

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Baltimore**

In re:

ELEANOR ARLENE QUEEN,

Debtor.

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Case No. 98-5-7158-SD

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**ORDER SUSTAINING DEBTOR'S OBJECTION TO ALLOWANCE
OF CLAIM OF OCWEN FEDERAL BANK**

Before the Court is Debtor's objection to the allowance of the proof of claim of Ocwen Federal Bank ("Ocwen"). The objection is made on the ground that the debtor participated in a Department of Housing & Urban Development ("HUD") Assignment Program, which provided that in exchange for minimal payment, HUD would forbear from foreclosing on Debtor's home. Debtor argues that Ocwen does not properly calculate the payments due or credit her for the payments made during the HUD Assignment Program. The dispute essentially concerns Ocwen's calculation of the mortgage arrearage amount. Upon consideration of the Debtor's objection, the opposition thereto and the supporting documentation, the court will sustain Debtor's objection to Ocwen's proof of claim.

STANDARD

In general, courts have placed the ultimate burden of persuasion of proving the validity and amount of a claim on the claimant in a bankruptcy proceeding. *See Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915, 925 (1st Cir.1993); *see also* Norton Bankruptcy Law and Practice, Bankruptcy Rules, at 189 (Clark Boardman Callaghan 1996). The burden of proof for the allowance or disallowance of claims rests on different parties at different times. *In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173-74 (3rd Cir.1992). A properly filed and supported proof of claim is deemed

"prima facie valid." 11 U.S.C. § 502(a); Fed.R.Bankr.P. 3001(f). Thereafter, the burden shifts to the party objecting to the claim. In such case, the objector must "produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence." California State Bd. of Equalization v. Official Unsecured Creditors Committee (In re Fidelity Holding Company, Ltd.), 837 F.2d 696, 698 (5th Cir.1988). The mere filing of an objection does not satisfy this requirement. In re Trending Cycles for Commodities Inc., 26 B.R. 350, 35 (Bankr.S.D.Fla.1982); In re Lanza, 51 B.R. 125, 127 (Bankr.N.J.1985).

FACTS

Debtor and her husband Steven Queen entered into a mortgage with Ryan Financial Services secured by a deed of trust. The amount advanced by Ryan Financial was \$87,500.00. The Deed of Trust provided that, due to deferral of interest, the principal could increase to \$94,132.19. Mr. & Mrs. Queen defaulted on their obligations under the mortgage and entered into the HUD Assignment Program in June, 1985. HUD assigned the note and deed of trust to Ocwen on March 7, 1997. Mrs. Queen filed a voluntary petition for relief under Chapter 13 of Title 11 on May 18, 1998.

Ocwen Federal Bank filed a proof of claim in the amount of \$145,936.58 on June 18, 1998. This proof of claim was objected to by Debtor. After a hearing, this court sustained the objection, with leave to amend, and stated that the Debtor was entitled to a breakdown of the arrearage claim and an explanation of how the amounts deferred under the HUD Assignment Program were included in the claim. Ocwen filed an amended proof of claim on January 29, 1999 in an amount identical to the original proof of claim. Ocwen claimed arrears in the amount of \$38,872.28. This sum included:

arrearages from 1995 in the amount of \$7,265.70; arrearages from 1996 in the amount of \$9,354.80; arrearages from 1998 in the amount of \$12,016.40; late charges totaling \$2,359.80; and foreclosure costs and fees in the amount of \$2,413.58. Debtor objected to this amended proof of claim.

The parties disagree about the duration of the forbearance period and the amount due monthly during the HUD Assignment Program. Debtor claims to have been in the HUD Assignment Program from October, 1994 to October, 1997. (Debtor's Objection to Amended Proof of Claim, ¶ 3). Ocwen provided a copy of the Debtor's forbearance agreement under the HUD Assignment Program. This agreement was dated September 1, 1994 and governs the period from October 1, 1994 to September 1, 1995. Ocwen states that it is not in possession of any additional agreements for the periods from October 1, 1995 through September 30, 1997. (Response to Request for Documentation Concerning Claim, ¶ 2). However, in its pleadings, Ocwen agreed that Debtor's participation in the HUD Assignment Program was extended for two additional years. (Answer to Debtor's Objection to Amended Proof of Claim, ¶ 3).

A court may, in its discretion, treat statements in a pleading as binding admissions of fact. See, e.g., City Nat'l Bank v. United States, 907 F.2d 536, 544 (5th Cir.1990). As the Court of Appeals for the Fourth Circuit has explained, "[a] judicial admission is usually treated as absolutely binding, but such admissions go to matters of fact which, otherwise, would require evidentiary proof. They serve a highly useful purpose in dispensing with proof of formal matters and of facts about which there is no real dispute. Once made, the subject matter ought not to be reopened in the absence of a showing of exceptional circumstances, but a court, unquestionably, has the right to relieve a party of his judicial admission if it appears that the admitted fact is clearly untrue and that the party was laboring under a mistake when he made the admission." New Amsterdam Cas. Co. v. Waller, 323 F.2d 20, 24 (4th

Cir.1963). The court finds that Ocwen's statements in its response to the Debtor's objection to its claim are judicial admissions. Ocwen's declaration that it has been unable to locate documentation extending the original forbearance agreement is insufficient to constitute a withdrawal of its prior admission. Therefore, the court finds that the debtor's participation in the HUD Assignment Program began on October 1, 1994 and was extended to September 30, 1997. This conclusion is consistent with HUD's failure to foreclose during the extended period.

Ocwen argues that the terms of the forbearance agreement provide that a default under the agreement could lead to a return to the original terms of the Note and Deed of Trust. Indeed, the agreement provides that upon a default HUD could require a return to the terms of the original note and mortgage. (Payment Plan, ¶ 6). There is no evidence before the court to indicate that HUD terminated the payment plan and the Debtor's participation in the Assignment Program prior to October, 1997. Absent such evidence, the court, as an alternative ground, accepts the assertions of Debtor and finds that her participation in the HUD Assignment Program began on October 1, 1994 and ended on September 30, 1997.

Ocwen has provided the court with a copy of the payment plan that governed the forbearance period. The payment plan memorializes the terms of the forbearance agreement between the Queens and HUD. The terms of the payment plan under the Assignment Program required the Debtor to make monthly payments in the amount of \$518.00 in exchange for HUD not foreclosing on Debtor's mortgage. This is consistent with the terms of the HUD Assignment Program. HUD Handbook 4330.2 describes the program as follows:

The assignment program provides temporary relief in the way of reduced or suspended mortgage payments to qualified homeowners for up to 36 months. Relief is provided to qualified homeowners with FHA-insured mortgages who fall behind on their

mortgage through no fault of their own. These homeowners must also demonstrate reasonable prospects for being able to pay their full monthly mortgage payment after an approved period of reduced or suspended payments.

Appendix A. Accordingly, under the Debtor's payment plan, the amount due monthly was reduced to \$518.00 during her participation in the HUD Assignment Program. Paragraph seven of the Payment Plan provides:

I understand that all the rights and obligations of the original note and mortgage, except as changed by this Payment Plan, remain in full force and that, when this Payment Plan expires, the monthly mortgage payments due under the note and mortgage will begin again, unless HUD agrees to renew, amend or extend the Payment Plan.

This language evidences an understanding that the Debtor's obligation to remit \$1092.40 monthly per the original note and deed of trust would be suspended for the duration of the HUD Assignment Program, and thereafter it would recommence.

Ocwen's proof of claim includes computations which assess an amount of \$1,092.40 due monthly from January 1995. (Answer to Debtor's Objection to Amended Proof of Claim, ¶ 2). This is in error. To the extent that Ocwen's proof of claim is based on calculations assessing an amount due monthly from October 1, 1994 to September 30, 1997 greater than \$518.00, it will be disallowed.

Both parties agree on the Debtor's payment history during the period of January, 1995 to January, 1997. Debtor made eleven (11) payments from January to October of 1995 totaling \$5,843.10, six (6) payments during 1996 totaling \$3,754.00 and a single payment on January 27, 1997 of \$1,092.40. Although no reference is made to the payments due from October to December of 1994, it is apparent from the above payment history that a number of payments were not made when due under the forbearance agreement. The entire amount due under the forbearance agreement (\$518.00 X 36) was \$18,648.00. Debtor's payments total \$10,689.50, plus payments that may have been made from

October, 1994 through December, 1994, of which there is no evidence presented by Debtor. However, Ocwen's arrearage claim does not include an amount for this period, and so the court will assume these three payments were made (\$518.00 X 3). Therefore, the balance plus unpaid late charges on the missed payments and pre-petition costs are properly characterized as an arrearage amount under the forbearance agreement. In re Santos, 97 B.R. 227, 229 (Bankr.E.D.Pa.1989), modified, sub nom. Santos v. U.S. Dep't of Housing and Urban Development, 1992 W.L. 165677 (E.D. Pa.) (arrearage figure is the sum of all prepetition funds that should have been paid to HUD in accordance with the Mortgage Assignment Program). Properly included in the arrearage figure are unpaid charges for the following: unpaid, reduced payments during the thirty-six month forbearance period and unpaid post-forbearance, prepetition period of full payments; late charges on the actual amount of a missed or late payment; costs under the loan agreement; and tax advances in excess of the escrow made between the commencement of the forbearance period and the filing of the petition. Id. at 232-33; Sciortino v. Mortgage Default Services, Inc., 120 B.R. 369, 371, 374-379 (Bankr. E.D. Pa. 1990). Not included in the arrearage figure, and not claimed, are missed pre-assignment period principal, interest, and escrow payments, in addition to charges forborne and suspended during the thirty-six month forbearance period. Those sums are part of the payoff figure and are to be added to the principal mortgage balance to be repaid outside and after the Chapter 13 plan. Santos at 232.

The parties disagree about whether the amounts forborne during the forbearance period should be characterized as unpaid principal or arrearages on Ocwen's proof of claim. According to the schedule attached to the deed of trust note, Debtor's monthly payments beginning in 1990 were to be made in the amount of \$1,092.40. (Deed of Trust Note, Schedule A). This amount includes \$974.08 for payment of principal and interest and \$118.32 to be applied to escrow. Therefore, during the HUD

Assignment Program \$574.40 was deferred monthly for a total of \$20,678.40 (\$574.40 X 36). Per the terms of the Deed of Trust Note, the deferred interest would be added to the principal balance monthly and would increase the principal balance to not more than \$94,132.19 (Deed of Trust Note, Schedule B). Consistent with the court's holding in In re Santos, and as limited by the terms of the Deed of Trust Note, the full amount of deferred interest is therefore to be added to the principal amount provided the principal balance does not exceed \$94,132.19. Regardless, the deferred interest may not be characterized as an arrearage amount. Santos at 232; Sciortino at 371, 378-379.

In the objection to Ocwen's proof of claim Debtor alleges that Ocwen did not properly apply the payments made to reduce the principal balance. In response, Ocwen notes that most of the Debtor's payments were applied towards a shortage in Debtor's escrow account. The remaining portion of the payments were credited to interest. Ocwen has supplied documentation to support its assertions regarding the allocation of Debtor's payments. There is no evidence that the payments were improperly applied or that Debtor received insufficient credit.

The remaining disputes between the parties concern the calculation of interest charged by Ocwen. Ocwen's original proof of claim includes an amount representing accrued interest of \$49,144.06. (Answer to Amended Objection to Claim, ¶ 6). This is consistent with the representations of counsel at the January 14, 1999 hearing on the Debtor's objection to Ocwen's proof of claim. However, the court is unable to discern the amount of interest claimed in Ocwen's amended proof of claim. To the extent that Ocwen's claim includes an amount for interest charged on the forborne amounts during the forbearance period, this is improper. The court in Ferrell v. Pierce (Ferrell I), 560 F. Supp 1344 (N.D. Ill 1983) examined the HUD handbook procedures for the assignment program and concluded that HUD's procedures prohibited the agency from charging interest on the forborne amounts

until after the forbearance period had ended. Ferrell I at 1364-5. Therefore, interest on the forborne amounts could not be charged until October of 1997, and the amount assessed was to be added to the principal balance in accordance with the terms of the Deed of Trust. Santos v. HUD, 1992 WL 165677, 41 (E.D.Pa. 1992). Accordingly, to the extent Ocwen's arrearage claim includes an amount for interest on the forborne amounts, it will be disallowed.

Ocwen's amended proof of claim is in the total amount of \$145,936.58. This includes an arrearage claim of \$38,872.28. (Amended Proof of Claim, Summary of Arrearage Claim). Ocwen has provided evidence that supports its claim of a principal balance due of \$91,810.36. (Ocwen's Response to Request for Documentation Concerning Claim, 1997 Ocwen Payment History). After examining the documents presented and the sum of the arrearage claim and the principal balance claim, the court is unable to account for the remaining \$15,253.94 included in Ocwen's proof of claim. The court also notes that Ocwen's answer to the original objection to claim asserts a claim to accrued interest in the amount of \$49,144.06. (Answer to Amended Objection to Claim, ¶ 6). It is unclear what amount of accrued interest is currently being claimed by Ocwen.

The Debtor has met her burden as a party objecting to a proof of claim to produce sufficient evidence to negate one or more of the sworn facts in the proof of claim. The court finds that Ocwen has not demonstrated the legal validity of its full claim by a preponderance of the evidence. Therefore, it is this ____ day of August, 2000, by the United States Bankruptcy Court for the District of Maryland,

DECLARED, that the Debtor participated in the HUD Assignment Program from October 1, 1994 to September 30, 1997; and it is further

DECLARED, that the amount due monthly during the Debtor's participation in the HUD Assignment Program did not exceed \$518.00; and it is further

ORDERED, that the claim of Ocwen Federal Bank as a secured creditor is disallowed in the amount claimed; and it is further

ORDERED, that Ocwen Federal Bank is granted leave to submit an amended proof of claim consistent with this opinion within 30 days.

E. Stephen Derby
Judge

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