

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

In re:

Case No. 3:04-bk-12958-PMG

MARK C. HOOVER  
ANNAMARIE G. HOOVER,

Debtors.

Chapter 13

MARK C. HOOVER,

Plaintiff,

vs.

Adv. No. 3:10-ap-382-PMG

WELLS FARGO BANK,

Defendant.

**ORDER ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

**THIS CASE** came before the Court for hearing to consider the Motion for Summary Judgment filed by the Defendant, Wells Fargo Bank, N.A.

Wells Fargo is the holder of a Note and Mortgage on the Debtor’s residential real property. The issue in this case is whether Wells Fargo is entitled to collect certain postpetition amounts due under the Mortgage, even though the Debtor has completed the payments under his confirmed Chapter 13 Plan and received his discharge.

The Court finds that the Debtor's obligations that became due under the Mortgage post-petition but were not paid through the Chapter 13 Plan were not affected by the Chapter 13 Plan, and that a summary judgment should be entered determining that Wells Fargo is entitled to collect the amounts that accrued under the Mortgage during the term of the Chapter 13 Plan.

### **Background**

On September 29, 1993, Mark C. Hoover executed an FHA Multi-State Note in the original principal amount of \$51,500.00. The Note was secured by an FHA Mortgage on the Debtor's real property located at 736 Plainfield Avenue, Orange Park, Florida. The Note and Mortgage provided for monthly payments in the original amount of \$399.28 per month, with a maturity date of October 1, 2013. The Defendant, Wells Fargo Bank, N.A., is the holder of the Note and Mortgage.

On December 28, 2004, the Debtors, Mark C. Hoover and AnnaMarie G. Hoover, filed a petition under Chapter 13 of the Bankruptcy Code. The property encumbered by the Mortgage was listed in the bankruptcy case as the Debtors' homestead property.

On April 29, 2005, Wells Fargo filed a secured Proof of Claim in the Chapter 13 case (Claim No. 21). According to the Claim, the total amount of the debt owed under the Note and Mortgage as of the petition date was \$42,626.81, and the total amount of the prepetition arrearage due under the Note and Mortgage was \$11,182.89.

On June 27, 2005, the Debtors filed an Amended Chapter 13 Plan. (Main Case Doc. 19). The Amended Plan provides in Paragraph 2.A.(2) for the Trustee to pay to Wells Fargo the prepetition arrearage in full as a priority claim. For the regular mortgage payments during the plan, Paragraph 2.B.(1) of the Amended Plan provides in part:

Wells Fargo Home Mortgage holds a first mortgage on the debtors' homestead property. The trustee shall make the regular monthly payment of \$467.08 (or such other monthly amount as may be required because of interest rate adjustments or escrow adjustments).

On October 28, 2005, the Court entered an Order Confirming Chapter 13 Plan, Allowing Claims, and Directing Distribution. (Main Case Doc. 41). The Order provided for the Debtors to make monthly payments to the Chapter 13 Trustee for a period of sixty months commencing in November of 2005. The Order also provided that the prepetition arrearage claim of Wells Fargo was allowed in the amount of \$11,182.89, to be paid in distributions of \$310.43 per month until paid in full. The Order further provided that the secured claim of Wells Fargo was allowed in the amount of \$28,776.60, to be paid in distributions of \$479.61 per month as the regular monthly Mortgage payment.

Wells Fargo asserts that during the pendency of the case, and in accordance with the Mortgage, it adjusted the amounts due for the regular monthly mortgage payments based on annual increases or decreases in property tax obligations and insurance premiums, and that upon any adjustment it provided to the Plaintiff an Escrow Disclosure Statement and Notice of New Mortgage Payment. Such notices were issued in August of 2006, January of 2008, and January of 2009. (Doc. 25, Exhibit 5).

On May 12, 2009, Wells Fargo filed a Notice of Mortgage Payment Change. (Main Case Doc. 56). According to the Notice, the monthly payment would increase to the sum of \$575.32, effective July 1, 2009, because of an "escrow change."

On July 20, 2009, the Chapter 13 Trustee filed a Notice of Plan Payment Change. (Main Case Doc. 57). The Notice states that the monthly mortgage payment owed to Wells Fargo increased from \$479.61 to \$575.32, effective July 2009, and that the Debtors' monthly payment to the Trustee therefore increased from \$1,494.15 to \$1,594.90, beginning with the payment due in July of 2009.

On April 6, 2010, the Court entered a Discharge of Debtor after Completion of Chapter 13 Plan. (Main Case Doc. 63). The Trustee's Final Report and Account reflects that Wells Fargo received distributions in the full amount of its arrearage claim, \$11,182.89, and distributions in the total amount of \$29,446.57 on its secured claim. (Main Case Doc. 69).

On May 28, 2010, Wells Fargo sent the Debtor a letter (the Post-Discharge Letter) advising him that the mortgage payments were past due in the amount of \$2,708.75 for the months of January of 2010 through May of 2010. (Doc. 25, Exhibit 6).

On July 22, 2010, the Debtor filed a Complaint against Wells Fargo. The Complaint contains five Counts. Count I is an action for violation of the automatic stay; Count II is an action for violation of the Debtor's discharge; Count III is an action for violation of the Confirmation Order; Count IV is an action for violation of the Fair Debt Collection Practices Act; and Count V is an action for an accounting.

Generally, the Debtor asserts that he made all of the payments that were due to Wells Fargo under his confirmed Chapter 13 Plan, and that only the subsequent payments of principal remained outstanding after completion of the Plan. Consequently, the Debtor contends that the Post-Discharge Letter is evidence that Wells Fargo had misapplied or misappropriated the distributions made to it under the Plan, and that Wells Fargo improperly sought to collect additional amounts from him by sending the Post-Discharge Letter on May 28, 2010. (Doc. 1, ¶¶ 34-36).

In response, Wells Fargo asserts that periodic increases in the escrow payments for property taxes and insurance were made during the Chapter 13 case, as expressly permitted by the Note and Mortgage, that notice of the increases was provided to the Debtor, and that the unpaid increases account for the shortfall that existed when the Plan was completed. According to Wells Fargo, it notified the Debtor of

the increased monthly payments as the amounts were adjusted, and is therefore entitled to collect the shortages that accrued during the term of the Plan. (Doc. 24, 25).

### **Discussion**

Wells Fargo contends that a summary judgment should be entered in its favor on all Counts of the Debtor's Complaint, because there is no genuine issue as to any material fact, and Wells Fargo is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). (Doc. 24).

#### **I. Guevara and Dominique**

Two Bankruptcy Courts in Florida have evaluated the question of whether a mortgage lender can collect post-confirmation escrow shortages from a Chapter 13 debtor after the debtor has received his discharge.

In In re Guevara, 258 B.R. 59 (Bankr. S.D. Fla. 2001), the debtors' Chapter 13 plan was confirmed by the Court, and the debtors paid all amounts owed under the confirmed plan, including amounts designated for their regular monthly mortgage payment and amounts required to cure the prepetition arrearage on their home mortgage. The taxes and insurance on the debtors' home had increased during the life of the plan, however, and the debtors did not make any additional payments for the increased obligations through their plan. After the debtors completed the plan, the holder of the mortgage attempted to collect the increased amount that had accrued for the taxes and insurance. In re Guevara, 258 B.R. at 60.

The Court determined that the accrued amount was not dischargeable in the debtors' Chapter 13 case. Id. at 62. First, the Court found that the increased obligations for taxes and insurance arose post-confirmation. Consequently, the debtors' plan did not provide for the obligations, since they had not

yet accrued at the time of confirmation, and confirmation of the plan therefore did not bind the mortgage holder pursuant to §1327(a) of the Bankruptcy Code. Id. at 61.

Second, the Court found that discharge of the increased obligations was prohibited by §1322(b)(2) of the Bankruptcy Code.

Charges for impound or reserve accounts arise from a debtor's contract obligation to make regular payments to the lender so the lender can maintain reserve accounts sufficient to pay the debtor's real property taxes and insurance premiums. Although the Debtors did not meet their contract obligations [by providing for the payment of the increased amounts of taxes and insurance], HSBC paid the Debtors' taxes and insurance and is now, pursuant to the terms of its contract, seeking repayment. The fact that HSBC is attempting collection of the annual shortfalls after completion of the Debtors' confirmed plan is of little significance. The terms of the mortgage provide for the payment of the annual shortfalls by the Debtors and 11 U.S.C. §1322(b)(2) requires payment thereof pursuant to the mortgage provisions. Section 1322(b)(2) of the Bankruptcy Code prohibits modification of the basic contract provisions for payments to a creditor secured by the Debtors' principal residence. Therefore, the Debtors' liability under the terms of their mortgage, which includes payment of all taxes and insurance, is unaffected by the Debtors' plans.

Id. at 61-62(Emphasis supplied). Since the debtors had notice of the increased obligations, "section 1322(b)(2) requires payment pursuant to the terms of the mortgage and there are no exceptions that can relieve the Debtors of their liability." Id. at 62. The increased debts were not discharged in the debtors' Chapter 13 case, and the mortgage holder was entitled to collect the unpaid amounts after completion of the plan.

Approximately six years after Guevara, in the case of In re Dominique, 368 B.R. 913, 919 (Bankr. S.D. Fla. 2007), the Court considered the dischargeability of mortgage payments that arose post-confirmation by virtue of changes in escrow obligations. In Dominique, the Court first found that "section 1322(b)(2) prohibits alteration of a creditor's rights secured solely by the primary residence. If the Mortgage allows payment changes, then nothing in a chapter 13 plan can alter that right." In re

Dominique, 368 B.R. at 920. Consequently, the post-confirmation increase in escrow obligations that are permitted under a home mortgage are not generally dischargeable upon the completion of a Chapter 13 plan.

In Dominique, however, the mortgage lender had not provided the debtor with annual notice of the escrow shortages as required by the federal Real Estate Settlement and Procedures Act. Since the lender had not provided the required notice during the Chapter 13 case, the Court found that it had waived its right to seek payment of the escrow shortage after the debtor's discharge. Id. at 921-22.

## **II. Application**

In this case, the FHA Mortgage signed by the Debtor, Mark C. Hoover, on September 29, 1993, provides:

**2. Monthly Payments of Taxes, Insurance and Other Charges.** Borrower shall include in each monthly payment, together with the principal and interest as set forth in the Note and any late charges, an installment of any (a) taxes and special assessments levied or to be levied against the Property, (b) leasehold payments or ground rents on the Property, and (c) premiums for insurance required by Paragraph 4.

Each monthly installment for items (a), (b) and (c) shall equal one-twelfth of the annual amounts, as reasonably estimated by Lender, plus an amount sufficient to maintain an additional balance of not more than one-sixth of the estimated amounts. The full annual amount for each item shall be accumulated by Lender within a period ending one month before an item would become delinquent. Lender shall hold the amounts collected in trust to pay items (a), (b) and (c) before they become delinquent.

If at any time the total of the payments held by Lender for items (a), (b) and (c), together with the future monthly payments for such items payable to Lender prior to the due dates of such items, exceeds by more than one-sixth the estimated amount of payments required to pay such items when due, and if payments on the Note are current, then Lender shall either refund the excess over one-sixth of the estimated payments or credit the excess over one-sixth of the estimated payments to subsequent payments by Borrower at the option of Borrower. If the total of the payments made by Borrower for item (a), (b) or (c) is insufficient to pay the item when due, then Borrower shall pay to

Lender any amount necessary to make up the deficiency on or before the date the item becomes due.

(Doc. 25, Exhibit 2)(Emphasis supplied).

The Debtors filed their petition under Chapter 13 of the Bankruptcy Code on December 28, 2004.

On January 4, 2005, Wells Fargo issued an Escrow Surplus Notice to the Debtor, reflecting a New Payment Effective Date of March 1, 2005. (Doc. 25, Exhibit 5).

The Debtors' Chapter 13 Plan was confirmed on October 28, 2005. (Main Case Doc. 41). The confirmed Plan provided for the Trustee to make payments to Wells Fargo to cure the prepetition arrearage, and also to make the "regular monthly payment" to Wells Fargo. Payments pursuant to the confirmed Plan were scheduled to commence on November 10, 2005, and to extend for a period of sixty months.

On August 14, 2006, Wells Fargo issued an Escrow Disclosure Statement to the Debtor, reflecting a New Payment Effective Date of October 1, 2006. (Doc. 25, Exhibit 5).

On January 29, 2008, Wells Fargo issued an Escrow Disclosure Statement to the Debtor, reflecting a New Payment Effective Date of April 1, 2008. (Doc. 25, Exhibit 5).

On January 5, 2009, Wells Fargo issued an Escrow Disclosure Statement to the Debtor, reflecting a New Payment Effective Date of March 1, 2009. (Doc. 25, Exhibit 5).

On May 12, 2009, Wells Fargo filed a Notice of Payment Change with the Court and served the Debtor and the Chapter 13 Trustee, and on July 20, 2009, the Trustee filed a Notice of Plan Payment Change, effective in July of 2009, based on an increase in the monthly Mortgage payment owed to Wells Fargo. (Main Case Doc. 57). The July 2009 Plan Payment Change is the only adjustment of the monthly amount owed to Wells Fargo that appears in the record of the bankruptcy case.

On April 6, 2010, the Court entered a Discharge of Debtor after Completion of Chapter 13 Plan. (Main Case Doc. 63).

According to Wells Fargo, the total amount of the regular monthly payments owed to it during the 60-month term of the Plan, apart from the amount to cure the prepetition arrearage, equaled the sum of \$30,561.74. (Doc. 25, ¶ 11). The Chapter 13 Trustee's Final Report and Account reflects that the total amount of the prepetition arrearage was paid to Wells Fargo, and that the amount of the "regular monthly payments" made to Wells Fargo totaled the sum of \$29,446.57. (Main Case Doc. 69). Consequently, Wells Fargo received less under the Plan than the amount that was owed to it under the Mortgage for the post-Confirmation period.

Under these circumstances, the Court finds that Wells Fargo did not improperly seek to collect additional amounts from the Debtor by sending the Post-Discharge Letter on May 28, 2010. The FHA Mortgage provides for the adjustment of the Debtor's monthly mortgage payment to cover property taxes and insurance premiums associated with their home. (Doc. 25, Exhibit 2). Wells Fargo made periodic adjustments to the amount of the Debtor's payment, as permitted by the Mortgage, and notified the Debtor of the adjustments pursuant to the Escrow Disclosure Statements sent to the Debtor. (Doc. 25, Exhibit 5). Accordingly, apart from the payments to cure the prepetition arrearage, the total amount of the payments owed to Wells Fargo during the term of the Debtor's Plan, including the adjusted amounts, was \$30,561.74. (Doc. 25, ¶ 11).

Section 1322(b)(2) of the Bankruptcy Code provides that a Chapter 13 plan may not modify the rights of the holder of a claim "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. §1322(b)(2). The property encumbered by Wells Fargo's Mortgage is

the Debtors' principal residence. Pursuant to §1322(b)(2) and the decision in Guevara, therefore, the Debtors' liability to Wells Fargo cannot be affected by their Plan. In re Guevara, 258 B.R. at 61-62. Wells Fargo provided notices of the periodic changes. The amount owed under the Mortgage, including adjustments for taxes and insurance, remained due and owing after the Debtors' completion of their Plan. To the extent that a shortage existed when the Plan was concluded, Wells Fargo is entitled to collect the shortage from the Debtors after the Debtors received their Discharge.

### **Conclusion**

In his Complaint, the Debtor asserts that Wells Fargo had misapplied or misappropriated the distributions made to it under his confirmed Chapter 13 Plan, and that Wells Fargo improperly sought to collect additional amounts from him after the completion of his Plan. The Debtors have made no showing, by affidavits or otherwise, of particular facts indicating that Wells Fargo misapplied the distributions that it received under the Plan. See Fed.R.Civ.P. 56(c).

Wells Fargo filed a Motion for Summary Judgment, and contends that the Court should enter a judgment determining that Wells Fargo is entitled to collect the shortages that accrued during the term of the Plan. The Motion for Summary Judgment should be granted. As permitted by the Mortgage, Wells Fargo made periodic adjustments to the monthly payment amount owed by the Debtor during the term of the Plan. Wells Fargo notified the Debtor of the adjustments. Pursuant to §1322(b)(2) of the Bankruptcy Code, the Debtors' liability under the Mortgage, including the amount arising from the adjustments for escrow changes during the term of the plan, cannot be affected by the contents of the Debtors' Chapter 13 Plan, and the Debtors are not relieved of the liability by virtue of their discharge.

Accordingly:

**IT IS ORDERED** that:

1. The Defendant's Motion for Summary Judgment, filed by Wells Fargo Bank, N.A., is granted, and Wells Fargo Bank, N.A. is entitled to collect the amounts owed to it under the FHA Mortgage dated September 29, 1993.

2. A separate Final Summary Judgment shall be entered consistent with this Order.

**DATED** this 22 day of July, 2011.

**BY THE COURT**

Paul M. Glenn

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PAUL M. GLENN  
Chief Bankruptcy Judge