

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

In re:

Case No.: 03-bk-03506-PMG  
Chapter 13

MARY DUNBAR

Debtor.

**ORDER ON OBJECTION TO CLAIM No. 1  
OF WELLS FARGO HOME MORTGAGE, INC.**

**THIS CASE** came before the Court for hearing to consider the Objection to Claim No. 1 of Wells Fargo Home Mortgage, Inc. filed by the Debtor, Mary Dunbar. Wells Fargo Home Mortgage, Inc. f/k/a Norwest Mortgage, Inc., filed a secured claim in the Debtor's current case in the total amount of \$28,837.33, with a pre-petition arrearage of \$11,201.16.

**Background**

The Debtor filed her chapter 13 petition on February 24, 2003. The Debtor had received a discharge following the completion of her Chapter 13 plan in a prior case, Case No. 98-5201, which was filed on March 31, 1998, and was completed in January, 2001. In that case, Norwest Mortgage, Inc., predecessor to Wells Fargo Home Mortgage, Inc., filed a secured claim showing a principal balance of \$36,310.21, and pre-petition arrearages totaling \$9,515.36. The claim was allowed as filed, and the Chapter 13 Trustee's office sent payments totaling \$9,515.36 to Norwest Mortgage, Inc.

In the Objection to Claim No. 1 of Wells Fargo Home Mortgage, Inc., (Docket #29), the Debtor stated that the creditor received funds, pre-petition, in the amount of \$10,000, which were not credited to the Debtor's account. In addition, the Debtor stated that the creditor received approximately \$10,000 through the previous Chapter 13 case for which she did not receive credit.

Wells Fargo Home Mortgage, Inc. ("Wells Fargo") filed an Amended Claimant's Response to Objection to Claim No. 1 (Docket #44), affirming the Proof of Claim as filed. Wells Fargo also attached a payment history of

the loan, and asserted that the payment history shows the receipt by the creditor of the eighteen payments made by the Chapter 13 Trustee over the course of Debtor's prior completed bankruptcy case. Wells Fargo also stated in its Response: "Debtor generally alleges that funds received in the amount of \$10,000.00 were not credited to the loan; however, Debtor does not dispute any particular disbursement or payment nor does Debtor attach proof of the alleged disputed payment."

The Debtor filed the Debtor's Response to Claimant's Amended Response to Objection to Claim No. 1 (Docket # 55), stating first that the payment history submitted by Wells Fargo was "incomprehensible." The Debtor attached evidence of payments in the following amounts: \$5,000.00 on May 17, 2002; \$1,200.00 on May 20, 2002; \$600.00 on May 30, 2002; \$1,700.00 on July 5, 2002, and claimed that the payment history did not include credits for such amounts. The Debtor challenged reversals (debits) to the account in the amounts of \$5,258.15 on July 10, 2002, and \$413.54 on September 19, 2002. The Debtor also questioned \$4,016.33 of "Other Fees" that were demanded in a letter dated September 3, 2001, a copy of which was attached to the Response, and stated that these were paid and discharged in the prior case. Last, the Debtor disputed "foreclosure costs" of \$1,791.10 and "property preservation" charges of \$225.00, as having no itemization or explanation.

Wells Fargo filed a Claimant's Reply to Debtor's Response to Claimant's Amended Response to Objection to Claim No. 1 (Docket #56), addressing the Debtor's assertions. Wells Fargo disputed the Debtor's contentions that the lump sum payments described above were not credited to the Debtor's account, and explained the application of the payments. Wells Fargo then explained the reversals to the account. With regard to the \$4,016 in "Other Fees" Wells Fargo explained these and then stated that in the current case, "the Claimant's Proof of Claim does not include any 'Other Fees,' rather it includes attorney's fees and costs associated with the pending foreclosure action in Hillsborough County..." With regard to the property preservation expenses, Wells Fargo affirmed that it would obtain a list of all actions taken in connection with the inspection and preservation of the property.

At the Final Evidentiary Hearing on the objection to the claim, the Debtor testified and Debtor's counsel introduced eight exhibits into evidence. Ms. McLamb, a default specialist with Wells Fargo, also testified and creditor's counsel introduced two exhibits into evidence:

a spreadsheet loan history for Ms. Dunbar's loan from January 5, 1998 to April 23, 2004 (Claimant's Exhibit No. 1), and a letter to Mr. and Mrs. Z. Chrobak from Wells Fargo dated August 29, 2002 (Claimant's Exhibit No. 3). All exhibits were admitted into evidence without objection.

