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ADV. NUMBER: 99-1136
JUDGE: M. A. Mahoney
PARTIES: Catherine D. Slick, Norwest Mortgage, Inc.
CHAPTER: 13
ATTORNEYS: S. Olen, S. L. Nicholas, D. J. Stewart, H. A. Callaway, III, W. C. Bitzer
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

CATHERINE D. SLICK, Case No. 98-14378-MAM

Debtors.

CATHERINE D. SLICK,

Plaintiff,

v. Adv. No. 99-1136

NORWEST MORTGAGE, INC.,

Defendant.

ORDER GRANTING DEFENDANT'S SUMMARY JUDGMENT MOTION AND DISMISSING CASE WITHOUT PREJUDICE

Steve Olen and Steven L. Nicholas, Mobile, Alabama, Attorneys for the Plaintiffs
Donald J. Stewart, Mobile, Alabama, Attorney for Plaintiffs
Henry A. Callaway, III, Mobile, Alabama Attorney for the Defendants
Windy C. Bitzer, Mobile, Alabama Attorney for the Defendants

This matter is before the Court on the Defendant's Motion for Summary Judgment against the Plaintiffs in this case. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is granting the motion of Norwest Mortgage, Inc.[1] for summary judgment in this case.

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[1]Norwest Corporation merged with Wells Fargo & Company in 1998. Norwest Mortgage, Inc., a subsidiary of Norwest Corporation, changed its name to Wells Fargo Home Mortgage. "Norwest Mortgage Changes Name to Wells Fargo Home Mortgage" <http://www.wellsfargo.com/press/press000417.jhtml>, Apr. 17, 2000. Since Norwest was the original defendant, this opinion will use that name.

FACTS[2] [3]

In April 1996 Ms. Slick signed a note and mortgage in favor of Norwest. Ms. Slick defaulted on her loan and foreclosure proceedings were commenced. On December 3, 1998, Ms. Slick filed a chapter 13 bankruptcy case in the Southern District of Alabama and the foreclosure was canceled. The Court confirmed Ms. Slick's plan on February 10, 1999. The plan treated Norwest as a secured creditor. It pledged to pay all postpetition payments due to Norwest directly to it and to pay all prepetition arrearages in full through the plan.

Norwest filed a timely proof of claim dated December 18, 1998, which was later amended and reduced by $125.00 to correct an error. The amended claim stated that the "Amount of arrearage and other charges included in secured claim above, if any $4,384.70." This amount did not include any charges for postpetition attorney's fees, postpetition property inspection fees, or a proof of claim fee. Norwest added a proof of claim fee in the amount of $125.00 and a property inspection fee to Ms. Slick's account. Neither the proof of claim fee nor the inspection fee was disclosed anywhere on the original or amended proof of claim filed on behalf of Norwest or disclosed in any other way to Ms. Slick or the Court. However, payments made by Ms. Slick were first credited to principal and interest and the proof of claim fee and

[2]The Court formally admits into evidence all exhibits conditionally received at the summary judgment and class certification hearing.

[3]The Court admits into evidence the highlighted depositions taken in the case as submitted by the Plaintiff. The defendant asserts that the highlighting is inappropriate and unfair since defendant did not submit highlighted copies of the same depositions. The Court concludes that there is no harm in admitting the highlighted depositions and since the Court reviewed all of the testimony, there is no prejudice to defendant.

inspection fee would not be collected until the end of the loan. None of the fee has ever been collected from Ms. Slick.[4]

Until 1994, Norwest prepared proofs of claim itself and did not charge a proof of claim fee to debtors. When Norwest began outsourcing proofs of claim to third parties they were predominately prepared by nonlawyers who charged a flat fee and whose offices were provided rent free by Norwest. Most of the proofs of claim were never even seen by an attorney prior to filing. Norwest originally disclosed the proof of claim fees on proofs of claim. However, in September of 1997, Norwest stopped including the fee on the proof of claim form and instead assessed the fee to the loan accounts of bankruptcy debtors without informing debtors of the fee.

This practice was a result of a class action law suit commenced in the U.S. District Court of the Eastern Division of the Northern District of Illinois against Norwest Mortgage Corporation and certain subsidiaries and employees on May 27, 1997. It was styled *Majchrowski v. Norwest Mortgage, Inc., et al.*, 6 F. Supp. 2d 946 (N.D. Ill. 1998). The suit alleged that Norwest had added "file proof of claim" and/or "collection property inspection" fees to chapter 13 debtors accounts, some or all of which were included on proofs of claim filed with U.S. bankruptcy courts. The debtors alleged that charging these fees constituted unfair and deceptive trade practices and/or RICO violations and were breaches of Norwest's contract with the debtors.

