This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Guy R. Humphrey
United States Bankruptcy Judge

Dated: June 17, 2008

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: WILLIAM C. TURNER GEORGIA TURNER, *Debtors*	Case No. 06-32852 Judge Humphrey Chapter 13

Decision Denying Debtors' Motion to Consolidate Adversary Cases

I. Introduction

This contested matter is before the court on the motion filed by the Debtors, William C. Turner and Georgia J. Long-Turner (the "Debtors"), on May 12, 2008 captioned *Motion to Consolidate Adversary Cases* (the "Motion") (Doc. 95) pursuant to which the Debtors request "an order consolidating proceedings in the following cases", and presumably with

the proceeding in their own case as well: Case No. 05-46629 (*In re Wetzel*); Case No. 02-30138 (*In re Minor*); Case No. 04-39700 (*In re Clippinger*); Case No. 05-38390 (*In re Wehry*); Case No. 05-33686 (*In re Stuart*); Case No. 05-38393 (*In re Weatherly*); and Case No.: 05-37776 (*In re Brown*). [1] The following interested parties have filed objections or responses to the Debtors' Motion: Chase Home Finance (Doc. 96); Litton Loan Servicing LP (Doc. 98); Countrywide Home Loans, Inc. (Doc. 99); GMAC Mortgage, LLC (Doc. 100); Washington Mutual Bank (Doc. 101); CitiMortgage, Inc. (Doc. 102); Wachovia Equity Servicing, LLC, f/k/a HomEq Servicing Corporation (Doc. 103); U.S. Bank National Association (Doc. 105); and Wells Fargo Bank, NA (Doc. 109). These objecting parties made loans to the Debtors or the other debtors that are the subject of the Debtors' Motion that are secured by mortgages on their real estate and are defendants to the action discussed below originally filed in the United States District Court for the Southern District of Ohio (the "District Court").

The Motion follows a decision and order entered by Hon. Walter Herbert Rice of the District Court on March 13, 2008, in an action captioned *Wetzel et al. v. HomeEq Servicing Corporation et al.,* Case No. 07-042 (the "Action"), which decision was titled: *Decision and Entry Sustaining In Part And Overruling, Without Prejudice, In Part Motion To Dismiss Of Defendant HomEq Services Corporation (Doc. #16); Decision and Entry Sustaining In Part And Overruling, Without Prejudice, In Part Motion To Dismiss Of Defendant U.S. Bank National Association (Doc. #19); Decision and Entry Overruling, Without Prejudice, Motion To Dismiss Of Defendant Countrywide Home Loans, Inc. (Doc. #29) ; Decision and Entry Sustaining In Part and*

[1] The Debtors list seven (7) cases in addition to their case at the beginning of their Motion to Consolidate Adversary Cases, but later in that Motion refer to "nine (9) separate adversaries". The Debtors, either intentionally or unintentionally, failed to refer to the case of Thomas N. Cousins, Case No. 06-30003, a case pending before the Hon. Lawrence S. Walter, as the ninth case that is related to the Debtors' Motion and the District Court's Decision discussed in this decision.

Overruling, Without Prejudice, In Part Motion To Dismiss Of Defendant Litton Loan Servicing LP (Doc. #33; Decision and Entry Overruling, Without Prejudice, Motion To Dismiss Or In The Alternative For More Definite Statement Of Defendant Chase Home Financing, Inc. (Doc. #52; Decision And Entry Sustaining In Part and Overruling, Without Prejudice, In Part Motion To Dismiss Of Defendant Citimortgage, Inc. (Doc. #62; Decision and Entry Overruling, Without Prejudice, Motion To Dismiss Of Defendant GMAC Mortgage, LLC (Doc. #64; Decision and Entry Overruling, Without Prejudice, Motion To Dismiss Of Defendant Washington Mutual Bank (Doc. #66; Decision and Entry Overruling, Without Prejudice, Plaintiffs Motion For Leave To File Second Amended Complaint (Doc. #84); Plaintiffs Claims Referred To The United States Bankruptcy Court For The Southern District Of Ohio; Judgment To Enter Accordingly; Conference Call Vacated; Termination Entry (the "Decision").

