NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. CC-03-1593-KMoP
	CC-04-1160-KMoP
VICKIE D. GEORGE,	(related appeals)
Debtor.	Bk. No. LA 00-33989-SB
VICKIE D. GEORGE,	Adv. No. LA 02-01486-SB
Appellant,	
v.	
MIDLAND MORTGAGE COMPANY; MIDFIRST BANK, formerly known as Midfirst Savings & Loan Assoc.; F. WAYNE ELGGREN, Ch. 7 Trustee; UNITED STATES TRUSTEE,	
Appellees.	
MIDLAND MORTGAGE COMPANY; MIDFIRST BANK, formerly known as Midfirst Savings & Loan Assoc.,	**M E M O R A N D U M**[1]
Appellants,	
v.	
VICKIE D. GEORGE,	
Appellee.	

Argued and Submitted on January 20, 2005
at Pasadena, California

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

Filed – August 11, 2005

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding

_____

Before: KLEIN, MONTALI, and PERRIS, Bankruptcy Judges.

Creditors Midfirst Bank and Midland Mortgage Company (collectively "Midfirst") appeal, in BAP No. 04-1160-KMoP, from a judgment determining the amount due on a mortgage. The questions involve a disagreement about how to cut a Gordian Knot regarding a loan balance. We AFFIRM IN PART, REVERSE IN PART, and REMAND with instructions to modify the judgment previously entered by the court.[2]

FACTS

This case involves a real estate loan made to the debtor's former husband, Mervin George. In 1985, Mervin executed a promissory note in the amount of $98,475.00 to American Empire Mortgage Company, at an interest rate of 11.5 percent per annum, with monthly payments of $975.19. The note was secured by a deed of trust on a residence located in Los Angeles, California. Shortly after Mervin purchased the home, he and the debtor were married. The debtor has a community property interest in the residence.

[2] In BAP No. CC-03-1593-KMoP, appellant Vickie George orally abandoned her appeal during oral argument and agreed that it could be dismissed.

In 1986, American Empire sold the loan to Victor Federal Savings and Loan Association, which, in turn, sold the loan to Midfirst in 1988.

Mervin filed a chapter 7 bankruptcy in 1995, in which he received a discharge, and two chapter 13 cases in 1999, in the latter of which a chapter 13 plan was confirmed. Midfirst did not apply funds in accordance with the terms of the confirmed chapter 13 plan.

In June 2000, Midfirst obtained relief from stay in Mervin's chapter 13 case with respect to the residence in question.

On August 22, 2000, the debtor filed her own chapter 7 case, from which case this appeal arises. Midfirst moved for relief from stay in the debtor's case in September 2000.

Before a hearing was held on its motion for relief from stay in the debtor's case, Midfirst went ahead and conducted its foreclosure sale. The bankruptcy court subsequently denied the motion for relief from stay in the debtor's case, set aside the foreclosure sale, and ordered the property reconveyed to the debtor and Mervin. Midfirst does not contest these measures.

In March 2002, the debtor commenced an adversary proceeding by filing a complaint in the bankruptcy court against Quality Loan Service Corporation, the Department of Veterans Affairs, and Midfirst. The complaint alleged a violation of the automatic stay, determination of the dischargeability of debt, determinations of the validity, priority, or extent of lien, a request for an accounting, valuation, and a request for an

injunction or other equitable relief.[3]

In May 2002, the bankruptcy court dismissed the debtor's complaint with leave to amend. The debtor then filed a second amended complaint.

The court denied a motion to dismiss the second amended complaint and ordered Midfirst to provide an accounting that established the amount owing on the loan.

On September 25, 2002, a status conference was held whereby the court ruled that the accounting submitted by Midfirst was deficient because it was not verified as being completed by a certified public accountant ("CPA").

Several more status conferences were held during which the court rejected the form and veracity of the accounting submitted by Midfirst.

On March 11, 2003, a pretrial conference was held at which Midfirst provided the court with another accounting. The court accepted that accounting and instructed the debtor to prepare written objections to the accounting. The court informed the parties that the debtor's written objections would establish the accounting issues to be determined at trial.

On May 6, 2003, the court issued a pretrial order stating that the only claims before the court were: (1) Accounting - i.e.

---

[3] In July 2001, the debtor filed an initial adversary complaint against Quality Loan Service Corporation, the Department of Veteran's Affairs, and Midfirst alleging several federal claims such as a violation of the Equal Credit Opportunity Act. The reference was withdrawn by the United States District Court, which eventually re-referred it back to the bankruptcy court where it was subsequently dismissed. That adversary proceeding is not relevant to our analysis.

what sum remains due and payable to Midfirst, and (2) Violation of the Automatic Stay.

In June 2003, a three-day trial was held on the accounting claim. At the end of the trial, the court ordered the parties to file closing trial briefs. Upon receipt of the parties' closing briefs, the court took the matter under submission.

On October 30, 2003, prior to the resolution of the adversary complaint, the bankruptcy court issued an "Order re: Monthly Mortgage Payments" which terminated a previously-ordered suspension of monthly mortgage payments and directed the debtor to commence monthly mortgage payments as of November 1, 2003.

On November 28, 2003, the bankruptcy court entered a written decision in the adversary proceeding. The court found "that the accounting is altogether unintelligible, and that the discrepancies cannot be resolved. Therefore, the court "set aside the unintelligible past, and start[ed] over."

On March 19, 2004, the court entered its judgment determining that the net principal balance owed was $55,989.85. Specifically, the amount owed to Midfirst, as of December 1, 2003, was $75,989.85, based upon the amortization schedule of the loan when initially made, with two adjustments - punitive damages of $10,000 for violation of the automatic stay, and $10,000 as sanctions to compensate the debtor and Mervin for unauthorized charges, false evidence provided to the court, delay and harassment. With the $20,000 reduction of the mortgage principal, the balance owed was $55,989.85.

The court's order specified that it was making no change in the interest rate and or in the amount of the monthly payments.

On March 29, 2004, Midfirst filed a timely notice of appeal (BAP No. CC-04-1160-KMoP).

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUES

Whether the effective date of the court's resort to the original loan amortization schedule of the disputed mortgage should have been at the beginning of a three-year payment hiatus, rather than after the hiatus ended.

STANDARD OF REVIEW

The bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701, 705 (9th Cir. 2004); Galam v. Carmel (In re Larry's Apt., LLC), 249 F.3d 832, 836 (9th Cir. 2001).

DISCUSSION

The nub of this appeal relates to $8,340.13 in principal, together with about $22,000 in interest, which represent the differences between Midfirst's position and the court's judgment regarding the date as of which the principal balance should have been determined according to a loan amortization schedule on the disputed mortgage debt and the accrual of interest.

Midfirst says that the principal balance should have been

$84,329.98,[4] which is $8,340.13 higher than the $75,989.85 that the court determined to be owed. This difference turns on whether the loan should have been determined to have been current as of July 1, 2000, when a three-year payment hiatus began or December 1, 2003, after the hiatus ended.

Although Midfirst also appealed the court's $10,000 sanction imposed for "unauthorized charges, false evidence provided to the court, delay and harassment," it conceded the sanctions issue during oral argument.[5] As a consequence of this concession, Midfirst says that the net principal balance should be $64,329.98, plus accrued interest, instead of the $55,989.85 determined by the court.

As noted, Midfirst does not contest the awards of stay-violation damages and other sanctions. Further, by arguing that the principal balance should be determined by reference to the loan amortization schedule, it does not contest the court's ruling to the extent the court refused to permit various charges, including late charges and charges for attorney's fees not authorized under applicable nonbankruptcy law and such so-called "junk charges" as "bankruptcy interest" not provided for in the contract. Nor does Midfirst contest the court's rulings that mortgage arrears payments made pursuant to Mervin's confirmed chapter 13 plan were improperly applied in contravention of the binding terms of the chapter 13 plan and that there were

---

[4] Although the number asserted in Midfirst's brief was $86,938.51, it revised that sum at oral argument to $84,329.98.

[5] Midfirst did not appeal the $10,000 damages award on account of its foreclosure in violation of the automatic stay.

improprieties and violations of applicable nonbankruptcy law in the handling of impound accounts.

After the conclusion of the three-day trial, the bankruptcy court found that Midfirst did not prove the amount owing on the loan and chose to "set aside the unintelligible past, and start over." The court then resorted to the original mortgage loan amortization schedule and chose that schedule's December 1, 2003, amount of $75,989.85 as the principal balance then due on the loan. In addition, the court reduced that amount by $20,000 for punitive and compensatory damages. The court made clear, however, that it was not purporting to adjust the interest rate or the required monthly payment.

The court was not persuaded by the testimony provided by Midfirst's witnesses regarding the application of payments. It found that the accountings submitted at trial were not credible because each submitted accounting presented a different amount. Rather than attempt to do an accounting on its own, the court decided to scrap the submitted accountings altogether as "unintelligible" and, instead, resort to the amortization schedule.

Midfirst acquiesces in the court's decision to start anew by resorting to the original loan amortization schedule but contests the court's choice of an effective date of December 1, 2003, instead of July 1, 2000. We conclude that the date chosen by the court was clearly erroneous.

The payment history was in evidence. Although burdensome, it would have been possible for the court to do the accounting on its own. We need not, however, consider whether we should remand

for such an analysis in this instance because Midfirst is content with the alternative method, albeit not the effective date, that the court selected for ascertaining the appropriate principal balance.

Specifically, Midfirst does not contest the court's use of the original loan amortization schedule, but contends that the court should have used as the starting point the scheduled principal amount as of the payment due July 1, 2000 ($84,329.98), which the parties agree is the date after which monthly payments ceased for a period of about three years, instead of the principal as of the payment due December 1, 2003 ($75,989.85). We agree.

The difference has two facets. First, the $8,340.20 difference in principal is primarily attributable to a three-year period for which it is agreed that no payments were made. Second, the court's decision implicitly writes off the interest that accrued on the unpaid balance during the three-year payment hiatus.

The court reasoned that the accountings that were in evidence were so confusing and inconsistent as to preclude a rational decision based upon them. Hence, by resorting to the amortization schedule it elected to treat the debt as if all required payments had been made when and as required. Midfirst concedes that the court's resort to the amortization schedule may be allowed to stand.

Midfirst contends, first, that the effective date for the resort to the amortization schedule should be the date on which the three-year payment hiatus began in July 2000. The court's

findings contain no explanation of why December 2003 is an appropriate choice or why the three-year hiatus should be laid at the feet of the lender. Hence, its decision to use $75,989.85, instead of $84,329.98, is clearly erroneous as unsupported by the court's findings and by the record.

Midfirst contends, second, that the court's decision implicitly permitted the three-year payment hiatus to be interest-free, even though interest was accruing. The court's decision announcing its findings is silent regarding the question whether there should have been a three-year interest moratorium. While the Judgment is not explicit regarding the interest holiday, the court's notation in paragraph 2 of the judgment that "the loan will be paid in full in approximately seven years" is consistent with the proposition that there was no accrued, but unpaid, interest as of December 1, 2003.[6] Hence, the court treated interest as if it had been paid in full during the three-year payment hiatus.

For the same reasons that the resort to a date on the amortization schedule after the end of, instead of at the beginning of, the three-year payment hiatus is clearly erroneous, the rejection of interest during that period is similarly clearly erroneous.

We do not, however, agree with Midfirst in two respects – computation of interest and capitalization of interest. Midfirst

---

[6] Standard amortization schedules reveal payment of $975.19 at an annualized interest rate of 11.5 percent will reduce a principal balance of $55,989.85 to zero in 83.77 months, i.e. 6.98 years.

contends that the 11.5 percent interest should have been applied to $84,329.98. Its acquiescence, however, in the full $20,000 adjustment means that the appropriate principal balance on which to calculate the running of interest as of July 1, 2000, is $64,329.98, which means that interest was accruing at a rate of $7,397.95 per year.[7] Midfirst also contends that accrued but unpaid interest attributable to the three-year payment hiatus should be capitalized. The contract, however, calls for simple interest; we perceive no basis for changing the terms of the bargain to require compound interest.

In sum, Midfirst accepts the court's decision that all payment defects and charges before the three-year payment hiatus be forgiven, with the loan payment obligations treated as timely performed until that time. In addition, by way of concession at oral argument, Midfirst accepts the court's decision that the principal balance should be reduced by $20,000 to reflect stay-violation damages and other sanctions.

Hence, we will affirm the judgment with respect to the $10,000 portion of the sanctions that was appealed and later conceded, and we will affirm the judgment with respect to the allowability of various loan charges but will reverse the judgment with respect to the choice of the date for resorting to the original loan amortization schedule to determine the principal balance of the loan and with respect to the accrual of interest during the three-year payment hiatus.

Since the result of our decision leaves nothing for the

---

[7] $64,329.98 x .115/yr = $7,397.95/yr.

trial court to do other than to enter a judgment consistent with our decision, we will exercise our discretion under Federal Rule of Bankruptcy Procedure 8013 to "modify" the judgment by ordering that it be revised to reflect the changed numbers and dates.

Accordingly, it will be ordered that the judgment be modified to: (1) substitute "July 1, 2000" for "December 1, 2003" in paragraph 1; (2) substitute "$84,329.98" for "$75,989.85" in paragraph 1; (3) substitute "$64,329.98" for "$55,989.85" in paragraph 2; and (4) delete the second sentence of paragraph 2.

CONCLUSION

The bankruptcy court erred when it selected December 1, 2003, instead of July 1, 2000, as the effective date for resort to the amortization schedule to determine the principal balance due and owing on the loan to Midfirst and erred when it disregarded the accrual of interest after July 1, 2000. In all other respects, the judgment shall stand.

Accordingly, in BAP No. 04-1160-KMoP, we AFFIRM IN PART, REVERSE IN PART, and REMAND with instructions to MODIFY the judgment as follows: (1) substitute "July 1, 2000" for "December 1, 2003" in paragraph 1; (2) substitute "$84,329.98" for "$75,989.85" in paragraph 1; (3) substitute "$64,329.98" for "$55,989.85" in paragraph 2; and (4) delete the second sentence of paragraph 2.

The appeal in BAP No. 03-1593-KMoP will be DISMISSED at the request of the appellant.