

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION**

<b>In re:</b>	)	
	)	
<b>Nelson Hillmon,</b>	)	<b>Case No. 11-80303</b>
	)	
<b>Debtor.</b>	)	
_____	)	

**ORDER SUSTAINING OBJECTION TO CLAIM**

THIS MATTER came on for hearing before the undersigned bankruptcy judge on the Debtor's Objection to the Claim of Specialized Loan Servicing, LLC. Koury Hicks appeared on behalf of the Debtor, Kimberly Sheek appeared on behalf of Specialized Loan Servicing, LLC (the "Creditor"), and Benjamin Lovell appeared on behalf of the Chapter 13 Trustee. Having considered the Objection and other matters of record, the Court makes the following findings of fact and conclusions of law:

The Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on February 21, 2011. On his schedules, the Debtor listed real property located at 102 Hadley Lane in Durham, North Carolina (the "Property") with a total value of \$152,201.00. The Property is encumbered by a mortgage in favor of the Creditor. Prepetition, the Creditor had commenced foreclosure proceedings, and the foreclosure sale had been scheduled for February 23, 2011. The Debtor's confirmed plan provides for payments to be made to the Creditor by the Chapter 13 trustee.

The Creditor filed a proof of claim in the amount of \$141,380.29 (the "Claim"). The Claim lists an arrearage in the amount of \$15,943.09, including \$1,936.57 for prepetition attorney fees and costs. The Claim does not disclose when these prepetition attorney fees and

costs were incurred or assessed. The Debtor objected to the portion of the Claim attributable to prepetition attorney fees and costs on the grounds that the Creditor did not comply with N.C.

Gen. Stat. § 45-91.

N.C. Gen. Stat. § 45-91 provides as follows:

A servicer must comply as to every home loan, regardless of whether the loan is considered in default or the borrower is in bankruptcy or the borrower has been in bankruptcy, with the following requirements:

(1) Any fee that is incurred by a servicer shall be both:

a. Assessed within 45 days of the date on which the fee was incurred. Provided, however, that attorney or trustee fees and costs incurred as a result of a foreclosure action shall be assessed within 45 days of the date they are charged by either the attorney or trustee to the servicer.

b. Explained clearly and conspicuously in a statement mailed to the borrower at the borrower's last known address within 30 days after assessing the fee, provided the servicer shall not be required to take any action in violation of the provisions of the federal bankruptcy code. The servicer shall not be required to send such a statement for a fee that: (I) results from a service that is affirmatively requested by the borrower, (ii) is paid for by the borrower at the time the service is provided, and (iii) is not charged to the borrower's loan account.

N.C. Gen.Stat. § 45-91(1). Here, the Creditor did not send a statement to the Debtor clearly and conspicuously explaining the fees within 30 days of assessing such fees as required by N.C.

Gen.Stat. § 45-91(1). The filing of a proof of claim with the court does not satisfy the

requirements of N.C. Gen.Stat. § 45-91(1). *In re Saeed*, No. 10-10303, slip op. at \*4 (Bankr.

M.D.N.C. Sept. 17, 2010) (2010 WL 3745641). A home loan servicer's failure to send a debtor a

statement meeting the requirements of N.C. Gen.Stat. § 45-91(1) constitutes a waiver of its

claim for fees and costs incurred as a result of a foreclosure action. N.C. Gen.Stat. § 45-91(3).

*See also In re Saeed*, No. 10-10303, slip op. at \*4; *In re Obie*, No. 09-80794C-13D, slip op. at

\*3 (Bankr. M.D.N.C. Nov. 24, 2009) (2009 WL 4113587).

Notwithstanding the clear language of N.C. Gen.Stat. § 45-91(1) mandating compliance regardless of whether the borrower is in bankruptcy, the Creditor contends that it was precluded from sending the Debtor a statement by the automatic stay as set forth in 11 U.S.C. § 362. Standing alone, the sending of an informative statement by a creditor to a debtor as prescribed by N.C. Gen.Stat. § 45-91(1) does not violate the automatic stay. *See, e.g., In re Knowles*, 442 B.R. 150, 161 (1st Cir. BAP 2011) (sending an annual tax statement and a statement listing current payment did not violate stay); *In re Zotow*, 432 B.R. 252, 258 (9th Cir. BAP 2010) (sending a notice of amount of debt and increase in postpetition escrow deposits without payment coupon or envelope did not violate stay); *In re Schatz*, 452 B.R. 544, 550 (Bankr. M.D. Pa. 2011) (sending a statement listing current payment, balance, and address for payment did not violate stay); *In re Pulz*, 400 B.R. 185, 191-92 (Bankr. D. Md. 2008) (sending of loan statement for informational purposes did not violate stay).

Inasmuch as the Creditor did not comply with N.C. Gen.Stat. § 45-91(1), and it was not excused from compliance by the automatic stay, the Debtor's Objection to the Creditor's claim for prepetition attorney fees and costs in the amount of \$1,936.57 is sustained.

## **SERVICE LIST**

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Debtor

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John Orcutt  
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Kimberly Sheek  
Attorney for Creditor

Richard M. Hutson, II  
Trustee