



THE FOLLOWING ORDER  
IS APPROVED AND ENTERED  
AS THE ORDER OF THIS COURT:

DATED: December 31, 2019

*Katherine M. Perhach*  
Katherine Maloney Perhach  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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In re:  
James H. Brewer, Jr. and  
Lisa M. Brewer,  
Debtors.

Chapter 13  
Case No. 15-29081-kmp

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**ORDER OVERRULING DEBTORS' OBJECTION TO  
NOTICES OF POSTPETITION MORTGAGE FEES, EXPENSES, AND CHARGES**

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The Debtors have objected to two Notices of Postpetition Mortgage Fees, Expenses, and Charges filed by Ocwen Loan Servicing, LLC ("Ocwen"), one filed on April 18, 2016 (the "2016 Notice") and one filed on January 17, 2019 (the "2019 Notice"). PHH Mortgage Corporation ("PHH"), the transferee of the claim held by Ocwen, takes the position that the Debtors' Objection to the 2016 Notice is untimely and ought to be overruled. PHH further maintains that a \$200 charge in the 2019 Notice for attorneys' fees incurred in reviewing a post-confirmation modified plan is reasonable. For their part, the Debtors assert their Objection is timely as to both Notices, and they challenge the reasonableness of the attorneys' fees claimed in the Notices. For the reasons set forth below, the Court overrules the Debtors' Objection to the 2016 Notice and the 2019 Notice.

**I. The Court Overrules the Debtors' Objection to the 2016 Notice as Untimely and Declines the Debtors' Invitation to "Exercise Its Discretion" to Review the 2016 Notice.**

**A. The Debtors' Objection to the 2016 Notice Is Untimely under Rule 3002.1(e).**

Bankruptcy Rule 3002.1 requires creditors to file notices "itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence." Rule 3002.1(e) provides a mechanism for debtors to object to the fees, expenses, and charges stated in these notices. It provides:

On motion of a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with §1322(b)(5) of the Code.

Rule 3002.1(e) expressly states that the debtor has one year after service of the Notice of Postpetition Mortgage Fees, Expenses, and Charges to file a motion requesting that the court determine whether the payment of any claimed fee is required by the underlying agreement and applicable nonbankruptcy law to maintain payments in accordance with § 1322(b)(5). Here, Ocwen, the predecessor in interest to PHH, served the 2016 Notice on April 18, 2016, itemizing \$400 in attorneys' fees incurred on the Debtors' mortgage account postpetition. The Debtors did not object to the 2016 Notice until February 14, 2019, and filed a second objection on May 16, 2019 after the Court overruled the initial objection without prejudice. The Debtors' Objection was not filed within one year after service of the 2016 Notice; therefore, the Debtors' Objection is untimely and must be overruled.

**B. The Court Declines the Debtors' Invitation to "Exercise Its Discretion" to Review the 2016 Notice.**

The Debtors argue that Rule 3002.1(e)'s use of the word "shall" might mandate that the Court consider motions brought within one year, but also permits the Court to exercise its discretion and consider motions brought outside that timeframe. They argue that such an exercise of discretion would promote judicial economy by allowing debtors to combine objections to multiple Rule 3002.1(c) notices into one motion.

In support of their argument, the Debtors cite *Bodrick v. Chase Home Finance, Inc. (In re Bodrick)*, 498 B.R. 793 (Bankr. N.D. Ohio 2013), which discusses Rule 3002.1(h) and not Rule 3002.1(e). After the debtor in *Bodrick* received a discharge, she filed an adversary complaint alleging that a number of actions by her mortgage creditor had violated the automatic stay. These allegedly included overcharging and misapplying mortgage payments, which caused the debtor "to be behind on her payments upon completion of the bankruptcy." *Id.* at 798. The creditor moved to dismiss the complaint, arguing that the debtor was required under Rule 3002.1(h) to file a motion within 21 days after the creditor filed its Response to the Notice of Final Cure Payment if she ever wanted to dispute that there was a postpetition arrearage. The court denied the creditor's motion to dismiss, holding that Rule 3002.1(h) does not require the Trustee or the debtor to file a motion after service of a Response to Notice of Final Cure Payment, but merely provides for what is to happen if such a motion is filed. *Id.* at 800. The court noted that Rule 3002.1(h) is not the exclusive procedure for "resolution of any disputes that may arise about payment of a claim secured by the debtor's principal residence." *Id.* Notably, the *Bodrick* court did not reject the 21-day period contained in Rule 3002.1(h) for bringing a motion for determination of the final cure and payment. Rather, *Bodrick* held that the absence of a Rule 3002.1(h) motion did not prevent the court from deciding the postpetition status of the

mortgage at a later date and in the context of an adversary proceeding alleging a violation of the automatic stay.

Adopting a reading of Rule 3002.1(e) that permits courts to consider a motion at any time overrides the policy determination made when the rule was written that such motions must be brought within one year of the service of the Notice of Fees, Expenses, and Charges. Rule 3002.1's requirement that creditors file itemized notices is meant to keep debtors apprised of additional fees, charges, and expenses incurred on the debtor's mortgage account during the pendency of the case. The 2011 Advisory Committee Notes to the rule explain the reason for this: "[t]imely notice of these changes [to the amount of the postpetition payment obligation] will permit the debtor or trustee to challenge the validity of any such charges, if appropriate, and to adjust postpetition mortgage payments to cover any undisputed claimed adjustment." Presumably, the drafters of the rule determined that one year was an appropriate time for a party to bring an objection to a notice and that a one-year period balanced the interests of both debtors and creditors.

Debtors' counsel argues that it would benefit debtors and courts for debtors to be able to wait until later in the case and bring a motion under Rule 3002.1(e) only if the fees, expenses, and charges reach a certain threshold. However, mortgage claims are frequently transferred, as happened in this case. It is plausible that the drafters determined that the one-year period was short enough to avoid requiring creditors to revisit fees, expenses, and charges long after those fees have been incurred or long after a mortgage loan has been service released to a new servicer, but long enough to promote judicial economy by allowing debtors to combine objections on occasion. The one-year time period to obtain a court determination of the validity of the fees, expenses, and charges seems to avoid imposing an unreasonable burden on either the debtor or

the mortgage creditor, while at the same time allowing a judicial determination that permits the debtor to make necessary adjustments in ongoing payments. If a debtor seeks to use the procedure of Rule 3002.1(e), the debtor must file a motion within the one-year period set forth in the rule. The Court declines to “exercise its discretion” to review the Debtors’ Objection to the 2016 Notice, if it even has such discretion.

**II. The Court Overrules the Debtors’ Objection to the 2019 Notice Because the Fees Satisfy Rule 3002.1(e) and Are Reasonable.**

**A. The Fees Stated in the 2019 Notice Are Required by the Underlying Agreement and Applicable Nonbankruptcy Law.**

That leaves the question of whether the \$200 in attorneys’ fees stated in the 2019 Notice “is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with §1322(b)(5) of the Code.” *See* Rule 3002.1(e). The Debtors’ Mortgage permits PHH to charge the attorneys’ fees that are set forth in the 2019 Notice. The Mortgage, which was filed as an attachment to PHH’s Proof of Claim in this matter, states:

Charges to Borrower and Protection of Lender’s Rights in the Property . . .  
If Borrower fails to make these payments or the payments required by paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender’s rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may *do and pay whatever is necessary to protect the value of the Property and Lender’s rights in the Property*, including payment of taxes, hazard insurance and other items mentioned in paragraph 2. Any amounts disbursed by Lender under this paragraph shall become an additional debt of Borrower and be secured by this Security Instrument. These amounts shall bear interest from the date of disbursement at the Note rate, and at the option of Lender shall be immediately due and payable.

*See* PHH’s Proof of Claim No. 8-1, Debtors’ Mortgage, Section 7 (emphasis added). The Debtors’ Mortgage expressly provides that PHH may “do and pay whatever is necessary” to

protect its interest in the property and its rights under the Mortgage when “there is a legal proceeding that may significantly affect Lender’s rights in the Property, such as a proceeding in bankruptcy” or when the Borrower fails to make its mortgage payments or otherwise fails to perform under the Mortgage. This includes paying PHH’s reasonable attorneys’ fees. The lender’s attorney’s review of the Debtors’ Chapter 13 plan modification falls within the scope of doing “whatever is necessary to protect . . . Lender’s rights in the Property” when its borrowers are in bankruptcy. According to the Mortgage, such fees become “immediately due and payable” at the lender’s option. The \$200 in attorneys’ fees incurred by PHH in reviewing the Debtors’ modified Chapter 13 plan was required by the underlying agreement and applicable nonbankruptcy law to maintain payments in accordance with § 1322(b)(5); therefore, the Debtors’ Objection to the 2019 Notice is overruled.

**B. The Fees Stated in the 2019 Notice Are Reasonable.**

Because the Court has determined that PHH can seek attorneys’ fees for reviewing the Debtors’ modified Chapter 13 plan under the terms of the underlying agreement and applicable nonbankruptcy law, the Court must now determine whether the \$200 in attorneys’ fees sought by PHH in the 2019 Notice is reasonable. After reviewing the Affidavit of Matthew Comella in support of PHH’s Response and the Notice of Postpetition Mortgage Fees, Expenses, and Charges, the Court determines that the \$200 charge for review of the modified plan is reasonable. Mr. Comella has summarized all of the work that went into reviewing the modified plan to ensure that PHH’s claim would receive adequate protection and treatment for the duration of the Debtors’ Chapter 13 case, including the following:

- Gathering all of the relevant documents for review by the supervising attorney;
- Review of the note and mortgage;

- Review of the bankruptcy docket;
- Review of the Debtors' petition and schedules;
- Determination of how PHH's claim would be treated for the duration of the plan;
- Determination of whether an objection to the plan would be necessary; and
- Requests for additional documentation or information.

(Docket No. 68 at 3, incorporated by Docket No. 74 at ¶ 6). Mr. Comella also appropriately notes that this bankruptcy case was filed in August 2015, and that this was the second modified plan filed by the Debtors, three years into their case. (*Id.*) As a result, this case also required the creditor's attorney to consider and review the contents of the modified plan, as well as the two previously filed plans and the previous three years of docket entries in the case, to ensure PHH's claim was properly treated during the remaining duration of the Chapter 13 plan. (*Id.*)

Debtors' counsel suggests that any evidence filed by PHH in support of its attorneys' fees ought to comport with the standards applicable to a debtor's attorney's application for compensation as described in *In re Nelson*, No. 16-22089-beh (Bankr. E.D. Wis. Feb. 1, 2017). However, the Court's Local Rule 2016 does not apply to PHH's response in support of its fees. Because there is no requirement for counsel to provide a chronological time record, PHH should not be penalized because it adopted a flat fee model and its attorneys did not maintain contemporaneous time records.

Debtors' counsel further asserts that no fees should have been incurred for review of the modified plan because the modification did not change the treatment of the creditor's claim. Essentially, according to Debtors' counsel, the Debtors were current on their mortgage at the time they filed the case and remained current throughout the case. Presumably, any prepetition arrearage had been paid by the time the modified plan was filed, and under the modified plan, the

Debtors were to continue making regular mortgage payments directly to the creditor, as they had from the beginning of the case. This is true, but as counsel for PHH points out, the only way for a creditor to make this determination is to review the plan and the file and do all of the work that PHH's attorneys did in this case for the \$200 fee that they charged. The attorneys' fees charged by PHH as stated in the 2019 Notice were reasonable and necessary to protect the creditor's interest in the property.

IT IS THEREFORE ORDERED: the Debtors' Objection to the Notice of Postpetition Mortgage Fees, Expenses, and Charges filed by Ocwen Loan Servicing, LLC on April 18, 2016 is overruled.

IT IS FURTHER ORDERED: the Debtors' Objection to the Notice of Postpetition Mortgage Fees, Expenses, and Charges filed by Ocwen Loan Servicing, LLC on January 17, 2019 is overruled.

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