UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

Edward Lee Jordan and
Deborah Diane Jordan — Case No. 99-13242-MAM-13

Debtors

Edward Lee Jordan and
Deborah Diane Jordan; and
Dottie Jean Ball Willis, on behalf
of themselves and all others similarly
situated

Plaintiffs

vs. — Adv. No 03-01132

GMAC Mortgage Corporation

Defendants

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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This case is before the court on the motion of the defendant, GMAC Mortgage Corporation, 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 denying the motion for judgment on the pleadings.

FACTS

The Jordans filed a chapter 13 case in this court on September 16, 1999. Their schedules indicated that they have a mortgage debt owing to GMAC Mortgage Corporation for which their homestead is the collateral. They proposed a chapter 13 plan that proposed to pay the mortgage payments of $734 per month directly to GMAC "outside the plan."[1] The plan proposed to pay the mortgage arrearages in full through the plan.

On October 19, 1999, GMAC filed a proof of claim in the case listing a principal balance on the mortgage of $54,058.20. It filed a second claim for arrearages in the amount of $4,382.49. The arrearage proof of claim did not include a fee charged by GMAC to the Jordans, although the plaintiffs allege such a fee was charged. The fee was, according to the plaintiffs, a postpetition/preconfirmation charge.

The Jordans' chapter 13 plan was confirmed on December 19, 1999. GMAC did not object to confirmation. The confirmation order provided that "MORTGAGE ARREARAGE TO BE PAID 100% THROUGH THE PLAN."

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[1] "Outside the plan" or "directly" 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 particularly onerous when mortgage debts are run through a chapter 13 plan.

Dottie Willis's factual situation is similar. She filed a chapter 13 case on September 18, 2001. She has a mortgage debt to GMAC for which her home is collateral. Her plan also provided that mortgage payments would be paid outside the plan and that GMAC would be paid its monthly payments of $457 outside the plan as a direct payment and the "arrearage" would be paid "100%" through the plan. She alleges that GMAC charged her account with a fee postpetition but that fee was not disclosed on the proof of claim form that GMAC filed in her case. The proof of claim was filed December 18, 2001.

Ms. Willis's plan was confirmed on November 7, 2001. GMAC did not object to confirmation. The confirmation order stated that "MORTGAGE ARREARAGE TO BE PAID 100% THROUGH THE PLAN."

LAW

The plaintiffs' complaint asserts that, although GMAC 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 GMAC. The complaint also asserts that the fee was not approved by the court.

The Jordans and Willis assert 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 debtors, should be disgorged. The Jordans and Willis, in a second cause of action, assert that such fees should be disallowed pursuant to 11 U.S.C. §§ 105, 506(b) and/or 502(j).

GMAC 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 . . . 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.*

GMAC asserts three grounds why judgment on the pleadings is due to be granted. First, "Plaintiffs' claims are inconsistent with their own bankruptcy plans." Defendant's Memorandum in Support of Motion for Judgment on the Pleadings, p.2. Second, the Plaintiffs state no claim because of recent case law in the Eleventh Circuit. *Id*. Third, each of the plaintiffs' four causes of action "independently fails because they [the debtors] either have failed to sufficiently allege a violation of any statute or contract provision, lack standing to bring a private cause of action, or have failed to allege facts necessary on the alleged cause of action." *Id*. The court will address each issue in turn.

A.

GMAC states that the chapter 13 plans of the Jordans and Willis are inconsistent with the claims they are making in this adversary case. GMAC theorizes that the plans of the debtors do not propose to pay postpetition/preconfirmation claim amounts. Therefore, a bankruptcy court

has no jurisdiction over any such fees charged by GMAC. A court only has authority to deal with amounts provided for in the plan. *In re Tomasevic*, 275 B.R. 86 (Bankr. M.D. Fla. 2001).[2]

The debtors assert that a debtor may deal with postpetition/predischarge debts in a chapter 13 plan, including home mortgage debt. The Eleventh Circuit recognized this in *In re Hoggle*, 12 F.3d 1008, 1010 (11th Cir. 1994). The *Telfair v. First Union Mortgage Corp. (In re Telfair)* case, 216 F.3d 1333 (11th Cir. 2000), specifically stated that pursuant to § 506(b) an oversecured creditor "may include post-petition interest and certain fees as part of the secured claim they will receive upon confirmation of the plan." *Id.* at p. 1339. Following this line of reasoning, a debtor may include in the amounts he or she seeks to pay under a plan all preconfirmation charges. Since the debtors' plans did not exclude postpetition/preconfirmation claims from their plan language, this court will not assume such charges can be omitted from a proof of claim form without more evidence.[3] The pleadings state possible grounds for relief.

The court concludes that GMAC has not sustained its burden of proof on this argument. The Eleventh Circuit clearly allows a debtor's plan to include postpetition fees and costs in it. The language of the debtors' plans did not clearly exclude postpetition fees and costs. The Jordan and Willis plans are not clearly inconsistent with their claims in this suit.

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[2] The Tomasevic case is distinguishable from this case. It stated in the plan that only *prepetition* arrearages were to be cured.

[3] GMAC argues that a postpetition/preconfirmation attorneys fee is not an "arrearage." However, when the entire plan of each debtor is viewed, it appears likely that such a fee can only be an arrearage. The plans of Jordan and Willis treat GMAC's debt in two parts: an arrearage and "monthly payments." Monthly payments are listed at the monthly mortgage payment amount that the debtor has paid (or should have paid) each month over the life of the mortgage, e..g. $734 and $547 per month. This monthly amount includes no amount for an attorneys fee or other charges not typically in the monthly amount. Therefore, the fee must be part of the arrearage component of the debt.

B.

GMAC 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 debtors' claims. GMAC 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 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 827. Therefore, per GMAC, "whether or not GMAC Mortgage filed a proper proof of claim for the attorneys fees, or any proof of claim at all for that matter, is irrelevant to GMAC Mortgage's ultimate right to assess and collect those fees from the Plaintiffs." Defendant's Memorandum in Support of Motion for Judgment on the Pleadings, p. 9.

The Jordans and Willis disagree with this premise. They argue that once GMAC files a claim it has a duty to file the claim appropriately. They also allege that the *Bateman* case involves a fact pattern distinguishable from the case at hand.

The court concludes that GMAC 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 stated her plan would 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 postconfirmation, 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 of the claim to be paid in the plan. The Jordans' and Willis' plans do not. *Bateman* involved a claim that was filed preconfirmation. In the Willis case, GMAC's claim was filed postconfirmation. *Bateman* involved a fully disclosed claim. This case involves an objection to an undisclosed part of a

claim.[4] This case is the opposite of the *Bateman* scenario. The debtors want to pay GMAC's entire claim, whatever it is. At least as alleged in the complaint, GMAC filed a proof of claim that did not allow payment in full because GMAC, not the debtor, did not put the full amount of its claim in its proof of claim.

GMAC has misframed the issue. 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 creditor, like GMAC, files a proof of cliam that sets forth its requested claim amount, it is establishing its own benchmark for payment. *Bateman* holds that, if the debtor does not object to the amount, the claim governs. *Id.*

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[4] 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 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 debtors stated that they intended to pay the full amount of their mortgage arrearages through the plan. There is no conflict between what their plans stated and what GMAC's proof of claim stated. The debtors never objected to what the proofs of claim stated on their face. In this case, the court is back to the same issue raised in the prior cases it has had before it. GMAC did not list its full claim. It did not disclose fees it was charging that were incurred preconfirmation.

However, if the creditor files an incorrect claim, knowingly or unknowingly, and the debtor and court and other creditors rely upon that claim to their prejudice, the creditor cannot later utilize different numbers in dealing with the debtor outside bankruptcy court jurisdiction or collect money from a debtor postconfirmation or postdischarge that is at odds with its own claim filed under oath.

The real issue is what duty GMAC has to include all preconfirmation amounts owed in its proof of claim. When a debtor's plan states that the debtor intends to cure the entire debt for mortgage arrearages owed to a creditor in his or her plan, the creditor needs to file a claim that includes all of the arrearages. That amount, based upon the law in the Eleventh Circuit and elsewhere,[5] can be all amounts due up to confirmation. Therefore, it is a creditor's duty to file a claim that includes all amounts it is owed. Otherwise, the debtor has no way of knowing how much the creditor is owed or asserts it is owed. Once the creditor files a claim, that amount is fixed as the amount owed to the creditor and the creditor should not be able to later assert that it is owed a different higher amount for the same time period. For the same reason that the debtor must live with the claim amount stated in the claim filed by the creditor, the creditor must also consistently stand by the amount claimed. Collection of undisclosed amounts postconfirmation violates the due process rights of the debtors and/or violates the res judicata effect of debtors plans and/or violates the sworn statement of the creditor to the court as to the amounts owed.

C.

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[5] *Rake v. Wade*,1508 U.S. 464, 468, 113 S.Ct. 2187, 124 L.Ed. 2d 424 (1993); *Green Tree Acceptance, Inc. v. Hoggle (In re Hoggle)*, 12 F.3d 1008 (11th Cir. 1994); *Telfair v. First Union Mortgage Corp. (In re Telfair)*, 216 F.3d 1333 (11th Cir. 2000); *In re Araujo*, 277 B.R. 166 (Bankr. D.R.I. 2002)(dicta).

The last issue raised by GMAC 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 GMAC's favor should be entered.

1.

The first issue is that the complaint states no grounds for disallowance of GMAC's 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.

GMAC 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, GMAC's 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 GMAC 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 GMAC for judgment on the pleadings is due to be denied. The plaintiffs' complaint states grounds for judgment under some fact scenarios.

IT IS ORDERED that the motion of GMAC Mortgage Corporation for judgment on the pleadings is DENIED.

Dated: January 31, 2005

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE