UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ANTHONY J. WEIR DONNA L. WEIR	CASE NO. 02-66376
Debtors	Chapter 13

APPEARANCES:

SCHILLER & KNAPP, LLP Attorneys for Movant 950 New Loudon Road Latham, NY 12110	WILLIAM B. SCHILLER, ESQ. Of Counsel
EDWARD J. FINTEL & ASSOCIATES Local Counsel for Movant 430 E. Genesee St., Ste. 205 P.O. Box 6451 Syracuse, NY 13217-6451	MICHELLE MARANS, ESQ. Of Counsel
PETER N. TALEV, ESQ. Attorney for Debtors 201 Second St. Liverpool, NY 13088	

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion ("Motion") filed on behalf of Washington Mutual Bank, F.A. ("Washington Mutual") on January 4, 2005, seeking reconsideration of an Order signed by the Court on May 21, 2003 ("May 2003 Order"). The Order (Docket #17) provides that the claim of Washington Mutual for arrears on its mortgage be reduced to $9,927.27. Opposition to the Motion was filed by Anthony and Donna Weir (the "Debtors") on

January 27, 2005.

The Motion was heard at the Court's regular motion term in Syracuse, New York, on February 15, 2005, and adjourned to March 22, 2005. The Court heard oral argument from both parties, and the Motion was again adjourned to April 19, 2005, for the submission of further memoranda of law. At the hearing on April 19, 2005, the Court indicated that it would take the matter under submission.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(B) and (O).

FACTS

The Debtors filed a voluntary petition, as well as a plan pursuant to chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), on October 21, 2002.[1] Washington Mutual is listed in the Debtors' schedules as a secured creditor at an address of "Washington Mutual

[1] A review of the Court's files confirms that the Debtors previously filed a chapter 13 petition on October 22, 1992 (Case No. 92-63291), which was dismissed for a default in the plan on September 4, 1997. On July 22, 1998, the Debtors filed a second chapter 13 petition (Case No. 98-64743), which was closed on September 25, 2000, after Fleet Mortgage Group, Inc., predecessor to Washington Mutual Home Loans, obtained relief from the automatic stay as a result of the Debtors' apparent failure to comply with a conditional order. On October 26, 2000, the Debtors filed a third chapter 13 petition (Case No. 00-65271), which was dismissed on January 30, 2002, for a default in their plan. The Debtors were represented in all four cases, including the one now pending in this Court, by Peter N. Talev, Esq. ("Talev")

Home Loans, c/o Gullace & Weld, 500 First Federal Plaza, Rochester, New York 14614." The Debtors' original plan, filed simultaneously with the petition, provided for payment to Washington Mutual of $19,176.90 in prepetition mortgage arrears at a rate of interest of 9.0% over 59 months. By letter dated October 21, 2002, from Gullace & Weld, Talev was apprized that the mortgage arrears amounted to $25,0260.60. *See* attachment to Debtors' Memorandum of Law, filed April 29, 2005 (Docket #53). Talev received additional correspondence from Gullace & Weld dated November 21, 2002, December 3, 2002 and December 23, 2002, concerning the Debtors' escrow account and the current monthly payment amount. *Id.*

In the interim, on November 27, 2002, the law firm of Steven J. Baum, P.C. (the "Baum firm) filed a Notice of Appearance on behalf of Washington Mutual (Docket #4). On that same day, Baum filed a motion for relief from the automatic stay on Washington Mutual's behalf in connection with the Debtors' residence located at Rural Route #2, Gunther Road, Central Square, New York (the "Premises"). Thereafter, a letter from the Baum firm was filed on February 24, 2003, withdrawing the motion for stay relief.

The Debtors filed an amended chapter 13 plan on February 5, 2003 (Docket #11), which listed mortgage arrears of $14,823.75 owed to Washington Mutual. However, the Order confirming that plan, dated May 2, 2003, fixes the arrears at $24,977.52, which was the amount set out in the proof of claim filed by Washington Mutual on February 13, 2003, payable with interest at a rate of 9.0% (Docket #16).

