1.21.11

First Circuit

Knowles v. Bayview Loan Servicing LLC (In re Knowles, Chapter 13), 2011 Bankr. Lexis 2 (BAP 1st Cir. 1/3/11)(Before Bankruptcy Judges Feeney, Tester, Bailey, Opinion by Judge Bailey).
Applying *de novo* review, Bankruptcy Appellate Panel affirmed the Maine Bankruptcy Court's grant of summary judgment to defendant, and denied defendant's request for fees and costs. Plaintiff/debtor filed a complaint against the loan servicer/defendant alleging violation of RESPA, and of the automatic stay, which the court below denied. Bankruptcy Court held that summary judgment as to the RESPA claim was proper because the loan was not a federally related mortgage loan under 12 U.S.C. §2602 (loan was initially between private parties, thereafter sold), that the eight-day turnaround time within which the loan was sold could not by itself demonstrate intent to sell to the entities named within Section 2602(1)(B)(iii); and, defendant had not violated the automatic stay by filing a proof claim or sending an annual tax statement or providing payoff statements (documents were informative, not an attempt to collect). Defendant's attempt to recover certain pre- and post-petition costs and fees was not a unilateral effort to modify the plan, since the confirmed plan had reserved determination of claims for which the bank asserted it was over secured and entitled to costs and fees per §506(b). Since the Plaintiff/debtor had advanced legitimate arguments upon appeal and provided support for them, defendant's separate motion requesting costs and fees was denied.

McMullen v. Schultz, 2011 U.S. Dist. Lexis 2175 (D. Mass. 1/6/11)(Nathaniel M. Gorton, District Judge).
On appeal, District Court initially affirmed Bankruptcy Court's reduction of debtor's counsel fees, as sanction for failure to comply with Fed. R. Bankr. P. 2016(a) and finding that the client was not fully apprised of the potential for large fees in certain circumstances relevant to the case. Upon motion for rehearing and request to supplement the record, the District Court granted the motion in part in that the District Court reduced the amount of sanction by 50% upon supplementation of the appellate record with correspondence that evidenced the client was apprised. Also, the attorney had attempted twice to withdraw from the debtor's representation, but the Bankruptcy Court had refused both requests.

Giza v. AMCAP Mortgage Inc., (In re Giza), 2011 Bankr. Lexis 16 (Bankr. D. Mass. 1/4/11)(Henry J. Boroff, Bankruptcy Judge).
Bankruptcy Court granted in part, denied in part, debtors' motion to amend adversary proceeding complaint. Plaintiff/debtors sought to (a) correct several factual errors involving dates, to correct the number of notices of right to cancel they had received, and (b) to assert additional claims. Court stated that the delay in filing the motion, approximately 13 months after the first complaint was filed, was considerable. Plaintiffs knew or should have known about the changes at the time they filed their original complaint. There would unquestionably be undue prejudice to defendants if the motion to amend was allowed, as it would add an additional defendant, force one defendant back into the case, and compel another defendant

to defend against several new claims. Moreover, allowance of the motion would also prejudice the Chapter 13 trustee and plaintiffs' other creditors by delaying the resolution of the adversary proceeding and thus distribution payments to creditors. Thus, plaintiffs could file a complaint (a) correcting factual errors as to dates and the number of notices plaintiffs received, (b) but the court would deny them leave to make the remaining proposed amendments to assert additional claims.

In re KS Realty Inc., and Pointe Luck LLC, 2011 BNH 01 (Bankr. D.N.H. 1/5/11)(J. Michael Deasy, Bankruptcy Judge)[unreported decision].

Bankruptcy Court held that the Realtor/creditor had no right to a commission. Jointly administered debtors objected to Realtor's proof of claim, asserting it was untimely, and substantively that Realtor was not due the commission on this post-confirmation sale. Purchaser terminated the 2008 P&S relevant to the Realtor, but two years later under a different agreement (2010 P&S) did purchase the property at issue. Applying NH state law to the exclusive listing agreement, because the purchase and sale agreement ("P&S") did not close by the date forth in the listing agreement nor close under the six-month protection period under the listing agreement, Realtor was not entitled to commission as Purchaser was not "ready, willing and able" to close under the 2008 P&S.

In re Davenport (Chapter 7)(Bankr. D. Maine 1/12/11)(Louis H. Kornreich, Chief Bankruptcy Judge) [unreported].

Judicial lien avoided that impaired state homestead exemption. Applying Maine state exemptions, a debtor is entitled to a $47,500 exemption in his residence enhanced to $95,000 if debtor is over age 60; but a another provision would preclude the age enhancement if the debtor was subject to a tort-based judgment other than from ordinary negligence. Debtor who was over age 60, consented to a judgment, pre-petition, due to intentional torts. Debtor sought to avoid that lien, under §522(f), claiming it impaired his exemption. Case law supports that state law limits to the homestead exemption are preempted. Even if the lien were determined to be non-dischargeable, it would not change this decision: Property exempted under §522 is not liable for any debt arising before or after a bankruptcy case except debts for certain tax liabilities, domestic support obligations, debt secured by a lien that is not avoided, debt for fraud/defalcation or malicious injury by certain financial institutions, and debt in connection with fraud related to financing a higher education, per §522(c).

Boudreau v. Option Mortgage Corp. (In re Boudreau, Chapter 7) (Bankr. D. R. I. 12/21/10)(Arthur N. Votolato, Bankruptcy Judge) [unreported].

While addressing bank's stay relief motion to proceed with eviction proceedings against the debtor in his residence which the bank purchased at its foreclosure sale, Court *sua sponte* abstained from adjudicating the pending adversary proceeding filed by the debtor to invalidate the foreclosure and determine the bank's claim, since parallel litigation in the state court had been filed and substantially completed.

In re Chassie , Chapter 13, (Bankr. D. Mass 1/14/11)(Melvin S. Hoffman, Bankruptcy Judge)[unreported].

Court granted IRS motion to dismiss Chapter 13 case under Section 1308(a) for debtors failing to file tax returns prior to the first meeting of creditors.

O'Brine v. Gove (In re Gove, Chapter 7)(Bankr. D. Mass. 1/13/11)(Joan N. Feeney, Bankruptcy Judge)[unreported].
Court granted plaintiff's (pre-petition Guardian Ad Litem to divorced couple's child) motion for summary judgment to determine his debt was non-dischargeable under §523(a)(5), and stay relief to pursue contempt proceedings in state court related to it, but denied the award of attorney fees.

Kapolis v. Heidenrich (In re Heidenrich), Chapter 7, (Bankr. D. Mass. 12/20/10)(Frank J. Bailey, Chief Bankruptcy Judge).
Debtor was not denied discharge under §523(a)(2)(A) because creditors failed to prove by a preponderance of evidence that (1) Debtor made a false representation, (2) knowingly or with reckless disregard for the truth, (3) with the intent to deceive and induce them to rely upon it and (4) they did rely, (5) their reliance was justifiable and (6) their reliance caused them pecuniary harm regarding the debtor's failed home renovations.

Submitted by:
PATRICIA S. GARDNER, ESQ.
THE GARDNER LAW FIRM
PO Box 453, Newmarket, NH 03857
Phone: (603) 766 - 4933
Fax: (603) 292 - 5207
email to: GardnerBusinessLaw@gmail.com
web site: **www.GardnerBusinessLaw.com**

JUDITH McMULLEN, Appellant, v. GORDON N. SCHULTZ, Appellee.

Bankruptcy Appeal No. 09-11205-NMG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2011 U.S. Dist. LEXIS 2175

January 6, 2011, Decided
January 6, 2011, Filed

CORE TERMS: settlement, attorney fees, correspondence, mortgage, reconsideration, failures to comply, reduction, fee awards, pro se, investment property, accounting, retainer, pursuing, fee arrangement, family residence, final orders, reimbursement, supplemental, disclosures, missing, real estate, deficiency judgment, obligation to pay, services rendered, misrepresentations, inconsistencies, disgorgement, acrimonious, reconsider, reiterated

COUNSEL: **[*1]** For Judith McMullen, Appellant: Bradly P. Bennion, LEAD ATTORNEY, Curhan Law Office, Boston, MA; Dana A. Curhan, LEAD ATTORNEY, Boston, MA.

For Gordon Schultz, Appellee: Gordon N. Schultz, LEAD ATTORNEY, Schultz & Company, Boston, MA.

JUDGES: Nathaniel M. Gorton, United States District Judge.

OPINION BY: Nathaniel M. Gorton

OPINION

MEMORANDUM & ORDER

GORTON, J.

This case involves an appeal of an award of attorney fees issued by a **bankruptcy** court. The appellee, Gordon N. Schultz, is an attorney who appears pro se.

I. Factual Background

The Debtor/Appellant, Judith McMullen ("McMullen" or "the Debtor"), is a licensed real estate broker. She filed a voluntary Chapter 7 **bankruptcy** petition in January, 2000 and the case was assigned to United States **Bankruptcy** Judge William C. Hillman of this district. At the time the Debtor initiated the proceedings, she owned a fully-rented, two-family residence as an investment property ("the Investment Property") and a single-family residence, both in New Bedford, Massachusetts. The Debtor's mortgages on both of the properties were in default, the Investment Property was in foreclosure and the single family residence had already been foreclosed upon. There were also legal issues concerning **[*2]** the propriety of the default and the deficiency judgment being pursued in conjunction with the foreclosure of the single family residence.

In April, 2000, the Debtor retained Attorney Gordon Schultz ("Att'y Schultz") to convert her case from a Chapter 7 to a Chapter 13 proceeding. According to the Statement filed by Att'y Schultz in April, 2000, pursuant to **Bankruptcy** Rule 2016(b) ("the Rule 2016(b) Statement"), the Debtor's parents, Addison and Louise Russell (collectively, "the Russells"), agreed to pay Att'y Schultz's fees and costs on the Debtor's behalf.

Due to the Debtor's involvement in numerous real estate transactions, the claims resolution process was long and convoluted. The most contentious portion of the litigation involved a series of claims and counterclaims arising from the Debtor's purchase and financing of the two properties in New Bedford from Curtis Perry, then a Chapter 7 Debtor himself, and his associates Isabel Perry, the trustee of Casa Sol Trust, the Perry family's trust, and Curtis Mello ("Mello") ("the McMullen/Perry Claim Litigation").

In 2001, the Debtor and Deborah Casey, the Chapter 7 Trustee of Curtis Perry's estate, entered into a settlement agreement **[*3]** ("the McMullen Claim Settlement") resolving the Debtor's claim against Curtis Perry's estate and the Chapter 7 Trustee's claim against the Debtor's estate. Pursuant to a settlement between Curtis Perry and the Chapter 7 Trustee in April, 2003, the Debtor was required to pursue the McMullen/Perry Claim Litigation against Casa Sol Trust and Mello. In August, 2008, the remaining parties entered into a formal settlement ("the Perry/Mello Settlement"). Although McMullen was involved in several other relevant actions, the only other recovery she received was as a result of a settlement in a state court action against John Vlahos for unpaid real estate commissions ("the Vlahos Settlement").

II. Procedural History

Att'y Schultz's first fee application ("the First Fee Application") was filed in June, 2003, and sought $131,080 in fees and $3,450 for expenses incurred up to that date. Rather than seeking compensation from the Russells (as stipulated in the Rule 2016(b) Statement), Att'y Schultz requested that his fees be paid from the $150,000 cash allowance which his client had received as part of the McMullen Claim Settlement. In July, 2003, both the Chapter 7 Trustee and Isabel Perry filed objections **[*4]** to the First Fee Application. In October of that year, the Trustee and Att'y Schultz filed a stipulation providing that Att'y Schultz would credit approximately $5,500 against the fee portion of the First Fee Application in consideration for the Trustee's withdrawal of her objection.

Thereafter, on March 4, 2004, the Debtor, acting pro se, filed with the Court a lengthy letter requesting an investigation of the case in light of the substantial fees sought by Att'y Schultz and what she considered to be the "underwhelming" **[*5]** results achieved up to that point. She also noted that her father had granted a mortgage on his home to Att'y Schultz when he demanded an $80,000 increase in his retainer and claimed that she signed the Affidavit (in support of the fee application) under the misconception that Att'y Schultz would release her parents from their obligation to pay his fees. Att'y Schultz allegedly refused to do so. Finally, the Debtor alleged that Att'y Schultz had forced her to agree to the McMullen Claim Settlement (under which she became entitled to only a small portion of the asserted claim) by threatening to withdraw his representation if she did not accept the terms of the settlement.

Shortly thereafter, Att'y Schultz filed a second fee application ("the Second Fee Application") requesting $131,040 in compensation for services rendered in the Vlahos Litigation and reimbursement of $2,490 for expenses. Isabel Perry objected to that application as well, questioning the reasonableness of the fees (which amounted to 97% of the recovery the Debtor had obtained in the Vlahos Settlement).

In August, 2004, **Bankruptcy** Judge Hillman issued a Memorandum of Decision in which he considered both the First and Second **[*6]** Fee Applications. In re McMullen, No. 00-10151-WCH (Bankr. D. Mass. Aug. 19, 2004) ("McMullen I"). In that decision, **Bankruptcy** Judge Hillman concluded that the Amendment and Affidavit effectively amended the Rule 2016(b) Statement, although he noted his apprehension about the Amendment's effect on the

Russells' obligation to pay Att'y Schultz's fees and expenses. He also opined that the record did not reflect that the services rendered had ultimately benefitted the estate but simultaneously awarded the Second Fee Application in full ($133,530) and $75,000 in compensation for the First Fee Application (approximately 55% of the fees originally requested). Despite **Bankruptcy** Judge Hillman's concern about the effect of the Amendment, Att'y Schultz took no action to correct the record or otherwise clarify his prior disclosures.

The issue of Att'y Schultz's fees was not revisited again until July, 2008, when he filed his Final Fee Application. By that time, the relationship between attorney and client had become acrimonious due, in large part, to the interim fees awarded in McMullen I. In the Final Fee Application, Att'y Schultz requested $116,586 in compensation and reimbursement of expenses **[*7]** in the amount of $10,125, in addition to the fees and expenses from the First Fee Application which were not previously awarded in McMullen I.

On August 14, 2008, **Bankruptcy** Judge Hillman held a hearing on the Final Fee Application at which the Debtor noted her objection on the record and requested additional time to prepare a forensic accounting. In the absence of a "substantive objection," however, **Bankruptcy** Judge Hillman approved the Final Fee Application. On August 20, 2008, Att'y Schultz sought entry of a final judgment with respect to the Final Fee Application. The Debtor, still acting pro se, responded by filing an objection and motion to reconsider, expressing general dissatisfaction with the results achieved in the case. She also claimed that Att'y Schultz had double-billed for services, charged excessive fees, fabricated charges and repeatedly lied to the Court. Specifically, McMullen objected to Att'y Schultz's fees on the grounds that they exceeded any potential recovery she could have obtained had her claims been successfully litigated. She also alleged that Att'y Schultz made various misrepresentations to the Court, including that she 1) signed the Affidavit in support **[*8]** of the First Fee Application and 2) agreed to the described settlements.

Finally, the Debtor asserted that Att'y Schultz had violated Fed. R. Bankr. P. 2016(b) by failing to disclose 1) periodic increases in his retainer or 2) that he had an interest adverse to the estate by virtue of the mortgage he held on her parents' house to secure payment of his fees. The Debtor asserted that she had consulted a forensic accounting firm and that they had discovered several accounting anomalies, particularly with respect to missing funds from the McMullen Claim Settlement.

In a Memorandum of Decision dated February 18, 2009, the **Bankruptcy** Judge found that the Debtor was in a substantially better position at the end of the case than she had been at its outset based upon 1) the two cash settlements totaling $287,500 ($150,000 in the McMullen Claim Settlement and $137,500 in the Vlahos Settlement), 2) $20,000 in value from other various claims that were disallowed, 3) the discharge of the mortgage on the Investment Property and 4) the release of the deficiency judgment on the single family residence. In re McMullen, 2009 Bankr. LEXIS 555, 2009 WL 530296 (Bankr. D. Mass. Feb 18, 2009) ("McMullen II"). **Bankruptcy** Judge Hillman **[*9]** noted that the Debtor's confusion and frustration were understandable, however, given that the cash settlements, in light of Att'y Schultz's fees, did not fully reimburse her actual damages. He concluded, nonetheless, that she had assumed the risk of not being made whole and that the three settlements, all of which had been reduced to final orders, could not be indirectly challenged through an objection to Att'y Schultz's fees.

After a closer review of the fee applications, **Bankruptcy** Judge Hillman determined that Att'y Schultz's fees were, for the most part, reasonable and necessary, especially in light of the "relative success" of the Debtor's case. He found that some fees were not, however, reasonably incurred and reduced the Final Fee Award by a modest $17,612. As in McMullen I, **Bankruptcy** Judge Hillman made it clear that the fee awards were not final and were, again, subject to partial or complete disgorgement.

Bankruptcy Judge Hillman also recognized that Att'y Schultz had failed to supplement the Rule 2016(b) Statement as required by that rule to reflect the Amendment to the initial fee agreement and found it likely that Att'y Schultz had periodically increased his retainer without **[*10]** disclosing the source of the funds. He therefore ordered Att'y Schultz to file a supplemental Rule 2016(b) Statement before any fee award would become final. **Bankruptcy** Judge Hillman nevertheless rejected the Debtor's allegations that Att'y Schultz had acted improperly in accepting a mortgage on the Russell's house in lieu of an increase in his retainer. The judge reasoned that Att'y Schultz had performed legal services for the Russells in cases unrelated to the Debtor's **bankruptcy** and that the mortgage secured a separate obligation for those unrelated legal fees.

In February, 2009, Att'y Schultz filed the Supplemental Rule 2016(b) Statement along with a renewed Request for Judgment seeking a final order with respect to his fees. The Debtor, in turn, continuing to act pro se, opposed entry of such an order and sought reconsideration of certain findings made in McMullen II. She reiterated many of her prior arguments concerning Att'y Schultz's allegedly fraudulent acts and misrepresentations.

On May 27, 2009, **Bankruptcy** Judge Hillman held that 1) Att'y Schultz's Rule 2016 disclosures were untimely and incomplete, 2) there had been at least five events during the pendency of the case warranting **[*11]** contemporaneous supplements to the Rule 2016(b) Statement and 3) Att'y Schultz had filed a supplement only after the Court ordered him to do so. In re McMullen, No. 00-10151-WCH, 2009 Bankr. LEXIS 1245, 2009 WL 1490581 (Bankr. D. Mass. May 27, 2009) ("McMullen III").

The **Bankruptcy** Judge admonished Att'y Schultz for taking no action to clarify inconsistencies in the record arising from his incomplete disclosures and for causing the Court to expend substantial resources investigating matters that should have been disclosed long before. Ultimately, however, **Bankruptcy** Judge Hillman found that Att'y Schultz's omissions, though "far below the appropriate standard", did not warrant complete disgorgement because "the fact that he must live with the errors he occasioned is an adequate sanction." 2009 Bankr. LEXIS 1245, [WL] at *16. The **Bankruptcy** Judge also found that the Debtor's allegations of fraud on the part of Att'y Schultz had already been considered and ruled upon in McMullen II. He characterized her allegations as "general . . . vague . . . [and] inconsistent" and concluded that she stated no grounds for reconsideration. 2009 Bankr. LEXIS 1245, [WL] at *19.

Finally, **Bankruptcy** Judge Hillman found that the Debtor's allegation that funds were missing from **[*12]** the estate was "colorable" and ordered Att'y Schultz and the Trustee to show cause why the Court should not appoint an independent accountant to investigate the missing funds. Shortly thereafter, the Trustee filed a response explaining the inconsistencies in the accounting of the McMullen Claim Settlement. Satisfied that the funds were fully accounted for, **Bankruptcy** Judge Hillman entered a final order on June 8, 2009, approving Att'y Schultz's request for a total of $315,347 in attorneys' fees. The instant appeal followed.

On March 30, 2010, this Court affirmed the **Bankruptcy** Court's general award of attorneys' fees but reduced that award by $60,000 to $255,347 (before reimbursement of the Chapter 13 Trustee) in order to sanction Att'y Schultz for his multiple failures to comply with Fed. R. Bankr. P. 2016. McMullen v. Schultz, 428 B.R. 4, 13 (D. Mass. 2010) ("McMullen Appeal"). The Court also denied Att'y Schultz's motion for attorney's fees and costs incurred as a result of the appeal, finding that the appeal was not frivolous.

On April 13, 2010, Att'y Schultz submitted a motion for rehearing pursuant to Fed. R. Bankr. P. 8015, asking the Court 1) to reconsider its decision to reduce **[*13]** his requested and approved fees by $60,000 and 2) to conclude that a reduction less than $60,000 is appropriate. He also moves to supplement the appellate record with 1) his affidavit and 2) 12 attached exhibits. The motion has not been opposed.

III. Motion for Rehearing

A. Legal Standard

Pursuant to Fed. R. Bankr. P. 8015, a party has a right to file a motion for rehearing. The rule does not provide a standard for analyzing such a motion. The Ninth Circuit Court of Appeals upheld a District Court's application of the standard for motions pursuant to Fed. R. App. P. 40(a)(2) because Rule 8015 was derived from that rule. In re Fowler, 394 F.3d 1208, 1214-15 (9th Cir. 2005). The Rule 40(a)(2) standard "requires that a motion for rehearing state with particularity each point of law or fact that the movant believes the court has overlooked or misapprehended." Id. at 1215. If the Court finds that it has not considered an important aspect of the case, then a rehearing is warranted. See id.

B. Application

Att'y Schultz takes issue with the Court's statement in its March, 2010 Memorandum and Order that:
There is no indication in the record, however, that Att'y Schultz ever advised the Debtor during **[*14]** the course of the proceedings of the exorbitant attorneys' fees that would be incurred in connection with the recovery of those benefits for the Debtor's estate. If, for example, he had produced correspondence warning her that she might incur fees that approached the amount of her recovery and she did not demur, then the ultimate award of fees would be more reasonable. In the absence of such correspondence, however, the extent of the attorney's work product was unjustified.
McMullen Appeal, 428 B.R. at 12. Att'y Schultz also contests the Court's statements that
Att'y Schultz represented to the Debtor that she held two claims exceeding $350,000 each [and that] . . . the failure of the attorney to comply with **Bankruptcy** Rule 2016 resulted in confusion and prejudice to the Debtor who reasonably claims that she was misled about the details of the fee arrangement.
Id. at 12-13. Finally, Att'y Schultz points out that he sought to suspend his representation of McMullen in 2007 and 2008 and **Bankruptcy** Judge Hillman refused both requests. Despite an increasingly acrimonious relationship with McMullen, Att'y Schultz continued to represent her.

Accompanying Att'y Schultz's motions is correspondence **[*15]** between him and his client which he maintains demonstrates that he repeatedly informed McMullen about 1) the cost of proceeding with her claims, 2) which facts could and could not be proven, 3) what could and could not be achieved and 4) the advisability of settlement on certain issues. Att'y Schultz asserts that the correspondence also indicates that McMullen was insistent that Att'y Schultz not settle, continue vigorously to defend her claims and assert counterclaims even though he repeatedly warned her that she was unlikely to prevail at trial. Finally, Att'y Schultz maintains that McMullen's July 9, 2003 Affidavit in support of his First Fee Application demonstrates that McMullen fully understood the fee arrangement.

Thus, Att'y Schultz argues that a $60,000 reduction in his fees is an excessive sanction for his failure to comply with Rule 2016. He asks the Court to affirm **Bankruptcy** Judge Hillman's decision that a public reprimand and discharge of the parents' mortgage as security for McMullen's remaining fee obligations were sufficient sanctions. He asserts that he has been embarrassed by **Bankruptcy** Judge Hillman's rulings and "vilified" by McMullen's accusations of fraud and **[*16]** incompetence. He maintains that this Court's $60,000 reduction of his fee is unwarranted because his failure to comply with Rule 2016 was not the result of "overreaching or intentional concealment".

Att'y Schultz contends that he did not provide the Court with the explanatory correspondence in the original appeal because **Bankruptcy** Judge Hillman did not suggest that McMullen was unaware of the legal work that was being performed or that, had she known, she would have either terminated the litigation or settled her claims. He argues that, because those issues were raised by this Court sua sponte, due process requires that he have an opportunity to respond.

After reviewing the correspondence that Att'y Schultz has provided, the Court finds that it has not previously considered an important aspect of the case and, therefore, reconsideration is warranted. Consequently, the Court will allow Att'y Schultz's motions for reconsideration and to supplement the appellate record.

Upon reconsideration of the appellate record, including the previously unseen correspondence, the Court concludes that there is ample evidence that Att'y Schultz advised McMullen of the attorney's fees that would be incurred **[*17]** and that such fees would consume most or all of her recovery. For example, in letters to McMullen dated December 30, 2004, January 17, February 2, and November 4, 2005, Att'y Schultz repeatedly and clearly stated that settlement was advisable because McMullen had yet to produce any evidence of the financial damages that she claimed to have suffered due to the conduct of Isabel and Mello in excess of the $150,000 which she had already recovered. In his February 2, 2005 letter, Att'y Schultz wrote:
without that evidence of damages, there will be little, if any, likelihood of prevailing at trial; and you unquestionably will have incurred more fees to me as well as the possible anger of the Court in pursuing a claim with no proof[.]
Despite all of the forewarning, McMullen insisted on pursuing her claims to trial.

Later, in a fax sent to McMullen on August 22, 2007, Att'y Schultz discussed their trial strategy and suggested that a Fed. R. Bankr. P. 9011 motion for attorney's fees against Isabel Perry might lead Isabel to withdraw her claims, thus ending the litigation without incurring further legal fees. In her response, dated September 4, 2007, McMullen reiterated her desire to proceed **[*18]** to trial for damages and attorney's fees on her claims against Isabel Perry and Curtis Mello. Att'y Schultz maintains that he continually informed her that she was being unrealistic. Unfortunately, her intransigence forced Att'y Schultz unilaterally to file a Motion for Authority to Compromise Controversy which McMullen opposed.

Upon reconsideration of the appellate record and the supplemental evidence, the Court finds that McMullen was aware of: 1) the risks of pursuing her claims and of incurring substantial additional fees, 2) the fee arrangement despite Att'y Schultz's failure to comply with Rule 2016 on five occasions, 3) the difficulty of pursuing claims without adequate proof of damages and 4) the fact that Att'y Schultz was compelled to continue to represent her after their relationship had eroded. In light of those considerations, the Court concludes that a fee reduction of $30,000 is more appropriate than $60,000. Such a reduction provides a reasonable sanction for Att'y Schultz's failure to comply with Rule 2016 but takes into account the hardship that he encountered in representing the Debtor.

ORDER

In accordance with the foregoing,
1) the Appellee's motions for rehearing (Docket **[*19]** No. 15) and to supplement the appellate record (Docket No. 16) are **ALLOWED**; and

2) the fee award is reduced by $30,000 to a total of $285,347.
So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated January 6, 2011

MONA LISA KNOWLES, Debtor. MONA LISA KNOWLES, Plaintiff-Appellant, v. BAYVIEW LOAN SERVICING, LLC, Defendant-Appellee.

BAP NO. EB 10-022

UNITED STATES **BANKRUPTCY** APPELLATE PANEL FOR THE FIRST CIRCUIT

2011 Bankr. LEXIS 2

January 3, 2011, Decided

PRIOR HISTORY: [*1]
Appeal from the United States **Bankruptcy** Court for the District of Maine. **Bankruptcy** Case No. 05-13492-LHK, Adversary Proceeding No. 08-01020-LHK. (Hon. Louis H. Kornreich, U.S. **Bankruptcy** Judge).

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff debtor filed a complaint against defendant loan servicer alleging violations of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C.S. § 2605 et seq., and of the automatic stay under 11 U.S.C.S. § 362. Plaintiff also sought to establish liability under 11 U.S.C.S. § 105(a). The United States **Bankruptcy** Court for the District of Maine entered judgments in favor of defendant. Plaintiff appealed. Defendant requested fees and costs.

OVERVIEW: The court held that summary judgment as to the RESPA claim was proper because the loan was not a federally related mortgage loan under 12 U.S.C.S. § 2602. The eight-day turnaround time within which the loan was sold could not by itself demonstrate intent to sell to the entities named within § 2602(1)(B)(iii). Next, defendant had not violated the automatic stay. The filing of a proof of claim merely indicated a desire to participate in the **bankruptcy** process and was sanctioned by 11 U.S.C.S. § 501(a). An annual tax statement was merely an informative document sent in the normal course of business. Nothing in payoff statements could be construed as an attempt to seek payment from plaintiff. As for relief under § 105, plaintiff's amended plan expressly reserved determination of claims under Bankr. D. Me. R. 3015-3(d)(3). Thus, the plan did not have a binding effect on defendant's claim. Furthermore, defendant's attempt to recover certain pre- and post-petition costs and fees was not a unilateral effort to modify the plan. The court declined to award defendant costs and fees under Fed. R. Bankr. P. 8020. Plaintiff asserted legitimate arguments on appeal and provided support for them.

OUTCOME: The court affirmed the **bankruptcy** court's decision. It denied defendant's request for fees and costs.

CORE TERMS: mortgage, summary judgment, mortgage loan, federally, payoff, proof of claim, confirmation, written requests, automatic stay, servicer, sending, genuine, confirmed, borrower, lender, real estate, entity, notice, issue of material fact, burden of proof, allowance, frivolous, insured, federal government, services rendered, legal fees, annual tax, originating, residential, servicing

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

HN1 A **bankruptcy** appellate panel may hear appeals from final judgments, orders and decrees pursuant to 28 U.S.C.S. § 158(a)(1) or with leave of the court, from interlocutory orders and decrees pursuant to § 158(a)(3). A decision is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. A judgment is final where it resolves all counts on a complaint. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

HN2 A **bankruptcy** appellate panel reviews the **bankruptcy** court's findings of fact for clear error and conclusions of law de novo. The panel reviews a **bankruptcy** court's grant of summary judgment de novo. More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants

HN3 To prevail on a motion for summary judgment, the movant must inform the trial court of the basis for its motion, and identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. To defeat summary judgment, the nonmoving party must come forward with facts that show a genuine issue for trial and may not rest upon mere allegation or denials of the movant's pleading, but must set forth specific facts showing that there is a genuine issue of material fact as to each issue upon which he would bear the ultimate burden of proof at trial. More Like This Headnote

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Materiality

HN4 A reviewing court should affirm a grant of summary judgment if it concludes that there is no genuine issue as to any material fact and if the prevailing party is entitled to judgment as a matter of law. An issue is "genuine" if the evidence of record permits a rational fact finder to resolve it in favor of either party. A fact is "material" if it has the potential to change the outcome. More Like This Headnote

Banking Law > Consumer Protection > Real Estate Settlement Procedures > Loan Servicing

HN5 See 12 U.S.C.S. § 2605(e)(1)(A).

Banking Law > Consumer Protection > Real Estate Settlement Procedures > Loan Servicing

HN6 See 12 U.S.C.S. § 2605(e)(2).

Banking Law > Consumer Protection > Real Estate Settlement Procedures > General Overview

Evidence > Procedural Considerations > Burdens of Proof > Allocation

HN7 A borrower bears the burden of persuasion as to a mortgagee's alleged violation of the Real Estate Settlement Procedures Act, 12 U.S.C.S. § 2605 et seq. The burden of proving that a borrower's letter constitutes a qualified written request is on the plaintiff borrower. The borrower's burden includes, as an essential element of her cause of action, proof that her loan was a federally related mortgage loan. More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants

HN8 Where the moving party would not bear the burden of proof at trial, the movant's initial burden on summary judgment is only to demonstrate or point out a lack of evidence to support at least one essential element of the opposing party's case. The burden then shifts to the opposing party, the party who would bear the burden of proof at trial, to adduce such evidence on each of the disputed elements as at trial would be sufficient to withstand a motion for directed verdict. More Like This Headnote

Banking Law > Consumer Protection > Real Estate Settlement Procedures > General Overview

HN9 The term "federally related mortgage loan," as used in 12 U.S.C.S. § 2605(e), is defined by statute at 12 U.S.C.S. § 2602. The definition has two prongs and requires satisfaction of both. More Like This Headnote

Banking Law > Consumer Protection > Real Estate Settlement Procedures > General Overview

HN10 See 12 U.S.C.S. § 2602(1).

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > General Overview

HN11 The automatic stay is effective upon the filing of the **bankruptcy** petition and serves to prevent creditors from acting against property of the debtor or property of the estate without leave from the **bankruptcy** court to do so. 11 U.S.C.S. § 362. The automatic stay is extremely broad in scope in that it prohibits almost all formal and informal acts taken against the debtor or the estate. The stay, however, does not prohibit all communication or actions by a creditor to a debtor. For instance, a mere request for payment does not violate the stay unless it is coercive or harassing. Likewise, an act does not violate the stay unless it immediately or potentially threatens the debtor's possession of its property, such that the debtor is required to take affirmative acts to protect its interest. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > General Overview

Bankruptcy Law > Claims > Proof > General Overview

HN12 The filing of a proof of claim is not an act against property of the debtor or the estate. 11 U.S.C.S. § 362. The filing of a proof of claim merely indicates a desire to participate in the **bankruptcy** process. It is not a request for payment from the debtor or an attempt to act against property of the debtor. It is certainly an act against property of the estate—one files a proof of claim in order to recover from the estate—but one the Code expressly sanctions: "a creditor. may file a proof of claim." 11 U.S.C.S. § 501(a). To the extent a debtor disputes the reasonableness of certain charges and fees, she is free to object to the claim. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > General Overview

HN13 With respect to allegations of a stay violation, the question is not whether certain fees are proper, but whether the creditor acted against property of the debtor or the estate. More Like This Headnote

Bankruptcy Law > Case Administration > Court Powers

HN14 11 U.S.C.S. § 105(a) does not proscribe any conduct and therefore cannot be violated. Rather, it merely empowers the **bankruptcy** court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the **Bankruptcy** Code. § 105(a). More Like This Headnote

Bankruptcy Law > Case Administration > Court Powers

HN15 See 11 U.S.C.S. § 105(a).

Bankruptcy Law > Case Administration > Court Powers

HN16 11 U.S.C.S. § 105(a) gives a **bankruptcy** court broad authority to exercise its equitable powers—where necessary or appropriate—to

facilitate the implementation of other **Bankruptcy** Code provisions. It functions, therefore, as a "catch-all" provision, effectively filling in gaps to preserve the integrity of the **bankruptcy** system. Despite this broad language, there are important limitations on a **bankruptcy** court's authority to act pursuant to § 105(a). Notably, a **bankruptcy** court may not apply § 105(a) in a manner that is inconsistent with another provision of the **Bankruptcy** Code. More Like This Headnote

Bankruptcy Law > Claims > Types > Secured Claims & Liens > Secured Creditors Rights

HN17 11 U.S.C.S. § 506(b) entitles secured creditors to post-petition interest, fees, and costs to the extent the claim is oversecured. More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > Effects

HN18 Generally, the provisions of a confirmed chapter 13 plan bind the parties and establish a creditor's treatment. However, a confirmed plan is not binding on a creditor whose treatment is not clearly determined under the plan. Particularly problematic is the procedure for the allowance and disallowance of claims, which is separate from, if not parallel to, confirmation. That is, a tension arises where a creditor's treatment under a confirmed plan differs from an allowed claim filed by the creditor. More Like This Headnote

Bankruptcy Law > Claims > Types > Secured Claims & Liens > Secured Creditors Rights

HN19 See 11 U.S.C.S. § 506(b).

Bankruptcy Law > Case Administration > Professional Services > Compensation > General Overview

Bankruptcy Law > Case Administration > Professional Services > Compensation > Interim Compensation

HN20 See Fed. R. Bankr. P. 2016(a).

Bankruptcy Law > Claims > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN21 In Maine, Bankr. D. Me. R. 3015-3(d)(3) allows chapter 13 debtors to reserve determination of claims until after the claims deadline has passed. Therefore, a plan that expressly postpones claims determinations under Rule 3015-3(d)(3) provides ample notice to creditors that their treatment has not been finally determined. Claims can be determined through an objection to claim, a motion to allow or disallow a claim, or an application for fees. More Like This Headnote

Bankruptcy Law > Claims > Allowance

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

HN22 See Bankr. D. Me. R. 3015-3(d)(3).

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview

Civil Procedure > Appeals > Frivolous Appeals

HN23 Under Fed. R. Bankr. P. 8020, a **bankruptcy** appellate panel may award an appellee costs and fees if it determines that the procedural requirements of the rule are satisfied and that the appeal is frivolous. Procedurally, the appellee must file a separate motion and the appellant must be given an opportunity to respond. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview

Civil Procedure > Appeals > Frivolous Appeals

HN24 See Fed. R. Bankr. P. 8020.

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview

Civil Procedure > Appeals > Frivolous Appeals

HN25 There is no formula for determining if an appeal is frivolous under Fed. R. Bankr. P. 8020. Factors to be considered include the following: whether the appellant filed the appeal in bad faith; whether the argument is meritless in toto or only partially without merit; whether the argument properly addresses the issues on appeal; and whether the appellant supports the argument with proper and applicable authority or simply asserts unsubstantiated facts or bare legal conclusions. More Like This Headnote

COUNSEL: J. Scott Logan, Esq., on brief for Plaintiff-Appellant.

James L. Audiffred, Esq., on brief for Defendant-Appellee.

JUDGES: Before Feeney, Tester, and Bailey, United States **Bankruptcy** Appellate Panel Judges.

OPINION BY: Bailey

OPINION

Bailey, U.S. Bankruptcy Appellate Panel Judge.

Mona Lisa Knowles (the "Debtor") filed a complaint against Bayview Loan Servicing, LLC ("Bayview"), the servicer of the first mortgage on her home, alleging [1] violations of the Real Estate Settlement Procedures Act [2] and of the automatic stay and seeking to establish liability under 11 U.S.C. § 105(a) ("§ 105(a)"). [3] The **bankruptcy** court entered summary judgment in favor of Bayview on the RESPA count, holding that RESPA does not apply to the Debtor's loan. The court subsequently entered judgment in favor of Bayview on the automatic stay and § 105(a) counts on the grounds that Bayview's acts were not against property of the Debtor or the estate, and that Bayview did not violate § 105(a) by filing its proof of claim after confirmation of the Debtor's **[*2]** chapter 13 plan. For the reasons discussed below, we **AFFIRM**. Additionally, we **DENY** Bayview's motion for fees and costs under **Bankruptcy** Rule 8020.

FOOTNOTES

1 The complaint also included a count for intentional infliction of emotional distress. The **bankruptcy** court granted summary judgment in favor of Bayview on this count, and the Debtor does not challenge this disposition on appeal.

2 All references to "RESPA" are to the Real Estate Settlement Procedures Act, as amended prior to July 21, 2010, 12 U.S.C. § 2605, et seq.

3 All references to the "**Bankruptcy** Code" or to specific sections are to the **Bankruptcy** Reform Act of 1978, as amended prior to April 20, 2005, 11 U.S.C. § 101, et seq. All references to "**Bankruptcy** Rule" are to the Federal Rules of **Bankruptcy** Procedure.

BACKGROUND

On November 14, 2002, the Debtor executed a note in favor of Peter and Leimomi Thompson (the "Thompsons") and granted them a first mortgage on her residence located in Strong, Maine. On November 22, 2002, the Thompsons assigned the note and mortgage to a third party that is not a party to this case. The record also reflects that the Thompsons assigned the note and mortgage to Wachovia Bank, N.A. ("Wachovia"). At oral argument, **[*3]** however, the parties clarified that the Thompsons had assigned the note and mortgage to a broker, who in turn made a further assignment to Wachovia. Bayview services the loan.

The Debtor filed a chapter 13 petition on October 16, 2005. She listed Bayview as a secured creditor holding a mortgage on her residence. On November 9, 2005, Wachovia filed a proof of claim in the amount of $9,273.39 for the pre-petition arrears [4] on the Debtor's mortgage and a total debt in the amount of $53,960.27. [5] On March 15, 2006, Wachovia filed an amended proof of claim in which it claimed pre-petition arrears of $9,398.39 and a total unpaid balance of $54,085.27.

FOOTNOTES

4 In its answer to the Debtor's complaint, Bayview explained that its proof of claim contained prepetition legal fees of $2,193.15, escrow advances of $3,037.74, and property inspections of $87.50. The past due prepetition arrears equaled $4,080.00.

5 The total debt includes the arrears.

On June 12, 2006, the **bankruptcy** court confirmed the Debtor's Amended Chapter 13 Plan (the "Amended Plan"). The Amended Plan provided for payments on the pre-petition arrearage to Bayview in the amount of $9,273.00. [6] The confirmation order provided that confirmation **[*4]** was: subject to (i) resolution of actions to determine the avoidability, priority, or extent of liens, (ii) resolution of all disputes over the amount and allowance of claims entitled to priority under Sec. 507, (iii) resolution of actions to determine the allowed amount of secured claims under Sec. 506, and (iv) resolution of all objections to claims.
The confirmation order also set forth procedures regarding the allowance of claims and the filing of proofs of claim or amended proofs of claim.

FOOTNOTES

6 The Debtor's original plan proposed to pay $8,802.00 in arrears through the plan. Bayview objected to the Plan on the grounds that its arrears were $9,273.39. The Amended Plan reflected the higher amount.

In the fall of 2007, the Debtor's house was destroyed by fire. In late 2007, the Debtor received a check in the amount of $209,996.00 from the insurance company that insured the real estate. The check was made payable to several parties, including the Debtor and Bayview, payable only upon endorsement by all parties.

The Debtor received an annual tax and interest statement from Bayview dated December 31, 2007. The statement indicated a principal balance of

$39,484.72 and an escrow balance of negative **[*5]** $3,018.26, for a total unpaid balance of $42,502.98. The statement provided "Instructions for Payer/Borrower" which explained that the information provided in the statement was "important tax information" that was "being furnished to the Internal Revenue Service." The instructions further explained the tax implications of the various balances reflected in the statement.

On February 15, 2008, the Debtor's counsel sent a payoff request to Bayview and attached to it a "Qualified Written Request," pursuant to RESPA, in which he requested detailed information on the Debtor's mortgage. On February 28, 2008, Bayview sent payoff information to the Debtor's attorney in which it stated that the Debtor owed $39,303.76 in current unpaid principal, $956.57 in interest, $10.00 in fees, $50.00 in release fees, $630.00 in legal fees, and $6,058.05 in "other funds," for a total payoff amount of $47,008.38. In the payoff statement, Bayview noted that "[p]ayoff figures have been requested on the loan for the borrower and property described below," and it described the payoff amount as the "[t]otal amount due to payoff loan in full." Additionally, Bayview explained that interest would continue to accrue **[*6]** daily and that the Debtor must call for updated figures "prior to remitting funds." Bayview also noted that the statement did not "suspend the contract requirements to make the mortgage payment when due."

On March 12, 2008, and April 3, 2008, the Debtor's attorney sent a second and a third "Qualified Written Request" to Bayview. On April 24, 2008, Bayview sent payoff information to the Debtor's attorney, indicating a total payoff amount of $47,826.21. The second payoff statement contained the same explanatory language contained in the first statement.

The parties disagreed as to the payoff amount the Debtor owed Bayview, and the Debtor filed a motion to compel Bayview to endorse the insurance check. [7] The parties resolved the dispute with a consent order, which provided that $42,500.00 be paid to Bayview and $6,125.91 be held in escrow pending determination of any additional balance owed to Bayview.

FOOTNOTES

7 It is not clear exactly when the Debtor filed the motion to compel. In its written opinion, the **bankruptcy** court places it after Bayview sent the payoff statements and before the Debtor filed her complaint.

On May 16, 2008, the Debtor filed the complaint against Bayview that gives rise to **[*7]** this appeal. The complaint included three relevant counts. In Count I, the Debtor sought damages for violation of RESPA. In Count II, she sought damages for violation of the automatic stay, § 362(a), contending that Bayview violated the stay by sending payoff statements that included **bankruptcy** charges and attorney fees that had not been authorized by the **bankruptcy** court and by requesting payment of these charges as a condition to its release of the Debtor's mortgage. And in Count III, entitled "Liability Pursuant to Title 11 Section 105 Generally," the Debtor alleged that Bayview was bound by its treatment under the Debtor's confirmed plan and that its attempts to collect additional funds violated § 105. In support of this count, the Debtor further argued that Bayview was not entitled to post-confirmation attorney and **bankruptcy** fees pursuant to § 506(b) or, in the alternative, if it was entitled to such fees, that it had failed to file a fee application as required by **Bankruptcy** Rule 2016.

After Bayview filed an answer, the Debtor moved for summary judgment on Counts II and III. Bayview opposed the Debtor's motion and cross-moved for summary judgment on all counts. With respect to **[*8]** Count I, for violation of RESPA, Bayview argued that RESPA does not apply to Bayview's loan because the loan was not a "federally related mortgage loan" as that term is defined in RESPA. Bayview further argued that even if RESPA applies, the Debtor's purported "qualified written requests" did not satisfy the requirements of RESPA because the requests were overly broad in that they did not identify a particular item in dispute. In support of its motion, Bayview filed a joint affidavit of the Thompsons in which they averred that they buy and sell real estate to supplement their retirement income, that the total amount of their mortgage loans has not exceeded $1,000,000.00, that they do not make a practice of selling their mortgages, and that they had sold the Debtors' mortgage to a company in Texas during 2000 or 2001.

With respect to Count II, for violations of the automatic stay, Bayview argued that § 506(b) entitled it to collect reasonable attorneys' fees, legal expenses, and other reasonable costs incurred in collecting on the note. With respect to Count III, for "Liability Pursuant to Title 11 Section 105 Generally," Bayview argued that its claim had not yet been fully adjudicated, **[*9]** and that it intended to move for approval of its legal fees and costs.

The Debtor opposed Bayview's motion for summary judgment and subsequently filed a statement of material facts. On July 16, 2009, the **bankruptcy** court held a hearing at which it granted summary judgment in favor of Bayview on Count I and denied summary judgment to both parties on the remaining counts. In the later memorandum of decision that accompanied the judgment on Counts II and III, the **bankruptcy** court explained that it had granted summary judgment in favor of Bayview on Count I because "the loan was originated by private individuals and was therefore not a 'federally related mortgage loan' within the meaning of 12 U.S.C. § 2602." The court explained:
The issue was whether the private individuals originating the mortgage were "a 'creditor,' as defined in section 1602(f) of title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year." 12 U.S.C. § 2602(1)(B)(iv). The court found that the Debtor had not met her burden of showing that the originators of this mortgage met the statutory definition.

Thereafter, the parties filed pretrial memoranda in which they reiterated **[*10]** and expanded upon their arguments with respect to the remaining counts. The **bankruptcy** court held a trial on these counts and subsequently entered judgment for Bayview on both counts. [8] In the memorandum of decision that accompanied its decision, the **bankruptcy** court concluded with respect to Count II that the filing of the proof of claim, the sending of the tax statement, and the sending of the payoff statements did not violate the automatic stay because they were not attempts to collect property of the estate or of the Debtor. With respect to Count III, the **bankruptcy** court concluded that the confirmation order did not prohibit Bayview from assessing post-confirmation fees or costs. The **bankruptcy** court reasoned that the order confirming the Debtor's plan was not final because it reserved determination of claims. The **bankruptcy** court explained that this was consistent with D. Me. LBR 3015-3(d)(3), which allows a chapter 13 debtor to postpone determination of claims until after the claims deadline has passed. The Debtor appealed. Bayview has moved for fees and costs under **Bankruptcy** Rule 8020, arguing that the appeal is frivolous.

FOOTNOTES

8 The Debtor did not provide transcripts of the summary **[*11]** judgment hearing or of the trial. The **bankruptcy** court, however, explained the basis for its decision in the opinion it issued in conjunction with its judgment in favor of Bayview. The appellate record, therefore, provides a sufficient basis for the Panel to review the **bankruptcy** court's grant of summary judgment in favor of Bayview. See Hamilton v. Wells Fargo Bank, N.A. (In re Hamilton), 401 B.R. 539, 541 n.3 (B.A.P. 1st Cir. 2009).

JURISDICTION

HN1 A **bankruptcy** appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (citations omitted). A judgment is final where it resolves all counts on a complaint. See Bartel v. Walsh (In re Bartel), 404 B.R. 584, 589 (B.A.P. 1st Cir. 2009); see also Alberty-Vélez v. CorporaciÓn de Puerto Rico Para La DifusiÓn Pública, 361 F.3d 1, 6 n.5

(1st Cir. 2004) **[*12]** (explaining that partial summary judgment order is not final but is merely a pre-trial adjudication determining certain issues which the trial court may revisit at any time prior to entry of final judgment); Dandurand v. Unum Life Ins. Co. of Am., 284 F.3d 331, 335 (1st Cir. 2002) (explaining that appeal of partial summary judgment ruling following entry of final judgment was timely). Here, the judgment is final because it left no counts unresolved, see In re Bartel, 404 B.R. at 589, and the grant of summary judgment became final upon entry of the judgment disposing of the remaining counts. See Dandurand, 284 F.3d at 335.

STANDARD OF REVIEW

HN2 The Panel reviews the **bankruptcy** court's findings of fact for clear error and conclusions of law *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). The Panel reviews a **bankruptcy** court's grant of summary judgment *de novo*. Backlund v. Stanley-Snow (In re Stanley-Snow), 405 B.R. 11, 17 (B.A.P. 1st Cir. 2009).

DISCUSSION

I. The Summary Judgment Standard

HN3 To prevail on a motion for summary judgment, the movant must inform the trial court of "the basis for its motion, and identify[ ] those portions of [the record] **[*13]** which it believes demonstrate the absence of a genuine issue of material fact." Sensing v. Outback Steakhouse of Fla., LLC, 575 F.3d 145, 152 (1st Cir. 2009) (quoting DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) and Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)) (internal quotation marks omitted). To defeat summary judgment, the nonmoving party "must come forward with facts that show a genuine issue for trial" and "may not rest upon mere allegation or denials of [the movant's] pleading, but must set forth specific facts showing that there is a genuine issue of material fact as to each issue upon which he would bear the ultimate burden of proof at trial." Id. (quoting Carroll v. Xerox Corp., 294 F.3d 231, 236 (1st Cir. 2002) and DeNovellis, 124 F.3d at 306)) (internal quotation marks omitted).

HN4 A reviewing court should affirm a grant of summary judgment if it concludes that there is no genuine issue as to any material fact and if the prevailing party is entitled to judgment as a matter of law. Braga v. Hodgson, 605 F.3d 58, 60 (1st Cir. 2010). An issue is "genuine" if the evidence of record permits a rational fact finder to resolve it in favor of either party. Borges ex rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1, 4-5 (1st Cir. 2010). **[*14]** A fact is "material" if it has the potential to change the outcome. Id.

II. Count I: Alleged Violations of RESPA

In her complaint, the Debtor alleged that Bayview violated § 2605(e)(1)(A) and (e)(2) of RESPA, 12 U.S.C. § 2605(e), by failing to acknowledge the receipt of three Qualified Written Requests within 20 days and by failing to respond to two Qualified Written Requests within 60 days. Subsections 2605(e)(1)(A) and (e)(2) impose upon certain mortgage servicers the obligations to acknowledge and respond within specified times to "qualified written requests," but the obligations are expressly limited to requests made with respect to "federally related mortgage loans." [9]

FOOTNOTES

9 The obligation to provide a written acknowledgment is in subsection (e)(1)(A): HN5 "If any servicer *of a federally related mortgage loan* receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing *of such loan*, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days . . . ." 12 U.S.C. § 2605(e)(1)(A) (emphasis added). The various obligations to respond are enumerated in subsection (e)(2) and, by the language **[*15]** of that subsection, triggered by the receipt of a qualified written request that conforms to subsection (e)(1): HN6 "Not later than 60 days . . . after the receipt from any borrower of any qualified written request under paragraph (1) . . . the servicer shall . . . ." 12 U.S.C. § 2605(e)(2).

The Debtor had the burden of proving that Bayview violated RESPA. [10] In re Tomasevic, 275 B.R. 103, 114 (Bankr. M.D. Fla. 2001) (HN7 borrower bears burden of persuasion as to mortgagee's alleged violation of RESPA); Ploog v. HomeSide Lending, Inc., 2001 U.S. Dist. LEXIS 15697, 2001 WL 1155288, *7 n.14 (N.D. Ill. Sept. 28, 2001) (the burden of proving that a borrower's letter constitutes a qualified written request is on the plaintiff borrower). The Debtor's burden included, as an essential element of her cause of action, proof that her loan was a federally related mortgage loan. Bayview's request for summary judgment did not relieve the Debtor of this burden. HN8 Where, as here, the moving party would not bear the burden of proof at trial, the movant's initial burden is only to demonstrate or point out a lack of evidence to support at least one essential element of the opposing party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). **[*16]** The burden then shifts to the opposing party, the party who would bear the burden of proof at trial, to adduce such evidence on each of the disputed elements as at trial would be sufficient to withstand a motion for directed verdict. Anderson v Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

FOOTNOTES

10 Citing 24 C.F.R. § 3500.2, the Debtor asserts that "[b]ecause Bayview admitted that Knowles sent documents purporting to be QWRs [qualified written requests], Bayview was required to establish that the loan is not a 'federally related mortgage loan.'" The Debtor, however, has not cited specific language from the regulation or otherwise explained how the regulation supports her position on burden of proof. We find nothing in the language of the regulation to support her position or that even addresses the issue of burden of proof. See 24 C.F.R. § 3500.2.

The **bankruptcy** court concluded that RESPA did not apply because the loan was not a "federally related mortgage loan" within the meaning of 12 U.S.C. § 2602. HN9 The term "federally related mortgage loan," as used in 12 U.S.C. § 2605(e), is defined by statute at 12 U.S.C. § 2602. [11] The definition has two prongs and requires satisfaction of both. Bayview **[*17]** does not dispute that the mortgage loan satisfies the first, the loan being secured by a first mortgage on the real property that is the Debtor's single-family residence. Only the second prong is at issue.

FOOTNOTES

11 In relevant part, 12 U.S.C. § 2602 states:

HN10 For purposes of this chapter—

(1) the term "federally related mortgage loan" includes any loan (other than temporary financing such as a construction loan) which—

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B) (I) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government, or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing **[*18]** or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or

(iv) is made in whole or in part by any "creditor", as defined in section 1602(f) of Title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year, except that for the purpose of this chapter, the term "creditor" does not include any agency or instrumentality of any State[.]

12 U.S.C. § 2602(1).

In its motion for summary judgment, Bayview argued that summary judgment should enter on the RESPA count because the Debtor's mortgage did not meet any of the four statutory, second-prong alternatives in § 2602(1)(B). Bayview adduced evidence in support of its position as to one of the four alternatives. Specifically, with respect to § 2602(1)(B)(iv), Bayview adduced evidence that the Debtor's mortgage originated as **[*19]** a private mortgage and that the Thompsons did not make or invest in residential real estate loans aggregating more than $1,000,000.00 per year. [12] The motion, however, was not limited in scope to § 2602(1)(B)(iv). In the motion, Bayview contended that the loan was not a federally related mortgage loan *under any definition*: "this mortgage does not meet any of the four statutory definitions provided in the second prong." According to Bayview, there was no evidence to support an essential element of the Debtor's case. In order to avert entry of summary judgment on this count, the Debtor was therefore required to adduce evidence to establish a genuine issue of material fact as to whether the loan qualified as a federally related mortgage loan under at least one of the available definitions.

FOOTNOTES

12 The **bankruptcy** court concluded that the loan did not meet the 12 U.S.C. § 2602(1)(B)(iv) definition of federally related mortgage loan, and the Debtor does not now challenge that determination on appeal.

The **bankruptcy** judge entered summary judgment on this count on the strength of his determination that the loan was not a federally related mortgage loan. The Debtor contends that this was error for **[*20]** a number of reasons.

First, we reject the Debtor's argument that "Bayview failed to refute the allegation that either Wachovia, or itself, is insured, guaranteed, supplemented or assisted in any way by an agency of the Federal government." This argument is an attempt to bring the loan within 12 U.S.C. § 2602(1)(B)(ii), under which a loan is a federally related mortgage loan if it is "insured, guaranteed, supplemented, or assisted in any way" by an agency of the federal government. 12 U.S.C. § 2602(1)(B)(ii). This argument fails for three reasons. First, as explained above, the Debtor, not Bayview, bore the burden of proof on the issue. Second, we cannot find in the record that the Debtor ever did allege, either in his complaint or in his response to Bayview's motion for summary judgment, that the loan was federally related as defined in 12 U.S.C. § 2602(1)(B)(ii). Third, and more importantly, in response to the motion for summary judgment, the Debtor adduced no evidence on this issue at all. [13]

FOOTNOTES

13 On appeal, the Debtor cites for the first time evidence that Bayview and Wachovia accepted funding from the Troubled Asset Relief Program, and therefore they were "assisted" by the federal government; **[*21]** they argue that this brings the Debtor's loan within 12 U.S.C. § 2602(1)(B)(ii). We need not consider this argument because the Debtor waived it by failing to raise it below. See Carreras v. Sajo, Garcia & Partners, 596 F.3d 25, 32 n.5 (1st Cir. 2010).

Second, we reject the Debtor's argument that because the loan was sold so quickly, just eight days after its origination, there existed a genuine issue of material fact as to whether the loan was intended to be sold by the originating lenders. This argument is an attempt to bring the loan within 12 U.S.C. § 2602(1)(B)(iii), under which a loan is a federally related mortgage loan if it is "intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation." The argument fails because the Debtor introduced no evidence below that the originators intended to sell the loan to any of the identified entities: FNMA, GNMA, FHLMC, or a financial institution from which it is to be purchased by FHLMC. The eight-day turnaround time **[*22]** cannot by itself demonstrate intent to sell *to these entities*.

Third, we reject the Debtor's argument that "RESPA makes specific reference to loan servicers. It requires servicers to respond to qualified written requests. 12 U.S.C. § 2605(e)." This two-sentence argument appears to contend that RESPA applies to any mortgage servicer, regardless of whether the loan in question is a federally related mortgage loan. The argument is waived because it was not raised below. It is also refuted by the language

of the statute, which begins: "If any servicer *of a federally related mortgage loan* receives a qualified written request . . . the servicer shall . . . ." 12 U.S.C. § 2605(e)(1)(A) (emphasis added). As explained above, the provisions in question apply not to servicers in general but to servicers of federally related mortgage loans, and the Debtor was obligated to prove that in servicing its loan, Bayview was servicing a federally related mortgage loan.

Fourth, we reject the Debtor's argument that there existed a genuine issue of material fact as to whether "the loan was originated by a dealer or a mortgage broker and intended to be assigned to an entity subject to one of the first four **[*23]** criteria." The Debtor does not elaborate on this argument and fails to cite even a statutory or other basis on which this argument, if supported with evidence, might qualify the loan as federally related. For this reason, we decline to consider the argument on appeal. The argument further fails because, in her opposition to the motion for summary judgment, the Debtor adduced no evidence in support of it.

For these reasons, we conclude that there were no genuine issues of material fact and that the **bankruptcy** judge correctly granted summary judgment as to the RESPA count.

III. Count II: Alleged Violations of the Automatic Stay

HN11 The automatic stay is effective upon the filing of the **bankruptcy** petition and serves to prevent creditors from acting against property of the debtor or property of the estate without leave from the **bankruptcy** court to do so. See 11 U.S.C. § 362. The automatic stay is "extremely broad in scope" in that it prohibits almost all formal and informal acts taken against the debtor or the estate. Lawrence P. King et al., Collier on **Bankruptcy** ¶ 362.03 (15th ed. rev. 2007). The stay, however, does not prohibit all communication or actions by a creditor to a debtor. Morgan Guar. Trust Co. of N.Y. v. Am. Sav. & Loan Ass'n (In re Morgan Guar. Trust Co. of N.Y.), 804 F.2d 1487, 1491 (9th Cir. 1986). **[*24]** For instance, a "mere request for payment" does not violate the stay unless it is coercive or harassing. Id. Likewise, an act does not violate the stay unless it immediately or potentially threatens the debtor's possession of its property, such that the debtor is required to take affirmative acts to protect its interest. Id.

Here, the Debtor argues that Bayview violated the automatic stay through the following three acts: filing a proof of claim, sending the annual tax statement, and sending the payoff statements. We examine these assertions in order and determine that none of them states a basis for finding a violation of the stay.

First, HN12 the filing of the proof of claim is not an act against property of the debtor or the estate. See 11 U.S.C. § 362; Campbell v. Countrywide Home Loans, Inc. (In re Campbell), 545 F.3d 348, 355-56 (5th Cir. 2008) (holding that automatic stay did not bar creditor from filing proof of claim); Zotow v. Johnson (In re Zotow), 432 B.R. 252, 261 (B.A.P. 9th Cir. 2010) (explaining that automatic stay "serves to control creditor action by encouraging creditors to participate in the **bankruptcy** process to resolve their claims"). As the **bankruptcy** court noted, the **[*25]** filing of a proof of claim merely indicates a desire to participate in the **bankruptcy** process. See In re Campbell, 545 F.3d at 355-56. It is not a request for payment from the debtor or an attempt to act against property of the debtor. It is certainly an act against property of the estate—one files a proof of claim in order to recover from the estate—but one the Code expressly sanctions: "[a] creditor . . . may file a proof of claim." 11 U.S.C. § 501(a). To the extent the Debtor disputed the reasonableness of certain charges and fees, she was free to object to the claim. [14] See id.

FOOTNOTES

14 On November 27, 2009, Bayview filed an application for legal fees and costs in which it sought $5,805.00 in fees and $1,010.99 in costs, for a total of $6,815.99. The application was still pending at the time the appeal was filed, because the parties had agreed to postpone determination of the application until after resolution of the adversary proceeding. At oral argument, the parties represented that the court has since approved the fees, and therefore, the amount is no longer in question.

Similarly, the sending of the annual tax statement was not an act against property of the Debtor or the estate. See **[*26]** 11 U.S.C. § 362; In re Morgan, 804 F.2d at 1491; In re Zotow, 432 B.R. at 261. The statement was merely an informative document sent in the normal course of business that contained data the Debtor needed in order to prepare her tax return. Because nothing in the statement can be construed as an attempt by Bayview to seek payment from the Debtor, Bayview's sending it was not violative of the stay. See 11 U.S.C. § 362; In re Morgan, 804 F.2d at 1491; In re Zotow, 432 B.R. at 261.

Nor was Bayview's transmission of the payoff statements an act against property of the Debtor or the estate. See 11 U.S.C. § 362; In re Morgan, 804 F.2d at 1491; In re Zotow, 432 B.R. at 261. The Debtor in fact requested the payoff information, and Bayview noted in both statements that it was providing the information pursuant to that request. Additionally, both statements contained language making it clear that the Debtor was not immediately obligated to pay anything beyond her normal mortgage payment and that the "total amount due" was only if the Debtor opted to pay off the loan in full. Additionally, the fact that these fees were omitted from the proof of claim "[does] not constitute the sort of overt, affirmative **[*27]** act stayed by § 362(a)." Mann v. Chase Manhattan Mortgage Corp. (In re Mann), 316 F.3d 1, 6 (1st Cir. 2003). As nothing in the statements can be construed as an attempt by Bayview to seek payment from the Debtor, Bayview's sending them did not violate the stay. See 11 U.S.C. § 362; In re Morgan, 804 F.2d at 1491; In re Zotow, 432 B.R. at 261.

The Debtor argues that the **bankruptcy** court "went no further than to determine Bayview had a right to seek those fees under Section 506" and that the **bankruptcy** court "erred in failing to analyze whether Bayview sought those fees improperly." [15] This is a misstatement of the **bankruptcy** court's conclusion. What the **bankruptcy** court in fact concluded was that Bayview had not sought to collect any fees outside the **bankruptcy** process. That is, the **bankruptcy** court concluded that Bayview had not acted against property of the Debtor or the estate by sending the annual tax statement or payoff statement or by filing a proof of claim. HN13 With respect to allegations of a stay violation, the question is not whether certain fees are proper, but whether the creditor acted against property of the Debtor or the estate. See 11 U.S.C. § 362; In re Morgan, 804 F.2d at 1491; **[*28]** In re Zotow, 432 B.R. at 261. As there is no evidence indicating that Bayview did so, the **bankruptcy** court did not err in concluding that Bayview did not violate the automatic stay.

FOOTNOTES

15 Additionally, the Debtor argues that Bayview and Wachovia are bound by their treatment under the Amended Plan. However, this argument pertains to the question of whether Bayview violated § 105, not whether Bayview violated the automatic stay.

IV. Count III: Alleged Violations of § 105 Generally

In Count III, the Debtor sought damages for an alleged "violation of § 105(a)." As a preliminary matter, we note that HN14 § 105(a) [16] does not proscribe any conduct and therefore cannot be violated. Rather, it merely empowers the **bankruptcy** court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the **Bankruptcy** Code]." 11 U.S.C. § 105(a). Consequently, we understand the Debtor to be arguing not that the Bayview has violated § 105(a) but that it has committed certain acts, resulting in injury to the Debtor, for

which the court may and should, pursuant to the authority granted in § 105(a), fashion relief.

FOOTNOTES

16 Section 105(a) provides that

HN15 The court may issue any order, **[*29]** process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

HN16 Section 105(a) gives a **bankruptcy** court broad authority to "exercise its equitable powers—where 'necessary' or 'appropriate'—to facilitate the implementation of other **Bankruptcy** Code provisions." Ameriquest Mortgage Co. v. Nosek (In re Nosek), 544 F.3d 34, 43 (1st Cir. 2008). It functions, therefore, as a "catch-all" provision, effectively filling in gaps to "preserve the integrity of the **bankruptcy** system." Cuevas-Segarra v. Contreras, 134 F.3d 458, 459 (1st Cir. 1998). Despite this broad language, there are "important limitations" on a **bankruptcy** court's authority to act pursuant to § 105(a). In re Nosek, 544 F.3d at 43. Notably, a **bankruptcy** court may not apply § 105(a) in a manner that is inconsistent with another provision of the **Bankruptcy** Code. Id.

HN17 Section 506(b) [17] entitles secured creditors **[*30]** to post-petition interest, fees, and costs to the extent the claim is oversecured. See 11 U.S.C. § 506(b); Burrell v. Town of Marion (In re Burrell), 346 B.R. 561, 568 (B.A.P. 1st Cir. 2006). **Bankruptcy** Rule 2016(a) [18] sets forth the procedure by which an entity can apply for compensation or reimbursement of expenses. See Fed. R. Bankr. P. 2016(a). HN18 Generally, the provisions of a confirmed chapter 13 plan bind the parties and establish a creditor's treatment. Torres Martinez v. Rivera Arce (In re Torres Martinez), 397 B.R. 158, 165 (B.A.P. 1st Cir. 2008). However, a confirmed plan is not binding on a creditor whose treatment is not clearly determined under the plan. Piedmont Trust Bank v. Linkous (In re Linkous), 990 F.2d 160, 162-63 (4th Cir. 1993) (confirmation order is not preclusive as to issue of valuation and quantification of secured claim where secured creditor, though given notice of the confirmation hearing, was afforded no notice that court would hold a hearing on valuation); see also Brawders v. County of Ventura (In re Brawders), 503 F.3d 856, 867-68, 325 B.R. 405 (9th Cir. 2007) (chapter 13 plan that does not clearly state its intended effect on a given issue may have no res judicata **[*31]** effect on that issue); In re Joyce E. Greene-Jackson, Case No. 00-14423 (Bankr. D. Mass. March 30, 2001) (where mortgagee was not afforded adequate notice by chapter 13 plan that plan would quantify the mortgagee's arrearage claim, the confirmation order was not preclusive as to the amount of that claim); K. Lundin, Chapter 13 **Bankruptcy** § 233.1 (3d ed. 2000) (explaining that binding effect of confirmed chapter 13 plan is limited by "[b]ad plans, bad notices and confirmations that fall short of the due process prescribed elsewhere in the Code and Rules"). Particularly problematic is the procedure for the allowance and disallowance of claims, which is "[s]eparate from, if not parallel to, confirmation." Id. That is, a "tension" arises where a creditor's treatment under a confirmed plan differs from an allowed claim filed by creditor. Id.

FOOTNOTES

17 Section 506(b) provides that

HN19 To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under **[*32]** the agreement under which such claim arose.

18 **Bankruptcy** Rule 2016(a) provides that

HN20 An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this **[*33]** subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

HN21 In Maine, Local Rule 3015-3(d)(3) [19] serves to alleviate this tension by allowing chapter 13 debtors to reserve determination of claims until after the claims deadline has passed. See D. Me. LBR 3015-3(d)(3). Therefore, a plan that expressly postpones claims determinations under D. Me. LBR 3015-3(d)(3) provides ample notice to creditors that their treatment has not been finally determined. [20] See id. Here, the Amended Plan expressly reserved determination of claims in accordance with D. Me. LBR 3015-3(d)(3). Claims can be determined through an objection to claim, a motion to allow or disallow a claim, or an application for fees. The Amended Plan, therefore, did not have a binding effect on Bayview's claim.

FOOTNOTES

19 Maine Local **Bankruptcy** Rule 3015-3(d)(3) provides:

HN22 Allowance and Payment of Claims. The trustee may pay allowed secured and priority claims as filed pursuant to a confirmed **[*34]** plan unless an objection to such claim is pending. After the last date for filing claims, the debtor or the trustee shall file a motion to allow and disallow claims. Such motion may also address objections to claims, priority of claims, the avoidability of liens, and any other matter which may be raised pursuant to statute or rule. Payment of general unsecured claims shall be made only after the order allowing and disallowing claims except as otherwise authorized by order of Court. The motion(s) and order(s) shall comport with Maine **Bankruptcy** Forms 3 and 4 in substance and in form.

20 The Panel need not consider whether the confirmation order must expressly reserve the determination of claims in order to postpone the determination of claims under D. Me. LBR 3015-3(d)(3).

The Debtor contends that Bayview violated § 105 by attempting to "impose its own modification" on the Amended Plan by seeking pre- and post-confirmation fees and costs. However, Bayview's attempt to recover certain pre- and post-petition costs and fees was not a unilateral effort to modify the Amended Plan. First, the **bankruptcy** court must adjudicate the fee application, and therefore any changes to Bayview's treatment **[*35]** would be court-sanctioned. Second, a change in Bayview's treatment would not be a modification of the Amended Plan. The confirmation order expressly reserved the determination of claims until after the claims deadline passed. Therefore, any change to the amount Bayview receives would be in accordance with—not in conflict with—the terms of the Amended Plan.

The Debtor further contends that, even if D. Me. LBR 3015-3(d)(3) generally allows for the postponing of claims determination until after the claims deadline has passed, in this case Bayview's treatment was determined under the Amended Plan because Bayview had participated in the confirmation process. Specifically, Bayview objected to its treatment under the Plan, and later withdrew its objection after reaching an agreement with the Debtor, as reflected in the Amended Plan. We reject these arguments, however, as there is nothing in the text of D. Me. LBR 3015-3(d)(3) to support them. See D. Me. LBR 3015-3(d)(3).

Lastly, the Debtor's reliance on Sanchez v. Ameriquest Mortgage Co. (In re Sanchez), 372 B.R. 289 (Bankr. S.D. Tex. 2007), is misplaced. In In re Sanchez, the **bankruptcy** court held that the lender had violated the confirmation **[*36]** order by sending a forbearance agreement to the debtor that purported to change the debtor's obligations under the confirmed plan. Id. at 317-18. As an initial matter, In re Sanchez is not binding precedent in this circuit. More importantly, the case is distinguishable from the case before us. Indeed, in that case the lender assessed post-petition charges "without giving notice to the debtor and without seeking court approval." Id. In In re Sanchez, the lender never disclosed the additional fees during the **bankruptcy** process. Id. Consequently, its effort to change the amounts due to it under the plan was not subject to the claims assessment process before the court. See 11 U.S.C. § 506(a) and **Bankruptcy** Rule 2016. That is simply not the case here. Bayview filed its proof of claim and sought its allowance through appropriate court procedures. Even if we were inclined to adopt the rulings in In re Sanchez, which we specifically do not embrace here, those rulings have no application on the facts presented in this case.

V. Motion for Fees and Costs

HN23 Under **Bankruptcy** Rule 8020, [21] the Panel may award an appellee costs and fees if it determines that the procedural requirements of the rule are **[*37]** satisfied and that the appeal is frivolous. See Fed. R. Bankr. P. 8020; Lumb v. Cimenian (In re Lumb), 401 B.R. 1, 9 (B.A.P. 1st Cir. 2009); Maloni v. Fairway Wholesale Corp. (In re Maloni), 282 B.R. 727, 734 (B.A.P. 1st Cir. 2002). Procedurally, the appellee must file a separate motion and the appellant must be given an opportunity to respond. Id. Here, Bayview satisfied the procedural requirement by filing a separate motion, to which the Debtor has objected.

FOOTNOTES

21 **Bankruptcy** Rule 8020 provides as follows:

HN24 If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

HN25 There is no formula for determining if an appeal is frivolous. Id. Factors to be considered include the following: whether the appellant filed the appeal in bad faith; whether the argument is meritless *in toto* or only partially without merit; whether the argument properly addresses the issues on appeal; and whether the appellant supports the argument with proper and applicable authority or simply asserts unsubstantiated facts or bare legal conclusions. In re Maloni, 282 B.R. at 734. **[*38]** Although the Debtor did not prevail on this appeal, the appeal was not frivolous. See id. The Debtor asserted legitimate arguments and provided support for them. For these reasons, costs and fees pursuant to **Bankruptcy** Rule 8020 are not appropriate. See id.

CONCLUSION

For the reasons discussed above, we **AFFIRM** the **bankruptcy** court's decision. We **DENY** Bayview's request for fees and costs under **Bankruptcy** Rule 8020.

In re: DAVID GIZA, Debtor; In re: LINDA Y. GIZA, Debtor; DAVID GIZA and LINDA Y. GIZA, Plaintiffs v. AMCAP MORTGAGE, INC., DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE, and ONEWEST BANK, FSB, Defendants

Chapter 13, Case No. 07-41782-HJB, Chapter 13, Case No. 09-30886-HJB, Adversary Proceeding, No. 09-03032

UNITED STATES **BANKRUPTCY** COURT FOR THE DISTRICT OF MASSACHUSETTS, WESTERN DIVISION

2011 Bankr. LEXIS 16

January 4, 2011, Decided
January 4, 2011, Filed, Entered

PRIOR HISTORY: Giza v. Amcap Mortg., Inc. (In re Giza), 428 B.R. 266, 2010 Bankr. LEXIS 1055 (Bankr. D. Mass., 2010)

CASE SUMMARY

PROCEDURAL POSTURE: In a consolidated adversary proceeding, plaintiff debtors filed a motion under Fed. R. Civ. P. 15(a)(2) to amend their complaint against defendant mortgage companies. Defendants opposed the motion.

OVERVIEW: Plaintiffs sought to correct several factual errors involving dates, to correct the number of notices of right to cancel they had received, and to bring additional claims. The court stated that the delay in filing the motion, approximately 13 months after the first complaint was filed, was considerable. Furthermore, plaintiffs knew or should have known about all of the changes now sought to be made in their proposed amended complaint at the time they filed their original complaint. There would unquestionably be undue prejudice to defendants if the motion to amend were allowed, as it would add an additional defendant, force one defendant back into the case, and compel another defendant to defend against several new claims. Moreover, allowance of the motion would also prejudice the Chapter 13 trustee and plaintiffs' other creditors by delaying the resolution of the adversary proceeding and thus distribution payments to creditors. Thus, plaintiffs could file a complaint correcting the errors as to dates and the number of notices plaintiffs received, but the court would deny them leave to make the remaining proposed amendments.

OUTCOME: The court allowed the motion to amend in part, so that plaintiffs could correct the errors made as to dates and to change the number of notices of right to cancel they received. The court denied leave to make the remaining proposed amendments.

CORE TERMS: amend, mortgage, adversary proceeding, rescission, discovery, notice, allowance, case law, declaratory judgment, briefing, judicial notice, new claims, withdrawn, viable, proposed amendments, leave to amend, undue prejudice, appearing, pre-trial, untimely, lapse, Act MCCCDA, federal rules, cause of action, automatic stay, summary judgment, arrearages, recorded, discover, disclose

LEXISNEXIS® HEADNOTES

Hide

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court

HN1 Fed. R. Civ. P. 15(a) states that a party may amend its pleading only with the court's leave. The court should freely give leave when justice so requires. Rule 15(a)(2). However, leave to amend should not be granted in cases where there has been undue delay or where there would be undue prejudice to the opposing party by virtue of allowance of the amendment. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court

HN2 As a case progresses, and the issues are joined, the burden on a plaintiff seeking to amend a complaint becomes more exacting. The longer a plaintiff delays, the more likely the motion to amend will be denied, as protracted delay, with its attendant burdens on the opponent and the court, is itself a sufficient reason for the court to withhold permission to amend. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court

HN3 When considerable time has elapsed between the filing of the complaint and the motion to amend, the movant has the burden of showing some valid reason for his neglect and delay. What the plaintiff knew or should have known and what he did or should have done are relevant to the question of whether justice requires leave to amend under the discretionary provision of Fed. R. Civ. P. 15(a). More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court

HN4 Fed. R. Civ. P. 15(a)'s liberal amendment policy seeks to serve justice, but does not excuse a lack of diligence that imposes additional and unwarranted burdens on an opponent and the courts. More Like This Headnote

COUNSEL: **[*1]** For Linda Y. Giza, Plaintiff: L. Jed Berliner, LEAD ATTORNEY, Meghan R. Bristol, Berliner Law Firm, Springfield, MA.

For David Giza, consolidated plaintiff, Plaintiff: L. Jed Berliner, Meghan R. Bristol, Berliner Law Firm, Springfield, MA.

Amcap Mortgage, Inc, Defendant, Pro se.

For Deutsche Bank National Trust Company, Defendant: Howard M. Brown, Sarah A Smegal, Bartlett Hackett Feinberg P.C., Boston, MA.

For OneWest Bank FSB, Defendant: Sarah A Smegal, Bartlett Hackett Feinberg P.C., Boston, MA.

JUDGES: Henry J. Boroff, United States **Bankruptcy** Judge.

OPINION BY: Henry J. Boroff

OPINION

MEMORANDUM OF DECISION

By their "Motion to File First Amended Complaint" (the "Motion to Amend"), the plaintiffs, David and Linda Giza ("David" and "Linda", together the "Gizas"), seek leave to make several significant changes to their original complaint.[1] The defendants, Deutsche Bank National Trust Company, As Trustee, and OneWest Bank, FSB ("Deutsche Bank" and "OneWest", together the "Defendants") adamantly oppose. After careful review of Fed. R. Civ. P. 15(a)(2),[2] as interpreted and applied by the First Circuit Court of Appeals and a balancing of the interests of both the Gizas and the Defendants in this hotly contested adversary **[*2]** proceeding, the Court will deny the Motion to Amend in part and allow it in part.

FOOTNOTES

1 As further described below, David and Linda filed separate but nearly identical adversary proceedings. After this Court's prior decision on the Defendants' motion to dismiss both complaints, see In re Giza, 428 B.R. 266 (Bankr. D. Mass. 2010), all appearing parties requested that the adversary proceedings be consolidated. That request was granted.

2 Fed. R. Civ. P. 15(a)(2) applies to **bankruptcy** proceedings through Fed. R. Bankr. P. 7015.

I. FACTS AND TRAVEL OF THE CASE

The Gizas are spouses residing at 15 Orchard Street in Palmer, Massachusetts (the "Property") and debtors in separately filed Chapter 13 cases. On January 8, 1988, they purchased the Property, subject to a purchase money mortgage. On May 24, 2006, the Gizas refinanced the Property and granted a new mortgage to Amcap Mortgage, Inc. ("Amcap").[3] On February 21, 2008, the Amcap mortgage was assigned to Deutsche Bank. The assignment was recorded on June 24, 2008.

FOOTNOTES

3 As of the date of this opinion, Amcap has not filed an answer in this adversary proceeding nor has default entered against Amcap. In their proposed Amended Complaint, the Gizas allege **[*3]** that "[u]pon information and belief, defendant Amcap was voluntarily dissolved on October 31, 2008." Am. Compl. ¶ 5. Although the Gizas sought in the proposed Amended Complaint to bring these same claims against Robert Williams, the alleged principal of Amcap, those claims have now been withdrawn by the Gizas' motion, dated January 3, 2011.

David filed a Chapter 13 case in this Court on May 10, 2007. Linda filed a separate Chapter 13 case on May 27, 2009. In between, on June 14, 2008, the Gizas' counsel sent a notice of rescission (the "Rescission Letter") to Amcap, Deutsche Bank, and OneWest. In the Rescission Letter, the Gizas stated they wished to rescind their mortgage for violations of the federal Truth in Lending Act ("TILA") and Massachusetts Consumer Credit Cost Disclosure Act ("MCCCDA").

On May 30, 2009, David instituted the instant adversary proceeding against Amcap, Deutsche Bank, and OneWest. Less than a month later, Linda filed her nearly identical adversary proceeding. By their virtually identical complaints, the Gizas sought to 1) determine the validity and extent of the recorded mortgage in light of the Rescission Letter and 2) obtain, under TILA and MCCCDA, statutory **[*4]** damages, injunctive relief, costs, and attorney's fees for the failure of the Defendants to honor their mortgage rescission. The Gizas also sought to "reserve" a cause of action under Massachusetts General Laws Chapter 93A.[4] Finally, the complaint in Linda's case sought redress for alleged automatic stay violations by the Defendants with regard to her interest in the Property.

FOOTNOTES

4 The legal basis for such a reservation has never been identified by the Gizas.

The Defendants moved to dismiss the complaints, and after extensive briefing and argument by all appearing parties, this Court issued its decision of April 15, 2010, supported by a Memorandum of Law. That decision dismissed all of the asserted claims against OneWest and all of the claims against Deutsche Bank, except the Gizas' claim for rescission under MCCCDA. On May 20, 2010, the parties filed a Joint Pre-Trial statement with the Court, agreeing to a discovery plan based on the sole claim remaining after the Court's April 15th ruling.

On June 21, 2010, the Gizas filed the instant Motion to Amend and the Amended Complaint. The proposed amendments fall into two categories. First, the Gizas seek to correct several factual errors. These **[*5]** changes include several minor factual errors pointed out by the Court in its April 15 decision — including errors in the closing date of the mortgage loan and the date on which David filed his Chapter 13 petition. More significantly, the Gizas now claim to have discovered that four Notices of Right of Cancel were given to the Gizas — three to David and one to Linda — rather than the total of three previously alleged.[5] The Gizas also seek to assert additional claims against Deutsche Bank and OneWest, thereby attempting to draw the latter back into the case. These claims include a Chapter 93A claim; a request that the Court declare that Deutsche Bank does not have standing to enforce the underlying promissory note; and a claim against OneWest for failure to acknowledge and respond to a Qualified Written Request in violation of the Real Estate Settlement Practices Act ("RESPA").[6]

FOOTNOTES

5 The Defendants assent to this amendment, and for this reason, it will be allowed. Defs.' Sur-Reply Br. 2, n.1. However, the Court must express its surprise that it took the Gizas thirteen months to discover or disclose to the Defendants and the Court that the Gizas received four Notices of Right to Rescission, **[*6]** instead of three. To discover or disclose such a relevant fact at this stage of the litigation suggests a certain carelessness in preparing the original complaint.

6 During briefing, the Gizas asked the Court to permit them to withdraw the RESPA count from the Amended Complaint.

II. POSITIONS OF THE PARTIES

The Defendants argue that the Gizas are unjustifiably and inexplicably late in the filing of the Motion to Amend. They maintain that the Amended Complaint dramatically alters the current state of case — from a single claim to be tried against Deutsche Bank alone to a multi-claim multi-party suit that will require the retooling of discovery and trial strategy. Further, they note that over a year passed between the filing of the original complaint and the Motion to Amend and over two months since this Court's ruling on the Defendants' Motion to Dismiss, and the Gizas have failed to provide any justification for that delay — a delay described by the Defendants as particularly unjustified when all of the new claims were known to the Gizas at the time the original complaint was filed. According to the Defendants, amendment of the complaint at this late hour would substantially prejudice **[*7]** the Defendants by vastly expanding the scope of the case after a narrow discovery schedule had been agreed upon and particularly prejudice OneWest, forced back into a case from which it had previously been dismissed.[7]

FOOTNOTES

7 It appears that the Gizas have withdrawn all of the major causes of actions against OneWest in the Amended Complaint through the briefing process. All that appear to remain are the previously dismissed claims for damages and costs under MCCCDA, which the Gizas claim are simply in the Amended Complaint to be preserved for appeal, and the declaratory judgment claim that OneWest has no servicing rights to the mortgage.

The Defendants also contend that the Motion to Amend is filed in bad faith, as it contains claims that the Court previously dismissed. Finally, the Defendants argue that the arguments on which the declaratory judgment and RESPA claims rest are futile under existing case law, and therefore, introducing them into the case serves no legitimate purpose.

The Gizas remind the Court that the federal rules encourage the liberal amendment of complaints in all instances "when justice so requires," and contend that this case is one such instance. The Gizas claim that their **[*8]** delay in raising the new claims was primarily based upon rapidly evolving case law surrounding the validity of mortgage assignments and foreclosures. Additionally, the Gizas maintain that the Defendants would not be prejudiced by allowance of the Motion to Amend, as the Defendants have long had actual notice of all of the claims alleged in the proposed Amended Complaint. Because the Gizas sent the Defendants a Chapter 93A letter long before the Amended Complaint was filed, the Gizas argue the Defendants have known about that claim for over a year. Finally, the Gizas contend that their Chapter 93A claim was contingent on the outcome of the Court's April 15th ruling. Since the Chapter 93A claim would be viable only if the Court found the MCCCDA claim to be viable, the Gizas claim to have simply waited until after the Court's ruling to reassess their case and amend their complaint.

III. DISCUSSION

HN1 Fed. R. Civ. P. 15(a) states "a party may amend its pleading only with . . . the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). However, leave to amend should not be granted in cases where there has been "undue delay" or where there would **[*9]** be "undue prejudice to the opposing party by virtue of allowance of the amendment." Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). See also Adorno v. Crowley Towing & Transp. Co., 443 F.3d 122, 126 (1st Cir. 2006), Acosta-Mestre v. Hilton Int'l of P.R., 156 F.3d 49, 51 (1st Cir. 1998).

The First Circuit Court of Appeals has considered the timeliness of motions to amend complaints in several cases. See e.g., Steir v. Girl Scouts of the USA, 383 F.3d 7, 12 (1st Cir. 2004); Grant v. News Grp. Boston, Inc., 55 F.3d 1, 6 (1st Cir. 1995) (finding a 14-month time lapse between the original complaint and amended complaint untimely); Acosta-Mestre, 156 F.3d at 52 (finding a 15-month time lapse between the original complaint and amended complaint untimely especially when discovery was nearly concluded and a pre-trial order had been approved). In Steir, that court warned that HN2 "[a]s a case progresses, and the issues are joined, the burden on a plaintiff seeking to amend a complaint becomes more exacting. . . . [T]he longer a plaintiff delays, the more likely the motion to amend will be denied, as protracted delay, with its attendant burdens on the opponent and the court, is itself a sufficient reason **[*10]** for the court to withhold permission to amend." Steir, 383 F.3d at 12.

In Grant, a case with a fourteen-month delay between the initial complaint and the motion to amend, the court found that delay "considerable" "in conjunction with the radical remaking of the case contemplated by the amended complaint," and noted that HN3 when "considerable time has elapsed between the filing of the complaint and the motion to amend, the *movant* has the burden of showing some 'valid reason for his neglect and delay.'" Grant, 55 F.3d at 6 (emphasis in original) (quoting Stepanischen v. Merchs. Despatch Transp. Corp., 722 F.2d 922, 933 (1st Cir. 1983), Hayes v. New England Millwork Distribs. Inc., 602 F.2d 15, 19-20 (1st Cir. 1979)). And in Grant, the court found important that the plaintiff possessed the knowledge necessary to present the claims as sought to be amended well before the amended complaint was filed. Grant, 55 F.3d at 6. See also Leonard v. Parry, 219 F.3d 25, 30 (1st Cir. 2000) ("What the plaintiff knew or should have known and what he did or should have done are relevant to the question of whether justice requires leave to amend under this discretionary provision."); Acosta-Mestre, 156 F.3d at 52 **[*11]** (affirming denial of the motion to amend in part because the plaintiff was aware or should have been aware of the additional defendant at the time of the filing of the initial complaint).

In this case, the Gizas' Motion to Amend cannot be considered timely under any fair interpretation of First Circuit precedent. The Gizas' delay is "considerable" — approximately thirteen months after the first Giza complaint was filed. Accordingly, disposition of the Motion to Amend requires examination into the reasons for the delay; whether the plaintiffs knew or should have known of the factors requiring the change to the complaint at an earlier time; and the burdens on the opponent. Here, all three weigh heavily against the Gizas.

The Gizas offer very little by way of reasons for their delay. The two primary excuses relate to the evolving nature of case law and a desire to await the Court's April 15th order before amending their complaint. Neither of these arguments have merit. By its very nature, law often evolves — but that does not excuse a change in direction by a litigant unless the change was not able to be anticipated. But here the vast majority of the case law cited by the Gizas in support **[*12]** of their declaratory judgment claim was in existence at the time the initial complaints were filed.[8] Therefore, the Gizas' failure to timely assert this claim rests solely upon them. And the Gizas' argument that their Chapter 93A claim was dependent on the outcome of the Court's April 15th order fails as well. Pleading in the alternative has been a staple of federal court practice since the advent of the Federal Rules of Civil Procedure in 1938.

FOOTNOTES

8 Further, the Gizas' proposed Amended Complaint, briefing, and argument surrounding the declaratory judgment claim appear as if their counsel sought to include every miscellaneous allegation that has been in the press with regard to mortgages, notarization, robo-signing, and assignments — whether relevant, irrelevant, or grounded in any actual law or fact pertinent to this case.

The Gizas knew or should have known about all of the changes now sought to be made in their proposed Amended Complaint at the time they filed their original complaint. Indeed, David questioned Deutsche Bank's standing in opposition to the bank's motion for a relief from the automatic stay filed in November of 2007 — nearly 8 months before the original complaint and over **[*13]** a year and a half before the Motion to Amend were filed.[9] A viable Chapter 93A claim could have been made as early as July 3, 2009 (30 days after the mailing of the Chapter 93A letter). There is no reason why the Gizas waited until June 21, 2010 — nearly a year later — to amend the complaint.

FOOTNOTES

9 See Opp'n to Mot. for Relief In re Giza, 07-41782-HJB (Bankr. D. Mass. Nov. 5, 2007), ECF No. 83. The Court is permitted to take judicial notice of its own docket. See LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.), 196 F.3d 1, 8 (1st Cir. 1999) ("[t]he **bankruptcy** court appropriately took judicial notice of its own docket"); In re Marrama, 345 B.R. 458, 463 n.9 (Bankr. D. Mass. 2006) ("I may take judicial notice of the dockets and documents in the Debtor's two pending cases.")

Furthermore, the proposed Amended Complaint now also includes a "Count III" that does not involve any of the original Defendants. Rather, it is simply entitled "Liability of Robert B. Williams: President, Treasurer, Secretary and Director of Amcap Mortgage, Inc.". That count has now been withdrawn by the Gizas.

There would unquestionably be undue prejudice to the Defendants if the Motion to Amend were allowed. **[*14]** The Court's April 15th order essentially boiled this case down to a single issue dispute between Deutsche Bank and the Gizas. Allowance of the Motion to Amend would add an additional defendant, force OneWest back into the case, and compel Deutsche Bank to defend against several new claims. A pretrial order was issued May 28, 2010. The parties were ordered to complete discovery and file summary judgment motions by December 2010. Those deadlines have since been extended, but even this Motion to Amend has needlessly extended this litigation and significantly thrown off its discovery and summary judgment schedules.

And allowance of the Motion to Amend would not prejudice the Defendants alone. It would also prejudice the Chapter 13 trustee and the Gizas' other creditors. While this adversary proceeding has trudged along, David and Linda's **bankruptcy** cases have stood at a virtual standstill. In June of 2010, the Chapter 13 trustee filed motions to dismiss in David's and Linda's **bankruptcy** cases. Their combined Chapter 13 plan arrearages then totaled $4,571. In lieu of dismissing the cases, this Court ordered the debtors to each file an amended plan within 30 days. David and Linda subsequently **[*15]** urged the Court to vacate that order over the objection of the Chapter 13 trustee who complained of the significant arrearages. And after hearing, the motions to vacate were continued generally pending the outcome of this adversary proceeding, an adversary proceeding whose resolution would be significantly delayed were the Motion to Amend allowed in full. And correspondingly, without a confirmable plan on the horizon, distribution payments to creditors will continue to be delayed indefinitely.

IV. CONCLUSION

HN4 "Rule 15(a)'s liberal amendment policy seeks to serve justice, but does not excuse a lack of diligence that imposes additional and unwarranted burdens on an opponent and the courts." Acosta-Mestre, 156 F.3d at 53. In this case, the Gizas knew or should have known all the information now sought to be alleged in the Amended Complaint at the outset of the case or shortly thereafter. Under those circumstances, a thirteen month delay in making those allegations is not justifiable and is prejudicial to the Defendants. Therefore, the Gizas may file an Amended Complaint which both corrects the errors made as to the dates on which events occurred and which changes the number of Notices of **[*16]** Right to Cancel, which the Gizas originally received. The Court DENIES leave to make the remaining proposed amendments to the complaint.[10]

FOOTNOTES

10 Because the Court will deny the Motion to Amend on other grounds, it need not reach the question of whether the allegations made therein are futile or made in bad faith.

An order consistent with this Memorandum will issue accordingly.

DATED: January 4, 2011

By the Court,

/s/ Henry J. Boroff

Henry J. Boroff

United States **Bankruptcy** Judge

2011 BNH 001 **Note: This is an unreported opinion. Refer to LBR 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:	Chapter 11
KS Realty, Inc. and Pointe Luck, LLC, Debtors	Bk. No. 09-10918-JMD Bk. No. 09-10919-JMD Jointly Administered

Robert J. Keach, Esq.
Jennifer Rood, Esq.
Bernstein, Shur, Sawyer & Nelson
Portland, ME and Manchester, NH
Attorneys for Debtor

John M. Sullivan, Esq.
Joshua E. Menard, Esq.
Preti Flaherty PLLP
Concord, NH
Attorneys for Maxfield Real Estate, Inc.

MEMORANDUM OPINION

I. INTRODUCTION

KS Realty, Inc. and Pointe Luck, LLC, jointly administered debtors (collectively, the "Debtors"), object to the proof of claim ("POC 11" or the "Claim") filed by Maxfield Real Estate, Inc. ("Maxfield") (Doc. No. 230) (the "Objection"). Maxfield asserts a claim for $584,000 based on its alleged entitlement to a commission from the post-confirmation sale of the Debtors' Grand View Commons subdivision property located in Wolfeboro, New Hampshire (the "Property"). The Court held an evidentiary hearing on the Objection and took the matter under advisement. This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the

United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

Maxfield and the Debtors entered into an Exclusive Listing Agreement (the "Agreement") dated July 2, 2007, with respect to the Property, which the parties extended through January 15, 2009. The Agreement stated in relevant part:

> If during the term of this Agreement, an individual or entity is procured who is ready, willing and able to purchase at said price, or upon another price and terms to which SELLER may agree, the SELLER agrees to pay AGENCY a commission of 5% to 6% of the contract price . . . . Upon full execution of a contract for sale and purchase of the PROPERTY, all rights and obligations of this Agreement will extend with respect to such Purchase and Sales Agreement and Deposit Receipt through the date of closing as specified in the Purchase and Sales Agreement and Deposit Receipt. . . . The commission as provided above shall be due if the PROPERTY is contracted to be or has been sold, leased, conveyed, exchanged or otherwise transferred within 6 months after the expiration or rescission of this Agreement to anyone with whom the Agency has procured, unless the PROPERTY has been listed with another licensed broker on an exclusive basis. "Procurement" shall include, but not be limited to, providing information about the PROPERTY, showing the PROPERTY, or presenting offers on the PROPERTY.

Under the Agreement the amount of the commission depended upon the nature of the lot being sold. The Agreement further authorized Maxfield to share its commission on an equal basis with licensed brokers and agents from other real estate firms. It also provided that Maxfield would be entitled to payment of fifty percent of any deposit forfeited by a defaulting buyer.

Maxfield and its co-broker, Yankee Pedlar Realtors ("Yankee Pedlar"), procured a buyer for the Property. On September 15, 2008, the Debtors entered into a purchase and sale agreement for the Property (the "2008 P&S") at a purchase price of $14,150,000 with JWM Generations Trust (the "Buyer" or "Marriott"). Pursuant to the 2008 P&S, the Buyer paid a deposit of $1,000,000 (the "Deposit"). The 2008 P&S did not have a set closing date; rather, it

called for a closing no later than fifteen days after completion of a due diligence period. The 2008 P&S called for a forty-five day due diligence period, which could be extended an additional thirty days.

On November 25, 2008, within the due diligence period, the Buyer terminated the 2008 P&S. The Debtors contended that the termination was unilateral and without cause. Marriott contended that the termination was permissible under section 5(c) of the 2008 P&S, which provided in relevant part:

> In the event that Buyer shall determine in Buyer's sole and absolute judgment and discretion, that the Property is in any manner unsuitable or unsatisfactory to Buyer, Buyer shall have the right, at the Buyer's option, to terminate this Agreement by giving written notice thereof to Seller on or before the expiration of the Due Diligence Period, in which event ONE HUNDRED AND NO/100 DOLLARS ($100.00) of the Earnest Money shall be delivered to the Seller as consideration for Seller's execution of and entry into this Agreement, the balance of the Earnest Money shall be refunded to Buyer immediately upon request, all rights and obligations of the parties under this Agreement shall expire, and this Agreement shall become null and void.

The 2008 P&S provided that if the Buyer defaulted, the Debtors could recover the Deposit. Maxfield would have been entitled to half the Deposit, or $500,000, as a professional fee. The Deposit was not recovered by the Debtors or Maxfield at that time.

In early 2009, the Debtors commenced litigation in state court (the "Marriott Litigation") asserting several causes of action against the Buyer and its trustee: Count I for breach of contract by the Buyer, Count II for breach of the covenant of good faith and fair dealing by the Buyer, Count III for violation of RSA c. 358-A by the Buyer, and Count IV for prima facie tort by the Buyer's trustee. The Debtors sought an award of damages plus interest, costs, and fees; the Debtors did not seek specific performance of the 2008 P&S in the state court suit. The Debtors contended that the Buyer's purported termination was ineffective and without cause. Shortly

thereafter, on March 23, 2009, the Debtors filed bankruptcy; they removed the state court litigation to this Court on June 19, 2009, and it became an adversary proceeding.

During the course of the Debtors' bankruptcy case they retained and employed a new real estate broker, Prudential Spencer-Hughes Real Estate ("Prudential"), to market the Property under an exclusive listing agreement that was in effect from April 15, 2009, to October 23, 2009. With court approval, the agreement was ultimately extended through January 31, 2010.

The Debtors filed their first plan of reorganization and disclosure statement on June 22, 2009. It incorrectly indicated that the Debtors were seeking specific performance of the 2008 P&S in the Marriott Litigation. This inaccuracy was repeated in the Debtors' second plan and disclosure statement filed with the Court on August 10, 2009, as well as the third plan and disclosure statement filed with the Court on October 26, 2009. The Court confirmed the Debtors' third plan of reorganization, as amended, on December 10, 2009. The confirmed plan provided for payments to creditors to be funded from sales of lots of the Property and from any recovery from post-confirmation causes of action, including the Marriott Litigation.

On December 10, 2009, the Court also approved a sale of lot 33 of the Property to Winter Harbor Holdings, LLC for a price of $1,520,000. Marriott objected to the sale of lot 33 and indicated that Marriott had previously made an offer to purchase the entire Property for $10,000,000, which offer had been rejected by the Debtors. The purchase and sales agreement for lot 33 contained no provision for the payment of a broker's commission to either Maxfield, Yankee Pedlar, or Prudential, and no broker asserted any claim for a commission with the Court with respect to that sale.

Post-confirmation, the Debtors and Marriott resolved their differences. The parties executed another purchase and sales agreement dated March 17, 2010 (the "2010 P&S") with a

stated purchase price of $14,100,000. The 2010 P&S differed from the 2008 P&S in the following ways:

1. The payment terms changed from a cash sale to a partial installment sale for more than $4,000,000 of the purchase price, which would be secured by a note and mortgage on certain designated lots;

2. The total face value of the purchase price was lowered by $50,000;

3. The Deposit already being held in escrow was being surrendered and was to constitute a portion of the purchase price;

4. $7,000,000 in cash was being transferred as part of the purchase price;

5. The closing date was changed to a date certain instead of being based on the performance of due diligence as set forth in the 2008 P&S;

6. The 2010 P&S did not include any due diligence condition or period whatsoever nor any other conditions precedent;

7. A requirement was added that the buyer pay the prorated share of all real estate taxes and other such liens;

8. A provision was added permitting the principal of the Debtors to store items in the airport hangar and insure those items;

9. A requirement was added that the buyer pay certain closing costs;

10. The requirement that the seller obtain estoppel certificates as a condition to closing was removed;

11. The provision identifying Maxfield and Yankee Pedlar as brokers was removed and a provision stating that Marriott had no liability to them was added;

12. A provision was added requiring the seller to repurchase lot 33 of the Property, using a portion of the purchase price, so that it could be transferred to the buyer;

13. The required deliverables were reduced;

14. A release provision was added releasing the parties from any claims raised or which could have been raised in the litigation between them;

15. Certain representations and warranties were removed; and

16. A provision was added requiring bankruptcy court approval of the sale.

On March 16, 2010, the Debtors filed a motion for an expedited hearing to clarify, or amend, their confirmed plan to approve the proposed sale to Marriott. After a hearing, the Court determined that Court approval of the proposed sale was unnecessary and inappropriate under the terms of the confirmed plan of reorganization. On March 18, 2010, the Court entered an order clarifying that a sale of all the remaining lots of the Property to one buyer was not inconsistent with the confirmed plan and that no plan provision prohibited the sale of all the remaining lots to one buyer.

A sale of the Property for $14,100,000 closed on March 19, 2010. A sale in that amount would have generated a commission pursuant to the Agreement in the amount of $584,000, which would have been shared equally by Maxfield and Yankee Pedlar. Neither Maxfield nor Yankee Pedlar received any commission from the sale of the Property.

In connection with the sale of the Property, the Debtors also sought approval of a settlement of the Marriott Litigation. Like the Debtors' plans and disclosures statements, the settlement motion incorrectly stated that the Debtors sought specific performance of the 2008 P&S in the Marriott Litigation. The Debtors indicated:

> The Sale of real estate to Marriott gives the Reorganized Debtors all the relief requested in the adversary complaint, i.e. specific performance, at essentially the same price as the 2008 sales contract, in an uncertain real estate market, without the costs and risks of continued litigation. The proceeds of the Marriott sale permit the Reorganized Debtors to satisfy all their obligations to their lender, removing the risk associated with trying to sell lots piecemeal in order to meet the benchmarks set forth in the Settlement Agreement with Ocean Bank and Meredith Village Savings Bank. The Marriot[t] sale also permits Debtors to make distributions to unsecured creditors on an expedited basis and removes the risk of default.

The Court approved the settlement after a hearing and ordered dismissal of the adversary proceeding with prejudice.

On March 31, 2010, Maxfield and Yankee Pedlar filed a joint motion seeking permission to file a late proof of claim under Federal Rules of Bankruptcy Procedure 3003 and 9006. The deadline for filing claims in the Debtors' bankruptcy case was July 21, 2009. After a hearing, the Court granted the motion, reserving any ruling on notice and timeliness issues. In accordance with the Court's order, Maxfield filed the Claim on June 1, 2010. The Debtors filed the Objection on June 28, 2010. A two-day hearing on the merits took place in August 2010.

III. DISCUSSION

In ruling on the Objection, the Court is faced with two issues: (1) whether Maxfield had legal grounds to file POC 11 late; and (2) if so, whether Maxfield's Claim is an allowable claim. Without deciding whether Maxfield had legal grounds to file a late proof of claim, the Court shall address whether the Claim is allowable.

A. Claims Allowance

> Sections 501 and 502 govern the filing and allowance of creditor claims in bankruptcy proceedings. . . . When a debtor files for relief, each creditor is entitled to file a proof of claim against the debtor's estate pursuant to § 501. Once a creditor has filed such a proof, the bankruptcy court must determine whether the claim is "allowed." Section 502(a) provides that a proof of claim filed under § 501 is deemed allowed unless a party in interest (often the trustee) objects. However, even where a party in interest objects, the court "shall allow" the claim unless one of nine exceptions enumerated in § 502(b) applies.

Am. Express Bank, FSB v. Askenaizer (In re Plourde), 418 B.R. 495, 502-03 (B.A.P. 1st Cir. 2009) (footnotes and citations omitted). Section 502(b) provides:

> Except as provided in [various subsections] of this section, if such objection to claim is made, the court, after notice and a hearing, shall determine the amount of such claim . . . as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that–

> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;
> . . .
>
> (9) proof of such claim is not timely filed . . . .

11 U.S.C. § 502(b).

A timely filed and properly supported proof of claim is initially presumed valid; however, a debtor or trustee may rebut such presumption by coming forward with substantial evidence in opposition to it. Plourde, 418 B.R. at 504. If the objecting party presents substantial evidence, the claimant generally has the burden of proving its claim by a preponderance of the evidence. Id.; see also Notinger v. Auto Shine Car Wash Sys., Inc. (In re Campano), 293 B.R. 281, 285 (D.N.H. 2003) ("[I]t is ultimately 'for the claimant to prove his claim, not for the objector to disprove it.'"); In re Plourde, 397 B.R. 207, 216 (Bankr. D.N.H. 2008) ("Generally, a creditor seeking to establish a claim under state law has the burden of proof."). The United States Supreme Court has further explained that state law governs the substance of claims in bankruptcy, and the substance of a claim includes its burden of proof. Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15, 20-21 (2000); see also Campano, 293 B.R. at 285-86 (citing Raleigh). Under New Hampshire state law, a broker seeking a commission must establish its claim by a preponderance of the evidence. See Blais v. Remillard, 138 N.H. 608, 611 (1994) ("[T]he plaintiff must present sufficient evidence to satisfy the burden of proof such that a reasonable jury could find in her favor."). For that reason, Maxfield has the burden of establishing its entitlement to a commission under the facts of this case.

B. Maxfield's Entitlement to a Commission

"A real estate broker's entitlement to a commission is based upon its agency agreement with the seller of the property." Coldwell Banker v. Pauson, 138 N.H. 666, 668 (1994). Where

an agency agreement exists, "[a] real estate broker is entitled to a commission if the broker procures a buyer who is ready, willing, and able to purchase the property to be sold upon the terms proposed by or acceptable to the seller." Blais, 138 N.H. at 610; see also Pauson, 138 N.H. at 669; Bell v. Warren Dev. Corp., 114 N.H. 267, 268 (1974); Philbrick v. Chase, 95 N.H. 82, 84 (1948); Parker v. Estabrooke, 68 N.H. 349 (1895). "The broker's duty is performed when the minds of the parties meet on an agreed price and terms of sale; the sale need not be completed in order for the broker to earn the commission where the failure to close is due to the seller rather than of the buyer." Blais, 138 N.H. at 610 (emphasis added); see also Dunn v. Staples, 109 N.H. 251, 254 (1968) (ruling broker was not entitled to a commission, when husband refused to sell under certain conditions even though the buyers were "willing and able" to purchase the property, since buyers were not willing to buy on terms reasonably acceptable to the sellers).

Maxfield and the Debtors agree that the Agreement is the controlling document that outlines the rights and obligations of Maxfield and the Debtors.[1] It also is undisputed that Maxfield and/or Yankee Pedlar procured Marriott as a buyer for the Property and that the Debtors and Marriott executed the 2008 P&S on September 15, 2008, within the exclusive listing period under the Agreement. The Agreement provided:

> Upon full execution of a contract for sale and purchase of the PROPERTY, all rights and obligations of this Agreement will extend with respect to such Purchase and Sales Agreement and Deposit Receipt through the date of closing as specified in the Purchase and Sales Agreement and Deposit Receipt.

Maxfield contends that the Agreement is clear that the right of commission extends through the closing of the 2008 P&S even if the Agreement has expired. The 2008 P&S provided in section

[1] At trial, Maxfield indicated that its Claim was based only upon its alleged entitlement to a commission and not any entitlement to a portion of the Deposit.

4 that the closing was to occur no later than fifteen days after the expiration of the due diligence period. Pursuant to section 5(c) of the 2008 P&S, Marriott had an initial period of forty-five days to conduct due diligence, with an option to extend the due diligence period an additional thirty days. Accordingly, it appears that the closing of the 2008 P&S was to occur no later than December 14, 2008.[2]

The 2008 P&S did not close by December 14, 2008. Rather, on November 25, 2008, Marriott gave written notice pursuant to section 5(c) of the 2008 P&S that the Buyer was electing to terminate the 2008 P&S, effective upon the expiration of the due diligence period. The 2008 P&S provided in section 12 that the Buyer's obligation to consummate the purchase and sale of the Property on the closing date was subject to the condition that the "Buyer shall not have terminated this Agreement pursuant to an express right so to terminate set forth in this Agreement." This section of the Agreement also provided that the Buyer could "terminate this Agreement by giving written notice to the Seller on or before the Closing Date, in which event all rights and obligations of Seller and Buyer under this Agreement shall expire, and this Agreement shall become null and void" if the Buyer previously had terminated the Agreement.

It is apparent to the Court that Marriott considered the 2008 P&S terminated, effective November 29, 2008, pursuant to section 5(c) of the 2008 P&S, which gave the Buyer the right to terminate the Agreement if the Buyer determined the Property to be unsuitable or unsatisfactory. As of the end of November 2008, Marriott was not a "ready, willing, and able buyer" within the meaning of that term under New Hampshire law. Marriott remained unwilling to purchase the Property through January 15, 2009, the end of the of the exclusive period under the Agreement,

[2] The Agreement was executed on September 15, 2008, resulting in an initial forty-five-day due diligence period through October 30, 2008, an extended thirty-day due diligence period through November 29, 2008, and a closing no later than fifteen days later, or December 14, 2008.

and through July 15, 2009, the end of the six-month protection period under the Agreement. The Debtors recognized this fact and brought suit seeking damages for breach of contract, for breach of the covenant of good faith and fair dealing, and for violation of RSA c. 358-A.

While the Debtors were in bankruptcy, after the Agreement's six-month protection period had expired, and after the Debtors had retained a new broker,[3] Marriott again expressed interest in purchasing the Property. Marriott filed an objection to the sale of lot 33 in October 2009, wherein Marriott indicated that it had made an offer to purchase the entire Property for $10,000,000, which offer was rejected by the Debtors. This is evidence that Maxfield did not obtain a "ready, willing, and able buyer" for the Debtors during the term of the Agreement or its six-month protection period. The New Hampshire Supreme Court has indicated that "if the terms proposed by the prospective purchaser vary in any material degree from those specified or accepted by the seller, the brokers have failed to fulfill the obligations they undertook and are not entitled to a commission." Bell, 114 N.H. at 268.

Only after the sale of lot 33 was consummated, and the Debtors' plan of reorganization was confirmed in December 2009, did Marriott and the Debtors resolve their differences and negotiate the 2010 P&S. Maxfield contends that the terms of the 2010 P&S were essentially the same as the terms of the 2008 P&S and, therefore, a closing of the 2010 P&S was essentially a closing of the 2008 P&S, entitling it to a commission under the Agreement. In support of its

[3] Before the end of the six-month protection period under the Agreement, the Debtors, with court approval, retained Prudential as a new real estate broker who had an exclusive agreement to list the Property from April 15, 2009, through January 31, 2010. The Court notes that the Agreement provided that "[t]he commission [due to Maxfield] as provided above shall be due if the PROPERTY is contracted to be or has been sold, leased, conveyed, exchanged or otherwise transferred within 6 months after the expiration or rescission of this Agreement to anyone with whom the Agency has procured, unless the PROPERTY has been listed with another licensed broker on an exclusive basis" (emphasis added). Here, the Property was listed with another broker on an exclusive basis after the Agreement with Maxfield expired.

position, Maxfield cites to the case of Finlay v. Frederick, 135 N.H. 482 (1992). In Finlay, the court held that the broker procured a ready, willing, and able buyer for commercial property and, thus, was entitled to a commission under the listing agreement where the broker informed the buyer of the property and led the buyer to the seller, and the buyer's principals purchased the property on terms nearly identical to terms previously negotiated by the broker. The broker had procured the buyer who made an offer that was ultimately rejected by the seller. Approximately thirty days later, during a period when the listing agreement was still in effect between the seller and the broker, the buyer contacted the seller directly, and the two parties, without the knowledge of the broker, entered into a five-year lease for the property with an exclusive right to purchase the property within three years. Two years later, the buyer executed the right to purchase the property. The court found that the listing agreement was in effect when the option to purchase was given, and because the option was subsequently exercised, the broker was entitled to a commission on the sale regardless of whether the option was exercised after termination of the agreement. The court held that broker had met its duty to procure a willing and able buyer since the buyer ultimately purchased the property for terms that were essentially the same as the rejected offer. Maxfield contends this case provides a basis for the Court to conclude that Maxfield should also be entitled to a commission upon the sale of the Property in 2010.

In the Court's view, there is a major difference between the facts of Finlay and the facts of this case. In Finlay, the parties executed the lease and option agreement during the exclusive period of the listing agreement, and it was pursuant to that agreement that the sale closed. In this case, the sale of the Property did not close pursuant to the 2008 P&S but rather pursuant to the 2010 P&S, which was executed long after the expiration of the Agreement. Maxfield argues that

the 2010 P&S is simply an amendment or an extension of the 2008 P&S as the essential elements of the 2008 P&S never changed, i.e., the agreement was for the "same price, same parties and same property." The Court disagrees that the terms of the agreements are essentially the same. As outlined above, there were at least sixteen differences between the two agreements. Maxfield itself acknowledges that there are differences and that the differences are "a reflection of the change of circumstances between the parties." Maxfield fails to recognize, however, that these changes in circumstances, i.e., the termination of the 2008 P&S, the state court suit, the Debtors' bankruptcy filings, the hiring of a new real estate broker, the new offer by Marriott to purchase the Property, the sale of lot 33, and the confirmation of the Debtors' plan, are what support the Debtors' contention that Marriott and the Debtors negotiated a new deal in the winter of 2010.

The Court finds the case of Coldwell Banker v. Pauson, 138 N.H. 666 (1994), to be more instructive than Finlay. In Pauson, the broker had entered into an exclusive listing agreement with the sellers in January 1991. The agreement expired in April 1991 and contained a ninety-day protection period. During the month of January, the broker introduced the buyers to the sellers. The buyers and sellers made several offers and counter-offers but none was ever accepted before the sellers took their home off the market and signed a form terminating the listing agreement. In July 1991, the buyers contacted the sellers and indicated they were still interested in buying the sellers' home should the sellers ever desire to sell. In December 1991, the sellers contacted the buyers and indicated they were again interested in selling their home. In March 1992, the buyers purchased the sellers' home. The broker brought suit claiming a right to a commission. The court held the provisions in the listing agreement made clear that the broker was to be paid a commission (1) where a sale of the property or an agreement resulting in a sale of the property was achieved before the listing agreement expired, or (2) if a sale of the property

was achieved within ninety days of the expiration of the listing, the sale was to a person either introduced to the seller or negotiated with by the broker during the term of the agreement. Because the sale in Pauson was neither accomplished nor agreed upon until well after the ninety-day protection period had expired, the court held that the broker was not entitled to a commission. The court stated that ""[w]here a definite time is specified in the listing agreement, the broker is entitled to a commission only if he achieves the result within the time specified." Pauson, 138 N.H. at 669.

The Agreement in this case makes clear that Maxfield was to be paid a commission where a sale of the Property, or an agreement resulting in the sale of the Property, was achieved before the Agreement expired or within six months of the expiration of the Agreement, if the sale was to anyone Maxfield had procured. In addition, Maxfield's right to a commission would extend through the closing of the 2008 P&S even if the Agreement had expired. In this case, the sale of the Property for $14,100,000, upon which Maxfield bases its claim, was neither accomplished nor agreed upon until well after the six-month protection period expired on July 15, 2009, and the sale did not close by December 14, 2008, the closing date set forth in the 2008 P&S.

Maxfield has made much of the fact that the Debtors represented to the Court in various pleadings that the Marriott Litigation involved a request for specific performance of the 2008 P&S. Representations by the Debtors, that they were seeking specific performance in the Marriott Litigation, does not make it so. And, even if the Debtors were seeking specific performance, such a request does not negate the fact that Marriott treated the 2008 P&S as terminated (a position the Buyer was entitled to take under the terms of the 2008 P&S) and, therefore, he was no longer a "ready, willing, and able buyer," which would preclude the

payment of a commission to Maxfield. See Allard & Geary, Inc. v. Faro, 122 N.H. 573, 576 (1982) (holding that the realtors were not entitled to a commission because they failed to produce a ready, willing, and able buyer by the date specified in the agreement, as extended).

Because Maxfield failed to produce a purchaser who was ready, willing, and able to buy in accordance with the terms authorized by the Debtors as set forth in the Agreement and the 2008 P&S, Maxfield was not entitled to a commission under the Agreement.

IV. CONCLUSION

Pursuant to New Hampshire law, because the 2008 P&S did not close by the deadline set forth in the agreement nor by July 15, 2009, the end of the six-month protection period under the Agreement, Maxfield is not entitled to any commission under the Agreement. For that reason, the Claim is unenforceable against the Debtors and property of the Debtors and shall be disallowed under § 502(b)(1). Consistent with this opinion, the Court will issue a separate order sustaining the Debtors' Objection and disallowing the Claim. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: January 5, 2011

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

In re:	:	
KENNETH N. BOUDREAU, JR. Debtor	:	BK No. 10-14158 Chapter 7
KENNETH N. BOUDREAU, JR. Plaintiff	:	
v.	:	A.P. No. 10-1092
OPTION ONE MORTGAGE CORPORATION, et al Defendants	:	

ORDER

The Debtor filed a Chapter 7 petition on October 2, 2010, and thereafter filed the above captioned adversary proceeding against the Defendants. Secured creditor Deutsche Bank National Trust Company (the "Bank") filed a Motion for Relief from Stay, for leave to continue with eviction proceedings that are pending against the Debtor in the Rhode Island Second Division District Court.

The Bank had purchased the Debtor's residence at 11 Echo Lane, Portsmouth, Rhode Island (the "Property"), at foreclosure on February 29, 2008. The deed was recorded on March 13, 2008. The Debtor alleges, with virtually no explanation or support, that the foreclosure sale was legally deficient and should be declared "null and void." At the hearing on the Bank's Motion for Relief from Stay, the parties, with the Court's tacit approval moved informally but consensually into a discussion involving allegations in the

Debtor's complaint against Deutsche Bank and Option One. The status of the pending (and identical) state court litigation, and whether abstention by this Court was appropriate in the circumstances, also became a subject of discussion.

The Debtor argued that his complaint should be heard anew in the Bankruptcy Court because his house is property of the estate, and that this Court should hear and adjudicate the dispute even though the relevant issues involve questions of state law. Deutsche Bank argues that in the state court proceedings have been extensively litigated, discovery is complete, hearings have been held and decided, and that the matter is ready for hearing and disposition on the eviction issue.[1]

The Debtor seeks, among other things, a declaratory judgment that the Debtor still owns the Property, that the auction held on February 29, 2008, should be declared void, and that the deed recorded by Deutsche Bank be declared void,[2] on the ground that the notices, procedures, and resulting foreclosure "did not comply with Rhode Island foreclosure law," and that the attorney conducting the

[1] A hearing in the District Court had been scheduled for October 4, 2010, but was stayed by this bankruptcy filing.

[2] While the Debtor also wants rescission of the original mortgage with Option One, he provides no facts or legal grounds upon which to consider rescission. This claim is haphazardly thrown in along with the Debtor's other unsupported requests for relief, with no facts or authority included in the complaint or at oral argument to show how or why rescission is appropriate.

sale "may have violated rules of Professional Conduct." Vague assertions like these, which unfairly present the opposing party with a constantly moving target, do not provide a serious basis for derailing state court process wherein the Debtor's arguments have already been litigated and adjudicated.

28 U.S.C. § 1334(c)(1) gives bankruptcy courts broad discretion to entertain matters that involve primarily state law issues:

> Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
> 28 U.S.C. § 1334(c)(1) (2010).

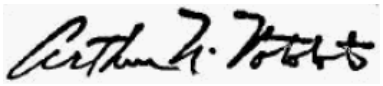
While no Section 1334(c)(2) request for relief is pending here, because: (1) discovery is complete; (2) the eviction hearing has already been scheduled but cancelled due to this bankruptcy; and because the state court litigation has been substantially completed, this Court sua sponte concludes that abstention is clearly the way to go in the circumstances.

Based upon all of the foregoing, and in the interest of judicial economy, this Court will, and does, abstain from hearing this adversary proceeding. If, in hindsight, it appears that this Order was entered improvidently, i.e., if the state court litigation does not proceed as anticipated, then the forum issue

may be revisited and addressed here by either party, for cause shown.

Entered as the Order of this Court.

Dated at Providence, Rhode Island, this 21st day of December, 2010.



Arthur N. Votolato
U.S. Bankruptcy Court

Entered on docket: 12/21/10

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
CENTRAL DIVISION

In re:	)	Chapter 13
	)	Case No. 10-41432-MSH
BRIAN K. CHASSIE TAMI CHASSIE	)	
Debtors.	)	

ORDER ON MOTION TO DISMISS

The United States of America, on behalf of the Internal Revenue Service, filed a motion to dismiss this case pursuant to § 1307(e) and § 1308(a) of the United States Bankruptcy Code, 11 U.S.C . § 101 *et seq.*, because the Debtors failed to properly file their 2008 federal income tax return by May 13, 2010, the day before the date first set for the meeting of creditors. Although the Debtors submitted an opposition in which they stated they had filed the returns at issue, I accept the representation of the IRS' attorney that the copies the Debtors purport to have submitted were unsigned and thus not filed.[1] Neither the Debtors nor their counsel appeared at the hearing on the motion to dismiss.

Pursuant to Bankruptcy Code § 1308(e) I must either dismiss or convert a case, whichever is in the best interest of the creditors and the estate, on request of a party in interest or the United States trustee if a debtor fails to file a tax return as required by § 1308(a). The Debtors have failed to file their 2008 tax return within the time frame set forth in § 1308(a) and therefore I must decide whether dismissal or conversion is warranted. I have no discretion beyond the choice of these two

[1] I am not aware when such copy was proffered.

drastic results. *In re Cushing*, 401 B.R. 528 (B.A.P. 1st Cir. 2009); Nancy Dreher and Joan N. Feeney, *Bankruptcy Law Manual* § 13:10 (5th ed. 2010).

In taking judicial notice of the docket and pleadings in this case,[2] I note that the plan has not been confirmed although the Chapter 13 trustee represented at the hearing on the motion to dismiss that the Debtors were making the plan payments. Although the Debtors claim some equity in their residence, the equity is fully exempt. Moreover, according to their amended Schedules I and J, they have net monthly income of $1,214.11. Permitting the Debtors with such a high monthly net income to convert to Chapter 7 is not in the best interest of their creditors or the estate.

Consequently the motion to dismiss is granted and the case is hereby dismissed.

Dated: January 14, 2011

By the Court,

Melvin S. Hoffman
U.S. Bankruptcy Judge

[2] *LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1,8 (1st Cir. 1999) ("The bankruptcy court appropriately took judicial notice of its own docket…")

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS

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In re
THOMAS E. GOVE, JR., Chapter 7
Debtor Case No. 09-22405-JNF

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GEORGE T. O'BRINE,
Plaintiff
v. Adv. P. No. 10-1048
THOMAS E. GOVE, JR.,
Defendant

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MEMORANDUM

I. INTRODUCTION

Four matters are before the Court: (1) the Motion for Summary Judgment filed by George T. O'Brine ("O'Brine") with respect to all counts set forth in his Complaint in which he seeks a determination that the debt of Thomas E. Gove, Jr. ("Gove" or the "Debtor") to him should be excepted from discharge; (2) the Motion for Relief from the Automatic Stay, pursuant to which O'Brine requests that the Court lift the automatic stay in the Debtor's Chapter 7 case so that the parties can proceed with a hearing at the Middlesex Probate and Family Court, Department of the Trial Court ("Middlesex Probate and Family Court") regarding a contempt petition that O'Brine filed against Gove; (3) the Motion for Counsel Fees, pursuant to which O'Brine seeks an award of attorney's fees and costs incurred in seeking relief from stay, filing the contempt
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petition, and filing and litigating the adversary proceeding; and (4) the Motion to Compel Defendant to Answer Plaintiff's Interrogatories and Production of Documents, through which O'Brine seeks discovery from the Debtor.

II. FACTS

A. The Divorce Action and The Contempt Petition

On January 3, 2008, Gove commenced a divorce action against his then wife, Carrie Ann Fawkes ("Fawkes"), in the Middlesex Probate and Family Court. On June 8, 2009, Gove filed "Plaintiff's Motion for Further Temporary Orders" in the divorce proceeding, requesting the appointment of a Guardian Ad Litem ["GAL"] or Parenting Coordinator "to make recommendations on custody and visitation and summer visitation schedule" regarding the couple's daughter. In the Motion for Further Temporary Orders, Gove requested "[t]hat the parties share equally the cost of the Guardian Ad Litem." On June 8, 2009, the Middlesex Probate and Family Court allowed the appointment of a GAL and issued an order appointing "George Thomas O'Brien [sic]" of 24 Main St., Peabody, MA as the GAL "to investigate and report on . . . issues of legal and physical custody [and] issues of visitation/parenting plan/access to child(ren)." In its order, the Probate Court stated that the GAL fees "shall be paid by the Plaintiff, 'Father,' initially[,] subject to possible allocation between the parties following trial."

Approximately ten weeks after the appointment of the GAL, on August 20, 2009, Gove and Fawkes entered into a separation agreement, which included "Exhibit C Financial Arrangements." In "Exhibit C Financial Arrangements," the parties agreed

that "HUSBAND [Gove] shall pay for the cost of the Guardian Ad Litem, Attorney George T. O'Brine, in this action." On the same day, Gove and Fawkes agreed and stipulated that "Exhibit C Financial Arrangements" "shall be made an order of judgment of this court . . . [and] shall be incorporated in the Judgment of Divorce," and the Middlesex Family and Probate Court entered a judgment of divorce nisi.

On November 19, 2009, the Register of the Middlesex Probate and Family Court certified that the Judgment of Divorce became absolute. At that time, Gove had not paid O'Brine.[1] Consequently, in late November of 2009, O'Brine filed a contempt petition seeking payment of his fees in the Middlesex Probate and Family Court. The hearing date for the contempt petition was set for March 7, 2010.[2]

B. The Chapter 7 Case

Gove filed his Chapter 7 petition on December 23, 2009. He listed O'Brine as the holder of an unsecured, nonpriority claim in the amount of $9,500 on Schedule F. On January 22, 2010, O'Brine filed the Motion for Relief from the Automatic Stay, which is now before the Court. In his two-paragraph motion, he asked the Court to lift the automatic stay under 11 U.S.C. § 362(d) to allow him to proceed with his contempt petition scheduled for March 7, 2010 in the Middlesex Probate and Family Court.[3] On

[1] According to the Joint Pretrial Statement, the parties had agreed that Gove would pay the GAL fees in installments. However, O'Brine claimed he received only one payment of an unspecified amount.

[2] O'Brine stated in his Motion for Relief from the Automatic Stay that the hearing was scheduled for March 7, 2010. However, O'Brine stated in the Joint Pretrial Memorandum that the hearing was scheduled for and held on January 3, 2010.

[3] O'Brine did not specify under which subsection of § 362(d) he was proceeding.

February 5, 2010, the Debtor filed an Opposition to O'Brine's Motion for Relief from the Automatic Stay, asserting that O'Brine was merely an unsecured, nonpriority creditor in the case. Further, the Debtor argued that relief from the automatic stay was unwarranted as O'Brine had no authority to attempt to collect the debt during the Chapter 7 case.

On February 25, 2010, O'Brine submitted an Affidavit in Support of his Motion for Relief from Stay, asserting that Gove had not paid for his services as GAL despite promises to do so and that Gove's debt to him was nondischargeable.[4] The Court scheduled O'Brine's Motion and the Debtor's Opposition for hearing, but one or the other party repeatedly sought continuances of the hearing.

On March 24, 2010, O'Brine filed a "Memorandum of Law in Support of Allowance of Attorney Fees caused by the Filing Motion for Relief for Automatic Stay" [sic]. In support of both his request for fees and his Motion for Relief from Stay, he cited, among other cases, In re Shepard, 2008 WL 5157898 (Bankr. D. N.M. June 30, 2008), in which the bankruptcy court awarded to the debtor's ex-wife fees owed to third parties in relation to a marital separation agreement, ruling that they were

[4] O'Brine did not specify in his Affidavit the subsection of 11 U.S.C. § 523(a) upon which he relied. He simply cited 11 U.S.C. § 523. O'Brine attached several cases to his Affidavit in which courts discussed nondischargeability under different subsections of § 523 in addition to In re Shepard, 2008 WL 5157898 (Bankr. D. N.M. June 30, 2008), including the following: In re Murphy, 2009 WL 3185488 (Bankr. D. Kan. September 29, 2009) (discussing nondischargeability under § 523(a)(2), (4) and (6)); In re Trump, 309 B.R. 585 (Bankr. D. Kan. 2004) (discussing nondischargeability under § 523(a)(5)); In re Patrick & Pierce, 2009 WL 2513438 (Bankr. D. Neb. July 14, 2009) (discussing nondischargeability under § 523(a)(19)); In re Busch, 369 B.R. 614 (B.A.P. 10th Cir. 2007) (discussing nondischargeability under § 523(a)(5)).

nondischargeable debts under 11 U.S.C. § 523(a)(15). O'Brine requested that Gove be ordered to pay both his GAL fees and the fees incurred in seeking relief from the automatic stay to enforce the order of the Middlesex Probate and Family Court. He cited case law from other districts in support of the contention that bankruptcy courts have the power to award attorney's fees.[5] Specifically, O'Brine sought attorney's fees in the sum of $2,500 and reimbursement of the filing fees he incurred.

On June 16, 2010, O'Brine filed a Motion for Counsel Fees with an Affidavit in Support of Fees and Costs, in which he described the work he performed in pursuing relief from the automatic stay and the commencement of the adversary proceeding discussed below. O'Brine stated that he worked 28 hours at a rate of $250 per hour, incurring attorney's fees of $7,000. He also sought $170 in expenses: $160 in filing fees and $10 for parking. On August 10, 2010, O'Brine filed his Second Affidavit in Support of Counsel Fees, seeking additional fees and costs. Specifically, he sought compensation for 27.5 hours of work at an hourly rate of $250, resulting in $6,875 in additional attorney's fees plus $250 in expenses, bringing the total prayer for attorney's fees and costs to $14,287.

On September 7, 2010, O'Brine filed the Affidavit of Maurice J. Ringel, Esq. ("Ringel"), Fawkes's counsel in the divorce action. Ringel attested to the appointment of O'Brine as GAL in the divorce action and stated that he "heard Mr. Gove state that he

[5] *See* Murphy, 2009 WL 3185488, at *9 ("The Court will reserve ruling on Plaintiff's request for attorney [sic] fees pending further hearing . . ." as neither party discussed the grounds for the prayer for attorney's fees.); Busch, 369 B.R. at 626 (noting that the bankruptcy court properly awarded attorney's fees under Utah statute).

would 'never' pay the GAL's invoice." The Court held a hearing regarding the Motion for Counsel Fees on October 19, 2010, as well as the Motion for Relief from the Automatic Stay. The parties agreed to consolidate the Motion for Relief from Stay with the adversary proceeding, discussed below, and the Court took all matters under advisement.

C. The Adversary Proceeding

On February 9, 2010, O'Brine commenced an adversary proceeding against Gove. O'Brine requested that "his name be stricken as a creditor and the automatic stay of the contempt proceeding be lifted and/or; Mr. O'Brine's court ordered debt owed by Mr. Gove debt [sic] not be discharged pursuant to 11 USC. 523 [sic]; or; Mr. Gove be denied a discharge." O'Brine alleged that because Gove's debt was incurred in connection with O'Brine's services as a GAL in the divorce action and because the Judgment of Divorce required Gove to pay the GAL fees, the debt is nondischargeable under 11 U.S.C. § 523(a)(15) as a divorce or separation obligation other than a domestic support order. Further, O'Brine alleged that he "was informed that Mr. Gove had stated that he had no intention of fulfilling his court imposed obligation," although when O'Brine asked Gove and his attorney, Mark Bartolomei[6] about repayment of his GAL fees, they both represented Gove would pay the fees.

[6] Attorney Bartolomei represented Gove in the divorce action, Chapter 7 filing and the adversary proceeding. On October 13, 2010, Bartolomei filed a Motion to Withdraw as Attorney for the Debtor and Defendant because "Debtor and counsel have experienced a breakdown in the attorney-client relationship and Debtor has recently advised counsel that he no longer desires his representation in this matter and that he is prepared to move forward without the services of an attorney." On October 19, 2010, the Court granted Bartolomei's Motion to Withdraw.

On March 11, 2010, Gove filed his Answer, denying that the GAL fees are a nondischargeable debt and that the Judgment of Divorce required him to pay for the GAL services. Further, Gove denied that O'Brine ever asked Gove or his attorney about payment of the GAL fees and denied that Gove or Bartolomei stated that Gove would pay the fees. In his Answer, Gove set forth as an affirmative defense that O'Brine's Complaint failed to state a claim upon which relief could be granted and requested the Court to dismiss the Complaint.

On June 8, 2010, O'Brine filed a Motion for Summary Judgment, supported by an Affidavit and a Memorandum of Law. In his Motion, he asserted that summary judgment was warranted because Gove had no defenses to the Complaint and the Debtor fraudulently intended to file a bankruptcy petition to obtain a discharge of the debt owed to him. O'Brine alleged that Gove's bankruptcy filing was executed "in violation of both state court orders and Federal Bankruptcy law" and that he filed his Chapter 7 petition and named O'Brine as an unsecured creditor to intentionally circumvent 11 U.S.C. § 523. In his supporting Memorandum, O'Brine argued that Gove's debt to O'Brine is not dischargeable under 11 U.S.C. § 523(a)(15).[7] O'Brine

[7] O'Brine set forth the following cases supporting his argument for the nondischargeability of the debt: In re Brodsky, 239 B.R. 365 (Bankr. N.D. Ill. 1999) (fees incurred by attorney in representing debtor's children in debtor's divorce case were nondischargeable under § 523(a)(5)); In re Chang, 163 F.3d 1138 (9th Cir. 1998) (GAL fees incurred in debtor's child custody dispute were nondischargeable under § 523(a)(5)); In re Busch, 369 B.R. 614 (B.A.P. 10th Cir. 2007) (court awarded wife's attorney's fees incurred in pursuing a § 523(a)(5) under a Utah statute that allowed for such fee awards). Notably, the decisions reference § 523(a)(5), not (a)(15).

emphasized that he filed his GAL report on August 1, 2009, in compliance with the deadline established by the Middlesex Probate and Family Court.

In his Memorandum filed in support of his summary judgment motion, O'Brine included a prayer for an award of the fees and costs he incurred in filing the contempt petition and adversary proceeding under 11 U.S.C. § 523(a)(2)(A). O'Brine alleged that Gove never intended to pay the GAL fees and always intended to file a Chapter 7 petition for the purpose of discharging the debt. Further, O'Brine argued that Gove's statements to the contrary constitute fraud on the Bankruptcy Court and the Middlesex Probate and Family Court and that these fraudulent statements and acts caused O'Brine to file the contempt petition and the adversary proceeding and therefore incur fees and costs.[8]

On October 19, 2010, the Court held a Pretrial Conference, heard the parties with respect to O'Brine's Motion for Summary Judgment and took the matter under advisement. The issue of whether the debt to Gove is excepted from discharge under 11 U.S.C. § 523(a)(5), rather than under 11 U.S.C. § 523(a)(15), was raised at the hearing on October 19, 2010, while Gove was present.

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[8] O'Brine cited cases in support of his prayer for attorney's fees. O'Brine referenced Travelers Cas. & Sur. Co. v. Pacific Gas and Elec. Co., 549 U.S. 443, 127 S. Ct. 1199 (2007), in which the Supreme Court of the United States considered an award of attorney's fees, negotiated by contract, in a Chapter 11 case. O'Brine also referenced Cohen v. de la Cruz, 523 U.S. 213, 118 S. Ct. 1212 (1998), in which the Supreme Court of the United States affirmed an award of treble damages and attorney's fees under the New Jersey Consumer Fraud Act. O'Brine noted that "Massachusetts allows a court to award double damages, court costs and attorney's fees for fraudulent conduct and cases of common law fraud," yet offered no authority for his assertion in the procedural context of the case.

On March 12, 2010, the Court issued a Pretrial Order, requiring the parties to complete discovery by June 10, 2010 and to file a Joint Pretrial Memorandum by July 12, 2010. Following a discovery dispute, the Court continued the discovery deadline until September 13, 2010. Nevertheless, on July 22, 2010, the parties submitted a Joint Pretrial Statement in which they asserted that there were no issues of fact that remained to be litigated. The parties stated that the only issues of law that remained to be litigated were whether O'Brine is entitled to attorney's fees and whether Gove's debt to O'Brine is dischargeable.

On October 7, 2010, O'Brine filed a Motion to Compel Gove to Answer O'Brine's Interrogatories and Production of Documents by October 15, 2010. In O'Brine's attached Affidavit, he stated that the Court ordered Gove to answer discovery requests by September 13, 2010, and that he did not do so. The Court held a hearing regarding the Motion to Compel on October 19, 2010 and took the matter under advisement.

III. POSITIONS OF THE PARTIES

A. O'Brine's Argument

O'Brine argues that Gove's debt for GAL fees is nondischargeable under 11 U.S.C. § 523(a)(15) because in the Judgment of Divorce, the Middlesex Probate and Family Court ordered Gove to pay O'Brine for his services as GAL in the divorce action. Further, O'Brine contends that he is entitled to relief from the automatic stay to pursue collection of the nondischargeable debt in the Middlesex Probate and Family Court as Gove is in contempt of the Judgment of Divorce because he has not paid the GAL fees. O'Brine argues that Gove should be compelled to produce discovery as the

Court ordered Gove to do so and he has not complied. Finally, O'Brine prays for an award of the attorney's fees and costs he incurred in filing the Motion for the Relief from Stay, the contempt petition and the adversary proceeding under 11 U.S.C. § 523(a)(2)(A).

B. Gove's Argument

Gove denies that the obligation to pay GAL fees is a nondischargeable debt and argues that he properly treated O'Brine "as an unsecured nonpriority creditor . . ." in this case. Further, Gove asserts that relief from the automatic stay is not warranted and that O'Brine had no authority to attempt to collect the debt during the Chapter 7 case.

IV. DISCUSSION

A. Motion for Summary Judgment

1. Summary Judgment Standard

A court shall grant summary judgment to the moving party if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c), made applicable to this proceeding by Fed. R. Bankr. P. 7056. If the nonmoving party has the burden of proof on any issues, the moving party need not do more than state "'an absence of evidence to support the nonmoving party's case.'" Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 763 n.1 (1st Cir. 1994) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986)). "The burden of production then shifts to the nonmovant, who, to avoid summary judgment, must establish the existence of at least one question

of fact that is both 'genuine' and 'material.'" Varrasso, 37 F.3d at 763 n.1 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986)). Further, Federal Rule of Civil Procedure 56(e)(2) provides:

> When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Fed. R. Civ. P. 56(e)(2).

B. Analysis

1. Nondischargeable Debts under 11 U.S.C. § 523(a)(5)

Generally, an individual Chapter 7 debtor is entitled to a discharge of the debts that arose before the date of the order for relief. 11. U.S.C. § 727(a)-(b). However, 11 U.S.C. § 523(a) provides "exceptions to discharge for certain debts which Congress has determined should be non-dischargeable." Shepard, 2008 WL 5157898, at *1. The party moving to establish the nondischargeability of a debt must "prov[e] the elements of the exception by a preponderance of the evidence." Id.; *see also* Grogan v. Garner, 498 U.S. 279, 279, 111 S. Ct. 654, 655 (1991). Under U.S.C. § 523(a)(5) "a domestic support obligation" is a nondischargeable debt. Section 101(14A) defines the term "domestic support obligation":

> The term 'domestic support obligation' means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable

nonbankruptcy law notwithstanding any other provision of this title, that is-

> (A) owed to or recoverable by-
>
> > (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
> >
> > (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of-
>
> > (i) a separation agreement, divorce decree, or property settlement agreement;
> >
> > (ii) an order of a court of record; or
> >
> > (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A).

Courts have employed a four part test to determine whether GAL fees qualify as a domestic support obligation under 11 U.S.C. 101(14A).[9] In re Defilippi, 430 B.R. 1, 3

[9] The definition of "domestic support obligation" was changed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 § 215 (Apr. 20, 2005) ("BAPCPA"), as the fourth prong of the test was added. Nonetheless, cases analyzing whether a debt is nondischargeable under 11 U.S.C. § 523(a)(5) both

n.7 (Bankr. D. Me. 2010). The debt must be owed "(1) 'to a . . . child of the debtor;' (2) incurred for the 'support' of the child; and (3)'in connection with' an 'order of a court of record.'" Spear v. Constantine (In re Constantine), 183 B.R. 335, 336 (Bankr. D. Mass. 1995) (citing 11 U.S.C. § 101(14A)); *see also* Defilippi, 430 B.R. at 3. BAPCPA added a fourth requirement that the debt must not "have been assigned to a non-governmental entity." Id. at 3 n.7 (citing 11 U.S.C. § 101(14A)).

Although O'Brine did not file a complaint to determine the nondischargeability of the GAL fees under 11 U.S.C. § 523(a)(5), the Court may nonetheless find that the debt is nondischargeable under that subsection because 11 U.S.C. § 523(c)(1) does not condition nondischargeability under 11 U.S.C. § 523(a)(5) on the timely filing of a complaint. 11 U.S.C. § 523(c)(1); In re Phillips, 2009 WL 2514162, at *3 (Bankr. D. Mass. August 13, 2009). Under Fed. R. Civ. P. 15(b), made applicable to this Court by Fed. R. Bankr. P. 7015, the Court may *sua sponte* amend the "pleadings to include new legal claims . . . 'when issues not raised in the pleadings are tried by express or implied consent of the parties.'" In re Parker, 334 B.R. 529, 537 (Bankr. D. Mass. 2005) (quoting In re Zaino, 316 B.R. 1, 8-11 (Bankr. D. R.I. 2004) (holding that a court can *sua sponte* consider whether a debt was nondischargeable under 11 U.S.C. § 523(a)(2)(A)); *see also* In re Dobrayel, 287 B.R. 3, 19 (Bankr. S.D.N.Y. 2002) ("[T]he [c]ourt will *sua sponte* examine non-dischargeability under Section 523(a)(4) without formal amendment of the

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before and after BAPCPA are relevant to analysis of this case because the fourth prong is irrelevant to the current facts. "The 2005 amendments did not effect a substantive change to the pertinent definition and discharge exception." In re Defilippi, 430 B.R. 1, 3 n.6. *See also* In re Bonito, 2010 WL 3398396, at *2 (Bankr. D. Conn. August 26, 2010); In re Burnes, 405 B.R. 654, 658-59 (Bankr. W.D. Mo. 2009).

complaint because 'all of the material facts' necessary for non-dischargeability under [the] subsection . . . ha[d] been pleaded in the complaint and proven at trial.'") (quoting Farraj v. Soliz (In re Soliz), 201 B.R. 363, 370 (Bankr. S.D. N.Y. 1996)).

In the present case, the issue of whether the debt to Gove is excepted from discharge under 11 U.S.C. § 523(a)(5) was raised at the hearing on October 19, 2010, while Gove was present. Further, O'Brine included all facts necessary in his Complaint to warrant a finding that the debt is nondischargeable under 11 U.S.C. § 523(a)(5). Based upon the undisputed facts, the Court finds that the order of the Middlesex Probate and Family Court requiring Gove to pay GAL fees to O'Brine qualifies as a "domestic support obligation" as defined in 11. U.S.C. § 101(14A) and, therefore, is a nondischargeable debt under 11 U.S.C. § 523(a)(5).

The first prong of the test is whether the debt is owed "'to . . . a child of the debtor.'" Constantine, 183 B.R. at 336 (citing 11 U.S.C. § 101(14A)); *see also* Defilippi, 430 B.R. at 3. Some courts have adhered strictly to the literal text of 11 U.S.C. § 101(14A) by holding that nondischargeable domestic support obligations cannot be owed to a third party. *See, e.g.,* In re Euell, 271 B.R. 388, 390-93 (Bankr. D. Colo. 2002); In re Townsend, 177 B.R. 902, 904 (Bankr. E.D. Mo. 1995). Nonetheless, several courts, interpreting the Bankruptcy Code before and after BAPCPA, have held that fees owed directly to third party GALs constitute a domestic support obligation under 11 U.S.C. § 101(14A). *See, e.g.,* Defilippi, 430 B.R. at 3, 5; Burnes, 405 B.R. at 658-59; In re Whitney, 265 B.R. 1, 2-3 (Bankr. D. Me. 2001); In re Miller, 55 F.3d 1487, 1490 (10th Cir. 1995); Constantine, 183 B.R. at 337; In re Stacey, 164 B.R. 210, 212 (Bankr. D. N.H. 1994). These

courts focus not on to whom the debt is owed, but the nature of the debt, and focus their analysis on the second prong of the domestic support obligation definition. *See, e.g.,* Miller, 55 F.3d at 1489; Constantine, 183 B.R. at 336.

The second question arising under the domestic support obligation definition is whether the debt was "incurred for the 'support' of the child." Constantine, 183 B.R. at 336 (citing 11 U.S.C. § 101(14A)); *see also* Defilippi, 430 B.R. at 3. Several courts have held that GAL or attorney's fees incurred in determining child custody constitute support of the child. *See, e.g.,* Miller, 55 F.3d at 1490[10]; Matter of Dvorak, 986 F.2d 940, 941 (5th Cir. 1993); In re Peters, 133 B.R. 291, 297 (Bankr. S.D. N.Y. 1991). In fact, this Court stated that "services rendered by a guardian ad litem 'were so inextricably intertwined with the welfare of the children . . . that it would be unreasonable to characterize the fee award [paid directly to the GAL] as anything other than in the nature of support.'" Constantine, 183 B.R. at 336-37 (quoting Hack v. Laney (In re Laney), 53 B.R. 231, 235 (Bankr. N.D. Tex. 1985)).

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[10] In In re Miller, the United States Court of Appeals for the Tenth Circuit stated:

> Since determination of child custody is essential to the child's proper 'support,' attorney fees incurred and awarded in child custody litigation should likewise be considered as obligations for 'support'. . . .
>
> Indeed, debts to a guardian ad litem, who is specifically charged with representing the child's best interests, and a psychologist hired to evaluate the family in child custody proceedings, can be said to relate just as directly to the support of the child as attorney's fees incurred by the parents in a custody proceeding.

55 F.3d at 1490 (quoting In re Poe, 118 B.R. 809, 812 (Bankr. N.D. Okla. 1990)).

In the instant case, the Middlesex Probate and Family Court appointed O'Brine as GAL "to investigate and report on . . . issues of legal and physical custody [and] issues of visitation/parenting plan/access to child(ren)." Thus, O'Brine's GAL fees were "incurred for the 'support' of the child." *See* Constantine, 183 B.R. at 336 (citing 11 U.S.C. § 101(14A)); *see also* Defilippi, 430 B.R. at 3.

With respect to the third prong, the Judgment of Divorce and the Order of the Middlesex Probate and Family Court incorporated "Exhibit C Financial Arrangements," which provided that Gove "shall pay for the cost of the Guardian Ad Litem, Attorney George T. O'Brine, in [the divorce action]." As such, Gove incurred his debt to O'Brine "'in connection with' an 'order of a court of record.'" *See* Constantine, 183 B.R. at 336 (citing 11 U.S.C. § 101(14A)); *see also* Defilippi, 430 B.R. at 3.

The fourth prong of the domestic support obligation is easily met as Gove's debt has not "been assigned to a non-governmental entity." Defilippi, 430 B.R. at 3 n.7 (citing 11 U.S.C. § 101(14A)(D)).

In this case, O'Brine is entitled to summary judgment as there are no issues of material fact and he is entitled to judgment as a matter of law with respect to an exception to discharge of his GAL fees. Gove's obligation to pay GAL fees to O'Brine meets the definition of a domestic support obligation under 11 U.S.C. § 101(14A) and is, therefore, a nondischargeable debt under 11 U.S.C. § 523(a)(5).

2. Nondischargeable Debts under 11 U.S.C. § 523(a)(15)

O'Brine argues that the debt is nondischargeable under 11 U.S.C § 523(a)(15). That Bankruptcy Code section excepts from discharge debts:

> to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a government unit.

11 U.S.C. § 523(a)(15).

Because this Court has found that Gove's liability to pay GAL fees is a nondischargeable debt under 11 U.S.C. § 523(a)(5), the debt cannot simultaneously be nondischargeable under 11 U.S.C § 523(a)(15). *See* Macy v. Macy, 200 B.R. 467, 470 (Bankr. D. Mass. 1996), *aff'd,* 114 F.3d 1, 2 (1st Cir. 1997).[11]

C. Motion for Counsel Fees

O'Brine asserts that he is entitled to attorney's fees under 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A), however, does not address awards of attorney's fees, but is an exception to discharge for debts "obtained by false pretenses, a false representation, or actual fraud" of the debtor. *See, e.g.,* In re Woodford, 403 B.R. 177, 184-89 (Bankr. D. Mass. 2009). The attorney's fees incurred by O'Brine for services in pursuing collection of his GAL fees were not incurred as a result of any false representations made by the Debtor; they were incurred pursuant to his appointment as GAL. Therefore, O'Brine's reliance on 11 U.S.C. § 523(a)(2)(A) is misplaced.

The only provision of 11 U.S.C. § 523 that provides authority for an award of attorney's fees is 11 U.S.C. § 523(d). That subsection applies exclusively to circumstances where "a creditor requests a determination of dischargeability of a

[11] "Since the attorneys' fees are classified as nondischaregable under § 523(a)(5), § 523(a)(15) by its very terms is inapplicable." Macy, 200 B.R. at 470.

consumer debt under subsection (a)(2)" of 11 U.S.C. § 523. 11 U.S.C. § 523(d). Furthermore, § 523(d) provides for attorney's fee only if the court determines that the consumer debt is dischargeable and the creditor was not "substantially justified" in asserting that the consumer debt was nondischargeable. 11 U.S.C. § 523(d); *see also* In re Goldstein, 345 B.R. 412, 424 & n.7 (Bankr. D. Mass. 2006).

O'Brine's claim that his attorney's fees and costs incurred in attempting to collect the GAL fees are nondischargeable does not meet the requirements of 11 U.S.C. § 523(d). First, under that section, attorney's fees can only be awarded to the debtor. *See e.g.,* In re McCarthy, 243 B.R. 203, 208 (1st Cir. B.A.P. 2000) ("Section 523(d) was enacted to discourage creditors from filing § 523(a)(2) complaints without first carefully reviewing the legal and factual bases for their fraud-based nondischargeability claims."). In this case, O'Brine, a creditor, is seeking attorney's fees, a circumstance which is not contemplated by the express language of 11 U.S.C. § 523(d). Because O'Brine is not a debtor seeking attorney's fees relating to a dischargeable consumer debt, the remaining requirements of 11 U.S.C. § 523(d) are inapplicable to the current facts. O'Brine did not move for an award of attorney's fees under 11 U.S.C. § 523(d), and reliance on the only section of 11 U.S.C. § 523 providing for an awards attorney's fees would have been misplaced.

Furthermore, O'Brine did not state claim under Fed. R. Bankr. P. 9011 nor did he comply with that rule's safe harbor requirements set forth in Fed. R. Bankr. P. 9011(c)(1)(A). Accordingly, O'Brine's Motion for Counsel Fees is denied without prejudice. The Court shall permit O'Brine to seek counsel fees in conjunction with his

contempt petition with respect to the Judgment of Divorce in the Middlesex Probate and Family Court.

D. Motion for Relief from Stay

A motion for relief from stay should be granted when "the party seeking relief has a colorable claim to property of the estate." Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 33 (1st Cir. 1994). The Grella court further stated:

> The statutory and procedural schemes, the legislative history, and the case law all direct that the hearing on a motion to lift the stay is not a proceeding for determining the merits of the underlying substantive claims, defenses, or counterclaims. Rather, it is analogous to a preliminary injunction hearing, requiring a speedy and necessarily cursory determination of the reasonable likelihood that a creditor has a legitimate claim or lien as to a debtor's property. If a court finds that likelihood to exist, this is not a determination of the validity of those claims, but merely a grant of permission from the court allowing that creditor to litigate its substantive claims elsewhere without violating the automatic stay.

Id. at 33-34.

In this case, the Middlesex Probate and Family Court issued an Order requiring Gove to pay the GAL fees to O'Brine. Gove failed to pay those fees. Consequently, O'Brine incurred fees in attempting to enforce the Middlesex Probate and Family Court's Order and obtain his fees. Courts have the discretion to order those found in contempt of court orders to pay attorney's fees that the moving party incurs in enforcing court orders. *See, e.g.,* Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 571 (1997). Accordingly, this Court finds that O'Brine has established a colorable claim for relief from stay against Gove and may proceed to assert his claim in the Middlesex Probate and Family Court.

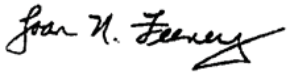
Bankruptcy courts may abstain from deciding issues that the probate court is better suited to adjudicate. *See* In re Berman, 352 B.R. 533, 543 (Bankr. D. Mass. 2006). In this case, the Middlesex Probate and Family Court is better suited to determine the total amount of Gove's award. First, the Middlesex Probate and Family Court can better determine whether Gove is entitled to any attorney's fees. Because the Middlesex Probate and Family Court issued the order for Gove to pay the GAL fees, that court is in the unique position to determine whether Gove's refusal to pay and O'Brine's subsequent incurrence of attorney's fees render Gove in contempt of the order. *See* In re Perry, 131 B.R. 763, 770-71 (Bankr. D. Mass. 1991). Second, the Middlesex Probate and Family Court can better determine the amount of the GAL fees that Gove must pay O'Brine. Because the Middlesex Probate and Family Court ordered Gove to pay O'Brine the GAL fees incurred in the divorce action, it is particularly appropriate that it determine the amount of fees and any associated attorney's fees O'Brine should receive in attempting to collect the GAL fees, if O'Brine prevails on his petition for contempt. This Court grants O'Brine's Motion for Relief from Stay under 11. U.S.C. § 362(d)(1) "for cause" so that O'Brine can seek counsel fees as an award for contempt of the Judgment of Divorce in the Middlesex Probate and Family Court. *See* Id.

IV. CONCLUSION

In accordance with the foregoing, the Court shall enter orders granting Plaintiff's Motion for Summary Judgment, denying Plaintiff's Motion for Counsel Fees and granting the Motion for Relief from Stay. The amount of any fees awarded to O'Brine by the Middlesex Probate and Family Court shall not be subject to the discharge in the

Debtor's Chapter 7 bankruptcy case. The Court finds that Plaintiff's Motion to Compel Defendant to Answer Plaintiff's Interrogatories and Production of Documents is moot.

By the Court,



Joan N. Feeney
United States Bankruptcy Judge

Dated: January 13, 2011

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

IN RE **FRANK J. HEIDENRICH, JR.,** **Debtor**	**Chapter 7** **Case No. 09-11188-FJB**
NICHOLAS J. KAPOLIS and DEMETRA J. KAPOLIS, **Plaintiffs** **v.** **FRANK J. HEIDENRICH, JR.,** **Defendant**	**Adversary Proceeding** **No. 09-01195**

MEMORANDUM OF DECISION ON
COMPLAINT FOR DETERMINATION OF DISCHARGEABILITY

By their complaint in this adversary proceeding, Nicholas and Demetra Kapolis seek a determination under 11 U.S.C. § 523(a)(2)(A) of the dischargeability of their prepetition judgment against the defendant and debtor, Frank Heidenrich, Jr. (the "Debtor"). They argue that the judgment, which arose from his service as general contractor in the renovation of Nicholas's home, is a debt for a false representation he made in inducing them to enter into a construction contract with him and, in parts, from other misrepresentations he made in the execution of the contract.

Procedural History

On February 17, 2009, Frank Heidenrich ("Heidenrich" or "Debtor") filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code. At the time, he was obligated to Nicholas Kapolis ("Nicholas") and his sister, Demetra Kapolis ("Demetra") (together, "Plaintiffs"

or “the Kapolises”) on a judgment they had obtained against him by default in the amount of $169,768.97. On June 16, 2009, the Kapolises, acting pro se, filed a complaint under 11 U.S.C. § 523(a) challenging the dischargeability of the judgment debt, thereby commencing the present adversary proceeding. Later, with the assistance of counsel, they filed an amended complaint. The amended complaint asserts three grounds on which the Kapolises contend their judgment debt, or parts thereof, should be excepted from discharge.[1]

First, they contend that in order to induce them to hire him for their home renovation project, Heidenrich knowingly gave them false references regarding his past contractor jobs. The references were false, they contend, because the Kapolises had asked for references from jobs on which he had been the general contractor, but some of the references Heidenrich provided were from jobs on which his son had been the general contractor. The Kapolises further allege that they relied on this misrepresentation to their detriment by entering into the contract with him and suffering numerous adverse consequences from that decision, leading to their judgment against him. As a result, Plaintiffs assert that the Court should deem the entire judgment debt to be nondischargeable.

Second, the Kapolises allege that during the course of the project, Heidenrich knowingly and fraudulently presented them with false invoices with the intent of inducing them to rely on the invoices. They state that they justifiably relied on those invoices by making payments on them. The Kapolises contend that the invoices were false in various ways, but especially by representing that services had been rendered that had not in fact been rendered or that materials had been purchased that had not in fact been purchased. The Kapolises contend their judgment against the Debtor should be excepted from discharge to the extent of payments made on fraudulently misrepresented items in the invoices.

Lastly, the Kapolises allege that Heidenrich intentionally misrepresented to them that he would file an insurance claim with his own insurance carrier on their behalf for extensive rain

[1] The complaint also included other grounds that the Kapolises did not pursue at trial.

damage that occurred when he left their roof open in a major storm, that he intended to induce them to rely on this representation, that in justifiable reliance on this misrepresentation, they did not file an insurance claim themselves, and that they suffered damage because, when they learned that he had not in fact made an insurance claim, it was too late to prove and recover most of the damages from their own carrier, the damaged area having by then already been demolished. As a result, the Plaintiffs contend that their claim against him should be deemed nondischargeable to the extent of the rain damage that was not covered by their own insurance.

On August 4, 2010, the Court conducted a trial of the matter at which four witnesses testified and thirteen exhibits were introduced into evidence. On the basis of the evidence adduced and pursuant to FED. R. CIV. P. 52(a)(1), the Court now enters the following findings and conclusions and, for the reasons thus articulated, will enter judgment for the Debtor.

Facts

a. Contract Formation

In 2005, Nicholas and Demetra decided to renovate the home that Nicholas owned, located at 50 Old Stage Road, Centerville, Massachusetts. They were renovating and expanding the home to serve as their home in retirement and planned to fund the project largely with monies left them by their mother. The scope of the project was large; according to Demetra, the renovations would expand the house by three times its original size.

The Kapolises had no experience hiring a general contractor. In furtherance of their renovation project, they first obtained architectural plans from an architectural designer and then solicited bids from a few contractors of whom they had learned either through word of mouth or through signs they had seen at construction sites. They reviewed the architectural plans with five contractors, each of whom later returned with a list of references, an estimate of what work the project would entail, and a bid.

The Kapolises first learned of Heidenrich when Demetra saw a sign for his company, Osterville Builders, on a home construction site. They were interested in hiring a local contractor to perform the work on the Centerville home. When they saw that Heidenrich was based on Cape Cod, they decided to solicit a bid from him.

Heidenrich, who is 61 and now retired, was a carpenter and builder by trade. When he met the Plaintiffs, he had operated a contracting business through his wholly-owned corporation, Osterville Builders, Inc. He testified that he has worked as a general contractor on hundreds of occasions in his career. On a few occasions he has worked for his son, who owns and operates a separate contracting business of his own, on projects for which his son was hired as general contractor. He testified that when he worked for his son, he did not work as a subcontractor—for example, as a carpenter—but assisted his son in performing the general contracting duties.

Demetra called Heidenrich and asked for an estimate on their project. Additionally, she testified, she asked him for references from jobs on which he had been the general contractor. She did not indicate the specific words she used for this request or the manner or circumstances in which she made it; and no other evidence has been adduced on these issues. Therefore, the Court can make no findings as to whether Heidenrich knew or should have understood that she was seeking not just "references," or "references from jobs on which he had worked in any relevant capacity," or "references from jobs on which he had performed general contracting duties," but "references from jobs on which he or Osterville Builders had been the contracting party."

Heidenrich provided Demetra with an estimate and a list of references. The list identified seven references, four homeowners and three businesses, and for each provided a telephone number and a brief description of the work Heidenrich had done or was doing on the reference's project. The last, one of the businesses, was identified as an "upcoming project," indicating that this project had not yet been started. The list did not expressly state or in any way represent

that the listed projects were projects on which Debtor had himself been hired as general contractor.[2]

It is undisputed that two of the seven listed references—Christine Cummings and Sarah Champion—were for projects on which the Debtor had himself been hired as general contractor. On each of the others, his son had been the general contractor, and Debtor had worked on the project for his son. Heidenrich testified that his work on these other projects had been in the nature of assistance with the general contracting duties, and I find this testimony credible, as it is corroborated by other evidence in the record.

Demetra spoke with the contractors and followed up on their references. Upon receiving Debtor's list of references, Demetra called the four homeowners listed. Of these, she spoke with only two, Ann Borokov and Dennis Liakos; the other two—those on whose projects Debtor had been hired as general contractor—did not return her calls. Demetra did not attempt to contact that the other three references, all businesses, because, as she testified, she was only interested in home projects—and accordingly I find that she and Nicholas did not rely at all on the business references or on Heidenrich's representation that they were relevant references. Demetra did not ask either of the references with whom she spoke whether Debtor had been the general contractor on their individual jobs, and neither indicated that he had not been general contractor on their jobs. However, one of the references, Mr. Liakos, warned her "to hold back on the money, not to give him much money up front." This warning, coming from one of the references on whose project Heidenrich had *not* been the general contractor, tends to corroborate Debtor's own testimony that his responsibilities on these jobs were in the nature of general contracting responsibilities. He was the party to whom the project owner made payments. In addition, it appears that Demetra was able to have conversations with these two

[2] A cover letter that Heidenrich faxed to Demetra with the list referred to the references as "customers": "In the process of updating and speaking to customers to coordinate viewing projects. and their schedules (sic)." This characterization of the references as customers is not indicative of Heidenrich's responsibilities on the jobs in question. He could as easily and innocently have used the term for those project owners for whom he had merely assisted his son as general contractor as for those for whom he was the party with whom they had contracted.

references about Heidenrich's qualifications as a general contractor, conversations that would have been meaningless to the references had Heidenrich not been known to them as the contractor on their projects;[3] yet they said nothing to Demetra to this effect, and this too I construe as corroboration that his duties on these jobs had been those of a general contractor.

Demetra spoke with Nicholas about the fact that one of the references had cautioned her to "hold back on the money, not to give him much money up front." They decided that this concern shouldn't dissuade them from hiring him, that they could manage it. Additionally, Demetra made inquiries regarding Heidenrich with the Better Business Bureau and with the Consumer Protection Division of the Attorney General's Office, neither of which reported to her that any complaint had been filed against Heidenrich or Osterville Builders. Satisfied with their discussion with Debtor as to the concerns that the reference raised, Nicholas and Demetra agreed that Nicholas should hire Heidenrich for the project, and he did.

On February 11, 2006, Nicholas and Heidenrich[4] entered into a written agreement for work to be performed on his Centerville home. Nicholas agreed to pay Heidenrich $245,900.00 for the material and labor to be performed under the contract. The contract required payment of seven percent of the contract price upon signing, billing every two weeks "on percent of work completed," and hold-backs of five percent for occupancy permit and another five percent "for punch list and satisfy owner." Demetra was not a party to the contract.

b. Invoice Issues

Both parties testified that approximately every other week during construction, Nicholas and Heidenrich met at the construction site. At each meeting, Heidenrich presented Nicholas with an invoice itemizing charges for work he had performed and for deposits on work to be

[3] Heidenrich's son, Justin Kelly, has a different last name from his father, and so it is not possible that Demetra and the references were discussing a Mr. Heidenrich but, unbeknownst to each other, referring to different Heidenriches.
[4] The contract was with "Frank Heidenrich DBA Osterville Builders, Inc.," not with Osterville Builders, Inc.

performed or materials to be procured in the future, and, after discussion of the various charges and the progress of the project, Nicholas wrote Heidenrich a check for the invoiced items.

The Kapolises submitted five sets of invoices into evidence at trial. Plaintiffs paid in full for all of the items listed on those invoices. The Kapolises contend that Heidenrich included in the invoices certain items that were false statements, made with knowledge that they were for work that he had not performed or for materials that he had not and did not intend to purchase, and that Heidenrich included these items to induce Nicholas to make payments in excess of amounts then due on the contract, and that Nicholas justifiably relied on these representations to his detriment by paying for the now-disputed items. Heidenrich testified that representations were not false or made with knowledge of falsity and intent to deceive.

The evidence as to each item is scant. The statements themselves are established by the introduction of the invoices, but as to most other elements—falsity, scienter, intent to deceive, reliance—the only evidence is Nicholas's uncorroborated testimony, which in most instances is contradicted by Heidenrich's testimony. Nicholas and Heidenrich discussed many billed items before Nicholas paid them, but no evidence has been adduced as to the substance of these discussions; this is perhaps attributable to a lapse of over four years between the events in question and the date of trial, but whatever the reason, the absence of evidence as to these discussions does not inspire confidence that all the relevant evidence is before me. Moreover, on the issue of reliance, Nicholas's testimony tends to show that there was none. Nicholas concedes that he reviewed the items in each invoice with Heidenrich before making payment and was frequently skeptical of the invoices and the representations they contained but elected to make payment despite his reservations. For these reasons and for those specified below as to each item in issue, the Court concludes that the Kapolises have not carried their burden as to any one of them.

1. Window Order

The invoices dated February 25, 2006 included charges of $9,750.00 for "deposit on custom window order" and $2,200.00 for "additional cost of window grills." This was a charge for a deposit to purchase the window, not a charge for payment of a window received or installed. At trial the Kapolises testified that Heidenrich never purchased the correct windows listed on the February 25, 2006 invoice. Still, there was evidence that Heidenrich had purchased windows for which this charge was to serve as a deposit, but also that he had mistakenly purchased windows that did not conform to the contract specifications. The evidence is insufficient to find that his inclusion of this item in the invoice was an attempt to bill for material that Heidenrich did not intend to purchase. Rather, it appears more likely to be an honest billing for an intended purchase, followed by a mistake in the execution. This is not fraud.

2. Retaining Wall

The invoices dated March 10, 2006 included a charge of $750.00 for "excavation, labor, concrete pour retaining wall." The evidence shows that this charge was for the excavation, labor, and concrete pouring involved in creating a retaining wall. Nicholas testified, and I find, that although a retaining wall was constructed on the site, no concrete foundation was ever poured for the wall. It is unclear whether the construction of the wall involved a "concrete pour" other than for the foundation—no details whatsoever are in evidence. Nicholas concedes that a wall was constructed. On the evidence presented, I cannot find that the evidence of fraud amounts to a preponderance. At best, the evidence suggests a failure to adhere to contract specifications or construction standards—though no evidence of specifications or standards was introduced—but these alone are not enough to establish intent to defraud.

3. Foundation Windows

The invoices dated March 10, 2006 included an "extra work" charge of $170.00 for "windows in foundation wall, materials only," and the invoices dated March 24, 2006 included a further charge of $690.00 for "windows in foundation wall, material and labor." The evidence shows that Heidenrich framed openings in the foundation wall to receive the windows but never installed windows in the openings. Nicholas conceded that he did not know whether Heidenrich had ever purchased the windows. From this evidence the plaintiffs urge the court to conclude that Heidenrich never purchased or installed the windows and that he billed for the windows and labor with knowledge that the invoices were false as to these items and with intent to deceive and induce reliance. At trial Heidenrich had no answer to this charge. To be fair, however, he also had no advance knowledge of it, as the Kapolises neither pleaded this particular charge of fraud in the complaint with particularity nor even identified it in their pretrial memorandum,[5] and the events at issue had occurred over four years before the trial. The Kapolises presented no evidence as to their reliance on these charges, at least the latter of the two. The installation of the windows would have been easy for Nicholas to verify; he was at the job site when presented with this bill, and his purpose in being there was to review both the progress of work on the project and the charges being presented for payment invoices. The absence of windows in the framed openings would have been evident. Lacking evidence that Nicholas did not actually check this item but instead relied purely on Heidenrich's representation in the invoice that they had been completed, the Court cannot find that he relied on the representation at all. I am not finding here that there was reliance that was not justifiable; rather, I am finding that the preponderance of the evidence tends to show no reliance at all. The fact that the noncompletion of this item would have been evident also tends to establish that Heidenrich did not make it with intent to deceive: he could not have expected to be successful in the

[5] The same is true as to each of the invoice items now in controversy: the Kapolises neither pleaded these particulars in the complaint nor identified them in their pretrial memorandum. They merely made a general charge of fraud through unspecified invoice items.

deception. For these reasons, I conclude that the Kapolises have not carried their burden of proof as to either reliance or intent to deceive.

4. Management Charge

The invoices dated March 10, 2006 also included a $2,000.00 charge for "labor for week management." The Kapolises testified that Debtor had not been present at the job site enough to justify this management fee. The evidence shows that the Kapolises were aware when Nicholas paid for this item that Heidenrich had not been present on the job site to the extent necessary to justify this charge. I find that insofar as this charge may constitute a misrepresentation, it is not one by which Nicholas was deceived or on which he relied. He made the payment with knowledge of the alleged falsity of the representation.

5. The May 6 Charges

The invoices dated May 6, 2006 included the following items, all characterized on the invoice as "extra work": a $10,000 charge for "deposit on plumbing, heat, electric, roof and siding," an $800 charge for "front wall demo, frame, remove electrical, retaining wall on side of driveway," a $3,400 charge for "retaining wall on side of driveway," and a $685 charge for "install new structural header front wall." Nicholas testified that the plumbing and electric were never installed, that only part of the roofing and siding work was completed, and that the retaining wall inside the driveway was never finished. In addition, Nicholas testified that the extra work billings were for work that was already included in billings for regular work. On the basis of this evidence, the Kapolises would have the court conclude that the items were included on the invoice without intent to complete the work and with intent to deceive and induce reliance.

With respect to the $10,000 deposit, I find on the basis of Nicholas's own testimony that the work in question was commenced and partly completed. Also, not long after the date of this

invoice, Heidenrich was diagnosed with cancer (as explained below) and hospitalized, which explains his failure to complete this project and may well account for his failure to complete the work for which this deposit was billed and paid. Therefore, I conclude that the billing for the $10,000 deposit was not essentially a false representation as to intent to perform work. With respect to the contention that the characterization of this work as "extra" was a fraudulent attempt to double-bill for work that was part of the basic contract, I find the contention unproven, the Kapolises having failed to show that these items had been previously billed and paid.

6. Framing Labor

The invoices dated March 24, 2006 included a charge of $12,000 for "deposit on framing labor and demo for week." The invoices dated April 7, 2006 included a further charge of $12,000 for "framing labor for past 2 weeks." The Kapolises contend that the April 7 charge was a double-billing for the $12,000 that had already been billed as a deposit in the March 24 invoice. Heidenrich testified that these two billings were proper charges for four weeks of labor and that the billing dates listed on the invoices did not necessarily coincide with the actual dates of the framing work. Aside from the text of the invoices themselves, Plaintiffs presented no evidence as to these charges. Notably missing is any evidence as to the amount of framing labor that was performed on the project during the period in question. It is plausible—at least as plausible as the Kapolises' proposed explanation—that the cost of framing labor was $24,000, half of which was paid at or near the beginning of the framing work and half of which was paid after completion. With respect to this representation, the Kapolises have not carried their burden of proof as to falsity.

c. Insurance Coverage

During construction, when the roof over the original structure had been temporarily removed, a heavy rain caused damage to Nicholas's home because Heidenrich's attempts to

cover the opened roof with tarpaulins proved inadequate. What happened next is in dispute. The Kapolises testified that at some point—they do not specify when—Heidenrich told them that he would file a claim for insurance coverage with his insurance carrier, and that the Kapolises would be compensated by that means. Heidenrich responds that he made no such promise until much later. He testified that he and the Kapolises initially reached an agreement that he was going to pay the damage himself because it was so minor. He added that he was never able to follow through on this promise because he became ill. Heidenrich further testified that much later, during litigation in the District Court (no date or period is specified, but, as discussed below, that the parties were litigating in the District Court in 2008), the Kapolises' attorney asked him to file a claim against his policy. He remembered that he obtained the paperwork to file a claim but never filed it; he could not remember whether he promised the Kapolises that he would file one.

The Kapolises testified to a quite different version of events. They testified that the damage was not minor but extensive: it required replacement of walls, floors, insulation, and electrical work throughout the original structure, down to the basement, and cost approximately $110,000 to repair. They further testified that Heidenrich did not tell them that he himself would pay for it. Rather, they testified, he told them that he would file an insurance claim: "Don't worry about anything, my insurance company will take care of it," he allegedly told them. They do not indicate when he made this representation. Months later (again they specified no date) they learned that in fact he never had filed a claim. At this point they filed a claim under their own policy and received partial reimbursement for the damage, approximately $53,000. Nicholas testified that this was inadequate to repair the damage, as he had to pay another $60,000 or $70,000 to complete repairs to the damaged areas. Demetra testified that she believed the $53,000 paid by their insurance company was much less than they would have received had they filed their claim sooner because, by the time they filed their own claim, Heidenrich had

already demolished most of the damaged materials and structure, with the result that their insurer could not see and verify the full extent of the damage.

Still, the Kapolises adduced no evidence as to the extent of coverage that would have been available from their own carrier had they filed their claim when Heidenrich allegedly promised to file a claim of his own. They adduced no evidence as to the extent of coverage that would have been available from Heidenrich's carrier had he filed a claim when he allegedly promised to. They adduced no evidence—other than Nicholas's conclusory testimony of $60,000 or $70,000—as to the extent of damage suffered beyond that which was reimbursed.[6]

The Court concludes that the Kapolises have not carried their burden of proof as to this count. The evidence they have adduced in support of this count consists almost entirely of their self-serving testimony, is wholly lacking in corroboration, and is contradicted by Heidenrich's own testimony. There is no evidence as to crucial dates and matters of timing. They offered no testimony as to whether it was justifiable to rely on Heidenrich's representation at all; they offered no explanation as to why they did not immediately file a claim of their own, regardless of whether Heidenrich also filed one. Most importantly, they adduced no evidence suggesting that, if and when Heidenrich represented to them that he would file an insurance claim for their benefit, he had no such intent and made his misrepresentation with intent to deceive them and induce reliance thereon. Specific intent is rarely demonstrable by direct evidence, and I would not expect any here, but here there is no suggestion that Heidenrich was motivated by a desire to avert the Kapolises' filing a claim of their own.

d. Discontinuance of Work; The State Court Litigation

On or about May 19, 2006, about three months after entering into the agreement and well into the construction project, Heidenrich was diagnosed with multiple myeloma, a form of

[6] Nicholas's attorney asked him,"How much additional work was required to restore it?" He responded: "Probably another sixty on top of that, seventy, around that whole area." This is the full extent of evidence on the issue.

cancer. Around the same time, he checked into a hospital and, as a result of his cancer, hospitalization, and treatment, ceased working on the Kapolis project, leaving it far from complete. With work at a virtual standstill, Nicholas hired Mr. John Keefe, the framing subcontractor whom Heidenrich had hired for this project, to "close in" the home and protect it from the elements. Thereafter, Nicholas "shut the whole job down," terminated Heidenrich's service, and eventually completed the project through other contractors. Heidenrich was never again well enough to return to the project.

Frustrated first with Heidenrich's performance before his illness and then with the cessation of work, Nicholas and Demetra filed a six-count complaint against Heidenrich in Barnstable Superior Court on October 16, 2006. The complaint itself was not entered into evidence. Testimony of Demetra suggests that the counts listed in the complaint included breach of contract, false pretenses, fraud, and violations of 93A, but the court has no evidence as to the specifics of each count. Heidenrich was duly served but did not defend. As a result, the Kapolises moved for default judgment, whereupon the Superior Court conducted proceedings to assess damages. The nature and details of these proceedings are not in evidence. The Superior Court assessed damages on Count I (the nature of which is not specified) in the amount of $169,768.97, and the sum of $1.00 as to each of the five other counts (whose natures, too, are unspecified). Accordingly, on October 4th, 2007, the Superior Court entered judgment by default against Heidenrich in the amount of $169,768.97, plus prejudgment interest of $19,702.97 and costs of $296.25. Lacking evidence as to the content of the complaint and of the proceedings for assessment of damages, the Court cannot determine what the awarded damages are compensation for.

In subsequent proceedings in Barnstable District Court for enforcement of the judgment, Heidenrich appeared and agreed to entry of an order, entered November 17, 2008, requiring that he pay the Kapolises $1,000 per month on their judgment. He made one or two such payments, then filed his bankruptcy petition. At present, he continues to be treated for cancer

and is unable to work. His only income is Social Security disability income, and he has no means of paying the judgment.

Discussion

Among the debts excepted from discharge in 11 U.S.C. § 523(a) is any debt "for money, property, services . . . to the extent obtained, by . . . false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). As with all § 523(a) exceptions to discharge, the exception listed in § 523(a)(2)(A) is "narrowly construed in furtherance of the Bankruptcy Code's 'fresh start' policy." *Palmacci v. Umpierrez*, 121 F.3d 781, 786 (1st Cir. 1997) (quoting *Century 21 Balfour Real Estate v. Menna*, 16 F.3d 7, 9 (1st Cir. 1994)) (internal quotation marks omitted). As creditors invoking 11 U.S.C. § 523(a)(2)(A), the Kapolises must prove each element of the exception by a preponderance of the evidence. *Palmacci*, 212 F.3d at 787 (citing *Grogan v. Garner*, 498 U.S. 279, 291 (1995)). Specifically, the Kapolises must show by a preponderance as to each count asserted that: (1) the debtor made a false representation; (2) he did so knowingly or with reckless disregard of the truth; (3) he made the misrepresentation with intent to deceive them and to induce them to rely upon it; (4) they did rely upon it; (5) their reliance was justifiable; and (6) their reliance caused pecuniary loss. *Palmacci*, 121 F.3d at 786; *In re Burgess*, 955 F.2d 134, 139 (1st Cir. 1992) (as to elements other than reasonableness or justifiability of reliance).

a. The List of References

As their first basis for nondischargeability under § 523(a)(2)(A), the only one of their bases that goes to the entire judgment debt, the Kapolises contend that Heidenrich knowingly misrepresented to them that the references he provided them were for jobs on which he had been the general contractor, meaning the party with whom the homeowner had contracted,

when in fact this was true of only two of the seven references. The Court finds that the Kapolises have not carried their burden on this count for the following reasons.

First, they have not adduced sufficient evidence of precisely what Demetra asked Heidenrich to produce and precisely how she asked for it. The alleged misrepresentation here is not an express statement by the defendant; rather, it is the implicit statement that the references he produced conformed to what Demetra had requested. Lacking the details of this request, the Court cannot conclude by a preponderance of the evidence that what he produced did not conform to what she requested—that is, that it was false—or that Heidenrich knew it to be false or that he made the representation with intent to deceive. As to each of these elements, it is necessary to know precisely how Demetra made her request.

Second, the evidence shows that as to each of the four homeowner references he provided, Heidenrich did perform the general contracting duties on the project. It is true that he was not the contracting party on all four, but especially where Demetra's request is unclear, the Court can find no certain or self-evident falsehood in his response.

Third, the evidence does not preponderate in favor of a finding that the Kapolises relied on this representation. What they contend is that it was important to them that he had served as general contractor on at least the four homeowner projects for which he had supplied references, and that they would not have hired him had they known he had only been general contractor on two of these. Had they been interested in the extent of his experience as a general contractor, they would have asked him directly how many home projects he had handled, and it is unlikely that a mere four jobs would have sufficed, especially if two would not have. In addition, they did not bother to contact more than two, did not ask him to supply further references when two did not return their inquiries, did not inquire of the two with whom they did speak as to the capacity in which he had worked on their projects, and hired Kapolis notwithstanding a caution from one.

And fourth, as to Demetra, reliance cannot be shown for the further reasons that she was not a party to the contract, did not hire Heidenrich, and did not own the home on which he worked. In her dealings with him, she acted essentially as agent for Nicholas, not in any capacity of her own.

Accordingly, the Court concludes that the Kapolises have failed to discharge their burden of proof as to the necessary elements of this count under § 523(a)(2)(A).

b. The Invoices

The alleged misrepresentations in the invoices fall into two categories: representations as to past facts—that work was performed or materials purchased; and representations as to intent—that a deposit was necessary because Heidenrich intended to use it to purchase materials or complete specified parts of the project. Representations as to intent to perform can be cause to except a resulting debt from discharge. As the First Circuit Court of Appeals has explained, "[i]f, at the time he made his promise, the debtor did not *intend to perform*, then he has made a false representation (false as to his intent)." *Palmacci*, 121 F.3d 781, at 787 (1st Cir. 1987) (citations omitted). Still, as to each misrepresentation, whether as to past performance or as to intent to perform in the future, the plaintiffs must satisfy each of the requirements enumerated above in order to prevail under § 523(a)(2)(A). For the reasons articulated in the findings of fact above, the plaintiffs have not carried their burden of proof as to any one of the items in question, and judgment must accordingly enter for Heidenrich as to the invoice counts.

c. The Insurance Claim

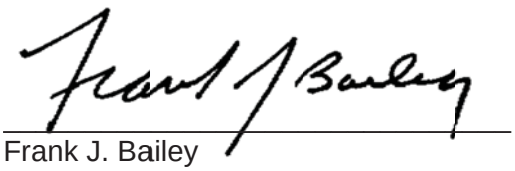
The Kapolises allege that Heidenrich intentionally misrepresented to them that he would file an insurance claim with his own insurance carrier for the rain damage to Nicholas's home, that he intended to induce them to rely on this representation, that in justifiable reliance on this

misrepresentation they did not immediately file an insurance claim themselves, and that they suffered damage because, when they learned that he had not in fact made an insurance claim, it was too late to prove and recover most of the damages from their own carrier. As detailed above, the evidence in support of this count, as to all its elements but one, is at best sketchy, based on self-serving testimony of one or both of the plaintiffs but controverted by Heidenrich and lacking corroboration. As to the element of intent to deceive and induce reliance, however, I find that evidence is wholly lacking. Therefore, I conclude that the Kapolises cannot prevail on this count.[7]

Conclusion

On the basis of the foregoing considerations, the Court concludes that no portion of Heidenrich's judgment debt to the Kapolises is excepted from discharge. A separate judgment will enter accordingly.

Date: December 20, 2010



Frank J. Bailey
United States Bankruptcy Judge

[7] Accordingly, I need not determine whether the evidence suffices as to any other element of this count.