

**ENTERED ON
AUG 15 2006
DOCKET**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 13
)	
VICKIE TURNER)	CASE NO. 02-90898-MHM
)	
Debtor)	

)	
ADAM M. GOODMAN)	
)	CONTESTED MATTER
Movant)	
v.)	
)	
GMAC MORTGAGE)	
)	
Respondent)	

**ORDER REGARDING DISBURSEMENT
OF EXCESS FORECLOSURE PROCEEDS**

This case converted from Chapter 7 to Chapter 13 March 28, 2002. By order entered April 20, 2005, the motion of Washington Mutual Home Loans (“Washington Mutual”) for relief from the automatic stay was granted to allow Washington Mutual to conduct a foreclosure sale of Debtor’s real property, located at 4199 Irish Highland, Powder Springs, Georgia 30127 (the “Property”). Washington Mutual has a first priority security interest in the Property. On November 4, 2005, the Chapter 13 Trustee received \$43,000 from Washington Mutual, representing foreclosure proceeds exceeding the amount due Washington Mutual.

When the Chapter 13 Trustee obtained a title report on the Property, a second mortgage held by Premier Lending Corporation ("Premier") was discovered. The second mortgage had not been disclosed in Debtor's schedules. Neither Premier nor any successor-in-interest has filed a proof of claim in this case.

Debtor was able to provide some information to the Chapter 13 Trustee about the second mortgagee, whom she believed to be GMAC Mortgage Corporation ("GMAC"). The Chapter 13 Trustee contacted GMAC to obtain documents to establish its interest in the Property (and thus in the excess foreclosure proceeds). The documents showed assignments of the original note and deed to secure debt originating with Premier through several different financial institutions, culminating with an unrecorded and incomplete assignment dated January 18, 2005, "but effective this 29th day of October, 2004" from EMC Mortgage Corporation to an unnamed assignee. As a result of GMAC's inability or unwillingness to provide appropriate documentation of its asserted interest in the Property, the Chapter 13 Trustee filed a motion seeking guidance from the court.

Hearing on the Chapter 13 Trustee's motion was held May 4, 2006. Present at the hearing were the attorney for the Chapter 13 Trustee, attorney for GMAC and Debtor. Debtor's attorney did not appear. At the hearing, GMAC asserted that an assignment from EMC Mortgage Corporation to GMAC had been recorded April 4, 2006. At the hearing, an issue arose concerning the validity of the postpetition assignment to GMAC. The parties were accorded an opportunity to file briefs on the issue.

A post-hearing brief was filed by GMAC. No other briefs were filed. GMAC showed that the postpetition assignment of the note and deed to secure debt on the Property was not a transaction involving property of the estate and thus no provision of the Bankruptcy Code was implicated. *Kapila v. Atlantic Mortgage and Investment Corporation (In re Talabi)*, 184 F. 3d 1335 (11th Cir. 1999).

With the response filed by GMAC April 25, 2006, GMAC provided a Payoff Statement, showing the total owed to GMAC as of April 13, 2006 was \$5,688.41, with a *per diem* of \$1.9359, which would yield an additional \$176.17, through July 13, 2006. The Payoff Statement does not appear to include any amount for attorneys fees. At the hearing, GMAC asserted the payoff was \$7,407.82. The difference in the two payoff amounts was not explained.

Under §506(b), a secured creditor may be entitled to reasonable attorneys fees if provided for by the parties' agreement. The proceedings in the instant case, however, beginning with the Chapter 13 Trustee's motion through and including the hearing and the post-hearing brief were necessitated by GMAC's failure to file a proof of claim and its inability to produce sufficient documentation to the Chapter 13 Trustee to establish GMAC's entitlement to any portion of the excess foreclosure proceeds. Therefore, any legal fees incurred by GMAC were occasioned by its own inefficiency and incompetency. To penalize Debtor or Debtor's creditors by assessing GMAC's legal fees against the excess foreclosure proceeds would be unjust and unreasonable.

Additionally, the creditor holding the first priority security interest in the Property, Washington Mutual, sold the Property at a foreclosure sale. GMAC, whose interest in the Property was subordinate to Washington Mutual's interest, now has no collateral securing its claim. The Property was transferred following relief from the stay and in accordance with state law. The Property was not transferred through a sale free and clear of liens under §363(f). The basis upon which GMAC claims an interest in the excess foreclosure sale proceeds is unclear. Therefore, it appears GMAC's claim, if allowed at all (as no proof of claim has been filed), should be allowed as a general unsecured claim.

Accordingly, it is hereby

ORDERED that, within 15 days of the date of entry of this order, GMAC may file a proof of claim in the amount of \$5,864.58 plus the per diem from July 13, 2006, forward, but not including attorneys fees, which shall stand allowed. If no proof of claim is filed within the time allowed, the Chapter 13 Trustee is authorized to disburse the excess foreclosure proceeds in accordance with the terms of Debtor's Chapter 13 plan.

IT IS SO ORDERED, this the 14th day of August, 2006.



MARGARET A. MURPHY
UNITED STATES BANKRUPTCY JUDGE