### **Discussion**

A properly filed proof of claim is prima facie evidence of the validity and amount of the claim. Fed. R. Bankr. P. 3001(f). If an objection is made to the proof of claim, as in this case, the creditor or claimant has the ultimate burden as to the validity and amount of the claim. In re Harrison, 987 F.2d 677, 680 (10th Cir. 1993), *citing In re Padgett*, 119 B.R. 793, 797 (Bankr. D. Colo. 1990), and In re Allegheny International, Inc., 954 F.2d 167, 174 (3d Cir. 1992)("The burden of persuasion is always on the claimant.") Therefore, Wells Fargo, as the claimant, has the burden of persuasion with regard to each component of Claim No. 1 in this case.

The District Court, in In re Friedman, 436 F.Supp. 234, 238 (D. Md. 1977), stated: "when an objector to a claim goes forward at the hearing with some evidence contradicting the claim, the objector's burden of going forward with the evidence is met. Then the bankruptcy judge must weigh the evidence presented by the objector against the proof of claim, together with any evidence presented by the claimant, and he must make a finding of fact as to the validity and amount of the claim." [Citation omitted]

Based on the original Objection to Claim (Docket #29), the several filings relating to the objection, and the testimony and exhibits introduced at the hearing, the Debtor has disputes with Wells Fargo with regard to several aspects of her mortgage loan account: (1) proper crediting of all trustee payments for the previous bankruptcy case; (2) proper crediting of lump sum payments made by the Debtor during May-July, 2002, totaling \$9,471; (3) reversals of amounts previously credited to the Debtor's loan account, in the sums of \$5,258.15 and \$413.54 in July and September, 2002; (4) "other fees" in the amount of \$4,016.33, and the amount of foreclosure fees and costs claimed in the current bankruptcy case; and (5) property preservation fees of \$225.00 claimed in the current bankruptcy case.

### **1. Trustee payments in the previous case.**

Counsel for Wells Fargo introduced into evidence a spreadsheet of Debtor's loan account history from January, 1998, to April, 2004. The spreadsheet shows that all eighteen payments made by the Chapter 13 Trustee in Debtor's previous case were credited to her loan. Generally, the check from the trustee's office was designated in the spreadsheet as an "Amount Received." For payment number 7 in the amount of \$177.33, however, there was no entry under "Amount Received;" the entry was in the "Suspense" column. Despite this inconsistency, such payment amount was shown as a credit to the Debtor's loan. All eighteen payments in the total amount of \$9,515.36 were credited to the Debtor's loan account.

### **2. Lump sum payments by debtor.**

The Debtor introduced into evidence confirmations of money orders in the lump sum amounts of \$5,000, \$1,200, \$1,700, \$600, and \$971 (for a total of \$9,471) payable to Wells Fargo. The spreadsheet shows that these amounts were credited to the Debtor's loan account. Wells Fargo split the amounts of the \$5,000, \$1,200 and \$1,700 money orders into the following amounts (designated under "Amount Received") for its accounting purposes: (a) on June 10, 2002, the separate amounts of \$5,226.48 and of \$973.52 total \$6,200, and (b) on July 5, 2002, the separate amounts of \$144.16, \$114.90, \$75.00, \$580.72, \$580.72, and \$204.50 total \$1,700. The other two lump sum amounts, \$600 and \$971, are shown by the spreadsheet as received on June 6, 2002, and on June 24, 2002. Again, the Court is satisfied that these lump sum payments made by the Debtor were credited to her loan account.

### **3. Reversals in the spreadsheet.**

On July 9, 2002, a series of reversals was applied to the Debtor's loan, for a reversal of payments previously credited in the total amount of \$5,258.15. Wells Fargo explains that these reversals were to correct the misapplication of certain Chapter 13 Trustee payments to the Debtor's loan when such payments should have been credited to another loan. ("Wells Fargo discovered that Trustee funds disbursed on another borrower's account had been misapplied to this Debtor's account. Another borrower named Zygmunt Chrobak was in bankruptcy and the Trustee in the case was disbursing funds. The Trustee referenced the incorrect loan number on the disbursement voucher, resulting in the misapplication of

funds in the foregoing amounts to this Debtor's account.") (¶ 4, Claimant's Reply to Debtor's Response to Claimant's Amended Response to Objection to Claim No. 1). Wells Fargo introduced into evidence a copy of a letter to Mr. and Mrs. Z. Chrobak from the Executive Communications Division of Wells Fargo, acknowledging that ten payments from the Chapter 13 Trustee for the benefit of their loan, totaling \$5,258.15, were inadvertently applied to another loan. The spreadsheet in evidence clearly indicates that *each* of the ten payments had been credited to the Debtor's loan. There was some uncertainty at the hearing as to a payment in the amount of \$291.65 (payment number 9) which was then subsequently reversed, and Wells Fargo was willing to reduce its claim by this amount. *See* Transcript of Hearing, September 10, 2004, page 80, lines 18-20; Claimant's Response to Debtor's Closing Arguments, paragraph 5. However, the spreadsheet shows that on December 2, 1999, \$291.65 was credited to the "Suspense" account (and not as an "Amount Received"). Accordingly, that "missing" payment 9 in the amount of \$291.65 was credited to the Debtor's loan.

There was also a reversal of \$413.54 on September 18, 2002 in the spreadsheet. (The original entry on October 3, 2000 showed \$413.54 as "Amount Received" and a credit to the Suspense account.) No explanation was substantiated for this reversal. Therefore, the Court determines that the amount of \$413.54 should be subtracted from the amounts set forth in Claim No. 1 filed by Wells Fargo.

#### **4. Fees.**

The Debtor questioned an item designated as "Other Fees" in the amount of \$4,016.33 that was included in a demand letter from Wells Fargo dated September 3, 2001. Wells Fargo responded that its Proof of Claim does not include an item designated as "Other Fees," but that the fees charged to the account are itemized in its Proof of Claim. Accordingly, there is no issue with regard to "Other Fees" in the amount of \$4,016.33.

As indicated, Wells Fargo did include certain fees in its Proof of Claim. Claim No. 1 of Wells Fargo includes \$960.00 in Foreclosure Fees, \$1,791.10 in Foreclosure Costs, and \$320.00 in Current Bankruptcy Attorney Fees and Costs. Prior Bankruptcy Fees and Costs are shown in the Proof of Claim as \$0.00. The Promissory Note payable to Norwest Mortgage, Inc. from the Debtor in the original principal amount of

\$44,547.00 provides that the lender may require the Debtor to pay "costs and expenses including reasonable and customary attorneys' fees for enforcing this Note." (Paragraph 6(C)). In addition, the Mortgage in favor of such lender requires that the Debtor may be responsible for "foreclosure costs and reasonable and customary attorneys' fees and expenses properly associated with the foreclosure proceeding." (Paragraph 10). From October, 2001 to May, 2002 the only payments made on the loan were subsequently reversed with the entry of "NSF." Foreclosure was filed against the Debtor in 2002. *See* Transcript, pages 21 and 24. On the loan spreadsheet on June 17, 2002, Foreclosure Expenses totaling \$2,517.00 are noted but not added to balances, and on February 26, 2003, Bankruptcy Expenses totaling \$2701.10 are noted but, again, not added to balances. The Court determines that the amounts in Claim No. 1 for Foreclosure Costs, Foreclosure Fees, and Current Bankruptcy Attorney Fees and Costs are in accordance with the Note and Mortgage entered into between the Debtor and Wells Fargo, predecessor, Norwest Mortgage, Inc.

#### **5. Property preservation.**

In the Debtor's Response to Claimant's Amended Response to Objection to Claim No. 1, the Debtor also questioned the amount in Claim No. 1 for Property Preservation expenses of \$225.00; however, this issue was not brought up at the hearing so the amount is allowed. (The Court notes that the Claimant provided property preservation reports as Exhibit 5 with its package of exhibits, but such Exhibit 5 was not introduced into evidence at the hearing).

#### **Conclusion**

There is only one credit to Claim No. 1 as filed by Wells Fargo that is necessary to account for the various issues brought up by the Debtor with regard to this mortgage loan. With regard to the reversal of \$413.54, no evidence was introduced at the hearing that would support this amount as a "misapplication reversal." With regard to all other issues, the Court determines that the arrearages and amounts set forth on Claim No. 1 are supported by the evidence presented at the hearing. Accordingly, the Debtor's Objection to the Claim of Wells Fargo should be sustained in part and overruled in part.

Therefore:

**IT IS ORDERED** that:

1. The Objection to Claim No. 1 of Wells Fargo Home Mortgage, Inc. filed by the Debtor, Mary Dunbar, is sustained in part and overruled in part as set forth herein.

2. The Claim No. 1 is allowed as a secured claim in the amount of \$28,423.79, with a pre-petition arrearage of \$10,787.62.

**DATED** this 30th day of March, 2005.

**BY THE COURT**

/s/ Paul M. Glenn  
PAUL M. GLENN  
Chief Bankruptcy Judge