

The document below is hereby signed.

Signed: August 11, 2010.



S. Martin Teel, Jr.
S. Martin Teel, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re)	
)	
STEPHEN THOMAS YELVERTON,)	Case No. 09-00414
)	(Chapter 11)
Debtor.)	
_____)	
)	
STEPHEN THOMAS YELVERTON,)	Adversary Proceeding No.
)	10-10001
Plaintiff,)	
)	
v.)	
)	
HOMES AT POTOMAC GREENS)	
ASSOCIATES, LIMITED)	
PARTNERSHIP, <i>et al.</i> ,)	
)	Not for publication in
Defendants.)	West's Bankruptcy Reporter.

MEMORANDUM DECISION AND ORDER DENYING IN PART AND GRANTING IN PART MOTION TO RECONSIDER RE: WELLS FARGO

The plaintiff Yelverton's amended complaint included as a defendant Wells Fargo Bank which held a second mortgage on Yelverton's townhouse located at 1804 Potomac Greens Drive, Alexandria, Virginia. Yelverton claimed that Wells Fargo and others had failed to perform an adequate inspection of the property before Yelverton took out the mortgage loans to purchase the townhouse (which he later learned had substandard noise level

abatement in place to address noise from nearby rail traffic). Yelverton sought (1) to void a foreclosure sale by the first mortgagee, and to void Wells Fargo's second mortgage; (2) to recover from Wells Fargo as damages the \$152,300 amount of the second mortgage loan made by Wells Fargo; (3) to discharge Wells Fargo's deficiency claim; and (4) to void and recover pre-petition mortgage payments that had been made to Wells Fargo. Thereafter, all the co-defendants, except Wells Fargo, filed in response to the complaint.

The court entered orders granting the various co-defendants' motions to dismiss and motions for summary judgment. Thinking that all claims had been dismissed, the court entered a judgment dismissing the adversary proceeding as to all defendants, including Wells Fargo.

On May 2, 2010, Yelverton timely filed a motion under Fed. R. Civ. P. 59 to reconsider the judgment of dismissal with regards to Wells Fargo on the basis that Wells Fargo had failed to both submit a proof of claim in the main case underlying this adversary proceeding and had failed to file an answer to the complaint. Yelverton asked the court "to DECLARE that, as a result of no Proof of Claim being filed as to the second mortgage, the debtor owes no deficiency or any amount to Wells Fargo, or its assignees, under this mortgage and any related claims, or in the Alternative that such Dismissal is without

Prejudice to Wells Fargo." For the reasons that follow I will grant in part and deny in part Yelverton's motion.

First, with regards to Yelverton's first request (that he owes no deficiency), I will deny the motion. As stated above, the first basis for this relief is that Wells Fargo has filed no proof of claim in his chapter 11 bankruptcy. Wells Fargo, however, was not required to file a proof of claim. Under Federal Rule of Bankruptcy Procedure 3002(a), "An unsecured creditor . . . must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005." Under Rule 3003(c)(2), though, the only creditors in a chapter 11 case that must file proofs of claim are creditors "whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated." Here, Yelverton scheduled Wells Fargo's claim without indicating that the claim was disputed, contingent, or unliquidated. Accordingly, Wells Fargo was not required to file a proof of claim in the first instance.

Moreover, because it did not receive sufficient service of process, Wells Fargo's failure to answer the complaint in this adversary proceeding is likewise an insufficient basis for declaring the debtor owes no deficiency. Under Rule 7004, service of process in an adversary proceeding may be made upon a corporation by mail; provided, however, that a copy of the

summons and complaint are mailed "to the attention of an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." Here, Yelverton mailed the summons and complaint to a Wells Fargo P.O. Box without directing it to the attention of an officer of the bank. Consequently, service was not effective.

Second, with regards to Yelverton's alternative basis for relief (that the dismissal be without prejudice), I will grant the motion. As I stated above, Wells Fargo has yet to file in response to Yelverton's complaint. Wells Fargo is similarly situated to Chase, which held the first mortgage on the property and against whom Yelverton asserted claims which for all practical purposes appear to have been identical to those asserted against Wells Fargo. The court's reasoning in dismissing the claims against Chase would likely have furnished a basis for denying Yelverton relief against Wells Fargo if Yelverton had made proper service on Wells Fargo and had sought a default judgment against it. But the court never ordered Yelverton to show cause why the claims against Wells Fargo ought not be dismissed with prejudice, and Yelverton has been free to dismiss the complaint without prejudice as to Wells Fargo in light of its never having answered or filed a motion for summary

