

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>00-13152</u>
Harold Grimes, Jr.)	
)	FILED
Debtor)	2002 MAY 23 P 3:55
<hr/>		
Harold Grimes, Jr.)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>01-01053A</u>
Cendant Mortgage)	
)	
Defendant.)	

ORDER

Pursuant to notice, trial was held on Harold Grimes' ("Plaintiff") complaint against Cendant Mortgage ("Defendant") for alleged violations of the confirmation order in Plaintiff's underlying Chapter 13 case. According to Plaintiff, Defendant violated the confirmation order by assessing attorney fees against the Defendant's account without the Court's approval. Because the attorney fees were incurred after confirmation, Defendant's actions did not violate the confirmation order.

The Court has jurisdiction to hear this matter as a core bankruptcy proceeding under 28 U.S.C. § 157(b)(2)(O) and 28 U.S.C.

§ 1334.

From the evidence presented, I make the following findings. On November 20, 1997, Plaintiff and his wife, Tonya Grimes, entered into a mortgage with M & I Bank Northwest secured by property at 943 Marvelle Lane, Green Bay, Wisconsin. (Def.'s Ex. 1 ¶4.) This mortgage was subsequently assigned to the Defendant. Plaintiff filed for chapter 13 bankruptcy protection on November 15, 2000 and listed Defendant as a creditor. Defendant filed a proof of secured claim for \$96,751.62. The collateral was valued at \$125,000. (Pl.'s Ex. 2.) The plan was confirmed on March 19, 2001 and provides that "all attorney fees, bankruptcy fees & expenses & other fees to be approved by the Bankruptcy Court." Defendant did not object to confirmation.

On February 28, 2001, Defendant sent Plaintiff a loan statement that set forth the balance due as \$98,332.65. (Pl.'s Ex. 3.) No attorney fees were included in this statement. By motion filed March 2, 2001, Plaintiff sought leave to sell this property for \$99,324.62. I granted the motion on April 16, 2001. In the meantime, on April 11, 2001, Defendant by motion sought relief from the automatic stay to foreclose on this property.

Defendant's second loan statement to Plaintiff dated April 30, 2001 added \$875.00 in bankruptcy attorney fees and cited the total amount due as \$100,222.75. (Pl.'s Ex. 4.) These attorneys fees were incurred by Defendant when it filed for stay relief on

April 11, 2001.

Because of the \$875.00 in attorney fees as well as other disputed real estate tax and escrow fees, Plaintiff refused to go forward with the sale closing scheduled for May 9, 2001. The sale fell through and the Defendant subsequently foreclosed on the property. On June 6, 2001, Plaintiff filed this adversary complaint alleging that the Defendant violated the chapter 13 plan by failing to seek Court's approval for these attorney fees. The Plaintiff's chapter 13 case later converted to chapter 7 on November 1, 2001 and a discharge was granted on March 29, 2002.

At trial held April 5, 2002, Plaintiff alleged that Defendant violated the confirmation order when it included attorney fees on its payoff statement dated April 30, 2001. Plaintiff argued that even if the plan did not comply with the Bankruptcy Code or case law interpreting the Code, the confirmation order bound both parties and that he was entitled to damages under 11 U.S.C. §105. Plaintiff testified that the only monetary damages were \$3,000.00 in attorney's fees incurred in this adversary proceeding and that no monetary damages were incurred directly from Defendant's inclusion of attorney fees on the April 30, 2001 payoff statement.

Defendant at trial maintained that it did not violate the confirmation order because attorney fees were incurred post-confirmation and therefore are an issue of state law under Telfair v. First Union Mortgage Corp., 216 F.3d 1333, 1338 (11th Cir. 2000),

cert. denied 531 U.S. 1073, 121 S.Ct. 765, 148 L.Ed.2d 1030 (2001). Furthermore, Defendant argued that damages are inappropriate under 11 U.S.C. §105 because Plaintiff did not incur any actual damages and any damage award would be merely punitive. Defendant also argued the plan's language was unclear as to when the Court's approval for fees was required.

Confirmation binds both debtor and creditors to the chapter 13 plan. 11 U.S.C. §1327(a). However, in order to confirm a plan I must determine at the confirmation hearing that the plan complies with the Bankruptcy Code. 11 U.S.C. §1325(a)(1). In interpreting the plan's language, I must therefore reconcile any ambiguities in accordance with applicable bankruptcy law. The plan, which provides that "[a]ll attorney fees, bankruptcy fees, expenses & other fees to be approved by the Bankruptcy Court," is ambiguous because it does not state when approval must be sought: up to time of confirmation, to discharge, or for as long as the debtor/creditor relationship exists for long term debts or for the lifetime of the debtor.

Post-confirmation attorney fees and expenses are governed by the underlying debt instrument and state law, and not by the Bankruptcy Code. Telfair v. First Union Mortgage Corp., 216 F.3d 1333, 1338 (11th Cir. 2000), cert. denied 531 U.S. 1073, 121 S.Ct. 765, 148 L.Ed.2d 1030 (2001). In reconciling the Plaintiff's plan with Telfair, I find that the plan requires this Court's approval

for pre-confirmation fees and expenses only. Defendant charged attorney fees against Plaintiff's account for filing a stay relief motion on April 11, 2001, post confirmation. Defendant did not violate the confirmation order.

Plaintiff argues that a confirmed plan must be given res judicata effect even if it is inconsistent with the provisions of the Bankruptcy Code. Plaintiff is correct in that a creditor who fails to object timely is bound by the confirmed plan. In re Stewart, 247 B.R. 515, 521 (Bankr. M.D. Fla. 2000). However, the issue in the instant case is interpretation of the confirmed plan's ambiguous language, and not enforcement of the confirmation plan's provisions¹.

It is therefore ORDERED that judgment is entered for the Defendant, Cendant Mortgage.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 23rd Day of May, 2002.

¹Having determined no plan violation occurred, I do not address Defendant's defense that Plaintiff suffered no damages warranting a monetary award.