



SO ORDERED,

A handwritten signature in blue ink that reads "Katharine M. Samson".

**Judge Katharine M. Samson  
United States Bankruptcy Judge  
Date Signed: August 2, 2016**

**The Order of the Court is set forth below. The docket reflects the date entered.**

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE: CLYDE J CARSON AND  
RAMONA D CARSON**

**CASE NO. 11-00271-KMS**

**DEBTORS**

**CHAPTER 13**

**ORDER GRANTING MOTION FOR  
DETERMINATION OF FINAL CURE OF MORTGAGE PAYMENT**

Before the Court is the Motion for Determination of Final Cure and Mortgage Payment re: Rule 3002.1 (Dkt. No. 118) filed by Trustee J.C. Bell (“the Trustee”) and the Response to Notice of Final Cure Payment filed by U.S. Bank, N.A., as trustee for Mid-State Trust VII by Ditech Financial LLC, as servicer with delegated authority (f/k/a “Green Tree”) (Claim 3-1 doc). The Court held a hearing on the motion on April 28, 2016. Dkt. No. 124. At the hearing, the Court provided the parties an opportunity to submit additional briefing, and, the parties having declined to do so, the Court took the matter under advisement on May 19, 2016. Dkt. No. 125. Green Tree asserts that the mortgage is not current because Debtors owe Green Tree for property

taxes it paid during the three years preceding discharge. Because Green Tree did not comply with Bankruptcy Rule<sup>1</sup> 3002.1, the Court grants the Trustee's motion.

### I. Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (K), & (O).<sup>2</sup>

### II. Findings of Fact

Clyde J. Carson and Ramona D. Carson filed their joint petition for Chapter 13 relief on January 26, 2011. Dkt. No. 1. The Carsons scheduled the secured debt on their home held by Walter Mortgage Company ("Walter Mortgage"). Dkt. No. 6 at 12. On February 16, 2011, Walter Mortgage filed a proof of claim in the amount of \$62,106.74. Claim 3-1 at 1. The deed of trust attached to the proof of claim provided that the Carsons would pay the property taxes. Claim 3-1 at 5. The Court confirmed the Carsons' Chapter 13 Plan on April 25, 2011, and the plan provided that the Carsons would pay their mortgage through the plan at \$476.00 per month. Dkt. No. 46 at 4 (Order Confirming Chapter 13 Plan); Dkt. No. 41 at 1 (Second Amended Chapter 13 Plan). Walter Mortgage filed two additional secured claims related to the Carsons' home mortgage. One was for reimbursement of force-placed insurance in the amount of \$1,213.00. Claim 11-1. And the second was for reimbursement of 2010 property taxes paid to the Chancery Clerk of Pike County in the amount of \$759.37. Claim 16-1. On January 23, 2013, Walter Mortgage transferred all three claims to Green Tree Servicing, LLC ("Green Tree"). Dkt. No. 72 (Claim 3-1); Dkt. No. 73 (Claim 11-1); Dkt. No. 74 (Claim 16-1). From 2012 to 2016,

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<sup>1</sup> For convenience, references to the Federal Rules of Bankruptcy Procedure are shortened to "Bankruptcy Rule \_\_\_".

<sup>2</sup> Pursuant to Federal Rule of Civil Procedure 52, made applicable here by Federal Rules of Bankruptcy Procedure 9014(c) and 7052, the following constitutes the findings of fact and conclusions of law of the Court.

Green Tree yearly force-placed insurance on the property, raising the Carsons' mortgage payment from \$476.00 to an approximate average of \$575.00.<sup>3</sup> In each case, Green Tree filed a notice of mortgage payment change.<sup>4</sup>

On February 19, 2016, the Trustee filed his Notice of Final Cure of Mortgage Payments related to Green Tree's claim. Dkt. No. 113. On March 2, 2016, Green Tree responded to the Trustee's Notice stating that the property taxes for 2011, 2013, 2014, and 2015 had not been paid. Claim No. 3-1 at doc. On March 21, 2016, the Trustee filed the Motion for Determination of Final Cure and Mortgage Payment re Rule 3002.1. Dkt. No. 118. On March 25, 2016, the Court granted both of the Carsons their discharge. Dkt. No. 121. On April 21, 2016, Green Tree responded to the Trustee's motion. Dkt. No. 123. On April 28, 2016, the Court held a hearing on the motion. At the hearing, the Trustee stated that he had paid the prepetition arrearage according to Green Tree's claim and had paid the ongoing mortgage obligation from March 2011 to January 2016. Green Tree stated that it had paid approximately \$4,300.00<sup>5</sup> in property taxes for three years when it was the Carsons' obligation to do so. The Court noted that, from the outset of the case, the Carsons' Schedule J for expenses did not itemize property taxes as an expense even though the mortgage payment did not contain an amount for escrow. Dkt. No. 6 at 22. The Court also noted that Green Tree had filed a mortgage payment change every year for force-placed insurance. At the end of the hearing, the Court provided Green Tree ten days to submit additional authority to support its opposition to the Trustee's motion. Dkt. No. 124. Green Tree

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<sup>3</sup> The yearly amounts are as follows: 2012 - \$567.06; 2013 - \$559.00, 2014 - \$580.45; 2015 - \$580.35; and 2016 - \$575.70.

<sup>4</sup> Attached to Green Tree's two most recent notices of mortgage payment changes are certificates of merger stating that Green Tree had merged with DT Holdings, LLC and Ditech Mortgage Corporation. The Court will continue, however, to refer to the creditor as Green Tree to prevent confusion.

<sup>5</sup> Green Tree's response to the Trustee's notice states that the unpaid taxes total \$4,333.76. Claim 3-1 doc at 1. The yearly amounts are as follows: 2011 - \$1,296.33, 2013 - \$1,472.39, 2014 - \$477.74, 2015 - \$1,087.30. *Id.* No unpaid amount was stated for 2012.

did not submit any additional authority. On May 19, 2016, the Court took the matter under advisement. Dkt. No. 125. On June 14, 2016, the Court held a telephonic status conference and requested that within five business days, Green Tree file supplemental documentation of the taxes it had paid on behalf of the Debtors. Dkt. No. 127. On June 23, 2016, Green Tree submitted additional documentation. Dkt. No. 130.

### III. Conclusions of Law

Bankruptcy Rule 3002.1 governs notices related to claims secured by a security interest in the debtor's principal residence. This rule was added in 2011 "to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan. It applies regardless of whether the trustee or the debtor is the disbursing agent for postpetition mortgage payments." Fed. R. Bankr. P. 3002.1 advisory committee's notes (2011 adoption). Under this rule, creditors are required to "serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges . . . within 180 days after the date on which the fees, expenses, or charges are incurred." Fed. R. Bankr. P. 3002.1(c). If a creditor fails to serve proper notice, the Court may "preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless[,] or award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure." Fed. R. Bankr. P. 3002.1(i). The Court may impose either or both sanctions. *Id.* The rule is intended to protect debtors from a last-minute surge in their debt based on charges that the creditor long knew about. When the lender complies with the rule, measures may be taken to prevent the debtor's immediate post-discharge default on the

mortgage, such as increasing the monthly plan payment to the lender and reducing the distribution to unsecured creditors.

The Court looks to recent case law applying Bankruptcy Rule 3002.1. In *In re Marks*, the court strictly applied the 180 day period to prohibit the creditor from recovering attorney's fees for time beyond 180 days prior to the notice filed with the court, finding that such notice was untimely as to those fees. *In re Marks*, 548 B.R. 703, 714 (Bankr. D.S.C. 2016).

In *In re Nieves*, the court stated that Bankruptcy "Rule 3002.1(d) requires that the Rule 3002.1(c) notice be prepared using [the official form] . . . And the form must be signed by the holder under penalty of perjury." *In re Nieves*, 499 B.R. 222, 224 (Bankr. D.P.R. 2013). The form also requires the mortgage lender to attach documentation of the increased expense. The *Nieves* court found failure to use the official form "or a substantially similar form of the [mortgage lender's] own crafting" fatal to an objection to the Trustee's Notice of Final Cure of Mortgage Payments. *Id.* at 225.

Here, Green Tree has neither timely filed its notice of post-petition fees and expenses nor has it used the official form or something substantially similar. The documents submitted by Green Tree reflect that the 2012, 2013, and 2014 taxes were paid by Green Tree on April 22, 2015.<sup>6</sup> Dkt. No. 130. It appears from the documents that the 2011 taxes may have been redeemed around the same time but there is nothing definitive to indicate payment. Dkt. No. 130. In any event, notice of these payments was not even attempted until March 2, 2016 well over 180 days from the date of the payments at issue.<sup>7</sup>

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<sup>6</sup> Under Mississippi law, ad valorem taxes "shall be paid on or before the first day of February next succeeding the date of the assessment and levying of such taxes." Miss. Code Ann. § 27-41-1 (1996). As a practical matter, the 2015 taxes were not due and payable until January 31, 2016. There is nothing in the record indicating that Green Tree has paid these taxes.

<sup>7</sup> The response filed on March 2, 2016 states only that certain taxes were not paid by the Carsons, but it does not state that Green Tree actually paid those taxes. The later response argues that the Carsons did not pay the property

Although *In re Tollios* appears to be factually similar to this case, the facts are easily distinguishable. *See In re Tollios*, 491 B.R. 886 (Bankr. N.D. Ill. 2013). There,

[t]he debtors had failed to pay their property taxes so [the mortgage lender] paid them and then increased the monthly escrow payment in accordance with its rights under the loan agreement. Although the debtors received notice of the payment increase, [the mortgage lender] did not file a notice of the increase with the court or serve it on the debtors' counsel or the chapter 13 trustee. The debtors have not paid the increased escrow amount to [the mortgage lender], and they have acknowledged that they cannot afford to pay the taxes on the property.

*Id.* at 888. The *Tollios* court found that the mortgage lender's "failure to file the notice and serve it on debtors' counsel and the trustee did not harm the debtors" and did not impose either of the sanctions allowed under Bankruptcy Rule 3002.1. *Id.* at 892.

The debtors knew they had to pay the taxes directly to the taxing authority, that they did not pay the taxes, that [the mortgage lender] paid the taxes on their behalf, and that this payment entitled [the mortgage lender] to increase the amount of the escrow payment to cover the taxes it paid as well as future taxes. The debtors received notice from [the mortgage lender] of the inevitable increase in the escrow amount. The plan required the debtors, not the trustee, to make direct payments to [the mortgage lender] so the failure to notify the trustee of the escrow increase had no impact on the debtors' case.

*Id.* Unlike the lender in *Tollios*, Green Tree has not shown that it provided timely notice to the Carsons, the Carsons' attorney, or the Trustee of its payment of the property taxes. It is clear from the annual notices of mortgage payment change related to force-placed insurance that Green Tree knew how to provide such notice but declined or failed to do so with regard to the property taxes during the pendency of the bankruptcy. Also, the Carsons' plan provided that the Trustee would make the monthly mortgage payment (rather than the Carsons making direct payments to Green Tree), so any increase would need to be made through the Trustee's disbursements. Although the Carsons were obligated under their contract to pay the property

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taxes and are the first to receive notice when taxes come due. It also states that "[t]he taxes should be paid," and does not suggest that Green Tree has paid them. Dkt. No. 123 at 1. Only the supplemental response filed on June 23, 2016, more than a year after the taxes were paid, indicates that Green Tree paid the taxes. *See* Dkt. No. 130.

taxes, when Green Tree paid them, expecting eventual reimbursement from the Carsons, any reimbursement could only come through the Trustee. In this case, failure to notify the Trustee prevented the Trustee from increasing the plan payments to cover the expense during the remaining life of the plan. Providing notice after the Carsons have received their discharge is too little, too late.

Because Green Tree has not complied with the requirements of Bankruptcy Rule 3002.1, the Trustee's motion is granted.

#### IV. Conclusion

The Court grants the motion for determination of final cure because (1) Green Tree did not timely serve notice on the debtor, debtor's counsel, and the trustee, as required by Bankruptcy Rule 3002.1 and (2) Green Tree's responses do not comply with the requirements of the official form. Green Tree cannot seek reimbursement from the Carsons for the 2011, 2012, 2013 and 2014 taxes it paid on the Carsons' behalf during the pendency of their bankruptcy as such debt is discharged. The 2015 taxes did not become due and payable until January 2016 and remain the obligation of the Carsons.

**IT IS HEREBY ORDERED THAT** the Motion for Determination of Final Cure and Mortgage Payment re: Rule 3002.1 is GRANTED.

*##END OF ORDER##*