UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
JIMMY DALE MILLER,
Debtor.

Case No. 02-29124
Chapter 13

JIMMY DALE MILLER,
Plaintiff,

v.

Adv. Proc. No. 03-00540

WASHINGTON MUTUAL BANK,
Defendant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the Plaintiff's motion for summary judgment filed February 27, 2004. The Defendant filed a response on April 14, 2004, and the court conducted a hearing to consider the arguments of the parties on May 18, 2004. The underlying complaint presents the question of whether failure to pay insurance premiums from escrow funds violates the automatic

stay of 11 U.S.C. § 362. The court has reviewed the pleadings, memoranda, and affidavits filed by the parties, and concludes that there remain genuine issues of material fact that require a trial.

FACTS

Jimmy Dale Miller ("Debtor" or "Plaintiff") filed a petition for relief under Chapter 13 of the Bankruptcy Code on June 4, 2002. Among his listed assets is his residence located in Atoka, Tennessee, which is encumbered by a deed of trust held by the Defendant, Washington Mutual Bank ("Washington Mutual"). The Debtor's plan as confirmed provided for the Chapter 13 trustee to disburse to Washington Mutual regular, monthly, ongoing mortgage payments together with a monthly payment of $136.00 to be applied toward the mortgage arrearage of $10,204.33. The Debtor alleges that the ongoing mortgage payment includes amounts in addition to principal and interest which were to be held in escrow by Washington Mutual for payment of property taxes and homeowners insurance. The Debtor has purchased homeowners insurance from Nationwide Insurance ("Nationwide") through its agent, Harry W. Lofton, since 1985. (Affidavit of Harry W. Lofton).

In late July or early August 2002, Nationwide gave notice that the homeowners policy would not be renewed when it expired on February 24, 2003, because of certain hazards revealed in a dwelling inspection. (Affidavit of Harry W. Lofton; Affidavit of Susie Purdue). These hazards were corrected and Nationwide gave notice that the policy would be renewed on or about August 22, 2002. (Affidavit of Harry W. Lofton).

Prior to this incident, however, Washington Mutual placed the Debtor's property into foreclosure as the result of his default in payments. The Debtor filed a petition under Chapter 7 of the Bankruptcy Code on January 8, 2002, and received a discharge on April 11, 2002. Washington

Mutual was granted relief from the automatic stay in that case by order entered March 12, 2002. The Debtor chose not to reaffirm the obligation to Washington Mutual. The affidavit of Susie Perdue, Section Manager for Washington Mutual Bank's Hazard Insurance Department, indicates that at the time the property was placed in foreclosure (June 17, 2002), a "stop code" was placed on the account and the property was designated for REO (real estate owned) insurance. Perdue states that through inadvertence and clerical error, this designation stayed on the account until June 2003, and that this coding error prevented Washington Mutual from reinstating the Nationwide policy. Perdue's affidavit further states that Washington Mutual canceled the pending foreclosure sale in October 2002 because of the filing of the Debtor's Chapter 13 petition. It is unclear why the sale was canceled so long after the Chapter 13 petition was filed in June. An appearance was made by counsel for Washington Mutual on June 13, 2003.

Both parties agree that Nationwide issued a cancellation notice as the result of non-payment on February 24, 2003. The affidavit of Harry W. Lofton indicates that he contacted the Debtor on February 11, 2003, to advise him of the pending cancellation. The affidavit states that the Debtor was to obtain his loan number and supply this information to Lofton, but that he did not do so prior to the cancellation of the policy. Washington Mutual admits that the premium was not paid because the property was erroneously coded REO.

On March 3, 2003, the Debtor did supply his loan number to Lofton who in turn contacted Washington Mutual about making the payment necessary to reinstate the Nationwide policy. Lofton describes four conversations that occurred between his office and representatives of Washington Mutual between March 3 and June 28, 2003, in which promises were made that a check was being mailed to Lofton. It does not appear that the information in the affidavit is based upon personal

knowledge. Further, it is clear from the affidavit that the Debtor did not tell Lofton about his pending Chapter 13 case or the defaults in his mortgage payments. Lofton states that it was not until June 28, 2003, that his office was informed by Jerome Fox at Washington Mutual that the Debtor's account was two months behind and later was informed by Alicia at Washington Mutual that the loan was in bankruptcy.

The Debtor filed a motion in his bankruptcy case on April 21, 2003, in which he asked the court to order Washington Mutual to purchase property insurance for his home. After two continuances, the motion was heard on June 10, 2003. By order entered June 13, 2003, Washington Mutual was ordered to "reinstate the homeowners insurance policy for [Debtor's residence] through Lofton & Wells Insurance (Nationwide) . . . ." Washington Mutual force-placed insurance for the period June 1, 2003 through May 31, 2004, for an annual premium of $1,052.00 and also obtained force-placed insurance for the period June 1, 2002 through May 31, 2003. (Affidavit of Susie Perdue). In July 2003, as the result of the court order, Washington Mutual tried to obtain the reinstatement of the Nationwide policy. Lofton's affidavit indicates that Perdue contacted his office and was told by someone that the policy could not be reinstated because it had been canceled in February (i.e., more than thirty days prior to the inquiry), and that Nationwide would not write a new policy because of the Debtor's bankruptcy case. Lofton's affidavit also states, "We asked her why we never received a payment from them since Mr. Miller had an escrow account and she said that it was because there was a bankruptcy for Mr. Miller." (Affidavit of Harry W. Lofton).

Lofton's affidavit states that as a result of this conversation, his office obtained a claim and credit report for the Debtor. The report included a notation of the Debtor's pending bankruptcy case, which rendered the Debtor ineligible for coverage by Nationwide. Lofton obtained a quote from

Foremost Insurance for comparable coverage at an annual premium of $2,208.00. A letter confirming this information was sent to Perdue on July 10, 2003. Lofton's affidavit, dated February 24, 2004, indicates that the annual premium for the Foremost policy based upon the coverage the Debtor had under the Nationwide policy would be $1,379.00. The difference between this and the prior quote of $2,208.00 is not explained. The affidavit also states that if the Debtor were eligible for coverage by Nationwide, the annual premium would be $943.00 based upon current rates. No information is given concerning the coverage provided in the forced policy, so it is not possible to compare the cost of the Foremost policy with that policy. It is also not clear when the Debtor will again become eligible for a Nationwide policy.

The Debtor alleges that he suffered damage to his roof in April of 2003 as the result of a wind storm, and that these damages were not covered by insurance because of the cancellation of the Nationwide policy. He claims that the cost of emergency and permanent repairs is $930.00, but he has offered no documents supporting this claim. He asserts that Washington Mutual should compensate him for these costs.

The Debtor filed the complaint commencing this adversary proceeding on June 7, 2003, *before* the hearing on the Debtor's motion and *before* the entry of the court's order directing Washington Mutual to purchase property insurance for the Debtor's home. The only issues raised by the complaint concern the activities of the parties *before* the filing of the complaint. The complaint is based upon the theory that Washington Mutual violated the automatic stay of 11 U.S.C. §§ 362(a)(3), (6), and (7) when it failed to timely pay the insurance premium owed to Nationwide or when its representatives made statements to the effect that a check would be sent. The complaint seeks damages pursuant to 11 U.S.C. § 362(h) which provides for the recovery of actual damages,

including costs and attorneys' fees, and, in appropriate circumstances, punitive damages, resulting from any willful violation of the stay. The Debtor's motion for summary judgment, however, incorporates additional claims set forth in the Debtor's pretrial statement. In the pretrial statement, the Debtor contends that Washington Mutual did not fail to pay the insurance premium, but instead actually withheld the payment in an attempt to collect the arrearage due on the mortgage loan. Further, in the pretrial statement the Debtor contends that Washington Mutual intentionally misled the Debtor by making promises to Lofton that a payment would be made and not making the payment. In addition to the contention that the actions of Washington Mutual violated the automatic stay, in the pretrial statement the Debtor contends that Washington Mutual breached an implied contract with the Debtor to use escrow funds for their intended purpose and breached a fiduciary duty to the Debtor by failing to "properly expense and maintain the escrow funds." At oral argument, the Debtor acknowledged that the breach of contract and breach of fiduciary duty theories are not properly before the court at this time.

In Washington Mutual's answer essentially all the factual allegations of the complaint are denied. In support of his motion for summary judgment, however, the Debtor offered no proof of the allegations of the complaint other than the affidavit of Harry W. Lofton. Lofton's affidavit is flawed in that it is not based on personal knowledge and contains a number of reports of the statements of other persons not before the court. Neither the Debtor nor the Debtor's attorney provided an affidavit concerning conversations to which they were parties which are alleged to underlie the allegations of the complaint. The Debtor did not attempt to rebut the affidavit of Susie Perdue, the representative of Washington Mutual. Perdue clearly states that the failure to pay the insurance premium was the result of inadvertence and clerical error.

ANALYSIS

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) ("the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'". *Celotex Corp.*, 477 U.S. at 324. That burden is not discharged by "mere allegations or denials." FED. R. CIV. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

The court will consider each of the Debtor's claims in turn.

A. Violation of the Automatic Stay

The Debtor contends that the actions of Washington Mutual in withholding payment to Nationwide and/or making promises that payment would be made violated the automatic stay. The mere failure to discharge some duty owed to the Debtor does not violate the automatic stay. In his

pretrial statement, the Debtor attempts to remedy this defect by contending that not only did Washington Mutual fail to pay the insurance premium when due, but it also and instead did something else with funds it had set aside to pay the premium. In order for the Debtor to prevail on this theory, he must at least prove that (1) Washington Mutual was in possession of escrow funds sufficient to pay the premium owed to Nationwide when it came due; and (2) Washington Mutual intentionally applied those funds to some other obligation.

The Debtor has not provided any information concerning the status of any escrow account established in connection with his mortgage loan. There is no question that the Debtor was substantially behind in making mortgage payments when his Chapter 13 case was filed. Washington Mutual asserted a claim in the bankruptcy case for a mortgage arrearage in the amount of $10,204.33. Further, Lofton's affidavit indicates that at least one person identified with Washington Mutual (Marina) stated that the escrow account had a negative balance. The court cannot evaluate the truthfulness of this statement, but it together with the lack of any other information concerning the status of the escrow account raises a genuine issue for trial concerning whether there were funds available to make the premium payment to Nationwide.

There are other statements in Lofton's deposition indicating an undertaking by Washington Mutual to send a check to him for the insurance premium, but Lofton's statements about those statements are not made upon personal knowledge and the statements themselves are not statements of fact, but statements of intention. At best, the Debtor would have the court draw a series of inferences from these statements: that funds were available to make the premium payment; that Washington Mutual authorized one or more of its employees to promise to make the premium payment; that the promises were knowingly false, i.e., that Washington Mutual actually did not

intend to make the payment; and that instead Washington Mutual did something else with the escrow funds. In evaluating the motion before the court, all inferences are to be drawn in favor of the non-moving party, not the moving party. Again, there remain genuine issues for trial.

In order for the Debtor to recover damages resulting from a violation of the automatic stay, the actions in violation of the stay must be willful. 11 U.S.C. § 362(h). Even if the court were to regard the failure to make the insurance premium payment as a violation of the automatic stay (by considering it, for example, the exercise of control over funds of the estate), the Debtor must demonstrate that the act was willful. The Debtor has offered no proof to rebut Washington Mutual's clear statement that the act was inadvertent. Even if there was a technical violation of the automatic stay, no damages can be awarded unless the Debtor produces proof contrary to the statement of Susie Perdue. Had Washington Mutual filed its own motion for summary judgment, the Debtor would have been compelled to produce this proof in response to the affidavit offered by Washington Mutual. As it is, the Debtor will be given the opportunity to rebut the statements of Perdue at trial.

B. Violation of the Prior Court Order

The order entered on June 13, 2003, directed Washington Mutual to "reinstate the homeowners insurance policy for [Debtor's address] through Lofton & Wells (Nationwide) . . . ." Washington Mutual has shown through the affidavit of Susie Perdue and the deposition of Harry W. Lofton that this was impossible. The fact that the policy could not be reinstated because of the passage of time was not made known to the court at the hearing on June 10, 2003, even though that fact clearly was known by both Lofton and the Debtor, if not also by the Debtor's attorney, well in advance of the hearing. (*See* Affidavit of Harry W. Lofton). Further, it appears that had the Debtor been more forthcoming with Lofton about his pending bankruptcy case, it would have been clear

to the Debtor prior to the hearing that not only could the policy not be reinstated, but that a policy with Nationwide could not be written until his credit improved. The Debtor misled the court on these essential facts which resulted in the issuance of the prior order. Washington Mutual has substantially complied with the court's order by providing insurance coverage at what appears to be a reasonable cost.

CONCLUSION

For the foregoing reason, the Debtor's motion for summary judgment should be and hereby is **DENIED**.

cc: Debtor/Plaintiff
Attorney for Debtor/Plaintiff
Defendant
Attorney for Defendant