II. Facts and Background

A. Litigation of the Action in the District Court

The Action was filed on February 9, 2007 by fifteen (15) named plaintiffs (the "Named Plaintiffs"), all of whom are or have been debtors in the United States Bankruptcy Court for the Southern District of Ohio, Western Division (the "Bankruptcy Court"), against eight (8) named defendants (the "Named Defendants'). The Action was brought "as a Class Action pursuant to Rule 23(a) and (b)(1)(A), (b)(1)(B) and (b)(3) of the Federal Rules of Civil Procedure on behalf of all persons who are, as of the date of this filing, debtors in a Chapter 13 bankruptcy case, in any Bankruptcy Court in the United States, and which debtors have real estate mortgages owned or serviced by the Defendants, and which said mortgages are being paid in the debtor's Chapter 13 plan and who have received demands for payment by

the defendants in the form of 'payment coupons.'"[2] The Named Defendants filed various motions to dismiss the Action (the "Motions to Dismiss"). The Motions to Dismiss, among other arguments made, disputed the subject matter jurisdiction of the District Court over the Action.

The District Court found through its Decision that it has been divested of its subject matter jurisdiction over the Action due to the order of reference entered in this District referring "all actions, matters, or proceedings arising under Title 11 of the United States Code or arising in or related to a case under the Bankruptcy Act and Title 11 of the United States Code . . . to the Bankruptcy Judges for the Judicial District." Decision, pp. 6-7. The District Court also found that withdrawal of the reference to the Bankruptcy Judges was not properly sought and that it would not exercise its discretion under 28 U.S.C. § 157(d) to withdraw the reference. Accordingly, the District Court through the Decision and accompanying Judgment entry referred each of the Named Plaintiffs' claims in the Action to "their case pending in the Bankruptcy Court". Decision, p. 10. Thus, the District Court stated that:

> [T]he claim of Plaintiff Beverly Wetzel must be referred to Case No 3:05bk46629 (Bankr. S.D.Ohio); that the claims of Plaintiffs David and Yvonne Minor must be referred to Case No. 3:02bk30138 (Bankr. S.D.Ohio); that the claims of Plaintiffs Melvin and Nellie Brown must be referred to Case No 3:05bk37776 (Bankr. S.D. Ohio) and that the claims Plaintiff Patricia Weatherly must be referred to Case No 3:05bk38393 (Bankr. S.D.Ohio).

The District Court then stated that the claims of the other Named Plaintiffs must be referred to their respective cases in the Bankruptcy Court. Decision, pp. 10-11. The District Court

[2] The Plaintiffs to the District Court Action intend to exclude from the plaintiff class: 1) any debtors who had "filed their cases in the United States Bankruptcy Court for the District of New Hampshire"; and 2) any debtors who had "filed proceedings in the bankruptcy courts to adjudicate their claims."

denied without prejudice all of the other relief sought by the Named Defendants in the Motions to Dismiss and stated that such relief "must be had in the Bankruptcy Court." Decision, p. 11.

B. **The Named Plaintiffs' Bankruptcy Cases**

1. *William C. Turner and Georgia J. Long-Turner, Case No. 06-32852*

The bankruptcy case of William C. Turner and Georgia J. Long-Turner is pending in Dayton before the Hon. Guy R. Humphrey.

2. *Beverly K. Wetzel, Case No. 05-46629*

The bankruptcy case of Beverly K. Wetzel is pending in Dayton before the Hon. Guy R. Humphrey.

3. *David S. Minor and Estella Yvonne Minor, Case No. 02-30138*

The bankruptcy case of David S. Minor and Estella Yvonne Minor is pending in Dayton before the Hon. Lawrence S. Walter. The Minors have filed an adversary complaint in their bankruptcy case against U.S. Bank Home Mortgage which contains allegations similar to those set forth in the Action which has been assigned Adversary Proceeding No. 07-03035.

4. *James G. Clippinger and Carole Kay Clippinger, Case No. 04-39700*

The bankruptcy case of James G. Clippinger and Carole Kay Clippinger was assigned to the Hon. Lawrence S. Walter in Dayton and was closed on April 16, 2008.

5. *Theodore P. Wehry and Jamie S. Wehry, Case No. 05-38390*

The bankruptcy case of Theodore P. Wehry and Jamie S. Wehry was assigned to the Hon. Thomas F. Waldron in Dayton and was closed on August 23, 2007. Judge Waldron has

since that time retired from the bench and this case has not been re-assigned to a different judge.

6. *Dennis L. Stuart and Dabie M. Stuart, Case No. 05-33686*

The bankruptcy case of Dennis L. Stuart and Dabie M. Stuart is pending in Dayton before the Hon. Lawrence S. Walter.

7. *Victoria Weatherly, Case No. 05-38393*

The bankruptcy case of Victoria Weatherly is pending in Dayton before the Hon. Guy R. Humphrey.

8. *Melvin Brown, Jr. and Nellie C. Brown, Case No. 05-37776*

The bankruptcy case of Melvin Brown, Jr. and Nellie C. Brown is pending in Dayton before the Hon. Guy R. Humphrey.

9. *Thomas N. Cousins, Case No. 06-30003*

The bankruptcy case of Thomas N. Cousins is pending in Dayton before the Hon. Lawrence S. Walter. This is the case that appears to have been left off the listing of cases at the beginning of the Debtors' Motion.

C. **The Motion to Consolidate Adversary Cases**

The Debtors' *Motion to Consolidate Adversary Cases* was filed in this case on May 12, 2008. The Motion was not filed in the other seven (7) cases involving the other Named Plaintiffs to the Action. The Motion mentions the District Court's Decision and states that "[r]ather than proceeding to file nine (9) separate adversaries with identical factual and class allegations, it would be in the interest of judicial economy to consolidate these cases with the instant case." Motion, pp. 1-2. The actual request for relief in the opening

statement of the Motion seeks "an order consolidating proceedings" in the above-mentioned cases. The Named Defendants to the Action that have responded to the Motion have construed the Motion as seeking the procedural or substantive consolidation of the Named Plaintiffs' bankruptcy cases, as opposed to the consolidation of adversary or other proceedings.

III. Legal Analysis

A. Confusion and Ambiguity Arising Out of the Motion: What Was A Case In The District Court Is An Adversary Proceeding In This Court

The court notes that the Debtors' Motion is ambiguous as to the relief which the Debtors seek, including whether they seek to consolidate the Debtors' bankruptcy case with the other Named Plaintiffs' bankruptcy cases, either procedurally or substantively, or whether they seek to consolidate an adversary proceeding or other "proceedings" in their case with adversary proceedings or other proceedings in the other Named Plaintiffs' bankruptcy cases. The title of the Motion is "Motion to Consolidate Adversary Cases" and the first sentence of the Motion reads: "Now come the Debtors, by and through their undersigned Counsel, and move the Court for an order consolidating proceedings in the following cases . . ." These references in the Motion lead the court to believe that the Debtors seek to consolidate adversary proceedings. However, later in the Motion the Debtors state as follows: "Rather than proceeding to file nine (9) separate adversaries with identical factual and class action allegations, it would be in the interest of judicial economy to consolidate these cases with instant case." This reference in the Motion leads the court, and apparently most if not all of the objecting parties, to believe that the Debtors seek to consolidate their bankruptcy case with the bankruptcy cases of the other Named Plaintiffs.

The United States District Courts, and bankruptcy courts through the orders of reference referring bankruptcy cases and proceedings to the bankruptcy courts, have jurisdiction over both "cases" and "proceedings" arising under, in, or related to Title 11 of the United States Code. 28 U.S.C. § 1334(b). In bankruptcy parlance, a "case" is the debtor's bankruptcy case initiated through the filing of the bankruptcy petition. *See* 11 U.S.C. §§ 301, 302, and 303 and Norton Bankruptcy Law and Practice 3d, §§ 3:19 and 4:45. It has been stated that the "case" is "the structure or receptacle within which litigated and certain uncontested matters are brought before the court for judicial action." Norton Bankruptcy Law and Practice 3d, § 4:45. A "proceeding" on the other hand is "any controversy or other matter requiring judicial action within a case." Norton Bankruptcy Law and Practice 3d, §§ 3:19 and 4:45. "Proceedings" include: a) adversary proceedings which are "civil actions" filed within a bankruptcy case (*See* Bankruptcy Rules 7001, 7003, 7005, and 7007); and b) contested matters (*See* Bankruptcy Rules 9013 and 9014). *Id.* The Debtors' Motion at times requests the court to consolidate adversary "cases" or "proceedings" and at other times requests the court to consolidate "cases", thus leading to the confusion as to the relief the Debtors are requesting through their Motion. While this court is cognizant that the "Action" may have been correctly referred to in the District Court as a "case", use of that term to refer to a "proceeding" in the bankruptcy court only leads to confusion in situations such as this where the distinction is significant.

Further, as the objecting parties have noted, the Debtors failed to comply with Bankruptcy Rule 9013 requiring that the grounds for a motion and the relief sought therein be set forth with particularity and Local Bankruptcy Rule 9013-1 requiring that all motions be

accompanied by a supporting memorandum. The failure to comply with these rules has exacerbated if not caused the problem with the court's inability to decipher the relief actually sought by the Debtors through their Motion.

B. The Action Is Currently Pending as "Proceedings" In The Debtors' and Other Named Plaintiffs' Bankruptcy Cases

As a consequence of the District Court's referral of the Action to this court and the respective bankruptcy cases of the Named Plaintiffs, the Action is already pending as a "proceeding" in each of the Named Plaintiffs' bankruptcy cases. However, the Action has not been properly documented in this court and in the Named Plaintiffs' bankruptcy cases as "proceedings" in those cases.

Section 1334(b) of Title 28 of the United States Code vests original jurisdiction in the United States District Courts over "all civil proceedings arising under Title 11, or arising in or related to cases under Title 11." Thus, the District Court had jurisdiction over the Action, but as stated in the Decision, was divested of that jurisdiction through the order of reference to the bankruptcy court. Furthermore, "the bankruptcy judges in regular active service . . . constitute a unit of the district court to be known as the bankruptcy court for that district." 28 U.S.C. § 151. In its Decision, the District Court did not dismiss the Action, but rather, referred it to the bankruptcy court and, specifically, to each of the Named Plaintiffs' bankruptcy cases. Thus, the Action, having been filed in the District Court, with the bankruptcy court being a unit of the District Court, and the District Court having referred the Action to the Named Plaintiffs' bankruptcy cases, is now pending in the cases of each of the Named Plaintiffs.

Bankruptcy Rule 7001 states what relief must be sought through an adversary proceeding. The Amended Complaint filed by the Named Plaintiffs in the Action seeks declaratory relief and injunctive relief which can only be sought in the bankruptcy court through an adversary proceeding. *See* Bankruptcy Rules 7001(7) and (9). Thus, the "proceedings" that are now pending within the Named Plaintiffs' cases as a result of the District Court's referral of the Action to this court and to the Named Plaintiffs' bankruptcy cases are adversary proceedings and must be administered as such through the opening of adversary proceedings in those cases. It would appear that through the Debtors' Motion, the Debtors seek to jump over the hurdle, and perhaps the expense, of opening adversary proceedings in each of the bankruptcy cases for the Named Plaintiffs by filing one adversary proceeding in the Debtors' case. One of the problems with that approach is the fact that the Action is already pending in all of the Named Plaintiffs' cases as a proceeding referred by the District Court and must be properly documented as such before this court can and will grant any relief sought in the Action as it has been referred to this court and the Named Plaintiffs' cases. As noted, the only manner in which the Action can be pending in this court is through an adversary proceeding since the Action seeks injunctive and declaratory relief. Accordingly, adversary proceedings must be opened in each of the bankruptcy cases of the Named Plaintiffs to properly reflect the record of the Action as referred by the District Court to this court and the cases of the Named Plaintiffs.

