

JUDGE BUCHANAN SUMMARY

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February 9, 2016

In re Joslin, Case No. 15-12376 (January 25, 2016)

Order Sustaining Trustee's Objection To Inclusion Of Attorney's Fees In Mortgage Arrearage Claim And Overruling, In Part, Sharefax Credit Union's Objection to Confirmation

Debtor sought to cure an arrearage on his residential mortgage through his Chapter 13 Plan while continuing his regular monthly mortgage payments. The Chapter 13 Trustee objected to the claim filed by the mortgagee for the arrearage as it included attorney's fees from a prepetition foreclosure.

Section 1322(e) provides that the amount to cure an arrearage is determined in accordance with the underlying agreement and nonbankruptcy law. The mortgagee relied on paragraph 18 of the mortgage (presumably a FNMA/FHLMC standard form) which provides that a mortgagor may reinstate a delinquent mortgage under certain circumstances. The Ohio Supreme Court in Wilbon v. Bank One Corp., 121 Ohio St. 3d 543, 906 N.E.2d 396 (Ohio 2009) held that a provision for the recovery of attorney's fees in connection with the reinstatement of a mortgage was valid and enforceable under Ohio law. The Trustee claimed Ohio follows the "American Rule" which provides that each party is responsible for payment of its own attorney's fees and that a provision for the payment of attorney's fees in a debt instrument upon a default is void and unenforceable under Ohio law as against Ohio public policy, at least in the consumer area.

The Chapter 13 Trustee also cited In re Tudor, 342 B.R. 540 (Bankr. S.D. Ohio) for the proposition that even if Ohio law allows recovery of attorney's fees on reinstatement that logic does not compel a similar result under Section 1322(e). The Court sided with the Trustee, and the Tudor decision, and held that the debtor did not actually invoke his contractual right to reinstate.

The Court found an economic difference between a contractual reinstatement provision and a cure over a reasonable period of time under Section 1322(e). The Court interpreted Section 1322 (e) as directing the court to analyze the underlying agreement and nonbankruptcy law to determine the amount necessary to cure a default but that the court is not directed to the agreement and nonbankruptcy law to determine the right to reinstatement itself. The Court distinguished the Sixth Circuit decision in Deutsche Bank Nat'l Trust Co. v. Tucker, 621 F.3d 460 (6th Cir. 2010) in a footnote confining Tucker to a Section 506(b) case.