UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

HELLEN V. CAVETT,	**CASE NO. 05-02941-NPO**
DEBTOR.	**CHAPTER 13**
HAROLD J. BARKLEY, JR., CHAPTER 13 TRUSTEE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, FOR AND ON BEHALF OF BANKRUPTCY ESTATE OF HELLEN V. CAVETT	**PLAINTIFF**
VS.	**ADV. PROC. NO. 06-00115-NPO**
WACHOVIA EQUITY SERVICING, LLC	**DEFENDANT**

MEMORANDUM OPINION AND ORDER
GRANTING MOTION TO DISMISS ADVERSARY COMPLAINT

There came on for hearing on January 19, 2007, and for status conference on May 14, 2007, (the "Hearings") the Motion to Dismiss Adversary Complaint (the "Motion")(Adv. Dk. No. 10) filed by Wachovia Equity Servicing, LLC ("Wachovia")[1] and the Responses to Motion to Dismiss Adversary Complaint (the "Responses")(Adv. Dk. Nos. 12 and 17) filed by Harold J. Barkley, Jr., Chapter 13 Trustee (the "Trustee") in the above-styled adversary proceeding (the "Adversary").[2]

[1] At the time the Adversary Complaint (the "Complaint")(Adv. Dk. No. 1) was filed, the Defendant's name was HomEq Servicing Corporation ("HomEq"). However, on November 1, 2006, HomEq purportedly sold the bulk of its assets, including its mortgage servicing contracts and the right to the use of the name HomEq, to Wachovia (Adv. Dk. No. 31). Accordingly, consistent with the agreement of the parties, the Defendant will be referred to as Wachovia in this Memorandum Opinion and Order. Id.

[2] The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

At the Hearings, Russell J. Pope, Ross F. Bass, Jr., and Christopher R. Maddux represented Wachovia, and Todd S. Johns represented the Trustee.

The Trustee alleges in the Complaint that Wachovia charged improper, excessive, and unreasonable fees and expenses to the mortgage account of Hellen V. Cavett (the "Debtor"). In response to the Complaint, Wachovia filed the Motion presently before the Court, contending that the various claims asserted by the Trustee are time barred, preempted and precluded by the Bankruptcy Code, and fail to state a claim upon which relief can be granted. The Trustee subsequently filed his Responses to the Motion, maintaining that he is entitled to conduct discovery through the Adversary in order to determine whether Wachovia may charge and collect the types of fees and costs it assessed to the Debtor and if so, whether those fees and costs are justified and reasonable.

In addition to the arguments presented in the Motion, Wachovia took the position at the Hearings that the Trustee lacks standing to prosecute the Complaint because the Court previously has entered an Order (the "Order on the Trustee's Objection")(Dk. No. 17) sustaining the Trustee's Objection to Proof of Claim (the "Trustee's Objection")(Dk. No. 10) to Wachovia's proof of claim (the "Proof of Claim")(Claim #4), which disallowed those very same fees and costs upon which the Complaint is based. At the Hearings, the Trustee argued that the entry of the Order on the Trustee's Objection does not deprive him of standing to prosecute the Complaint because he preserved his right to bring claims and causes of action against Wachovia by language included in the Order on the Trustee's Objection. Having considered the pleadings and the arguments of counsel, the Court finds that the Motion should be granted, but based on the more compelling application of the doctrine of *res judicata*.

Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this Adversary pursuant to 28 U.S.C. § 1334. Notice of the Motion was proper under the circumstances.

Facts

1. On June 3, 2005, the Debtor filed a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code (Dk. No. 1).

2. On July 15, 2005, Wachovia filed the Proof of Claim in the total amount of $42,605.32 which included a prepetition arrearage amount of $6,040.71.

3. On July 20, 2005, the Trustee filed the Trustee's Objection, objecting to charges for an "appraisal fee" in the amount of $650.00, "foreclosure fees and costs" in the amount of $1,659.41, and a "property inspection fee" in the amount of $40.80, each of which was included in the prepetition arrearage portion of the Proof of Claim.

4. The Trustee's Objection was set for hearing on September 19, 2005 (Dk. No. 12).

5. Wachovia did not file a response to the Trustee's Objection nor appear at the September 19, 2005, hearing.

6. On September 23, 2005, the Court entered the Order on the Trustee's Objection. The Order on the Trustee's Objection contained the following language: "[A]n entry of this Order or any subsequent Order Allowing Claims shall in no way waive any claims or causes of action that the Trustee or this bankrupt estate may have against this creditor." Wachovia did not appeal the Order on the Trustee's Objection.

7. Wachovia has never attempted to recover the fees and costs disallowed by the Order on the Trustee's Objection.

8. An Order Confirming the Debtor's Plan (the "Confirmation Order")(Dk. No. 26) was entered on November 29, 2005. The Confirmation Order referenced the Order on the Trustee's Objection and reflected the reduced prepetition arrearage amount to be paid to Wachovia. Wachovia did not appeal the Confirmation Order.

