UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

Irene B. Palmer — Case No. 03-11604-MAM-13

Debtor

Irene B. Palmer, on behalf of
herself and all others similarly situated

Plaintiff

v. — Adv. No. 03-01135

Homecomings Financial
Network, Inc.

Defendant

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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This case is before the court on the motion of the defendant, Homecomings Financial Network, Inc., for judgment on the pleadings. This court has jurisdiction to hear this matter pursuant to 28 U.S.C. § § 157 and 1334 and the Order of Reference of the District Court. This motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the court has the authority to enter a final order. For the reasons indicated below, the court is granting the motion for judgment on the pleadings.

FACTS

Irene Palmer filed a chapter 13 bankruptcy case on March 18, 2003. She listed as one of her debts a mortgage with Homecomings Financial Network, Inc. for which her home was the collateral. She proposed a chapter 13 plan that did not provide any treatment for "arrearages" on her home mortgage. It proposed to pay monthly mortgage payments of $710.29 directly to Homecomings "outside the plan."[1] The plan proposed to pay unsecured creditors 8% of their allowed claims. The plan was confirmed on April 30, 2003.

The bar date for filing proofs of claim in the case was July 16, 2003. Homecomings filed a claim for the full balance of its loan on April 24, 2003. The claim stated: "Amount of Arrearage and other charges at time case filed included in secured claim, if any: $0.00." On June 10, 2003, this adversary case was filed. On July 10, 2003, seven days before the claims bar date and one day before the answer in this adversary case was due, Homecomings filed an amended proof of claim that stated $150 was owed for postpetition/preconfirmation "Fee Expenses . . . relating to Protecting Lender's Interest in the Property, the Lien, and Rights under the Mortgage, including but limited to, Preparing, Filing, and Amendment of the Proof of Claim, and Monitoring the Bankruptcy Case."

The initial and amended proofs of claim contain no signature or filer's name. The filing data shows that the claims were filed by Pamela Beck-Jansen. Ms. Palmer asserts that Ms.

[1] "Outside the plan" means that the debtor pays the debt owed directly to the creditor. The creditor does not file a claim for this debt. The trustee collects no administrative fee for this payment. A direct payment to a creditor is often allowed to be made on a long term debt that will survive the plan. Particularly with mortgage debt, it is easier to insure that payments will be made by the proper date each month. Also, the trustee fee of up to 10% on all amounts paid through the plan becomes onerous when mortgage debts are run through a chapter 13 plan.

Beck-Jansen is not an attorney in Minnesota and works for Fidelity National Foreclosure Solutions.

LAW

The plaintiff's complaint asserts that, although Homecomings charged a "bankruptcy fee, bankruptcy attorneys fee or attorneys fees" during the case that fee was not disclosed to the debtor, creditors or court in the proof of claim filed by Homecomings before this suit was filed. The complaint also asserts that the fee was not approved by the court.

Palmer asserts that such undisclosed fees "are not allowable fees or charges under the Bankruptcy Code." Therefore, the fees or charges should be disallowed and declared improper and the fees, if already paid by the debtor, should be disgorged. Palmer, in a second cause of action, asserts that such fees should be disallowed pursuant to 11 U.S.C. §§105, 506(b) and/or 502(j).

Homecomings has brought a motion for judgment on the pleadings in the case. Judgment on the pleadings is a motion properly brought under Fed. R. Bankr. P. 7012(c) which provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

The court must "view the pleadings in the light most favorable to, and to draw all reasonable inferences in favor of, the nonmovant." *Park Center Inc. v. Champion Int'l Corp*., 804 F.Supp. 294, 301 (S.D. Ala. 1992) (citing to *MaDonna v. U.S.*, 878 F.2d 62, 65 (2nd Cir. 1989)). The court may "grant judgment on the pleadings if it appears beyond doubt that the non-movant can plead or prove no set of facts in support of his claim which would entitle him to relief." *Id.* Judgment on the pleadings is also appropriate "where material facts are undisputed and where judgment on the merits is possible merely by considering the contents of the pleadings." *Id.*

Homecomings asserts three grounds why judgment on the pleadings is due to be granted. First, since Palmer was not in arrears on her mortgage at the filing of her chapter 13 case, and her plan did not address arrearages, "Palmer's theory completely breaks down and she fails to state a claim for relief" and/or "[p]laintiff's claims are inconsistent with her own bankruptcy plan." Defendant's Memorandum in Support of Motion for Judgment on the Pleadings, p. 2. Second, the plaintiff states no claim because of recent case law in the Eleventh Circuit. *Id*. Third, each of the plaintiff's four causes of action "independently fails because she either has failed to sufficiently allege a violation of any statute or contract provision, lacks standing to bring a private cause of action, or has failed to allege facts necessary on the alleged cause of action." *Id*. The court will address each issue in turn.

A.

Homecomings states that Palmer was not in arrears on her mortgage at the time of filing of her bankruptcy case and her chapter 13 plan is inconsistent with the claims she is making in this adversary case. Homecomings breaks this ground for dismissal into three subparts. First, Homecomings proof of claim contained a disclosed fee. Second, Homecomings had no obligation to disclose the fee because Palmer was not in arrears on her mortgage at the filing of her bankruptcy case. Third, Palmer's plan did not provide for payment of bankruptcy fees, so Homecomings cannot be faulted for not filing for the fees. The court will address each subpart in turn.

1.

Homecomings asserts that it filed an amended proof of claim that disclosed the postpetition/preconfirmation fee at issue and that disclosure requires dismissal of this case. In

essence, Homecomings argues its July 10, 2003 filing moots this case. This court has held that adequate disclosure of a postpetition/preconfirmation fee is necessary for a creditor to validly claim and collect such a fee. *Sheffield v. HomeSide Lending, Inc. (In re Sheffield)*, 281 B.R. 67, 73 (Bankr. S.D. Ala. 2001). This court does not agree that this case is mooted by the filing of a proof of claim after commencement of the case. As stated in a similar suit:

> Bank One asserts that the debtors cannot seek relief because their claims are moot. Bank One amended its proofs of claim in each of the debtors' case [to delete postpetition interest and late fees included in claims for unsecured credit card debt] after the filing of this adversary. The mootness doctrine does not provide an avenue for Bank One to preclude debtors' possible class claim. This Court has ruled on this issue in a different context in at least two other class action cases. Those rulings are incorporated by reference. *Powe v Chrysler Financial Corp. (In re Powe)*, 278 B.R. 539,549-50 (Bankr. S.D. Ala. 2002) (quoting from *Noletto v. NationsBanc Mortgage Corp*., Case No. 98-13813-MAM-13, Adv. No. 99-1120, Order Granting Class Certification Motion (Bankr. S.D. Ala. Dec. 29, 2000). The claims of the plaintiff were viable at the filing of the case. It would be patently inappropriate for Bank One to be able to moot any action against it simply by fixing the claims of anyone who dared file suit before an adjudication of the propriety of class certification could even be reached . . . Amending the claims does not extinguish the debtors' claim that Bank One should be sanctioned under section 105.
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> *Corner v. First USA Bank, N.A. (In re Corner)*, Order Partially Granting and Partially Denying Defendant's Motion to Dismiss, Adv. 03-01034 (Bankr. S.D. Ala. July 3, 2003).

The Court adopts the reasoning of the *Corner* case and the cases cited in it.

2.

Homecomings next asserts that it did not need to disclose its claim because Palmer was not in arrears on her mortgage on the date of her bankruptcy filing. The court concludes that this reasoning is faulty. Regardless of whether Palmer was in default on her mortgage at the filing of the case, the plan of the debtor is what governs what type of claim Homecomings must file. Homecomings, in order to be paid through a debtor's plan, must file a claim that includes all of

the debts the debtor indicates he or she want to pay through the chapter 13 case. If Homecomings, or any creditor, files a claim, it needs to examine the plan of the debtor and file a claim that includes the proper debt.

In this case, the plan indicated no payments would be made to Homecomings through the plan. Therefore, Homecomings was not obligated to file any claim for prepetition arrearages or postpetition/preconfirmation arrearages. Courts review claims filed for debts provided for in the plan. *See In re Tomasevic*, 275 B.R. 86 (Bankr. M.D. Fla. 2001). "Post-petition claims that are not included within the plan are outside the scope of the bankruptcy court's jurisdiction." *Id*. at 99 (citing *Telfair v. First Union Mortgage Corp.(In re Telfair)*, 216 F.3d 1333, 339 (11th Cir. 2000).

3.

Homecomings finally asserts that it did not need to file a proof of claim for postpetition/preconfirmation arrearages because the plan did not provide for payment of any arrearages in the plan. As stated above, Homecomings is correct in this view. The filing would accomplish nothing for Homecomings beyond notice to the debtor.

Therefore, Homecomings motion for judgment on the pleadings is due to be granted. The plan did not contemplate payment of any mortgage arrearages. It was not Homecomings duty to file a claim to alert the debtor to such an arrearage.

B.

Although judgment on the pleadings is due to be granted as to Palmer's case, the court will discuss the other grounds for relief asserted by Homecomings in its motion out of an abundance of caution. Homecomings asserts that Eleventh Circuit case law, specifically the case of *Universal American Mortgage Co. v. Bateman (In re Bateman)*, 331 F.3d 821 (11th Cir. 2003), precludes the debtor's claims. Homecomings asserts that *Bateman* held that

> a secured creditor's claim for mortgage arrearage survives the confirmed plan to the extent it is not satisfied in full by payments under the plan, or otherwise satisfied under the terms of § 1325(a)(5), because to permit otherwise would deny the effect of 11 U.S.C. § 1322(b)(2), which, in effect, prohibits modifications of secured claims for mortgages on a debtor's principal residence.

Id. at p. 822. *Bateman* further stated that "in fact, a secured creditor need not do anything during the course of the bankruptcy proceeding because it will always be able to look to the underlying collateral to satisfy the lien." *Id*. at p. 827. Therefore, per Homecomings, "whether or not Homecomings filed a proper proof of claim for the attorneys fees, or any proof of claim at all for that matter, is irrelevant to Homecomings' ultimate right to assess and collect those fees from the Plaintiff." Defendant's Memorandum in Support of Motion for Judgment on the Pleadings, p. 10.

Ms. Palmer disagrees with this premise. She argues that, once Homecomings files a claim, it has a duty to file the claim appropriately. She also alleges that the *Bateman* case involves a fact pattern distinguishable from the case at hand.

The court concludes that Homecomings has not sustained its burden of proof in regard to this argument. The *Bateman* case is distinguishable from this case. The *Bateman* case involved a debtor, Ms. Bateman, who filed a chapter 13 plan in which she proposed to pay Universal

American Mortgage Company $21,600 over the life of the plan. The $21,600 was to pay any arrearage amount due to Universal. The plan stated that Universal disputed this arrearage amount.

On February 5, 1997, Universal filed a proof of claim stating that its arrearage claim was $49,178.80. The debtor never objected to Universal's proof of claim until July 13, 1998. Bateman's plan was confirmed on March 14, 1997. Universal never objected to the plan.

When Bateman objected to Universal's arrearage claim, the Bankruptcy Court sustained the objection stating that the chapter 13 plan and its stated treatment of Universal's debt, in substance, was an objection to the claim. Since Universal did not respond to the objection/plan treatment, the plan treatment was given res judicata effect and Universal's claim was set at the lower amount.

The Eleventh Circuit reversed the Bankruptcy Court and held that the proof of claim of Universal was deemed allowed pursuant to § 502(a) of the Bankruptcy Code and the debtor's statement of a different amount in the plan was not to be deemed a constructive objection to the claim. "That the Plan states an amount in conflict with the proof of claim demands a resolution of the inconsistency, but a debtor's post-confirmation objection is not the appropriate vehicle by which to do so." *Id.* at 829.

Bateman involved a claim that stated an exact dollar amount to be paid to a secured creditor in the plan. Ms. Palmer's plan does not. *Bateman* involved a fully disclosed claim. This case involves an objection to an undisclosed part of a claim.[2] *Bateman* involved a case

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[2] Cases in the Eleventh Circuit since *Bateman* have more fully explored its holding and meaning. As stated in *In re Shank*, 315 B.R. 799,805 (Bankr. N.D. Ga. 2004), *Bateman* held that "a provision in a plan cannot control the amount of a claim if a proof of claim states a different

where the debtor explicitly indicated that arrearages were to be paid through the plan. This case is the opposite of the *Bateman* scenario. Ms. Palmer did not indicate she wanted to pay any amount to Homecomings through the plan. There is no conflict between Homecomings' claim and the plan.

Homecomings has misframed the issue in any event. It says that § 1322(b)(2) of the Bankruptcy Code governs. It states that " the plan may . . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." But § 1322(b)(2) is not the relevant law for the facts alleged in the complaint. Section 1322(b)(2) instructs the debtor as to how he or she can treat a home mortgage creditor in a plan. When the debtor chooses not to pay arrearages through a chapter 13 plan, then Homecomings need not file a claim. The debtor runs the risk that there will be an arrearage in the mortgage debt of which the debtor is unaware. If the debt, by the debtor's choice, is not treated in the plan, the arrearage debt of a home lender survives the plan. If the debtor proposed a plan that did pay arrearages to the creditor, then, if the creditor filed a claim, it would need to include all arrearages in the claim.

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amount." In *In re Sernaque*, 311 B.R. 632, 638 (Bankr. S.D. Fla. 2004), the court stated that, based on *Bateman*, a claim is

> 'deemed allowed' under 502(a), and is 'prima facie evidence of the *validity* and *amount* of the amount of the claim' under Fed. R. Bankr. P. 3001(f). As such, the unobjected to proof of claim in *Batema*n was prima facie evidence of the *amount* of the mortgage arrearage, and a plan providing for cure of a lesser amount was therefore an impermissible modification under § 1322(b)(2).

In this case, the debtor stated that she intended not to pay any mortgage arrearages through the plan. There is no conflict between what her plan stated and what Homecomings' proof of claim stated.

C.

The last issue raised by Homecomings is that the prior rulings of this court in regard to the specific causes of action stated in the complaint should be changed and rulings in Homecomings' favor should be entered.

1.

The first issue is that the complaint states no grounds for disallowance of Homecomings' pospetition/preconfirmation charges. This court in rulings in prior class action cases brought in this court has ruled on this issue when it was raised in regard to very similar pleadings. The court has held that undisclosed charges can be disallowed under the Bankruptcy Code.

> The Court has ruled in other cases that some disclosure of a postpetition/preconfirmation fee is required. *Slick v. Norwest Mortgage, Inc. (In re Slick)*, Order Awarding Judgment to Plaintffs, Case No. 98-14378, Adv. No. 99-1136 (Bankr. S.D. Ala. May 10, 2002); *Dean v. First Union Mortgage Corp. (In re Dean)*, Order Awarding Judgment to Plaintiffs, Case No. 00-1123 and 96-14029, Adv. No. 99-1144 (Bankr. S.D. Ala. 2002). In prior rulings in similar cases, the Court has ruled that postpetition/preconfirmation attorneys fees must be included in a creditor's proof of claim or an application for compensation or the fees cannot be collected from a debtor and are discharged. *Id.*
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> *In re Powe*, 278 B.R. 539, 553 (Bankr. S.D. Ala. 2002)

The court will not restate all of the reasons given or citations made in those prior cases. They are incorporated by reference.

2.

Homecomings next argues that the plaintiffs have no private right of action to seek damages under § § 506 or 105 or 502(j) of the Bankruptcy Code. Again, the court has ruled on this issue and incorporates its reasoning from its earlier rulings. *In re Powe*, 278 B.R. 539, 553

(Bankr. S.D. Ala. 2002) (and cases cited in that opinion). The court has also stated in another opinion that § 105 of the Bankruptcy Code may provide an independent cause of action when a creditor's actions constitute an abuse of process. *Thigpen v. Matrix Fin. Servcs. Corp. (In re Thigpen),* Order Denying Defendant's Motion to Dismiss and Denying Any Further Stay of Discovery, Case No. 02-14280-MAM-13, Adv. No. 04-01035 (Bankr. S.D. Ala. May 25, 2004); *Kerney v. Capital One Fin. Corp. (In re Sims)*, 278 B.R. 457, 481 (Bankr. E.D. Tenn. 2002). Under certain fact scenarios that might be proven, Homecomings' failure to include postpetition/preconfirmation fees or charges could be an abuse of process. A judgment on the pleadings is therefore not appropriate.

The court agrees with Homecomings that posting a fee to a consumer debtor's account is not a violation of the stay. *In re Powe*, 281 B.R. 336, 348 (Bankr. S.D. Ala. 2001).

CONCLUSION

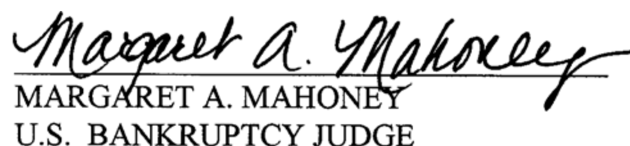
For the reasons stated above, the motion of Homecomings for judgment on the pleadings is due to be granted. The plaintiffs' complaint does not state grounds for judgment because Ms. Palmer has not provided for arrearages in her plan.

IT IS ORDERED that

1. The motion of Homecomings Financial Network, Inc., for judgment on the pleadings is GRANTED; and

2. The court will hold a hearing on **March 2, 2005 at 8:30 a.m.** as to whether the entire class action should or should not be dismissed in light of this ruling.

Dated: January 31, 2005



MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE