UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE:

TIMOTHY BROWN AND CHIQUETTA BROWN,	**CASE NO. 10-10443-NPO**
DEBTORS.	**CHAPTER 13**
TIMOTHY BROWN AND CHIQUETTA BROWN	**PLAINTIFFS**
VS.	**ADV. PROC. NO. 10-01210-NPO**
AMERICAN HOME MORTGAGE SERVICING, INC. AND WELLS FARGO BANK, N.A., AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2001-C, ASSET-BACKED CERTIFICATES, SERIES 2001-C	**DEFENDANTS**

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

There came on for consideration the Defendants' Motion for Summary Judgment and Memorandum in Support (the "Motion") (Adv. Dkt. 42)[1] filed by American Home Mortgage Servicing, Inc. ("AHMSI") and Wells Fargo Bank, N.A. ("Wells Fargo"), as Trustee for Option One Mortgage Loan Trust 2001-C, Asset-Backed Certificates, Series 2001-C ("Option One Securitized Trust"), in the above-styled adversary proceeding (the "Adversary"). Together, AHMSI and Wells Fargo are referred to as the "Defendants." The Defendants are represented by James E. Bailey III, and Timothy Brown ("Mr. Brown") and Chiquetta Brown ("Mrs. Brown") (together, the "Browns")

[1] Citations to the record are as follows: (1) citations to docket entries in this adversary proceeding, Adv. Proc. No. 10-01210-NPO, are cited as "(Adv. Dkt. ___)" and (2) citations to docket entries in the main bankruptcy case, Case No. 10-10443-NPO, are cited as "(Dkt. ___)".

are represented by Frank H. Coxwell. The Browns did not file any response to the Motion as was required by the Uniform Local Rules of the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi (the "Local Rules").[2] As a result, this Court has only the Motion before it to consider. After reviewing the Motion and the exhibits attached thereto, the Court finds that the Motion should be granted in part and denied in part.[3]

Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(B). Notice of the Motion was proper under the circumstances.

Facts[4]

1. On May 11, 2001, Mr. Brown entered into a promissory note (the "Balloon Note") with Option One Mortgage Corporation ("Option One Mortgage") secured by a deed of trust (the "Deed of Trust") on his residence located at 2601 Kay White Circle in Greenwood, Mississippi (the "Subject Property"). (Def. Exs. 1-2).[5]

2. The Balloon Note obligated Mr. Brown to pay Option One Mortgage, beginning on

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[2] The Local Rules provide that "[t]he respondent shall file its response and memorandum brief within 21 days of service of the motion for summary judgment and supporting memorandum." MISS. BANKR. L.R. 7056-1(3)(B). Here, the Defendants filed the Motion on March 19, 2012. Therefore, the last day for the Browns to file a timely response was April 9, 2012. As of the date of this Opinion, the Browns had not filed any response to the Motion.

[3] Specifically, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

[4] These facts consist of the allegations in the Motion and in the documents attached to the Motion.

[5] Hereinafter, exhibits attached to the Motion are cited as "(Def. Ex. ___)".

July 1, 2001, the principal amount of $50,400.00, plus interest at 9.475%, in monthly installments of $422.87 until June 1, 2016, at which time any outstanding balance would become due in full. (Def. Ex. 1).

3. The Balloon Note provided that the "Lender may transfer this Note" and defined a "Note Holder" as the "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note." (Def. Ex. 1 at ¶ 1).

4. On May 24, 2001, Mr. Brown and Option One Mortgage entered into an Assignment of Deed of Trust whereby Mr. Brown assigned the Deed of Trust to Option One Mortgage. (Def. Ex. 3).

5. On July 1, 2001, Option One Mortgage, as the originator of the loan, "transfer[red], assign[ed], set over and otherwise convey[ed] in trust" to Wells Fargo, without recourse, all of its rights and interests in each mortgage loan, including but not limited to, those endorsed in blank[6] or endorsed as "[p]ay to the Order of Wells Fargo Bank Minnesota, N.A., as Trustee for registered Holders of Option One Mortgage Loan Trust 2001-C, Asset-Backed Certificates, Series 2001-C, without recourse." (Def. Ex. 4 at 3). As a result of this transfer, according to the Defendants, Wells Fargo became the holder in due course of the Balloon Note. (Mot. at 3).

6. Sometime after Mr. Brown entered into the Balloon Note, Option One Mortgage endorsed the Balloon Note as, "PAY TO THE ORDER OF Wells Fargo Bank Minnesota, N.A., as Trustee for registered Holders of Option One Mortgage Loan Trust 2001-C, Asset-Backed Certificates, Series 2001-C" without recourse. (Def. Ex. 1 at 3).

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[6] All notes endorsed in blank were to be subsequently endorsed over to Wells Fargo in accordance with the arrangement between the parties. (Def. Ex. 4).

First Bankruptcy Case

7. On September 25, 2003, Mr. Brown filed a voluntary petition for relief under chapter 13 of the United States Bankruptcy Code[7] (the "First Bankruptcy Case"). Mrs. Brown was not a joint debtor in the First Bankruptcy Case. (No. 03-16136-DWH, Dkt. 1).

8. Mr. Brown filed a proposed chapter 13 plan on October 3, 2003. (No. 03-16136-DWH, Dkt. 3). The chapter 13 plan proposed to pay Option One Mortgage $485.65 per month for 60 months.

9. On October 14, 2003, Option One Mortgage filed its proof of claim. (Mot. at 4, ¶ 8).

10. On November 26, 2003, Option One Mortgage filed its Objections to Confirmation of Chapter 13 Plan (the "Plan Objection") (No. 03-16136-DWH, Dkt. 14). In the Plan Objection, Option One Mortgage asserted that Mr. Brown was delinquent in his payments on the Balloon Note. Id. at ¶ 2. According to the Plan Objection, between July, 2003 and November, 2003, Mr. Brown accrued a total arrearage of $3,708.37 as a result of his failure to make payments on the Balloon Note each month. Option One Mortgage claimed that the proposed chapter 13 plan was not filed in good faith and did not make adequate provisions for its secured claim. Id. at ¶ 5.

11. To resolve the Plan Objection, Mr. Brown and Option One Mortgage entered into an Agreed Order (No. 03-16136-DWH, Dkt. 16) whereby Mr. Brown agreed to pay the total amount of the arrearage owed on his Balloon Note and to continue making monthly payments upon confirmation of his chapter 13 plan.

12. On January 20, 2004, an Order Confirming the Debtor's Plan, Awarding a Fee to the

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[7] "Bankruptcy Code" or "Code" refers to the United States Bankruptcy Code located at Title 11 of the United States Code. All code sections hereinafter will refer to the Bankruptcy Code unless specifically noted otherwise.

Debtor's Attorney and Related Orders (No. 03-16136-DWH, Dkt. 17) was entered.

13. On February 15, 2006, an Order Finding that Long Term Debt Treated Per 1322(B)(5) of Option One Mortgage is Current and Defaults are Cured (the "Order Finding Mortgage Current") (No. 03-16136-DWH, Dkt. 31) was entered. In the Order Finding Mortgage Current, the Court deemed the Balloon Note current through January 27, 2006.

14. Mr. Brown completed his plan payments and on April 4, 2006, received a discharge of his debts. (No. 03-16136-DWH, Dkt. 34).

15. On March 17, 2008, Option One Mortgage entered into a purchase agreement (the "Purchase Agreement") with AH Mortgage Acquisition Co., Inc.[8] in which Option One Mortgage agreed to sell and assign to AH Mortgage Acquisition Co., Inc. certain assets, including certain servicing rights. (Def. Ex. 6). As a result of entering into the Purchase Agreement with Option One Mortgage, AH Mortgage Acquisition Co., Inc. became the servicer of the Balloon Note, according to the Defendants. (Mot. at 4, ¶ 4).

16. Thereafter, on April 14, 2008, AH Mortgage Acquisition Co., Inc. amended its Amended and Restated Certificate of Incorporation in order to change its name to American Home Mortgage Servicing, Inc. ("AHMSI"). (Def. Ex. 7).

Current Bankruptcy Case

17. As permitted by § 302,[9] the Browns filed a joint petition (the "Petition") for relief

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[8] The Purchase Agreement included other entities whose identities are irrelevant to the Motion. (Def. Ex. 6).

[9] Section 302 permits the commencement of a joint case by the filing of a single petition by an individual (eligible to be a debtor under the relevant chapter) and the individual's spouse. 11 U.S.C. § 302(a). Although the estates are jointly administered, they are treated separately unless the court determines otherwise. 11 U.S.C. § 302(b); FED. R. BANKR. P. 1015.

under chapter 13 of the Code (the "Current Bankruptcy Case") on January 30, 2010. (Dkt 1).

18. On "Schedule D" to the Petition, the Browns listed "American Home Mortgage" as a creditor holding a $47,098.00 claim secured by the Subject Property and an unsecured, arrearage claim of $6,640.94. (Dkt. 1 at 13, Def. Ex. 14). They also listed American Home Mortgage as a creditor in the Verification of Creditor Matrix. (Dkt. 7, Def. Ex. 15).

Proof of Claim

19 On February 11, 2010, the Defendants filed a proof of claim (the "POC") (Cl. No.1-1, Def. Ex. 16) using the official proof of claim form (the "Official Form 10"). The POC listed the name of the creditor as "Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2001-C, Asset-Backed Certificates, Series 2001-C" and gave the "[n]ame and address where notices should be sent" and the "[n]ame and address where payment should be sent" as "AHMSI." (Cl. No.1-1, Def. Ex. 16).

20. The amount of the Defendants' claim against Mr. Brown, according to the POC, was $57,101.23 and was secured by the Subject Property. (Cl. No. 1-1, Def. Ex. 16).