9. On July 28, 2006, the Adversary was initiated by the filing of the Complaint wherein, as discussed above, the Trustee alleges that Wachovia charged improper, excessive, and unreasonable fees and expenses to the Debtor's mortgage account. The Complaint sets forth various counts including violations of the Fair Debt Collection Practices Act, negligent and intentional breach of contract, negligent and intentional misrepresentation, unjust enrichment, and the filing of a fraudulent proof of claim. The Trustee seeks a judgment for compensatory and punitive damages of an unspecified amount.

10. Thereafter, Wachovia filed the Motion presently before the Court, and the Trustee filed his Responses.

Discussion

1. Failure to Plead *Res Judicata*: The Two Exceptions

Although not raised by Wachovia in its Motion,[3] the Court finds that the Motion should be granted on the basis of *res judicata*. In general, "res judicata is an affirmative defense that must be pleaded, not raised *sua sponte*." Mowbray v. Cameron County, Texas, 274 F.3d 269, 281 (5th Cir. 2001). However, the United States Court of Appeals for the Fifth Circuit has recognized two limited exceptions. Id. The first exception allows dismissal by the court *sua sponte* "in the interest of

[3] Wachovia maintained at the Hearings that it had raised *res judicata* as a defense, but had couched the argument in terms of the Trustee's standing.

judicial economy where both actions were brought before the same court." Id.; *see also* Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980)(same). The second exception "holds that 'where all of the relevant facts are contained in the record before us and all are uncontroverted, we may not ignore their legal effect, nor may we decline to consider the application of controlling rules of law to dispositive facts, simply because neither party has seen fit to invite our attention by technically correct and exact pleadings.'" Mowbray v. Cameron County, Texas, 274 F.3d at 281 (quoting Am. Furniture Co. v. Int'l Accommodations Supply, 721 F.2d 478, 482 (5th Cir. Unit A Mar. 1981)).

As noted previously, in the case at bar, this Court entered an Order on the Trustee's Objection sustaining the Trustee's Objection to those charges included in the Proof of Claim which the Trustee contended were improper. Thus, the first exception applies and, consequently, this Court may raise the *res judicata* defense.

2. *Res Judicata*: The Four Factors

The Fifth Circuit has applied the traditional test for *res judicata* in the bankruptcy context. *See* Bank of Lafayette v. Baudoin (In re Baudoin), 981 F.2d 736, 739 (5th Cir. 1993). "Any attempt by the parties to relitigate any of the matters that were raised *or could have been raised* therein is barred under the doctrine of *res judicata*." Id. (emphasis in original)(quoting Matter of Brady, 936 F.2d 212, 215 (5th Cir.), cert. denied, 502 U.S. 1013, 112 S.Ct. 657, 116 L.Ed.2d 748 (1991)). "Thus, a bankruptcy judgment bars a subsequent suit if: 1) both cases involve the same parties; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) the prior decision was a final judgment on the merits; and 4) the same cause of action is at issue in both cases." Id. at 740 (citing Latham v. Wells Fargo Bank, N.A., 896 F.2d 979, 983 (5th Cir. 1990)).

The Court finds that the first and second factors required for the application of *res judicata*

are present. That is, the parties involved in the Adversary, the Trustee and Wachovia, are the same parties that were involved in the Trustee's Objection. Moreover, the prior judgment was entered by this Court, a court of competent jurisdiction.

The Court also finds that the third factor required for the application of *res judicata* is present. Although "[t]he Fifth Circuit has not articulated an exact standard for determining when an order by the court in a bankruptcy proceeding constitutes a final judgment on the merits," it has stated that "for purposes of determining the finality of a bankruptcy order, each matter that arises between the filing of the bankruptcy petition and the issuing of a closing order is treated as a separate proceeding." Industrial Clearinghouse, Inc. v. Mims (In re Coastal Plains, Inc.), 338 B.R. 703, 712-13 (5th Cir. 2006). Consequently, a "'final' order in a bankruptcy case can be any order that 'ends a discrete judicial unit in the larger case.'" Id. (quoting Smith v. Revie (In re Moody), 817 F.2d 365, 368 (5th Cir. 1987)). Thus, "an order allowing a proof of claim is . . . a final judgment." In re Baudoin, 981 F.3d at 742; Moody v. Empire Life Ins. Co., 849 F.2d 902, 904 (5th Cir. 1988)("[W]e agree in principle with our First Circuit colleagues who have concluded that 'as long as an order allowing a claim . . . effectively settles the amount due the creditor, the order is 'final'.'"); *see also* Siegel v. Federal Home Loan Mortg. Corp., 143 F.3d 525, 529 (9th Cir. 1998)("[T]he allowance or disallowance of a claim in bankruptcy is binding and conclusive on all parties or their privies, and being in the nature of a final judgment, furnishes a basis for a plea of res judicata.")(citations omitted). Accordingly, the Court finds that the Order on the Trustee's Objection constitutes a final judgment regarding those prepetition fees and costs charged by Wachovia to which the Trustee successfully objected. The Court further finds that the fourth factor, the requirement that the same cause of action be involved in both suits, is present as well.

The Fifth Circuit "has adopted the 'transactional test' for deciding whether two cases involve the same cause of action for *res judicata* purposes." In re Baudoin, 981 F.3d at 743. "Under this test, 'the critical issue is . . . . whether the two actions [are based] on the same nucleus of operative facts.'" Id. (quoting Matter of Howe, 913 F.2d 1138, 1144 (5th Cir. 1990)). The Order on the Trustee's Objection disallowed certain prepetition fees and costs included by Wachovia in the Proof of Claim. The Complaint alleges various counts, each arising from the propriety of Wachovia including in the Proof of Claim those very prepetition fees and costs. Thus, the Trustee's Objection and the Complaint involve the same nucleus of operative facts. As mentioned previously, the Order on the Trustee's Objection contains the language: "[A]n entry of this Order or any subsequent Order Allowing Claims shall in no way waive any claims or causes of action that the Trustee or this bankrupt estate may have against this creditor." The Trustee reasons that the quoted language preserves all of the claims or causes of action he asserted against Wachovia in the Complaint. The Court, however, concludes that the language quoted in the Order on the Trustee's Objection served only as notice to all interested parties that the Trustee did not intend to *waive* his right to assert any causes of action against Wachovia and indeed, he did not waive them as evidenced by the filing of the Complaint. However, the Order on the Trustee's Objection nevertheless *resolved* the Trustee's claims arising from the nucleus of operative facts underlying Wachovia's charging of the prepetition fees and costs listed in the Proof of Claim, thereby prohibiting the Trustee from relitigating those same claims. The Trustee cannot and did not deprive Wachovia or this Court of the ability to assert the doctrine of *res judicata* resulting from the entry of the Order on the Trustee's Objection.

Based on the foregoing, the Court finds that the four factors required for the application of *res judicata* have been satisfied. As a final note, though, the Court also will address the case of 1st

Franklin Financial Corp. v. Barkley (In re Anthony), 302 B.R. 843 (Bankr. N.D. Miss. 2003), wherein Judge David W. Houston, III, held that *res judicata* did not apply to bar a trustee's adversary claims against 1st Franklin following the entry of an order sustaining the trustee's motion to allow 1st Franklin's uncontested proof of claim. Yet, in the Anthony case, the trustee did not have knowledge of any potential causes against 1st Franklin at the time the order sustaining the motion to allow 1st Franklin's proof of claim was entered.

To the contrary, in the case at bar, the Trustee not only contested the Proof of Claim by filing an Objection, which resulted in the disallowance of the exact costs and fees giving rise to the Complaint, but he also included language in the Order on the Trustee's Objection which demonstrates his awareness that potential claims might exist against Wachovia. Thus, the Trustee could have and should have raised and joined those potential claims with the Trustee's Objection in an adversary proceeding rather than attempt to preserve them through the language included in the Order on the Trustee's Objection.[4] *See* In re Baudoin, 981 F.3d at 739 ("Any attempt by the parties to relitigate any of the matters that were raised *or could have been raised* therein is barred under the doctrine of *res judicata*.")(emphasis in original); Simmons v. Chatham Nursing Home, Inc., 93 F.Supp.2d 1265, 1267 (S.D. Ga. 2000)(quoting Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1356-57 (11th Cir. 1998))("res judicata bars 'not only the precise legal theory presented in the previous litigation, but . . . all legal theories and claims arising out of the same operative

[4] The Trustee explained at the Hearings that one of his primary objectives in entering the Order on the Trustee's Objection prior to filing the Complaint was to expedite the claims payment process, which was ongoing in the underlying bankruptcy case, while preserving his ability to conduct discovery regarding the propriety of the fees and costs charged by Wachovia through the Adversary. The Court observes that, as an alternative to the entry of such an order in the underlying bankruptcy case, the Trustee has options, including utilizing Federal Rule of Bankruptcy Procedure 2004, to obtain information and documents.

nucleus of fact'"); Morales v. U.S. (In re Morales), 2000 WL 33249006, *2 (Dk. Nev. 2000)(quoting Cabrera v. City of Huntington Park, 159 F.3d 374, 381 (9th Cir. 1998))("Res judicata, also known as claim preclusion, prohibits the litigation in a subsequent action of any claims that were raised or could have been raised in the prior action.").

For the reasons discussed above, the Court concludes that the Trustee is precluded by the doctrine of *res judicata* from relitigating the causes of action set forth in the Complaint. Consequently, the Motion is well taken and should be granted.

IT IS, THEREFORE, ORDERED that the Motion is granted.

A separate final judgment will be entered in accordance with Rules 7054 and 9021.

DATED, this the 8th day of June, 2007.

/ s / Neil P. Olack
NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE