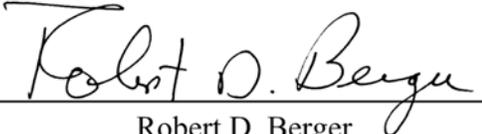




The relief described hereinbelow is SO ORDERED.

SIGNED this 24th day of July, 2019.


Robert D. Berger
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**Bobby Joe Spencer
Diane Wiggins Spencer,**

Case No. 12-20854-13

Debtors.

**Order Denying Debtors' Motion for Judicial Notice,
Sustaining Debtors' Objection to the CitiMortgage Proof of Claim,
and Resolving Remaining Matters**

Debtors Bobby and Diane Spencer have been engaged in seemingly endless litigation against CitiMortgage, Inc., concerning the foreclosure of their home. The Court currently considers Debtors' "motion for judicial notice,"¹ wherein Debtors request judicial notice of an alleged violation of the Real Estate Settlement Procedures Act (RESPA) based on a failure to

¹ Doc. 348 (motion); Doc. 349 (memorandum in support); Doc. 357 (objection of CitiMortgage).

give required notices upon the “sale” of Debtors’ mortgage in 2005. After finding the motion to be without merit, the Court next considers Debtors’ objection to CitiMortgage’s proof of claim² and sustains Debtors’ objection to the claim. The Kansas Court of Appeals concluded that CitiMortgage is the holder of the mortgage and note at issue and was the secured lender entitled to judgment against Debtors. The amount owed by Debtors, including principal, escrow, and numerous associated fees, has also already been established. The claim filed by CitiMortgage in this bankruptcy case, however, was not timely filed, and as a result, Debtors’ objection to that proof of claim is sustained. Finally, based on these rulings, the Court resolves the remaining motions and matters pending in Debtors’ bankruptcy case.

I. Background

Debtor Bobby Spencer first filed for Chapter 13 bankruptcy in August 2005.³ He had significant prepetition and postpetition arrearages to CitiMortgage in that case.⁴ Ultimately, the case was dismissed in November 2007 for default in plan payments. Debtors Bobby and Diane Spencer then filed their current Chapter 13 petition on March 31, 2012. The date for the meeting of creditors under 11 U.S.C. § 341 was set for April 25, 2012, and a proof of claim deadline was set for July 24, 2012, with government claims due October 1, 2012.

In the interim between the 2005 and 2012 bankruptcy cases, CitiMortgage filed a mortgage foreclosure action against Debtors in state court. CitiMortgage filed a proof of claim in the 2012 bankruptcy case on October 1, 2012, stating a claim as of that date for \$282,528.77 and

² Doc. 162 (claim objection); Doc. 333 (Order requiring Debtors to show cause why their claim objection should not be denied); Doc. 340 (Debtors’ response to Order to show cause).

³ Case No. 05-23969-13.

⁴ Case No. 05-23969-13, Doc. 98.

an arrearage of \$123,528.77. No payments had been made by Debtors since August 2007.

Debtors objected to the proof of claim, generally complaining about references to the Bank of New York Mellon in the documents surrounding their note and mortgage, making more general allegations against CitiMortgage and “robo-signing,” and referencing certain industry-wide mortgage issue settlements. Ruling on a motion for a more definite statement filed by CitiMortgage, this Court required that a final amended objection to claim be filed expanding on the claims of fraud Debtors presented, and Debtors filed their second amended objection to CitiMortgage’s claim on July 11, 2014.⁵ The objection generally complains about the escrow amount claimed by CitiMortgage and alleges that CitiMortgage’s claim is fraudulent because it is based on fraudulent documentation and was “reprogrammed” incorrectly. Debtors have also occasionally argued that the CitiMortgage claim was filed late.⁶

CitiMortgage filed a motion for summary judgment on the claim objection, and in January 2016, the Court entered an order on that motion.⁷ In its Order, the Court noted that the state court granted summary judgment in a mortgage foreclosure action on Debtors’ property on February 27, 2012, but that on March 1, 2012, Debtors filed a motion to alter that judgment. No decision had been entered on the motion to alter judgment, because Debtors then filed their bankruptcy petition on March 31, 2012. This Court, therefore, granted stay relief to

⁵ Doc. 162, with Document in Support at Doc. 163 and Supplement at Doc. 165.

⁶ *See, e.g.*, Doc. 35 ¶ 9 (original Objection to Claim No. 12 of CitiMortgage stating that CitiMortgage “filed an untimely claim”), Doc. 103 p.1 (amended Objection to Claim referring to the claim as “Late”), Doc. 162 p.1 (second amended Objection to Claim relying on original objections but expanding on allegations of fraud per Court’s Order); Doc. 340-1 p.1 (“CitiMortgage’s proof of claim in the case at bar was admitted by its counsel to be tardy[.]”).

⁷ Doc. 301.

CitiMortgage so that any remaining issues in the mortgage foreclosure action could be finalized.

Ultimately, the state court considered Debtors' original motion to alter or amend the foreclosure judgment and a renewed motion to amend and denied Debtors' motions. Debtors appealed that denial to the Kansas Court of Appeals and the Kansas Supreme Court, but Debtors' avenues for appeal expired when the Kansas Supreme Court denied review on April 27, 2018.

The original order entered by the state court on February 27, 2012, granted judgment of foreclosure to CitiMortgage. Specifically, the state court entered in personam judgment against Bobby Spencer and in rem judgment against Diane Spencer for a total of \$303,921.88. After stay relief was granted by this Court and the state court was able to consider Debtors' post-judgment motions therein, the state court again entered judgment for CitiMortgage and expanded on its earlier written decision. The state court found that Bobby Spencer executed the promissory note through his attorney in fact and that CitiMortgage was in physical possession of that original note that had been endorsed "in blank." Debtors also executed the mortgage at issue and granted a security interest to secure that note, and the mortgage had been assigned to CitiMortgage. Debtors defaulted on their payments, and the entire amount had been accelerated and was due. The Kansas Court of Appeals, upholding that judgment, stated that the record conclusively established that "(1) [Debtors] signed a promissory note secured by a mortgage; (2) Citi was the holder of the note executed by [Debtors] and [Debtors'] mortgage was assigned and recorded in favor of Citi; and (3) [Debtors] were in default on the note."⁸ The Kansas Court of Appeals stated that other issues were "immaterial to the legal issue of whether Citi was the holder of the

⁸ *CitiMortgage, Inc. v. Spencer*, No. 116,889 at 8, 2017 WL 3947343, at *1 (Kan. Ct. App. Sept. 8, 2017).

note and mortgage and had the legal authority to enforce those instruments.”⁹

In an Order denying as moot Debtors’ request to compel certain discovery, the Court noted that the Kansas courts had conclusively established that CitiMortgage was the holder of the mortgage and note and was the secured lender underpinning the proof of claim. The Court also concluded that the state court judgment establishing the amount owed by Debtors, including principal, escrow, and associated fees, was also established. As a result, the Court directed Debtors to show cause why their objection to the CitiMortgage proof of claim should not be denied. Debtors then filed an additional response memorandum and their motion for judicial notice.

II. Analysis

Proceedings concerning the “allowance or disallowance of claims against the estate” are core proceedings under 28 U.S.C. § 157(b)(2)(B), over which this Court may exercise subject matter jurisdiction.¹⁰

A. Debtors’ Motion for Judicial Notice

Debtors’ motion for judicial notice is difficult to parse. The motion references a March 18, 2019, letter from CitiMortgage informing Debtors that servicing of their mortgage had been transferred to Cenlar FSB. Somehow the March 2019 letter triggered Debtors into believing that when Debtors’ note and servicer were allegedly sold/transferred in 2005, Debtors did not receive requisite notices pursuant to the Real Estate Settlement Procedures Act (“RESPA”)¹¹ and

⁹ *Id.*

¹⁰ 28 U.S.C. § 157(b)(1) and § 1334(b).

¹¹ Debtors specifically reference 12 U.S.C. § 2605, which requires certain notices by a transferor of a federally related mortgage loan.

that the Court should take judicial notice of that “fact.”

As CitiMortgage points out, however, this subject is entirely inappropriate for judicial notice. Under Federal Rule of Evidence 201, a court may take judicial notice of “adjudicative facts”—i.e., the facts of a particular case¹²—only if the fact “is not subject to reasonable dispute” because it is generally known or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Yes, the doctrine of judicial notice is broadly construed in the Tenth Circuit,¹³ but whether CitiMortgage was required to give certain notices under RESPA, and if so, whether they gave those notices, is not a fact established beyond reasonable dispute. The doctrine applies only to those facts “that are verifiable with certainty.”¹⁴ A court may also take judicial notice of the existence and contents of publicly filed orders and pleadings and may take judicial notice of what was decided in court documents,¹⁵ but again, notices given to or received by Debtors more than ten years ago do not fit this category.

And that brings the Court to the next point. Even if the Court were to entertain the subject of alleged RESPA violations, the statute of limitations on such a claim has long passed. An action under RESPA’s noticing section (12 U.S.C. § 2605) must be brought “within 3 years” of a violation.¹⁶ A violation that allegedly occurred in 2005 is far beyond the three years

¹² *United States v. Iverson*, 818 F.3d 1015, 1030 (10th Cir. 2016) (defining “adjudicative facts” as “simply the facts of the particular case,” and citing case calling adjudicative facts as the “who, what, where, and when of a lawsuit” (internal quotations and citations omitted)).

¹³ *Bullock v. Telluride Income Growth LP (In re Telluride Income Growth LP)*, 364 B.R. 407, 414 (B.A.P. 10th Cir. 2007).

¹⁴ *Id.*

¹⁵ *Columbian Fin. Corp. v. Bowman*, 314 F. Supp. 3d 1113, 1119-20 (D. Kan. 2018).

¹⁶ 12 U.S.C. § 2614.

contemplated by RESPA for actions. As a result, even if this Court could take judicial notice of alleged notice violations, the statute of limitations prohibits any RESPA action.

Finally, the Court exercises its discretion to decline to take judicial notice of the facts alleged by Debtors. The decision whether to “take judicial notice of a particular fact is within the court’s discretion.”¹⁷ If Debtors wish to allege a RESPA violation, the appropriate place to do so is neither this Court nor this time.

B. Debtors’ Objection to CitiMortgage’s Proof of Claim

As stated above, Debtors’ objection to CitiMortgage’s proof of claim generally complains about the escrow amount claimed by CitiMortgage and alleges that CitiMortgage’s claim is fraudulent because it is based on fraudulent documentation and was “reprogrammed” incorrectly. The Court addressed both arguments in its prior order,¹⁸ and Debtors continue to press those arguments. Debtors clearly do not understand, however, that the state court has already entered a judgment of foreclosure against them. The issue of the ownership of the mortgage/note has been finally decided by the state court. Regardless, the Court sustains Debtors’ objection to the CitiMortgage proof of claim for another, entirely unrelated, reason.

Under Federal Rule of Bankruptcy Procedure 3001(f), a proof of claim filed in accordance with Rule 3001 constitutes “prima facie evidence of the validity and amount of the claim.” Debtors, as the objecting party to the proof of claim, carry “the burden of going forward with evidence supporting the objection” to the CitiMortgage proof of claim.¹⁹ The Court treats

¹⁷ *JP Morgan Trust Co. Nat’l Ass’n v. Mid-America Pipeline Co.*, 413 F. Supp. 2d 1244, 1258 (D. Kan. 2006).

¹⁸ *See* Doc. 333.