The District Court dismissed the case at the summary judgment stage of the case after the class was certified, because although the debtors stated RICO claims against Norwest, the mortgage contracts authorized the fees. *Id*. Therefore, the breach of contract, RICO and unfair

[4]As the facts and law show, there are viable class representatives who could bring a proper suit against Norwest.

trade practices claims were unfounded. The case was dismissed on May 19, 1998 with prejudice. A Fed. R. Civ. P. 23(b)(2) class had been certified in the case on January 14, 1998. It was defined as "all persons who 'were obligated on, or owned property secured by, a real estate mortgage or deed of trust or other security instrument'; whose loans were serviced by Norwest; and against whom Norwest assessed 'file proof of claim,' 'collection property inspection' or 'foreclosure property inspection' fees." *Id*. at 952. No notice was sent to any of the class members prior to dismissal.

On July 9, 1999, this adversary case was filed containing four counts which are:

1. Fees and charges assessed by the defendant postpetition are not reasonable, authorized, or allowable under the Bankruptcy Code and defendant's claims for any of these fees or charges should be disallowed and any of these fees or charges actually collected by the defendant should be reimbursed with interest.

2. Fees and charges assessed by defendant postpetition are assessable only with specific bankruptcy court approval pursuant to § 506(b) of the Bankruptcy Code, defendants failed to obtain such approval, and these fees and charges collected by defendants after the filing of a bankruptcy petition, which would not have been claimed absent bankruptcy, should be disallowed, and any of these fees or charges collected should be reimbursed with interest where defendants have failed to obtain specific approval of the bankruptcy court as required by law.

3. Defendant violated the automatic stay of § 362 of the Bankruptcy Code by assessing and/or collecting postpetition, fees or charges which would not have been claimed absent bankruptcy, without specific approval of the bankruptcy court and these fees or charges should be disallowed and any of these fees or charges actually collected should be reimbursed with interest where the defendants have failed to obtain specific approval of the bankruptcy court.

4. Plaintiffs are entitled to an order declaring defendant's acts and practices to be in violation of bankruptcy law, and permanently enjoining the defendant from engaging in such acts and practices in the future with respect to any debtor who is, or could become, a member of the class, and an order requiring the defendant to disgorge all amounts collected by defendant as a result of such illegal fees and charges with interest.

LAW

This is a motion for summary judgment filed by the defendant pursuant to Fed. R. Bankr. P. 7056. It states that the Court shall grant summary judgment to the moving party if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Bankr. P. 7056(c). The moving party bears the burden of proving that there is no issue of material fact. In *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court found that a judge's function is not to determine the truth of the matter asserted or weight of the evidence presented, but to determine whether or not the factual disputes raise genuine issues for trial. *Anderson*, at 2510-11. In making this determination, the facts are to be looked upon in the light most favorable to the nonmoving party. *Id.; Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). All inferences are resolved in favor of the nonmoving party. *Stewart v. Booker T. Washington Ins.*, 2000 WL 1681226 (11th Cir. 2000); *Stewart v. Happy Herman's Cheshire Bridge, Inc*., 117 F.3d 1278, 1285 (11th Cir. 1997).

A.

Norwest asserts that the *Majchrowski* suit has a res judicata effect on all potential claims in this case and there is no need for the Court to look further than the *Majchrowski* decision to dismiss this case. Res judicata requires: (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with a substantial identity of parties, and (4) with the same cause of action presented in both suits. *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222 (11th Cir. 1998); *N.A.A.C.P. v. Hunt*, 891 F.2d 1555 (11th Cir. 1990). The dismissal with prejudice in the *Majchrowski* case is a judgment on the merits. The judgment was rendered by a court of competent jurisdiction--the U.S. District Court of the Northern District of Illinois. There is a

substantial identity of parties. In fact, there is an exact overlap or nearly so. In both suits, the plaintiffs are chapter 13 debtors with loans from Norwest who were assessed proof of claim filing fees in their bankruptcy cases. The causes of action are also the same. The Eleventh Circuit test is "whether the primary right and duty are the same" in both cases. *Twigg* at 1225. Res judicata applies "not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of facts (cite omitted)," *Twigg* at 1225. *Majchrowski* alleged that fees and costs were improperly assessed against mortgage holders. Only the legal theory is different. This class action complaint alleges only federal bankruptcy law violations by Norwest, not claims of breach of contract, RICO, or unfair trade practices. However, the operative facts are identical and *Majchrowski* could have raised the bankruptcy issues. The *Majchrowski* judgment therefore meets the criteria for a res judicata bar of this litigation. *Matsushita Electrical Industrial Co., Inc. v. Epstein*, 516 U.S. 367, 116 S. Ct. 873, 134 L. Ed. 2d 6, (1996) (preclusive effect of res judicata). The only remaining issues are the breadth of the class involved in *Majchrowski* and the breadth of the res judicata bar.

The class certified in *Majchrowski* was a Rule 23(b)(2) class. This means that all potential members of the class were included as members. Members of a Rule 23(b)(2) class generally do not have the choice of opting out of the class. Under certain circumstances, some courts have used their discretionary power to extend that right to a Rule 23(b)(2) class, but that was not done in the *Majchrowski* case. *See, e.g., Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir. 1986); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983). The class as described by the District Judge in the *Majchrowski* ruling does not state that “future” claimants are or are not included. However, since injunctive relief was sought, as a Rule 23(b)(2) class action mainly requests, the class typically includes future claimants because

injunctive relief benefits future as well as present mortgage holders. Fed. R. Civ. P. 23(b)(2) ('the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole"). Ms. Slick is therefore precluded from seeking injunctive relief in this case due to the *Majchrowski* case.

Courts do allow litigants who had no actual notice of the Rule 23(b)(2) class action that bound them to seek Rule 23(b)(3) monetary damages. *Johnson v. General Motors Corp*., 598 F.2d 432 (5th Cir. 1979). Ms. Slick had no notice of the class action while it was pending because her claim had not arisen yet. Therefore, Ms. Slick cannot seek an injunction or declaratory relief, but can seek monetary damages, if she has any, in a Rule 7023(b)(3) class, as can other *Majchrowski* class members if a Rule 23(b)(3) class is possible.

B.

In the Slick case, there is no injunctive relief available as stated above. Therefore, Rule 7023(b)(2) cannot apply to the case. The Court must determine if Rule 7023(b)(3) applies instead. Since the *Majchrowski* ruling held that the fees were appropriately chargeable to the debtors, the only question will be whether they have been properly claimed as postpetition/preconfirmation charges which will be paid through a plan, or whether they have been paid outside the bankruptcy process.

For Rule 7023(b)(3) to be applicable, the Court must conclude that the questions of law or fact common to the members of the class predominate over the questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In order to make this determination the Court must look at:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

3. The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

4. The difficulties likely to be encountered in the management of a class action.

The issues will be addressed in turn as they pertain to the Slick case.

The class of Slick plaintiffs would be only those debtors who obtained a chapter 13 discharge (which would discharge the fees owed) and who had actually paid fees posted to their corporate accounts outside their chapter 13 plans. The fees to be recovered would be small and the likelihood is that the fees would not be pursued except in a class action such as this. Requirement one is met.

There is no other litigation commenced by or against other members of the class as to Norwest of which this Court is aware. Therefore there is no need to fashion relief around another suit. Requirement two is met.

The potential plaintiffs in this case live in many different parts of the country and different states. There is no reason that having all of their claims dealt with in this Court would be a problem for them. The issue will be a straight forward one--did Norwest actually collect fees from discharged chapter 13 debtors outside of the confines of the debtors' chapter 13 plans. If so, the sum should be refunded. Requirement three is met.

There should be few difficulties managing the class. All of the potential plaintiffs will have very similar factual patterns. There should be no need for subclasses. The size of the class

will not be large since only debtors who actually paid fees outside of a chapter 13 plan will be affected. Requirement four is met.

Since all of the requirements are met, the Court concludes a class will be certified in the Slick case under Fed. R. Bankr. P. 7023(b)(3).

The facts in evidence for this summary judgment motion, taken in the light most favorable to Ms. Slick, show a $125 proof of claim fee was added to Ms. Slick's loan balance, but the fee was never disclosed on any bankruptcy filings of Norwest. The fees remain on Ms. Slick's loan account until the end of the loan at which time a decision is made by Norwest and/or the debtor as to whether its fees shall be paid or not.

Debtor asserts that these facts entitle her to monetary relief as well as the previously denied injunctive relief. Ms. Slick seeks two kinds of monetary relief: (1) damages under 362(h) for violation of the stay; and (2) disgorgement of the fees paid by Ms. Slick. For the reasons stated in the case of *Noletto v. NationsBanc Mortgage Corp.*, summary judgment order dated December 29, 2000, there has been no violation of the stay. The fees have not been paid by Ms. Slick. Therefore, no monetary damages are due under 11 U.S.C. § 362(h). No other monetary relief is appropriate either. Ms. Slick has paid no fees to date.

CONCLUSION

Ms. Slick filed her chapter 13 case and sought to pay all mortgage arrearages in her plan. Without disclosing that it was charging a fee, Norwest added a $125 proof of claim fee and a fee for property inspection to Ms. Slick's mortgage balance and has posted that charge to Ms. Slick's account.

Based upon the reasoning above, the evidence in the record, reviewed in the light most favorable to the plaintiffs, dictates the motion of Norwest for summary judgment as to Ms. Slick

be granted. Norwest should not have added the fees for filing a proof of claim or for property inspection to Ms. Slick's mortgage debt without more specific disclosure of the fees. The fees should have been claimed as an arrearage which needed to be cured through the plan and the proof of claim form should have been explicit, specifically showing the fees and the purpose of those fees. However, Ms. Slick is precluded from seeking injunctive relief in this case due to the res judicata effect of *Majchroski v. Norwest Mortgage, Inc., et al.,* 6 F. Supp. 2d 946 (N.D. Ill. 1998). Since, Ms. Slick has not paid any of the fees at issue in this case she also is not entitled to any monetary damages.

THEREFORE, IT IS ORDERED AND ADJUDGED that the motion of Norwest Mortgage, Inc. for summary judgment is GRANTED as to Ms. Slick.

Dated: December 29, 2000

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE