IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	
	:	**Chapter 13**
ALLISON VANESSA KEE,	:	
	:	**Case No. 01-87193**
Debtor.	:	
	:	

ORDER WITH REGARD TO UNCLAIMED FUNDS OF FIFTH THIRD MORTGAGE COMPANY

Fifth Third Mortgage Company ("Fifth Third") filed a proof of claim in this Chapter 13 case on January 22, 2002 for an arrearage of $2,077.65 on a debt of $113,897.49 secured by real estate. [Claim No. 8]. The Debtor's Chapter 13 plan was confirmed, and the Trustee paid Fifth Third's claim in full.

Fifth Third did not claim $1,412.41 of the disbursement. Consequently, pursuant to 11 U.S.C. § 347(a), the Trustee paid $1,412.41 into the registry of the Court as unclaimed funds. TMG Consultants, Ltd., as attorney-in-fact for Fifth Third Bank, N.A., has filed an application for disbursement of the funds (the "Application"). [Docket No. 59].

As explained below, the Court must deny the Application because Fifth Third *Bank*, N.A., is not entitled to unclaimed funds paid into Court on a claim of Fifth Third *Mortgage Company* and because the Application does not show the continued existence of a debt to which the funds could be applied.

The Debtor in this case had more than one parcel of real estate, so an initial question is which real estate secured Fifth Third's claim. Its proof of claim does not reveal this information.

Attached to Fifth Third's proof of claim is a copy of the first page of a deed to secure debt executed by the Debtor in favor of Old Kent Mortgage Company ("Old Kent"). The page shows

an address for the Debtor of 3937 Garrett Springs Drive, Powder Springs, GA, 30127, but neither the attachment nor the proof of claim otherwise describes the real property that the security deed encumbers, and nothing explains how Fifth Third has a claim based on a security deed in favor of Old Kent.

On her Chapter 13 petition and on Schedule A, the Debtor lists her residence as a house and lot located at 1834 Barrington Overlook, Marietta, GA ("Barrington Overlook"); the Debtor's Schedule C states that Old Kent has a "first mortgage" on her "residence" to secure a debt of $112,165.51. [Docket No. 1, pp. 1, 3, 8]. Based on the foregoing and other information in the record discussed below, it appears to the Court that Fifth Third acquired a security deed originally executed in favor of Old Kent and that it encumbers the Debtor's residence, Barrington Overlook.

On November 10, 2004 (some 34 months after confirmation), Aurora Loan Services, Inc., ("Aurora") filed a motion for relief from the automatic stay, asserting that it was the servicer of a loan secured by Barrington Overlook. [Docket No. 23].[1] The Motion does not explain who actually holds the debt or the security deed. A Consent Order was entered on March 1, 2005 [Docket No. 26], and Aurora filed a proof of claim for attorney's fees of $750 pursuant to the Consent Order. [Claim No. 9].

On June 20, 2005, Aurora filed a "Notice of Transfer of Claim" in which it purported to transfer its claim in the amount of $2,827.65 to Midland Mortgage Co ("Midland"). [Docket No. 34]. No claim in such amount exists. The stated amount equals the sum of Aurora's $750 claim

[1]The law firm of McCalla, Raymer, Padrick, Cobb, Nichols & Clark represented Aurora with regard to this motion. It appears that an attorney with this firm signed Fifth Third's proof of claim.

and Fifth Third's arrearage claim, but the notice of transfer does not refer to Fifth Third's claim, the underlying debt, or the security deed.

On March 14, 2006, the Debtor filed a motion to sell Barrington Overlook, noting that it was encumbered by a secured obligation in favor of Old Kent, an entity that has never appeared in the case. The sale motion does not mention Aurora or Midland. [Docket No. 43]. The Debtor withdrew the motion on May 3, 2006 [Docket No. 45], and Midland filed a default motion for stay relief on June 7, 2006 [Docket No. 46], which the Court granted on June 9, 2006. [Docket No. 47]. In accordance with standard practice in this Court, the order modifying the stay directed the Trustee to "cease funding the balance of Movant's pre-petition arrearage claim and supplemental claim, if any." The "Movant" was Midland, so this provision would not have affected Fifth Third's claim.

The Debtor filed a second motion to sell Barrington Overlook on June 28, 2006 [Docket No. 49], which the Court granted on August 17, 2006. [Docket No. 51]. The Debtor proposed to satisfy existing encumbrances with proceeds from the sale of Barrington Overlook and to pay the balance to the Trustee.

The record does not reflect whether the Debtor sold the property as proposed or Midland (or someone) foreclosed, but in due course the Trustee received enough money to pay claims due under the confirmed plan [Trustee's Final Report, Docket No. 56], the Debtor received a discharge [Docket No. 54], and the case was closed on March 21, 2007.

In many, perhaps most, cases, the sloppy lawyering reflected in the foregoing summary of events in this case makes no difference. The Court is generally lenient with regard to technical accuracy of proofs of claim, motions for stay relief, and proposed orders that lawyers

present as consent orders or when no opposition to a motion exists. At the same time, the Court expects lawyers for both debtors and secured lenders to be as accurate as possible. For example, it appears that lawyers with the same law firm filed Fifth Third's proof of claim, Aurora's motion for relief from stay, and Midland's motion for a default order. The relationships should have been explained. Similarly, the Court cannot understand how counsel for the Debtor could represent that Old Kent held the security deed on the residence when the record shows that either Fifth Third, Aurora, or Midland held the claim.

The Court relies on lawyers to be accurate in their pleadings and proposed orders. The Court cannot possibly check the technical accuracy of every proposed order presented by consent or without opposition, but the Court will not knowingly enter orders such as the ones referenced above if they contain material unexplained discrepancies. For example, the Court will not knowingly enter an order on a motion for stay relief filed by a lender or servicer if the record shows that another entity holds the claim unless the lender or servicer shows good cause for doing so.

Section 347(a) provides for disbursement of unclaimed funds pursuant to chapter 129 of title 28 of the United States Code. The applicable provisions of chapter 129 direct the Court to disburse unclaimed funds to the "rightful owners," 28 U.S.C. § 2041, upon "full proof of the right thereto." 28 U.S.C. § 2042. Under chapter 129's requirements and due process principles, the Court has the duty to make sure that unclaimed funds are disbursed to their true owner. *Cf. Leider v. United States*, 301 F.3d 1290, 1296 (Fed. Cir. 2002). Because the Court typically considers an application for unclaimed funds payable on a proof of claim in a bankruptcy case *ex parte*, the Court must insist on a claimant's exact compliance with legal requirements relating

to the authority of an individual or entity to act on behalf of the claiming party and a definitive showing that the claiming party is actually entitled to the funds. *See generally In re Applications for Unclaimed Funds,* 341 B.R. 65 (Bankr. N.D.Ga. 2005).

The first problem here is that the record owner of the funds is Fifth Third Mortgage Company, not its alleged parent, Fifth Third Bank, N.A.[2] *See In re Applications for Unclaimed Funds, supra,* 341 B.R. at 69-71 ("[T]he Court cannot grant an application of a parent corporation for payment of funds that belong to its subsidiary."). For this reason alone, the Court must deny the Application.

But there is a second problem. The Application does not establish that a debt to Fifth Third (or any later holder of the debt) still exists. A creditor applying for unclaimed funds must affirmatively show that it has a "present entitlement to the unclaimed funds sought." *In re Acker,* 275 B.R. 143, 145 (Bankr. D.D.C. 2002). *Accord, In re Scott,* 346 B.R. 557 (Bankr. N.D. Ga. 2006). A creditor does not have the required present entitlement if its claim has been paid, if there is no enforceable claim after foreclosure of its collateral, or if the debtor has brought the obligation current such that no payment is currently due. Consequently, an applicant seeking unclaimed funds arising from distributions that were made on account of a secured claim must show that the debt has not been satisfied (through payment or foreclosure) and that an amount is currently due and payable to which the unclaimed funds may lawfully be applied.

The Application here makes no such showing. To the contrary, the record summarized above strongly indicates that the claims of Fifth Third and Aurora (or their "successors" and

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[2]In any event, the Application does not establish that the Bank is the parent of the mortgage company.

"assigns," if the debts were transferred) were satisfied either with proceeds from the Debtor's sale of Barrington Overlook or through a foreclosure sale. Consequently, it could very well be that the Chapter 13 Trustee or the Debtor, not Fifth Third, is entitled to the unclaimed funds.

In accordance with the foregoing, it is hereby **ORDERED and ADJUDGED** that the Application for disbursement of unclaimed funds is denied, without prejudice. Because the Debtor or the Chapter 13 Trustee may have an interest in the unclaimed funds, due process considerations require that Fifth Third serve any future Application for the funds on the Debtor, her counsel, and the Chapter 13 Trustee.[3]

IT IS SO ORDERED this 22 day of May, 2009.

Paul W. Bonapfel
United States Bankruptcy Judge

[3]Similarly, due process considerations require that any application by the Debtor or the Trustee for disbursement of the funds be served on Fifth Third Mortgage Company.

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