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IT IS SO ORDERED.

Dated: January 6, 2025



  
Guy R. Humphrey  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

*In re:* :  
MARK A. POSTON, : Case No. 19-33896  
: Chapter 13  
*Debtor.* : Judge Humphrey  
:  
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MEMORANDUM ORDER DENYING  
DEBTOR’S CLAIM OBJECTION (DOCS. 33 & 34)

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On February 5, 2016 the Debtor, Mark Poston (the “Debtor”) entered into an FHA Rehabilitation Loan Agreement (the “Loan Agreement”) with Caliber Home Loans, Inc. (“Caliber”) in the amount of \$87,927. Doc. 99 (Ex. B). The Loan Agreement was secured by an open-end mortgage (the “Mortgage”) that the Debtor granted Caliber on the Debtor’s property located at 3515 Paris Dr., Moraine, Ohio 45439-1223 (the “Property”). Doc. 99 (Ex. A). Under the Loan Agreement, \$22,550 was set aside in escrow or trust for the “total rehabilitation cost” on the Property. Ex. B, ¶ 4. In addition, the Loan Agreement provided that “[i]f the contingency reserve or any part thereof is not used, the remaining balance will be applied as a partial prepayment of the loan.” *Id.* at ¶ 6; see also *Id.* ¶ at 14 (using similar language to ¶ 6 of the Loan Agreement). Another section states that “[a]ny funds remaining in the escrow account must be

paid down on the unpaid principal balance.” *Id.* at ¶ 11. Finally, a Rehabilitation Loan Rider states that “[i]f the rehabilitation is not properly completed, performed with reasonable diligence, or is discontinued at any time except for strikes or lockouts, the lender is vested with full authority to take the necessary steps to protect the rehabilitation improvements . . . .” Doc. 99 (Ex. C, ¶ B).

On December 19, 2019 the Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code. Doc. 1. The proposed amended Chapter 13 plan (the “Plan”) provided a monthly payment to the Trustee of \$1,165. Doc. 18 at 1, ¶ 2.1. In turn, the Chapter 13 Trustee was to pay, among other creditors, the monthly mortgage loan on the Debtor’s residence owed to the mortgagee, Caliber. *Id.* at 3, ¶ 5.1.1. The Plan also provided to cure a pre-petition arrearage of approximately \$12,000, with the proof of claim controlling the exact amount of such arrearage. *Id.* at 5, ¶ 5.2.1. The Plan also included a Special Plan Provision that stated:

The actual arrearage owed to [Caliber] is \$12,155. [Caliber] is holding \$10,000 that was to be paid to a Contactor for work on Debtor’s home. The original total amount was \$20,000, \$10,000 of which was delivered to the Contractor who absconded with the funds. \$10,000 remains in [Caliber’s] possession. Debtor PROPOSES that those funds be sent to the Chapter 13 Trustee by [Caliber] so that the funds may be properly applied by the Trustee to a properly filed claim by [Caliber].

Caliber objected to both the original plan and the Plan because this Special Plan Provision allegedly required the Chapter 13 Trustee to apply funds in contravention of the Loan Agreement. Docs. 13, 24. However, Caliber withdrew its objections (Docs. 29, 30), and the Plan was confirmed on June 10, 2020 (Doc. 31).

On February 26, 2020 Calber filed a secured proof of claim for the total amount of \$99,235.74 and listed a pre-petition arrearage of \$18,400.06. Cl. 6-1; Stipulation, ¶ 1 (Doc. 99). On July 10, 2020, the Debtor objected to Caliber’s proof of claim. Doc. 33. In its objection, the

Debtor asserted that Caliber was holding \$10,000 in “insurance proceeds”<sup>1</sup> and that those proceeds should be applied to Caliber’s proof of claim, reducing the arrearage to \$8,400.06. In response, on August 7, 2020, Caliber took a similar position to its objections to the Debtor’s Chapter 13 plans, noting the Loan Agreement was a “rehabilitation loan” and that the loan proceeds could not be applied to the mortgage loan arrearage, but only the principal amount due. Doc. 34. The proof of claim was later assigned to NewRez LLC dba Shellpoint Mortgage Servicing (“NewRez”). Doc. 78.

The Chapter 13 Trustee is currently holding approximately \$10,861. Doc. 99, ¶ 3. In addition, NewRez is holding \$12,095 of escrowed funds that were intended to be used for rehabilitation of the Property. *Id.* at ¶ 4.<sup>2</sup> The construction project was not completed because “the contractor absconded with funds and never completed the work.” *Id.*

The Debtor requests that the court order that the funds escrowed by NewRez be applied to the arrearage on the Loan Agreement, which would allow the Plan to complete and return the Loan Agreement to a current status upon completion of the Plan. NewRez asserts that it is unable to do so under the Loan Agreement. NewRez’s counsel has indicated that if the funds were applied as the Debtor requests, the FHA insurance on the Property could be placed in jeopardy. Doc. 100, ¶ 9. Without these funds being applied to the arrearage, it appears that the Plan will not complete, and the Debtor’s case may be subject to dismissal.

Approximately five years after this dispute began, and after a series of scheduling orders, status reports, phone conferences, the assignment of the relevant proof of claim to NewRez, new creditor counsel, and hopeful settlement discussions, this claim objection remains unresolved.

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<sup>1</sup> The \$10,000 was simply part of the escrowed proceeds from the Loan Agreement. There has never been any insurance proceeds in dispute.

<sup>2</sup> The construction work was to be a garage built on the Property.

See Docs. 35, 38, 39, 41, 42, 43, 45, 46, 49, 51, 52, 54, 55, 57, 58, 60, 61, 64, 66, 70, 71, 72, 76, 80, 81, 83, 84, 85, 86, 88, 94, 96. The parties filed stipulations (Doc. 99), as well as supplemental memoranda (Doc. 100, 101). The court took the matter under advisement.

The Property is the Debtor's primary residence. Therefore, the Loan Agreement, the Rehabilitation Loan Rider, and the Mortgage cannot be modified in the Chapter 13. 11 U.S.C. § 1322(b)(2) and (e). *Nobleman v. Am. Sav. Bank*, 508 U.S. 324, 332 (1993). Under the plain meaning of the relevant portions of the Loan Agreement, the funds cannot be used to cure the arrearage under the Loan Agreement.

The Debtor does not dispute this interpretation of the Loan Agreement, but instead argues that NewRez is bound otherwise by the language in the Special Plan Provision of the confirmed Plan. Of course, it is axiomatic that the confirmed Plan binds both the Debtor and NewRez. 11 U.S.C. § 1327(a). However, the Plan's use of the verb "proposes" creates an unbinding term. The court's order confirming the Plan cannot be construed as compelling the result that the Debtor "proposed" in his Plan. In addition, the Special Plan Provision only required escrowed funds to be held by the Chapter 13 Trustee to be "properly applied." The proper application of the funds needs to be consistent with the Loan Agreement. Use of the funds in contravention of the Loan Agreement and Mortgage would be a modification of the rights of NewRez, which, as noted, is not permitted under 11 U.S.C. § 1322(b)(2) and (e). *Nobleman*, 508 U.S. at 332 (mortgage loan cannot be modified that is secured only by a lien on a debtor's principal residence).<sup>3</sup> Nothing in the Special Plan Provision suggests the loan documents are to be modified to allow funds to be

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<sup>3</sup> The two exceptions to modifying a loan secured only by a mortgage on a Chapter 13 debtor's primary residence is a debtor can attempt to cure and reinstate a mortgage loan arrearage pursuant to 11 U.S.C. § 1322(b)(5) and (e). However, § 1322(e) makes it clear that the cure must be consistent with "the underlying agreement and applicable nonbankruptcy law." The second exception is a mortgage loan not secured by any equity in the property, sometimes referred to as a wholly unsecured mortgage, may be stripped off in Chapter 13. *In re Lane*, 280 F.3d 663, 667 (6th Cir. 2002). That exception has no application here.

applied contrary to the express terms of the Loan Agreement. Therefore, assuming the assignor, Caliber, consented to the Plan by withdrawing its objection, the Plan does not change the terms or application of the Loan Agreement.

The Debtor's other argument is that the Loan Agreement is void due to the contractual doctrine of impossibility, or the related "frustration of purpose" doctrine.

Impossibility of performance refers to when a contract cannot be performed due to an unforeseen event. *Scott Holding Co. v. Turbo Rests. U.S., LLC*, Nos. 2024 CA 00037, 2024 CA 00066, 2024 Ohio App. LEXIS 3929, at \*27 (Ohio Ct. App. Nov. 1, 2024). The doctrine sometimes applies when there is a "disproportionate" risk to an individual or property. *Id.* at \*28 However, impossibility does not apply when the event could have been contemplated at the time the contract was made. *Id.* In addition, the "mere impossibility of performance [does not] necessarily relieve the promisor from the payment of damages [or obligations] for failure to perform, unless the contract itself contains a provision, express or implied, releasing him from damages [or obligations] in case the contract becomes impossible of performance." *State ex rel. Jewett v. Sayre*, 109 N.E. 636, 639 (Ohio 1914).

In this instance, the Loan Agreement is not impossible to perform. The Loan Agreement contemplates rehabilitation may not be completed and provides exactly how the funds escrowed for rehabilitation are to be applied by the mortgagee in that exact situation. The Loan Agreement requires that these funds can only be used to reduce the principal amount of the loan. While the court is sympathetic to the Debtor's situation, the Loan Agreement addresses these unfortunate circumstances in a straightforward manner. Ex. B, ¶¶ 4, 6, 11, and 14.

The frustration of purpose doctrine also does not provide the Debtor relief. This doctrine, related to the doctrine of impossibility, applies "when one of the two parties to a contract creates

a situation where the basis for the parties’ contract essentially becomes moot.” *America’s Floor Source, LLC v. Holmes*, 946 N.E.2d 799, 808 (Ohio Ct. App. 2010). See also Restatement (Second) of the Law of Contracts, § 265 (1981) (explaining the duty to “render performance are discharged” when the occurrence of an event “was a basic assumption” of the agreement, “unless the language or circumstances indicate to the contrary”). First, this doctrine is not widely accepted under Ohio case law, and has not been adopted by the Supreme Court of Ohio.<sup>4</sup> *Starlion Elecs. Distrib., LLC v. Zoran Med., L.L.C.*, 223 N.E.3d 780, 789 (Ohio Ct. App. 2023). Second, even if it is good law in Ohio, the doctrine does not apply here because, again, the Loan Agreement and related loan documents are able to be performed according to their precise terms. Although the Debtor was a victim to a third-party theft, the construction of the garage was the purpose of the escrowed funds and the plain language of the Loan Agreement states that the result of the failure of the funds to be used for their express purpose results in them being applied to the unpaid principal balance of the Loan Agreement, not arrearages. *Id.* (noting that frustration of purpose does not apply “when the language or circumstances [of the contract] indicate the contrary”). Ex. B, ¶¶ 4, 6, 11, and 14.

For all these reasons, the Debtor’s objection to the proof of claim 6-1 (Doc. 33), assigned to NewRez, is **denied**.

**IT IS SO ORDERED.**

Copies to:

Default List

Shellpoint Mortgage Servicing, P.O. Box 10826, Greenville, SC 29603-0675

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<sup>4</sup> The Mortgage provides that the security agreement shall be interpreted based upon the law in which the Property is located, which in this case is Ohio. Ex. A at 22, ¶ 15. The Loan Agreement is secured by property located in Ohio. Neither party has suggested any other state law applies to this dispute.