

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re:

Case No. 9:09-bk-22282-FMD
Chapter 13

Angel Merino,

Debtor.

**ORDER OVERRULING DEBTOR'S
OBJECTION TO NOTICE OF MORTGAGE
PAYMENT CHANGE AND DENYING REQUEST
FOR ATTORNEY'S FEES**

THIS CASE came on for consideration, without a hearing, of the Debtor's Objection to Notice of Mortgage Payment Change and Request for Attorney's Fees (Doc. No. 56) (the "Objection"). The Debtor seeks an order striking the Notice of Mortgage Payment Change filed by SunTrust Bank, N.A., pursuant to Fed. R. Bankr. P. 3002.1 (the "Notice"), and requests attorney's fees for the filing and prosecution of the Objection. The Court has reviewed the Objection and the record, and finds that there is no legal basis to object to the Notice or request that it be stricken from the record, and no basis for an award of attorney's fees incurred in prosecuting the Objection.

Rule 3002.1 applies to claims in Chapter 13 cases that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under 11 U.S.C. § 1322(b)(5) in the debtor's plan. Section 1322(b)(5) states that a plan may "provide for the curing of any default . . . and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due." Rule 3002.1 does not specifically state that it applies only to payments being made "inside the plan" (i.e., through the Chapter 13 trustee's office); likewise, Rule 3002.1 does not clearly state that the rule does not apply to claims being paid "outside the plan" (i.e., paid directly by the debtor). But the legislative history of Rule 3002.1 reveals that the rule was adopted 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."¹ An inference may be drawn that Rule 3002.1 does not apply to claims being paid outside the plan.

In *In re Garduno*,² Judge Erik Kimball recently ruled that Rule 3002.1 does not apply to claims being paid directly by the debtor outside the plan. In *Garduno*, the holder of a mortgage claim filed a notice of payment change. The debtor objected, requesting that the notice be stricken and that the debtor be awarded attorney's fees. Judge Kimball overruled the debtor's objection and found no cause to award attorney's fees to the debtor. He reasoned that:

Because . . . Fed. R. Bankr. P. 3002.1 . . . [does not] apply to the Bank's claim in this case, the Bank gained nothing by filing the Notice. Failure to file the Notice would not have resulted in the Bank waiving any right it may have with regard to the Debtors or their property. *Similarly, because the . . . rule[] do[es] not apply to the Bank's claim, the filing of the Notice did not trigger a need for the Debtors to respond.*³

This Court agrees with Judge Kimball's analysis. SunTrust's filing of the Notice did not trigger a need for the Debtor to respond. Accordingly, it is

ORDERED:

1. The Objection is OVERRULED.
2. The request for attorney's fees is DENIED.

DONE and ORDERED in Chambers at Tampa, Florida, on July 16, 2012.

/s/
Caryl E. Delano
United States Bankruptcy Judge

¹ Fed. R. Bankr. P. 3002.1 advisory committee notes.

² 2012 WL 2402789, (Bankr. S.D. Fla. June 26, 2012).

³ *Id.* at *1 (emphasis added).