C. The Debtors Have Not Established Any Basis For the Consolidation of Their Bankruptcy Case With The Bankruptcy Cases of Other Debtors, Including the Bankruptcy Cases of the Named Plaintiffs

The Debtors have not cited any authority, statutory or jurisprudential, in support of their Motion. In particular, the Debtors have not explained how the standards for consolidation are met under (i) Bankruptcy Rule 7042; (ii) Bankruptcy Rule 1015; or (iii) the requirements for substantive consolidation. The court cannot determine a basis for consolidation or joint administration under Bankruptcy Rule 1015 because it does not appear that the cases sought to be consolidated or jointly administered, if that is in fact what the Debtors are seeking, involve the same or related debtors as is required under Rule 1015. Moreover, substantive consolidation of bankruptcy cases requires an extremely fact-intensive analysis of the respective cases before any such determination can be made. *See In re Owens Corning*, 419 F.3d 195 (3rd Cir. 2005); *Union Saving Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co., Ltd.),* 860 F.2d 515 (2nd Cir. 1988); *Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp., Inc.),* 810 F.2d 270 (D.C. Cir. 1987); and *In re Steury*, 94 B.R. 553 (Bankr. N.D. Ind. 1988). The Debtors have not set forth any such facts justifying substantive consolidation. Accordingly, the court has been provided with no basis upon which to procedurally consolidate, substantively consolidate, or jointly administer the Debtors' bankruptcy case with the bankruptcy cases of other debtors, including the bankruptcy cases of the other Named Plaintiffs.

If the Named Plaintiffs open adversary proceedings and file the record of the Action from the District Court in their respective adversary proceedings, there may be a basis pursuant to Bankruptcy Rule 7042 for consolidating those adversary proceedings or matters

at issue in those adversary proceedings. However, before this court can ever make such a determination, adversary proceedings must be properly opened in accordance with this Decision to properly establish the record of the Action as it has been referred to this court and the respective bankruptcy cases of the Named Plaintiffs by the District Court.

IV. Conclusion

For the foregoing reasons, the Debtors' *Motion to Consolidate Adversary Cases* (Doc. 95) is denied without prejudice to consolidation pursuant to Bankruptcy Rule 7042 of the Debtors' adversary proceeding or any matter at issue in the adversary proceeding with other adversary proceedings or matters at issue in other adversary proceedings then pending in this court, if such adversary proceedings are administratively opened in the appropriate bankruptcy cases. To the extent that the Debtors are seeking consolidation of their bankruptcy case with the bankruptcy cases of other debtors, including the bankruptcy cases of the other Named Plaintiffs, whether it be procedural or substantive consolidation, such relief is denied.

The Debtors shall have thirty (30) days from the date of the entry of the order on this Decision to open an adversary proceeding (the "Adversary Proceeding") in this bankruptcy case and to file the record of the Action from the District Court in the Adversary Proceeding in order to properly establish the records of the Action as it has been referred to this court and this case by the District Court. The Debtors shall pay the bankruptcy court filing fee for the filing and opening of the Adversary Proceeding and shall comply with any other procedural requirements attendant to the filing and opening of an adversary proceeding in this court. To the extent that this Decision is pertinent to other bankruptcy cases in this

court, the respective debtors shall first file a motion to reopen the case and pay the attendant fee to reopen that case prior to the opening of the respective adversary proceeding if the case has been closed by the court. In the event an adversary proceeding is not opened and the District Court record filed in that adversary proceeding for any of the Named Plaintiffs to the Action within thirty (30) days from the date of the entry of the order on this Decision, the court will enter an order in that case dismissing, without prejudice, the proceeding arising out of the Action referred to that case.

The court is contemporaneously entering a separate order in this case and in the cases of the other Named Plaintiffs consistent with this Decision.

c:

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