Attached to Washington Mutual's proof of claim as "Exhibit A" is an itemization of its claim. There is a request within the proof of claim that all payments be forwarded to Washington Mutual's Bankruptcy Department, 11200 W. Parkland Avenue, Milwaukee, WI 53224, which

is the address listed on the face of the proof of claim as being "Where all Notices Should be Sent." However, according to "Exhibit A," all correspondence and court pleadings were to be forwarded to McCalla, Rayner, Patrick, Cobb, Nichols & Clark, National Bankruptcy Department, 1544 Old Alabama Road, Roswell, Georgia 30076-2102 (the "McCalla firm").

Talev received correspondence from the McCalla firm on February 13, 2003, notifying him that the prepetition arrears on the Debtors' mortgage amounted to $24,977.52, the amount set forth in Washington Mutual's proof of claim. Talev also received letters from the McCalla firm dated February 25, 2003 and March 11, 2003 regarding the Debtors' mortgage with Washington Mutual. *See* attachment to Debtors' Memorandum of Law, filed April 29, 2005.

On April 2, 2003, prior to the entry of the order confirming the February plan, the Debtors filed and served a motion to determine the claim of Washington Mutual for arrearages as being only $9,927.27 (Docket #13). According to the Affidavit of Mailing (Docket #15), also filed on April 2, 2003, the motion was served on the McCalla firm, "Attorneys for Debtors, Washington Mutual Bank, 1544 Old Alabama Road, Roswell, Georgia 20076." The motion was unopposed and on May 21, 2003, the Court signed the May 2003 Order, granting the relief requested by the Debtors (Docket #17). There is no evidence that the signed May 2003 Order was ever served on either Washington Mutual or the McCalla Firm, or on Baum. However, Talev indicates that a copy of a letter addressed to the Court and dated May 12, 2003, along with a copy of the proposed order, was mailed to the McCalla Firm.[2] *See* attachment to the Debtors' Memorandum of Law, filed April 29, 2005). It is the May 2003 Order that is the subject of the Motion herein.

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[2] The letter contains no reference to either Washington Mutual's loan number or the McCalla Firm's file number, as referenced in the prior correspondence from the McCalla Firm to Talev. The letter simply identifies the Debtors' case number.

On June 4, 2003, following confirmation of the February amended plan, the Debtors filed a second amended chapter 13 plan in which the arrearage claim of Washington Mutual is now fixed at $9,927.27, payable at an interest rate of 6% (Docket #19). However, no motion was made seeking the Court's approval of that amended plan until September 23, 2003. In that motion (Docket #20), the Debtors indicated that the basis for the modification was "to allow for the reduction of the secured claim for arrears of Washington Mutual Home Loans" based on the May 2003 Order. The Certificate of Service for the motion, dated September 23, 2003, indicates service of the motion on September 22, 2003. However, there is nothing in the Certificate to indicate on whom it was served (Docket #21). The chapter 13 trustee filed opposition to the September 23rd motion on October 13, 2003. Although originally scheduled to be heard on October 21, 2003, the motion was continually adjourned to the next three chapter 13 calendar dates in Syracuse, New York, namely November 18, 2003, December 16, 2003, and January 20, 2004 without disposition.

In the interim, on January 15, 2004, the Debtors filed another motion to modify their plan (Docket #24), apparently superseding their earlier motion of September 23, 2003. This most current plan again provided for payment to Washington Mutual of $9,927.27 at a rate of interest of 6%. According to the Certificate of Service, this motion was served on "Washington Mutual Home Loans, c/o Gullace & Weld, 500 First Federal Plaza, Rochester, New York 14614. On March 24, 2004, the Debtors filed yet another chapter 13 plan (Docket #30), without any notice or motion to modify. On December 10, 2004, the Court signed an Order granting the Debtors' motion to modify the plan filed on January 15, 2004 (Docket #37), which reflects the monthly payment of $613, as set forth in the amended plan filed on March 24, 2004, rather than the

monthly payment of $500 as set forth in the amended plan filed and served on or about January 15, 2004.

Subsequently, the law firm of Schiller & Knapp filed a motion on October 20, 2004 (Docket #32), on behalf of Washington Mutual seeking relief from the automatic stay pursuant to Code § 362(d), in which it alleged that the Debtors were in default on their mortgage payments postpetition, beginning with the payment due on June 1, 2004. In addition to $3,162.05 in alleged postpetition arrears, the motion also asserts prepetition arrears of $20,967,28. The Debtors filed a response to the motion on November 8, 2004 (Docket #35), denying any default and providing proof of payments between June and October 2004. A hearing on the motion was held on November 16, 2004, and an evidentiary hearing was scheduled for December 20, 2004, which was subsequently adjourned several times. In the interim, Schiller & Knapp filed the Motion which is presently under consideration.

ARGUMENTS

It is the position of Washington Mutual that the Debtors' motion, filed April 2, 2003, seeking to reduce its claim was not served on it pursuant to Rule 7004(h) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") or on the Baum firm, its attorney of record in April 2003. Washington Mutual contends that Local Rule 2091(b) of this Court provides that "[w]ithdrawal of other attorneys of record may be accomplished by providing written notice to the court and to all creditors and interested parties." In this case, there is no evidence that the Baum firm provided written notice of withdrawal of its representation of Washington Mutual.

In response, the Debtors question why it is that Baum is not making the motion presently under consideration if, as it asserted, the Baum firm is Washington Mutual's attorney of record.

The Debtors argue that they served their motion on the McCalla firm in April 2003 in accordance with the instructions found in Washington Mutual's proof of claim and "Exhibit A," attached thereto. Debtors' counsel alleges that someone in his office contacted the Baum firm and was apprized that it no longer represented Washington Mutual and that all notices should be forwarded to the McCalla firm. *See* Debtors' Supplemental Memorandum of Law, filed April 15, 2005, at ¶ 3. According to Debtors' counsel, his office also contacted Gullace & Weld and was directed to forward any notices to the McCalla firm. *Id.* Debtors' counsel also points out that there has been no assertion on behalf of Washington Mutual that the McCalla firm did not receive the motion in April 2003.

The Court notes that in opposing Washington Mutual's motion, the Debtors raise arguments concerning the fact that a party seeking to revoke an Order of Confirmation must do so within 180 days of its entry and then only if fraud is established. However, Washington Mutual's motion does not seek revocation of the Order of Confirmation. Rather, it is asking that the Court vacate the May 2003 Order reducing its claim for prepetition arrears.

DISCUSSION

Code § 502(j) expressly authorizes reconsideration of a claim that has been disallowed for cause. *See In re Rayborn*, 307 B.R. 710, 720 (Bankr. S.D. Ala. 2002); *In re Gomez*, 250 B.R. 397, 399-400 (Bankr. M.D. Fla. 1999). This authority extends postconfirmation. *See In re*

Sheffield, 281 B.R. 67, 71 (Bankr. S.D. Ala. 2001). Indeed, the courts have held that "under § 502(j) and Federal Rule of Bankruptcy Procedure 3008, a claim may be reconsidered at any time before the case is closed." *Gomez*, 250 B.R. at 400 (citations omitted); *see also In re Adams*, 275 B.R. 274, 281 (Bankr. N.D. Ill. 2002) (noting that "[m]ost courts have held that the only bar to reconsideration of a claim under § 502(j) is closure of the bankruptcy case").

Bankruptcy judges have broad discretion in deciding whether cause exists to allow reconsideration of a claim. *Id.* at 280; *In re Willoughby*, 324 B.R. 66, 73 (Bankr. S.D. Ind. 2005). "Cause" is not defined in the Code or in the Rules. Some courts have applied the standard set forth in Fed.R.Civ.P. 60(b) in the situation where the claim was allowed or disallowed after contested litigation. *See Gomez*, 250 B.R. at 400 (citations omitted). Others have elected to apply that standard only if the motion for reconsideration was filed more than ten days after the order allowing or disallowing the claim was entered; otherwise, Fed.R.Bankr.P. 9023, which incorporates Fed.R.Civ.P. 59, is applied. *See, e.g. Ashford v. Consolidated Pioneer Mortgage (In re Consolidated Pioneer Mortgage)*, 178 B.R. 222, 227 (9th Cir. BAP 1995).

In *Willoughby,* the court observed that "§ 502(j) and Rule 3008 are unnecessary if Rule 9023 and 9024 were intended to apply mechanically to reconsider claims." *Willoughby*, 324 B.R. at 73. The court in *Willoughby* elected to consider the totality of circumstances in determining whether cause existed and whether equity required the prior allowance or disallowance to be adjusted. In this regard, the court noted that

> [i]n examining the totality of the circumstances, the Court may also consider any relevant factor to determine whether equity warrants reconsideration of the claim, including the reason for, and effect of, any delay in seeking reconsideration of the claim; the detrimental or beneficial effect of reconsideration on other parties; whether any party has altered its position in reliance on

> the Court's previous judgment or confirmation order, the effect of reconsideration on administration of the case or like case; and the movant's good faith.

Id. at 74.

Washington Mutual takes the position that "cause" exists for reconsideration of its claim based on the argument that it did not receive adequate notice of the Debtors' motion in April 2003, which fixed its arrearage claim at $9,927.27. In this regard, Fed.R.Bankr.P. 7004(h) requires that service on an insured depository institution, which Washington Mutual allegedly is, in a contested matter, be made by certified mail addressed to an officer of the institution unless "the institution has appeared by its attorney, in which case the attorney shall be served by first class mail." Fed.R.Bankr.P. 7004(h)(1).

In addition, Washington Mutual takes the position that having filed a Notice of Appearance, the Baum firm should have been served with the notice and motion seeking to reduce the arrearage claim of Washington Mutual. That Notice of Appearance indicated that the Baum firm was appearing on behalf of Washington Mutual Home Loans, Inc., successor in interest by merger to Fleet Mortgage Corp. The Notice of Appearance is signed by Brian B. Kumiega, Esq., on behalf of Steven J. Baum, P.C. The Notice of Appearance was neither signed nor acknowledged by anyone at Washington Mutual Home Loans or by its successor by merger, Washington Mutual Bank, F.A., the movant herein.

"An agent's statement that he has been empowered to accept process is insufficient, standing alone, to establish authorization to receive process." *In re Reisman*, 139 B.R. 797, 800 (Bankr. S.D.N.Y. 1992) (citations omitted). In *Reisman* the court concluded that there was no explicit authorization given to counsel to accept service on behalf of the corporate creditor.

Instead, the court concluded that counsel had implicitly been authorized to accept service based on counsel's active involvement in the case on the creditor's behalf.

In the matter before this Court, the Baum firm was involved only with the November 2002 motion for relief from the automatic stay filed on behalf of Washington Mutual Home Loans, which was subsequently withdrawn. On the other hand, the McCalla Firm was given explicit authorization by virtue of the proof of claim filed by Washington Mutual to accept correspondence and court pleadings concerning the Premises. At the same time, the proof of claim also requested that Washington Mutual be sent any notices at its Bankruptcy Department 11200 W. Parkland Avenue, Milwaukee, WI 53224.

In this case, the McCalla firm was served with a copy of the April 2003 notice and motion seeking to reduce the claim of Washington Mutual; Washington Mutual was not. According to Talev, the McCalla firm also received a copy of the Debtors' proposed order in connection with the motion, which referenced the Debtors' bankruptcy case but made no reference to Washington Mutual's loan number or the McCalla firm's file number. Courts have expressed some reluctance to read excessive strictness into the notice provisions of the Bankruptcy Rules. What is required for due process is that the notice provided be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Court concludes, under the circumstances, including the mandate of Fed.R.Bankr.P. 7004(h)(1), that service of the motion on the McCalla firm was reasonably calculated to provide notice to Washington Mutual based on not only the provision in Exhibit "A" attached to the proof of claim, but also given the correspondence from the McCalla firm between February and March 2003

which concerned the amount of arrears due on Washington Mutual's mortgage as set forth in its proof of claim.

Having concluded that Washington Mutual received sufficient notice of the Debtors' April 2003 motion to reduce its claim, the Court is confronted with the question of whether Washington Mutual may still be entitled to reconsideration of the disallowance of a portion of its claim pursuant to Code § 502(j). As discussed above, Fed.R.Bankr.P. 9024 does not require that the relief be requested within a year of the Order and the courts have indicated that a motion pursuant to Code § 502(j) is appropriate as long as the case has not been closed. Furthermore, the Court notes that the May 2003 Order was issued on default. Fed.R.Bankr.P. 7055, which incorporates Fed.R.Civ.P. 55, grants the Court authority to set aside a judgment by default in accordance with Fed.R.Civ.P. 60(b). Such relief is left to the Court's sound discretion, keeping in mind the strong policy favoring the resolution of disputes on their merits. *See American Alliance Ins. Co. Ltd., v. Eagle Insur. Co.*, 92 F.3d 57, 62 (2d Cir. 1996).

In addition, the Court is mindful that Code § 502(j) makes express reference to consideration of the "equities of the case" when deciding whether or not to allow a claim. Certainly, the Debtors will be prejudiced if Washington Mutual's claim is allowed in the full amount of $24,977.52, as set forth in its proof of claim, without consideration of any subsequent default, since they have been making plan payments for approximately two years based on an allowed claim of $9,927.27, as provided for in the May 2003 Order. Yet, if the Court were to determine that reconsideration is warranted, the parties would still have an opportunity to litigate the actual amount of the claim. In this regard, the Debtors still maintain that they can establish that the appropriate amount is the $9,927.27.

In considering the equities of this case, the Court must note some concerns it has concerning the overall procedures followed by Debtors' counsel in this case. Local Rule 3015-2 of this Court requires, *inter alia*, that a debtor in a chapter 13 case that wishes to modify a confirmed plan must serve a copy of the notice of the modification on the chapter 13 trustee, the United States Trustee and "all detrimentally affected creditors" and file a certificate of service to that effect within ten days after service. There is nothing to indicate on whom the Debtors' motion, dated September 23, 2003, seeking modification of their plan to reflect the May 2003 Order, was served. *See* Certificate of Service (Docket #21) referencing service on September 22, 2003. Debtors' subsequent motion, filed on January 15, 2004, seeking to modify their plan to provide for payment of $9,927.27 in arrears to Washington Mutual at an interest rate of 6%, rather than 9%, as originally proposed, was served on Washington Mutual Home Loans, c/o Gullace & Weld," rather than on the McCalla firm or on Washington Mutual at the address noted on its proof of claim. Yet, in opposing Washington's Motion seeking reconsideration and the argument that it was appropriate to have served the McCalla firm in April 2003, Talev emphasized the fact that his office received confirmation from both the Baum firm and the law firm of Gullace & Weld that all correspondence and notices involving Washington Mutual's claim was to be directed to the McCalla firm. Under those circumstances, it is understandable that no opposition was ever filed on behalf of Washington Mutual to the Debtors' plan, as modified, and why it did not seek reconsideration of the May 2003 Order until it filed a motion seeking relief from the automatic stay on October 20, 2004, and was informed by Debtors' counsel of the May 2003 Order.

Under these circumstances, the Court concludes that the equities of this case warrant an

opportunity for both the Debtors and Washington Mutual to be given their day in court to establish the amount of the prepetition mortgage arrears. Accordingly, the Court will not make any final determination regarding its May 2003 Order, and whether the Debtors will have to amend their plan, until after an evidentiary hearing has been conducted.

Based on the foregoing, it is hereby

ORDERED that the Motion of Washington Mutual, seeking reconsideration of the Court's May 2003 Order, is granted; and it is further

ORDERED that an evidentiary hearing on the Debtors' motion, filed on April 2, 2003, to determine the claim of Washington Mutual, will be held on Monday, September 26, 2005 at 1:00 PM at the Alexander Pirnie Federal Building, U.S. Bankruptcy Court, 10 Broad Street, Utica, NY.

Dated at Utica, New York

this 4th day of August 2005

/s/
STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge