FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

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In Re:

FRANCISCO RODRIGUEZ and ANNA RODRIGUEZ	Chapter 13 Case No. 07-24687(MBK)

Debtors.

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APPEARANCES:

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MICHAEL B. KAPLAN, U.S.B.J.

MEMORANDUM DECISION

I. INTRODUCTION

This dispute arises from post-petition escrow analysis of the mortgage account of Francisco and Anna Rodriguez ("Debtors") undertaken by the mortgagee, Countrywide

Home Loans, Inc. ("Countrywide") pursuant to which Countrywide has recalculated and assessed an increase to the Debtors' required post-petition escrow deposits (as compared to the amount of the Debtors' pre-petition escrow deposits). Debtors contend that the additional escrow assessment constitute an unlawful post-petition collection of a pre-petition obligation resulting in "repetitive and excessive payments by the Debtor of significantly more than what would have been paid but for the bankruptcy, or what Countrywide would be entitled to through the Debtor's Bankruptcy (sic) Chapter 13 Plan."[1] The Debtors filed the within motion asserting that post-petition collection of a pre-petition escrow shortage constitutes a violation of Debtor's rights under § 1322 of the Bankruptcy Code, as well as a violation of the automatic stay provisions set forth in 11 U.S.C. § 362(a). Specifically, Debtors assert that these actions violate 11 U.S.C. § 362(a) as follows:

> a) 11 U.S.C. § 362(a)(1) and (6):
>
> The commencement of action against the Debtors which could have been commenced prior to filing to collect a claim against the Debtors which arose prior to filing (the escrow shortage).
>
> b) 11 U.S.C. § 362(a)(3):
>
> The commencement of an action to obtain property of the estate (Debtors' earnings).

Based on these alleged wilful and intentional violations of the automatic stay, Debtors seek corrective relief through the entry of an order directing Countrywide to reapply the alleged escrow balance, as well as recovery of damages, including costs and attorney fees, pursuant to 11 U.S.C. § 362 (k).

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[1]See Debtors Reply Memorandum at P. 4 (Docket#53).

For the reasons which follow, this Court determines that Countrywide's actions were in compliance with its loan documentation and the Real Estate Settlement Procedures Act, 12 U.S.C.§ 2601, *et seq.* ("RESPA"), and thus were not undertaken in violation of any provision of the Bankruptcy Code. However, the Court does find that Countrywide acted arbitrarily in the method of calculating the Debtors' escrow shortage and therefore orders Countrywide to issue a corrected escrow ledger to project the summary balance of the Debtors' escrow account, consistent with the findings contained herein.

II. JURISDICTION

This court has jurisdiction over the contested matter under 28 U.S.C § 1334(a) and 157(a) and the Standing Order of the United States District Court dated July 10, 1984 referring all bankruptcy cases to the bankruptcy court. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(O). A hearing on this matter was held on June 25, 2008. The following constitutes the Court's findings of fact and conclusions of law as required by Fed. R. Bankr. 7052.[2]

III. FACTS

On October 10, 2007 (the "Petition Date"), Francisco and Ana Rodriguez filed a Voluntary Petition seeking relief under Chapter 13 of the Bankruptcy Code. Countrywide is the holder of a purchase money mortgage on Debtors' real property at 32 Hedgewood Road in Howell, New Jersey.

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[2]To the extent that any of the findings of fact might constitute conclusions of law, they are adopted as such. Conversely, to the extent that any conclusions of law constitute findings of fact, they are adopted as such.

On January 15, 2008, Countrywide filed its proof of claim. In the proof of claim, Countrywide calculates pre-petition arrears at $ 21,283.71, including line items as follows:

Monthly Payments (8 months @ $1,898.35)- $ 15,186.80
Foreclosure Fees- $700.00
Foreclosure Costs- $1,527.00
Escrow Shortage-$3,869.91
Total Pre-petition Arrears- $ 21,283.71

It is undisputed that the escrow shortage of $3,869.91 reflects sums actually disbursed pre-petition by Countrywide, to meet the Debtors' real estate tax and insurance obligations, which exceeded the sums deposited by Debtors in their account through their monthly escrow deposits. If Debtors had been current in their monthly payments to Countrywide and Countrywide had debited their escrow account for the amounts disbursed, the remaining balance in Debtors' escrow account on the Petition Date would have been $2,494.84 ($6,364.80 received from Debtors less $3,869.91 paid out by Countrywide).

Countrywide's proof of claim also fixes Debtors' post-petition monthly mortgage payment at $2,846.12, effective 2007, calculated to include the following:

Item	Amount
Principal & Interest	$1,893.35
Required Escrow	$ 650.10
Shortage Contribution	$ 210.62
Required Reserve	$ 87.02
Total	$2,846.12

As is evident from the foregoing calculations, upon the filing of Debtor's petition, Countrywide increased Debtor's post petition payments in the amount of $210.65 per month, alleging the collection of an escrow shortage of $2,527.81. In this regard, Countrywide treated Debtors' escrow account as having a zero balance as of the Petition Date. In other words, for purposes of calculating the post-petition payment, Countrywide treated the escrow account as if there had been neither an escrow account deficit nor surplus on the Petition Date. Countrywide then calculated the Debtors' post-petition escrow deposit obligations utilizing a twelve month projection, permitted by RESPA, to fix the Debtors' post-petition escrow deposit at $947.74, comprised of (1) a $650.10 "base" escrow payment, (2) $210.62 shortage contribution, and (3) $87.02 required reserve. Countrywide prepared the following projected balance of the Debtors' escrow account to fix the "shortage contribution" component:

Month	Escrow Deposit(s)	Taxes Payments	Ins.	MIP/PM Payment	**Balance**
Beginning Balance					**$2,494.89**
	-2494.89				**0**
07-Oct		1,267.64			**-1,267.64**
Nov-07				125.87	**-1393.51**
Dec-07	650.10		556.00	125.87	**-1425.28**
Jan-08	650.10	1599.73		125.87	**-2500.78**
Feb-08	650.10			125.87	**-1976.55**
Mar-08	650.10			125.87	**-1452.32**
Apr-08	650.10	1599.72		125.87	**-2527.81** *
Ma-08	650.10			125.87	**-2003.58**
Jun-08	650.10			125.87	**-1479.35**
Jul-08	650.10	1267.64		125.87	**-2222.76**
Aug-08	650.10			125.87	**-1698.53**
Sep-08	650.10			125.87	**-1174.30**
Oct-08	650.10	1267.64		125.87	**-1917.71**
Nov-08	650.10			125.87	**-1393.48**
End Balance					**-1393.48**
*Lowest Projected Balance					

The above chart reveals that Countrywide calculates the Debtors' lowest possible escrow balance during the projected twelve month period as occurring in the month of April, 2008, when the escrow balance will be $-2,527.81. Countrywide, by assessing the Debtors' escrow account an additional monthly sum of $210.62, seeks to recover the shortage over the twelve month period commencing December, 2007. The Debtor, however, feels Countrywide's increased escrow demands represent an unlawful effort to recover the pre-petition escrow shortage over a twelve month period, as opposed to the length of the Chapter 13 plan-sixty months.

IV. DISCUSSION

Contractually, the Debtors' mortgage provides that the Debtors shall pay all property taxes.[3] However, the mortgage further requires that the Debtors pay amounts due for property taxes to the lender as future escrow items throughout the 12-month period preceding the month in which the property taxes are due. Such payments must be made concurrently with the principal and interest payments due to the lender each month. The amount of the required escrow funds is determined in accordance with Paragraph 2 of the mortgage which provides that the lender "may, at any time, collect and hold amounts for Escrow Items in an aggregate amount not to exceed the maximum amount that may be required for Borrower's escrow account under [Real Estate Settlement Procedures Act (" RESPA")], except that this cushion or reserve permitted by RESPA for unanticipated disbursements....." As a result, a lender must estimate future

[3]See ¶2 of mortgage, dated March 25, 2005, annexed to Countrywide's filed proof of claim.

property taxes and assessments, as well as insurance premiums, and allocate the estimated sum over a period sufficient to provide adequate funds to pay the escrow charges when due. This right is limited by RESPA which proscribes lenders from requiring a borrower to deposit in any escrow account an aggregate sum which exceeds the amount sufficient to pay taxes, insurance premiums and other charges with respect to the property during the ensuing twelve-month period, plus one-sixth of the estimated total of such amounts. 12 U.S.C. § 2609(a). This restriction, however, is subject to exception. If the lender determines that a deficiency exists, the lender may require the borrower to make additional monthly deposits into the escrow account to remedy such deficiency but must notify the borrower of any shortage of funds. Id. at § 2609(a)(2), (b). Upon the borrower's payment of the escrow amounts, the mortgage requires the lender to hold the Funds in accordance with RESPA and to apply the Funds to pay the escrow charges when due, but no later than the time specified under RESPA.

RESPA, which was passed in 1974 to assure a good-faith handling of these matters, prescribes an "Aggregate Analysis" to calculate escrow deposits. RESPA Regulation X, 24 C.F.R. § 3500.17 (b), (d)(1) (2007). In such an analysis, the "base" escrow deposit is determined by estimating the payments that the lender will have to make for taxes, insurance and the like over the next twelve months. That estimated amount is then divided by twelve to determine the monthly base escrow deposit. <u>See</u> 24 C.F.R. § 3500.17 (c)(1)(ii) (generally describing the components of escrow), § 3500.17 (d)(1)(A) (2007) (explaining how to project a "trial balance"). RESPA allows this calculation to occur on many different occasions, including at the inception of a loan, on the anniversary date of the loan, or on other dates of the lender's choosing. <u>See</u> 24 C.F.R.

§ 3500.17 (c)(2) (analysis at the beginning of the loan), (c)(3) (analysis at the end of the computation year), and (f)(1)(ii) ("The servicer may conduct an escrow analysis on other times during the escrow computation year"). Countrywide performed this analysis to determine Debtors' post-petition base escrow deposit.

RESPA also authorizes lenders like Countrywide to calculate and collect certain "advance deposits in escrow accounts," or shortage contributions, in order to minimize any negative balance that may occur in a borrower's escrow account over the next twelve months when Countrywide must disburse funds to protect the property (*e.g.* insurance, PMI payments, and taxes). See 12 U.S.C. § 2609(a)(2) (2007) ("in the event the lender determines there will be or is a deficiency he shall not be prohibited from requiring additional monthly deposits in such escrow account to avoid or eliminate such deficiency"). [4]

To calculate the escrow shortage contribution, a ledger is created reflecting a projected summary balance of a debtor's escrow account, assuming that all deposits of base escrow balance during the next twelve months is determined, as it is here. If that balance is negative, then that negative balance (the shortage) is divided by twelve to determine the monthly escrow shortage contribution. See 24 C.F.R. § 3500.17 (c)(1)(ii) (generally describing the components of escrow), (d)(1)(i)(c) (2007) (describing the

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[4]RESPA also authorizes a lender to collect as part of the monthly escrow deposit an additional "reserve". The "reserve" is calculated by multiplying the total estimated annual cost for insurance and taxes only by .166 (1/6, or 2 months), which amount is then divided by 12 to determine the monthly reserve deposit. See 24 C.F.R. § 3500.17 (c)(1)(ii). In the case at bar, the 'reserve" component of the post-petition payment is $87.02 per month and is uncontested.

calculation of the "cushion"). RESPA generally requires all escrow shortages to be repaid to a lender within twelve months. 24 C.F.R. § 3500.17(f) (2007).

The Debtors acknowledge in their pleadings that prior to the bankruptcy filing on October 10, 2007, there was an eight month arrearage owing Countrywide, which arrearage depleted the escrow account, leaving a negative balance of $-3,869.91. Debtors further admit that had they been current in payments at the time of the filing, there would have been a positive balance of $450.93, after payment of the October, 2007 quarterly tax payment. Notwithstanding, Debtors submit that Countrywide is taking advantage of the bankruptcy filing to impose unreasonable and unsupportable monetary burdens upon the Debtors by seeking to recover the escrow "cushion" permitted under RESPA. Debtors, however, fail to explain satisfactorily why such rights afforded lenders under RESPA should be abrogated in the context of a Chapter 13 bankruptcy proceeding. Debtors' required shortage contribution is a charge authorized by and calculated in accordance with RESPA, as well as the underlying loan agreement; as such, any modification of such rights would contravene the prohibition against modifying the rights of a holder of a claim secured by a security interests in a debtor's principal residence, found in 11 U.S.C. § 1322(b)(2).

This Court finds no merit in the Debtors challenge to Countrywide's methodology of fixing its pre-petition claims. In this regard, Debtors argue:

> The "actual" ending balance (- $ 3,869.91) is utilized for the proof of claim as opposed to the true escrow monthly deposit contractually due for the missing pre-petition arrears which is higher (8 x 707.20 = $ 5,657.60). Countrywide relies on this reduction in favor of the Debtor in the POC as a basis for differentiation between pre petition actual disbursements (in the POC) and the remaining pre-petition escrow requirements

> (not in the POC). This then becomes the rationale for the post-petition collection, whereby Countrywide collects post petition not only the difference ($ 1,787.69) but substantially more than that amount claiming it all to be a post petition shortage.[5]

In effect, Debtors seek to have Countrywide include in its pre-petition arrearage, to be paid over the life of the Chapter 13 plan, not only sums actually disbursed by Countrywide for items such as taxes and insurance, but also such additional sums the Debtors should have paid into the escrow account prior to filing. Moreover, Debtors contend that in projecting the twelve month summary balance of the Debtors' escrow account, Countrywide should not have started at zero, but rather should have calculated the lowest projected escrow balance as if the Debtors had made the requisite pre-petition monthly payments. This Court is not prepared to leap into the "Alice in Wonderland" approach to mortgage servicing advocated by the Debtors, in which lenders are required to credit an escrow account for payments not made, while coming out of pocket to advance additional payments of taxes and insurance on behalf of Chapter 13 debtors.

Countrywide does not dispute that the Debtors' obligation to pay property taxes[6] to and insurance arose pre-petition and that the mortgage instrument provides that the lender shall collect and hold such amounts as outlined in ¶2 of the mortgage. Instead, Countrywide asserts that as between itself and the Debtors, no claim arose in its favor until it paid the taxes and an escrow shortage accrued. In this regard, Countrywide

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[5]See Debtors Reply Memorandum at P. 7 (Docket#53).

[6]Pursuant to ______________, real estate taxes in New Jersey are due upon assessment, which occurs annually on the first day of each new year, to be paid in quarterly installments thereafter.

contends that its pre-petition claim should be limited to the amounts actually disbursed. This Court agrees. Taxes, insurance and related escrow deposits are not part of the mortgage loan obligation due and owing Countrywide. Rather, in collecting escrow amounts as part of the mortgagors' monthly mortgage payments, Countrywide serves merely as a conduit for such payments and should only recover in bankruptcy for such items actually disbursed on behalf of mortgagors. Indeed, absent sums actually expended, as permitted under the loan documents to protect its own collateral interest, Countrywide should not include pre-petition escrow arrears in its proof of claim inasmuch as the mortgage instrument only permits Countrywide to retain such funds to the extent it has made actual disbursements. Otherwise, Countrywide merely collects and holds such funds for the benefit of third parties. Accordingly, this Court regards Countrywide's approach in treating the Debtors' escrow account as having a zero balance as logical, reasonable and supported by applicable non-bankruptcy law. Moreover, outside of bankruptcy, mortgagors with a negative escrow account can and should expect to have their escrow account reexamined, in accordance with RESPA regulations, and be assessed an additional monthly charge for the escrow shortage. No one would suggest that non-debtors could seek to have a lender calculate an escrow shortage contribution, by giving credit for outstanding monthly payments. Certainly, there is no reason to afford Chapter 13 debtors with such rights, and this Court finds nothing in either RESPA or the Bankruptcy Code which mandates such a result.

Having determined that Countrywide is entitles, as a matter of law, to calculate and collect the shortage contribution as part of the post-petition monthly escrow deposit, this Court does not agree that the Debtors' lowest possible escrow balance during the twelve months following the calculation of their escrow payment to be $2,527.81, as Countrywide asserts. Countrywide acknowledges that the "Aggregate Analysis" to calculate escrow deposits prescribed by RESPA permits such calculation to occur "on many different occasions, including at the inception of a loan, on the anniversary date of the loan, <u>or on other dates of the lender's choosing</u>(emphasis added)(citations omitted).[7] In preparing its ledger to reflect a projected summary balance of the Debtors' escrow account, and pinpoint the lowest possible escrow balance,[8] Countrywide employs an "effective date" of December 1, 2007, yet commences the analysis with a zero balance for the month of October, 2007. Countrywide then takes into account the charge items for the months of October and November, while ascribing no projected escrow deposits for these months. The result is an escrow balance on the "effective date" of $-1393.51. This Court views Countrywide's decision to undertake its analysis in this fashion to be both arbitrary and penal. There is no reason why Countrywide could not commence its projection of the Debtors' escrow account with a zero balance through November 30, 2007 (the day before Countrywide's deemed "effective date), and thereafter project escrow deposits and charges for the next twelve months, through November, 2008, as reflected below:

Month	Escrow Deposit(s)	Tax Payment(s)	Insurance Payment(s)	MIP/PMI payment(s)	**Balance**
Start Balance					
Nov-07					**0.00**
Dec-07	650.10		556.00	125.87	**-31.77**
Jan-08	650.10	1599.73		125.87	**-1107.27**

[7]See ¶7 of Countrywide's Response in Opposition (Dkt# 44).

[8]Refer to chart on P. 5.

Feb-08	650.10			125.87	**-583.04**
Mar-08	650.10			125.87	**-58.81**
Apr-08	650.10	1599.72		125.87	**-1134.30**
May-08	650.10			125.87	**-610.07**
Jun-08	650.10			125.87	**-85.84**
Jul-08	650.10	1267.64		125.87	**-829.25**
Aug-08	650.10			125.87	**-305.02**
Sep-08	650.10			125.87	**219.21**
Oct-08	650.10	1267.64		125.87	**-524.20**
Nov-08	650.10			125.87	**0.03**
End Balance					**12.03**
TOTALS	7813.20	5734.73	556.00	1510.44	**12.03**

Using the above approach, the lowest possible escrow balance still occurs in April, 2008 at $-1134.30, which would represent an additional monthly charge of $94.53, considerably less than the requested $210.65.

Lastly, to the extent Debtors have relied upon the recent decision in Campbell v. Countrywide Home Loans, Inc., 361 B.R. 831 (Bankr. S.D. Tex. 2007), such reliance is misplaced. In Campbell, the court found that Countrywide violated the automatic stay when it acted to collect and enforce a pre-petition debt against the Debtors and property of the estate post-petition. Campbell v. Countrywide Home Loans, Inc., 361 B.R. 851 (Bankr. S.D. Tex. 2007). However, the central issue in Campbell is a Texas state law issue regarding whether certain property taxes are a pre or post-petition debt, which is not the issue at hand. Countrywide's calculation and assessment of a shortage contribution is not an attempt to collect a pre-petition obligation or "double collection" of Debtors' pre-petition escrow deficits. Rather, the shortage contribution is authorized under RESPA to minimize the risks to lenders where there are disbursements of funds to protect the underling property before the escrow account contains sufficient funds to pay such amounts.

V. CONCLUSION

Debtors' motion is granted in part, and denied in part. This Court finds no violations of 11 U.S.C. § 362(a); however, Countrywide is directed to recalculate the Debtors' shortage component of the post-petition escrow deposit in conformance with this decision. Counsel for Countrywide is directed to submit an appropriate form of order.

Dated: July 9, 2008

Honorable Michael B. Kaplan
United States Bankruptcy Judge