

Dated: August 07, 2009
The following is ORDERED:



Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

JAMES MALCOLM WINBORN
and PEGGY ANN WINBORN,

Debtors.

Case No. 05-36341-L
Chapter 13

James Malcolm Winborn
and Peggy Ann Winborn,
Plaintiffs,

v.

Wells Fargo Bank, National Association
and America's Servicing Company,
Defendants.

Adv. Proc. No. 09-00083

ORDER GRANTING AMENDED MOTION TO DISMISS

BEFORE THE COURT is the amended motion of Wells Fargo Home Mortgage, a division of Wells Fargo Bank, National Association, and America's Servicing Company (hereinafter "Wells Fargo"), seeking an order of the bankruptcy court dismissing the Plaintiffs' complaint for damages and injunctive relief (the "Complaint") on the basis that the court lacks subject matter jurisdiction to entertain the Plaintiffs' claims. In the alternative, Wells Fargo asks the court to dismiss the

Complaint for failure to state a claim upon which relief can be granted. Although I indicated at the scheduled hearing that the Amended Motion to Dismiss would be denied, after carefully reviewing the factual allegations of the Complaint, I have concluded that the Complaint does not implicate important considerations of bankruptcy policy and that the outcome of this dispute will have no conceivable effect upon the bankruptcy estate. Therefore, the Complaint should be dismissed for lack of subject matter jurisdiction.

FACTUAL BACKGROUND

The Plaintiffs, James Winborn and Peggy Winborn, filed their joint Chapter 13 petition on October 6, 2005, in order to reorganize their personal financial affairs. Doc. No. 1.¹ The most valuable asset listed in their schedules is their home, which was listed in their schedules as encumbered by the lien of a deed of trust held by Wells Fargo. Their plan, which made provision for the secured claim of Wells Fargo, was confirmed by order entered December 1, 2005. Doc. No. 14. Among other provisions, the plan called for payments by the Plaintiffs of \$525.00 every two weeks over a period of 60 months. The plan provided for payment of the Plaintiffs' ongoing deed of trust payments in the amount of \$593.59 per month, as well as payment of an arrearage, also secured by the Plaintiffs' home, in the amount of \$4,200.00. Wells Fargo timely filed a proof of claim on December 20, 2005, in the amount of \$2,658.53. Claim No. 14-1. So far as I can tell, the Plaintiff made regular plan payments through payroll deductions.

As the plan neared completion, Sylvia Ford Brown, the Chapter 13 trustee, filed a "Motion to Require Mortgage Holder to Appear and Show Cause Why Its Records Should Not Reflect the Trustee's Records." Doc. No. 38. No objection was filed and no hearing was conducted. Instead, an order was entered on December 16, 2008, directing Wells Fargo "to show that the debtor's

¹ References to the court's docket are abbreviated Doc. No. for "document number." The court may take judicial notice of matters set forth in its files. See Federal Rule of Evidence 201(c) which applies to this proceeding pursuant to Bankruptcy Rule 9017; *In re Drytech, Inc.*, 2008 WL 4525331 (Bankr. M.D. Tenn. 2008), citing *In re Hamby*, 360 B.R. 657 (Bankr. E.D. Tenn. 2007).

mortgage is current.” Doc. No. 40. The Plaintiffs completed their plan payments and received a discharge on December 24, 2008. Doc. No. 43.

The Complaint makes the following allegations. The Chapter 13 trustee paid the ongoing deed of trust payment to Wells Fargo that was due on or about January 1, 2009. The Plaintiffs made the next ongoing payment which came due in February. Wells Fargo made demand upon the Plaintiffs by letter dated January 18, 2009, for payment of \$2,162.95, in order to bring the loan current. Exhibit D to Complaint. The letter reads in pertinent part as follows:

Our records indicate that your loan is in default. Unless the payments on your loan can be brought current by February 17, 2009, it will be necessary to accelerate your Mortgage Note and pursue the remedies provided for in your Mortgage or Deed of Trust. The total delinquency against your account as of today’s date is as follows:

Past Due Payments	\$1,187.18
Late Charge Balance	\$ 29.68
Other Fees	\$ 352.50
Suspense Balance	\$ 0.00
Total Delinquency as of 01/18/09	\$1,159.36
Payments due in next 30 days	\$ 593.59

Total to cure default and bring loan current as of February 17, 2009	\$2,162.95
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Exhibit D to Complaint. The Plaintiffs subsequently received a mortgage statement on January 20, 2009, showing a balance due of \$1,810.95. Exhibit C to Complaint. This amount is composed of:

Overdue Payments 12/01/08 - 01/01/09	\$1,187.18
Unpaid Late Charges	\$ 29.68
Other Charges	\$ 0.00

TOTAL PAYMENT DUE 02/01/09	\$1,810.45
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Exhibit C to Complaint. This amount is the same as that set forth in the letter of January 18, 2009, except that it does not include “Other Fees” in the amount of \$352.50. The court notes that \$1,187.18 is exactly twice the amount of the regular monthly payment of \$593.59, and further that the time period noted for the overdue payments is December 1, 2008, through January 1, 2009. It appears that Wells Fargo claims that the December and January payments were not paid. Although the Plaintiffs allege that they were notified that “an arrearage exists for the plan for the period of time during the term of the plan and prior thereto,” in fact, at most, only one of the allegedly

delinquent payments and some or all of the accumulated late charges date from that period. One of the delinquent payments relates to the period *after* the plan was complete and the Plaintiffs received their discharge. The court need not resolve this factual dispute in the context of the pending motions, but the nature of the delinquency alleged, which clearly relates to the post-confirmation period if not, indeed, the post discharge period, is crucial to consideration of the motion to dismiss.

The Plaintiffs allege that on January 23, 2009, they found a hang tag on their door knob requesting that they call Wells Fargo. Exhibit E to Complaint. The Plaintiffs responded not by calling, but by filing the complaint that commenced this adversary proceeding. Rather than filing an answer, Wells Fargo filed the motion to dismiss that is the subject of this memorandum.

DISCUSSION

Wells Fargo brings its motion pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012. That rule permits the raising of certain defenses to a complaint by motion before a responsive pleading is filed. Among the enumerated grounds that may support a motion to dismiss are lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted.

The bankruptcy courts, as all federal courts, are courts of limited jurisdiction, possessing only those powers authorized by Constitution and statute. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675 (1994). It is to be presumed that a particular action lies outside the jurisdiction of the court, with the result that the burden to establish jurisdiction lies with the party asserting it. *Id.* As Wells Fargo correctly states, the Plaintiffs have the burden of establishing the jurisdiction of this court.

The jurisdiction of the bankruptcy courts is derived from the bankruptcy jurisdiction of the federal district courts, which is original and exclusive with respect to bankruptcy cases, and original but not exclusive as to all civil proceedings arising under the Bankruptcy Code, or arising in or related to a bankruptcy case. *See* 28 U.S.C. § 157; 28 U.S.C. § 1334(a) and (b).

Wells Fargo argues that the Complaint raises a post-discharge dispute over which this court has no jurisdiction. It is true that bankruptcy courts do not have jurisdiction to entertain post-discharge disputes arising from long-term debt that was not discharged under a bankruptcy plan. *See, e.g., McAlpin v. Educ. Credit Mgmt. Corp.*, 278 F.3d 866, 868 (8th Cir. 2002); *McGlynn v. Credit Store*, 234 B.R. 576, 584 (D.R.I. 1999); *In re Vogt*, 257 B.R. 65, 67 (2000); *Goldstein v. Marine Midland Bank (In re Goldstein)*, 201 B.R. 1, 4 (Bankr. D. Me. 1996). Wells Fargo further argues that this adversary proceeding involves no right created by bankruptcy law, nor will it have an effect upon the bankruptcy estate because the Plaintiffs have received their discharge in bankruptcy and there is no longer a bankruptcy estate. The Sixth Circuit has adopted the *Pacor* test for determining whether a civil proceeding is related to bankruptcy:

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the estate.

Robinson v. Mich. Consol. Gas Co., 918 F.2d 579, 584 (6th Cir. 1990) quoting *In re Pacor, Inc.*, 743 F.2d 984, 994 (3rd Cir. 1984)(emphasis in the original.)

We [the Sixth Circuit] too have accepted the *Pacor* articulation, albeit with the caveat that "situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement."

Id. quoting *In re Salem Mortgage Co.*, 783 F.2d 626, 634 (6th Cir. 1986); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 115 S.T. 1493, n.6 (1995)("[W]hatever test is used, [the] cases make clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor."). Wells Fargo urges that it is the Plaintiffs who seek recovery in this adversary proceeding for their own benefit, and not for the benefit of their creditors.

The Plaintiffs counter that they seek merely to have the court enforce its prior order. There is no question that the bankruptcy courts have continuing jurisdiction to interpret and enforce prior orders. *See Travelers Indem. Co. v. Bailey*, 129 S. Ct 2195, 2205 (2009) citing *Local Loan Co. v.*

Hunt, 292 U.S. 234, 239, 54 S. Ct. 695, 78 L.E. 1230 (1934). In effect, the Plaintiffs allege that, notwithstanding the fact that their long-term liability to Wells Fargo was not subject to discharge, Wells Fargo is bound by the prior declaration of this court that the arrearage that was to have been cured through the plan was in fact cured.

The proceeding that was initiated by the Chapter 13 trustee and which resulted in that order was intended to prevent surprises for the Plaintiffs after they completed payments under their Chapter 13 plan. The trustee's motion called upon Wells Fargo to come forward and declare whether or not the payments made by the Plaintiffs were sufficient to cure the pre-petition arrearage such that upon their emergence from Chapter 13 they would remain obligated to pay their regularly-occurring house payments, but none of the fees or other expenses that might have accrued and been collected but for the filing of their bankruptcy case. When Wells Fargo failed to come forward to dispute the trustee's record keeping, the court entered its order directing Wells Fargo to indicate in its business records, by altering them if necessary, that all pre- and post-petition obligations under the loan agreement with the Plaintiffs had been satisfied save the obligation to make ongoing payments as they came due. This case thus presents the troubling question whether and under what circumstances a bankruptcy court may ever exercise jurisdiction over post-discharge disputes arising in or after a Chapter 13 plan where the debt at issue is not subject to discharge. It does not raise the much simpler question of whether a bankruptcy court may entertain disputes arising from obligations related to long-term debt that arise after plan payments have been completed and discharge granted. Nor does it raise another simple question: whether a bankruptcy court has jurisdiction to determine whether a particular act violates the discharge injunction.

Wells Fargo relies upon a number of cases that are factually similar to the present dispute. The first is *McAlpin v. Educational Credit Mgmt. Corp.* in which the Eighth Circuit Court of Appeals held that a bankruptcy court lacked jurisdiction over an enforcement action by a student loan creditor. The creditor filed a late claim for principal, interest, and collection costs and fees, which was not provided for in the debtor's plan. Two days after receiving a discharge, the debtor filed an objection to the late-filed claim arguing that the claimed collection costs were excessive

under applicable federal regulations. The creditor did not respond, and the bankruptcy court entered default, holding that the creditor could recover unpaid principal and interest only. The creditor did not appeal, but continued to attempt to collect its costs from the debtor. The debtor obtained the reopening of his closed bankruptcy case and filed an adversary complaint asking the court to enforce its prior order. The bankruptcy court issued an order permanently enjoining the creditor from attempting to collect the collection costs that had been disallowed in the court's prior order. The bankruptcy appellate panel reversed on the basis that the bankruptcy court lacked subject matter jurisdiction to limit the creditor's recovery to principal and interest. The court of appeals affirmed the decision of the appellate panel.²

The *McAlpin* court stated that the bankruptcy court did not have jurisdiction over the claims-objection proceeding because (1) the debtor's objection came only after his discharge was entered, so the claim could no longer have been one against the estate; and (2) the claims-objection proceeding was not related to the bankruptcy case because at the time of the objection there was no longer a plan to be confirmed or an estate, and therefore the proceeding could not conceivably have an effect on the estate. 278 F.3d at 868. The debtor's plan in *McAlpin* differs from the plan in the present case in that the *McAlpin* plan did not make provision for the disputed claim while the plan in this case did make provision for Well Fargo's arrearage claim and its ongoing deed of trust payments. Whether or not this difference is sufficient to necessitate a different outcome in this case remains to be seen.

The second decision relied upon by Wells Fargo is *Brown v. GMAC Mtg. Corp. (In re Brown)*, 300 B.R. 871 (D. Md. 2003). In that case, the debtor was compelled to pay a bankruptcy fee and costs imposed by her lender at the closing of the sale of her home arising from post-confirmation events related to her home mortgage. The debtor paid the full amount demanded rather

² This characterization of the result reached by the court of appeals may have been in error. The courts of appeals review the decisions of the bankruptcy courts, not those of the intermediate appellate courts, whether that is the district court exercising appellate jurisdiction or the bankruptcy appellate panel. *In re Federated Dept. Stores, Inc.*, 270 F.3d 994, 999 (6th Cir. 2001).

than risk the loss of the sale. The sale was completed prior to the completion of the bankruptcy plan. Upon completion of the payments due under her plan, the debtor received her discharge. Two weeks after entry of her discharge, the debtor filed an adversary complaint alleging that the creditor's actions violated the automatic stay. The debtor also asserted state-law claims for breach of contract and unjust enrichment. The bankruptcy court dismissed the complaint for lack of subject matter jurisdiction and the district court affirmed. The court noted that while bankruptcy jurisdiction is fairly broad upon the filing of a petition, it narrows upon the confirmation of a plan of reorganization: "Once a plan has been confirmed 'the bankruptcy estate ceases to exist,' and upon discharge from bankruptcy, the bankruptcy case ends." 300 B.R. at 875, quoting *In re Shank*, 240 B.R. 216, 221 (Bankr. D. Md. 1999). After confirmation of a bankruptcy plan, the bankruptcy court's jurisdiction is limited to matters "'concerning the implementation or execution of the confirmed plan.'" 300 B.R. at 875-76, quoting *Goodman v. Phillip R. Curtis Enter., Inc.*, 809 F.2d 228, 232 (4th Cir. 1987). The debtor argued the fact that the creditor's imposition of a "bankruptcy fee" and "bankruptcy costs" significantly altered her liabilities rendering her complaint one "related to" the bankruptcy case. 300 B.R. at 876. The court rejected this argument, however: "[B]oth the bankruptcy estate and the underlying bankruptcy case ended when the bankruptcy court entered Appellant's discharge. Therefore, Appellant's proceeding cannot impact an entity that no longer exists." *Id.* The court noted, and this is significant, that the fact that the bankruptcy court had no jurisdiction to hear the dispute did not mean that the debtor was without a remedy: "That the bankruptcy court lacks jurisdiction over Appellant's claim does not foreclose her from pursuing it in another, more appropriate, judicial forum." *Id.*

The Complaint in the present case alleges that the Plaintiffs have completed all payments under their plan and have received their discharge. Complaint, ¶ 10. In response to the trustee's motion, the court entered its order on December 16, 2008, declaring that "the arrearage claim has been paid in full," and further that "the debtor's account with AMERICA'S SERVICING COMPANY has now been brought current." The Complaint makes no allegation concerning the

source of the delinquency or indebtedness that gives rise to the past due amount shown in the statement of January 20, 2009, or the letter of January 18, 2009, but the exhibits themselves indicate that the delinquencies arose in the period December 1, 2008, to January 1, 2009. Therefore, the past due amounts relate to the post-confirmation and post-discharge periods.

The delinquency asserted by Wells Fargo arises in the post-confirmation period. It does not implicate the plan's provision for curing the pre-petition arrearage. It does implicate the plan's provision for payment of ongoing mortgage payments. Upon confirmation of a debtor's plan, "the provisions of the confirmed plan bind the debtor and the creditor." 11 U.S.C. § 1327(a), but a plan may not modify the rights of holders of secured claims "*secured only by a security interest in real property that is the debtor's principal residence.*" 11 U.S.C. § 1322(b)(2) (emphasis added). The Complaint does not allege that the last payment due to Wells Fargo came due during the plan period and, indeed, the Complaint refers to payments coming due after discharge. Thus, it is clear that while the Plaintiffs received a discharge of some of their debts, the claim of Wells Fargo was not discharged. *See* 11 U.S.C. § 1328(a)(1), which specifically excepts from discharge claims provided for under section 1322(b)(5).³

The Complaint alleges that the Plaintiffs completed all payments under the plan, and alleges that "the trustee paid the ongoing mortgage through the end of January 2009." In the context of the pending motion, the Court must consider this allegation to be true, even though it seems clear that there is a factual dispute between the parties about precisely this. *See, e.g., Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)). Even if the allegation is true, meaning that the December and January payments were in fact made by the trustee, this does not mean that Wells Fargo violated an order of the bankruptcy court.

³ Section 1322(b)(5) relates to secured or unsecured claims "on which the last payment is due after the date on which the final payment under the plan is due."

The payments that Wells Fargo claims were missed came due at the very end of the Plaintiffs' Chapter 13 plan, well after confirmation and not implicating the arrearage which was to be cured through the plan. The trustee's motion to show cause was filed on November 19, 2008. At that time, the December payment was not due, and there would have been no reason for Wells Fargo to dispute the trustee's records. The mortgage was apparently current at that time. The order that was entered as the result of the trustee's motion can relate only to the facts that existed at the time the motion was filed. Therefore, even if the allegations of the Complaint are true and Wells Fargo is attempting to collect payments that were made by the trustee, this act does not violate any order of the bankruptcy court nor does it implicate any question of bankruptcy policy. Because the debt owed to Wells Fargo was not discharged, and because the bankruptcy plan has been completed, the outcome of the dispute between Wells Fargo and the Plaintiffs can have no conceivable effect upon the estate, which no longer exists. The dispute is not "related to" a bankruptcy case, and this bankruptcy court is without jurisdiction to entertain it.

CONCLUSION

For the foregoing reasons, the motion of Wells Fargo is **GRANTED** and this adversary proceeding is **DISMISSED** for lack of subject matter jurisdiction. The Court need not address the additional grounds for Wells Fargo's motion.

cc: Debtors/Plaintiffs
Attorney for Debtors/Plaintiffs
Defendants
Attorney for Defendants
Chapter 13 Trustee