

**AUG 11 2005**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

6	In re:	)	BAP Nos.	CC-03-1593-KMoP
		)		CC-04-1160-KMoP
7	VICKIE D. GEORGE,	)		(related appeals)
		)		
8	Debtor.	)	Bk. No.	LA 00-33989-SB
		)		
9	_____	)	Adv. No.	LA 02-01486-SB
	VICKIE D. GEORGE,	)		
10		)		
	Appellant,	)		
11	v.	)		
		)		
12	MIDLAND MORTGAGE COMPANY;	)		
	MIDFIRST BANK, formerly known	)		
13	as Midfirst Savings & Loan	)		
	Assoc.; F. WAYNE ELGGREN, Ch.	)		
14	7 Trustee; UNITED STATES	)		
	TRUSTEE,	)		
15		)		
	Appellees.	)		
16	_____	)		
	MIDLAND MORTGAGE COMPANY;	)		
17	MIDFIRST BANK, formerly known	)		
18	as Midfirst Savings & Loan	)		
	Assoc.,	)		
19		)	<b>MEMORANDUM<sup>1</sup></b>	
	Appellants,	)		
20		)		
21	v.	)		
		)		
22	VICKIE D. GEORGE,	)		
		)		
23	Appellee.	)		
	_____	)		

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

<sup>1</sup> 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.

1 Filed - August 11, 2005

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

4 Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding

5 Before: KLEIN, MONTALI, and PERRIS, Bankruptcy Judges.  
6  
7

8 Creditors Midfirst Bank and Midland Mortgage Company  
9 (collectively "Midfirst") appeal, in BAP No. 04-1160-KMoP, from a  
10 judgment determining the amount due on a mortgage. The questions  
11 involve a disagreement about how to cut a Gordian Knot regarding  
12 a loan balance. We AFFIRM IN PART, REVERSE IN PART, and REMAND  
13 with instructions to modify the judgment previously entered by  
14 the court.<sup>2</sup>  
15

16 FACTS

17 This case involves a real estate loan made to the debtor's  
18 former husband, Mervin George. In 1985, Mervin executed a  
19 promissory note in the amount of \$98,475.00 to American Empire  
20 Mortgage Company, at an interest rate of 11.5 percent per annum,  
21 with monthly payments of \$975.19. The note was secured by a deed  
22 of trust on a residence located in Los Angeles, California.  
23 Shortly after Mervin purchased the home, he and the debtor were  
24 married. The debtor has a community property interest in the  
25 residence.  
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27 <sup>2</sup> In BAP No. CC-03-1593-KMoP, appellant Vickie George  
28 orally abandoned her appeal during oral argument and agreed that  
it could be dismissed.

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

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

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

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

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

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

1 injunction or other equitable relief.<sup>3</sup>

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

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

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

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

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

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

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23  
24 <sup>3</sup> In July 2001, the debtor filed an initial adversary  
25 complaint against Quality Loan Service Corporation, the  
26 Department of Veteran's Affairs, and Midfirst alleging several  
27 federal claims such as a violation of the Equal Credit  
28 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.

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

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

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

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

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

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

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

3  
4 JURISDICTION

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

7  
8 ISSUES

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

13  
14 STANDARD OF REVIEW

15 The bankruptcy court's findings of fact are reviewed for  
16 clear error and its conclusions of law are reviewed de novo.  
17 Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701, 705 (9th Cir.  
18 2004); Galam v. Carmel (In re Larry's Apt., LLC), 249 F.3d 832,  
19 836 (9th Cir. 2001).

20  
21 DISCUSSION

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

28 Midfirst says that the principal balance should have been

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

6 Although Midfirst also appealed the court's \$10,000 sanction  
7 imposed for "unauthorized charges, false evidence provided to the  
8 court, delay and harassment," it conceded the sanctions issue  
9 during oral argument.<sup>5</sup> As a consequence of this concession,  
10 Midfirst says that the net principal balance should be  
11 \$64,329.98, plus accrued interest, instead of the \$55,989.85  
12 determined by the court.

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

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25  
26 <sup>4</sup> Although the number asserted in Midfirst's brief was  
\$86,938.51, it revised that sum at oral argument to \$84,329.98.

27 <sup>5</sup> Midfirst did not appeal the \$10,000 damages award on  
28 account of its foreclosure in violation of the automatic stay.

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

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

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

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

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



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

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

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

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

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

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

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

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

23 We do not, however, agree with Midfirst in two respects -  
24 computation of interest and capitalization of interest. Midfirst  
25

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26 <sup>6</sup> Standard amortization schedules reveal payment of \$975.19  
27 at an annualized interest rate of 11.5 percent will reduce a  
28 principal balance of \$55,989.85 to zero in 83.77 months, i.e.  
6.98 years.

1 contends that the 11.5 percent interest should have been applied  
2 to \$84,329.98. Its acquiescence, however, in the full \$20,000  
3 adjustment means that the appropriate principal balance on which  
4 to calculate the running of interest as of July 1, 2000, is  
5 \$64,329.98, which means that interest was accruing at a rate of  
6 \$7,397.95 per year.<sup>7</sup> Midfirst also contends that accrued but  
7 unpaid interest attributable to the three-year payment hiatus  
8 should be capitalized. The contract, however, calls for simple  
9 interest; we perceive no basis for changing the terms of the  
10 bargain to require compound interest.

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

18 Hence, we will affirm the judgment with respect to the  
19 \$10,000 portion of the sanctions that was appealed and later  
20 conceded, and we will affirm the judgment with respect to the  
21 allowability of various loan charges but will reverse the  
22 judgment with respect to the choice of the date for resorting to  
23 the original loan amortization schedule to determine the  
24 principal balance of the loan and with respect to the accrual of  
25 interest during the three-year payment hiatus.

26 Since the result of our decision leaves nothing for the  
27

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28 <sup>7</sup>  $\$64,329.98 \times .115/\text{yr} = \$7,397.95/\text{yr}.$

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

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

10  
11 CONCLUSION

12 The bankruptcy court erred when it selected December 1,  
13 2003, instead of July 1, 2000, as the effective date for resort  
14 to the amortization schedule to determine the principal balance  
15 due and owing on the loan to Midfirst and erred when it  
16 disregarded the accrual of interest after July 1, 2000. In all  
17 other respects, the judgment shall stand.

18 Accordingly, in BAP No. 04-1160-KMoP, we AFFIRM IN PART,  
19 REVERSE IN PART, and REMAND with instructions to MODIFY the  
20 judgment as follows: (1) substitute "July 1, 2000" for "December  
21 1, 2003" in paragraph 1; (2) substitute "\$84,329.98" for  
22 "\$75,989.85" in paragraph 1; (3) substitute "\$64,329.98" for  
23 "\$55,989.85" in paragraph 2; and (4) delete the second sentence  
24 of paragraph 2.

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