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Eleventh Circuit Holds Recordation of Bankruptcy-Related Fees for Internal Purposes Does Not Violate Automatic Stay

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In *In re Jacks*, 2011 WL 2183979 (11th Cir. 2011), the debtor argued that the mortgage servicer violated the automatic stay when it recorded certain costs into its internal servicing system. Section 362(a)(3) of the Bankruptcy code prohibits “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” Section 362(a)(5) prohibits “any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under [Title 11].” Section 362(a)(6) prohibits “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under [Title 11].”

The Jacks argued that when their servicer recorded bankruptcy-related expenses totaling $310 on the Jacks’ account activity statement they violated these provisions of Section 362. The servicer argued that merely recording charges on the activity statement was not an act in violation of the automatic stay.

The Jacks first argued that the servicer incurred the $310 in fees when it filed a proof of claim to protect its interest in their property. They then argued that the $310 became a lien on their property because of the terms of the mortgage (which allowed additions to loan principal for legal fees) in violation of Section 362(a)(3). However, while the terms of the mortgage allowed such additional fees to be secured by the mortgage, the Eleventh Circuit held that there was no evidence the servicer actually added these fees to the Jacks’ loan balance. Further, the servicer had not attempted to collect these fees. The servicer sent regular monthly statements to the Jacks that did not reflect the fees. The Eleventh Circuit held that the mere recordation of fees on internal records is not an “act” in violation of Section 362(a)(3). Since the servicer did not attempt to recover the fees or gain any advantage over other creditors, there was no violation of the automatic stay.

The Jacks next argued that the servicer’s recordation of the $310 was an act to create, perfect, or enforce a lien against the property of the debtor in violation of Section 362(a)(5). The Eleventh Circuit held that since the servicer has not actually modified the lien, they had not committed any act in violation of the stay. The Jacks also argued that the servicer had attempted to collect a prepetition debt in violation of Section 362(a)(6). The Eleventh Circuit held that the servicer had not attempted to collect on any prepetition debt and in fact only communicated the recordation of the fees to the Jacks because the Jacks requested a document internal to the servicer.

Section 506(b) allows a secured creditor to add post-petition interest and reasonable fees to a secured claim so long as the total does not exceed the value of the collateral securing the claim. Bankruptcy Rule 2016(a) requires that an entity seeking compensation for services, or reimbursement of necessary expenses, must file a detailed statement of the services rendered, time expended, and expenses incurred as well as the amounts requested.

The Jacks argued that the servicer was in violation of Section 506(b) and Rule 2016(a) because the servicer added the $310 to their activity account statement. The Jacks argued that this was contrary to the intent of the Bankruptcy Code, which is to provide a fresh start to the debtor in bankruptcy. However, the Eleventh Circuit distinguished the cases upon which the Jacks relied as involving creditors who had attempted to collect legal fees. The Eleventh Circuit went on to hold that when a creditor makes no attempt to collect bankruptcy-related costs from a debtor but merely records them for internal bookkeeping purposes, no violation of Section 506(b) or Rule 2016(a) occurs.

The Eleventh Circuit went on to note that there was a possibility that the servicer could attempt to collect the $310 once the Jacks have completed their Chapter 13 plan. However, the Eleventh Circuit held that such a claim was unripe. The servicer argued that there was a possibility that the Jacks would not complete their Chapter 13 plan, and that the bankruptcy court would dismiss their case. Further, the servicer said they would not attempt to collect the $310 if the Jacks completed their Chapter 13 plan. The Eleventh Circuit agreed with the servicer, and held that since the Jacks' based their claim on speculation about future events it was due for dismissal.

Section 502(a) provides that the bankruptcy court will deem a claim or interest contained in a Proof of Claim allowed unless some party in interest objects. Section 502(b)(1) provides that if such objection is made, then the bankruptcy court should determine the amount of the claim and allow it in that amount, except to the extent to which it is unenforceable against the debtor.

The Jacks objected to the servicer's claim because the servicer did not include the $310 fee. The Eleventh Circuit held that their objection had no merit, as the proof of claim was for the mortgage without the $310 fee. The Jacks did not argue that any part of the claimed amount was unenforceable.

This case allows lenders to keep track of bankruptcy-related expenses categorized by individual borrowers. The Eleventh Circuit covers Florida, Georgia and Alabama. So long as the servicer does not attempt to collect these expenses from the debtor in bankruptcy, they have not violated the automatic stay.