

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

**Felicia S. Allard,
Debtor.**

**Chapter 13
Case # 19-10203**

ORDER

**Granting Debtor's Motion for Attorney's Fees,
Denying Debtor's Motion to Disallow Creditor Fees as Moot,
Precluding Creditor from Seeking Certain Fees in the Future, and
Setting Schedule to Finalize Amount of Debtor's Attorney's Fees and Have Them Paid**

This matter has come before the Court on the Debtor's Motion (doc. # 21, the "Debtor's Motion") to Disallow the Post-Petition Mortgage Fees, Expenses and Charges that The Money Source, Inc. ("TMS") sought in its Notice (doc. # 23, "TMS's Notice"). The Court held a hearing on the Debtor's Motion on November 20, 2020, at which Michelle M. Kainen, Esq., presented arguments on behalf of the Debtor, and Jeffrey J. Hardiman, Esq., presented arguments on behalf of TMS. The Court issues this Order to memorialize its bench ruling on the record at the November 20th hearing.

In ruling on the Debtor's Motion, the Court has considered the record in this case, the documents the parties have filed in connection with this contested matter, including the Debtor's Motion, TMS's Notice, and TMS's proof of claim (claim # 10-1), and the parties' arguments at the November 20th hearing, and gives significant weight to these undisputed facts:

- (i) The Debtor was current on the subject mortgage as of the petition date and her confirmed plan provides for direct mortgage payments, i.e., she does not make conduit mortgage payments through the chapter 13 trustee (see confirmation order entered June 17, 2019, at doc. # 16).
- (ii) On July 24, 2019, TMS filed a proof of claim following its recalculation of the Debtor's escrow reserve indicating a projected escrow shortage of \$1,159.31 (see proof of claim # 10-1, pp. 2, 4). TMS attached to its proof of claim a copy of the mortgage, which sets forth the following language describing the circumstances under which TMS may recover attorney's fees from the borrower (i.e., the Debtor) as pertinent to fees incurred in connection with a bankruptcy case:

If ... there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (**such as a proceeding in bankruptcy**) ... then Lender may do and pay for whatever is reasonable or appropriate ... Lender's actions can include ... **paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding.**

(claim # 10-1, pp. 18–19, ¶ 9) (emphases added).

(iii) Approximately seven weeks after the Debtor filed the Motion, and approximately one week prior to the hearing on the Debtor's Motion, TMS withdrew its Notice without explanation (see docket entry dated November 10, 2020). At the November 20th hearing, in response to the Court's inquiry, TMS's attorney was unable to state why TMS withdrew its Notice.

Based on the record in this case, THE COURT FINDS it was not necessary for TMS to retain counsel to file the proof of claim in this case to protect its interest in its collateral and/or rights under the mortgage, including its secured position in this bankruptcy case, as those were never challenged; if, in an abundance of caution, it chose to do so, then that was a cost of doing business and not a cost that could be imposed on the Debtor pursuant to the terms of ¶ 9 of the instant mortgage.

Therefore, IT IS HEREBY ORDERED that the Debtor's motion to disallow the fees TMS sought in its Notice of Post-Petition Fees (doc. # 19) is denied as moot and IT IS FURTHER ORDERED that TMS is permanently prohibited from seeking those fees.


THE COURT FURTHER FINDS that it would be unfair to require the Debtor to pay fees to her chapter 13 attorney to defend against a Post-Petition Fee Notice because TMS chose to retain an attorney to file a proof of claim under these circumstances, especially since TMS withdrew the Notice after the Debtor's attorney challenged it; to do so would penalize the Debtor for the lender's business decisions, and would be inconsistent with the rationale this Court articulated in In re Wallett, 2012 Bankr. LEXIS 4274, 2012 WL 4062657 (Bankr. D. Vt. Sept 14, 2012).

Therefore, IT IS FURTHER ORDERED that TMS must pay reasonable attorney's fees the Debtor incurred in connection with her Motion objecting to the TMS's Notice.

To implement that directive, IT IS FURTHER ORDERED that **by November 30, 2020**, Ms. Kainen shall file either (i) a statement of fees incurred in reviewing, responding to, and appearing in opposition to TMS's Notice, or (ii) a stipulation between herself and TMS's attorney stipulating to the amount of fees TMS shall pay Ms. Kainen and the due date for such payment. If there is no stipulation, then the Court will give TMS seven (7) days to respond to Ms. Kainen's fee statement before ruling on the amount of fees TMS must pay and date by which TMS must pay them.

SO ORDERED.

November 23, 2020
Burlington, Vermont



Colleen A. Brown
United States Bankruptcy Judge