IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE	: CHAPTER 13
DONALD SMITH AND MARILYN SMITH,	:
DEBTORS	: BANKRUPTCY NO. 04-12387-SR

OPINION

By: STEPHEN RASLAVICH, UNITED STATES BANKRUPTCY JUDGE.

Introduction.

Before the Court is the Objection ("Objection") of the Debtors, Donald and his wife, Marilyn Smith, to the proof of claim ("POC") filed by Mellon Bank., N.A. ("Mellon Bank"). A hearing on the Objection was held on September 10, 2004. The issues raised by the Objection are twofold: (I) whether a mortgage fails to satisfy the Statute of Frauds when the only information given therein regarding the location of the subject property is a reference to the city and county in which the property is located; and (ii) whether the attorney's fees and costs which Mellon Bank seeks to recover are limited by the Pennsylvania Loan Interest and Protection Law, 41 Pa. Stat. §101 *et seq.* ("Act 6") and/or the terms of its mortgage agreement with the debtor, Donald Smith ("Donald'), and his former wife, Kathleen Smith.

Background.

On February 19, 2004, Debtors filed their Chapter 13 bankruptcy case.

Approximately one month later, Mellon filed its POC, listing a secured debt in the amount of $11,599.59. Mellon Exhibit 1. As supporting documentation, Mellon Bank attached the following to its POC: (i) an "Itemized Statement of Payoff"; (ii) an "Itemized Statement of Arrearages"; (iii) a copy of a Mortgage ("Mortgage"), dated March 30, 1987, between Debtor and his former wife; and (iv) a copy of the "Note and Federal Truth in Lending Disclosures" ("Note"), dated the same as the Mortgage, listing Donald and his former wife as the "borrowers."

On April 2, 2004, Debtors filed their objection to Mellon Bank's POC. Exhibit S-1. At the hearing on the Objection, three witnesses testified: (i) Mellon Bank's custodian of records for Philadelphia; (ii) the attorney who represented Mellon Bank in the mortgage foreclosure action which it commenced under the Mortgage in February of 2003 in Philadelphia County against Debtors and Donald's former wife (collectively referred to hereinafter as the "State Defendants"); and (iii) Donald. The parties also submitted exhibits at the hearing.

Property Description and Signatures

The copy of the Mortgage which Mellon attached to its POC contains only one passage making reference to the location of the property (the "Property") which is the subject thereof. This passage provides, in relevant part:

> Now, therefore, ... to secure **payment** the payment of all sums due or which may become due hereafter under the Agreement, and any and all extensions and renewals thereof, in whole or in part (hereinafter called the "Indebtedness"), as well as to secure performance of all

> obligations under the Agreement and this Mortgage, and in consideration of the promises Mortgagor by these presents, intending to be legally bound, does grant, bargain, sell, and convey unto Mortgagee ...**all that certain property situate in Philadelphia County, Philadelphia**.

Mellon Exhibit 1 (emphasis added). Only the city and county in which the Property is located is given. This version of the Mortgage was never recorded. However, at the hearing on this matter, Mellon Bank produced a version of the Mortgage ("Recorded Mortgage") which was recorded. See Mellon Exhibit 2. Both versions of the Mortgage (the unrecorded and recorded versions) contain signatures for Donald and his former wife. However, the second page of the Recorded Mortgage specifically lists the mortgagors' address as "1748 S. 53rd Street, Phila., PA." Mellon Bank inserted this street address into the Mortgage after Debtor and his former wife had signed it but before it was recorded. Debtors consider this fact significant because they contend that, since the original mortgage only referred to the Property by its city and county, the Property was insufficiently identified to satisfy the Statute of Frauds.

As with the unrecorded version of the Mortgage, the Note does not list an address for the Property. Nevertheless, it reveals the following information: (i) that the credit limit of the personal credit line (the "Loan") was $10,000; (ii) that the Smiths gave "real property" as security for the Loan; (iii) that the finance charges pertained to a "PCL Home Equity Account"; and (iv) that the Smiths were being

charged fees in conjunction with the Loan for: "recording the mortgage," "satisfying mortgage," and a "Property Search and Appraisal." Mellon Exhibit 3. Significantly, the Note, like the Mortgage, contains signatures for Donald and his former wife.

At the hearing, Mellon Bank also offered as evidence the Loan application ("Loan Application") relating to the Note and Mortgage. See Mellon Exhibit 11. The Loan Application, dated March 2, 1987, lists the amount of the "credit line requested" as $10,000 which is consistent with the credit limit listed on the Note. Importantly, the Loan Application also lists Donald's address as "1748 S. 53rd Street in Philadelphia" which is the same address listed for him on the Recorded Mortgage.

At the hearing, Donald was questioned regarding the Loan. His testimony was inconsistent and lacked credibility. While Donald denied taking out the Loan from Mellon in 1987, he admitted signing the Mortgage. Transcript, dated September 10, 2004 ("Transcript"), at 57, 65. He denied that his former wife signed the Mortgage, denied that either he or his former wife signed the Note and denied having seen the Note prior to the mortgage foreclosure action. Transcript at 57-58. However, he admitted signing the answer to the complaint ("Answer") in the mortgage foreclosure action. Id. See also Exhibit S-3. Notably, the signatures for Donald on the Mortgage, Note and Answer are *strikingly* similar. Moreover, while Donald testified that his current and former wives also signed the Answer, Transcript at 58, the "Smith" in their signatures which appears directly under his signature for "Smith" is undeniably similar to his which suggests that the *same* person signed the Answer

on behalf of all three of them.

Donald was also questioned regarding several letters which he sent to Mellon regarding the Loan; two of the letters were signed and he admits that the signatures on them are his.[1] Transcript at 61-63. See also Mellon Exhibits 6 &7. The signatures for "Donald Smith" on these two letters look the *same* as the signatures for him on the Mortgage and Note,[2] which reinforces the Court's conclusion that Donald signed both the Mortgage and the Note.

Donald also admitted that he resides at 1748 South 53rd Street which is the same address listed for him on the Recorded Mortgage.[3] Transcript at 64. Moreover, despite the issue being raised, see Transcript at 106, Debtors never claimed (or sought to present any evidence) that Donald owns or ever owned any real property in Philadelphia County besides the Property.

Suffice it to say that this Court is not persuaded by Donald's testimony that the

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[1] Debtors' counsel objected to the admission of these letters on the grounds that they contain settlement negotiations. Since the Court is not relying upon the content of these letters in issuing its ruling herein, the letters are admitted into evidence solely for the purposes of the signatures contained thereon and not for their content.

[2] Donald also denied that he and his wife signed a document entitled "Truth In Lending Disclosure Statement – Credit Life Insurance," which is dated the same as the Mortgage and Note and lists the same credit limit as the Note, namely $10,000. Transcript at 70-71. See also Mellon Exhibit 14. The signatures for Katherine and Donald Smith on this disclosure document look the same as their signatures on the Mortgage and Note. Compare Exhibit Mellon 14 with Mellon Exhibit 1 (containing the Mortgage and Note).

[3] While Donald admits residing at 1738 S. 53rd Street in Philadelphia, Pennsylvania, he denies having received two letters which Mellon mailed to him at that address in August of 2002. Transcript at 63-65.

signatures on the Note and Mortgage are forgeries. This Court finds that the signatures on these documents, at least for him (as opposed to his former wife), are genuine. Based on the Loan documentation and his testimony, this Court is also convinced that Donald had knowledge of the Loan and was aware it was a home equity line of credit secured by a mortgage on his residence at 1738 S. 53rd Street in Philadelphia, PA.

Attorney's Fees and Costs

As mentioned above, Mellon Bank commenced its mortgage foreclosure action against the State Defendants in February of 2003. After the State Defendants filed an answer, Mellon Bank moved for summary judgment but the motion was denied. Before a trial was held, Debtors filed the instant bankruptcy case which activated the automatic stay under 11 U.S.C. §362 and stayed the foreclosure action.

James F. Grenen, Esquire ("Grenen") is the attorney who represented Mellon in its mortgage foreclosure action. He testified at the hearing about the attorney's fees and costs which his firm, Grenen & Birsic, P.C. (the "Grenen Firm"), charged Mellon for the aforementioned representation. The invoices from the firm were submitted into evidence as Mellon Exhibit 9.

Grenen explained that Mellon was charged a flat fee of $100.00 for a "Combined Act 6 and 91 notice." Id. at 90, 92. See also Mellon Exhibit 9 at 1. He further testified that Mellon was charged a flat fee of $1,250.00 in conjunction with

the filing of its mortgage foreclosure action. Transcript at 98. Elaborating on this point, Grenen testified that this amount is the standard and customary amount charged by his firm for uncontested mortgage foreclosures in Pennsylvania in accordance with Fannie Mae, Freddie Mac and Ginnie Mae standard mortgage foreclosure guidelines. Id. at 94. Grenen also explained that Mellon was charged $800.00 for the summary judgment motion litigation which occurred in the mortgage foreclosure action. Id. According to Green, $800.00 is the lowest standard fee which his firm charges for such litigation. Id. After the summary judgment motion was denied, Grenen's firm charged Mellon on an hourly basis for work performed in connection with the foreclosure action. Id. at 99. See also Mellon Exhibit 9. The total amount charged on a hourly basis prior to the commencement of Debtors' bankruptcy case was $1,262.50.

Mellon was also charged costs for postage, a property report, photocopying (.10 per page) and the filing and service of the mortgage foreclosure complaint. Transcript at 97; Mellon Exhibit 9. The total amount of these charges is $638.46.

Arguments

At the hearing, Mellon Bank asserted that it had met the burden for establishing the *prima facie* validity of its POC and, consequently, that the burden of production was on the Debtors. Instead of directly refuting this assertion with an

argument that Mellon Bank's POC did not satisfy the requirements for filing claims,[4] Debtors raised the following two substantive arguments in opposition to Mellon Bank's claim: (i) the Mortgage fails to satisfy the Statute of Frauds because it fails to sufficiently identify the Property; and (ii) even if the Mortgage satisfies the Statute of Frauds, the amount of Mellon Bank's claim is limited to $547.50. See Transcript at 6-8.

Analysis

I. Burden of Proof

In claims litigation, the burden of production lies with different parties at different times. In re Allegheny International, Inc., 954 F.2d 167, 173 (3d Cir. 1992). Initially, the burden lies with the claimant but pursuant to Fed.R.Bankr.P. 3001(f), a proof of claim filed in accordance with the rules constitutes "prima facie evidence of the validity and amount of the claim." Pagnotti v. Lehigh Valley Coal Sale Co. (In re Pagnotti), 269 B.R. 326, 331 (Bankr. M.D. Pa. 2001). If a claimant's proof of claim is *prima facie* valid, then the claimant has met the initial burden of going forward and the burden of production shifts to the debtor. North American Communications, Inc. v. Lacynski (In re North American Communications, Inc.), 154 B.R. 888, 893 (W.D. Pa. 1993). The debtor may overcome the presumption by filing an objection to the claim and presenting sufficient evidence to negate the *prima facie* validity of it. Id. If the debtor does so, the burden of production reverts to the claimant to prove its claim by a preponderance of the evidence. Sterling Packaging Corporation v.

[4] Rule 3001(f) states that a "proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Debtors could have argued that Mellon Bank had not filed its POC in "accordance with" Rule 3001(d). See infra n.5.

Systec Corporation (In re Sterling Packaging Corporation), 265 B.R. 701, 704-05 (Bankr. W.D. Pa. 2001). Although the burden of production is a shifting one, the burden of persuasion always remains on the claimant. In re Allegheny International, Inc., 954 F.2d 167, 173 (3d Cir. 1992). Explaining this concept, the Third Circuit Court of Appeals stated:

> [A] claim that alleges facts sufficient to support a legal liability to the claimant satisfies the claimant's initial obligation to go forward. The burden of going forward then shifts to the objector to produce evidence sufficient to negate the *prima facie* validity of the filed claim. .... The objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to provide the validity of the claim by a preponderance of the evidence.

Id. at 173-74.

At the hearing, Mellon Bank asserted that it had met the standard for establishing the *prima facie* validity of its claim and, consequently, that the burden of going forward shifted to the Debtors. Instead of directly refuting this point, Debtors argued and presented evidence in opposition to the substance of Mellon Bank's claim. See Transcript at 6-8. Debtors effectively raised the issue of whether the Mortgage satisfies the Statute of Frauds and also whether Mellon Bank overstated the amount of the claim. Debtors thus overcame the presumed validity and amount of the claim. Consequently, the burden of production shifted back to Mellon Bank to prove the validity of its claim by a preponderance of the evidence. Since Mellon Bank had the burden of production, it is unnecessary to rule upon Mellon Bank's assertion that its POC was entitled to *prima facie* validity.[5]

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[5] Pursuant to the requirement of Rule 3001(d), "[i]f a security interest in property of the (continued...)

II. Statute of Frauds

The Statute of Frauds, 33 P.S. §1, applies to transactions involving the transfer of an interest in land. American Leasing v. Morrison Company, 308 Pa. Super. 318, 323, 454 A.2d 555, 557 (1982). "Between a mortgagor and a mortgagee, a mortgage represents an interest in land[.]" Bozzi v. Greater Delaware Valley Savings and Loan Association, 255 Pa. Super. 566, 569, 389 A.2d 122, 124 (1978).

Transactions subject to the Statute of Frauds must be manifest in writing in order to make them enforceable. American Leasing, supra, 308 Pa. at 323, 454 A.2d at 557. "The property must be adequately described, the consideration must be set forth, and the agreement must be signed by the party to be charged." Id.

However, "the Statute [of Frauds] is *not* designed to prevent the performance or enforcement of oral contracts that in fact *were* made." Hessenthaler v. Farzin, 388 Pa. Super. 37, 42, 564 A.2d 990, 992 (1989)(emphasis in original). The purpose of the Statute "is to prevent the possibility of enforcing unfounded, fraudulent claims by requiring that contracts pertaining to interests in real estate be supported by written evidence signed by the party creating the interest." Id. at 37, 564 A.2d at 992-93. See also Sferra v. Urling, 328 Pa. 161, 168, 195 A. 422, 426 (1937) ("The real purpose to be attained by the statute of frauds is to prevent owners of land from having their interests taken from them or defeated by false testimony in support of oral agreements.").

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[5](...continued)
debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected." Since Mellon Bank attached a copy of the unrecorded Mortgage to its POC rather than a copy of the Recorded Mortgage, it is arguable that Mellon Bank's POC was not entitled to *prima facie* validity.

Debtors contend that Mellon Bank does not have a secured claim because the Property was not adequately described in the Mortgage as it appeared when they signed it.[6] In support of this contention, Debtors cite Hoffa v. Department of Public Welfare (In re Hoffa), 17 B.R. 699 (Bankr. E.D. Pa. 1982), and Palmeri v. Diomedo, 59 D. & C.2d 664 (1970).

In Hoffa, the debtor owned real estate which was encumbered by a lien belonging to the Department of Public Welfare ("DPW"). 17 B.R. at 700. The lien existed because the debtor, as a recipient of public assistance, was required to sign a reimbursement form authorizing the DPW to take a judgment by confession against her, which it did. Id. The reimbursement form provided that "this judgment [by confession] shall be a lien upon my property." Id. The relevant issue before the Pennsylvania Superior Court was whether the DPW's lien arose by virtue of a security interest. The Superior Court decided this issue in the negative, reasoning that "[o]ne of the criteria necessary to the creation of a valid security interest is specificity in the description of the collateral." Id. The Superior Court concluded that since the reimbursement form did not describe any particular piece of Debtor's real estate, it did not grant DPW a security interest in the debtor's property.

Hoffa is distinguishable from the instant case because the reimbursement form which the debtor in that case signed contained no reference whatsoever to any particular property of the debtor. It stated merely that a judgment by confession "shall be a lien upon my property." Id. at 700. In contrast, in the instant case, the Mortgage specifically states that a lien was created by the Mortgage and that the lien is on the Property owned by

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[6] As noted above on page 3, Debtor's address of "1748 S. 53rd Street, Philadelphia, PA" is on the Recorded Mortgage.

Donald and his former wife located in the city and county of Philadelphia.

In Palmeri, which is the other case Debtors cites as support for their position, the Court of Common Pleas ruled that a transaction failed to satisfy the Statute of Frauds because, inter alia, the writing in question did not "adequately identify or describe the property to be sold." 59 D. & C.2d at 667. The writing, which was a receipt, provided, in pertinent part, that plaintiffs received from the debtors a "$2000.00 deposit of property... – said property located in Lower Mt. Bethel Twp. Total Purchase price to be $78,000.00 in settlement to be on or before Dec. 1, 1970[.]" Id. at 666. The Common Pleas court reasoned that the writing was "vague, indefinite and uncertain" and failed to "locate the land itself or describe what portion was to be conveyed." Id. at 668. The Common Pleas court refused to allow parol evidence to be admitted to "define the writing's subject matter." Id.

The court's decision in Palmeri does not reveal whether the sellers owned more than one property in "Lower Mt. Bethel Twp." In two decisions by the Pennsylvania Supreme Court, that fact made a difference.

In Cohen v. Jones, 274 Pa. 417, 118 A. 362 (1922), decided almost fifty years before Palmari, the plaintiff entered into an agreement with the defendants for the purchase of:

> a certain lot of land owned by the female signer hereof, situate on East avenue, Worden Place, Harvey's Lake, Lake Township, Luzerne county, Pa., said plot being 50 feet in front on East avenue and 63 feet more or less in depth, and improved with a small frame dwelling house.

Id. at 418, 118 A. at 362. When the defendants refused to convey in accordance with the agreement, the plaintiff sued for specific performance. The defendant raised the Statute of Frauds as a defense, asserting that the property was not sufficiently described to satisfy

the statute. The Supreme Court disagreed. Significant to the court's decision was the fact that the land described in the agreement was the only land owned by the seller on "East Avenue, Worden Place, Harvey Lake, Lake Township, Luzerne County, PA." The Supreme Court reasoned:

> In this case, the description designates the property as a certain lot owned by the woman signer and is complete in description, except as to the precise location on East Avenue, which is given as Worden Place, thus fixing the property at a definite part of the avenue. We have the precise locality thus confined within narrow limits. ... It being also conceded that Mrs. Jones owns but one piece of land in the particular locality, this fact would tend to eliminate any difficulty in identifying the property.

Id. at 419-20, 118 A. at 362-62.

In Suchan v. Swope, 357 Pa. 16, 53 A.2d 116 (1947), also decided before Palmeri, the plaintiffs sought specific performance of a contract with the defendant for the sale of land. The contract between the parties stated as follows:

> March 30, 1945
> Received of Anna Suchan Fifty ($50.00) dollars first payment on my farm the balance thirty nine fifty 3950.
> Ray Swope.

The defendant argued that the plaintiffs were not entitled to specific performance because the contract's reference to "my farm" insufficiently described the property being sold. The Pennsylvania Supreme Court disagreed, concluding that the phrase "my farm" was sufficient to identity the property since the seller owned only one farm and the parties "well

knew" what was intended by that phrase. The Supreme Court declared:

> It is true, of course, that a contract for the sale of land is unenforceable if the property is not designated with sufficient definiteness to determine what is intended to be conveyed, nor can parol evidence be accepted to overcome the failure of the writing to locate the subject of the sale. But the ancient maxim still prevails: *Certum est quod certum reddi potest*, and, as was said in Peart v. Brice, 152 Pa. 277, 279, 25 A. 537, 'parol evidence to describe the land intended to be sold is one thing, and parol evidence to apply a written description to land is another and very different thing, and for that purpose is admissible.' **The designation 'my farm,' under the circumstances of the present case, is clearly sufficient to satisfy the statute. Ray owned only one farm and the parties well knew that what was intended by 'my farm' was the farm next to which plaintiffs had lived for many years and for the purchase of which they had long been in negotiation with him** ... The identity of the property is certain and all that is necessary is to refer to the deed by which Ray acquired title in order, purely for conveyancing purposes, to ascertain the metes and bounds. Our reports are replete with cases in which specific performance was granted, declarations of trust held valid, or other relief granted, where the description of the property involved was not more definite or detailed than that in the present instance[.]

357 Pa. at 19-20; 53 A.2d at 118 (emphasis added). Since the description "my farm" was sufficient for the Statute of Frauds,[7] this Court concludes that under the facts of the instant case, the Mortgage's identification of the Property as being located in Philadelphia in Philadelphia County is also sufficient. The Loan documentation clearly reveals that the Loan was in the form of a home equity account and that it was secured by a mortgage on

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[7] See also Merwarth v. Townsend, 455 Pa. 475, 476-479, 317 A.2d 275, 275-277 (1974) (ruling that a written agreement which described property as "a tract of land containing approximately 5 or 6 acres 'whereupon the dwelling and all other buildings are located'"and incorporated a survey of the land therein was capable of specific performance); Yinger v. Springer, 452 Pa. 66, 305 A.2d 19 (1973) (allowing parol evidence to show that a description of property as "the property known as R D 1 New Cumberland Jacob Springer's 80 acres more or less wich (sic) will exclude 7 acres of the 87 acres more or less" was sufficiently definite to be identifiable).

Debtor's residence. Based on this documentation and Donald's testimony, this Court concludes that the parties "well knew" that the Mortgage referred to Debtor's residence at 1748 S. 53rd Street in Philadelphia. It is the only property which Debtor owned that fits the description in the Mortgage. See Shaw v. Cornman, 271 Pa. 260, 114 A. 632 (1921) (holding that the land was sufficiently identified so that with a minimum of external evidence it could be found without a possibility of contradiction or uncertainty). But see In re Poteat, 176 B.R. 734, 737-738 (Bankr. D. Del. 1995) (since debtors owned three properties lots in Hidden Acres, Delaware, the mortgage's identification of the property as "all that certain property situated in Town of Frankford, Sussex County, Delaware" was "grossly inadequate" in that it was unclear whether all, two or just one of the property lots was encumbered by the mortgage).

Under the facts of this case, it would be inequitable to allow Donald to evade his obligation under the Note and Mortgage and contrary to the purpose to be served by the Statute of Frauds. The Court is convinced based on the evidence in this case and Donald's demeanor on the witness stand that he granted the Mortgage on his residence at 1748 S. 53rd Street in Philadelphia. The Loan Documents clearly reveal that the Loan was to be secured and was secured by a lien on his residential property.

III. Attorney's Fees and Costs

Defendants contend that Mellon Bank's claim for attorney's fees is limited by the terms of the Mortgage. The Mortgage states, in pertinent part:

> In the event of any ...default under the terms of the Agreement, or in the event of any default under the terms of any agreement securing repayment of, or relating to, any portion of the indebtedness, or in the event of default under the terms of any other mortgage or instrument creating a lien on the Mortgaged

> Property, Mortgagee may, in addition to exercising any rights which Mortgagee may have under the terms of any agreement securing repayment of, or relating to, any portion of the Indebtedness, or otherwise provided by law, foreclose upon the Mortgaged Property by appropriate legal proceedings and sell the Mortgaged Property for the collection of the Indebtedness, **together with costs of suit and an attorney's commission of the lesser of (A) twenty percent (20%) of the total Indebtedness, or Five Hundred Dollars ($500), whichever is the larger amount, or (B) the maximum amount permitted by law.**

Mellon Exhibit 2 (emphasis added). Based on this passage, Mellon Bank is entitled to its costs of suit and an attorney's commission equal to the lesser amount of: (i) twenty percent (20%) of the "total Indebtedness" or five hundred dollars ($500), whichever is the larger amount; or (ii) the maximum amount permitted by law.[8]

Under the Mortgage, "Indebtedness" is defined as "all sums due or which may become due hereafter under the Agreement[.]" The "Agreement" is defined as the agreement between Mellon Bank, Debtor and his former wife, dated March 30, 1987 which means the Note. The principal amount and interest due under the Note is $7,884.48.[9] Twenty percent (20%) of this amount is $1,576.90, which is larger than $500.

The maximum amount of attorney's fees which Mellon is "permitted by law" is governed by § 406 of Act 6. See In re Schwartz, 68 B.R. 376, 381 (Bankr. E.D. Pa. 1986) (through the language of the parties' agreement, "the debtors have granted the lender the

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[8] Mellon Bank's counsel also cited this provision of the Mortgage but incorrectly quoted it as entitling Mellon to the *larger* of the maximum amount permitted by law or 20% of the total indebtedness or $500. See Transcript at 106.

[9] Mellon Bank included $41.15 in late fees through 2/19/04 in the amount of its POC; however, Mellon Bank failed to identify any provision in the Note or Mortgage entitling it to such fees. This Court is unaware of any such provision. Consequently, the late fees are deducted from the amount due.

maximum right to collect attorney's fees permitted under Act 6; *i.e.*, the right to collect reasonable fees, actually incurred, subject to any restrictions in 41 Pa. Stat. § 406."). Section 406 provides, in pertinent part:

> With regard to residential mortgages, no residential mortgage lender shall contract for or receive attorney's fees from a residential mortgage debtor except as follows:
>
> (1) Reasonable fees for services included in actual settlement costs.
>
> (2) Upon commencement of foreclosure or other legal action with respect to a residential mortgage, attorney's fees which are reasonable and actually incurred by the residential mortgage lender may be charged to the residential mortgage debtor.
>
> (3) Prior to commencement of foreclosure or other legal action attorneys' fees which are reasonable and actually incurred not in excess of fifty ($50) provided that no attorneys' fee may be charged for legal expenses incurred prior to or during the thirty-day notice period provided in section 403 of this act.

41 P.S. § 406.[10] Pursuant to subsection (3) of this provision, Mellon Bank cannot charge

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[10] Section 406 divides a residential mortgage lender's right to pass on its attorney's fees to the borrower into three distinct time periods. My colleague, Bankruptcy Judge Fox, explained these time periods, stating:

> First, before a 30 day notice is sent (and during the 30 day period), no legal expenses whatsoever may be charged. This initial period is designed to minimize costs to the borrower and maximize the potential for a cure of the default. If the borrower has not cured the default within the 30 day period, reasonable and actually incurred legal fees may be assessed, but no in excess of $50.00 during the period prior to the commencement of foreclosure or other legal action. During this second period, the legislature recognized that some legal work would have to be done to prepare a case for court, but strictly limited the amount of legal expense it considered legitimate prior to foreclosure. Finally, if a foreclosure or other equivalent action has been instituted, reasonable fees may be

(continued...)

or receive an attorney's fee for legal expenses incurred prior to or during the thirty-day notice period provided in section 403 of Act 6. Accordingly, Mellon Bank cannot recover the $100.00 which it was charged by the Grenen Firm for preparation of the Act 6/Act 91 notices under Pennsylvania law.

Subsection (2) of §406 governs a mortgagee's recovery of attorney's fees after a foreclosure suit is commenced. After the commencement of such a suit, the mortgagee is permitted to charge the residential mortgage debtor for attorney's fees which are "reasonable and actually incurred by the residential mortgage lender." Reviewing the Grenen Firm's invoice statements, this Court concludes that such fees amount to *at least* $1,600.00 See Mellon Exhibit 9. Included in this sum are the following entries from the Grenen Firm's invoices:[11]

11/17/2003 $320.00
Court Appearance - Scheduling Conf.
2 hours at $160.00/hr. = $320.00

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[10](...continued)
assessed.

In re Schwartz, 68 B.R. at 383. See also Flores v. Shapiro & Kreisman, 246 F. Supp.2d 427, 430-31 (E.D. Pa. 2002) (ruling that after a foreclosure suit is commenced, it is "permissible for [a residential mortgage lender] to contract for or receive fees in excess of $50 that were incurred pre-foreclosure.").

[11] The Grenen Firm's invoice contains one additional hourly charge for $39.00 for work performed on 2/25/2004 which is post-petition. This charge is not included in the Court's calculation and is not listed above.

12/4/2003 $227.50

Preparation of Pre-Trial Statement
1.75 hours at $130.00/hr. = $227.50

1/23/2004 $65.00

Telephone call to L. Kenny regarding trial and necessary exhibits; telephone call to settlement master regarding postponement of settlement conference; e-mail to L. Kenney regarding same
.5 hour at $130.00/hr. = $65.00

1/23/2004 $312.00

Court Appearance - Settlement Conference
2.4 hours at $130.00/hr. = $312.00

1/26/2004 $65.00

E-mails from L. Kenney regarding loan history and trial; telephone call and e-mails to L. Keeney regarding same; review payment history
.5 hour at $130.00/hr. = $65.00

1/27/2004 $26.00

Reviewed revised payment history

1/28/2004 $65.00

Telephone call to L. Keeney regarding loan history; telephone call from H. Chambers of the complex litigation center regarding settlement conference; e-mail to L. Keeny (sic) regarding same
.5 hour at $130.00/hr. = $65.00

1/29/2004 $78.00

Prepare for trial; telephone call from Philadelphia Complex Litigation Center regarding postponement of trial; e-mails to L. Kenney regarding same
.6 hour at $130.00/hr. = $78.00

2/5/2004 $26.00

Review Scheduling Order; E-mail to L. Kenney regarding same
.2 hour at $130.00/hr. = $26.00

2/11/2004 $13.00
E-mail to L. Kenney regarding status conference
.10 hour at $130.00/hr. = $13.00

2/17/2004 $65.00
Telephone call to M. Jeffery, Esquire regarding settlement; Letter to M. Jeffery, Esquire regarding basis of foreclosure (sic)
.5 hour at $130.00/hr. = $65.00

TOTAL: $1,262.50

Id. The Court has no reason to conclude that these fees are not reasonable. In addition to these hourly fees totaling $1,262.50, the Grenen Firm also charged Mellon Bank a flat fee of $1,250.00 for filing the mortgage foreclosure action and $800.00 for moving for summary judgment in the action. While Debtor disputes the "reasonableness" of these flat fees (totaling $2,050.00), there is no doubt that *at least* $337.50 of these two charges is reasonable.[12] That amount equals less than 3 hours at the rate of $130.00 per hour for preparing the foreclosure complaint and moving for summary judgment. Three hours for preparing a foreclosure complaint and moving for summary judgment is clearly a reasonable amount of time. Consequently, Mellon Bank would be permitted under Pennsylvania law to contract for or receive an attorney's fee from Debtors of at least $1,600.00 ($1,262.50 [total hourly charges] plus $337.50 [portion of flat fee] equals $1,600.00).

While Mellon Bank might have incurred reasonable and actual attorney's fees of more than $1,600.00, the Court need not reach that issue. Mellon Bank's attorney fee or commission is capped under the terms of the Mortgage at the lesser of: (i) $1,576.90 (20%

[12] The amount of $337.50 is used simply because the total of $1262.50 (the total hourly charges) plus $337.50 is more than $1,585.13 which is 20% of the Indebtedness under the Mortgage.

of the Indebtedness); or (ii) $1,600.00 or more (the maximum amount of fees permitted by law). Consequently, Mellon Bank is limited to an attorney's fee of $1,576.90.

Mellon Bank is also entitled to the "costs of suit." According to the Grenen Firm's invoices, Mellon Bank incurred a total of $638.46 in such costs. Upon review of the Grenen Firm's invoices, the Court finds these costs are reasonable. Consequently, the amount of Mellon Bank's secured claim is $7,884.48 (principal and interest) plus $1,576.90 (attorney's fee) plus $638.46 (costs of suit) for a total of $10,099.84.

Summary

Debtor's objection to Mellon Bank's POC is granted in part and denied in part. Mellon Bank shall be allowed a claim in the amount of $10,099.84.

By the Court:

____
Stephen Raslavich
United States Bankruptcy Judge

Dated: October 20, 2004

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE	: CHAPTER 13
	:
DONALD SMITH AND MARILYN SMITH	:
	:
DEBTOR(S)	: BANKRUPTCY NO. 04-12387-SR

ORDER

AND NOW, upon consideration of the Objection ("Objection") of the Debtors to the proof of claim filed by Mellon Bank and after a hearing with notice, it is hereby **ORDERED** that Debtor's Objection is **granted in part** and **denied in part**. Mellon Bank shall have an allowed secured claim in the amount of $10,099.84.

BY THE COURT:

STEPHEN RASLAVICH
UNITED STATES BANKRUPTCY JUDGE

DATED: October 20, 2004

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