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United States Bankruptcy Court,
S.D. Ohio, Western Division.

IN RE: Constance E. DEWITT, Debtor.

Case No. 11-36341
|
Signed September 30, 2022

Attorneys and Law Firms

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AMENDED DECISION GRANTING IN PART AND DENYING IN PART DEBTOR'S MOTION FOR SUMMARY JUDGMENT AND HSBC BANK USA, NA, AS INDENTURE TRUSTEE FOR THE REGISTERED HOLDERS OF THE RENAISSANCE HOME EQUITY LOAN ASSET-BACKED CERTIFICATES, SERIES 2005-1, PHH MORTGAGE CORPORATION AND OCWEN LOAN SERVICING, LLC'S CROSS-MOTION FOR SUMMARY JUDGMENT

Guy R. Humphrey, United States Bankruptcy Judge

I. Introduction

***1** When a person files a bankruptcy petition under Chapter 13, they hope to receive what Congress intended – an opportunity to rehabilitate long-term debt, repay creditors to the best of their ability, and obtain a fresh financial start. Because of this, "a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934)) (internal quotation marks omitted). The present circumstances were less utopian.

When Constance Dewitt ("Dewitt") filed under Chapter 13, she owed a substantial arrearage on her home mortgage. She proposed to cure the arrearage through her Chapter 13 plan. Dewitt experienced several missteps during her case – specifically, she repeatedly failed to pay property taxes for her primary residence, despite agreeing in her Chapter 13 plan to do so. As a result, her mortgage creditor, HSBC Bank USA, NA, as Indenture Trustee for the registered holders of the Renaissance Home Equity Loan Asset-Backed Certificates, Series 2005-1 ("HSBC"), found it necessary to advance the funds to pay those taxes on her behalf on three separate occasions ("the First, Second, and Third Advances"). HSBC waived the First Advance and submitted a Rule 3002.1(c) notice for the Second Advance, which in effect served as a claim for that advance. However, HSBC did not file a Rule 3002.1(c) notice for the Third Advance. At the conclusion of the case, the Chapter 13 Trustee ("the Trustee") filed a Notice of Final Cure Payment showing the mortgage as current. In its Rule 3002.1(g) Response, HSBC agreed that Dewitt had paid the prepetition arrearage in full and was otherwise current on all post-petition payments. Nearly a year after entry of the discharge order, HSBC, through its mortgage servicer, notified Dewitt that she still owed the Third Advance. After other collection efforts, HSBC proceeded with a foreclosure action on Dewitt's home. Upon HSBC's proceeding with the foreclosure, Dewitt moved this court to reopen her bankruptcy and find HSBC and its two loan servicers in contempt for violations of Rule 3002.1 and the discharge injunction. The court will refer to HSBC and the servicers collectively as "the Mortgagee." The court reopened Dewitt's bankruptcy case and both parties have filed cross-motions for summary judgment on Dewitt's contempt motion.

II. Jurisdiction

This court has jurisdiction pursuant to 28 U.S.C. § 1334(b) and the Standing Order of Reference (Amended General Order 05-02) of the District Court for the Southern District of Ohio in accordance with 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B), and this court has constitutional authority to enter a final judgment. *Stern v. Marshall*, 564 U.S. 462, 499, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011).

III. Summary Judgment Standard

***2** A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (made applicable in this contested

matter by Federal Rule of Bankruptcy Procedure 7056). A factual disagreement is genuine if "a rational trier of fact could find in favor of either party on the issue." *SPC Plastics Corp. v. Griffith* (***In re*** *Structurlite Plastics Corp.*), 224 B.R. 27, 30 (B.A.P. 6th Cir. 1998) (citing *Schaffer v. A.O. Smith Harvestore Prods., Inc.*, 74 F.3d 722, 727 (6th Cir. 1996)). A fact is material if it might affect the outcome of the suit under substantive law. *Niecko v. Emro Mktg. Co.*, 973 F.2d 1296, 1304 (6th Cir. 1992) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). When reviewing a motion for summary judgment, a court views all evidence and draws all inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

IV. Factual and Procedural Background

Dewitt filed a petition for bankruptcy relief under Chapter 13 in November 2011. Doc. 114, ¶ 1. She listed her primary residence, a property located at 5250 Stoneridge Drive, Springfield, OH 45503 (the "Property"), as an asset. *Id.* at ¶¶ 2-3. **Dewitt's** property was subject to a mortgage lien held by HSBC. *Id.* at ¶¶ 4-6. While PHH Mortgage Corporation ("PHH") now services the loan, Ocwen Loan Servicing LLC ("Ocwen"), the original loan servicer, serviced the loan until May 2019. *Id.* at ¶ 8.

Dewitt's Chapter 13 Plan (the "Plan") required the Trustee to pay Ocwen "(1) the full amount of the pre-petition arrearages in the amount of $19,543.56; (2) the on-going, post-bankruptcy monthly payments due on the loan through May 2017; and (3) a post-petition fee that Ocwen incurred for paying the 2014 installment of real estate taxes in the amount of $1,655.63 (the Second Advance) ...." *Id.* at ¶ 11. The Plan required **Dewitt** to directly pay post-petition property taxes to Clark County, but she did not do so. *Id.* at ¶¶ 10, 13. Instead, Ocwen paid the property taxes on three occasions: (1) $6,097.95 on August 11, 2014 (the "First Advance"), (2) $1,655.63 on August 31, 2015 (the "Second Advance"), and (3) $4,155.91 on April 26, 2017 (the "Third Advance"). *Id.* at ¶¶ 11-12, 14. While HSBC filed a Notice of Post-Petition Escrow Advances for the Second Advance (doc. 46), it did not file notices for the First Advance or the Third Advance. *Id.* at ¶¶ 11, 16. HSBC never attempted to recover the First Advance from **Dewitt**. *Id.* at ¶ 15, 27. Ocwen paid the Third Advance shortly after the Clark County Treasurer filed a tax foreclosure against the Property for unpaid, past-due taxes. *Id.* at ¶ 14, 17; Doc. 97, Ex. I. Neither HSBC nor Ocwen sought to collect the Third Advance during the pendency of the bankruptcy case or at any time before August 1, 2018. Doc. 114, ¶ 26.

In May 2017 the Trustee filed a Notice of Final Cure (doc. 55). Doc. 114, ¶ 18. In its Response to Notice of Final Cure (doc. 56), HSBC "agreed that Debtor was current on all postpetition payments due, including all fees, charges, escrow and costs, and stating that the next postpetition payment was due June 1, 2017." *Id.* at ¶ 19. The Trustee subsequently filed a Certification of Final Payment and Case History (doc. 58) to which HSBC did not object. *Id.* at ¶ 20. This court entered an order granting **Dewitt's** discharge in June 2017. Doc. 60; *Id.* at ¶ 24. Despite HSBC's statements, in August 2017, Ocwen's records showed that **Dewitt's** escrow balance had been reduced by $6,097.95 (reflective of Ocwen's waiver of the First Advance) but was still $4,155.91 in arrears. *Id.* at 22; Doc. 116, Ex. K at 64. **Dewitt's** bankruptcy case was closed on October 17, 2017. She continued to make monthly mortgage payments after her bankruptcy case concluded. Debtor Affidavit, Doc. 72.

***3** In May 2018, nearly a year after receiving her discharge, Ocwen advised **Dewitt** via letter "that the Loan would be escrowed in the amount of $346.32 per month beginning on August 1, 2018, for taxes that Ocwen advanced on behalf of the Debtor." Doc. 114, ¶ 25. **Dewitt** did not begin paying the monthly escrow amount and continued to make only her monthly principal and interest payments. Doc. 118 at 7. Ocwen avers that she did not respond to multiple notices indicating that the monthly escrow amounts were also due. *Id.* at 7-8. Ocwen sent a notice of mortgage default on December 4, 2018. Feezer Affidavit, Doc. 69 at 34-37. Subsequently, in February 2019, Ocwen began returning **Dewitt's** monthly mortgage payments. Debtor Affidavit, Doc. 72. Despite this, **Dewitt** continued to make the monthly payments by bank transfer from her personal account. *Id.* **Dewitt** contacted Ocwen repeatedly but was unable to learn why these payments were returned. *Id.* In September 2019, HSBC filed a foreclosure complaint (the "Complaint") in the Clark County, Ohio, Common Pleas Court seeking to foreclose on the mortgage secured by **Dewitt's** Property. Doc. 114 at ¶ 28. **Dewitt**, through her attorney, disputed the amount due on the Note and requested "documentation relating to the amount due on the Loan, including an explanation as to any escrow payments that were due." *Id.* at ¶ 32; Doc. 97, Ex. J; Doc. 118 at 4. In February 2020 **Dewitt** filed an answer to the Complaint along with counterclaims against HSBC alleging "wrongful foreclosure, attempted wrongful

foreclosure, breach of contract, and breach of good faith and fair dealing." Doc. 114, ¶ 34. After an unsuccessful settlement attempt, HSBC indicated a desire to proceed in its foreclosure suit. In response, on May 11, 2021, **Dewitt** filed a motion to reopen the present bankruptcy case (doc. 64). *Id.* at ¶ 36-37; Doc. 118 at 5. The court granted the motion to reopen the case to resolve this contested matter (doc. 75). *Id.* at ¶ 37.

After a failed mediation conference (doc. 84), **Dewitt** filed a motion to show cause why the Mortgagee should not be held in contempt for violation of the discharge order and other actions and seeking sanctions. Doc. 89. The Mortgagee filed a brief in opposition to which **Dewitt** replied. Docs. 97, 103. In accordance with the court's scheduling order (doc. 112) bifurcating the liability and damages issues and directing the parties to brief only the liability issue, both **Dewitt** and the Mortgagee filed cross-motions for summary judgment in March 2022. Docs. 118, 121. In addition, both parties filed response and reply briefs. Docs. 127, 128, 132, 133. The court reviewed these documents, the attached exhibits, and the parties' stipulations (doc. 114). The court also takes judicial notice of the docket in this case.

V. Statement of the Parties' Positions

Dewitt asks this court to hold the Mortgagee in contempt for violations of the discharge injunction and Rule 3002.1.[1] She further requests that the court set a separate hearing to issue sanctions and award damages. **Dewitt** argues that because the Mortgagee failed to file a Notice of Fees, Expenses, and Charges for the Third Advance as required by Rule 3002.1(c), these fees should be disallowed and unavailable for collection. **Dewitt** also argues that the Mortgagee cannot collect the Third Advance or otherwise claim that **Dewitt's** failure to pay this amount resulted in a mortgage arrearage because HSBC agreed in its Response to the Trustee's Notice of Final Cure Payment that the mortgage was current and, by doing so, waived any right to contest whether the mortgage was current at the time of discharge. Accordingly, **Dewitt** asks the court to strike any references to a mortgage default related to the Third Advance in the Mortgagee's proffered evidence as a Rule 3002.1(i) sanction. Finally, **Dewitt** argues that the Mortgagee violated the discharge injunction when they attempted to collect the Third Advance from **Dewitt** and took other actions because the Third Advance was a disallowed claim under § 502(a) and separate from the remaining rehabilitated long-term mortgage debt under § 1328(a)(1). When HSBC failed to submit the required notice under Rule 3002.1(c), any claim for the Third Advance became a disallowed claim under § 502(a).

In the alternative, **Dewitt** suggests that the Third Advance was a debt provided for by the plan because HSBC "was required to supplement its claim with the filing of a 3002.1(c) notice ... in order for the amount that would have been included in the supplement to be an allowed claim." Doc. 121 at 8. By attempting to collect a debt discharged under § 1328(a), the Mortgagee violated the discharge injunction. **Dewitt** further argues that the Mortgagee violated the discharge injunction when PHH "added to **Dewitt's** payment records the April 26, 2017 tax payment [the Third Advance] ... without ever filing a 3002.1(c) notice, and despite its Response to the Notice of Final Cure Payment that **Dewitt** was current on all prepetition payments and postpetition payments." Doc. 121 at 10-11. **Dewitt** argues that these actions were in violation of § 524(i). In response to the Mortgagee's laches argument, **Dewitt** states that she did not unreasonably delay the reopening of her bankruptcy case or the filing of her contempt motion. She further asserts that the Mortgagee cannot rely on this equitable defense because they are "guilty of having unclean hands." Doc. 121 at 13.

***4** The Mortgagee argues that Ocwen and HSBC did not violate Rule 3002.1(c) because **Dewitt** obtained a discharge on June 15, 2017 and completed her case well before October 23, 2017, the 180-day deadline by which the Mortgagee would otherwise have been required to file a notice under Bankruptcy Rule 3002.1(c). The Mortgagee also contends that **Dewitt** cannot rely on equitable estoppel or waiver because she received notice that her monthly payments would change to allow Ocwen to collect the Third Advance and therefore should not have relied on HSBC's response to the Trustee's Notice of Final Cure Payment. Doc. 118 at 24. The Mortgagee argues that, in any case, Rule 3002.1(i) does not permit courts to disallow fees for which a creditor fails to provide a Rule 3002.1(c) notice. The Mortgagee also argues that they did not violate the discharge injunction because "they did not admit that they failed to properly apply Debtor's payments [,] ... Debtor's Loan was not discharged through her Bankruptcy [,] ... Debtor cannot establish that she is entitled to relief under 11 U.S.C. § 524(i) or 11 U.S.C. § 105[,] ... and the Motion is barred by the doctrine of laches." Doc. 118 at 9.[2] The Mortgagee further argues that, even if the Third Advance was discharged, the Mortgagee cannot be held in contempt under § 524(i) for their attempts to collect it because the discharge order "did not sufficiently advise Respondents that they could not collect the Third Advance." Doc. 118

at 11. The Mortgagee also asserts that "Debtor's Motion is barred by laches as she unreasonably delayed **in re**-opening her Bankruptcy to file her Motion," and they were prejudiced by this delay. Doc. 118 at 15, 17. Finally, the Mortgagee argues that they cannot be held in contempt under § 105 for violating the Confirmation Order because the "Respondents' allowed secured claim included a contingent right to recover post-petition tax advances from Debtor" under the terms of the mortgage, and the Plan did not otherwise "contain specific and definite terms, as is required for a finding of contempt, that prevented Respondents from assessing and collecting post-petition, pre-discharge advances[.]" Doc. 118 at 21.

VI. Legal Analysis

Unlike Chapter 7, Chapter 13 allows debtors to cure long-term debt arrearages and exit bankruptcy with current and ongoing mortgage obligations on their primary residence. However, this power is subject to several provisions that govern the treatment of mortgage lender claims and restrict modification of contract terms. Another bankruptcy court explained the limitations on how mortgage creditors' rights on a debtor's primary residence can be modified through a Chapter 13 plan:

> Combined, the provisions [§§ 1322(b)(2) and (b)(5)] have the effect of precluding the modification of a mortgage lender's right to payments pursuant to the lender's pre-petition mortgage contract. A chapter 13 plan may not reduce the lender's claim to the value of the collateral under § 506 nor may the plan alter the contractual interest rate. The plan may not per se preclude the collection of fees and expenses allowed by the contract. Nor may the debtor obtain a discharge of amounts allowed by the contract. Other provisions balance mortgage lenders' special rights with debtor rights and protections. The primary right provided to debtors is the right to cure arrearages and remain current on mortgage debt so that debtors emerge from chapter 13 with the promised fresh start. Two sections of the Bankruptcy Code are at the heart of this dispute. Section 1322(b)(2) provides that a chapter 13 plan may:
>
> > *modify the rights of holders of secured claims, other than a claim that is secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;*
>
> The breadth of § 1322(b)(2) is limited by § 1322(b)(5), which reads as follows:
>
> > *notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;*
>
> Section 1322(b)(2)'s protections are not limited to principal and interest payments. Rather, § 1322(b)(2)'s language is broad, precluding the modification of any contractual right.... Sections 1322(b)(2) and (b)(5), together, define how a mortgage lender will be paid in a chapter 13 plan. Based on these provisions, the plans in these cases provide that the debtors will pay a certain amount each month on account of their mortgages. A portion of the established amount must be allocated to the outstanding pre-petition arrearages, and the remainder must be allocated to current principal and interest payments.

5** *Rodriguez v. Countrywide Home Loans, Inc.* (In re*** *Rodriguez*), 396 B.R. 436, 440-41 (Bankr. S.D. Tex. 2008). Thus, while a debtor's mortgage arrearage can be cured through a Chapter 13 plan, the mortgage creditor's contractual rights remain in place, including any rights to charge and collect applicable post-petition fees. To balance this right with the need to ensure a fresh start for debtors, Congress adopted Rule 3002.1. The rule exists to "aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan." ***In re*** *Roper*, 621 B.R. 899, 902 (Bankr. D. Colo. 2020) (quoting Fed. R. Bankr. P. 3002-1 advisory committee's note to the 2011 adoption). Rule 3002.1 "does not allow the secured creditor to silently accrue additional amounts and then spring a 'gotcha' foreclosure after the debtor has completed her plan and emerged from bankruptcy protection." *Id.* at 902. **Dewitt** argues that the Mortgagee acted in violation of subsections (c) and (g) of Rule 3002.1.

A. Rule 3002.1(c)

Rule 3002.1(c) requires mortgage creditors whose claims are secured by a security interest in the debtor's primary residence to "file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence." Fed. R. Bankr. P. 3002.1(c). This rule further instructs that the "notice shall be served within 180 days after

the date on which the fees, expenses, or charges are incurred." *Id.* Rule 3002.1 exists to "prevent unexpected deficiencies in residential mortgage payments when a chapter 13 case is completed and closed." *Figueroa v. Banco Popular de P.R.* (***In re*** *Figueroa*), Nos. 09-07725 (MCF), 19-00032, 2021 Bankr. LEXIS 3337, at *12, 2021 WL 5815641, at *4 (Bankr. D.P.R. Dec. 7, 2021) (citing ***In re*** *Melendez Vega*, 2019 WL 927006, 2019 Bankr. LEXIS 545 (Bankr. D. P.R. Feb. 21, 2019)); see also ***In re*** *Lescinskas*, 628 B.R. 377, 378-79 (Bankr. D. Mass 2021) ("The purpose of the rule is to facilitate successful chapter 13 debt adjustments by promoting transparent and timely notice, thus avoiding situations where unpaid amounts accumulate to the point where, by the time a debtor is made aware of them, they are beyond his ability to pay."). Here, there is no genuine factual issue as to whether HSBC submitted a 3002.1(c) notice for the Third Advance – the parties agree that it did not. Doc. 114 at ¶ 16. Instead, the inquiry turns to the consequences, if any, for HSBC's failure to submit this statement.

HSBC argues that it was not in fact required to submit a 3002.1(c) notice because the case concluded before the expiration of the applicable 180 day period to submit the notice. Because the court finds that HSBC violated Rule 3002.1(g) by failing to file required information when it responded in agreement to the Trustee's Notice of Final Cure Payment yet showed the account status as delinquent, the court declines to determine whether a creditor is required to file a 3002.1(c) notice when the Chapter 13 plan concludes before the 180 day period expires.

B. Rule 3002.1(g)

Subsections (f) and (g) of Rule 3002.1 state (emphasis added):

> **(f) Notice of Final Cure Payment.** Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.
>
> ***6 (g) Response to Notice of Final Cure Payment.** Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. **The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement.** The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

Judge Buchanan, a bankruptcy judge in this district, explained the process set out in these two subsections:

> Within thirty days after the debtor completes all payments under a plan, the Chapter 13 trustee is required to file and serve on the secured creditor a notice stating that the debtor has paid in full the amount required to cure any default on the claim. Fed. R. Bankr. P. 3002.1(f). The secured creditor is given twenty-one days to dispute whether the default has been cured and whether the debtor is otherwise current on all payments consistent with Section 1322(b)(5). Fed. R. Bankr. P. 3002.1(g). If the secured creditor files a timely dispute, the debtor or the Chapter 13 trustee may file a motion to have the court determine whether the debtor has cured the default and paid all required post-petition amounts. Fed. R. Bankr. P. 3002.1(h).

In re *Poff*, No. 11-15869, 2012 Bankr. LEXIS 1189, at *20-23, 2012 WL 7991472, at *8 (Bankr. S.D. Ohio Mar. 16, 2012). Thus, Rule 3002.1 "provides a procedure to draw a bright line at the conclusion of a case as to any amounts that may remain due to a creditor relating to the cure payments or payments due on a mortgage during the pendency of the chapter 13 case." *Culberson v. Nationstar Mortgage, LLC* (***In re*** *Culberson*), 2022 Bankr. LEXIS 1629 at *33, 2022 WL 2111268, at *10 (Bankr. E.D. Tenn. June 10, 2022) (quoting ***In re*** *Carr*, 468 B.R. 806, 808 (Bankr. E.D. Va. 2012)).

Rule 3002.1(g) responses "must be signed by the holder under penalty of perjury." ***In re*** *Howard*, 563 B.R. 308, 314 (Bankr. N.D. Cal. 2016) (quoting ***In re*** *Nieves*, 499 B.R. 222, 224 (Bankr. D.P.R. 2013). A bankruptcy court addressed a creditor's failure to submit accurate information in its 3002.1 (c) notice and stated, "When the Official Form 410S2 – the 3002.1 Notice – is submitted under penalty of perjury, the Court expects that the facts asserted have been carefully researched and, to the best of the creditor's knowledge, are not only true, but are complete enough to be an accurate characterization." *Trevino v. HSBC Mortg. Servs.* (***In re*** *Trevino*), 615 B.R. 108, 131 (Bankr. S.D. Tex. 2020). The court noted, "Official Form 410S2 states in

bold: 'I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.' Whether Defendants service a few loans, or a few million, it is not excused from conducting its due diligence." *Id.*

In the present case, Official Form 4100R, required for 3002.1(g) responses and submitted by HSBC, includes an identical statement requiring it to be signed under penalty of perjury and was signed by HSBC's attorney (doc. 57). On that response, HSBC indicated that "Creditor agrees that the debtor(s) have paid in full the amount required to cure the prepetition default on the creditor's claim." Doc. 57 at 1. HSBC further indicated, "Creditor agrees that the debtor(s) are current with all postpetition payments consistent with § 1322(b)(5) of the Bankruptcy Code, including all fees, charges, expenses, escrow, and costs." *Id.* Nothing on the statement suggests that HSBC did not agree that the debtor was current in each respect indicated. Even now, HSBC agrees that "[a]t the time the Final Cure Response was filed, Ocwen's records reflected that the escrow balance in the amount of $10,253.86 would be waived from the Loan.... Ultimately, the Waiver was approved on July 31, 2017." Doc. 118 at 6. In explaining its dichotomous subsequent behavior, HSBC states:

> ***7** On June 15, 2017, this Court entered an order (the "Discharge Order") granting Debtor her discharge (Doc. #60) (Stipulation, Doc. # 114, ¶ 24). Subsequently, due to a further account reconciliation, the Waiver that was previously approved on July 31, 2017, was reversed, in part. Specifically, the Third Advance in the amount of $4,155.91 was added back to the Loan.

Id. In plain terms, HSBC argues that it changed its mind about waiving the Third Advance and added the charge back onto the Debtor's account after this court entered a discharge and closed the case and despite its affirmation to this court that the debt was current at the time of discharge – an assertion equivalent to crossing fingers behind one's back. This court is hardly amused.

At the outset, the court notes that HSBC's 3002.1(g) response was filed on May 19, 2017 (doc. 57), approximately one month after it advanced those taxes to the county treasurer and more than two months before HSBC claims the initial waiver of the Third Advance occurred. Even though the waiver was apparently pending internal approval, HSBC swore under penalty of perjury that the account was current. Doc. 57 at 2. At no time did HSBC request an extension of time to file the 3002.1(g) response or submit an accurate showing that the amount remained outstanding. The careful review conceived by the 3002.1(f) and (g) notice and response process ought to have triggered HSBC to either file a 3002.1(c) notice of the Third Advance and an appropriate 3002.1(g) response indicating the outstanding amount or, in the alternative, to request an extension of the response deadline under Rule 9006(b) to ensure that the internal process to approve the waiver was complete. Instead, HSBC apparently filed a statement that, at best, it hoped would be true. In any case, it is clearly impermissible for a creditor aver one set of facts to the court and then later take the opposite position, offering the excuse that it simply changed its mind. Here, the Debtor was deemed current because HSBC failed to respond otherwise and instead agreed under penalty of perjury that the mortgage, including all post-petition payments, was indeed current. See *Figueroa*, Nos. 09-07725 (MCF), 19-00032, 2021 Bankr. LEXIS 3337, at *13-14, 2021 WL 5815641, at *5 ("By failing to notify the arrears during the bankruptcy on a timely basis pursuant to the rule [3002.1], [the creditor] could not collect any further charges pertaining to the time-period of the bankruptcy, even if the Debtor was in arrears ... the Debtor was deemed current because [the creditor] failed to notify otherwise."); ***In re*** *Owens*, No. 12-40716, 2014 Bankr. LEXIS 163, at *9, 2014 WL 184781, at *4 (Bankr. W.D.N.C. Jan. 15, 2014) (rejecting creditor's argument that it did not need to comply with Rule 3002.1 when the creditor argued "that it may collect the fees at a later date and not immediately" because this argument "would undercut[s] the purpose of the rule."). Rule 3002.1 is clear – creditors who intend to recover additional post-petition fees related to a § 1322(b)(5) mortgage claim secured by the debtor's primary residence must timely disclose these fees. *Owens*, No. 12-40716, 2014 Bankr. LEXIS 163, at *9, 2014 WL 184781, at *4; *Haynes v. Wells Fargo Bank, N.A.*, No. 2:08-CV-00183-RWS-RSP, 2017 U.S. Dist. LEXIS 197254, at *7-8, 2017 WL 5895160, at *3 (E.D. Tex. Oct. 30, 2017) ("If the holder seeks to recover, after the case has been closed, amounts that should have been (but were not) disclosed during the bankruptcy proceeding, the debtor may seek sanctions against the holder."). Creditors are barred from collecting these fees if undisclosed.

***8** Chapter 13 debtors are permitted to seek assistance from the bankruptcy court when mortgage creditors attempt to collect amounts that should have been disclosed under Rule 3002.1 during the pendency of the case. 9 Collier on Bankruptcy ¶ 3002.1.05, n. 7 (16th ed. 2022) (quoting 2011 Advisory Committee Note) ("If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal

residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (i).”); see *Figueroa*, Nos. 09-07725 (MCF), 19-00032, 2021 Bankr. LEXIS 3337, at *12, 2021 WL 5815641, at *5 (“If the creditor fails to timely file and serve the notice of fees, expenses, and charges in the proper form or with the proper notice, the court may, upon motion brought by the debtor, trustee, or other party in interest and after notice and hearing, take action against the creditor.”); *Blanco v. Bayview Loan Servicing, LLC* (***In re*** *Blanco*), 633 B.R. 714, 747-48 (Bankr. S.D. Tex. 2021) (similar). And Rule 3002.1 specifies the consequences for a creditor who fails to disclose required information:

> (i) **Failure to Notify.** If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:
>
> (1) Preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
>
> (2) Award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Fed. R. Bankr. P. 3002.1(i). In *Figueroa*, a bankruptcy court confronted a similar circumstance in which a creditor failed to provide notice of additional fees under 3002.1(c) or respond to the Trustee's Notice of Final Cure Mortgage Payment then attempted to “ambush” the debtor by notifying him of a significant mortgage deficiency and the potential for foreclosure on his house. Nos. 09-07725 (MCF), 19-00032, 2021 Bankr. LEXIS 3337 at *14, 2021 WL 5815641 at *5. The court determined:

> By failing to notify the arrears during the bankruptcy on a timely basis pursuant to the rule, [the creditor] could not collect any further charges pertaining to the time-period of the bankruptcy, even if the Debtor was in arrears, as [the creditor] alleges. In other words, the Debtor was deemed current because [the creditor] failed to notify otherwise. Collection of “alleged arrears” by [the creditor] violates the discharge order since the Debtor was current on his mortgage and all his unsecured debts were discharged. Consequently, [the creditor] could not pursue any alleged arrears that may have incurred during the bankruptcy case as a result of [the creditor's] failure to object to the Notice of Final Cure.

Id. The relief permitted by 3002.1(i) “permits the court to prevent the creditor from collecting an un-noticed amount only if the non-compliance caused harm, ‘serv[ing] the remedial goal of shielding the debtor from unforeseen charges,’ so that the debtor's fresh start is not later disrupted.” *Blanco*, 633 B.R. at 752 (quoting *PHH Mortg. Corp.*, 2017 WL 6999820, at *9, 2017 U.S. Dist. LEXIS 207801, at *—— (D. Vt. Dec. 18, 2017)) (internal quotation marks omitted).

Here, the Mortgagee's noncompliance did cause harm – the Debtor was forced to defend a state court foreclosure action and to reopen her bankruptcy case to assert her rights. There is no basis to find that HSBC's failure to file an accurate 3002.1(g) response and act in accordance with its sworn statements was substantially justified. See ***In re*** *Luzier*, 580 B.R. 725, 730-31 (Bankr. N.D. Ohio 2014) (finding that a mortgage creditor's failure to object to the information in the Notice of Final Cure was not substantially justified or harmless). Therefore, in accordance with Rule 3002.1(i)(1), at the hearing on damages or sanctions and with respect to any other hearing or proceeding, the court will preclude the Mortgagee from presenting any information that could have been included in its response to the Trustee's Notice of Final Cure or that otherwise controverts the information contained therein, which HSBC swore on penalty of perjury was accurate. See *id.* at 731 (precluding the mortgage creditor from presenting information contrary to that contained in the Notice of Final Cure); *Figueroa*, Nos. 09-07725 (MCF), 19-00032, 2021 Bankr. LEXIS 3337, at *11, 2021 WL 5815691, at *4.

C. The Discharge Injunction

***9** **Dewitt** also asserts that the Mortgagee has violated the injunction arising out of § 524(a) and the discharge of her dischargeable debts.

Because the Code provides no private right of action under § 524(a) for a discharge injunction violation, debtors must enforce the discharge injunction through a contempt proceeding in the court that issued the discharge order. *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir. 2000); ***In re*** *Orlandi*, 612 B.R. 372, 381 (B.A.P. 6th Cir. 2020). To support a contempt finding, the debtor must show that the creditor “violated a specific and definite order of the court.” *Knupfer v. Lindblade* (***In re*** *Dyer*), 322 F.3d 1178, 1190-91 (9th Cir. 2003) (quoting *Renwick v. Bennett* (***In re*** *Bennett*), 298 F.3d 1059, 1069 (9th Cir. 2002)).

Assuming the court finds that the discharge injunction was a specific and definite order that was violated, it "may [only] hold a creditor in civil contempt for violating a discharge order when there is not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the discharge order." *Taggart v. Lorenzen*, —— U.S. ——, 139 S. Ct. 1795, 1804, 204 L.Ed.2d 129 (2019). After *Taggart*, bankruptcy courts have used a "two-step process" to determine discharge injunction contempt issues, first addressing whether a discharge injunction violation occurred and then analyzing whether the creditor acted with "no fair ground of doubt" as to whether his actions violated the discharge order. ***In re*** *Distefano*, 611 B.R. 100, 102 (Bankr. W.D. Mich. 2019).

No fair ground of doubt exists when "there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order." *Taggart*, 139 S. Ct. at 1801. "This standard reflects the fact that civil contempt is a severe remedy ... and that principles of basic fairness require that those enjoined receive explicit notice of what conduct is outlawed before being held in civil contempt." *Id.* at 1802 (citing *Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974)) (internal quotation marks omitted). Thus, the "no fair ground of doubt" standard is an objective one and does not require a finding of willfulness. *Id.* (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1994)). On the contrary, a creditor's subjective belief that an action complied with the discharge order "will not insulate her from civil contempt if that belief was objectively unreasonable." *Id.* "In other words, there is no fair ground of doubt when the creditor violates a discharge injunction 'based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope.' " *Orlandi v. Leavitt Family Ltd. P'ship* (***In re*** *Orlandi*), 612 B.R. 372, 382 (B.A.P. 6th Cir. 2020) (quoting *Taggart*, 139 S. Ct. at 1802). However, subjective intent may be considered by the court in determining whether a creditor acted in bad faith or when finding that a creditor's good faith is relevant to a sanctions determination. *Id.*

10** After a bankruptcy court enters a discharge order, the automatic stay is replaced with the § 524(a) discharge injunction. *Kilbourne v. CitiMortg., Inc.* (In re*** *Kilbourne*), 555 B.R. 628, 632 (Bankr. S.D. Ohio 2015) (citing *Ung v. Boni* (***In re*** *Boni*), 240 B.R. 381, 384 n.5 (B.A.P. 9th Cir. 1999)). Section 524 states in pertinent part:

> (a) A discharge in a case under this title—
>
> ....
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]
>
> ....
>
> (i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

11 U.S.C. § 524(a) and (i).

The discharge injunction "bars post-discharge lawsuits that seek to collect discharged debts." *Cawood v. Seterus* (***In re*** *Cawood*), 577 B.R. 538, 546 (Bankr. E.D. Tenn. 2017) (citing ***In re*** *Lafferty*, 229 B.R. 707, 712-13 (Bankr. N.D. Ohio 1998)). However, § 1328(a)(1) excepts § 1322(b)(5) long-term debt ("cure and maintain" debt) from discharge in a Chapter 13 case. ***In re*** *Polvorosa*, 621 B.R. 1, 13-14 (Bankr. D. Nev. 2020); see also Keith M. Lundin, Lundin On Chapter 13, § 158.7, at ¶ [9], LundinOnChapter13.com (last visited September 8, 2022) (stating that "after completion of [§ 1322(b)(5)] payments under the plan, amounts due by contract that have not been paid through the plan are excepted from discharge by § 1328(a)(1)"). Thus, § 524(i) "was designed for long-term debts that are not discharged at the end of a plan." *Swink v. Fannie Mae* (***In re*** *Swink*), Nos. 19-51012, 20-06193, 2021 Bankr. LEXIS 2827, at *15, 2021 WL 4768091, at *5 (Bankr. M.D.N.C. Oct. 12, 2021) (citing *Carnegie v. Nationstar Mortg., LLC* (***In re*** *Carnegie*), 621 B.R. 392, 403-409 (Bankr. M.D.N.C. 2020)).

A creditor's post-discharge conduct violates the discharge injunction when "the objective effect of the creditor's action is to pressure a debtor to repay a discharged debt." *Roth v. Nationstar Mortg., LLC* (***In re*** *Roth*), 935 F.3d 1270, 1276 (11th Cir. 2019) (quoting *GreenPoint Credit, LLC v. McLean* (***In re*** *McLean*), 794 F.3d 1313, 1322 (11th Cir. 2015)). "To prove a discharge injunction violation, a debtor must establish

that the creditor (1) has notice of the debtor's discharge; (2) intends the actions which constituted the violation; and (3) acts in a way that improperly coerces or harasses the debtor." *Bates v. CitiMortgage, Inc.*, 844 F.3d 300, 304 (1st Cir. 2016) (quoting *Best v. Nationstar Mortgage LLC*, 540 B.R. 1, 9 (B.A.P. 1st Cir. 2015)) (internal quotation marks omitted). This court entered **Dewitt's** discharge order on June 15, 2017 (doc. 60). A certificate of service (doc. 61) showing that both HSBC and Ocwen received service and notice of the discharge order was subsequently filed on June 18, 2017. The Mortgagee has never argued that they did not have notice of **Dewitt's** discharge. The court therefore finds that the Mortgagee had notice of the discharge order.

***11** Having determined that the Mortgagee had notice of the discharge injunction, the court must determine whether the Mortgagee in fact violated the discharge injunction. The court finds that the Mortgagee did not engage in such a violation.

Dewitt argues that the Mortgagee violated the discharge injunction by failing to properly credit plan payments as required by § 524(i). See Doc. 121 at 10. However, **Dewitt** has offered no evidence to show that the Mortgagee misapplied plan payments. Rather, **Dewitt's** evidence and statements establish not that the Mortgagee misapplied plan payments, but instead, inappropriately added the Third Advance to her account after she received her discharge and then sought to collect that amount post-discharge.

Courts addressing Rule 3002.1 violations have sometimes found co-existing discharge violations, but those cases involved the misapplication of plan payments when creditors applied payments to undisclosed charges in the place of the payments on the arrearage which the plan proposed to cure. See *Figueroa*, Nos. 09-07725 (MCF), 19-00032, 2021 Bankr. LEXIS at *16-17, 2021 WL 5815641, at *6 (finding that a mortgage creditor violated the discharge injunction when it failed to respond to the Notice of Final Cure Payment and to properly apply mortgage payments); *Bivens v. NewRez LLC* (***In re*** *Bivens*), 625 B.R. 843, 847 (denying motion to dismiss when debtor argued that mortgage creditor misapplied plan payments and assessed undisclosed fees to debtor's mortgage account during the case); but see *Polvorosa*, 621 B.R. at 12-14 (finding that the mortgage creditor did not violate the discharge injunction when it sought to collect unpaid post-petition maintenance payments because those amounts were not discharged and the arrearage was disclosed in the creditor's 3002.1(g) response, albeit inadequately). Here, there is no evidence that the Mortgagee credited any plan-provided maintenance or cure payment to the Third Advance instead of the monthly mortgage payment or the allowed arrearage claim. Instead, it appears that plan payments were correctly applied throughout the case. Had the Mortgagee applied the Chapter 13 Trustee's payments under the plan to the Third Advance without notice during the bankruptcy case and caused **Dewitt** to emerge from bankruptcy with an uncured arrearage or missed monthly maintenance payments, they would have been in violation of the discharge order. But the sole post-discharge arrearage claimed by the Mortgagee was the Third Advance, and they did not attempt to collect this amount during the pendency of the case. Further, the Plan required **Dewitt** to directly pay the real estate tax installments. Simply put, the Mortgagee did not divert plan payments to make the Third Advance or to reimburse themselves for the Third Advance. Rather, they simply billed **Dewitt** for that advance and tried to collect it from her after she received her discharge despite stating in their Rule 3002.1(g) response that the loan was current at that time. Because of this, the court cannot find that the Mortgagee misapplied plan payments. While the court does find that this conduct violated Rule 3002.1, it did not violate the discharge injunction.

For similar reasons, the Mortgagee did not violate the confirmation order. **Dewitt's** plan stated that she would directly pay the property taxes. When she did not do so, HSBC exercised its contractual right to pay the taxes and seek recompense through the escrow process. Post-petition mortgage issues are generally governed by the underlying contract between the debtor and creditor. It is clear that HSBC could have collected the Third Advance through escrow had it filed a Rule 3002.1(c) notice and included this amount in its Response to Notice of Final Cure Payment. Had HSBC attempted to collect this amount from plan payments during the case, it would have been in violation of Rule 3002.1 and the confirmation order. See *Rodriguez*, 396 B.R. at 442-43 (stating that a creditor could not apply plan payments to undisclosed post-petition charges without violating the confirmation order under Rule 2016(a)).

D. The Mortgagee's Laches Argument

***12** The Mortgagee argues that **Dewitt** is barred by the equitable doctrine of laches from asserting her claims because she unreasonably delayed reopening her bankruptcy case and filing the present motion for contempt. See Doc. 118 at 15. The Mortgagee asserts that **Dewitt** "waited almost three years to reopen her Bankruptcy [case] and seek sanctions," and that she "had the information she needed to re-open her Bankruptcy [case] by January 23, 2020." *Id.* at 16.

"Laches is the negligent and unintentional failure to protect one's rights." ***In re*** *Bowshier*, 389 B.R. 542, 549 (Bankr. S.D. Ohio 2008) (quoting *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002)) (internal quotation marks omitted). To assert the laches defense, a litigant must demonstrate: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Id.*; *Grant v. Granader* (***In re*** *Granader*), 657 Fed. Appx. 554, 557 (6th Cir. 2016) (reviewing a bankruptcy court's denial of a creditor's motion to reopen a case). In the Sixth Circuit, there is a "strong presumption that a plaintiff's delay in asserting its rights is reasonable as long as an analogous state statute of limitations has not elapsed." *Id.* (citing *Elvis Presley Enter., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991). Further, "[a]ttempts to resolve a dispute without resorting to a court do not constitute unreasonable delay for determining the applicability of the doctrine of laches." *McKeon Prods. v. Howard S. Leight & Assocs.*, 15 F.4th 736, 743 (6th Cir. 2021) (quoting *Kehoe Component Sales Inc. v. Best Lighting Prods.*, 796 F.3d 576, 585 (6th Cir. 2015)).

The court does not find that **Dewitt** exhibited a lack of diligence in pursuing her claim. It is clear from the record that **Dewitt** continuously asserted that her mortgage was current as of the time of her bankruptcy discharge. **Dewitt** retained counsel who communicated with the Mortgagee, requested information, and filed an answer in the state foreclosure case. Nor does the court find prejudice to the Mortgagee. The Mortgagee has demonstrated no evidence of prejudice beyond legal fees incurred in pursuing foreclosure and defending this action. The Sixth Circuit has made clear that "[p]assage of time in itself does not constitute prejudice." *Granader*, 657 Fed. Appx. at 557 (quoting ***In re*** *Bianucci*, 4 F.3d 526, 528 (7th Cir. 1993)). To the extent that the Mortgagee suggests that they would not have pursued collection and foreclosure remedies if **Dewitt** had reopened her bankruptcy case earlier, the court rejects this argument. The Mortgagee was made aware of **Dewitt's** position that she emerged from her Chapter 13 case current on all post-petition payments. The Mortgagee cannot argue that they are prejudiced by **Dewitt's** failure to stop them from violating her rights under the Bankruptcy Code and Rules.

VII. Conclusion

For these reasons, the court grants in part and denies in part **Dewitt's** motion for summary judgment and HSBC's cross-motion for summary judgment. The court will issue: a) an order consistent with and incorporating this decision; and b) a separate scheduling order setting a pre-trial conference and briefing dates to address appropriate sanctions.

IT IS SO ORDERED.

All Citations

--- B.R. ----, 2022 WL 4588320

Footnotes

1 Although **Dewitt** initially sought an additional determination that the Mortgagee violated the automatic stay (doc. 89), she withdrew this argument in her Motion of Debtor for Summary Judgment (doc. 121 at 13).

2 The Mortgagee also argues that "punitive damages are impermissible." Doc. 118 at 9. However, the court will not address that argument at this time in keeping with the court's decision to bifurcate the issue of sanctions and damages from the liability issues presently before the court.

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