

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re:

Case No. 9:10-bk-14251-FMD
Chapter 13

Erin Porco,

Debtor.

**ORDER SUSTAINING
OBJECTION TO PROOF OF
CLAIM 10-2 FILED BY ANSON STREET LLC**

THIS CASE came on for hearing on December 20, 2012, on the Chapter 13 Trustee's *Objection to Amended Claim No. 10-2 filed by Anson Street LLC* (Doc. No. 50) (the "Objection") and the *Response to Objection to Amended Claim No. 10-2 of Anson Street LLC* filed by Arch Bay Holdings, LLC – Series 2010B (Doc. No. 51) (the "Response").¹ For the reasons that follow, the Court will sustain the Objection.

Procedural History

The Debtor filed a voluntary petition under Chapter 13 on June 14, 2010. In her bankruptcy schedules, Debtor listed the real property at 28683 Alessandria Circle, Bonita Springs, Florida 34135 (the "Property") with a value of \$177,070.00 (Doc. No. 1, p. 6). On Schedule D, the Debtor listed BAC Home Loans Servicing ("BAC") and Resurgent as holding mortgages on the Property. The Debtor listed BAC's claim as being \$268,715.00, with the unsecured portion of the claim being \$91,645.00, and Resurgent's claim as being \$67,950.00, with the unsecured portion of the claim being \$67,950.00 (Doc. No. 1, pp. 14 - 15). Although the Debtor's schedules do not identify the relative priority of the BAC and Resurgent claims, based upon the Debtor's having scheduled BAC as being partially unsecured and Resurgent as being wholly unsecured, it appears that BAC was the holder of the first mortgage and Resurgent the holder of the second mortgage on the Property.

The Debtor filed a Chapter 13 Plan (Doc. No. 3). The Plan provided for the surrender of the Property to the creditors holding liens against the Property (i.e., BAC and Resurgent). The Plan further provided for

termination of the automatic stay "*in rem*" as to BAC and Resurgent, permitting them to proceed with their state law foreclosure remedies.

The Court set October 20, 2010, as the deadline for creditors to file proofs of claim. (Doc. No. 7.) Anson Street LLC ("c/o Resurgent Capital Services, LP")² timely filed Proof of Claim No. 10-1, asserting a secured mortgage claim against the Property in the amount of \$76,139.08. Exhibit "A" to the proof of claim expressly stated that the "[c]laim will be amended once collateral is liquidated by foreclosure."

On October 21, 2010, the Debtor filed her *Motion to Abandon Real Property* (Doc. No. 34) ("the Motion to Abandon"). In the Motion to Abandon, the Debtor alleged, consistent with the information set forth on her Schedules A and D, that the estimated fair market value of the Property was \$177,070.00, with liens on the Property totaling \$339,474.00. The Debtor served the Motion to Abandon on Resurgent, and Resurgent was served with the Court's order granting the Motion to Abandon. (Doc. No. 36.)

On May 11, 2011, the Court confirmed the Debtor's Chapter 13 Plan (Doc. No. 41) (the "Confirmation Order"). The Confirmation Order states that distributions to unsecured creditors will total \$4,400.00. The Court's *Order Allowing and Disallowing Claims and Ordering Disbursements* (Doc. No. 43) indicates that unsecured claims totaling approximately \$40,000.00 would receive distributions under the Plan, and that Claim No. 10 of Anson Street LLC was allowed, but would not receive any payment from the Chapter 13 Trustee under the confirmed Plan. (*Id.* at p. 3.)

On October 15, 2012, nearly two years after Anson Street/Resurgent first filed its proof of claim and was served with the Debtor's Motion to Abandon, as well as with the order granting that motion, Anson Street LLC (again "c/o Resurgent Capital Services, LP") filed an amended proof of claim (Claim No. 10-2), this time stating that its \$76,139.08 claim (the identical amount set forth in Claim No. 10-1) is wholly unsecured (the "Amended Claim").

At the December 20, 2012 hearing on the Objection, counsel for Anson Street LLC represented to the Court that a final judgment of foreclosure against the Property was entered on April 20, 2012. Although counsel did not identify the foreclosing party, it appears likely that the Anson Street/Resurgent loan was foreclosed out by a foreclosure sale conducted by

¹ It is unclear why the Response was filed by Arch Bay Holdings, LLC- Series 2010B ("Arch Bay"). At the December 20, 2012 hearing, counsel announced her appearance on behalf of Anson Street LLC. Perhaps the reference to Arch Bay in the Response was in error.

² Sometimes collectively referred to as Anson Street/Resurgent.

the holder of the first mortgage. Counsel did not explain why it took nearly six months after the foreclosure sale was conducted for Anson Street/Resurgent to file the Amended Claim.

Discussion

In *In re International Horizons, Inc.*, 751 F.2d 1213, 1216 (11th Cir. 1985), the Eleventh Circuit held that, under limited circumstances, a claim filed after the bar date may be allowed if it amends a timely-filed proof of claim. The court held that an amended proof of claim should be “freely allowed where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim.” *Id.* at 1216.

In *In re Winters*, 380 B.R. 855 (Bankr. M.D. Fla. 2007), the bankruptcy court allowed an amended proof of claim that was filed nearly four months after confirmation of the debtor’s plan. The amendment arose from the post-confirmation repossession and sale of the debtor’s motor vehicle. The court held that the creditor had clearly reserved its right to amend its original timely-filed claim, that the debtor, the Chapter 13 trustee, and the debtor’s other creditors had sufficient reason to know from the initial claim that the creditor intended to pursue a deficiency claim, and that the creditor had not attempted to file a new claim under the guise of amendment.

However, on similar facts, the district court in *Toyota Motor Credit Corp. v. Rodriguez (In re Rodriguez)*, 2010 WL 1838286 (M.D. Fla. May 3, 2010), affirmed the bankruptcy court’s order sustaining the debtor’s objection to an amended proof of claim. The objection had been sustained despite the fact that the creditor had reserved the right to amend its claim after it had liquidated its collateral, an automobile surrendered by the debtor to the creditor. The district court held that the bankruptcy court had not abused its discretion in refusing to allow the amended claim (which was nearly double the amount of the creditor’s previous unsecured claim) because the balancing of the equities did not weigh in favor of the creditor, no defect was cured by the amended proof of claim, and the creditor did not plead its claim with greater particularity by increasing the unsecured claim. The district court concluded that the bankruptcy court did not err in finding that the allowance of the untimely claim would be highly prejudicial. *Id.* at *4.

Similarly, in this case, the equities do not weigh in favor of Anson Street/Resurgent. Notwithstanding Anson Street/Resurgent’s reservation of the right to

amend its original claim once its collateral was liquidated, it must have known -- from the inception of the case and certainly no later than its receipt of the Debtor’s Motion to Abandon -- that the first mortgage lien far exceeded the value of the Property, thus rendering its claim completely unsecured. And, the Amended Claim did not cure a defect in the initial claim; it simply altered the status of Anson Street/Resurgent’s claim from secured to unsecured.

Further, allowing the Amended Claim would be prejudicial to the Chapter 13 Trustee, who commenced making disbursements under the Plan nearly two years ago. To allow Anson Street/Resurgent’s claim to be included now as an unsecured claim would unduly complicate the Chapter 13 Trustee’s administration of plan payments. Accordingly, it is

ORDERED:

1. The Chapter 13 Trustee’s Objection to the Amended Claim (Claim No. 10-2) is SUSTAINED.
2. Claim No. 10-2 is DISALLOWED.

DONE and ORDERED in Chambers at Tampa, Florida, on March 28, 2013.

/s/
Caryl E. Delano
United States Bankruptcy Judge