IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

IN RE:	§	
	§	
DEVERAUX LYNETTE COLE	§	Case No. 00-20044
	§	
	§	
Debtor	§	Chapter 13

MEMORANDUM OF DECISION[1]

This matter came before the Court for hearing of the Motion of Chase Manhattan Mortgage Corporation for Relief from Stay (the "Motion") filed by Chase Manhattan Mortgage Corporation ("Movant") on December 2, 2002, and the response and objection thereto filed by the debtor, Deveraux Lynette Cole ("Debtor"). Upon the conclusion of the hearing, the Court took the matter under advisement. This memorandum of decision disposes of all issues pending before the Court.[2]

Background

Pursuant to a Texas Home Equity Note dated April 8, 1998, the Debtor became indebted to Advanta National Bank ("Advanta Mortgage" or "Advanta") in the original

[1] This Memorandum of Decision is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case or as to other evidentiary doctrines applicable to the specific parties in this proceeding.

[2] This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has authority to enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (G), and (O).

amount of $25,500.00 with interest thereon at the rate of 9.625% per annum.[3] The obligation of the Debtor to pay the indebtedness was secured by a Texas Home Equity Security Instrument ("Security Agreement") executed on the same date and granting to Advanta a security interest in certain real property described in the Motion and located at 204 Fairview Street in Marshall, Harrison County, Texas (the "Collateral").[4] The Collateral constitutes the Debtor's homestead.

Thereafter, on January 11, 2000, the Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code. At the time of her petition, the Debtor was approximately 10 months behind on her monthly mortgage payments, and she testified that she filed for bankruptcy protection mainly to address this arrearage. The Debtor listed Advanta Mortgage as a creditor on both Schedule D and on the original creditor matrix. Despite receiving notice of the Debtor's bankruptcy filing, Advanta did not file a proof of claim in this proceeding. Consequently, on August 11, 2000, the Debtor filed a proof of claim on Advanta's behalf reflecting pre-petition arrearages of $2,160.00,[5] and Advanta never objected to this proof of claim. The Debtor's Chapter 13 plan was confirmed on September 6, 2000, with the plan providing for a 60-month cure of the $2,160.00 arrearage owed to Advanta. In addition, the Debtor agreed to continue paying her regular

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[3] *See* Movant's Ex. 1.

[4] *See* Movant's Ex. 2.

[5] Advanta subsequently attempted to file its own proof of claim on November 2, 2000, but the Debtor objected to this proof of claim as being untimely. On January 9, 2001, Advanta withdrew its motion to allow this late filed claim.

monthly mortgage payments to Advanta outside of the plan.

At the time that the Chapter 13 plan was confirmed, the Debtor's current monthly mortgage payment was $240.12, with no inclusion for property taxes or insurance.[6] Shortly thereafter, on November 15, 2000, Advanta increased the required monthly mortgage payment to $390.61, apparently because it[7] implemented an escrow account to facilitate the payment of property taxes and insurance. Despite a requirement in the Security Agreement that an annual accounting of the escrow account be given to the Debtor,[8] there is no evidence that the Debtor received any notice that an escrow account had been implemented or that her monthly mortgage payments had increased, and the Debtor affirmatively testified that no such notice was given. Hence, the Debtor continued paying the $240.12 reflected in her coupon book, which caused an arrearage to

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[6] *See* Debtor's Amended Schedule J.

[7] Sometime between the date of confirmation and the date that the current Motion for Relief from Stay was filed, the Movant became the successor in interest to Advanta. Accordingly, any reference in this factual discussion to "Advanta" will also refer to the Movant, and any reference to the "Movant" will likewise refer to Advanta.

[8] Paragraph #2 of the Texas Home Equity Security Instrument states:

> Lender shall give to Borrower, without charge, an annual accounting of the Funds, showing credits and debits to the Funds and the purpose for which each debit to the Funds was made. The Funds are not pledged as additional security for any sums secured by this Security Instrument. . . . If the amount of the Funds held by Lender at any time is not sufficient to pay the Escrow Items when due, Lender may so notify Borrower in writing, and in such case Borrower shall pay to Lender the amount necessary to make up the deficiency. Borrower shall make up the deficiency in no more than twelve monthly payments, at Lender's sole discretion.

See Movant's Ex. 2.

accumulate each month unbeknownst to the Debtor.[9] Likewise, on November 15, 2001, Advanta again altered the required monthly mortgage payment, this time decreasing it from $390.61 to $335.71. Again, the Debtor was not provided with notice that her monthly payment amount had changed, nor was she provided with notice that the escrow account had even been created, or that deficiencies were accruing in that account.

The Movant filed its Motion for Relief from Stay on December 2, 2002, alleging that the Debtor was in arrears for six monthly mortgage payments through and including the November 15, 2002, payment. The Debtor responded by denying the Movant's allegations and asserting as an affirmative defense that the Movant's failure to provide the Debtor with an annual accounting of the escrow account, as required by the Security Agreement, or with an annual notice of the escrow shortages, as required by applicable law, operates as a waiver of the right to collect any such deficiencies.[10] At the hearing on this Motion, a dispute arose regarding the date that the Debtor received notice of the increased monthly payments and the escrow shortages. The Movant argued that its original motion for relief from stay, filed on May 8, 2002, placed the Debtor on notice that a deficiency existed as to her escrow account.[11] Alternatively, the Movant argued that the Debtor received notice on July 11, 2002, via the transmission of a document

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[9] *See* Movant's Ex. 4.

[10] *See* First Amended Debtor's Response to Motion of Chase Manhattan Mortgage Corporation's Motion for Relief from Stay.

[11] An agreement was subsequently entered into between the parties, which resulted in the dismissal of the Movant's original motion on November 14, 2002.

entitled "Updated Pmt History" which was purportedly sent from Julia Garceau, an employee of the Movant, and which identified the various changes in the required monthly payments.[12] Finally, the Movant asserts, in the alternative, that the Debtor was properly placed on notice on or about September 10, 2002, via a letter and attached escrow analysis sent to her by the Movant.[13]

Discussion

11 U.S.C. §362(d) states as follows:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —
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> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
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> (2) with respect to a stay of an act against property under subsection (a) of this section, if —
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> (A) the debtor does not have an equity in such property; and
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> (B) such property is not necessary to an effective reorganization.

Hence, there are two basic methods by which a movant may seek relief from the

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[12] *See* Debtor's Ex. L. Exhibit L is merely a one-page document that purports to have been sent on July 11, 2002, by Julia Garceau, a "Bankruptcy Specialist" employed by the Movant. *See* Debtor's Ex. H.

[13] *See* Debtor's Ex. H.

automatic stay.[14] Here, the Movant failed to introduce any evidence regarding the Debtor's equity in the property serving as security for the note, an issue upon which the Movant clearly bears the burden of proof. *See* 11 U.S.C. §362(g)(1). Consequently, the Movant cannot prevail under §362(d)(2). The Movant is thus left with its argument for relief from the stay for cause under §362(d)(1). At the hearing, the Movant presented two bases for lifting the stay for cause: (a) the Debtor's pre-petition arrearages in falling behind approximately 10 monthly mortgage payments, and (b) the Debtor's post-petition arrearages. However, based upon the failure by the Movant's predecessor, Advanta, to file a proof of claim for the pre-petition arrearages, and in response to a direct question from the Court, the Movant admitted that the pre-petition arrearages do not constitute cause for lifting the automatic stay.

The issue regarding the Debtor's post-petition arrearages, however, is more problematic. According to the Movant, the Debtor's post-petition payments, or lack thereof, have created a $2,785.58 deficiency.[15] The Debtor, on the other hand, argues that the Movant was required under the Security Agreement to provide the Debtor with an annual accounting of the escrow account, and was required under the Real Estate Settlement Procedure Act ("RESPA")[16] to give an annual accounting and a notice of any

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[14] There is also a third method, 11 U.S.C. §362(d)(3), which deals only with "a stay of an act against single asset real estate."

[15] *See* Movant's Ex. 4.

[16] 12 U.S.C. §2601 *et seq.*

deficiency in the escrow account. *See* 12 U.S.C. §2609(b), (c). According to the Debtor, she would have been able to cure any deficiency that arose during 2000 or 2001 if she had received notice that the $240.12 payment that she was making each month was insufficient. Because the Movant failed to supply the Debtor with this accounting, however, the Debtor claims that she was never on notice that she was accruing a deficiency each month, and that to require her to repay the entire indebtedness now, in light of her limited economic capability, would cause an unjust hardship to her. Therefore, the Debtor argues that the Movant's failure to provide her with notice of the increased payment amounts or with an annual accounting of her escrow account operates as a waiver of the Movant's right to collect the arrearages.

The Debtor is correct that the Security Agreement required the Movant to provide her with an annual accounting of the escrow account.[17] Furthermore, RESPA contains a similar notice requirement. Section 2609(b) states as follows:

> Notification of shortage in escrow account. If the terms of any federally related mortgage loan require the borrower to make payments to the servicer (as that term is defined in section 6(i) [12 U.S.C. §2605(i)]) of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, *the servicer shall notify the borrower not less than annually of any shortage of funds in the escrow account.*

See 12 U.S.C. §2609(b) (emphasis added).

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[17] *See supra* Note 8.

In addition, §2609(c)(2) states that:

> (A) In general. Any servicer that has established or continued an escrow account in connection with a federally related mortgage loan *shall submit to the borrower* for which the escrow account has been established or continued *a statement clearly itemizing*, for each period described in subparagraph (B) (during which the servicer services the escrow account), *the amount of the borrower's current monthly payment*, the portion of the monthly payment being placed in the escrow account, the total amount paid into the escrow account during the period, the total amount paid out of the escrow account during the period for taxes, insurance premiums, and other charges (as separately identified), *and the balance in the escrow account at the conclusion of the period.*
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> (B) Time of submission. *The statement required under subparagraph (A) shall be submitted to the borrower not less than once for each 12-month period*, the first such period beginning on the first January 1st that occurs after the date of the enactment of the Cranston-Gonzales National Affordable Housing Act [enacted Nov. 28, 1990], and shall be submitted not more than 30 days after the conclusion of each such 1-year period.

See 12 U.S.C. §2609(c)(2) (emphasis added).[18]

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[18] 12 U.S.C. §2602(1)(B)(i) provides that a loan is a "federally related mortgage loan" if the loan "is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government. . . ." 12 U.S.C. § 2602(1)(B)(iv) further provides that a loan is a "federally related mortgage loan," if the loan is made "in whole or in part by any 'creditor', as defined in section 1602(f) of Title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year. . . ." Section 1602(f) of Title 15 provides in relevant part, *inter alia,* the following:

> The term "creditor" refers only to a person [or organization] who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.

15 U.S.C. §1602.

Here, the Movant does not dispute that the mortgage at issue is insured by the United States Department

The evidence is clear that Advanta initially failed to comply with these notice requirements, and that proper notice was not given to the Debtor by the Movant until September 10, 2002. The Movant's original motion for relief from stay filed May 8, 2002, cannot be deemed as sufficient notice to the Debtor of the arrearage claim. That motion referred only to the Debtor's failure to make four post-petition payments to the Movant. It did not mention or otherwise imply that the Debtor's required monthly payments had increased, nor did it convey that an escrow account had been established and was deficient. Similarly, there is no evidence which establishes that the Debtor ever received, much less received on July 11, 2002, the "Updated Pmt History," purportedly sent by the Movant.[19] It was not until September 10, 2002, that the Debtor was provided with notice of the increased monthly amount and the escrow deficiencies. At that time, the Movant sent a letter to the Debtor's attorney with an attached "Annual Escrow Account Disclosure Statement," informing the Debtor of the current deficiency in her escrow account and also stating that the monthly payment would increase again in October 2002 from $335.71 to $369.87.

Because Advanta (and subsequently the Movant) were obligated under the Security Agreement to give the Debtor an annual accounting of her escrow account, and

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of Housing and Urban Development under the National Housing Act, 12 U.S.C. §§ 1701, 1709, or that the Movant is a lender that makes or invests in residential real estate loans aggregating more than $1,000,000 per year. Thus, the Court finds that the loan in question is a "federally related mortgage loan."

[19] *See* Debtor's Ex. L which is merely a one-page document which listed the changes in monthly payments and which purports to have been sent on July 11, 2002, by Julia Garceau, a "Bankruptcy Specialist" employed by the Movant. *See* Ex. H.

were obligated under RESPA to notify the Debtor of the escrow deficiency on at least an annual basis, (much less to speak of the implied obligation to notify the Debtor that the monthly payment had been increased at all), the failure to provide such notice allowed an arrearage to accrue surreptitiously, prior to September 10, 2002, as the Debtor continued making the original $240.12 monthly mortgage payments, without knowledge that an additional sum had been added to her obligation. This obviously raises a significant question as to whether any arrearages claimed by the Movant or its predecessor-in-interest which purportedly occurred prior to September 10, 2002, and which the Debtor testified could have been paid on a monthly basis had proper notice been given, should be recognized and imposed as an aggregate sum upon the Debtor.

The answer is no. Because the failure of Advanta and the Movant to provide the required notices to the Debtor was the most significant cause-in-fact which allowed this large arrearage claim to accrue, the Court finds that such failure to fulfill its contractual and statutory duties operates as a waiver of the Movant's right to recover for any deficiencies that arose as a result of such failure. *See, e.g., Chase Manhattan Mortgage Corp. v. Padgett*, 268 B.R. 309 (S.D. Fla. 2001) [affirming a bankruptcy court's confirmation of a modified plan which provided for an increased mortgage payment, but which denied a mortgagee's right to impose escrow deficiencies upon a debtor when such mortgagee failed to notify the debtor of such deficiencies and of the need to increase monthly payments to cover them].

Hence, the Court finds that, for all times prior to the September 10, 2002, notice,

the Debtor was only obligated to pay the sum of $240.12 per month to the Movant, and the Movant may not now assert an arrearage based on any higher monthly amount. The Debtor was therefore required to pay, beginning with the February 15, 2000, payment[20] and encompassing the payment due on August 15, 2002,[21] 31 monthly payments of $240.12, or $7,443.72. During this same time period, the Debtor actually paid $7,631.08.[22] Accordingly, because the Debtor paid more money to the Movant during these months than could properly charged to her, the Court finds that the Debtor was current on her obligations to the Movant at the time that the September 10, 2002, notice was given.[23]

Consequently, just cause to terminate the automatic stay can only legitimately be based upon the post-September 10, 2002, arrearages. A review of the post-petition payment history reveals that $2,150.90 in payments came due subsequent to the September 10, 2002, notice, through and including the payment due on February 15,

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[20] Although the Debtor filed her Chapter 13 petition on January 11, 2000, the Court is beginning its calculation of the Debtor's postpetition arrearages with the February 15, 2000, payment because the "Post Petition Payment History" submitted as Movant's Ex. 4 begins with this date.

[21] This is the last payment that became due prior to the date that the Movant gave an annual accounting and notice of the escrow deficiencies to the Debtor.

[22] *See* Movant's Ex. 4.

[23] Although the Debtor appears to have overpaid during this period by the amount of $187.36, the Debtor also testified that she occasionally tendered her monthly payment past the due date and therefore incurred a late fee. Because the aggregate amount of late fees incurred and properly owing by the Debtor was not quantified by the evidence, the Court will allow the Movant to apply this additional $187.36 sum to the obligation.

2003.[24] During this same time period, however, the Debtor only tendered payments of $1,600.00.[25] Consequently, the Debtor has a $550.90 arrearage from September 10, 2002, through and including the payment due on February 15, 2003. In recognition of all of the circumstances of this case, including the Movant's alternative prayer for relief, the Court finds that termination of the automatic stay should be denied, but that a modification of the stay is warranted in order to insure that the Debtor promptly address the existing arrearage claim.

Accordingly, the Court finds that the Motion for Relief from Stay filed in the above-referenced case by Chase Manhattan Mortgage Corporation is granted in part and denied in part and the continuation of the automatic stay provided under 11 U.S.C. §362(a) as to the Collateral is hereby conditioned upon the fulfillment of the following conditions by the Debtor, Deveraux Lynette Cole, in order to provide adequate protection of Movant's interest in the Collateral as specified:

1. that the Debtor shall, on or before Friday, July 18, 2003, either:

(a) cure the arrearage of $550.90 as accrued through March 4, 2003, by payment to the Movant through its attorney; or

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[24] The date of the hearing operates as the cut-off date for any arrearage claim. Accordingly, the Court arrived at its $2,150.90 figure based upon the figures provided in Movant's Ex. 4: $335.71 due September 15, 2002 and October 15, 2002, plus $369.87 due November 15, 2002 through February 15, 2003.

[25] Movant's Ex. 4 indicates that the Debtor paid $400.00 in September 2002, October 2002, and January 2003. In addition, the Debtor testified without contradiction by the Movant that she had paid $400.00 in February 2003. Because Movant's Ex. 4 was prepared prior to February 6, 2003, and because the Movant did not dispute the Debtor's payment testimony, the Court accepts the Debtor's testimony regarding the additional $400.00 payment for February 2003.

(b) file a motion for modification of her confirmed Chapter 13 plan which provides for the payment of the accrued arrearage of $550.90 due and owing to the Movant through March 4, 2003; provided, however, that the Debtor shall achieve confirmation of such a modified plan on or before September 30, 2003;

2. that the Debtor shall, at all times hereafter, tender all payments to the Chapter 13 Trustee as such subsequent payments become due under her confirmed Chapter 13 plan as currently constituted or as may be modified;

3. that the Debtor shall maintain and provide to Movant proof of current and effective casualty insurance on any improvements constituting the Collateral which lists the Movant as lienholder or loss payee.

In addition, should the Debtor fail to fulfill condition #1, there will be no opportunity to cure such a default and, in such event, the automatic stay shall automatically terminate without further notice, hearing, or order of this Court and the Movant shall file a certificate with the Court to evidence the termination of the stay.

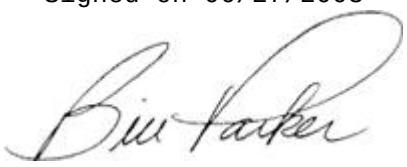
The Court further orders that, should the Debtor fail to fulfill and maintain either condition #2 or condition #3, the Movant shall provide written notice of such default to the Debtor and her attorney by certified United States Mail, return receipt requested. If

the Debtor fails to cure such default within ten (10) days of receipt of such notice by either the Debtor or her attorney, whichever is earlier, then the automatic stay shall automatically terminate without further notice, hearing, or order of this Court and the Movant shall file a certificate with the Court to evidence the termination of the stay.

Moreover, the Court will grant the Debtor a total of two opportunities to cure any default of either condition #2 or condition #3 through the remaining term of the confirmed plan as currently constituted or hereafter modified. Upon the third incidence of default, the automatic stay shall automatically terminate without further notice, hearing, or order of this Court and the Movant shall file a certificate with the Court to evidence the termination of the stay. All other relief requested by any party is denied.

This memorandum of decision constitutes the Court's findings of fact and conclusions of law[26] pursuant to Fed. R. Civ. P. 52, as incorporated into contested matters in bankruptcy cases by Fed. R. Bankr. P. 7052 and 9014. A separate order will be entered which is consistent with this opinion.

Signed on 06/27/2003



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BILL PARKER
UNITED STATES BANKRUPTCY JUDGE

[26] To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as necessary or as may be requested by any party.

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