SO ORDERED

SIGNED this 24 day of May, 2024.

Pamela W. McAfee
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

IN RE:

WILLIAM ETHAN GREENE, JR. and
REBECCA ANN GREENE,

DEBTORS

CASE NO.
18-04747-5-PWM
CHAPTER 13

ORDER DENYING MOTION TO AMEND ORDER

The matter before the court is the motion filed by creditor BSI Financial Services (BSI), D.E. 43, seeking amendment, pursuant to Bankruptcy Rule 9024, of the Order Deeming Mortgage Current entered by this court on November 16, 2023, D.E. 36. The debtors, William and Rebecca Greene, filed a response in opposition to that motion on March 4, 2024, D.E. 45, and a hearing was held in Raleigh, North Carolina on May 9, 2024. In addition to the parties, the chapter 13 trustee appeared at the hearing in opposition to the motion. The court took the matter under advisement at the conclusion of the hearing, and now issues this order denying BSI's motion.

FACTS AND PROCEDURAL HISTORY

William Ethan Greene, Jr. and Rebecca Ann Greene filed a petition for relief under chapter 13 of the Bankruptcy Code on September 28, 2018. BSI's predecessor, Mortgage Solutions of Colorado, filed a secured claim in the amount of $155,603.08 secured by the Greenes' residence,

Claim 5-1. The note was transferred and assigned several times, ultimately to Servis One, Inc. DBA BSI Financial Services. D.E. 27. The Greenes' confirmed chapter 13 plan provided for BSI's claim to be treated as a long-term debt conduit mortgage, with contractual monthly installments and full payment of the arrearage both to be made through trustee disbursements. As the plan neared completion, on September 22, 2023, the trustee filed a Notice of Final Cure Mortgage Payment, D.E. 33 (the Notice). In the Notice, the trustee reported:

> The debtors having made all payments necessary to complete the plan, the Trustee reports that the mortgage account is contractually current through September 30, 2023, with the next payment due October 1, 2023. **The total amount due on this mortgage as of October 1, 2023 is calculated to be $135,507.58.**

D.E. 33 (emphasis in original).

As is required by Federal Rule of Bankruptcy Procedure 3002.1(g), BSI filed its Form 4100R Response to Notice of Final Cure Payment on October 12, 2023, D.E. 34 (the BSI Response). Page one of that document includes a check in the box stating that "the debtor(s) are current" and includes the notation: "Creditor agrees with Notice of Final Cure. Principal balance $105,505.65." Shortly thereafter, the trustee filed his motion to deem motion current, in which he recited that BSI had advised the trustee that the account was current; that BSI agreed with the information contained in the Notice; and that the balance of the loan as of October 1, 2023 was deemed to be $105,505.65, D.E. 35. No response to the motion to deem current was filed.

On November 16, 2023, the court entered its Order To Deem Mortgage Current, D.E. 36 (the Order), which echoed the trustee's motion and provided "[t]hat BSI is required to treat the Debtors' mortgage as reinstated and fully current in all obligations under the mortgage as of September 30, 2023, with the balance of the loan as of October 1, 2023 determined to be $105,505.65." The Order further provided that the case could be processed for closing and, on January 3, 2024, the Greenes received their discharge. D.E. 39.

On January 11, 2024, BSI filed an Amended Response to Notice of Final Cure Payment, D.E. 42 (the Second Response), in which it asserted that the next postpetition payment from the debtors was due on October 10, 2023, and "Principal balance as of 9/30/23 is $134,296.39." A month later, BSI filed the instant motion, in which it requests that the court amend the Order to determine that the principal balance of BSI's claim on September 30, 2023 was $134,296.39, *i.e.*, the balance provided by BSI in its Second Response. *See* D.E. 43. Notably, throughout this motion, BSI refers to what it deems the "incorrect principal balance" it originally provided (that amount being $105,505.65) by using another incorrect sum: $105,105.65 (the Erroneous Sum), which is a new number entirely. D.E. 43 at 1 & ¶¶ 6, 8, 9, 10, 14.[1]

The Greenes filed a response in opposition to the motion, contending that BSI's request was antithetical to the purpose of Rule 3002.1(g) and would cause real and undue harm to the Greenes if allowed. Both parties presented their arguments at the hearing on May 9, 2024, with the trustee appearing in support of the Greenes' objections. At the hearing, BSI maintained that it should be allowed to correct its mistake, and further contended that if the Greenes wished to dispute BSI's current characterization of the principal balance owing, they would need to file an adversary proceeding to dispute the validity, priority, or extent of BSI's lien. Otherwise, BSI contends, the Greenes will receive a windfall.

[1] BSI later supplemented its motion with an affidavit in support of its motion, in which a bankruptcy manager employed by BSI represented that the "incorrect principal balance" was provided in its Response due to the transcriber of the loan data making a cut and paste error, and further that BSI's "system of record has always reflected the correct and proper outstanding principal balance of $134,296.39, in accordance with the loan repayment terms per the contracts." D.E. 54 at 4. The affidavit uses the Erroneous Sum of $105,105.65 instead of the "incorrect principal balance" previously asserted, which is $105,505.65. The trustee objected to the court's consideration of the affidavit as hearsay. The court sustained the objection, and mentions it here only to highlight the inability of BSI to stick with one "incorrect number."

Mr. Greene, a disabled veteran amputee, and Mrs. Greene attended the hearing in Raleigh, North Carolina, more than an hour's drive from their home. No representative of BSI appeared to provide evidence in support of its motion.

DISCUSSION

The trustee's Notice, and BSI's Response, were filed as required by Rule 3002.1(f) and (g) of the Federal Rules of Bankruptcy Procedure and E.D.N.C. LBR 3070-2(e). Taken together, the rules ensure that as a plan nears completion, both debtors and mortgagors arrive at, and agree to, a determination that the mortgage is current, and *a specification of the correct mortgage balance*. The Trustee files the notice, and the mortgage holder must then respond:

> (g) Response to Notice of Final Cure Payment. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, the debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement….

Fed. R. Bankr. P. 3002-1(g). The rule goes on to provide that where the holder of a claim fails to provide any information required by subsection (g), among others, the court may, after notice and hearing, take "either or both" of these actions:

> (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
> (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Fed. R. Bankr. P. 3002-1(i). The Local Rule provides, in cases where the mortgage payments have been made by the trustee by means of conduit payments, that "the chapter 13 trustee shall file and serve the notice referred to under Fed. R. Bank. P. 3002.1(f), which notice also shall set forth the total amount due on the mortgage loan as of a specific date identified in the notice." E.D.N.C. LBR

3070(2)(e)(1)(B). Following the notice and any response (or lack thereof) by the creditor, the trustee is to file a motion to deem the mortgage current pursuant to Federal Rule of Bankruptcy Procedure 3002.1(h), which also must include the total amount due on the mortgage loan as of a specific date pursuant to E.D.N.C. LBR 3070(2)(e)(4).

As noted, BSI filed a response to the Notice that agreed with the Notice but set forth an outstanding balance of $105,505.65. The trustee's motion to deem current relied upon the balance provided by BSI in its Response, and – with no objection filed – the court's Order adopted that outstanding balance. BSI now contends that that balance was provided as a result of "mistake, oversight and clerical error," as a transcriber of the loan data made a "'cut and paste' error when providing the outstanding principal balance figure to counsel." D.E. 43 at ¶ 7. BSI maintains that the "system of record has always reflected the correct and proper outstanding principal balance." *Id.* Without any competent evidence before the court to establish that there was, in fact, a mistake made or what that mistake might have been, BSI asks the court to amend the Order to Deem Mortgage Current pursuant to Federal Rule of Bankruptcy Procedure 9024, which incorporates Federal Rule of Civil Procedure 60.

As an initial matter, BSI has not articulated an appropriate basis under Rule 60 for the relief it seeks, but instead suggests that the mistake is obvious because of the beginning balance established by the proof of claim and the total of payments made through the plan. BSI also contends that this court's Local Rule requirement of confirming the outstanding principal balance at the end of the case is not contained in the Federal Rule, and is therefore an impermissible substantive requirement that cannot be imposed through local rules.

The facts and legal arguments in this case closely mirror those considered by both this court and the district court in *In re Devita*, Case No. 12-02549-5-SWH (Bankr. E.D.N.C. May 31, 2018), and *Specialized Loan Servicing, LLC v. Devita (In re Devita)*, 610 B.R. 513 (E.D.N.C. 2019),

respectively, which concluded that the mortgage creditor was not entitled to relief from an order determining the principal amount due on the mortgage where the creditor failed to object to the trustee's motion. In *Devita*, the trustee filed the notice of final cure payment, and the mortgage creditor filed a response that did not dispute the amounts disbursed or the remaining balance asserted by the trustee. As in this case, the trustee then filed a motion to deem the mortgage current stating the outstanding balance of the mortgage, and, after no response from the creditor, the court entered an order granting the trustee's motion. The mortgage creditor filed a motion to set aside, contending that the outstanding balance was understated by nearly $50,000, that its failure to object to the motion was due to mistake, and that the order provides the debtors with a substantial windfall. A representative from the mortgage company actually appeared at the hearing and testified, but the bankruptcy court found no cause to set aside its order. *See generally Devita*, Case No. 12-02549-5-SWH.

On appeal, the district court found no error. The court first set forth the threshold requirements for relief under Rule 60(b) that a moving party must demonstrate: (1) that the motion is timely; (2) that the moving party has a meritorious claim or defense; (3) that the nonmoving party will not suffer unfair prejudice; and (4) that exceptional circumstances justify relief. 610 B.R. at 519. Only after *all four* requirements are met will the court consider the enumerated grounds for relief under Rule 60(b). *Id.* The district court noted that there was no evidence concerning whether the debtors would suffer unfair prejudice from setting aside the judgment, and further that no extraordinary circumstances had been shown. That determination addresses "the delicate balancing of the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of all the facts." *Id.* at 520 (citations omitted). In *Devita*, the court concluded that this factor balanced in the debtors'

favor: while the mortgage creditor "will not recoup all of the money it seeks, any loss arises because [it] failed to respond to the Notice and the trustee's motion." *Id.*

Notwithstanding its determination that the threshold elements had not been met, the district court then determined that the mortgage creditor was not entitled to relief under Rule 60(b), as the creditor did not show that it was "not at fault" for failing to respond to the motion. *Id.* The court further found that the mortgage creditor had notice that the unpaid balance was being established, and rejected the creditor's argument that an adversary proceeding was necessary to determine the extent of its lien in this situation. *Id.* at 521. Finally, the court rejected the creditor's argument that the local bankruptcy rule conflicts with the federal rule, finding instead that the two rules are consistent and set procedures for determining the status of the mortgage. *Id.* at 523.

In this case, the few distinguishing facts do not warrant a different result. While BSI responded to the Notice, to the extent its statement of the outstanding balance on the note was incorrect (which is asserted but not established), its response fell short of compliance with Rule 3002.1. *See In re Howard*, 563 B.R. 308, 315 (Bankr. N.D. Ca. 2016) ("An inaccurate response under Rule 3002.1(g) complies with neither the letter nor the spirit of rule 3002.1 and defeats the very purpose for which Rule 3002.1 was enacted."). BSI failed to respond to the motion to deem the mortgage current, which is the motion upon which the Order was based. And, unlike in *Devita*, no representative appeared at the hearing to even try to meet the threshold elements of setting aside an order, never mind the more exacting requirements of Rule 60.

There was no evidence of a meritorious claim, as no witness appeared at the hearing to testify as to whether and what mistake may have been made and in which filing. The trustee emphasized that the balance set out within the trustee's notice is calculated based on the proof of claim and the distributions made by the trustee, a number that is generally "pretty close" to accurate

but "almost never entirely accurate." The creditor has exclusive access to the full account details, which is why the trustee relies upon and does not question the more precise number provided by the creditor. The trustee pointed out that not infrequently, the North Carolina Homeowner Assistance Fund or similar agencies make direct payments to mortgagors to reduce or cure deficiencies, which the trustee may or may not have reason to know about. In this case, he argued, he and the debtors still have no idea how BSI came up with the "incorrect principal balance" set out on its response, or any of the numbers that have been submitted to the court.

There was no showing that the Greenes would not be prejudiced by setting aside the order. The Greenes have done all that was required of them in this chapter 13 case, and their appearance at the hearing – even without testimony – demonstrated that the result of this motion was of great importance to them. So while the court may not have evidence of prejudice, it certainly has no evidence of *no* prejudice.

There was also no showing of extraordinary circumstances. To the extent an error was made, which has not been clearly established, errors come with consequences. *See, e.g., Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 777 F.3d 100 (2nd Cir. 2015) (Second Circuit finds secured party responsible for failure to identify and correct an error in filing a UCC termination statement that had the effect of terminating a $1.5 billion security interest that should not have been terminated.). As in *Devita*, there was no showing in this case that there are circumstances to justify relieving BSI from any error it might have made in this case.

BSI has not met the threshold inquiry to merit review under Rule 60(b), but even turning to the arguments, BSI's Response was inaccurate in multiple respects and without sufficient explanation: First, it represented that it agreed with the $135,507.58 balance set out in the trustee's

Notice, then it provided a different balance of $105,505.65, although it now maintains that the correct balance all along, according to its records, was $134,296.39. This, according to BSI, is what was "always reflected" in its "system of record." D.E. 54 at 4. As the Greenes noted in their opposition to BSI's motion, BSI has offered "no explanation as to how the balance in its Response to Final Cure Payment (Doc. 34) was contemplated, calculated, or brought into existence. The existence of this number cannot be explained by 'cut and paste,' especially in light of BSI's obligations under Rule 3002(1)(g) and 11 U.S.C. § 524(i)." D.E. 45 at 1. The court agrees. It is as though no inquiry was even made. On these facts, the court has no difficulty in concluding that the relief BSI seeks is incompatible with the text, purpose, and spirit of Rule 3002.1(g).

In addition, BSI's request for relief from its first error was presented to the court within two separate documents that compound the original error by introducing a new one. The court has no understanding of whether any or all of these errors were in the nature of "cut and paste," simple carelessness, inattention to crucial details, or some combination of same, but the result is a series of errors in BSI's recitation of the total amount due on the Greenes' mortgage – which has been the object of this endeavor all along, and is all anyone has tried to determine since the trustee filed his notice on September 22, 2023.

The court also rejects BSI's legal arguments that the Greenes were required to file an adversary proceeding to change the amount secured by its lien and that the local rule conflicts with the requirements of the federal rule for the reasons set forth in the district court's opinion in *Devita*.

BSI's numerical errors and inaccuracies occurred (repeatedly) in a context in which the accuracy of a certain number was of paramount importance, and where others were entitled to and in fact did rely upon the accuracy of BSI's calculations. The trustee accepted and moved forward with the $105,505.65 sum provided by BSI. So too did the court, repeating that sum in its Order.

So too did the Greenes, as that is the sum that was in effect when the Greenes received their discharge. The court finds no basis to amend its Order.

CONCLUSION

The court declines to find cause to set aside its Order pursuant to Federal Rule of Civil Procedure 60(b). Accordingly, the motion to amend the court's order dated November 16, 2023 is DENIED.

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