Note: We handed out copies of In re Stewart as a primer on how to evaluate mortgage loan add-on's.

Residential Mortgage Lender/Servicer Claim Abuse

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Representative Cases

I. *In re Stewart*, 391 B.R. 327 (Bankr. E.D. La. 2008):

Debtor filed an objection to mortgagee's claim, thereby denying liability for the amounts claimed, and requested a payment history and support for items included in the second amended claim described as amounts for inspection fees, appraisal fees, NSF check charges, and other charges as well as pre-petition attorneys' fees and escrow advances. After a proceeding prolonged by the mortgagee's sloppiness and misrepresentations, the United States Bankruptcy Court for the Eastern District of Louisiana held mortgagee's conduct was duplicitous and misleading, debtor was improperly charged for "drive by inspections" and broker's price opinions, its escrow calculations were incorrect and resulted in overcharges, and its imposition of late charges was improper and unreasonable. Given the excessive and improper charges, as well as a nearly incomprehensible escrow account, the court imposed sanctions and warned mortgagee against further improper conduct in the proceedings.

II. *Nosek v. Ameriquest Mortgage Co.* (*In re Nosek*), 386 B.R. 374 (Bankr. D. Mass. 2008):

The United States Bankruptcy Court for the District of Massachusetts issued an order to show cause why sanctions should not be imposed under Rule 9011 of the Federal Rules of Bankruptcy Procedure for apparent misrepresentations as to the status of a lender as the holder of the note and mortgage. The Order to Show Cause was directed at the lender, local counsel, three of its attorneys, the lender's national counsel, one of its attorneys, and the existing mortgage holder. Throughout an adversary proceeding, the lender and its attorneys represented that the lender was the holder of a note and mortgage given by plaintiff, the Chapter 7 debtor, on her principal residence. In actuality, the lender was the original holder of the note and mortgage for only five days and had assigned the note and mortgage to the predecessor of the existing holder in 1997. Additionally, the lender assigned its servicing rights in connection with the note and mortgage in 2005. Despite the fact that the lender no longer held the note and mortgage and ended its servicer role, the court noted that the lender's attorneys and representatives had repeatedly and consistently made contrary representations throughout the adversary proceeding.

The court found that those parties who do not "hold" the note and mortgage and who do not service the mortgage, such as the lender, do not have standing to pursue motions for relief or other actions arising from the mortgage obligation. Unfortunately, either through confusion or lack of knowledge, or perhaps sloppiness, all too many lenders misrepresent the roles and positions they hold in bankruptcy mortgage claims. These misrepresentations require debtors, already burdened in their attempts to pay their mortgages, to expend additional time and resources in an effort to sort out who actually holds and/or services a given note and mortgage.

The court sanctioned the lender $250,000 because it made repeated misrepresentations and its behavior in failing to properly disclose its role was unreasonable under the circumstances. The court also sanctioned the lender's local law firm and the partner in charge of the matter $25,000 each, because, had they checked the firm's file, they would have seen that the existing holder was perhaps the real party in interest. The court sanctioned the national firm $100,000 because it had a responsibility to know its client's role in the case. The court sanctioned the existing holder $250,000 because it should have been able to correct the misrepresentations.

III. *In re Fitch*, 390 B.R. 834 (Bankr. E.D. La. 2008):

Debtors filed an objection to the claim of creditor mortgagee, and served a qualified written request pursuant to the Real Estate Settlement Procedures Act ("RESPA"), seeking documentation to support the mortgagee's claim for broker's price opinion charges, inspection fees, foreclosure fees and costs, and amounts due under debtors' escrow account. Debtors also sought damages and attorney's fees. The purpose of RESPA is to protect home buyers from material nondisclosures in settlement statements and abusive practices in the settlement process.

The primary issue considered by the court involved past due amounts the mortgagee claimed for escrow. The mortgagee had a great deal of difficulty producing evidence and explaining how the amounts assessed against the debtors were calculated. Its calculation resulted in substantial overstatement of the amounts owed. After it failed to produce evidence at trial, the court declared the escrow account current, striking all past due sums. The mortgagee finally satisfied the qualified written request, well after the time limit set by RESPA. The debtors sought sanctions and damages for its failure to timely provide the information requested. The mortgagee would be liable for actual damages should a pattern of noncompliance be proven. The court found that the debtors did not show a pattern of noncompliance by the lender, nor did they prove that additional damages were warranted. The court awarded the debtors $3,500 in attorneys' fees for time spent pursuing the objection to claim.

IV. *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008):

Court issued two show cause orders requiring mortgage loan servicer, its national counsel and local counsel to appear and show cause why they should not be sanctioned for the conduct related to a motion to lift the automatic stay, which was later withdrawn. After local counsel for the servicer sought to withdraw the motion to lift the automatic stay, the court inquired why it was necessary to withdraw the motion. Rather than admitting that the motion was based on an incorrect payment history, local counsel attempted to conceal the truth from the court. Over the course of expansive proceedings related to the show cause orders, the court discovered that the servicer had failed to property maintain payment histories and effectively communicate with its counsel. Additionally, the court found that attorneys and legal assistants employed by servicer's local counsel are "filing motions to lift the stay without questioning the accuracy of the debt figures and other allegations…and appearing in court without properly preparing for hearings." *Parsley*, 384 B.R. at 183. Attorneys and appearing at hearings ill prepared because they have not been property trained, have little to no communication with their clients, and they are drafting, signing and filing motions to lift the automatic stay without having the client review the final version of the motion for accuracy. While the court was gravely concerned with the practice of

the servicer, national counsel and local counsel, it declined to impose sanctions as the court was unable to find that the parties conduct was anything more than negligent bungling.

V. *In re Jacobson*, 2009 WL 567188 (Bankr. W.D. Wash. March 10, 2009):

An alleged servicing agent for a deed of trust holder filed a motion for relief from stay in order to enforce the deed of trust on the debtor's residence. Attached to the motion were unauthenticated copies of the adjustable rate note, a barely legible copy of the debtor's deed of trust, an unrecorded assignment of mortgage, and a copy of the Debtor's real property and secured claims schedule (Schedules A and D). The motion was further supported by a declaration of a "bankruptcy specialist" of the alleged servicing agent which did little more that parrot the narrative set forth in the motion. There was no evidence provided, nor any assertion made, regarding the servicing agents authority to act for the holder of the note, beyond the unelaborated statements that it was the servicing agent for the holder of the note. Additionally, the servicing agent neither asserted a beneficial interest in the note, nor that it could enforce the note in its own right.

Inasmuch as the deficient record put the servicer's standing in question, the court opined that it had "*an independent duty to determine whether [it has] jurisdiction over matters that come before [the court].*" *Id*. at *__. Consequently, the court had a threshold obligation to determine whether the servicer had standing to seek the relief it sought.

The primary issues confronted by the court were whether a "servicing agent" is a real party in interest in whose name a relief from stay can be brought and whether a "servicing agent" has standing to seek relief from stay to enforce debtor's deed of trust. Fed. R. Bankr. P 7017, imposing the requirements of Fed. R. Civ. P. 17, sets forth that actions must be prosecuted in the name of the real party in interest. In applying Fed. R. Civ. P. 17, the Court concluded that a stay relief motion must be prosecuted in the name of the real party in interest. The Court went on to hold that "the real party in interest in relief from stay is whoever is entitled to enforce the obligation sought to be enforced. Even if a servicer or agent has authority to bring the motion on behalf of the holder [of the deed of trust], it is the holder, rather than the servicer, which must be the moving party, and so identified in the papers and in the electronic docketing done by the moving party's counsel." It follows that an order granting a motion for relief from stay must do so only to the actual holder of the note – not the servicer acting on the note holder's behalf.

The court went on the hold that for a federal court to have jurisdiction of the motion for relief from stay, the movant must have constitutional standing, which requires an injury fairly traceable to the debtor's alleged wrongful conduct and likely to be redressed by the requested relief. Under the Bankruptcy Code, a party seeking a motion for relief from stay must establish entitlement to that relief. 11 U.S.C. § 362(d). Servicing agents do no automatically have standing to prosecute a motion for relief from stay and must establish their authority to act for the real party in interest or holder of the note that does. In Washington, only the holder of the obligation secured by the deed of trust is entitled to foreclose. It follows, then, that for a servicing agent to have standing to prosecute a motion for relief from stay, it must not only establish that it represents the real party in interest, but also that it has clear authority to act on

behalf of the real party in interest. The court found that the servicing agent failed to establish that it had standing in its own right to bring the motion or authority to act on behalf of the real party in interest.

Another issue addressed by the court in *Jacobson* is the sufficiency of the evidence identifying the real party in interest or the holder of the note. In prosecuting a motion for relief from stay, a servicing agent, as the movant, must establish that it represents the present holder of the note and that it has authority to act on such person or corporation's behalf. Often, to establish its right to prosecute a motion for relief from stay, the servicing agent will rely on business records to provide the necessary proof. The exception to the hearsay rule for records of a regularly conducted activity requires that records be (1) made at or near the time by, or from information transited by, a person with knowledge; (2) kept in the course of a regularly conducted business or activity; (3) it was the regular course of the business activity to make and keep the record or data compilations; and (4) the source of information or the method or circumstances of preparation do not indicate a lack of trustworthiness. Fed. R. Evid. 803(6). Each of these elements must be established by the testimony of a custodian of the servicing agent or note holder, and the documents must be authenticated. The individual authenticating the business records, whether through affidavit or live testimony, must establish that he or she is sufficiently qualified and knowledgeable about the records at issue to allow the court to reach the conclusion that the proffered records are what they purport to be. In proffering this testimony, it is not sufficient for declarant to make the bare assertion that "I am employed as bankruptcy specialist for movant and in this capacity, I am one of the custodians of the books, records, file and banking records of movant." Such testimony does little to inform the court that the records at issue were created in the regularly conducted business activity of the movant or that it was the regular business activity of the movant to keep the records or data compilations at issue.

If a servicing agent is prosecuting the motion for relief from stay on behalf of a bank, and the note secured by the deed of trust is in the possession of the bank, a custodian of the bank and not the servicing agent would be required to authenticate the business records. The custodian of the bank would also have to establish that the servicing agent is authorized to enforce the note on the bank's behalf.

VI. *In re Sheridan*, 2009 WL 631355 (Bankr. D. Idaho. March 12, 2009):

The Chapter 7 trustee objected to a motion for relief from stay, alleging that the moving party was not a party in interest. The issue highlighted by the trustee's objection was the standing of the moving creditor. The motion for relief from stay was filed by "Mortgage Electronic Registration Systems, Inc. as nominee for HSBC Bank USA, National Association, as Indenture Trustee of the Fieldstone Mortgage Investment Trust Series 2006-3." The movant characterized itself as a "secured creditor and claimant." The trustee objected to the motion for relief from stay on that grounds that the movant failed to establish its interest in the property or its standing to seek stay relief.

Under the Bankruptcy Code, relief from the stay is authorized on "request of a *party in interest* and after notice and a hearing…" 11 U.S.C. § 362(d) (emphasis added). While the term

"party in interest" is not defined by the Bankruptcy Code, the Court held that such a party must have a pecuniary interest in the outcome of the dispute. It follows that only a "party in interest" or "party with a pecuniary interest" in the outcome of the dispute has standing to bring a motion for relief from stay. In addressing whether a party has sufficient party in interest standing to be heard, the court stated:

> The doctrine of standing encompasses both constitutional limitations on federal court jurisdiction (*i.e.*, the case or controversy requirements of Article III), and prudential limitations on the court's exercise of that jurisdiction. Constitutional standing requires an injury in fact, *viz.* an invasion of a judicially cognizable interest. Prudential standing requires that the party's assertions fall within the zone of interests protected by the statute and, further, requires that the litigant assert only its own rights and not those of another party. The party asserting standing exists has the burden of proving it. Though sometimes articulated in the cases as principles applicable to standing on appeal, the same propositions apply to a party at the bankruptcy court level.

Sheridan. 2009 WL 631355 at *3 (internal citations omitted). As such, a party may not asset objections that relate solely to others, or that go to issues that do not directly and adversely affect them pecuniarily. It follows, "the real party in interest in relief from stay is whoever is entitled to enforce the obligation sought to be enforced. Even if a servicer or agent has authority to bring the motion on behalf of the holder, it is the holder, rather than the servicer, which must be the moving party, and so identified in the papers and in the electronic docketing done by the moving party's counsel." *Id*. at *10 (citing *In re Jacobson*, 2009 WL 567118 at *11). Thus, to obtain stay relief, a motion must be brought by a party in interest, with standing. This means:

> The motion must be brought by one who has a pecuniary interest in the case and, in connection with secured debts, by the entity that is entitled to payment from the debtor and to enforce security for such payment. That entity is the real party in interest. It must bring the motion or, if the motion is filed by a servicer or nominee or other agent with claimed authority to bring the motion, the motion must identify and be prosecuted in the name of the real party in interest.

Sheridan, 2009 WL 631355 at *11. The court found that the movant failed to establish that it was the real party in interest with standing to bring the motion for relief from stay or that it had authority to prosecute the motion in the name of the real party in interest.