



**IT IS ORDERED as set forth below:**

**Date: May 23, 2007**

**Paul W. Bonapfel  
U.S. Bankruptcy Court Judge**

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

IN RE:	)	
	)	
JONATHAN S. JOHNSTON and BEVERLY	)	
DAWN JOHNSON,	)	Case No. 04-41390-PWB
	)	
Debtors.	)	
_____	)	
	)	
GE MORTGAGE SERVICES, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary No. 04-04052-PWB
	)	
JONATHAN S. JOHNSTON and BEVERLY	)	
DAWN JOHNSON,	)	
	)	
Defendants.	)	
_____	)	

**ORDER DENYING MOTION FOR DEFAULT  
JUDGMENT AND DISMISSING CASE**

On May 16, 2007, the Court conducted a hearing on the motion of the Plaintiff, GE

Mortgage Services, LLC (“Mortgage Services”) for entry of default judgment on its complaint seeking a determination that certain debts owed by the Defendants, Jonathan S. Johnston and Beverly Dawn Johnston, are excepted from their chapter 7 discharge pursuant to 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4), and 523(a)(6).

The procedural history of this adversary proceeding and the allegations in support of Mortgage Services’s claims are set forth in two Orders of this Court entered on March 30, 2005, and May 1, 2007. The material facts as alleged in the complaint and motion for entry of default judgment, as amplified by representations that counsel for Mortgage Services made at the hearing, are as follows.

Wells Fargo Home Mortgage, Inc. (“Wells Fargo”) contracted with GE Capital Residential Connections Corporation (“Rescon”) for Rescon to provide underwriting services with regard to applications for residential mortgage loans submitted to Wells Fargo. Rescon, in turn, contracted with Headway Corporate Staffing Services, Inc. (“Headway”) for Headway to perform services on behalf of Rescon for Wells Fargo. As an employee of Headway, Ms. Johnston actually processed loan applications, which apparently included obtaining and verifying information concerning the applicant’s income, financial condition, and the value of the home that would serve as collateral for the loan. Ms. Johnston thus was responsible for properly compiling factual information that Rescon would use in providing underwriting services to Wells Fargo and on which Wells Fargo would rely in making its lending decisions.

Mr. Johnston, the husband of Ms. Johnston, was employed by a mortgage broker. The mortgage broker solicited potential borrowers and, on their behalf, submitted applications for residential mortgage loans to be made by Wells Fargo (as well as other lenders, presumably).

Mortgage Services alleges that the Johnstons, acting in concert with others, engaged in various fraudulent schemes that misrepresented the financial situation of applicants and the value of collateral in connection with residential mortgage loans made by Wells Fargo. Wells Fargo invoked provisions of its contract with Rescon that required Rescon to make Wells Fargo whole with regard to loans Wells Fargo made that were based on fraudulent representations.

Rescon filed a lawsuit in the Superior Court of Fulton County in September 2003 against the Johnstons and others seeking to recover the losses it incurred in having to make Wells Fargo whole as a result of fraudulent representations that the defendants in that lawsuit, including the Johnstons, had made or were responsible for.

In April 2004, the Johnstons filed their chapter 7 bankruptcy case. They did not list Rescon as a creditor. At some point, Mortgage Services, an affiliate of Rescon, acquired the fraudulent mortgage loans from Wells Fargo, thereby, presumably, resolving Wells Fargo's claim against Rescon. The record does not reflect any agreement between Mortgage Services and Rescon with regard to their respective rights and obligations arising out of Mortgage Services' acquisition of the loans.

One of the loans Wells Fargo made was a \$319,800 loan made to Mr. Johnston himself secured by property he owned known as 135 Waterstone Pointe, Acworth, Georgia. This loan was made based on a fraudulent application that did not adequately provide income and employment information and that reflected a value for the property grossly in excess of its actual market value. The loan was among those that Mortgage Services acquired from Wells Fargo.

Mortgage Services obtained relief from the stay in the Johnstons's bankruptcy case and foreclosed on the Waterstone Pointe property in August 2004. Mortgage Services bid \$340,000

for the property, was the high bidder, recorded a deed under power, and obtained confirmation of the sale. (See Plaintiff's Supplemental Brief, Exhibits "A" and "B", Docket No. 24). Mortgage Services contends that the proceeds from the foreclosure sale were less than the principal, interest, and attorney's fees due on the note and that, therefore, it holds a deficiency claim against the maker, Mr. Johnston.

Mortgage Services contends that its deficiency claim is excepted from Mr. Johnston's discharge: under § 523(a)(2) because the underlying loan was obtained by fraud he committed against Wells Fargo and Rescon; under § 523(a)(4) because Mr. Johnston committed fraud with regard to the loan against Wells Fargo and Rescon in violation of his fiduciary duty to them; and under § 523(a)(6) because Mr. Johnston's fraudulent conduct was intentional.

The Court has no difficulty in concluding that Mortgage Services's allegations state actionable claims that Rescon and Wells Fargo might have had against the Johnstons for fraud that could be excepted from discharge. But Rescon and Wells Fargo are not plaintiffs in this action, and the record does not reflect that they have timely sought a determination in the Johnstons's bankruptcy case that their claims against the Johnstons are excepted from discharge under § 523(a)(2), (4), or (6) as § 523(c) requires. Moreover, it appears that Wells Fargo has been made whole by Mortgage Services's acquisition of the fraudulent loans. As such, it would appear that Wells Fargo has suffered no damages and, as such, has no claim against the Johnstons. And because Mortgage Services apparently acquired the fraudulent loans from Wells Fargo without obtaining any recourse against Rescon, it could well be that Rescon, likewise, has suffered no damages such that it also has no claim against the Johnstons.

In its amended complaint (Docket No. 10), Mortgage Services sought a determination

that any judgment obtained against the Debtors in the Fulton County action was excepted from discharge. Mortgage Services was not a party to that litigation. To the extent that Mortgage Services in this proceeding sought a determination that any debts of the Johnstons to Wells Fargo or Rescon are excepted from discharge under §§ 523(a)(2), (4), or (6), it is not entitled to that relief.

As Mortgage Services acknowledged at the hearing, Mortgage Services does not have independent tort claims against the Johnstons arising out of their fraudulent conduct directed at Wells Fargo and Rescon. Further, it is clear that Georgia law does not permit the assignment of fraud claims. O.C.G.A. § 44-12-24.

Mortgage Services contends, however, that the fraud committed by Mr. Johnston in connection with the loan he personally obtained makes that debt nondischargeable. But the only liability that Mr. Johnston has to Mortgage Services is his obligation on the note that was assigned to Mortgage Services. The fact that an obligor on a note may be liable to the original holder in fraud as well as in contract, however, does not permit the assignee to enforce the fraud claim under Georgia law. *E.g., Cadlerock Joint Venture, L.P. v. Pittard (In re Pittard)*, 358 B.R. 457 (Bankr. N.D. Ga. 2006).

Under the allegations of its complaint as amplified in its motion and at the hearing, Mortgage Services has nothing more than a contractual claim against Mr. Johnston and no claims against Mrs. Johnston. The contractual debt is not excepted from discharge, and Mortgage Services has no fraud claims to assert. Mortgage Services is not entitled to default judgment on its claims.

Mortgage Services has had ample opportunity to demonstrate that it has claims that might

be excepted from discharge but has not been able to do so. Accordingly, the Court will dismiss this proceeding.

Based on, and in accordance with, the foregoing, it is hereby **ORDERED and ADJUDGED** that the Plaintiff's Motion for Entry of Default Judgment and Award of Attorney's Fees and Expenses be, and it hereby is **DENIED**, and that this proceeding be, and the same hereby is, **DISMISSED**.

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**Distribution List**

Linda S. Finley  
Gambrell & Stolz, LLP  
Monarch Plaza  
Suite 1600, 3414 Peachtree Road  
Atlanta, GA 30326

Kevin A. Stine  
Gambrell & Stolz, L.L.P.  
Monarch Plaza, Suite 1600  
3414 Peachtree Road, N.E.  
Atlanta, GA 30326

Jonathan S. Johnston  
135 Waterstone Pointe  
Acworth, GA 30101-5901

Beverly Dawn Johnston  
135 Waterstone Pointe  
Acworth, GA 30101-5901

Roderick H. Martin  
Roderick H. Martin & Associates, P.C.  
279 Washington Avenue  
Marietta, GA 30060-1980