



**ORDERED in the Southern District of Florida on November 19, 2013.**

A handwritten signature in black ink, appearing to read "Laurel M. Isicoff".

Laurel M. Isicoff, Judge  
United States Bankruptcy Court

Tagged Opinion

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA

In re: CASE NO. 11-14128-BKC-LMI  
MARIA G. MARTINS, Chapter 13  
Debtor.

**ORDER GRANTING IN PART AND DENYING IN PART LENDER'S  
MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS**

This matter came before the Court on the Motion of Secured Creditor, City First Mortgage Corp., for Award of Attorneys' Fees and Costs (ECF #188) (the "Motion for Attorneys' Fees"). For the reasons set forth below, the Motion for Attorneys' Fees is granted in part and denied in part.

**Facts and Procedural History**

First Mortgage Corp. (the "Lender") is the holder of the first mortgage on the Debtor's homestead. The Debtor's loan to the Lender has been in default for quite some time, due, at least in part, to the Debtor's failure to pay real estate taxes for several years preceding the

bankruptcy.<sup>1</sup> The Lender filed a foreclosure action, however, it is not clear when the action was filed. The Debtor filed a chapter 13 case on August 23, 2010. However, that case was voluntarily dismissed on December 27, 2010.

The Debtor filed this chapter 13 case on February 17, 2011, apparently to stop a foreclosure sale of the homestead. The case was dismissed on August 22, 2011, because the Debtor had failed to keep current with her chapter 13 plan payments; however, on October 4, 2011, the case was reinstated. On January 27, 2012, the Debtor's Fifth Amended Plan was confirmed, yet the case was dismissed again on October 31, 2012, due to the Debtor's failure to keep current with her plan payments. The case was reinstated after the Debtor filed an Emergency Motion to Reinstate on January 8, 2013, in order to stop the rescheduled foreclosure sale of her homestead. Once again, on June 17, 2013, the Debtor's case was dismissed for failure to make payments to the Chapter 13 trustee and, once again, the Debtor's homestead was scheduled for a foreclosure sale prompting yet another emergency motion to reinstate.

At this juncture, the Lender filed its Motion for Attorneys' Fees, arguing that the Debtor's starts and stops, and the consequent rescheduling and cancelation of foreclosure sales, have caused the Lender to incur, collectively, over \$11,000 in attorneys' fees. The Lender argued that, as a condition of reinstatement, the Debtor should be required to pay the Lender's attorneys' fees associated with these dismissals and reinstatements. The Debtor countered that the Lender should not be able to claim attorneys' fees incurred more than 180 days prior to the request being filed, since Federal Rule of Bankruptcy Procedure 3002.1 prohibits the collection of fees without the required notice.

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<sup>1</sup> A bankruptcy notice filed by the Miami-Dade County Tax Collector (ECF #27) indicated tax certificates had been sold for tax years 2008 and 2009.

### Analysis

Federal Rule of Bankruptcy Procedure 3002.1 was enacted in 2011 to curb the chapter 13 “ugly surprise.” After the conclusion of many successful chapter 13 cases, debtors were surprised to learn that their loans were in default because of unpaid fees and other charges that had accrued during the chapter 13 case, but for which—for the most part—demand had not been made. *See In re Sheppard*, No. 10–33959–KRH, 2012 WL 1344112 (Bankr. E.D. Va. Apr. 18, 2012).

Rule 3002.1(c) requires lenders to advise debtors of fees, expenses, or charges after a bankruptcy claim is filed “that are recoverable against the debtor or the debtor’s principal residence.”<sup>2</sup> The notice must be served no later than 180 days after the date any of such charges are incurred. Rule 3002.1 became effective on December 1, 2011, and applies to all cases filed after that date “and, insofar as just and practicable, all proceedings then pending.”<sup>3</sup>

The Debtor argues that the Lender may only seek attorneys’ fees incurred within the 180 days prior to the Motion for Attorneys’ Fees; the Lender argues that, due to the Debtor’s continued and repeated failures to keep up her regular plan payments, and the repeated dismissals and reinstatements which require lump sums to be paid to the chapter 13 trustee as a condition of reinstatement, the Lender’s request that its attorneys’ fees be paid as a condition to reinstatement takes the request outside the 3002.1(c) deadline.

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<sup>2</sup> Fed. R. Bankr. P. 3002.1(c) Notice of fees, expenses, and charges:

The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

<sup>3</sup> Supreme Court Order on Rules of Bankruptcy Procedure (Apr. 26, 2011), *available at* <http://www.supremecourt.gov/orders/ordersofthecourt.aspx?Term=10>.

The Lender's Motion seeks attorneys' fees based on 11 U.S.C. §506(a) and the terms of the Mortgage and Security Agreement (the "Mortgage") dated May 15, 2008, recorded in the Public Records of Miami-Dade County Florida, OR Book 26396, Pages 2467-2473. The Motion for Attorneys' Fees clearly seeks fees "recoverable against the debtor or against the debtor's principal residence," relief which falls squarely within the Rule's application; therefore, the Lender's request is subject to the Rule's temporal limitations.<sup>4</sup>

Accordingly, the Lender's Motion for Attorneys' Fees is granted in part and denied in part. The Lender is entitled to seek recovery of fees and costs incurred within the 180 days preceding the filing of the motion. The Lender is directed to file an accounting that shows which fees are allowable. However, if the Debtor's case is dismissed again,<sup>5</sup> nothing in this order shall limit the Lender's ability to seek all fees and costs incurred to which the Lender might otherwise be entitled in a subsequent foreclosure action.<sup>6</sup>

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Copies furnished to:

Jeffrey Berlowitz, Esq.  
Laila Gonzalez, Esq.

*Attorney Berlowitz shall serve a conformed copy of this order upon all parties in interest and shall file a Certificate of Service of same with the Clerk of the Court.*

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<sup>4</sup> If the Lender had had a basis to seek fees under any other rule (e.g., as a sanction), then Rule 3002.1(c) would not apply.

<sup>5</sup> The Court notes the Lender has filed a motion for stay relief and the Trustee has issued a notice of delinquency advising that the Debtor is once again behind in her plan payments.

<sup>6</sup> Fed. R. Bankr. P. 3002.1 restricts collection of untimely requested fees and costs in an action commenced after the debtor completes all payments under a plan. However, if the Debtor does not complete her plan, those restrictions will not apply.