

The document below is hereby signed.

Signed: May 25, 2018



*S. Martin Teel, Jr.*

S. Martin Teel, Jr.  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
KAREN SUSAN RICHARDSON,	)	Case No. 17-00598
	)	(Chapter 13)
Debtor.	)	
_____	)	
	)	
KAREN SUSAN RICHARDSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No.
	)	18-10004
NATIONSTAR MORTGAGE D/B/A	)	
MR. COOPER,	)	Not for publication in
	)	West's Bankruptcy Reporter.
Defendant.	)	

MEMORANDUM DECISION AND ORDER RE  
DISMISSAL OF OR ABSTENTION REGARDING CERTAIN CLAIMS

The debtor, Karen Susan Richardson, brought this adversary proceeding against her mortgagee, Nationstar Mortgage, LLC. Nationstar has moved to dismiss this adversary proceeding based upon the collateral estoppel effect of an order issued by the Superior Court of the District Of Columbia and for failure to

state a claim upon which relief can be granted.<sup>1</sup> Richardson's complaint contains four counts:

- I will dismiss one count, Count IV, based on collateral estoppel.
- I will deny dismissal of part of Count II, the part asserting a claim that has not been adjudicated in the Superior Court, and which asserts that Ocwen failed timely to credit Richardson's payments, resulting in the assessment of unauthorized late fees, and demanding an accounting. To that extent, I will treat Count II as an objection to Nationstar's claim.
- However, abstention appears to be appropriate as to the claims asserted by the remaining allegations of the complaint (the balance of the allegations contained in Count II, and the allegations of Counts I and III). If abstention is not appropriate, dismissal is warranted as to such claims for failure to state claims upon which relief can be granted.<sup>2</sup>

I

Nationstar holds a Note executed by Richardson and assigned

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<sup>1</sup> I reject Nationstar's additional argument that dismissal is warranted based on failure to join a necessary party.

<sup>2</sup> If I abstain from hearing such claims, it would not be appropriate to dismiss the claims for failure to state claims upon which relief can be granted.

to Nationstar by Ocwen Loan Servicing, LLC ("Ocwen"), the payment of which is secured by a *Deed of Trust* against Richardson's real property.<sup>3</sup> On September 21, 2015, Nationstar sued Richardson in a civil action in the Superior Court of the District of Columbia, seeking a judgment for judicial foreclosure.

Richardson filed counterclaims against Nationstar, and asserted a third-party complaint against Ocwen. She alleged violations of various statutes (the Truth in Lending Act ("TILA"); the D.C. Consumer Protection Procedures Act ("CPPA"); D.C. Code § 42-2431 (part of the D.C. Home Equity Protection Act); and 12 U.S.C. § 2605(d)), and alleging that the *Deed of Trust* and *Note* are void. On March 7, 2017, the Superior Court dismissed the counterclaims. Richardson appealed from the dismissal order to the District of Columbia Court of Appeals, which, in Case No. 17-CV-1078, dismissed the appeal on November 17, 2017, as having been taken from a non-final and non-appealable order.

In the Superior Court in the meantime, Nationstar moved for summary judgment regarding its right to judicial foreclosure, and Richardson moved for leave to assert an amended third-party complaint against Ocwen. By an order entered on September 13,

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<sup>3</sup> The terms of the *Note* were modified by a *Loan Modification Agreement* between Richardson and Ocwen. In referring to obligations under the *Note*, I mean the obligations under the *Note* as modified by the *Loan Modification Agreement*.

2017, the Superior Court granted Nationstar's motion for summary judgment regarding its right to judicial foreclosure; granted Richardson leave to file the amended third-party complaint against Ocwen, but dismissed all but one of the claims in Richardson's amended third-party complaint. On October 10, 2017, Richardson filed a notice of appeal from the Superior Court's order of September 13, 2017, and the appeal was docketed as Case No. 17-CV-1165 in the District of Columbia Court of Appeals.

Nationstar's complaint in the Superior Court requested that the Superior Court "enumerate all amounts due to Plaintiff pursuant to said Note and Deed of Trust," the Superior Court did enter an order in regard to that request. The Superior Court was able to decree that judicial foreclosure was appropriate without resolving an accounting issue Richardson raised as a defense, namely, an allegation that certain payments on the Note were credited by Ocwen in an untimely manner between 2009 and 2013, resulting in unjustified late payment charges. She pointed to a specific payment that she made on December 22, 2009, which was not credited until March 25, 2010. However, Richardson did not dispute that she had been in default since July 1, 2012, in making payments on the Note, a span of many months. Moreover, Richardson failed to show that untimely crediting of her payments led to her eventual default on July 1, 2012, or that the unjustified late payment charges created a genuine issue of

material fact concerning whether Richardson was in default on the Note. Accordingly, because Richardson was in default, the Superior Court ordered that a foreclosure sale proceed.

In Richardson's pending appeal in the District of Columbia Court of Appeals, Case No. 17-CV-1165, from the Superior Court's order of September 13, 2017, the Court of Appeals directed Richardson to show cause why the appeal ought not be dismissed as having been taken from a non-final and non-appealable order. On January 9, 2018, the Court of Appeals entered an order discharging the order to show cause "to the extent the judgment authorizing the foreclosure sale changes or affects possession of property." (Citations omitted.)<sup>4</sup> Based on the authorities cited by the Court of Appeals, the Superior Court's order of September 13, 2017, is a final appealable order with respect to authorizing a foreclosure sale. As a final order, the Superior Court's order of September 13, 2017, is entitled to collateral estoppel effect as to issues necessarily decided in decreeing that a foreclosure sale proceed.

The Court of Appeals order discharging the order to show cause in Case No. 17-CV-1165 did not treat the appeal as properly pending with respect to the dismissal of Richardson's

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<sup>4</sup> However, because Richardson had filed her bankruptcy case, the Court of Appeals concluded that the automatic stay of 11 U.S.C. § 362(a) stayed Richardson's appeal of the order authorizing a foreclosure sale.

counterclaims in the Superior Court, a dismissal that in its previous order of November 17, 2017, in Case No. 17-CV-1078 it had treated as a non-final non-appealable order. The part of the Superior Court's order of September 13, 2017, that dismissed Richardson's counterclaims against Nationstar remains a non-final non-appealable order.<sup>5</sup>

However, as discussed at the hearing on Nationstar's motion to dismiss this adversary proceeding, it will likely be appropriate to lift the automatic stay to permit the Superior Court to enter a final appealable order dismissing the counterclaims. Nationstar has filed in the main bankruptcy case a motion for relief from the automatic stay alleging that "it is judicially economical to lift the stay to allow the [Superior Court] case to proceed to its final conclusion," and I view the motion for relief from the automatic stay as seeking such a lifting of the stay although it principally seeks an order permitting Nationstar to conduct a foreclosure sale.

## II

Richardson's complaint here consists of four counts. Each will be addressed in turn.

### A. Count I

Count I is a claim that Nationstar as an assignee of Ocwen

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<sup>5</sup> For example, there is still a third-party claim pending against Ocwen, and there has not yet been an adjudication of the amounts owed to Nationstar.

violated a *Consent Judgment* entered against Ocwen by the United States District Court for the District of Columbia on December 19, 2013. The gist of this count is that Ocwen charged fees that it ought not have charged. For reasons already discussed, if Ocwen did charge fees that it ought not have charged, that would potentially affect the amount that is owed to Nationstar. However, Richardson alleges that the *Note* was assigned to Nationstar prior to the entry of the *Consent Judgment*. There could not have been a violation of the *Consent Judgment* based on acts preceding the entry of the *Consent Judgment*. Moreover, Nationstar was not a party to the *Consent Judgment*. Abstention appears to be warranted as to this Count I for reasons discussed in Part E, below, but if abstention is inappropriate, I conclude that Count I fails to state a claim upon which relief can be granted.

#### B. Count II

Count II is a claim under the Mortgage Lender Broker Act. It alleges that Ocwen failed timely to credit Richardson's payments, repeatedly assessed improper fees, failed to provide Richardson with information on her indebtedness, and that Richardson attempted to make a payment that Ocwen improperly rejected as insufficient to cure her default. Based on those allegations, Count II demands an accounting. For the following reasons, I will treat part of Count II as an objection to

Nationstar's claim, seeking a credit for any unjustified late payment charges made by Ocwen (or charges flowing from the improper rejection of a payment) and a recalculation of the amount owed based on such credit as well as proper crediting of her past payments.<sup>6</sup>

At a hearing of May 8, 2018, on Nationstar's motion to dismiss the complaint in this adversary proceeding, Nationstar conceded (1) that the Superior Court did not decide the amount of credits for any unjustified late payment charges made by Ocwen; (2) that, upon assignment to it of the Note, Nationstar was owed only what was owed to Ocwen; and (3) that Richardson would be entitled to a credit for any unjustified late payment charges made by Ocwen and a recalculation of the amount owed based on timely credits of Richardson's payments and the setting aside of unjustified late charges. Richardson is entitled to object to Nationstar's proof of claim to the extent that she can show she is entitled to such relief. There is no need for Richardson to pursue a separate objection to claim in the bankruptcy case: Richardson's complaint can be treated as asserting such an objection.

As discussed in Part E, below, abstention appears to be

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<sup>6</sup> The background facts pertinent to this accounting issue are contained in the opening section of the complaint (entitled "PARTIES"). Specific allegations pertinent to the accounting issues are contained in paragraphs 41, 42, 43, 44, 53, 54, 55, and 57 of the complaint.



warranted as to the balance of the claims in Count II (the part not treated as an objection to claim) because those claims were part of the counterclaims asserted in the Superior Court. If abstention is inappropriate, these remaining claims in Count II will be dismissed for failure to state a claim upon which relief can be granted (and specifically for failure to state a valid claim against Nationstar under the Mortgage Lender Broker Act). The complaint may state a violation of that Act by Ocwen for engaging in "unfair or deceptive practice[s]," "fail[ing] to make disclosures as required by . . . any applicable federal or District law," and "fail[ing] to truthfully account for monies belonging to a party to a residential mortgage loan transaction[.]" D.C.Code §§ 26-1114(d)(1), (2), (7), (14) (2001). See *Logan v. LaSalle Bank Nat'l Ass'n*, 80 A.3d 1014, (D.C. 2013). However, Richardson's complaint does not allege any wrongdoing by Nationstar under the Act.

### C. Count III

Abstention appears to be warranted as to Count III, as discussed in Part E, below. If abstention is not warranted, Count III will be dismissed for failure to state a claim upon which relief can be granted. Count III asserts violations of TILA, alleging that Ocwen failed to timely credit payments, but Count III fails to identify a specific provision of TILA that Nationstar violated. Richardson's counterclaims against

Nationstar in the Superior Court also included claims for violation of TILA, alleging that Ocwen failed to timely credit payments, but also failed to identify a specific provision of TILA that Nationstar violated. As in the Superior Court, the TILA allegations here fail to state a claim upon which relief can be granted against Nationstar.

#### D. Count IV

Count IV asserts that the *Note* and *Deed of Trust* are void "as in violations [sic] of federal and DC law as stated aforesaid and therefore unenforceable." The Superior Court, however, has already ruled, in a final appealable judgment for foreclosure, that the *Note* and *Deed of Trust* are enforceable. Count IV is thus barred by collateral estoppel .

#### E. Abstention as to Some Claims

Under 28 U.S.C. § 1334(c)(1), nothing in 28 U.S.C. § 1334, governing a district court's subject matter jurisdiction, exercised by a bankruptcy court by way of referral under 28 U.S.C. § 157, prevents the court "in the interest of justice, and the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title

11."<sup>7</sup> Although Nationstar has not specifically moved for abstention based on this provision, its invocation of collateral estoppel signifies that it views the claims here (other than the accounting issue) as claims already adjudicated in the Superior Court (though pursuant to an order not yet made a final appealable order) and Nationstar therefore has implicitly requested discretionary abstention under 28 U.S.C. § 1334(c)(1). The issue of abstention was also addressed at the hearing on the motion to dismiss.

Discretionary abstention appears to be warranted as to Counts I, II, and III except for the part of Count II that is being treated as an objection to claim. The Superior Court has already adjudicated the claims contained therein, and can promptly enter a final appealable order as to those claims. It

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<sup>7</sup> Indeed, under 28 U.S.C. § 1334(b)(2):

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

It is unnecessary to address whether Richardson's claims could be pursued in the District Court only as "related to" claims under § 1334, but if that is the case, mandatory abstention would appear to be required.

does not make sense for the claims to be re-litigated here. Nevertheless, I will give Richardson an opportunity to address in this adversary proceeding whether abstention should be granted, and will allow her to respond to this order in that regard by June 11, 2018.

F. Non-Abstention as to Objection to Claim

The question of unjustified late payment charges made by Ocwen remains an issue in the Superior Court for two reasons. First, the remaining claim in the third-party complaint against Ocwen is for violations of D.C. Code §§ 26-1114(d)(1), (2), (7), and (14), provisions of the Mortgage Lenders and Brokers Act, based on the allegedly unfair trade practice of Ocwen's not timely crediting payments. Second, the Superior Court has not adjudicated Nationstar's request that the Superior Court enumerate all amounts due to Nationstar pursuant to the *Note and Deed of Trust*. Because the issue of untimely crediting of payments remains an issue in the Superior Court, and includes Ocwen as a party when Ocwen has not been made a party here, it makes sense to allow the Superior Court to hear that issue.

Nevertheless, this court can hear the issue as well, and fixing the amount of any arrears owed by Richardson (incident to the objection to claim discussed in Part B, above) will be important for purposes of determining whether a Chapter 13 plan can be confirmed in this bankruptcy case. Accordingly, I will

not abstain at this juncture from hearing the objection to Nationstar's claim discussed in Part B, above.

III

In light of the foregoing, it is

ORDERED that Count IV of the complaint is dismissed as barred by collateral estoppel. It is further

ORDERED that:

(1) the following allegations of the complaint are treated as an objection to claim: the opening section of the complaint (entitled "PARTIES"), and paragraphs 41, 42, 43, 44, 53, 54, 55, and 57 of the complaint; and

(2) within 14 days after entry of this order, Nationstar shall file an answer to those allegations.

It is further

ORDERED that with respect to the remaining claims in the complaint:

(1) by June 11, 2018, the debtor, Karen Susan Richardson, shall file a writing showing cause, if any she has, why the court ought not abstain from hearing those claims; and

(2) pending disposition of the issue of whether the court ought to abstain from hearing those claims, Nationstar

need not file an answer to those claims.

[Signed and dated above.]

Copies to: All counsel of record; Chapter 13 Trustee.