

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF VIRGINIA  
Lynchburg Division**

In re BARRY MEADE HOMES, LLC,	)	Case No. 10-61301-LYN
	)	
Debtor.	)	Chapter 7
_____	)	

**MEMORANDUM AND ORDER  
ON OBJECTION TO TRUSTEE'S FINAL REPORT**

This matter comes before the court on the objection of Wells Fargo Bank, National Association, successor by merger to Wachovia Bank, National Association (“Wells Fargo”), to the Chapter 7 trustee's final report and proposed order of distribution of the debtor's estate (“the Final Report”). Wells Fargo seeks to participate in the distribution of the debtor’s estate as an unsecured creditor based on a deficiency claim resulting from the foreclosure sale of certain real properties which secured its claim. Wells Fargo asserts that its amended proof of claim for its deficiency should be allowed and should be deemed to relate back to the filing date of the secured proof of claim.

***Jurisdiction***

This court has jurisdiction over this matter. 28 U.S.C. § 1334(a) & 157(a). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). This court may enter a final order. This memorandum shall constitute the court’s findings of fact and conclusions of law as required by Fed. R. Civ. P. 52, which is made applicable in this proceeding by Fed. R. Bankr. P. 7052.

***Facts***

On April 4, 2010, the Barry Meade Homes, LLC (“the Debtor”) filed a voluntary chapter

7 petition. On June 4, 2010, the first meeting of creditors was held. On June 9, 2010, a notice of assets issued to the creditors. September 7, 2010, was established as the bar date to file claims. On August 20, 2010, Wells Fargo filed a secured proof of claim in the amount of \$3,151,206.57.

On July 23, 2010, an order issued granting Wells Fargo relief from the automatic stay that permitted it to foreclose on properties of the estate that secured its claim against the Debtor. The properties were sold and the commissioner of accounts approved the foreclosure accounting on October 13, 2011.

On December 12, 2011, Wells Fargo filed an amended proof of claim asserting an unsecured claim in the amount of \$967,295.56. On February 2, 2012, the proof of claim was amended to assert a claim in the amount of \$957,189.88, an amount that both parties now agree is correct.

On December 6, 2011, the Chapter 7 trustee filed his Trustee's Final Report. Wells Fargo filed an objection to the Final Report on the grounds that it did not provide for its unsecured deficiency claim.

### ***Discussion***

The Chapter 7 trustee opposes the objection to the Final Report asserting that Wells Fargo's amended unsecured proof of claim was not timely filed.

An unsecured creditor must file a proof of claim for the claim to be allowed. Fed.R.Bankr.P. 3002(a). The proof of claim must be filed within 90 days after the first date set for the meeting of creditors pursuant to 11 U.S.C. § 341. Fed.R.Bankr.P. 3002(c). The trustee distributes estate assets to allowed unsecured claims. 11 U.S.C. § 726(a)(2). Read together, the Rules and the Code provide that if a creditor holding a claim against the debtor greater than the

value of its collateral wishes to participate in distribution of the estate, then a proof of claim evidencing an unsecured claim must be timely filed. *In re Glick*, 136 B.R. 654, 656 (Bankr.W.D.Va.1991), citing *In re Fell*, 112 B.R. 219, 221–22 (Bankr.N.D.Ohio 1989). See also, *In re Ruark*, 134 B.R. 25, 27 (Bankr.E.D.Okl.1991) (“The intent of the Bankruptcy Rules is clear in charging an unsecured creditor seeking recovery from a bankruptcy estate to be aware of the deadlines imposed by the Rules and tailor their actions in timely asserting a claim accordingly”).

Amended claims may, however, be allowed if justice so requires. An amended claim will be allowed if it is filed after the bar date if the trustee has sufficient notice of the claim and the trustee has not yet made a distribution to the unsecured creditors.

Although timely filing requirements are intended to promote desired finality in bankruptcy proceedings, in some circumstances, fairness and equity require that strict adherence to deadlines be relaxed and that filing of amended proofs of claims be permitted. *Dabney v. Addison*, 65 B.R. 348, 350 (E.D.Va.1985). Bankruptcy courts, as courts of equity, have allowed the filing of amended proofs of claim after expiration of the bar date. In *Fyne v. Atlas Supply Co.*, 245 F.2d 107 (4th Cir.1957) the court held that amendment of proofs of claim after the claims bar date will be allowed if in the opinion of the court, such course is in the “furtherance of justice” provided that “sufficient notice of the claim has been given in the course of the bankruptcy proceeding.” *Id.* at 107. In *In re Intern. Horizons, Inc.*, 751 F.2d 1213 (11th Cir.1985) the Eleventh Circuit held that “amendments to claims should be freely allowed to cure a defect or to more fully explain a claim but that an amendment filed after the bar date should be closely scrutinized to ensure it is not a new claim disguised as an amendment.”

*In re Richard Roberts Lexington Associates, Ltd.*, 171 B.R. 546, 548 (Bankr. W.D.Va. 1994).

In the case at bar, the trustee has not yet made a distribution to unsecured creditors. The issue then is whether the trustee received adequate notice of Wells Fargo’s deficiency claim. It is clear that he did. First, the Debtor scheduled Wells Fargo as having an unsecured claim in the amount of \$390,650.00. Second, in its motion for relief, Wells Fargo asserted that, and based the motion on the fact that, it had no equity in the property. The trustee did not challenge this

assertion. Third, the order granting Wells Fargo relief from the stay provided that Wells Fargo should advise the court of such overage and remit the overage to the trustee. It follows that no overage existed because none was remitted to the trustee. Because no overage existed, it follows that, in all likelihood, Wells Fargo's claim was undersecured and a deficiency exists. Finally, counsel for the trustee billed 10.4 hours for reviewing materials related to Wells Fargo's claim. Given the foregoing, it can only be concluded that the trustee was aware of Wells Fargo's deficiency claim.

The trustee's opposition to Wells Fargo's objection is based in part on the fact that this court requires secured creditors to file a proof of claim for an unsecured deficiency claim in Chapter 13 cases within 120 days of the date that relief from the stay is granted. In this case, Wells Fargo received relief from the stay on July 23, 2010, and filed its amended proof of claim on December 12, 2011.

In this instance, the delay was justified. First, the 120-day limitation that this court imposes in Chapter 13 cases is not based on the Bankruptcy Code or the Bankruptcy Rules. Rather, it is based on the need to allow the Chapter 13 trustee to close out the estate in a timely fashion. Further, and more importantly, the limitation only applies when the order granting relief from the stay contains the requisite language.<sup>1</sup> In this case no such language was included in the order granting relief from the stay.

Second, the facts in this case vary significantly from any Chapter 13 case. In the typical Chapter 13 case, the secured claim is collateralized by either a vehicle or a single residential real property. The repossession or foreclosure process in any Chapter 13 case is much less complex

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<sup>1</sup> This court now requires the language limiting the filing of a deficiency claim to 120 days before signing an order granting relief from the stay in a Chapter 13 case.

than that faced by Wells Fargo. In this instance, the Debtor scheduled seventeen properties, much or all of which is raw land, securing Wells Fargo's claim. One would not expect Wells Fargo to sell all of the collateral as quickly as a bank might sell a vehicle or single residential property. There is nothing in the record to indicate that Wells Fargo did not timely prosecute the liquidation of its collateral. Further, Wells Fargo filed its deficiency proof of claim less than sixty days after the commissioner of accounts approved the foreclosure accounting.

***Conclusion***

The trustee had sufficient notice that Wells Fargo was entitled to a deficiency claim. Further, the trustee has not yet made a distribution to the unsecured creditors. Wells Fargo's objection to the Trustee's Final Report will be sustained.

**ORDER**

For the reasons stated above, Wells Fargo's objection to the Trustee's Final Report shall be, and hereby is, sustained. Wells Fargo's deficiency claim shall, and hereby is, allowed in the amount claimed in its amended claim filed on February 2, 2012.

So ORDERED.

Upon entry of this Memorandum and Order the Clerk shall forward a copy to the debtor, to the chapter 7 trustee and to Jeremy S. Williams, Esq.

Entered on this 27<sup>th</sup> day of February, 2012.



William E. Anderson  
United States Bankruptcy Judge