IN THE UNITED STATES BANKRUPTCY COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA

IN RE:	)	
	)	
BARRY CERONE EDWARDS,	)	Case No. 17-01707
	)	
Debtor.	)	

ORDER GRANTING MOTION TO DETERMINE MORTGAGE FEES AND EXPENSES

This case is before the court on the debtor's motion (doc. 79) to determine mortgage fees and expenses pursuant to Federal Rule of Bankruptcy Procedure 3002.1(e). The debtor challenges the fees listed on Carrington Mortgage Services, LLC's Notice of Postpetition Mortgage Fees, Expenses, and Charges under Rule 3002.1 filed on November 30, 2017. (*See* doc. 58). Specifically, Carrington listed $300.00 in attorney's fees incurred on September 1, 2017, which Carrington states were associated with the preparation and filing of a proof of claim. Having carefully considered the motion, the parties' briefs (docs. 94, 95) and oral argument, the language of the Carrington mortgage,[1] and the applicable law, the court grants the motion and disallows the fees.

The court adopts Judge Oldshue's framework for analyzing a motion to determine as set out in *In re Clark*, 593 B.R. 661 (Bankr. S.D. Ala. 2018). The issue here is whether the Carrington mortgage permits the recovery of attorney's fees associated with filing a bankruptcy proof of claim. In deciding this issue, "the [c]ourt must look to the underlying agreement and applicable nonbankruptcy law to determine if the amounts are permissible." *See id.* at 663 (citation and quotation marks omitted). "'A lender is only permitted to collect mortgage fees, expenses, and charges in bankruptcy if the underlying agreement or applicable nonbankruptcy law so permit.'" *Id.* (citation omitted).

[1] A copy of the mortgage was filed with Carrington's proof of claim number 6 and as an exhibit to Carrington's brief (doc. 94).

The Carrington mortgage contains a choice of law provision that the law of the jurisdiction in which the property is located – in this case, Alabama – applies. "It is well-established law in Alabama that the parties to a mortgage may agree to the payment of reasonable fees if certain circumstances arise or actions are taken." *In re England*, 586 B.R. 795, 799-800 (Bankr. M.D. Ala. 2018) (emphasis omitted). "Therefore, a mortgagee may recover reasonable fees incurred in connection with the enforcement of a mortgage only where the mortgage contractually imposes a duty on the mortgagor to pay those fees." *Id.* at 800 (citation and quotation marks omitted). "Furthermore, provisions in a mortgage permitting fees must be unambiguous and will only be enforced to the extent so provided for by the language of the mortgage." *Id.*

Carrington bears the burden of establishing its entitlement to the attorney's fees. *See id.* at 802; *In re Trudelle*, No. 16-60382-EJC, 2017 WL 4411004, at *3 (Bankr. S.D. Ga. Sept. 29, 2017). Carrington argues that paragraph 8 of its mortgage permits the recovery of fees. That paragraph states that "Lender may collect fees and charges authorized by the Secretary." Paragraph 2 defines "the Secretary" as "the Secretary of Housing and Urban Development." Carrington's entitlement to attorney's fees under paragraph 8 thus depends on the Secretary of HUD having authorized the fees, presumably by promulgating regulations. *See In re Brumley*, 570 B.R. 287, 290 (Bankr. W.D. Mich. 2017); *see also In re Mandeville*, 596 B.R. 750, 756 (Bankr. N.D. Ala. 2019) ("'Where HUD rules and regulations are incorporated into an insured mortgage, they are binding upon both the mortgagor and mortgagee.'") (citation omitted).

Carrington has not identified any specific HUD regulation but relies on *In re Mandeville*, 596 B.R. 750 (Bankr. N.D. Ala. 2019), in which Judge Robinson found that paragraph 8 authorized attorney's fees. The HUD regulation discussed in *In re Mandeville* states in pertinent part: "<u>Where permitted by the security instrument [*i.e.*, the mortgage]</u>, [the mortgagee may recover] attorney's fees and expenses actually incurred in the defense of any suit or legal proceeding wherein the mortgagee shall be made a party thereto by reason of the mortgage . . . ." 24 C.F.R. § 203.552(a)(13). The

HUD regulation thus points the court back to the underlying mortgage to determine if the mortgagee can recover attorney's fees; it does not provide an independent basis for recovery of fees.

This leads the court to Carrington's contention that the fees are also permitted by paragraph 7 of the mortgage. That paragraph states in pertinent part: "If . . . there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy . . .), 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."[2] This court agrees with Judge Robinson's holding in *In re Mandeville* that the first part of this sentence includes chapter 13 bankruptcies. *See* 596 B.R. at 759. A mortgage lender's "rights in the property" include the right to foreclose, which is "significantly affect[ed]" by the automatic stay, to say the least. And bankruptcy is specifically listed in the first part of the sentence as a type of legal proceeding to which the provision would apply.

The more problematic part of the provision is the second half of the quoted sentence. Judge Oldshue has found this language ambiguous and thus unenforceable with regard to "filing fees and court costs" and attorney's fees for "plan review" because those type charges are not listed in either paragraph 2 or 7. *See In re Clark*, 593 B.R. at 663. However, the only fees sought in this case are for preparing a proof of claim. Even if unambiguous, paragraph 7 only allows for the recovery of fees "to protect the value of the Property and Lender's rights in the Property . . . ." The purpose of filing a proof of claim in a chapter 13 case is to get paid by the chapter 13 trustee from the debtor's postpetition earnings through a confirmed plan. Unlike filing a motion for relief from stay to institute a foreclosure or force-placing insurance, for example, preparing and filing a proof of claim does not protect the value of the property and the lender's rights in the property. *See In re Barrett*, No. 10-05854-8-RDD, 2011 WL 5902780, at *4 (E.D.N.C. 2011) ("The attorney's preparation and

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[2] The paragraph further provides that any such expense shall become part of the debt secured by the mortgage.

filing a proof of claim are not services that are necessary to protect the value of [the lender]'s rights in its collateral, but only preserves it ability to collect arrearages due under the Note."); *see also In re Zunner*, 396 B.R. 265, 266 (Bankr. W.D.N.Y. 2008) (interpreting nearly identical mortgage language and finding that a broker's price opinion was not an expense that would protect the collateral and thus its cost could not be allowed as a claim under the mortgage). The court does not need to reach the issue of ambiguity since the proof of claim fees would not be covered in any case.

For the reasons discussed herein, the court grants the debtor's motion (doc. 79) to determine mortgage fees and expenses and disallows the fees listed on Carrington Mortgage Services, LLC's Notice of Postpetition Mortgage Fees, Expenses, and Charges (doc. 58).

Dated: April 4, 2019

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE