UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re NELSON AGBAYANI AGCAOILI and ANITA DALIGCON AGCAOILI, Debtors.	Case No. 00-04514 Chapter 13 Re: Docket No. 133

MEMORANDUM DECISION ON
DEBTORS' MOTION FOR CONTEMPT AND SANCTIONS

The debtors in this chapter 13 case seek sanctions against the holder of the first mortgage on their residence, alleging that the mortgagee improperly demanded payment of amounts that were not owed under the mortgage. The lender's servicing agent has admitted that its payoff demand was incorrect. Astonishingly, the lender's agent has admitted that it could not substantiate some of the amounts which it demanded and that its computerized accounting systems do not permit it to account properly for payments made in a chapter 13 case. Based on these shocking admissions, I will grant the debtors' motion.

The debtors commenced this chapter 13 case on December 29, 2000. At the time, the debtors were in default of the first mortgage on their residence, and the lender's servicing agent, New Century Mortgage Company ("New Century"),

had commenced foreclosure proceedings. U.S. Bank, N.A., as Trustee, successor by merger to Firstar Bank, N.A., successor in interest to Firstar Bank Milwaukee, N.A., as Trustee for Salomon Brothers Mortgage Securities VII, Inc., Mortgage Pass-Through Certificates Series 1999-NC1, is the present owner and holder of the note and mortgage ("mortgagee").

On January 25, 2001, New Century filed a proof of claim for $435,778.28, including $29,945.05 which was in arrears at the petition date.

The debtors filed a chapter 13 plan which provided that they would continue to make their regular contractual payments directly to the lender and that they would make monthly payments to the standing chapter 13 trustee which would be used to cure the mortgage arrearage and pay other creditors. "Cure and maintenance plans" such as this one are very common. New Century did not object to the plan. The plan was confirmed on June 8, 2001.

On July 1, 2001, Ocwen Federal Savings Bank, FSB ("Ocwen") became the servicing agent for the lender. New Century provided certain information to Ocwen about the loan. Among other things, New Century told Ocwen that there was a "negative escrow balance" of $4,746.02. Residential mortgagees generally require borrowers to make monthly payments to cover insurance and property taxes on the mortgaged property. The lender holds these

payments in an escrow account and uses them to pay insurance premiums and taxes when due. A negative escrow balance can arise if the amounts paid out of the escrow account exceed the amounts credited to that account. New Century gave Ocwen no information, however, to substantiate the negative escrow balance.

The arrearage was paid in full by about February 2004. The debtors had some difficulty in keeping their regular payments current during 2004. The debtors decided to refinance their residence so they could pay off their existing mortgage and the remaining amount due under their chapter 13 plan. The order approving the refinancing was entered on December 23, 2004.

Ocwen submitted a payoff demand, dated December 27, 2004, to the escrow holder handling the refinancing transaction. The demand asserted that the total amount owed under the mortgage was $432,695.07. Ocwen now admits that this figure was wrong for two reasons. First, the payoff demand included the negative escrow balance which Ocwen knew or should have known it could not substantiate. Second, "the computer system used by Ocwen in managing the loan" apparently does not permit Ocwen to apply properly arrearage payments received from a chapter 13 trustee.

The debtors believed that Ocwen's demand was incorrect and that only $417,628.30 was owed. Accordingly, after the refinancing transaction closed

on December 30, 2004, the debtors' attorney mailed a check to Ocwen for the amount which the debtors believed was owed, $417,628.30, and requested prompt action to reconcile the difference. Ocwen received this check on January 10, 2005. The debtors were unsatisfied with the pace of Ocwen's effort to substantiate its payoff demand. Therefore, the debtors filed the instant motion on January 27, 2005.

The court held a series of hearings on the motion. The continuances enabled the parties to narrow their differences, but areas of disagreement remain.

The parties agree that the unpaid principal balance of the loan is $418,959.19 and that interest is owed through December 30, 2004, in the amount of $3,209.77.

The debtors claim that interest should not accrue after the refinancing closed on December 30, 2004, even though the lender was not actually paid until January 10, 2005. The debtors claim that this is consistent with standard industry practice, but they offer no admissible evidence to support this assertion. As a matter of law, interest runs until the debt is paid or a proper tender of payment is made. There is no evidence that a proper tender was made before Ocwen received the money on January 10, 2005. Interest therefore accrues until January 10, 2005.

There is a further dispute about the rate at which interest accrues after

December 30, 2004. The debtors argue in favor of a per diem rate of $106.90. The debtors reach this result by multiplying the contract rate of interest, 9.50%, by the principal balance, then dividing by twelve (to derive a monthly rate), then dividing by the number of days in the month in question. This calculation is flawed in that it yields different results depending on the month in question. Ocwen argues for a per diem rate of $110.56, which equals the annual rate of interest multiplied by the principal balance and divided by 360. The use of a 360 day year overstates the actual interest accrual and is not authorized by the note or mortgage. The correct per diem rate is $109.04, which equals the annual rate of interest multiplied by the principal balance and divided by 365.

The debtors object to the way in which Ocwen reversed certain charges which it now admits it cannot substantiate or has decided to waive. Although Ocwen's accounting and its explanations have changed over time and have been unnecessarily confusing, it now appears that Ocwen's accounting for the balance owed is correct.

The debtors argue that Ocwen should be required to pay their reasonable attorneys' fees in addressing this dispute. I agree. This case has uncovered truly shocking facts about Ocwen's behavior. In particular, Ocwen has admitted that it demanded repayment of a debt which it could not completely

substantiate. Ocwen has never been able to prove that the "negative escrow balance" included in its original demand had any basis. Ocwen has admitted that it cannot properly apply payments received in chapter 13 cases. Several hundred thousand chapter 13 cases are filed every year. Most of these cases probably involve a defaulted home mortgage. It is simply astonishing to hear that a mortgage servicing company is not capable of dealing with a situation which is so common.

Debtors have a duty to pay their just debts. Creditors are entitled to demand payment, but they have a duty to demand only that which is owed and to provide substantiation for their demands upon request. Ocwen breached its duty and should pay the attorneys' fees reasonably incurred by the debtors as a consequence pursuant to Hawaii Revised Statutes § 607-14. The debtors seek attorneys' fees and costs in the amount of $9,611.40. Ocwen does not challenge the reasonableness of this amount.

The debtors contend that Ocwen's false demands and false reports to credit bureaus reduced their creditworthiness and probably increased the interest rate charged on the refinancing loan. This claim is plausible but not proven.

Ocwen owes the debtors $2,879.74 , calculated as follows:

Principal	$418,959.19
Interest to 12/30/2004	3,209.77
Interest after 12/30/2004 [1]	1,090.40
Ocwen's costs incurred	1,100.60
Debtors' attorneys' fees	-9,611.40
Paid to lender	-417,628.30
Due to debtors	$2,879.74

Judgment shall enter in favor of the debtors and against Ocwen and the mortgagee declaring that the mortgage has been paid and satisfied in full, that any funds held by the refinancing escrow shall be disbursed to the debtors, and that Ocwen and the mortgagee owe the debtors $2,879.74.

DATED: Honolulu, Hawaii, August 3, 2005.

[1] The interest after 12/30/04 is calculated by multiplying the per diem rate of $109.04 by 10 days.