

IN RE:

CARL RICCITELLI,  
  
Debtor.

Case No. 95-10030  
Chapter 13

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CARL RICCITELLI,  
  
Plaintiff,

A.P. No. 98-1005

v.

WILSHIRE CREDIT CORP. and  
GIRARD SAVINGS BANK,  
  
Defendants.

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APPEARANCES:

Lisa L. Chalidze, Esq., Miller, Fagnant & Whelton, P.C., 36 Merchants Row, Rutland, VT 05701, for Carl Riccitelli.

Gordon C. Gebauer, Esq., Saxer Anderson Wolinsky & Sunshine P.C., P.O. Box 1505, Burlington, VT 05402-1505, for Wilshire Credit Corp. and Girard Savings Bank.

**MEMORANDUM OF DECISION ON  
MOTION FOR SUMMARY JUDGMENT**

**I.**

**Nature of the Action**

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On January 13, 1995, Carl Riccitelli (“Plaintiff” or “Debtor”) filed a chapter 13 bankruptcy petition. On November 22, 1996, fire destroyed Plaintiff’s home. On January 13,

1998, Plaintiff commenced the instant action against Green Mountain Power Corporation (“GMP”), alleging GMP directly or indirectly caused the fire. Plaintiff later amended his complaint to add defendants Wilshire Credit Corporation (“Wilshire”) and Girard Savings Bank (“Girard”; and together with Wilshire, “Defendant”). Defendant held the note and mortgage on Plaintiff’s home. Plaintiff alleged that Defendant breached an obligation to insure Plaintiff’s interest in the destroyed home.

On June 17, 1999, after oral argument, the Court (Conrad, J.) issued a bench ruling granting summary judgment in favor of GMP and Defendant. While the ruling was complete with respect to GMP, the Court reserved judgment on the proper amount of Defendant’s claim. As set forth in the June 30, 1999 order granting summary judgment in favor of Defendant, the “Court reserve[d] ruling on the issues of whether the Defendant[] obtained the full amount of the available insurance proceeds . . . and how those proceeds were applied to the Plaintiff’s loan . . . .”

On January 27, 2000, Defendant filed its second motion for summary judgment (the “Second S/J Motion”), seeking to resolve the issues reserved by the Court. Plaintiff was required to respond to the Second S/J Motion no later than February 17, 2000. To date, Plaintiff has not responded to the Second S/J Motion. Pursuant to this Court’s Chambers Rule No. 1, all material facts set forth in the Second S/J Motion are deemed admitted if not controverted by a statement of disputed facts.

Based upon the uncontroverted facts set forth in the Second S/J Motion pleadings, the Court grants the Second S/J Motion in accordance with the findings of fact and conclusions of law that follow.

## II.

### Material Facts

The material facts set forth herein are based upon Defendant's statement of uncontested facts, including the transcripts and affidavits annexed thereto, and the record of the proceedings to date.

On or about August 14, 1998, Plaintiff served his (newly amended) complaint on Defendant. On June 17, 1999, finding no material facts in dispute, Judge Conrad granted Defendant's first summary judgment motion, holding that Defendant had no duty to insure Plaintiff's interest in the destroyed home. As Defendant had insured Plaintiff's obligation to it under the note, the Court left for another day "the issues of whether the Defendant[] obtained the full amount of the available insurance proceeds . . . and how those proceeds were applied to the Plaintiff's loan . . . ." June 30, 1999 Summary Judgement Order (doc. no. 147).

Since the June 17 hearing, Plaintiff has deposed two Wilshire employees, Bruce Weinstein, Vice President of Loan Servicing, and Yvonne Harman-Sera, a Customer Service Representative. Defendant has submitted affidavits from Mr. Weinstein and Ms. Harman-Sera in support of the Second S/J Motion.

Mr. Weinstein's uncontroverted affidavit states, in relevant part, as follows:

1. I am responsible for the hazard insurance protection which Wilshire purchases to protect its collateral. I am very well aware of the issues and circumstances regarding insurance protection on lenders' collateral.
2. At the time Wilshire acquired Carl Riccitelli's loan it had in place a so-called "blanket" insurance policy which was designed to protect all of the collateral in Wilshire's portfolio. This so-called "blanket" insurance policy is the same instrument that some people in my industry refer to as a "force placed" policy. It was, in fact, insurance which Wilshire purchased to

protect its interest in collateral whenever the owners (borrowers) failed to purchase their own insurance.

3. In the case of Plaintiff, Carl Riccitelli, the insurance proceeds which Wilshire received in the amount of \$178,558.00, represented Wilshire's claimed unpaid principal balance on Mr. Riccitelli's loan at the time the insurance claim was made. *The unpaid principal balance is the limit of the liability of the policy purchased by Wilshire.* This amount is the same amount of money Wilshire would have received whether the insurance was called "force placed", "blanket", "lender's risk", etc. Wilshire would not have received more than the unpaid principal balance no matter what label one attaches to the type of insurance coverage which Wilshire purchased to protect its interest in its collateral.
4. It is customary and universal within the mortgage servicing and insurance industry that the amount recoverable on a "force-placed" or "blanket" policy is the unpaid principal balance on a Borrower's loan. *If Wilshire attempted to insure Mr. Riccitelli's property for more than Wilshire's interest in the property, it would not have recovered any amount exceeding its interest.*
5. The premium which Wilshire pays for a "force-placed" insurance policy is based upon the value of Wilshire's insurable interest. *Wilshire cannot obtain insurance for more than its insurable interest in the property. The insurable interest of Wilshire is the investment which Wilshire has in the property, or the unpaid principal balance. A "force-placed" insurance policy is designed to protect the lender's investment, not the time value of money such as interest.*
6. If Wilshire had attempted to purchase insurance to protect more than the unpaid principal balance in Mr. Riccitelli's case, it would have resulted in Wilshire paying a premium to the insurance company, and then passing that premium on to Mr. Riccitelli, for insurance which would never pay the value of what the insurance was designed to protect. In other words, paying more money for more insurance would not have resulted in a higher payout from the insurance company. It only would have resulted in additional costs to Mr. Riccitelli.
7. If the insurance policy allowed for Wilshire to recover more than the unpaid principal balance, then Wilshire would have applied for and if justified by the loss received additional funds and would have applied those funds to Mr. Riccitelli's loan.

8. It is not in Wilshire's interest to obtain less on an insurance policy than it is entitled to and in this case Wilshire did not receive any less than it was entitled to regarding Mr. Riccitelli's loan.

(emphasis added).

Ms. Harman-Sera's affidavit indicates the amount of Defendant's claim and the application against that claim of payments received from Plaintiff, insurance coverage and the chapter 13 trustee. More specifically, Ms. Harman-Sera's uncontroverted affidavit states, in relevant part, as follows:

1. I have reviewed and thoroughly examined the Riccitelli loan file regarding payment and expense history. Specifically, I have examined payments made to Wilshire by Mr. Riccitelli and the Chapter 13 Trustee. I have examined expenses incurred by Wilshire throughout its servicing of this loan, including escrow payments for taxes and insurance. I have reexamined the amount due by Mr. Riccitelli to Wilshire, from the time Wilshire began servicing this loan through the present, including how all amounts received were applied to Mr. Riccitelli's loan balance. I have reexamined this loan to make certain that all amounts received were applied to the correct accounts under Mr. Riccitelli's loan.
2. Mr. Riccitelli's loan was established at Wilshire such that it contained three separate accounts for the various charges made to Mr. Riccitelli's loan. There was a main loan account, which contained the unpaid principal balance and accrued interest; there was an escrow account, which showed the amount of money paid by Wilshire for taxes and insurance and any reimbursements paid by Mr. Riccitelli which were applied to the escrow account; the third account was the arrearage account, which consisted of the delinquent mortgage payments (arrearage) which Mr. Riccitelli sought to cure through his Chapter 13 Plan.
3. At the time that Wilshire made a claim against its "force-placed" insurance policy in December, 1996, the account officer reviewing this file incorrectly concluded that the unpaid principal balance was \$178,558.00 [rather than the correct balance of \$179,081.42] and indicated this on the insurance claim form. At the time that Wilshire made its claim against its "force-placed" insurance policy, Mr. Riccitelli's arrearage account was \$27,910.39. The account officer, George Moraine, filled out an insurance claim form with both of these figures included. The insurance company

paid the reported unpaid principal balance of \$178,558.00 in March, 1997.

4. The \$178,558.00 insurance proceeds received in March 1997 were applied to Mr. Riccitelli's loan as follows:

10/96 through 4/97 monthly payments  
for principal and interest (arrear)  
@ \$1,519.91 per month - \$10,639.37

Application to negative escrow balance  
(taxes, insurance, etc.) of 10/96  
through 4/97 escrow payments - \$ 4,059.05

Late fees - \$ 613.24

Remaining balance of insurance  
proceeds which were applied to the  
unpaid principal balance **\$163,246.34**

5. The application of the remainder of the insurance proceeds of \$163,246.34, and application of a payment from Mr. Riccitelli in July, 1997, reduced the unpaid principal balance to \$12,525.03 [, the current unpaid principal balance].
6. Mr. Riccitelli's arrearage account, which is the amount he was to repay through his Chapter 13 Plan [is] . . . \$13,263.56 [(calculations in affidavit omitted)].
7. Mr. Riccitelli's current account balance is . . . [\$8,789.08].

Since the depositions of Weinstein and Harman-Sera, Plaintiff has not requested further discovery, disclosed any expert witnesses, provided additional documents in support of his amended complaint, produced any independent evidence or testimony to contradict or refute any of Defendant's positions. As earlier noted, Plaintiff has filed no response to Defendant's Second S/J Motion.

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### III.

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#### **Legal Discussion**

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Summary judgment is appropriate only if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material when it affects the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a genuine dispute over a material fact when the "evidence supporting the claimed factual dispute [is] shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Id. at 249 (quoting First National Bank of Arizona v. Cities Services Co., 391 U.S. 253, 288-89 (1968)).

The issues for determination by the Court, per Judge Conrad's June 30, 1999 Order, are "whether the Defendants obtained the full amount of available insurance proceeds from their insurance company, and how those proceeds were applied to the Plaintiff's loan, in order to determine what amount, if any, the Plaintiff may still owe to the Defendants."

Given the absence of a response from Plaintiff to the Second S/J Motion, including the factual averments contained in the documents filed therewith, the Court accepts as true the facts set forth by Defendant. Nevertheless, the Court is mindful that in deciding a motion for summary judgment, it must resolve all ambiguities and inferences in favor of the nonmoving party. Foucher v. First Vermont Bank & Trust Co., 821 F. Supp. 916, 922 (D.Vt.1993).

By Defendant's own admission it did not collect the full amount of available insurance proceeds. According to Ms. Harman-Sera, the claim made to the insurance company

was understated in the amount of \$523.42. Defendant's claim thus is appropriately reduced by such amount, as well as interest, if any, charged on such amount, given that Defendant has charged Plaintiff for the cost of maintaining such insurance coverage.

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**IV.**

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**Conclusion**

For the reasons set forth above, the Court grants Defendant's Second S/J Motion; provided, however, that the amount of Defendant's remaining claim is reduced by \$523.42 and any interest that has accrued on that amount.

**SO ORDERED.**

**Dated at Rutland, Vermont this 26<sup>th</sup> day of June, 2000**

**/s/ Colleen A. Brown**  
**Colleen A. Brown**  
**U.S. BANKRUPTCY JUDGE**