21. The Defendants attached seven documents to the POC in support of its claim, including: (1) an itemization of the charges (the "Itemization"), (2) the Deed of Trust, (3) the Balloon Note, (4) two invoices for legal services rendered by Adams & Edens, PA, and (5) two invoices for legal services rendered by Miller and Clark, P.C. Three of the four invoices attached to the POC were for legal services rendered during the First Bankruptcy Case.

22. The Itemization listed the total debt owed to the Defendants by Mr. Brown as $57,101.23. This $57,101.23 debt included ten missed payments on the Balloon Note from April, 2009, until January, 2010, in the total amount of $4,228.70, interest in the amount of $4,156.05,

"Attorney Fees and Costs," in the amount of $1,250.00, and "Other Charges," in the amount of $4,698.72. (Cl. No. 1-1, Def. Ex. 16).

Plan Confirmation in Current Bankruptcy Case

23. On April 29, 2010, an Order Confirming the Debtor's Plan, Awarding a Fee to the Debtor's Attorney and Related Orders (the "Order Confirming Plan in Current Bankruptcy Case") (Dkt. 30) was entered.

24. In the Order Confirming Plan in Current Bankruptcy Case, the Browns agreed to pay through the plan the current Balloon Note payment of $422.87, plus an additional $176.67 per month for "[m]ortgage [a]rrearage payments." (Dkt. 30 at 4).

Adversary

25. On December 4, 2010, the Browns commenced the Adversary by filing a Complaint (Adv. Dkt. 1) against the Defendants seeking damages and other relief based on the following six claims: (1) the Defendants do not own or hold the loan that is the basis for the POC (the "Lack of Standing Claim") (Compl. at ¶¶ 26-35); (2) the Defendants included in the POC certain fees and charges incurred during the First Bankruptcy Case (the "Improper Charges Claim")(Compl. at ¶¶ 36-44); (3) the Defendants violated § 506(b) and Rule 2016 of the Federal Rules of Bankruptcy Procedure by charging fees not previously approved by the Court (the "Violation of § 506(b) Claim") (Compl. at ¶¶ 45-47); (4) the Defendants committed fraud on the Court (the "Fraud on the Court Claim") (Compl. at ¶¶ 48-51); (5) the Defendants' conduct constituted contempt of court which is sanctionable under § 105 (the "Contempt Claim") (Compl. at ¶¶ 52-54); and (6) the Defendants filed a false POC under § 105 (the "False POC Claim")(Compl. at ¶¶ 55-58).

26. In response to the Complaint, the Defendants filed a Motion to Dismiss Adversary

Complaint (the "Motion to Dismiss") on the ground that the Browns failed to state a claim upon which relief can be granted pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, which incorporates by reference Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Adv. Dkt. 11). The Defendants argued that Mrs. Brown had no cause of action against them because she was not a party to the Balloon Note on which the POC was based and because the POC was filed solely against Mr. Brown. The Defendants also challenged the sufficiency of the factual allegations supporting the claims of the Browns, mainly on the ground that the POC reflected a valid debt without regard to whether it also included fees and charges incurred during the pendency of the First Bankruptcy Case.

27. On March 10, 2011, a hearing was held on the Motion to Dismiss. After the hearing, the Court entered the Order Granting in Part and Denying in Part Motion to Dismiss Adversary Complaint (the "Order on Motion to Dismiss") (Adv. Dkt. 16). In the Order on Motion to Dismiss, the Court found that Mrs. Brown, as the wife of Mr. Brown, had homestead rights in the real property that was the subject of the Adversary, and that her interest was sufficient to state a cause of action against the Defendants. Also, the Court dismissed with prejudice the Contempt Claim, to the extent the Browns sought punitive damages based on the Defendants' alleged criminal contempt, and dismissed without prejudice the Fraud on the Court Claim.

28. Thereafter, the Browns filed an Amended Complaint (Adv. Dkt. 18), which did not include the previously dismissed Fraud on the Court Claim and which limited the Contempt Claim, but which did include all of the remaining claims alleged in the initial Complaint. For clarification, the five remaining claims in the Amended Complaint are: (1) Lack of Standing Claim, (2) Improper Charges Claim, (3) Violation of § 506(b) Claim, (4) Civil Contempt Claim, and (5) False POC Claim.

29. The Defendants filed an Answer and Affirmative Defenses (Adv. Dkt. 19) to the Amended Complaint on April 13, 2011.

30. On March 19, 2012, the Defendants filed the Motion seeking summary judgment on all claims asserted in the Amended Complaint. As previously mentioned, the Browns failed to file any response to the Motion as was required by Local Rule 7056-1(3)(B).

Discussion

A. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(a),[10] made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056, summary judgment is appropriate when viewing the evidence in the light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *see* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

"Summary judgment . . . serves, among other ways, to root out, narrow, and focus the issues, if not resolve them completely." Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1415 (5th Cir. 1993). Ultimately, the role of this Court is "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249; *see* Hamilton v. Segue Software Inc., 232 F.3d 473, 477 (5th Cir. 2000).

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[10] Pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, Rule 56 of the Federal Rules of Civil Procedure was amended, as of December 1, 2010. The amendment did not change the standard for granting summary judgment. *See* FED. R. CIV. P. 56 advisory committee's note to 2010 Amendments ("The standard for granting summary judgment remains unchanged.").

If the nonmoving party fails to file a response to a summary judgment motion, the Court cannot simply grant summary judgment by default to the movant. Eversley v. Mbank Dallas, 843 F.2d 172, 174 (5th Cir. 1988). "[H]owever, such failure does permit the court to accept as undisputed the evidence set forth in support of a movant's motion for summary judgment." Reed v. Litton Loan Servicing, LP, No. 1:10-CV-217, 2011 WL 817357, *3 (E.D. Tex. Jan. 27, 2011) (citation omitted).

Because the Browns did not file a response to the Motion, they are "relegated to [their] unsworn pleading[], [the Amended Complaint], . . . which do[es] not constitute competent summary judgment evidence." Frobish v. City of Irving, Tex., No. 3:05-CV-1586-L, 2008 WL 2987193, at *4 (N.D. Tex. July 31, 2008) (citation omitted). An unsworn complaint does not raise a genuine issue of material fact sufficient to deny a party the right to summary judgment. Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300, 1306 (5th Cir. 1988). Thus, this Court refers to the allegations presented by the Browns in the Amended Complaint simply to provide a context for the Defendants' arguments in their Motion. Even absent the presence of any genuine issue, the Court has the discretion to deny motions for summary judgment and allow parties to proceed to trial so that the record might be more fully developed for the trier of fact. *See* Kunin v. Feofanov, 69 F.3d 59, 62 (5th Cir. 1995); Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994); Veillon v. Exploration Services, Inc., 876 F.2d 1197, 1200 (5th Cir. 1989).

B. Lack of Standing Claim

On February 11, 2010, AHMSI filed the POC (Cl. No.1-1, Def. Ex. 16), in the amount of $57,101.23, secured by the Deed of Trust on the Subject Property in the Current Bankruptcy Case. On the POC, the Defendants identified the name of the creditor as "Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2001-C, Asset-Backed Certificates, Series 2001-C." (Cl.

No. 1-1).

The Browns alleged in the Amended Complaint that neither Wells Fargo nor AHMSI had standing to file the POC in the Current Bankruptcy Case, because neither Wells Fargo, as the trustee for the Option One Securitized Trust, nor AHMSI qualified as a real party in interest under Federal Rule of Civil Procedure 17(a).[11] (Am. Compl. ¶ 35). The reason why the Defendants lacked standing, according to the Browns, was because neither the Option One Securitized Trust, for which Wells Fargo was the trustee, nor AHMSI had shown it was a holder in due course of the Balloon Note. (Am. Compl. ¶ 28-29). The Browns maintained in their Amended Complaint that to properly establish standing, the Option One Securitized Trust had to prove a transfer of the Balloon Note and Deed of Trust from Option One Mortgage, which it had not shown. (Am. Compl. ¶ 34). Moreover, AHMSI lacked standing to file the POC because, according to the Browns, "AHMSI is only a servicer, a sub-servicer or a default-servicer of the debt pursuant to a pooling and servicing agreement with Option One Securitized Trust" and "AHMSI ha[d] not demonstrated it ha[d] authority to act on behalf of the current 'owner and holder' of the Deed of Trust [and] Note." (Am. Compl. ¶¶ 29, 31).

The Defendants insist in the Motion that they both had standing to file the POC in the Current Bankruptcy Case. (Mot. at 10) Because Option One Mortgage endorsed the Balloon Note to Wells Fargo, Wells Fargo was the holder in due course of the Balloon Note. (Mot. at 10). The Defendants contend that Wells Fargo, as the holder in due course, was entitled to enforce the Balloon Note under Mississippi law, and, thus, had standing to file the POC. (Mot. at 10). The Defendants further maintain that AHMSI, as the Balloon Note's servicer, likewise had standing to file the POC. (Mot.

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[11] Rule 17 of the Federal Rule of Civil Procedure, made applicable to bankruptcy proceedings by Rule 7017 of the Federal Rules of Bankruptcy Procedure, requires that, "[a]n action . . . be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a).

at 11). The Defendants rely upon the Purchase Agreement between Option One Mortgage and AH Mortgage Acquisition Co., Inc.[12] as undisputed proof that AHMSI was the servicer of the Balloon Note. The Court considers the standing issues against AHMSI and Wells Fargo in turn.

1. AHMSI

Although the Fifth Circuit Court of Appeals has not yet decided the issue, the Eleventh Circuit Court of Appeals has found that a loan servicer is a real party in interest with standing to file a POC. Greer v. O'Dell, 305 F.3d 1297, 1302 (11th Cir. 2002). The Court agrees with the reasoning of the Eleventh Circuit in Greer that "[t]he Bankruptcy Code and Rule 17 of the Federal Rules of Procedure each have liberal standing provisions, designed to allow a party to appear as long as it has a direct stake in the litigation under the particular circumstances." Id. Many courts, including other bankruptcy courts in the Fifth Circuit, have adopted a similar position, finding that a loan servicer has standing to file a proof of claim "by virtue of a pecuniary interest in collecting payments under the terms of a note." Gulley v. Countrywide Home Loans, Inc. (In re Gulley), 436 B.R. 878, 892 (Bankr. N.D. Tex. 2010) (citations omitted).

The Court finds that as the servicer of the Balloon Note, AHMSI had standing to file the POC. This finding does not thwart the purpose behind Federal Rule of Civil Procedure 17(a), which is to protect defendants from subsequent actions which may be taken by the actual party entitled to recover that is, to ensure that judgments will have their proper *res judicata* effect. Greer, 305 F.3d at 1299. Here, as more fully discussed below, Option One Mortgage had fully relinquished its rights in the Balloon Note to Wells Fargo, the alleged holder of the Balloon Note, and to AHMSI, the loan

[12] As stated previously, AH Mortgage Acquisition Co., Inc. changed its name to American Home Mortgage Servicing, Inc. ("AHMSI") in 2008.

servicer. As a result, Option One Mortgage no longer has any pecuniary interest in the Balloon Note, was no longer a real party in interest, and would not have had standing to file a proof of claim in the Current Bankruptcy Case. Thus, only AHMSI, as the Balloon Note's servicer, and Wells Fargo, as Trustee for the Option One Securitized Trust, could have asserted the interests of the original lender, Option One Mortgage, in the Current Bankruptcy Case.

2. Wells Fargo, as Trustee for the Option One Securitized Trust

The Court next turns to the issue of whether Wells Fargo, as Trustee for the Option One Securitized Trust, is the holder in due course of the Balloon Note and, thus, had standing to file the POC. Under Mississippi law, the holder of an instrument may enforce the instrument. MISS. CODE ANN. § 75-3-301. To establish that a party is a holder in due course, Mississippi law provides that six elements must be met:

> [t]he holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in Section 75-3-306, and (vi) without notice that any party has a defense or claim in recoupment described in Section 75-3-305(a).

MISS. CODE. ANN. § 75-3-302(a)(2). Other bankruptcy courts, interpreting similar state code provisions, have found that the holder of a note has standing to file a proof of claim. *See, e.g.,* In re Smoak, 461 B.R. 510, 519 (Bankr. S.D. Ohio 2011) (finding holder of negotiable instrument under the Ohio Uniform Commercial Code had standing to file a proof of claim and was real party in interest).

The Browns did not allege that Wells Fargo failed to meet any of the aforementioned elements necessary to find Wells Fargo a holder in due course under Mississippi law. Instead, the

Browns argued that the Option One Securitized Trust, for which Wells Fargo is the trustee, is not a holder in due course of the Balloon Note because the Defendants have produced no evidence which shows the transfer of the Balloon Note from Option One Mortgage to the Option One Securitized Trust. (Am. Compl. ¶ 34). This Court disagrees.

In the Motion, the Defendants presented this Court with undisputed evidence of the chain of title from Option One Mortgage, the originator of the Balloon Note, to Wells Fargo, as Trustee for the Option One Securitized Trust, to prove that Wells Fargo, as Trustee for the Option One Securitized Trust, is the holder in due course of the Balloon Note, and as a result, had standing to file the POC. Originally, the Browns entered into the Balloon Note with Option One Mortgage. Shortly thereafter, Option One Mortgage entered into the Purchase Agreement with Wells Fargo which created the Option One Securitized Trust.[13] Additionally, the Purchase Agreement between Option One Mortgage and Wells Fargo conveyed in trust to Wells Fargo all of its rights in all mortgage notes which it endorsed, "PAY TO THE ORDER OF Wells Fargo Bank Minnesota, N.A., as Trustee for registered Holders of Option One Mortgage Trust 2001-C, Asset-Backed Certificates, Series 2001-C, WITHOUT RECOURSE." (Def. Ex. 1 at 3). Here, at some point after the Browns entered into the Balloon Note with Option One Mortgage, the Balloon Note was endorsed to Wells Fargo, as Trustee for the Option One Securitized Trust. As a result of this series of transactions, Wells Fargo became the holder in due course of the Balloon Note and under Mississippi law became free to enforce its terms. Thus, there is no genuine dispute that both AHMSI, as the Balloon Note's servicer, and Wells Fargo, as the holder in due course of the Balloon Note, had standing to file the

[13] The Purchase Agreement between Option One Mortgage and Wells Fargo defines the Option One Securitized Trust as "[a]ll of the assets of Option One Mortgage Loan Trust 2001-C, which is the trust created hereunder." (Def. Ex. 4 at 2).

POC. Therefore, the Court finds that as a matter of law, the Defendants are entitled to summary judgment against the Browns on the Lack of Standing Claim.

C. Improper Charges Claim

Next, the Browns alleged in the Amended Complaint that the POC filed by the Defendants in the Current Bankruptcy Case included "improper fees and overstate[d] the amounts owed, if any, to Defendants." (Am. Compl. ¶ 37). Specifically, the Browns alleged that certain "Attorney Fees and Costs" and "Other Charges" included in the Itemization to the POC, were incurred during the First Bankruptcy Case. Yet, according to the Browns, the Defendants never sought approval from the Court for these "Attorney Fees and Costs" and "Other Charges" in accordance with Rule 2016 of the Federal Rules of Bankruptcy Procedure.[14] Moreover, the Browns alleged that the Defendants did not respond to the Order Finding Mortgage Current. The Browns further alleged that the POC was "fatally defective" and that all such fees and charges were "unreasonable per se" because the Defendants did not attach sufficient documentation to the POC to account for the "Attorney Fees and Costs" and "Other Charges" allegedly owed by Mr. Brown. (Am. Compl. ¶ 40). In the Motion, the Defendants maintain that they are entitled to summary judgment on the Improper Charges Claim as the Browns have failed to come forward with any evidence that the "Attorney Fees and Costs" or "Other Charges" were unreasonable or "not actually incurred." (Mot. at 12).

When an individual files a bankruptcy petition, each of his creditors is entitled to file a proof

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[14] Under Federal Rule of Bankruptcy Procedure 2016, a creditor who seeks to recover charges must file with the court an application seeking approval of those charges. FED. R. BANKR. P. 2016. The Rule 2016 procedure, which requires thorough documentation from a claimant, allows the court, the debtor, and other parties in interest to carefully review each application. It is this detailed application process that courts rely on in gauging the reasonableness of fee requests under § 506(b).

of claim, that is, a document proving its "right to payment" against the debtor's estate. Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 449 (2007). With limited exceptions, the filing of a proof of claim in accordance with § 501 is the first step toward a creditor's participation in any distribution of the bankruptcy estate. 4 COLLIER ON BANKRUPTCY ¶ 501.01[2][a] (16th ed. 2011). In chapter 13 cases, only those claims that have been "allowed" are entitled to participate in a distribution under a confirmed plan. 4 COLLIER ON BANKRUPTCY ¶ 501.01[2][b] (16th ed. 2011). The "allowance" of a claim or interest filed under § 501 is determined pursuant to § 502. A proof of claim that complies with Rule 3001(a)[15] of the Federal Rules of Bankruptcy Procedure by substantially conforming to Official Form 10, is *prima facie* evidence of the claim or interest under § 502. In re Armstrong, 320 B.R. 97, 102 (N.D. Tex. 2005) ("Sections 501 and 502 of the Bankruptcy Code and Bankruptcy Rule 3001 provide that 'a party correctly filing a proof of claim is deemed to have established a *prima facie* case against Debtor's assets.'").

This Court must decide as a threshold matter whether the POC filed by the Defendants in the Current Bankruptcy Case substantially conformed to Official Form 10. If so, then the POC serves as *prima facie* evidence of the validity and amount of the Defendants' claim against Mr. Brown and the burden of production shifts to the Browns to dispute the validity and amount of the Defendants' claims. If the POC did not substantially conform to Official Form 10, then the POC is deprived of any presumption that it would otherwise have enjoyed and the burden of persuasion remains with the Defendants to prove the validity and amount of its claim by a preponderance of the evidence.

Official Form 10 required the Defendants to attach to the POC "any documents that support

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[15] Rule 3001 was amended in 2011. That amendment did not become effective until December 1, 2011. The Court applies the version of Rule 3001 in effect when the POC was filed.

the claim," that is, any documents necessary for the Court to assess fully the validity and amount of their claim.[16] In re Armstrong, 320 B.R. at 104. In that regard, the Defendants attached the Itemization, which is a summary of the fees and charges they alleged Mr. Brown owed them. From the total debt of $57,101.23, the Defendants claimed an arrearage of $4,228.70, interest of $4,156.05, "Attorney Fees and Costs" of $1,250.00, and "Other Charges" of $4,698.72. According to the allegations in the Amended Complaint, the "Attorney Fees and Costs" and "Other Charges" included in the POC grossly overstated the amount of Mr. Brown's debt.

In addition to the Itemization, the Defendants attached to the POC the Balloon Note and Deed of Trust. (Cl. No. 1-1, Def. Ex. 16). They also attached four invoices for legal services. They did not attach, however, any documents to the POC that would help the Court assess the validity and amount of the "Other Charges." As a result, the Court finds that the POC was not properly filed because it did not substantially conform to the requirements of Official Form 10. The Defendants, therefore, may not rely on the POC as *prima facie* evidence of the validity or amount of the Defendants' claim against Mr. Brown in the Current Bankruptcy Case.

This finding by the Court does not automatically warrant the disallowance of the Defendants' claim, notwithstanding the Browns' allegation in the Amended Complaint that the POC was "fatally defective." Rather, the insufficiency of a proof of claim merely affects the burdens of proof between

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[16] At the time the POC was filed, Rule 3001(c) read, in pertinent part, as follows:

> When a claim . . . is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

FED. R. BANKR. P. 3001(c). The 2011 amendment did not change this language but moved it to Rule 3001(c)(1), and created an entirely new subsection, Rule 3001(c)(2).

the parties. An insufficient proof of claim "is merely deprived of any *prima facie* validity which it could otherwise have obtained." In re Colvin, 11-51241-C, 2012 WL 1123055, at *3 (Bankr. W.D. Tex. Apr. 4, 2012) (citation omitted).

If the insufficiency of the POC were the sole basis for the Browns' Improper Charges Claim, the Court's inquiry would end here. The Browns, however, objected to the substance of the Defendants' claim. The Court next turns to whether a material dispute exists regarding the validity or amount of the Defendants' claim and whether the Defendants are entitled to judgment as a matter of law. In this analysis, the Defendants do not benefit from any favorable presumption.

Attached to the POC were four invoices for legal services. The first invoice for legal services was for charges submitted for payment on February 10, 2010, during the Current Bankruptcy Case, which was filed on January 30, 2010. The second, third, and fourth invoices, however, appear to have been incurred during the First Bankruptcy Case, which was pending from September 25, 2003, through April 4, 2006. The second invoice listed fees incurred for an "Objection to Confirmation" and is dated December 17, 2003. The third invoice described the category of fees as "Proof of Claim" and is dated October 10, 2003.[17] Finally, the fourth invoice described the category of fees as an "Amended Proof of Claim" and is dated August 2, 2004. Thus, the POC appears on its face to have included charges which were incurred during the First Bankruptcy Case. Yet, the Order Finding Mortgage Current was entered on February 15, 2006. "Section 502(b)(1) requires disallowance of a claim to the extent that 'such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law.'" 4 COLLIER ON BANKRUPTCY ¶

[17] Although the third invoice predates the second invoice, it was attached to the POC in third place and, therefore, is referred to as the third invoice.

502.03[2][a] (16th ed. 2011).

The Court finds that the Defendants have not shown the absence of material facts regarding the enforceability of their claims against Mr. Brown for legal services incurred during the First Bankruptcy Case. *See* In re Natl. Gypsum Co., 118 F.3d 1056, 1063 (5th Cir. 1997). Moreover, because it appears that the inclusion of at least some of these charges in the POC may have been improper, the Defendants have not shown they are entitled to a judgment as a matter of law. Therefore, summary judgment on the Improper Charges Claim should be denied.

D. Violation of § 506(b) Claim

In the Amended Complaint, the Browns sought actual damages and legal fees for the Defendants' alleged violations of § 506(b)[18] and Rule 2016 of the Federal Rules of Bankruptcy Procedure. (Am. Compl. ¶ 46-47). According to the Browns, the inclusion of certain legal fees and costs in the POC "without any prior notice or Court approval constitute[d] willful, intentional, gross and flagrant violations of . . . Section 506 . . . and Rule 2016." (Am. Compl. ¶ 46). The Defendants contend in the Motion that the Browns are not entitled to damages or attorney's fees as a matter of law because the Browns have failed to show that they incurred any actual losses as a result of the Defendants' alleged violations. (Mot. at 13).

Although it is clear that in order for the Defendants to collect reasonable attorney's fees or other charges, the Defendants had to comply with the requirements of § 506(b), it is not so clear whether the statute creates a private right of action in favor of the Browns based on the facts presented here. *See* Myles v. Wells Fargo (In re Myles), 395 B.R. 599, 607 (Bankr. M.D. La. 2008). The Fifth

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[18] If the value of a creditor's collateral exceeds the amount of its claim, the creditor may recover "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose." 11 U.S.C. § 506(b).

Circuit has not yet decided the issue. Id. Some courts that have addressed the issue have found that it does not because it does not meet the four-factor test enumerated by the United States Supreme Court in Cort v. Ash, 422 U.S. 66 (1975). *See, e.g.*, Willis v. Chase Manhattan Mortg. Corp., No. CIV. A. 01-CV-1312, 2001 WL 1079547, at *2 (E.D. Pa. Sept. 14, 2011) (holding that neither the legislative history nor statutory text of § 506(b) suggested an intent by Congress to create a private right of action). The uncertainty as to whether the Defendants' alleged violation of § 506(b) provides the Browns with a private cause of action against the Defendants is largely irrelevant because this Court has previously allowed a debtor to invoke § 105(a)[19] as a basis for awarding sanctions for a violation of § 506(b). In re Galloway, No. 09-01124-NPO, 2010 WL 364336 (Bankr. N.D. Miss. Jan. 29, 2010). Thus, the Court finds that the Defendants have not shown that they are entitled to summary judgment as a matter of law on the Violation of § 506(b) Claim.

E. Civil Contempt Claim

In the Amended Complaint, the Browns maintained that the fees asserted by the Defendants in the POC violated this Court's Order Finding Mortgage Current. (Am. Compl. ¶ 49). The Defendants simply counter in the Motion they are entitled to summary judgment because the Browns have failed to show they incurred any actual damages as a result of the Defendants' alleged contempt. (Mot. at 15).

