UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

BILLINGS MANN and
CHERYL MANN

v. CA No. 00-192-T

CHASE MANHATTAN MORTGAGE
CORP.

MEMORANDUM AND ORDER

ERNEST C. TORRES, Chief United States District Judge.

Billings and Cheryl Mann (the "plaintiffs"), bring this putative class action alleging that Chase Manhattan Mortgage Corporation ("Chase") added charges for inspection and attorneys' fees to the balance due under their mortgage after they had filed a bankruptcy petition and that such charges violated the automatic stay provision of the Bankruptcy Code. In addition, the plaintiffs claim that Chase breached the mortgage agreement between the parties by failing to give advance notice of the inspections.

Chase has moved for summary judgement. For the reasons hereinafter stated, Chase's motion for summary judgement is granted.

Background

In December of 1998, the plaintiffs were in default on a residential mortgage loan obtained from Chase. Chase sent the

plaintiffs a notice that, pursuant to the terms of the mortgage, Chase planned to inspect the property in order to ensure that its security was not being impaired.

On April 9, 1999, the plaintiffs filed a petition for relief under Chapter 13 of the Bankruptcy Code. Chase filed a proof of claim ("POC") that included a $ 345 charge for twenty-three (23) "drive by" inspections that it had made prior to the date of filing and $ 375 in attorneys' fees for preparing and filing the POC. Those charges were approved as part of an order issued by the bankruptcy court confirming the plaintiffs' plan of reorganization. The plaintiffs belatedly objected to that portion of the confirmation order but subsequently withdrew their objection.

During the pendency of the bankruptcy case, Chase has continued to make periodic drive by inspections of the plaintiffs' property and has posted charges for those inspections to the plaintiffs' account. In addition, Chase has posted certain post-petition charges for legal fees incurred over the course of the bankruptcy proceedings. Chase has not billed the plaintiffs for any of those charges and the plaintiffs have not paid them; but the mortgage provides that it covers additional costs incurred as a result of any default by the mortgagor.

In this action, the plaintiffs seek sanctions for what they claim was Chase's violation of the automatic stay provision of 11 U.S.C. § 362 in continuing to assess fees for post-petition

inspections and legal services against the plaintiffs' account. In addition, they assert that Chase breached the contract between the parties by conducting the inspections without prior notice.[1]

The Summary Judgment Standard

Summary judgement is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." Fed. R. Civ. P. 56(c); see also Smith v. O'Connell, 997 F. Supp. 226, 233 (D.R.I. 1998). In deciding a motion for summary judgement, the Court must view the evidence in the light most favorable to the nonmovant and to draw all reasonable inferences in that party's favor. United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992).

When a motion for summary judgment is directed against a party that bears the burden of proof, the movant may make an initial showing of entitlement to summary judgment by producing evidence that negates an essential element of the nonmovant's case or by demonstrating an absence of record evidence to support the nonmovant's case. Celotex Corp. v. Catrett, 477 U.S. 317,

[1] Count I of the Complaint alleges that Chase violated the Cranston Gonzales Act amendments to RESPA (12 U.S.C. § 2605(e)) by charging a fee to respond to the plaintiffs' request for information regarding the status of their loan. This count has been dismissed by agreement of the parties.

322-23 (1986); DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997). The nonmovant, then, has the burden of demonstrating the existence of a genuine issue of material fact requiring a trial. Dow v. United Bhd. of Carpenters and Joiners, 1 F.3d 56, 58 (1st Cir. 1993). More specifically, the nonmovant is required to establish that it has sufficient evidence to enable a jury to find in its favor. See DeNovellis, 124 F.3d at 306.

Discussion

The exact nature of the plaintiffs' claims is not entirely clear. The plaintiffs' memorandum in opposition to Chase's motion for summary judgment is prefaced by an almost incomprehensible statement that some of their claims are being revised, others are being deleted and that the plaintiffs are challenging only "the imposition of the unauthorized post-petition legal fees."[2] The remaining portion of the memorandum consists primarily of a jumble of quotations from sections of the Bankruptcy Act and terse statements of general legal principles that appear to have no application whatever to this case.[3] In addition, the memorandum

[2]Plaintiffs' Memorandum in Opposition to Chase's Motion for Summary Judgement at 1. The revisions and deletions presumably refer to the series of proposed amended complaints submitted by the plaintiffs, all of which have been disallowed.

[3]For example, the plaintiffs refer to § 362(a)(8) of the Bankruptcy Code, which makes the automatic stay provisions applicable to proceedings before the United States Tax Court.

makes assertions regarding matters not alleged in the complaint.[4]

I. The Automatic Stay Claim

There is a real question as to whether the claimed automatic stay violation was properly brought in this Court. Although a district court is vested with jurisdiction to hear bankruptcy cases; proceedings in related cases; and proceedings arising under Title XI, it may refer such matters to the bankruptcy judges in that district. 28 U.S.C. § 157(a). The District of Rhode Island has adopted a standing order that automatically does just that. See "Order Referring Bankruptcy Proceedings" (July 18, 1984).

In this district, a claim subject to the automatic referral order may not be brought, initially, in the District Court unless a motion to withdraw the automatic reference to the Bankruptcy Court is granted. Here, no such motion was made. Nevertheless, the failure to withdraw the reference does not deprive this Court of subject matter jurisdiction. As already noted, jurisdiction over bankruptcy matters is vested in the district court. The bankruptcy court is merely an arm of the district court to which

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[4]For example, in an apparent effort to counter the defendant's argument that summary judgment should be granted because the plaintiffs sustained no injury, the plaintiffs assert that "injury" should be defined broadly to include "emotional distress and aggravation." However, the complaint contains no allegation that the plaintiffs suffered any emotional injury. Moreover, incorporating claims of emotional distress in a purported class action is something for which plaintiffs' counsel previously have been admonished for by the Seventh Circuit. Aiello v. Providian Fin. Corp., 2001 WL 101533, at *4 (7th Cir. Feb. 6, 2001).

such matters may be referred. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Because subject matter jurisdiction is not at issue; and, because the parties have neither briefed nor argued whether the case was properly brought here, this Court will not decide that question *sua sponte*. Instead, this Court will address the merits of the plaintiffs' claims.

A. The Pre-petition Charges

The plaintiffs claim that the charges assessed for pre-petition inspections and attorneys' fees incurred in filing the POC violated the automatic stay. As previously stated, those charges were approved as part of the confirmation order entered by the Bankruptcy Court. The plaintiffs cannot, now, collaterally attack that order, especially after having withdrawn their belated challenge to the order in the Bankruptcy Court. Adair v. Sherman, 230 F.3d 890, 894 (7th Cir. 2000) (failure to object at the confirmation hearing or to appeal from the order of confirmation precludes an attack on the plan or any provision therein in a subsequent proceeding).

B. Post-petition Charges

In order to obtain sanctions for an alleged violation of the automatic stay, a plaintiff must prove:

(1) The actions taken are in violation of the automatic stay;
(2) the violation was willful; and
(3) the debtor was injured as a result of the violation.

In re Clayton, 235 B.R. 801, 806 (M.D.N.C. 1998); see also In re Red Ash & Coke Corp., 83 B.R. 399, 403 (W.D. Va. 1988).

In this case, the plaintiffs have failed to present any evidence that Chase's actions violated the automatic stay or that they were injured as a result of the alleged violations.

The purposes of the automatic stay imposed by § 362(a) are:

1. To prevent pre-petition creditors from interfering with the debtor's efforts to reorganize his financial affairs and

2. To prevent some creditors from interfering with the orderly administration of the estate and the distribution of assets in accordance with statutory priorities by dismembering the estate or gaining an unfair advantage over other creditors.

Garofalo's Finer Foods, Inc. v. First Nat'l Bank of Harvey, 186 B.R. 414, 435-36 (N.D. Ill. 1995) (emphasis added); BNT Terminals, Inc. v. CitiBank, N.A., 125 B.R. 963, 971 (N.D. Ill. 1991).

In order to accomplish those purposes, § 362(a) stays, *inter alia*, any attempt to collect pre-petition debts from the debtor and any attempt to obtain or impose a lien against property of the estate on account of either pre or post-petition debts. The statute does not bar the assertion of claims for post-petition debts against the debtor. Taylor v. First Federal Savings & Loan Assn., 843 F.2d 153, 154 (3rd Cir. 1988); In re Chateaugay, 86 B.R. 33, 37-38 (S.D.N.Y. 1987). Nor does it bar attempts made, after the bankruptcy case has been terminated, to collect post-petition debts or pre-petition debts that have not been discharged. See 11 U.S.C. § 362(a).

The plaintiffs' apparent reliance on § 362(a)(3)-(4) is

misplaced. Those subsections make the automatic stay applicable to:

> (3) Any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate;
>
> (4) Any act to create, perfect, or enforce any lien against property of the estate;

11 U.S.C. §§ 362(a)(3)-(4).

It is not clear how the plaintiffs contend that charging to their account expenses for post-petition inspections and for legal services performed during the bankruptcy proceedings constituted acts to obtain possession of or to exercise control over property of the estate. The plaintiffs have not identified any act by Chase that reasonably could be construed as such an attempt or as an attempt to enforce any lien against the property. Indeed, even if the addition of post-petition inspection fees to the plaintiffs' account is viewed as the assertion of a claim for those fees, the mere assertion of such a claim would not violate the automatic stay. Taylor, 843 F.2d at 154.

Nor does the assessment of post-petition inspection fees amount to an act "to create, perfect, or enforce any lien" against the property within the meaning of subsection (a)(4). It is true that, such charges, if valid, increase the amount owed under the note and secured by the mortgage.[5] However, increases in the

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[5] Paragraph 7 of the Mortgage Agreement states, in relevant part:

amount due under a mortgage loan that are attributable to expenses incurred as a result of the debtor's default do not "create" a lien any more than the accrual of additional interest on the unpaid obligation would. In re Kennedy Mortgage Co. v. Larson, 23 B.R. 466, 472 (D.N.J. 1982). Like interest that automatically accrues on a pre-petition debt while a bankruptcy case is pending, legal and inspection fees attributable to the debtor's default on a pre-existing mortgage loan arise out of and are incidental to that loan.

Moreover, viewing such charges as "creating' a lien against property of the estate would be inconsistent with the purpose of subsection (a)(4). The prohibition against creating liens on a debtor's property after a bankruptcy petition has been filed was designed to prevent a creditor from obtaining preferential treatment *vis a vis* other creditors by converting an unsecured debt into a secured debt. H.R. Rep. No. 95-595, at 341 (1977). Here,

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> If Borrower fails to perform the covenants and agreements contained in this [Mortgage Agreement], or there is a legal proceeding that may significantly affect Lender's right in the Property (such as a proceeding in bankruptcy, . . .), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include . . . , paying reasonable attorneys' fees and entering on the Property to make repairs. *Any amounts disbursed by Lender under Paragraph 7 shall become additional debt of Borrower secured by this [Mortgage].*

Mortgage Agreement, ¶ 7 (emphasis added).

the assessment of additional charges against the plaintiffs' account does not confer, on Chase, any advantage over other creditors. The confirmation order specifies the amount that can be paid to Chase while the plaintiffs' bankruptcy case remains open and Chase is precluded from foreclosing on its mortgage until after the termination of the bankruptcy under the plan. Thus, the fact that the additional charges may be secured by Chase's mortgage does not provide Chase with any advantage over other creditors of the estate.

If, as the plaintiffs contend, the post-petition inspection and attorneys' fees were improper, the plaintiffs can contest the assessment of those fees if and when Chase seeks to collect them after the bankruptcy case has been terminated.

II. The Breach of Contract Claim

In order to prevail on their state law claim for breach of contract, the plaintiffs must prove: (1) the existence of a valid contract; (2) that the defendant breached its duties under the contract; and (3) the breach caused damage to the plaintiffs. Redine v. Catoia, 52 R.I. 140 (1932). Here, the plaintiffs are unable to show that Chase breached its contract or that they have been damaged by the alleged breach.

The alleged breach is that Chase inspected the property without giving them prior notice, which the plaintiffs claim violated ¶ 9 of the mortgage. Paragraph 9 provides:

> Inspection. Lender or its agent may make reasonable entries upon and inspections of the Property. Lender *shall give Borrower notice at the time of or prior to an inspection* specifying a reasonable cause for the inspection.

Mortgage Agreement, ¶ 9 (emphasis added).

The plaintiffs' claim fails for two reasons. First, it is undisputed that, shortly after the plaintiffs defaulted on their mortgage, Chase sent the plaintiffs a written notice of Chase's intent to inspect the property and to add the costs of inspection to the amount owed by the plaintiffs. Although the notice did not state the specific times of inspection, it did inform the plaintiffs that, because of the default, Chase intended to inspect the property in order to protect its interest.

More importantly, since the "drive by" inspections conducted by Chase did not involve entry upon the plaintiffs' property, those inspections were authorized by ¶ 7 of the mortgage, which does not require prior notice. Paragraph 7 provides:

> Lender may do and pay for *whatever is necessary to protect the value of the Property and Lender's rights in the Property*. Lender's actions may include . . . , paying reasonable attorneys' fees and entering on the Property to make repairs. Any amounts disbursed by Lender under Paragraph 7 shall become additional debt of Borrower secured by this [Mortgage].

Mortgage Agreement, ¶ 7 (emphasis added).

There is no doubt that inspections to determine the condition of the mortgaged property may be "necessary to protect the value of the Property." Majchrowlski v. Norwest Mortgage, Inc., 6 F. Supp. 2d 946, 964-965 (N.D. Ill. 1998) (finding that

provisions of a mortgage agreement identical to ¶¶ 7 and 9 authorized post-default inspections).

The plaintiffs, also, are unable to establish that they suffered any damage as a result of the alleged lack of notice. There is no indication that they were harmed by the "drive by" inspections and there is nothing in the mortgage that would have enabled them to prevent the inspections even if more specific notice had been given.

Conclusion

For all of the foregoing reasons, Chase's motion for summary judgment is GRANTED and the Clerk is directed to enter judgement denying and dismissing the plaintiffs' claims.

IT IS SO ORDERED:

Ernest C. Torres, Chief Judge
Date: February , 2002