UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

LORI B. MURRELL Case No. 91-11341 K

Debtor

The Debtor has objected to the pre-petition arrearage claim of the Charles F. Curry Company, to the extent that that claim seeks reimbursement of pre-petition attorneys fees and pre-petition costs and expenses incurred by Curry in connection with its efforts to realize upon its collateral.

Although the mortgage document makes provision (at paragraph 15) for costs and attorneys fees incident to remedying any default by the mortgagor that puts the security at risk, there is no such provision contained in the mortgage (or, the Court is informed, in the note) with regard to collection expenses, costs and fees.[1]

The types of fees for which reimbursement is sought as part of the pre-petition claim included over $3,000 in foreclosure attorneys fees and costs, over $1,000 in attorneys fees for representation in earlier bankruptcy proceedings involving this Debtor, $92 in property inspections required by

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[1]The mortgage is an FHA insured mortgage originally given to Sibley Corporation and later assigned to Curry.

FHA, $500 for a title search, $125 for having to file a lis pendens, $225.75 for service of process, a Request for Judicial Intervention Fee of $50, a calendar servicing fee of $75, and a Referee's fee of $50.

The Debtor objects to these on the grounds that in the absence of a provision in the loan agreements or some provision of law, the mortgagee may only claim unpaid pre-petition principal and interest payments and late fees.

The creditor asserts that it is entitled to reimbursement for the costs and expenses incurred by them in connection with the foreclosure action in the two earlier bankruptcy cases, but cites no authority for this proposition.

The Court agrees with the Debtor. Under 11 U.S.C. § 502(b)(1), a claim is disallowed if it is "unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." While this language is somewhat twisted, the Court does not believe that it imposes the burden on the Debtor to somehow prove that this claim is unenforceable. Rather, and despite Bankruptcy Rule 3001(f), the Court is of the view that a proof of claim is not entitled to be treated as prima facie valid when it fails to demonstrate that it is prima facie enforceable. The present Curry claim reflects a mere desire or wish that the Debtor reimburse Curry its costs and expenses. It has failed to demonstrate how that would constitute

a legal obligation of the Debtor.

Of course, it is true that various statutes provide for the recovery of costs and attorneys fees in connection with legal actions such as mortgage foreclosure, and that the award of costs of a legal action (but not attorneys fees) are regularly granted at the conclusion of civil actions and proceedings. As was ably addressed by Bankruptcy Judge Conrad, however, in the case of *In re Drexel Burnham Lambert Group, Inc.,* 148 B.R. 979, 981 (Bankr. S.D.N.Y. 1992), claims are measured by whether there was a "right to payment" on the date of the filing of the petition, and if the statutory right to payment depends upon prosecuting an action to a successful conclusion in the non-bankruptcy forum, there is no right to payment, and therefore no allowable claim, if the filing of the bankruptcy petition prevented such successful prosecution.

Hence, Curry may take no solace in the fact that it could recover costs and certain attorneys fees were it able to proceed to foreclosure. Curry's pre-petition claim should be the amount that the Debtor would have to submit, under applicable law, if she were to have cured her deficiencies on the date of the filing of the petition. If any statute or FHA regulation would have imposed on this Debtor the duty to pay costs and fees in addition to unpaid installments of principal, interest, and late charges, the Court has not been cited to it.

Counsel are to settle the terms of a suitable order in accordance with the above, sustaining the Debtor's objection and

allowing the pre-petition arrears claim only in an appropriate amount.

SO ORDERED.

Dated: Buffalo, New York
February 24, 1995

/s/ Michael J. Kaplan
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U.S.B.J.