



The following constitutes
the order of the court. Signed August 14, 2016

A handwritten signature in black ink that reads "Stephen L. Johnson". The signature is written in a cursive style and is positioned above a horizontal line.

Stephen L. Johnson
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:

MARSHA HOWARD,

Debtor.

Case No. 10-52527 SLJ

Date: July 21, 2016

Time: 10:00 a.m.

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**ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DETERMINE
THAT MORTGAGE IS CURRENT**

Debtor's Motion to Determination [sic] that Mortgage is Current ("Motion") came on for hearing at the above-referenced date and time. Appearances were noted on the record. After hearing argument from counsel, the court took the matter under submission. For the following reasons, the court will grant the relief requested pursuant to Bankruptcy Rule 3002.1(h) but will deny Debtor's request for attorney's fees.

ORDER ON MOTION TO DEEM MORTGAGE CURRENT

1 **I. BACKGROUND**

2 The background of this case and the relevant facts were set forth in the Order Granting
3 in Part and Denying in Part Motion to Deem Mortgage Current (“Preclusion Order”), entered on
4 June 1, 2016, which is incorporated. This is a brief summary of events prior to the filing of the
5 current Motion. In response to the chapter 13 trustee’s (“Trustee’s”) notice of final cure
6 payment under Bankruptcy Rule 3002.1(f), PNC, which holds the mortgage on Debtor’s
7 residence, filed three substantially different responses under Bankruptcy Rule 3002.1(g), none
8 of which was supported by an itemized statement. As a result, Debtor brought a motion under
9 Bankruptcy Rule 3002.1(i) (“Rule 3002.1(i) Motion”). Based on PNC’s explanation at the
10 hearing on the Rule 3002.1(i) Motion, PNC alleged that over \$60,000 in escrow advances for
11 taxes and insurance remain outstanding.

12 For reasons stated in the Preclusion Order, I struck all of the responses filed by PNC
13 under Bankruptcy Rule 3002.1(g), precluded PNC from introducing evidence of the alleged
14 outstanding escrow advances in any contested matter and adversary proceeding under
15 Bankruptcy Rule 3002.1(i)(1), and awarded attorney’s fees and costs to Debtor under
16 Bankruptcy Rule 3002.1(i)(2). I denied without prejudice Debtor’s request to deem the
17 mortgage current, subject to Debtor filing a motion based on Bankruptcy Rule 3002.1(h).

18 Debtor then filed her Motion under Bankruptcy Rule 3002.1(h) to deem the mortgage
19 current, as well as a request for attorney’s fees and costs for prosecuting the Motion.

20 PNC filed an opposition to the Motion. PNC asserted that the underlying note was
21 executed by Debtor’s non-filing spouse Ricky Maurice Howard, to whom its security interest
22 extends. It opposed any order to deem the mortgage current because it would impermissibly
23 infringe on PNC’s rights to collect from Mr. Howard. As to the request for attorney’s fees,
24 PNC argued that Bankruptcy Rule 3002.1(h) does not authorize the award of attorney’s fees.

25 At the hearing on the Motion, PNC made additional arguments not found in the
26 opposition papers. PNC argued: (1) The court cannot grant the Motion unless Debtor has
27 actually paid off the outstanding escrow advances as alleged by PNC; (2) Debtor has the burden
28 of proof under Rule 3002.1(h) unless the payments to PNC were made through the chapter 13

1 trustee; (3) PNC has the right to present the excluded evidence and pursue any deficiency in a
2 non-bankruptcy forum against Debtor's non-filing spouse; (4) Debtor knew she didn't pay the
3 property taxes and insurance and granting the Motion would result in a windfall to Debtor; and
4 (5) Bankruptcy Rule 3002.1 does not apply to taxes and insurance which Debtor knew she must
5 pay.

6
7 **II. DISCUSSION**

8 A. Applicability of Bankruptcy Rule 3002.1

9 At various points during oral argument, PNC argued that Bankruptcy Rule 3002.1 and
10 its purpose do not apply to escrow advances for property taxes and insurance which a debtor
11 knows she did not pay. To the extent that PNC is arguing that Bankruptcy Rule 3002.1 is
12 inapplicable, it is a threshold issue which must be addressed first.

13 This argument is foreclosed by the law of the case doctrine, which precludes
14 reconsideration of an issue that has already been decided by the same court, or a higher court, in
15 the identical case. *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993). "For the doctrine to
16 apply, the issue in question must have been decided either expressly or by necessary implication
17 in [the] previous disposition." *Id.*, at 154 (internal quotation marks and citations omitted). The
18 prior finding should be followed unless "[1] the evidence on a subsequent trial was substantially
19 different, [2] controlling authority has since made a contrary decision of the law applicable to
20 such issues, or [3] the decision was clearly erroneous and would work a manifest injustice." *Pit
21 River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1096-97 (9th Cir. 1994)
22 (quotation and citation omitted).

23 The court has already decided that Bankruptcy Rule 3002.1 is applicable in the
24 Preclusion Order. Although the Preclusion Order resolved a motion under Bankruptcy Rule
25 3002.1(i), my application of Bankruptcy Rule 3002.1 as a whole was necessarily and expressly
26 decided. I am precluded from considering the applicability of Bankruptcy Rule 3002.1 now.

27 Even if the law of the case doctrine was not applicable, I do not find merit in PNC's
28 argument. Preliminarily, it is worth observing that PNC did not raise the argument that Rule

1 3002.1 is not applicable to escrow advances by a mortgage lender for taxes and insurance in its
2 pleadings or during oral argument in opposing the Rule 3002.1(i) Motion, or in its written
3 opposition to the Motion. Instead, PNC raised the argument for the first time during oral
4 argument on the Motion, without providing any legal authority to support its contention. This is
5 not proper.

6 Moreover, a review of Bankruptcy Rule 3002.1 makes it easy to see the argument is
7 unsupported. Subpart (b) provides that a mortgage holder must file and serve a notice of any
8 change in payment amount, “including any change that results from an interest rate or *escrow*
9 *account adjustment*[.]” Fed.R.Bankr.P. 3002.1(b) (emphasis added). Subpart (c) requires the
10 mortgage holder to file and serve a notice “itemizing *all fees, expenses, or charges* (1) that were
11 incurred in connection with the claim after the bankruptcy case was filed, and (2) that *the*
12 *holder asserts are recoverable against the debtor or against the debtor’s principal residence.*”
13 Fed.R.Bankr.P. 3002.1(c) (emphasis added). Subpart (g) requires the mortgage holder to file a
14 response to Trustee’s Notice of Final Cure Payment indicating “whether the debtor is otherwise
15 *current on all payments consistent with § 1322(b)(5) of the Code*” and to the extent the
16 mortgage lender asserts debtor is not current, it must itemize “the required cure or *postpetition*
17 *amounts.*” Fed.R.Bankr.P. 3002.1(g) (emphasis added). These provisions clearly contemplate
18 escrow advances for taxes and insurance to be included in notices and responses filed by the
19 mortgage lender under the rule. Nothing in Bankruptcy Rule 3002.1 indicates they should be
20 treated differently than other charges or expenses which a mortgage holder may seek to collect
21 from a debtor.

22 B. Burden of Proof under Bankruptcy Rule 3002.1(h)

23 In determining the burden of proof under Bankruptcy Rule 3002.1(h), the court must
24 look to other subparts of Rule 3002.1 and read the statute as a whole. The mortgage holder is
25 required to file and serve notices of payment changes no later than twenty-one days before the
26 new payment is due and must itemize all postpetition fees, expenses or charges that the holder
27 asserts are recoverable against the debtor or her residence. Fed.R.Bankr.P. 3002.1(b)-(c). Upon
28 completion of the plan, if the mortgage holder contends there are outstanding amounts, it must

1 file a response to Trustee’s notice of final cure payment and “itemize the required cure or
2 postpetition amounts, if any, that the holder contends remain unpaid as of the date of the
3 statement.” Fed.R.Bankr.P. 3002.1(g). The itemization must be sufficiently detailed for a
4 debtor to contest the holder’s response under Bankruptcy Rule 3002.1(g). *See In re Carr*, 468
5 B.R. 806, 808 (Bankr. E.D. Va. 2012)(“The creditor must respond to that notice [of final cure
6 payment] by acknowledging that it is correct, or if it is not correct, stating *with particularity* the
7 amounts that remain unpaid.” (emphasis added)). Additionally, Bankruptcy Rule 3002.1(g)
8 states that the mortgage holder’s response to the notice of final cure payment does not enjoy the
9 same prima facie presumption set forth in Bankruptcy Rule 3001(f). I conclude the mortgage
10 holder has the burden to establish the prepetition cure amounts and outstanding postpetition
11 obligations on the mortgage.

12 Other courts have come to the same conclusion. *See In re Kreidler*, 494 B.R. 201, 204
13 (Bankr. M.D.Pa. 2013)(“In order to prevail on its claim for postpetition defaults, the holder was
14 required to appear and establish that fact.”); *In re Rodriguez*, 2013 WL 3430872, *4 (Bankr.
15 S.D.Tex. 2013)(“The court infers from the absence of a presumption of prima facie validity that
16 the claimant bears the burden of proof under Bankruptcy Rule 3002.1(h).”); *In re Galvan*, 2014
17 WL 1347977, *2 (Bankr. S.D.Tex. 2014)(“The claimant bears the burden of proof as to whether
18 postpetition charges are allowed under Bankruptcy Rule 3002.1(h)”).

19 PNC asserted that the burden of proof would be on PNC only if the Trustee made the
20 payments to PNC, but because Debtor made payments directly to PNC in this case, the burden
21 of proof is on Debtor. PNC did not provide any legal authority for this proposition.
22 Bankruptcy Rule 3002.1 makes no such distinction. In fact, the commentary to the rule
23 contradicts this argument. The Advisory Committee Notes to Bankruptcy Rule 3002.1 state
24 that “[Rule 3002.1] applies regardless of whether the trustee or the debtor is the disbursing
25 agent for postpetition mortgage payments.”

26 C. Determination under Bankruptcy Rule 3002.1(h)

27 PNC has not met its burden to establish the existence of the alleged outstanding balance.
28 PNC argued that Debtor cannot prevail on the Motion unless she can show she actually made

1 the payments PNC alleges are delinquent. To find otherwise, PNC alleges, would result in a
2 windfall to Debtor.

3 These contentions rely on unproven assumptions. First, they presuppose that the amount
4 of the escrow advances claimed by PNC were actually correct. That is far from certain given
5 PNC's conduct in this case as set forth in the Preclusion Order. Second, the argument depends
6 on a conclusion that the burden of proof is on Debtor. That is incorrect: the burden of proof is
7 on PNC to establish Debtor owes the amount in question.

8 PNC's argument is also illogical. PNC contends that to prevail on the Motion, Debtor
9 must actually pay the amounts for escrow advances. In this case, Debtor could not do so
10 because of PNC's failure to file the detailed information required under Bankruptcy Rule
11 3002.1(g) in response to the original Notice given by the Trustee. Taking PNC's argument
12 literally, a debtor would be obliged to pay for charges that were never itemized, as required by
13 Rule 3002.1, and that PNC could never prove. The only party who could possibly benefit from
14 such an arrangement would be PNC, and it would do so even though it conceded it failed to
15 comply with the specific requirements of Bankruptcy Rule 3002.1(g). The law is inconsistent
16 with this contention.

17 At the hearing on this Motion, PNC brushed aside its failure to comply with the rule by
18 insisting that Debtor knew she had to pay taxes and insurance but did not do so. This is a
19 misstatement of the factual record. The record shows that PNC was collecting escrow
20 payments from Debtor to pay these taxes and insurance throughout this bankruptcy case. As set
21 forth in detail in the Preclusion Order, PNC filed three notices of mortgage payment change in
22 this case between 2012 and end of 2013, showing changes in escrow payments from \$787.59 to
23 \$4,145.05 to \$772.57 to \$1,153.76. Debtor paid the taxes and insurance in the form of escrow
24 payments specified by PNC.¹ Debtor—and the court—are perplexed about why there would be
25 a shortfall under the circumstances. PNC's allegation that Debtor is getting a windfall has not
26 been proven.

27 _____
28 ¹ At the hearing on the Rule 3002.1(i) Motion, PNC's counsel admitted on the record that
Debtor paid the amounts as indicated in the notices of payment change.

1 Most importantly, PNC’s arguments at the hearing must fail because they are not
2 supported by the plain language of Rule 3002.1(h). PNC failed to provide any supporting legal
3 authority that these are proper considerations under Bankruptcy Rule 3002.1(h). Rather, PNC
4 appealed to the equitable power of the bankruptcy court. Equity does not permit the court to
5 subvert or contradict specific law. *See Law v. Siegel*, 134 S.Ct. 1188, 1194 (2014)(“whatever
6 equitable powers remain in the bankruptcy courts must and can only be exercised within the
7 confines of the Bankruptcy Code.”). Even if the court had the power, equity is not available to
8 remedy a situation of PNC’s making.

9 D. Collection from Non-Debtor Third Party

10 PNC cites to *In re Felipe*, 549 B.R. 252 (Bankr. D.Haw. 2016) for the proposition that it
11 can present evidence and pursue Debtor’s non-filing spouse for the outstanding escrow
12 advances PNC made to cover taxes and insurance. *Felipe* is distinguishable. The court in
13 *Felipe* was discussing an order to preclude evidence under Bankruptcy Rule 3002.1(i) and
14 stated, “The rule permits me to preclude the presentation of evidence in the bankruptcy court,
15 but not in other courts.” *Id.*, at 256. This case does not involve a motion to preclude evidence.
16 Here, by contrast, the court has already barred the introduction of evidence under Bankruptcy
17 Rule 3002.1(i)(1). Nothing in *Felipe* suggests an order determining that a debtor has cured the
18 prepetition default and paid all postpetition payments under Rule 3002.1(h) is not an
19 enforceable order in other courts.

20 At present, PNC is not attempting to collect or assert a default against Debtor’s non-
21 filing spouse based on the alleged outstanding escrow advances, so the issue is not before the
22 court. This order will have whatever effect it has in other legal forums under applicable law,
23 including California community property law. Given the history between the parties, the court
24 strongly encourages PNC to conduct a thorough legal analysis of bankruptcy and applicable
25 non-bankruptcy law before attempting to collect from Debtor’s non-filing spouse in another
26 forum.

1 E. Request for Attorney's Fees

2 In requesting attorney's fees, Debtor contends that the Motion is an extension of the
3 relief she sought under Rule 3002.1(i). As explained in the Preclusion Order, the court does not
4 find the phrase "award other appropriate relief" in Bankruptcy Rule 3002.1(i)(2) to encompass a
5 request to deem the mortgage current and instructed Debtor to file a motion under subpart (h) if
6 she wants this type of relief. The remedies available under Rule 3002.1(i), to the extent
7 requested by Debtor, had already been awarded in the Preclusion Order. This Motion was made
8 pursuant to subpart (h), which does not have a provision for award of attorney's fees, and is
9 independent from subpart (i). The court will not import provisions of Rule 3002.1(i) into Rule
10 3002.1(h).

11
12 **III. CONCLUSION**

13 For the foregoing reasons, IT IS HEREBY ORDERED as follows:

14 1. The Motion is GRANTED IN PART and DENIED IN PART.

15 2. Pursuant to Bankruptcy Rule 3002.1(h), the court finds that the Debtor has cured
16 all prepetition default and paid all required postpetition amounts on the mortgage held by PNC.

17 3. Debtor's request for attorney's fees is denied.

18 IT IS SO ORDERED.

19 ***** END OF ORDER *****

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