An action for contempt of court may be either criminal or civil in nature. Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.), 108 F.3d 609, 612 (5th Cir. 1997) (citation omitted). If the intent behind the contempt order is to punish, then the order is for

[19] "Section 105(a) empowers courts to issue any orders and judgments necessary and appropriate to carry out other provisions of the Bankruptcy Code." In re Myles, 395 B.R. at 608.

criminal contempt. Id. If, however, the intent "of the contempt order is to coerce compliance with a court order or to compensate another party for the contemnor's violation," the order is civil. Id.; *see also* Musslewhite v. O'Quinn (In re Musslewhite), 270 B.R. 72, 78 (S.D. Tex. 2000) (compensation can include reasonable attorney's fees). Bankruptcy courts have the power to hold entities in civil contempt under § 105(a), but not in criminal contempt. In re Sanchez, 372 B.R. 289, 309 (Bankr. S.D. Tex. 2007). The Court has previously dismissed with prejudice the Browns' claim for criminal contempt and punitive damages. To seek an order of civil contempt, the Browns must show by clear and convincing evidence 1) that a court order was in effect, 2) that the order required certain conduct by the Defendants, and 3) that the Defendants failed to comply with the court's order. Whitcraft v. Brown, 570 F.3d 268, 271 (5th Cir. 2009).

On February 15, 2006, this Court entered its Order Finding Mortgage Current. The Order Finding Mortgage Current stated that the Balloon Note was current and all defaults had been cured through January 27, 2006. The Defendants, however, attached to the POC three invoices for legal services rendered by Adams & Edens, P.A. and Miller & Clark, P.C. between 2003 and 2004, during the First Bankruptcy Case. These attorney's fees were included in the amount the Defendants claim they are entitled to recover from Mr. Brown in the Current Bankruptcy Case. Because the Defendants chose to include legal fees incurred during the First Bankruptcy Case in the POC, there is a question of law as to whether the Defendants are in contempt of the Order Finding Mortgage Current. As a result, the Defendants are not entitled to summary judgment as a matter of law on the Civil Contempt Claim.

F. False POC Claim

Finally, the Browns argue that the POC "is false and fraudulent in that it attempts to collect

amounts that are not owed, grossly overstates the amounts owed and knowingly misrepresents material facts related to the debt including the secured status of the alleged debt." (Am. Compl. ¶ 52). Thus, according to the Amended Complaint, this Court should award the Browns attorney's fees and actual damages pursuant to its equitable powers under § 105(a). (Am. Compl. ¶ 54). The Defendants counter that the Browns have presented no evidence that anything in the POC was false. (Mot. at 15). According to the Defendants, because they had standing to file the POC and because the Browns have not shown that they were damaged by the filing of the POC, entitled them to summary judgment on the False POC Claim. (Mot. at 16).

Unlike the Browns' derivative claim under § 105(a) for the Defendants' alleged violation of § 506(b), the Browns do not state any underlying statute for the Court to enforce through its equitable powers in support of its False POC Claim. Many courts have found that the Code, and specifically § 105(a), does not provide a private right of action against creditors who file false proofs of claims. In re Rodgers, 391 B.R. 317, 323 (Bankr. M.D. La. 2008); *see also* Stooksbury v. FSG Bank (In re Stooksbury), No. 08-3012, 2008 WL 2169452, at *3 (Bankr. E.D. Tenn. May 22, 2008) (finding "105(a) is not without limits, may not be used to circumvent the Bankruptcy Code, and does not create a private cause of action unless it is invoked in connection with another section of the Bankruptcy Code."). Debtors who believe that a creditor's proof of claim was filed "without proper prefiling investigation and support" may instead use Federal Rule of Bankruptcy Procedure 9011 to sanction creditors who file false proofs of claims. In re Rodgers, 391 B.R. at 323. The Browns do not attempt to sanction the Defendants for "grossly overstat[ing] the amounts owed" to Defendants by the Browns in the POC. (Am. Compl. ¶ 52). Instead, they seek damages and legal fees under its § 105 powers. (Am. Compl. ¶ 54). This Court, however, declines to create a private right of action

using its § 105 powers for filing a false proof of claim. As a result, the Defendants are entitled to summary judgment as a matter of law on the False POC Claim.

Conclusion

Accordingly, for the reasons set forth herein, the Court finds that the Motion should be granted in part and denied in part. Specifically, the Court finds: (1) that the Defendants are entitled to summary judgment on the Lack of Standing Claim and the False POC Claim and (2) that the Defendants are not entitled to summary judgment on the Improper Charges Claim, the Violation of § 506(b) Claim, and the Civil Contempt Claim. All other relief not expressly granted to the Defendants should be denied. A final judgment will not be entered until final disposition of the entire Adversary.

SO ORDERED.

Neil P. Olack
United States Bankruptcy Judge
Dated: July 6, 2012