

**Dated: September 23, 2020**  
**The following is ORDERED:**



*Jennie D. Latta*

Jennie D. Latta  
UNITED STATES BANKRUPTCY JUDGE

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**UNITED STATES BANKRUPTCY COURT**  
**WESTERN DISTRICT OF TENNESSEE**  
**WESTERN DIVISION**

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In re  
EVA LOIS MOORE,  
Debtor.

Case No. 16-24039-K  
Chapter 13

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Eva Lois Moore,  
Plaintiff,  
v.  
Ocwen Loan Servicing,  
Defendant.

Adv. Proc. No. 18-00236

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**OPINION ON MOTION TO  
DISMISS ADVERSARY PROCEEDING**

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BEFORE THE COURT is *Defendant Ocwen Loan Servicing, LLC's Motion to Dismiss Plaintiff's Complaint* filed August 25, 2020 [Dkt. No. 17] and the letter filed in response to the motion by the Plaintiff, Eva Lois Moore, on September 16, 2020 [Dkt. No. 20]. Both the Defendant and the Plaintiff attached exhibits to their motion and response, which the court has carefully reviewed. Ocwen asked that the complaint be dismissed pursuant to Federal Rule of

Civil Procedure 41(b), made applicable in the adversary proceeding by Federal Rule of Bankruptcy Procedure 7041, for lack of prosecution, or in the alternative, that the Plaintiff be given notice of the possibility of dismissal and a limited opportunity to obtain counsel or otherwise take some meaningful step in progressing the litigation.

### **BACKGROUND FACTS**

The Plaintiff filed a voluntary petition under Chapter 13 of the Bankruptcy Code on April 28, 2016. At that time, she was represented by attorney Joseph D. Fox. An order confirming her chapter 13 plan was entered July 7, 2016. The confirmed plan made no provision for payment of ongoing mortgage payments but did provide for repayment of an arrearage in the amount of \$23,564.12, with 0.00% interest at \$393.00 per month. *See* Bankr. Dkt. Nos. 1 and 19.

The Defendant was the servicer of Plaintiff's home mortgage loan with U.S. Bank National Association, as Trustee, Successor in Interest to Bank of America, National Association, as Trustee, Successor by Merger to LaSalle National Bank, as Trustee for BCF L.L.C. Mortgage Pass-Through Certificates, Series 1997-R3.

The deadline for filing proofs of claim was August 29, 2016. Neither the Defendant nor the Plaintiff filed a timely proof of claim with respect to the home mortgage loan.

On March 16, 2017, the trustee in bankruptcy sent a *Notice of Final Cure Payment and Completion of Plan Payments* to Ocwen stating that the amount needed to cure the default had been paid in full but also stating that no claim had been filed by the creditor. [Bankr. Dkt. No. 24].

In response to this notice, the Defendant filed a proof of claim on April 4, 2017, in the amount of \$46,698.44, with \$4,963.17 shown as the amount needed to cure any default as of the date of the petition. The proof of claim contains the following explanation: "Please be advised this is a total debt claim as the maturity date is on 07/01/2017. The interest considered in the total

debt calculation is until the plan end date.” The proof of claim contains a calculation of the claim consisting of (a) principal balance of \$19,790.37; (b) deferred principal of \$14,313.75; (c) interest due of \$11,544.44; and (d) fees, costs due of \$514.68. The prepetition arrearage consists of: (a) principal and interest due of \$3,630; (b) prepetition fees due of \$514.68; (c) escrow deficiency for funds advanced of \$622.18; and (d) projected escrow shortfall of \$283.25. Proof of Claim No. 1.

An *Administrative Order Allowing Additional Claims* was entered April 7, 2017, which allowed the mortgage arrearage claim of the Defendant in the amount of \$4,963.17, even though the proof of claim was filed late. [Bankr. Dkt. No. 28].

An *Order Approving Chapter 13 Trustee’s Final Report and Account; Discharging Chapter 13 Trustee; and Closing Chapter 13 Case Combined with Related Orders and Notice of the Entry Thereof*, was entered November 13, 2017. [Bankr. Dkt. No. 37]. The *Chapter 13 Trustee’s Final Report and Account* shows that \$4,963.17 was paid to Ocwen during the plan. [Bankr. Dkt. No. 36].

The Plaintiff asked to court to reopen the bankruptcy case to permit her to file her complaint and the motion was granted September 5, 2018. [Bankr. Dkt. No. 43].

The Plaintiff commenced this adversary proceeding by filing her *Complaint to Determine Extent of the Lien and Dischargeability as to Ocwen Loan Servicing* on September 21, 2018. [Dkt. No. 1]. The Plaintiff was represented by Mr. Fox. The complaint includes many of the facts recited above and, in addition, recites that on or about July 25, 2018, the Plaintiff received a notice from the Defendant indicating that the loan would be foreclosed unless \$36,564.05 was paid to the Defendant. The complaint further alleges that the mortgage balance was satisfied by the Chapter 13 plan. The complaint asked that the court determine the dischargeability of the debt owed to the Defendant and the extent of any lien securing it.

The Defendant filed *Ocwen Loan Servicing's Answer and Affirmative Defenses to Complaint* on October 22, 2018. [Dkt. No. 5]. This proceeding was set for pretrial conference on November 20, 2018.

The Motion to Dismiss recites that before the pretrial conference, counsel conferred about resolving the dispute by a loan modification that would permit the Plaintiff to repay the loan under modified terms. Mr. Fox indicated that he would confer with his client about her ability to pay and relay that information to counsel for Ocwen.

The scheduled pretrial conference was continued seven times before Mr. Fox filed his *Motion to Withdraw as Counsel* on July 24, 2019. [Dkt. No. 6]. As grounds for the motion, Mr. Fox stated, “[T]he Debtor has repeatedly refused to take action required of her for the benefit of the Chapter 13 case and has failed to maintain communication with her attorney’s office.”

The hearing on the motion to withdraw was continued once before being granted on August 27, 2019. An Amended Order granting Mr. Fox’s motion was entered September 27, 2019. [Dkt. No. 11].

The scheduled pretrial conference was continued an additional ten times before the Defendant filed the pending Motion to Dismiss on August 25, 2020. The Plaintiff never engaged substitute counsel and has taken no steps in the intervening year to prosecute her case.

The letter that the Plaintiff filed in response to the Motion to Dismiss states the following:

To Whom It May Concern, I, Eva L. Moore, am petitioning my adversary complaint in bankruptcy court to not be dismissed. I want my mortgage principal and interest arrearage to be investigated thoroughly to determine if any mortgage fraud has been committed on my mortgage loan, on the grounds of fraud for profit and mortgage servicing misconduct.

In short, I have in my possession mortgage statements, 1098 tax statements, forbearance agreement plans, and Escrow balance statements dating back to 1997 to 2018. Over the years, I have witness [sic] a lot of strange and unusual activity when it comes to my mortgage loan. Particularly, the interest arrearage that Ocwen Loan Servicing says I owe, going up and down

like a “rollercoaster ride.” That’s why I’m petitioning the bankruptcy court to not dismiss my adversary complaint against Ocwen Loan Servicing, because I strongly believe that I’m a victim of mortgage fraud, on the grounds of fraud-for-profit, in some type of shape, form, or fashion.

The Plaintiff provided certain documents to the Chapter 13 trustee that have now been provided to the court. They consist of:

- a) The first page of a HUD 1 Settlement Statement dated June 26, 1987, showing a loan balance of \$41,364;
- b) A year-end mortgage recap dated December 31, 1990, showing a principal balance of \$40,473.95;
- c) A mortgage delinquency statement dated February 1, 1994, showing a principal balance of \$39,666.15, a total delinquency of \$0.00, and a note that a forbearance agreement is in effect;
- d) A mortgage delinquency statement dated July 15, 1994, showing a principal balance of \$39,666.65, a total delinquency of \$6,058.69, and a note that a forbearance agreement is in effect;
- e) A mortgage delinquency statement dated February 1, 1995, showing a principal balance of \$39,666.65, a total delinquency of \$8,110.06, and a note that a forbearance agreement is in effect;
- f) A mortgage delinquency statement dated May 1, 1995, showing a principal balance of \$39,666.65, a total delinquency of \$17,822.56 and a note that a forbearance agreement is in effect;
- g) A mortgage delinquency statement dated November 1, 1995, showing a principal balance of \$39,666.65, a total delinquency of \$10,920.88, and a note that a forbearance agreement is in effect;

- h) A mortgage delinquency statement dated January 1, 1996, showing a principal balance of \$39,666.65, a total delinquency of \$11,739.88, and a note that a forbearance agreement is in effect;
- i) A mortgage delinquency statement dated March 1, 1996, showing a principal balance of \$39,666.65, a total delinquency of \$12,561.88, and a note that a forbearance agreement is in effect;
- j) A mortgage delinquency statement dated May 1, 1996, showing a principal balance of \$39,666.65, a total delinquency of \$13,180.88, and a note that a forbearance agreement is in effect;
- k) A mortgage delinquency statement dated April 1, 1996, showing a principal balance of \$39,666.65, a total delinquency of \$12,769.88, and a note that a forbearance agreement is in effect;
- l) A mortgage delinquency statement dated June 1, 1996, showing a principal balance of \$39,666.65, and a total delinquency of \$13,591.88;
- m) A mortgage delinquency statement dated August 1, 1996, showing a principal balance of \$39,666.65, and a total delinquency of \$14,424.20;
- n) A mortgage delinquency statement dated October 1, 1996, showing a principal balance of \$39,666.65, and a total delinquency of \$14,981.64;
- o) A mortgage delinquency statement dated November 1, 1996, showing a principal balance of \$39,666.65, and a total delinquency of \$15,405.96;
- p) An unsigned United States Department of Housing and Urban Development Forbearance Agreement dated November 19, 1996, pursuant to which the Plaintiff agreed to pay monthly payments in the amount of \$408 for one year. The delinquency

- amount as of November 1, 1996, is listed as \$16, 181.22, and the amount to pay the mortgage in full is listed at \$53,637.92;
- q) A mortgage delinquency statement dated December 1, 1996, showing a principal balance of \$39,666.65, and a total delinquency of \$15,816.96;
  - r) A letter from HUD to the Plaintiff dated March 20, 1997, stating that servicing of her mortgage was transferred effective April 1, 1997, to Ocwen;
  - s) A letter from HUD to the Plaintiff dated March 10, 1997, stating that servicing of her mortgage was being transferred effective March 31, 1997, to Ocwen.
  - t) A notice from HUD dated February 18, 1997, asking for payment of the March 1, 1997 monthly payment of \$408;
  - u) A Billing Notice from Ocwen Federal dated June 16, 1997, showing a principal balance of \$39,568.51, a past due amount of \$408, and a current amount due of \$408, for a total due of \$816;
  - v) A Billing Notice from Ocwen Federal dated August 18, 1997, showing a principal balance of \$39,568.51, a past due amount of \$1,224.00, and a current installment of \$408, for a total of \$1,632;
  - w) A Billing Notice from Ocwen Federal dated October 17, 1997, showing a principal balance of \$39,467.89, a past due amount of \$816, and a current installment of \$408, for a total of \$1,224;
  - x) The first page of a Forbearance Agreement dated February 1, 2000, which recites that the Plaintiff is in default under the original note in the amount of \$16,521.17. The Plaintiff agrees to pay \$408.00 per month beginning January 1, 2000 and ending June 1, 2000, in exchange for Ocwen's agreement to forbear from foreclosure;

- y) The first page of a Forbearance Agreement dated November 3, 2001, which recites that the Plaintiff is in default under the original note in the amount of \$15,625.87. The Plaintiff agrees to pay \$530.40 per month beginning December 1, 2001 and ending May 1, 2002, in exchange for Ocwen's agreement to forbear from foreclosure;
- z) An unsigned Forbearance Agreement dated May 3, 2002, which recites that the Plaintiff is in default under the original note in the amount of \$14,675.80. The Plaintiff agrees to pay \$530.40 per month beginning June 1, 2002 and ending November 1, 2002, in exchange for Ocwen's agreement to forbear from foreclosure;
- aa) An undated, unsigned Forbearance Agreement, which recites that the Plaintiff is in default under the original note in the amount of \$16,960.71. The Plaintiff agrees to pay \$476.31 per month beginning November 1, 2008 and ending April 1, 2009, in exchange for Ocwen's agreement to forbear from foreclosure;
- bb) A letter dated August 20, 2015, from Ocwen Loan Servicing, LLC to the Plaintiff stating that loan funds received in the amount of \$514.48 are being returned because they are not sufficient to satisfy the defaulted amount on her loan;
- cc) A letter dated March 2, 2016 from Ocwen Loan Servicing, LLC to the Plaintiff apparently in response to an inquiry from the Plaintiff that states that, "the loan was established on a Repayment Plan with an initial down payment in the amount of \$514.48 due August 1, 2015. However, the forbearance plan was closed November 10, 2015 and the loan is contractually due for July 1, 2015." The letter also indicates that a Payment Reconciliation History was being sent under separate cover;



- dd) A notice dated August 31, 2016, entitled **URGENT REQUEST PLEASE SEND YOUR TAXPAYER IDENTIFICATION NUMBER RIGHT AWAY** requesting the taxpayer identification number of Eddie D. Morgan; and
- ee) An incomplete Addendum to Notice of Servicing Transfer from PHH Mortgage Services addressed to no one with no information that connects it to the Plaintiff's mortgage loan.

The court took this matter under submission upon the filing of the Plaintiff's letter on September 16, 2020.

### LAW AND ANALYSIS

The Defendant has asked that this adversary proceeding be dismissed pursuant to Federal Rule of Civil Procedure 41(b), which provides:

Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

The Court of Appeals for the Sixth Circuit has described Rule 41(b) as a “tool to effect ‘management of [the court’s] docket and avoidance of unnecessary burdens on the tax-supported courts [and] opposing parties.’” *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 363 (6th Cir. 1999), quoting *Matter of Sanction of Baker*, 744 F.2d 1438, 1441 (10th Cir. 1984). Whether to dismiss a proceeding for lack of prosecution lies within the discretion of the trial court and is reviewed only for abuse of discretion. *Knoll*, 176 F.3d at 363; *Little v. Yeutter*, 984 F.2d 160, 162 (6th Cir. 1993)(citing cases). The Sixth Circuit has made clear, however, that dismissal “is a harsh sanction which the court should order only in extreme situations showing ‘a clear record of delay or contumacious conduct by the plaintiff.’” *Carver v. Bunch*, 946 F.2d 451, 454 (6th Cir. 1991)

(quoting *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980)). When determining whether dismissal for failure to prosecute was an appropriate exercise of discretion, a reviewing court should consider:

(1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.

*Schafer v. City of Defiance Police Dep't*, 529 F.3d 731, 737 (6th Cir. 2008) (quoting *Knoll*, 176 F.3d at 363). The plaintiff “has the burden of showing that his failure to comply was due to inability, not willfulness or bad faith.” *United States v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002)(citation omitted).

The Plaintiff has responded to the Motion to Dismiss with a request that her complaint not be dismissed and parts of some 31 documents. The documents, unfortunately, do not address the failure of the Plaintiff to prosecute this adversary proceeding. The adversary complaint has been pending since September 21, 2018. A full year passed with no progress in the litigation before counsel for the Plaintiff was permitted to withdraw on September 17, 2019. Another year has now passed with no progress in the litigation. The Plaintiff has not engaged substitute counsel and has not requested discovery or filed any dispositive motion in furtherance of her case. The Motion to Dismiss recites that the last contact counsel for Ocwen had with the Plaintiff (prior to the filing of her letter) occurred February 25, 2020.

The Plaintiff requests that her mortgage principal and interest arrearage be investigated thoroughly to determine if mortgage fraud was committed. The complaint, however, makes no allegation of fraud and the court is not in a position to investigate facts outside the record. The problem, if any, is apparent from the face of the complaint – no proof of claim was timely filed by

Ocwen (or the Plaintiff). As a result, the payments that were made with respect to the mortgage claim through the plan were applied to the prepetition arrearage. The Trustee's Final Report and Account reflects that \$8,973.00 was paid by the Plaintiff during the 18 months that her case was pending. Of that amount, \$4,009.83 was applied to administrative expenses and \$4,963.17 was applied to the allowed claim of Ocwen. No other creditors were paid because no other claims were filed.

The Plaintiff's claim that "the interest arrearage that Ocwen Loan Servicing says I owe, [was] going up and down like a 'rollercoaster ride'" is not borne out by the documents she provided to the court. Instead the documents show a loan that was placed in forbearance status as early as February 1994 with a steadily mounting delinquency that continued almost without interruption to the filing of the bankruptcy petition. The Plaintiff does not seem to understand that the natural consequence of her failure to make full and timely mortgage payments is an ever-increasing delinquency.

The court cannot provide the Plaintiff with legal advice. It is clear from the documents that have been introduced into the record that the mortgage loan has now matured and that a substantial amount remains unpaid. Ocwen rightfully claims that it is prejudiced by the extended delay in its ability to exercise its contractual remedies. It is possible that a solution can be reached if the Plaintiff acknowledges the debt and makes arrangements to pay it. The court does not want to see the Plaintiff lose her home, but she must take immediate steps to protect herself.

### **CONCLUSION**

Based on the foregoing, the court will enter an Order Conditionally Denying the Motion to Dismiss giving the Plaintiff thirty (30) days to obtain counsel or otherwise take steps to resolve this dispute failing which this adversary proceeding will be dismissed.

cc: Debtor/Plaintiff  
Attorney for Debtor/Plaintiff (if any)  
Defendant  
Attorney for Defendant  
Chapter 13 Trustee