trustee's rights might be impacted, and made no attempt to contact the Trustee to disclose that some of the acreage was not encumbered. Mr. Proctor never inquired within LSR to determine if amended relief from stay and abandonment requests were needed. Mr. Proctor confirmed, however, that the counterclaim against the Moores and the reformation count were dismissed, and that the foreclosure only proceeded against the 5 acres based upon the legal description attached to the mortgage.

Mr. Proctor testified that he later learned that the 5 acre parcel attached to the Creditor's mortgage had not been properly divided, according to the Muskingum County Auditor. He acknowledged that the foreclosure complaint should have been filed without the reformation count, and that he should have done further review regarding what was intended to be encumbered. Mr.

Proctor testified that if the Trustee had called before filing the adversary, he would have investigated.

Turning to the issue of whether damages should be assessed, the actions of the Creditor must be viewed in the context of this Court's civil contempt powers under section 105(a) of the United States Bankruptcy Code ("Code"). This provision must be utilized, rather than section 362(h) of the Code, because the Trustee has commenced the litigation. As written, section 362(h) is only applicable to individuals not corporations or trustees, who represent the interests of the estate as an entity that has suffered harm. This is in contrast to debtors that as individuals claim damages. *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 193 (9th Cir. 1995); *The Elder-Beerman Stores Corp. v. Thomasville Furniture Industries, Inc. (In re Elder-Beerman Stores Corp., et al.)*, 197 B.R. 629, 630-634 (Bankr. S.D. Oh. 1996), affirmed in part, reversed in part and remanded, *Thomasville Furniture Industries, Inc. v. The Elder-Beerman Stores, Corporation*, 250 B.R. 609, 620 (D. S.D. Oh. 1998).

To assess damages under this Courts's civil contempt powers, the party initiating the action must demonstrate that the creditor had sufficient information to provide a reasonable man constructive knowledge that the stay was in effect, and that even with this information, actions in violation of the stay were taken. *In re Elder-Beerman Stores Corp.* 197 B.R. at 633. Based upon the evidence, the Court concludes that the Trustee has sustained his burden.

The Creditor was aware of the bankruptcy filing, the existence of the Trustee, and sought the modification of the stay and abandonment based upon incomplete and inaccurate information. Once it became aware of the additional acreage, the Creditor failed to notify the Trustee and amend its requests for relief from stay and abandonment. The Creditor acknowledges that its actions were in error. In reviewing the record, however, the Court finds that there are five mitigating factors.

First, the Debtors were uniquely situated to know how much acreage they owned. While they disclosed that there had been a transfer to the Moores in 2003, there was no indication in the Schedules or Statement of Affairs, how much acreage they retained. No testimony from the Debtors was provided to explain why the first mortgage to the Creditor only referred to the 5 acres, while the second mortgage referred to the 35 acres, minus the acreage conveyed to the Moores. This transfer was accomplished between the execution of the first and second mortgages.

Second, the Court does not know what information the Debtors provided the Trustee during the meeting of creditors; however, it is clear that the Trustee, like the Creditor, acted on incomplete and inaccurate information by initially filing a no distribution report and ultimately acquiescing to the modification of the stay and abandonment. Since the Trustee testified that he routinely has Counsel perform title exams, it would appear that this practice would be more effective prior to the issuance of no distribution reports and the execution of abandonments. Third, it was not until a title examination was reviewed by the Counsel for the Trustee and LSR that either the Trustee or Creditor became aware of the additional acreage.

Fourth, the mistake made by the Creditor is that it failed to adequately consider the bankruptcy ramifications of the new information, and failed to amend its relief from stay and abandonment requests. Based upon this Court's review of the testimony of attorneys for LSR and observation of their demeanor, the Court can not find any intent to mislead the Trustee. After the filing of the adversary, the Creditor acted promptly to dismiss the reformation count, and it does not appear that the estate suffered any diminution in the sum recovered. A recent decision indicates that stay violation damages may not be awarded in the absence of proof of injury. *In re Perrin*, 2007 WL 148757 (6th Cir. BAP 2007).

Fifth, the Creditor was not given an opportunity to correct the mistake prior to the commencement of the adversary proceeding. Although such prior contact is not statutorily required, it is a practical mechanism employed to mitigate damages were inadvertent violations occur. *In re Price*, 175 B.R. 219, 221-222 (D. S.D. Oh. 1994); *In re Price*, 179 B.R. 70, 73 (Bankr. S.D. Oh. 1995); *In re Roush*, 88 B.R. 163, 165 (Bankr. S.D. Oh. 1988); *In re Newell*, 117 B.R. 323, 325-326 (Bankr. S.D. Oh. 1990).

In weighing all of these factors, the Court finds that the harm in this case was the potential loss to the estate of the value of the additional acreage due to the incomplete and inaccurate information included in the relief from stay and abandonment requests prepared by the Creditor. For these actions the Trustee seeks damages as follows: a. \$6,439.06 for legal fees related to the adversary through November 22, 2006; b. \$2,500.00 for trial preparation; c. \$5,500.00 in Trustee's fees based upon funds to be distributed (\$39,000.00 in real estate sale proceeds and \$8,939.06 in administrative expenses); and d. Punitive damages as determined by this Court. According to the Trustee an award of all of the requested damages would result in a 92-100% dividend.

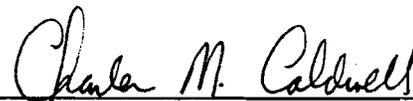
The Court agrees with the Trustee that the preservation of the integrity of the process is important, and that parties that access the system on a routine basis are uniquely obligated to exercise greater care. Further, the Court understands why the Trustee may have felt misled. These factors, however, must be weighed against the fact the actions of the Creditor were not intentional, there is no apparent harm to the estate, and the claimed damages are comprised primarily of legal fees associated with the prosecution of the adversary proceeding. The fees may have been greatly minimized by prior contact with the Creditor's Counsel.

Based upon these factors the following conclusions have been reached: a. In view of the fact that the actions of the Creditor and its Counsel were not intentional, an award of punitive damages is not warranted. b. As there has been no diminution in the recovery to the estate by the Creditor's actions, it should not be assessed the burden of solely paying for the Trustee's administration; and c. While it is clear that the Creditor's actions would inevitably cause the estate to incur some legal fees and expenses, the amount currently requested (\$8,939.06) may have been greatly minimized by prior contact. The record demonstrates that the parties have been engaged in extensive settlement discussions on this point.

For these reasons, the Court concludes that the damages should be limited to the sum of \$4,469.53, which represents fifty percent of the legal fees detailed above. This balance is struck in view of the harm that could have been caused to the estate weighed against the fact that the costs could have been significantly minimized by prior contact between the parties.

It is so ordered.

Date: March 3, 2007



Charles M. Caldwell
United States Bankruptcy Judge

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