SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: November 20, 2020

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

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

DANNY HALL AND JUDY HALL **CASE NO. 11-03139-NPO**

DEBTORS. **CHAPTER 7**

ORDER SUSTAINING DEBTORS' OBJECTION
AND RESPONSE TO NOTICE OF DEFAULT AFTER AGREED ORDER

This matter came before the Court for telephonic hearing on October 30, 2020 (the "Hearing"), on the Notice of Default After Agreed Order (the "Default Notice") (Dkt. 987) filed by U.S. Bank National Association, solely in its capacity as trustee for Lehman Mortgage Trust Mortgage Pass-Through Certificates, Series 2007-6 (the "Creditor"),[1] alleging that the debtors, Danny Hall and Judy Hall (together, the "Debtors"), were in default of the Agreed Order (the "2012 Agreed Order") (Dkt. 316) entered on September 27, 2012 and the Objection and Response to Notice of Default After Agreed Order (the "Objection") (Dkt. 988) filed by the Debtors in the above-referenced bankruptcy case (the "Bankruptcy Case"). At the Hearing, Craig M. Geno represented the Debtors and Eric C. Miller ("Miller") represented the Creditor. The Creditor

[1] PHH Fidelity Managed was the servicing agent for the Creditor and references to the Creditor include actions by PHH Fidelity Managed as servicing agent.

offered the testimony of Blaine Shadle ("Shadle"), a senior loan analyst with the Creditor, and four (4) exhibits into evidence.[2] The Debtors offered the testimony of Judy Hall and twenty-five (25) exhibits into evidence.[3] The Court sustained the Objection from the bench. This Order memorializes and supplements the Court's decision.

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (G), and (O). Notice of the Hearing was proper under the circumstances.

Facts

A. Pre-Conversion

On April 25, 2006, Danny Hall executed a note in the principal amount of $261,450.00 secured by a deed of trust on property located at 521 Holly Bush Road, Brandon, Mississippi (the "Property") (Cl. 24-1). The note required monthly payments of $1,783.65 with a maturity date of May 1, 2036. (Cl. 24-1). The Debtors filed a voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code on September 8, 2011. (Dkt. 1). On Schedule A: Real Property, the Debtors

[2] The exhibits introduced into evidence at the Hearing by the Creditor are cited as "(Cred. Ex. ___)"; and exhibits introduced into evidence by the Debtors are cited as "(Deb. Ex. ___)".

[3] Pursuant to the COVID-19-related instructions for filing exhibits, the Debtors docketed twenty-seven (27) exhibits before the Hearing to offer into evidence. (Dkt. 1025). At the Hearing, the Debtors did not offer the first two (2) exhibits, labeled "Debtors' Exhibit 1" and "Debtors' Exhibit 2", included in the Exhibit Index for 10/21/2021 Hearings on: (1) U.S. Bank's Notice of Default After Agreed Order [Dk #987] and (2) U.S. Bank's Motion to Limit Discovery [Dk #1007] (Dkt. 1025). The Debtors' exhibits were pre-marked. For ease of reference, the Court maintains the original labels despite the absence of the first two (2) exhibits in the record. The Creditor docketed three (3) exhibits before the Hearing to offer into evidence. (Dkt. 1024, 1026). The Creditor emailed an electronic copy of a fourth exhibit that was entered into evidence at the Hearing without objection. See https://www.mssb.uscourts.gov/special-notices/court-hearings (last visited Nov. 18, 2020).

included the Property with a current value of $400,000.00 and a secured claim of $245,995.00.[4] (Dkt. 35 at 3).

On April 26, 2012, the Creditor filed the Motion for Relief from Automatic Stay and for Abandonment or Alternatively, for Adequate Protection (the "First Motion for Relief") (Dkt. 252) asking the Court to lift the automatic stay with respect to the Property because the Debtors had defaulted on payments from October 2011 through April 2012 for a balance of $14,763.79.[5] The Debtors filed the Answer and Response to Motion for Relief from Automatic Stay and for Abandonment or Alternatively, for Adequate Protection (Dkt. 266) denying that the Creditor was entitled to the requested relief. The Court entered the 2012 Agreed Order resolving the First Motion for Relief and allowing the Debtors to pay the amounts due from August 2011 through August 2012, which totaled $27,059.87, through the chapter 11 plan. (Dkt. 316 at 1-2).

B. Post-Conversion

On April 1, 2014, the Bankruptcy Case was converted to a case under chapter 7 of the U.S. Bankruptcy Code (Dkt. 404) because the Debtors were unable to obtain confirmation of a chapter 11 plan by the deadline set forth in a previous order. (Dkt. 389). The U.S. Trustee appointed Eileen N. Shaffer to serve as the chapter 7 trustee (the "Trustee"). (Dkt. 404).

On April 22, 2014, the Creditor filed the Motion for Relief from Automatic Stay and for Abandonment, or Alternatively for Adequate Protection (the "Second Motion for Relief") (Dkt. 419) alleging that the Debtors were in default from April 2012 through April 2014 and that the

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[4] The Court recognizes that there are a number of potential and actual issues with the Creditor's interest in the Property. The only issues before the Court are those raised in the Objection.

[5] At this time the late Michael Alan Jedynak ("Jedynak") represented the Creditor. On June 10, 2020, Miller appeared on behalf of the Creditor.

Debtors owed $45,047.37. The Debtors filed the Answer and Response of Debtors to Motion for Relief from Automatic Stay and for Abandonment, or Alternatively for Adequate Protection (Dkt. 444) asking the Court to deny the Second Motion for Relief because the Creditor had not properly administered a mortgage modification program to the Debtors. The day before the Court was scheduled to hold a hearing on the Second Motion for Relief, on August 21, 2014, the Creditor withdrew the Second Motion for Relief.

On January 27, 2015, the Creditor filed another Motion for Relief from Automatic Stay and for Abandonment, or Alternatively for Adequate Protection (the "Third Motion for Relief") (Dkt. 583) asking the Court to terminate the automatic stay and for the Debtors to abandon the Property. The Third Motion for Relief alleged that the Debtors owed payments from May 2012 through January 2015 that totaled an arrearage of $62,318.65. (Dkt. 583 at 2). The Trustee filed the Trustee's Objection to Motion for Relief from Automatic Stay and for Abandonment, or Alternatively for Adequate Protection (Dkt. 585) requesting that the Court allow the Trustee to liquidate the Property because the equity in the Property belonged to the bankruptcy estate. The Debtors filed another Answer and Response to Motion for Relief from Automatic Stay and for Abandonment, or Alternatively for Adequate Protection (Dkt. 595) alleging that the Creditor had "'lost' the application for restructuring on at least half a dozen occasions and has otherwise failed to adequately 'service' Debtor's restructuring rights under applicable law." (Dkt. 595 at 2).

1. Agreed Order

On April 3, 2015, the Court entered the Agreed Order (the "Agreed Order") (Dkt. 645) resolving the Third Motion for Relief. The Agreed Order stated that the Debtors were in arrears on monthly post-petition payments from May 2012 through March 2015 in the amount of $61,098.16. (Dkt. 645 at 1-2). The Debtor agreed to "pay the sum of $275,000.00 amortized over

30 years at 4.5% interest to Creditor." (Dkt. 645 at 2). The Agreed Order provided, "Debtors shall resume the monthly mortgage payments in the amount of $1783.55 P&I plus $245.92 escrow direct to PHH beginning with the April 2015 payment, which will be applied to contractual due dates." (Dkt. 645 at 2). The Agreed Order required the Creditor to send a notice of default if the Debtors became more than thirty (30) days delinquent in their payments beginning with the April 2015 payment. (Dkt. 645 at 2). The Debtors would have fourteen (14) days to cure the default after notice. (Dkt. 645 at 2).

2. Amended Agreed Order

On June 27, 2016, the Court entered the Amended Agreed Order (the "Amended Agreed Order") (Dkt. 738) modifying one term of the Agreed Order. The Amended Agreed Order changed the amount of principal and interest payments from $1,783.55 to $1,393.00. (Dkt. 738). The Agreed Order and the Amended Agreed Order were otherwise identical. The Amended Agreed Order thus provided as follows: "Debtors shall resume the monthly mortgage payments in the amount of $1,393.00 P&I plus $245.92 escrow." (Dkt. 738). Judy Hall testified that she personally negotiated the terms of the Agreed Order and the Amended Agreed Order with a representative of the Creditor and that the change in principal and interest payments was necessary only to correct the terms to reflect the original agreement. (Test. of Judy Hall at 2:06:15-2:06:34 (Oct. 30, 2020)).[6] In the Amended Agreed Order, the escrow payment remained the same, and the Debtors were still entitled to an opportunity to cure any default within fourteen (14) days after proper notice of default. (Dkt. 738).

Judy Hall testified that she discussed the terms she had negotiated with the representative of the Creditor directly with Jedynak to assist him in drafting the Agreed Order and Amended

[6] The Hearing was not transcribed. The citation is to the timestamp of the audio recording.

Agreed Order. According to Judy Hall, the terms of the agreement were that the $275,000.00 figure in the Amended Agreed Order represented the "comprehensive total of [the debt]—interest and any penalties or fees that [she] had incurred at that time including [her] escrow." (Test. of Judy Hall at 2:06:34-2:06:52 (Oct. 30, 2020)). Judy Hall explained that the Agreed Order had to be modified in 2016 because she and Jedynak agreed the payments were not calculated properly. (Test. of Judy Hall at 2:07:20-2:07:49 (Oct. 30, 2020)). Jedynak drafted the Amended Agreed Order. The terms of the Amended Agreed Order did not indicate that the Debtors had not made proper payments under the Agreed Order from its effective date of April 3, 2015 to the date of the Amended Agreed Order on June 27, 2016. (Test. of Judy Hall at 2:08:00-2:08:44 (Oct. 30, 2020)). Indeed, the Amended Agreed Order indicated that the period of non-payment had remained the same, May 2012 through March 2015. (Dkt. 738).

3. Default Notice[7]

On June 10, 2020, the Creditor filed the Default Notice notifying the Debtors that "[p]ursuant to the terms of that Agreed Order (dk#316) entered September 27, 2012, the Debtors have defaulted in payments to [the Creditor]." (Dkt. 987). In the Default Notice, the Creditor alleges that the Debtors owe "for August 2019 through May 2020 [(the "Alleged Default Period")], in the amount of $15,984.20, plus a notice of default fee of $100.00 less a suspense balance of $564.33 for a total of $15,519.87" and further provides that the Debtors have fifteen (15) days to cure the deficiency. (Dkt. 987). In support of the Default Notice, the Creditor attached a "Breakdown" that detailed ten (10) payments of $1,598.42 due from August 1, 2019 through May 1, 2020. (Dkt. 987 at 3).

[7] The Bankruptcy Case was reassigned from the Honorable Edward Ellington to the above-signed bankruptcy judge on December 1, 2018.

The Debtors filed the Objection alleging that the Default Notice was defective and that the Debtors are current on their payments to the Creditor under the Amended Agreed Order. (Dkt. 988 at 1). The Debtors argue that the Amended Agreed Order required the Creditor to allow the Debtors fourteen (14), not fifteen (15), days to cure the default and that the Creditor must "start over in the noticing process." (Dkt. 988 ¶ 3).

Discussion

The Debtors dispute the Creditor's assertion that they are in default and claim that, even if they were in default, the Default Notice is deficient. The Creditor has the burden of proving that the Default Notice was proper and complied with the notice requirements of the Amended Agreed Order. The Court first turns to the Amended Agreed Order to consider whether any of its requirements are ambiguous.

A. Amended Agreed Order is Not Ambiguous

"Several courts have held that an agreed order in a bankruptcy proceeding should be interpreted according to traditional contract principles." *Kindler v. Litton Loan Servicing, L.P.*, 2006 WL 3420282, at *1 (S.D. Tex. Nov. 22, 2006) (citing *Thornburg v. Lynch (In re Thornburg)*, 277 B.R. 719 (Bankr. E.D. Tex. Mar. 12, 2002)). Under Mississippi law, courts use a three-tiered approach for construing and interpreting written instruments. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003). First, courts apply the "four corners" test, meaning that courts look to the actual language the parties used in expressing their agreement to determine their intent. *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352 (Miss 1990). Second, if the parties' intent cannot be determined from the "four corners" of the agreement, courts "apply the discretionary 'canons' of contract construction." *Royer*, 857 So. 2d at 753. Third, if the contract remains ambiguous as to the parties' intent, courts may consider extrinsic or parole

evidence, if necessary. *Id.* A contract is ambiguous if its terms are susceptible to more than one reasonable interpretation. *Songcharoen v. Plastic & Hand Surgery Assocs.*, 561 F. App'x 327, 333 (5th Cir. 2014) (applying Mississippi law). "A mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law." *Epperson v. SOUTHBank*, 93 So. 3d 10, 16-17 (Miss. 2012) (quotation omitted). The primary concern for courts is to ascertain and give effect to the intentions of the parties as expressed in the written instrument. *Id.* at *2. If a contract contains conflicting clauses when the contract is read as a whole, it is ambiguous, and the resolution of any uncertainties will be against the drafter of the contract. *Perkins*, 558 at 352.

Mindful of these rules of construction, the Court finds that the Amended Agreed Order is not ambiguous. The Amended Agreed Order provides that the Debtors were "in arrears on the monthly post petition mortgage payment to [the Creditor], for the month of May, 2012 [sic] through March 2015 in the amount of $61,098.16." (Dkt. 738 at 1-2). To resolve the Third Motion for Relief, the parties agreed that the Debtors would "pay the sum of $275,000.00 amortized over 30 years at 4.5% interest to Creditor." (Dkt. 738). The Amended Agreed Order set forth the allocation of the monthly mortgage payments, "$1393.00 P&I plus $245.92 escrow . . . *beginning with the April 2015 payment.*" (Dkt 738 at 2) (emphasis added). The Amended Agreed Order then retroactively modified the allocation of funds to the respective categories.[8] (Dkt. 738 at 2). The Amended Agreed Order, therefore, determined the amount the Debtors would pay, $275,000.00, beginning April 2015, amortized over thirty (30) years at 4.5% interest. Here, the problem is not ambiguity in the Amended Agreed Order, which if it existed would be interpreted against the

[8] Hereinafter, the Amended Agreed Order and the Agreed Order are discussed together by reference to the Amended Agreed Order unless stated otherwise.

Creditor as the drafter, but the Creditor's failure to comply with the unambiguous orders of this Court for over four (4) years. As evidenced by the following discussion, the Creditor created an irreconcilable record of the Debtors' monthly payments from the initiation of the Bankruptcy Case that resulted in a Default Notice that is defective on its face and in substance.

B. Apparent Defects in Default Notice

The Amended Agreed Order provided "that should the Debtors become 30 days or more delinquent beginning with the April 2015 payment, [the Creditor] shall send a fourteen (14) day Notice of Default to the Debtors and Debtors Attorney," and allowed the Debtors fourteen (14) days to cure the default. (Dkt. 738 at 2). The Amended Agreed Order, therefore, required the Creditor to give notice of the default *and* an opportunity to cure the default. (Dkt. 738). The Default Notice contains two (2) apparent defects.

1. Creditor's Reliance on 2012 Agreed Order

The Default Notice filed on June 10, 2020 provides that the Debtors are in default pursuant to the 2012 Agreed Order entered on September 27, 2012 and does not mention the Amended Agreed Order. (Dkt. 987). The 2012 Agreed Order provided that the $27,059.87 arrearage on the Property would be paid "through the life of the plan." (Dkt. 316). Since the 2012 Agreed Order, the Bankruptcy Case has been converted to a chapter 7 case, the Creditor has filed the Second Motion for Relief, the Court has entered the Agreed Order, the Creditor has filed the Third Motion for Relief, and the Court has entered the Amended Agreed Order. The Agreed Order superseded the 2012 Agreed Order in 2015, and the Amended Agreed Order superseded the Agreed Order in 2016. Not only did the Creditor agree to the subsequent orders updating the agreement between the parties, but Jedynak, the Creditor's attorney at the time, drafted both the Agreed Order and the

Amended Agreed Order. The citation of the 2012 Agreed Order in the Default Notice is an apparent defect.

2. Days to Cure Alleged Default

The Amended Agreed Order provided the Debtors fourteen (14) days to cure any default. The Default Notice, however, provides the Debtors fifteen (15) days to cure the alleged $15,519.87 deficiency. The Debtors argue that this error requires the Creditor to "start over in the noticing process." The incorrect deadline in the Default Notice is another apparent defect but one that is "quantum of real-world harm." *Casalicchio v. BOKF, N.A.*, 951 F.3d 672, 675-76 (5th Cir. 2020). Although the deadline does not strictly conform to the Amended Agreed Order or even the 2012 Agreed Order, it provides the Debtors additional time to cure the alleged default and thus is not prejudicial.

C. Substantive Defects in Default Notice

Even assuming the apparent defects in the Default Notice are inconsequential, the Amended Agreed Order required the Creditor to provide the Debtors with a reasonable opportunity to cure the default, which includes providing correct information as to the amount of the deficiency. In that regard, there are several substantive defects in the Default Notice. At the Hearing, the Creditor relied on Shadle's testimony regarding three (3) internal documents to prove that the Debtors were in default.[9] Shadle, however, did not have any involvement with the drafting or implementation of the 2012 Agreed Order or the Amended Agreed Order. (Test. of Shadle at 10:03:00-10:03:30 (Oct. 30, 2020)). Shadle testified to his general understanding of the activity

[9] Shadle has been a senior loan analyst with Ocwen Financial for approximately twenty (20) years. Ocwen Financial acquired PHH Fidelity Managed, the former loan servicer for the Creditor. (Test. of Shadle at 9:12:00-9:12:30 (Oct. 30, 2020)). The Court also refers to Ocwen Financial as the Creditor.

in the Debtors' mortgage account xxxx-xxx-105 (the "Mortgage Account") based on the Loan Activity Information ("Exhibit A") (Cred. Ex. A), the Reconciliation Statement ("Exhibit C") (Cred. Ex. C), and the Customer Account Activity Statement ("Exhibit D") (Cred. Ex. D). Exhibit A provides a brief, generic description and the amount of the transaction for activity on the Mortgage Account from May 2006 through April 2020. (Cred. Ex. A). Exhibit C and Exhibit D both provide individual transaction information as well as the effect of the individual transaction on the escrow balance, principal balance, and suspense balance with respect to the Mortgage Account. The due dates in Exhibit C are from April 2015 through January 2020 and in Exhibit D are from January 2015 through October 2020.

1. Incorrect Number of Missed Monthly Payments

The Debtors dispute the Creditor's allegation in the Default Notice that they were "due for August 2019 through May 2020," or ten (10) monthly payments including fees, totaling $15,519.87. (Dkt. 987 at 1). Shadle testified at the Hearing that the Debtors made fifty-six (56) payments, in varying amounts, of the sixty-three (63) payments due from April 2015 until June 2020 when the Default Notice was filed. (Test. of Shadle at 9:26:00-9:59:10 (Oct. 30, 2020)). The Creditor, therefore, introduced evidence that the Debtors had missed seven (7) payments not ten (10) payments as set forth in the Default Notice. (Test. of Shadle at 9:57:29-9:58:16 (Oct. 30, 2020)). The Creditor conceded that the number of delinquent payments in the Default Notice was incorrect.

2. Incorrect Default Amount

The Breakdown (Dkt. 987 at 3) attached to the Default Notice calculated the amount due as ten (10) monthly payments of $1,598.42 for a total amount due of $15,984.20. Shadle admitted

at the Hearing, however, that the Debtors had not missed ten (10) monthly payments but did not state the amount that the Debtors owed to cure the alleged default.

The Creditor had the burden of proving that the Debtors were in default and the amount necessary to cure the default. Exhibit A, Exhibit C, and Exhibit D, which the Creditor offered into evidence, are inconsistent. Shadle testified at the Hearing for nearly four (4) hours trying to reconcile the activity in the Mortgage Account with the Amended Agreed Order. Instead, Shadle's testimony regarding Exhibit A, Exhibit C, and Exhibit D showed that the Creditor ignored the Amended Agreed Order for nearly four (4) years and incorrectly applied payments to the Mortgage Account. (Test. of Shadle at 11:35:00-11:35:44 (Oct. 30, 2020)). In August 2019, the Creditor attempted to correct the Mortgage Account with respect to the Amended Agreed Order further convoluting the Creditor's records of the Mortgage Account. (Test. of Shadle at 10:40:12-10:41:13 (Oct. 30, 2020)). The Court cites the following examples in support of its conclusion that the Creditor has failed to meet its burden of proof.

a. Transaction Date, Due Date, & Effective Date

Exhibit C and Exhibit D provide a due date and an effective date. (Cred. Exs. C & D). Exhibit D provides an additional date, the transaction date. (Cred. Ex. D). Shadle explained that the transaction date is the date the transaction occurred, and the due date "is what the account is due for" as of the effective date. (Test. of Shadle at 11:31:48-11:34:44 (Oct. 30, 2018)). Exhibit D indicates that the Creditor incorrectly applied payments made from April 2015 through March 2019 to past due amounts that the Amended Agreed Order resolved. For Example, Exhibit D provides that on the effective date of April 27, 2015 a payment in the amount of $2,029.47 was applied to the monthly payment obligation due on May 1, 2012. (Cred. Ex. D). The transaction dates beginning in March 2019 and the corresponding due dates beginning in April 2015 suggest

an attempt by the Creditor to correct the principal balance pursuant to the Amended Agreed Order. Exhibit D, which the Creditor used to total the number of missed payments, does not list the individual payments made during the time that the Creditor reconciled the Mortgage Account in 2019. Instead, Exhibit D includes large, lump-sum payments and reductions in principal without a corresponding payment. Although Shadle testified that Exhibit D provided a record of the transaction date and amount of each payment the Debtors made during this time, the Court cannot reconcile Shadle's testimony as to the number of payments with the other account activity. (Cred. Ex. D).

Exhibit C also does not provide a record of monthly payments made by the Debtors. (Cred. Ex. C). Similar to Exhibit D, the effective dates on Exhibit C begin in August 2019 and the due dates begin in April 2015. Exhibit C, however, does not show the individual payment for each due date but instead demonstrates a steady, monthly decrease in the principal balance. (Cred. Ex. C). Exhibit C does not provide information regarding the actual date of the transaction or the amount of each payment. In fact, Exhibit C suggests that the Debtors made regular monthly payments that slowly reduced the principal balance rather than a default.

Neither Exhibit C nor Exhibit D provides a clear record of each monthly payment the Debtors made from April 2015 through early 2019. If the Court sets aside the Creditor's mistake in failing to implement the terms of the Amended Agreed Order and evaluates the payments made after the "reconciliation or correction," the Creditor's records suggest that the Debtors did not miss a single payment during the period in question. (Cred. Ex. D). Shadle explained that around March 2019, an account reconciliation occurred and thereafter the Debtors made monthly payments of $1,654.88 from May 2019 through January 2020 and monthly payments of $1,598.42 from February 2020 through July 2020. (Test. of Shadle at 9:51:00-9:56:30 (Oct. 30, 2020)). The

only conclusion the Court can confidently make from Exhibit D is that the Debtors consistently made payments after the account reconciliation in March 2019.

b. Negative Escrow Balance

The Court cannot reconcile the negative escrow balance of $19,916.47 shown in Exhibit D. The Amended Agreed Order states that the Debtors are "in arrears on the monthly post petition mortgage payments . . . in the amount of $61,098.16." (Dkt. 738). To cure this arrearage, the parties agreed that the Debtors would pay the "sum of $275,000.00." (Dkt. 738). The Amended Agreed Order, therefore, resolved any outstanding postpetition arrearage on the Mortgage Account. As previously mentioned, the Creditor did not implement the changes to the Mortgage Account outlined in the Amended Agreed Order. The Mortgage Account, therefore, for April 2015 on Exhibit D shows a principal balance of $242,623.97[10] and a negative escrow balance of $8,886.44. (Cred. Ex. D). In contrast, April 2015 on Exhibit C states a principal balance of $275,000.00 and a negative escrow balance of $19,916.47. (Cred. Ex. C). Indeed, Exhibit D does not amend the principal balance until May 7, 2019. (Cred. Ex. D). Shadle testified that the transactions reflected in Exhibit D from May 7, 2019 through August 26, 2019, consisting of nearly seventy (70) transaction entries, are an attempt to correct the Mortgage Account in accordance with the Amended Agreed Order. (Test. of Shadle at 11:35:00-11:35:44 (Oct. 30, 2020)). After these corrective entries, Exhibit D provides a negative escrow balance of $19,916.47. (Cred. Ex. D).

The Amended Agreed Order provided that the total outstanding balance on the Mortgage Account for postpetition payments was $61,098.16, and to resolve the outstanding balance on the

[10] The Creditor provided a poor quality copy of Exhibit D that made it difficult to differentiate certain numbers. The Court notes that any inconsistency is minor and inconsequential.

Mortgage Account the Debtors agreed to pay $275,000.00. Shadle agreed that the Amended Agreed order did not include anything about an escrow balance. (Test. of Shadle at 11:20:30-11:21:10 (Oct. 30, 2020)). Any application of monthly mortgage payments after April 2015 to any existing outstanding balances, including any outstanding escrow balance, violated the Amended Agreed Order. It is unclear how this application of payments may have affected the escrow account, but the Creditor cannot include any pre-existing escrow deficiency in the amount necessary to cure any alleged default. To the extent the Creditor misallocated the escrow funds, the Creditor must apply the Debtors' payments beginning in April 2015 to an escrow balance of $0.00 in accordance with the Amended Agreed Order.

c. Principal Balance Increase & Suspense Account

Another matter of concern with the Creditor's records was the indication in Exhibit D that the Debtors' principal balance had increased. Shadle explained that the increase in principal was likely due to payment reversals, but Shadle did not have any specific explanation for or actual knowledge of why the reversals labeled on Exhibit A, and also documented on Exhibit D, occurred. (Test. of Shadle at 10:20:21-10:26:01 (Oct. 30, 2020)). Shadle explained that reversing payments is a common practice and that the suspense balance is an account that "serves as a means to adjust, reverse, or amend" the Mortgage Account. (Test. of Shadle at 10:39:04-10:39:36 (Oct. 30, 2020); Cred. Ex. C). In May 2019 when the Creditor reconciled the account, the Debtors' principal balance was adjusted to $275,000.00 and the suspense balance was increased to over $100,000.00. (Cred. Ex. D). Shadle could not answer "how or why" the suspense account would have as much as $102,804.89, and Exhibit D does not show that the Creditor reapplied the suspense balance to the Mortgage Account in accordance with the Amended Agreed Order. (Test. of Shadle at 10:38:30-10:38:48 (Oct. 30, 2020)). Indeed, Exhibit D suggests that the suspense balance was

used to decrease the negative escrow balance from $19,916.47 to $5,469.33, a difference of $14,447.14 that potentially was misapplied even after the reconciliation. (Cred. Ex. D). As previously stated, the Amended Agreed Order did not provide payment for a negative escrow balance. The Amended Agreed Order stated that the Debtors would pay the sum of $275,000.00 over thirty (30) years and provided the distribution of the monthly payment to principal, interest, and escrow. The Amended Agreed Order is not ambiguous, but if it were, any ambiguity would be interpreted against the Creditor as the drafting party. Judy Hall, the only witness with personal knowledge of the negotiation and agreement explained that the $275,000.00 figure was the "comprehensive total of [the debt]—interest and any penalties or fees that [she] had incurred at that time including [her] escrow." (Test. of Judy Hall at 2:06:34-2:06:52 (Oct. 30, 2020)).

d. 2018

The year 2018 is particularly troublesome and is a clear indication that the Creditor has not met its burden of proof. Shadle testified that Exhibit D provided that the Debtors made eight (8) payments of $1,654.88 in 2018. (Test. of Shadle at 9:46:00-9:46:15 (Oct. 30, 2020)). Seven (7) of these (8) payments, all with different transaction and effective dates in 2018, are applied to the payment due on January 1, 2015. (Cred. Ex. D). Despite these seven payments, the principal balance remains the same, and the suspense balance increases from $1,710.88 to $9,985.26. (Cred. Ex. D). In 2018, which was before the Creditor's attempted reconciliation to implement the Amended Agreed Order, the Creditor's records indicate a misapplication of monthly payments.

The Debtors offered into evidence their 2018 Mortgage Interest Statement that the Creditor provided to the Internal Revenue Service (the "IRS"). The Creditor reported that the Debtors paid $853.23 in interest for the year 2018 and that the outstanding principal was $227,527.17. (Deb. Ex. 7). The inconsistency between Exhibit D and the information the Creditor used to report the

interest paid to the IRS is irreconcilable. While there may be an explanation, the Creditor has not provided one. The year 2018 provides a clear indication that the Creditor's internal records for the Mortgage Account demand attention and currently are unreliable.

D. Reconciliation of Mortgage Account

The Court recognizes that its finding that the Default Notice is deficient does not substantively resolve the parties' dispute. In the future, the Creditor must provide adequate notice and an opportunity for the Debtors to cure any default pursuant to the terms of the Amended Agreed Order. The Creditor, therefore, must provide the Debtors with an amount calculated pursuant to the Amended Agreed Order to cure any alleged default. To ensure the Creditor is diligent in that regard, the Creditor must retain an accountant to reconcile the Mortgage Account at its own expense. The Creditor may not issue another notice finding the Debtors in default until a proper reconciliation of the Mortgage Account occurs so that the Creditor can provide with reasonable certainty the amount, if any, that is past due on the Mortgage Account pursuant to the Amended Agreed Order. If the Creditor fails to reconcile the Mortgage Account properly, the Court will order the Mortgage Account current as of a particular date.

Conclusion

While the narrow issue of the Default Notice is all that is before the Court, the Court cannot overlook that the parties have been trying to resolve what appears to be an issue with the servicing of this loan for eight (8) years. The failure of the Creditor to implement the Amended Agreed Order for nearly four (4) years is the most recent source of these financial problems. Exhibit A, Exhibit C, and Exhibit D are hopelessly inconsistent. Although Shadle attempted to provide a possible explanation for the inconsistencies, he did not have first-hand knowledge of the previous events and could only provide speculative explanations for the Mortgage Account activity. The

evidence the Creditor provided only supported the finding that the Default Notice was deficient. Even if the Default Notice had not been wholly deficient, the Creditor did not overcome its burden of proving that the Debtor was in default. For these reasons, the Court finds that the Objection should be sustained.

IT IS, THEREFORE, ORDERED that the Objection is hereby sustained.

IT IS FURTHER ORDERED that the Creditor shall employ either an internal or external accountant at its own expense to reconcile the Mortgage Account within ninety (90) days of this Order. Failure to reconcile the account will result in the Court ordering the account current as of a particular date.

IT IS FURTHER ORDERED that until the Creditor properly reconciles the Mortgage Account, the Creditor is prohibited from issuing a notice of default to the Debtors.

IT IS FURTHER ORDERED that the automatic stay pursuant to 11 U.S.C. § 362 with regard to the Property remains in effect until further order of this Court.

##END OF ORDER##