¹⁹ *In re Picacho Hills Util. Co., Inc.*, 515 B.R. 820, 824 (Bankr. D.N.M. 2014).

pro se pleadings liberally, but it cannot advocate for pro se litigants.²⁰ A court cannot “construct arguments or theories for the [movant] in the absence of any discussion of those issues”²¹ or “supply additional factual allegations to round out a . . . complaint or construct a legal theory on [a movant’s] behalf.”²²

That said, the timeliness of a proof of claim is a threshold issue. Section 502(b)(9) of the Bankruptcy Code directs that a bankruptcy court “shall allow” a claim that has been objected to, except when the “proof of claim is not timely filed” under the Federal Rules of Bankruptcy Procedure. Under the version of Federal Rule of Bankruptcy Procedure 3002(c) that was in effect at the time this case and the claim were filed, a proof of claim was “timely filed” in a Chapter 13 case when filed “not later than 90 days after the first date set for the meeting of creditors.” CitiMortgage did not ask for an extension of the deadline to file its proof of claim and has never argued that it filed an “informal” proof of claim.²³

Here, Debtors filed their bankruptcy petition on March 31, 2012. On April 2, 2012, a notice was issued stating that a meeting of creditors in Debtors’ case was scheduled for April 25,

²⁰ *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Debtors have at various times been represented by counsel, but are currently proceeding pro se.

²¹ *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991).

²² *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997).

²³ *See Clark v. Valley Fed. Sav. & Loan Ass’n (In re Reliance Equities, Inc.)*, 966 F.2d 1338 (10th Cir. 1992) (elucidating the informal proof of claim standard: a writing, with a demand by the creditor on the debtor’s estate, expressing an intent to hold the debtor liable for the debt, filed with the bankruptcy court, and equity would be served by allowing the informal proof of claim). Even if CitiMortgage had made such an argument, at minimum, there was no written demand presented to the Court before the October 1, 2012 proof of claim was filed, i.e., there was no writing submitted by CitiMortgage to the Court at all during the claims filing period.

2012, and that the deadline for proofs of claim to be filed was July 24, 2012. Per the certificate of service filed by the Court showing service of that notice,²⁴ CitiMortgage was given notice of these dates by first class mail. Despite this, CitiMortgage did not file its proof of claim until October 1, 2012, the deadline for filing proofs of claim by the *government*, long past the July 24, 2012, deadline for CitiMortgage to file a proof of claim.

Debtors raised the timeliness of the CitiMortgage claim at various points, but that valid defense was often lost in the “noise” of Debtors’ other arguments based on fraud. At one hearing in this case, counsel for Creditor acknowledged the lateness of the claim,²⁵ although the parties focused more generally on the best way forward with discovery at that point. The case law, however, mandates that § 509(b)(9) must be strictly complied with: if a proof of claim is objected to, then the Court cannot allow the claim if it is not timely filed.²⁶ There is no dispute that the claim was not timely filed and was objected to by Debtors in this case. As a result, the claim cannot be allowed.

III. Conclusion

Debtors’ motion for judicial notice²⁷ is denied. Debtors’ objection to the CitiMortgage

²⁴ Doc. 10.

²⁵ Doc. 339 at 9 (referring to the claim as “obviously . . . late filed”).

²⁶ *See, e.g., In re Boucek*, 280 B.R. 533, 537 (Bankr. D. Kan. 2002) (stating that “§ 502(b)(9) clearly conditions allowance of a claim on the timely filing of a proof of claim” and citing “majority” line of cases holding same); *In re Swenson*, No. 14-40173-12, 2015 WL 3745307, at *2 (Bankr. D. Kan. June 12, 2015) (applying ruling from *In re Greenig*, 152 F.3d 631 (7th Cir. 1998), and holding that “a bankruptcy court has no power . . . to allow a late-filed proof of claim on equitable grounds” under § 502(b)(9) and Rule 3002(c)).

²⁷ Doc. 348.

proof of claim,²⁸ however, is sustained.

Additional matters have been pending in this case and have either been resolved through the Court's ruling on the objection to claim or are now moot. CitiMortgage's motion to resume payments on its claim²⁹ is denied. Debtors' motion for disbursement of funds from the Trustee³⁰ is denied as moot. Debtors' motions for appointment of expert witnesses³¹ and to make payment for expert witnesses³² are also denied. Debtors' motion for transfer of escrow account funds to the Chapter 13 Trustee³³ is denied. Debtors' motion to reconsider the Court's Order conditionally denying the Chapter 13 Trustee's motion to dismiss³⁴ is denied as moot. Debtors' motion to show cause regarding violations of the automatic stay via the CitiMortgage proof of claim³⁵ is denied. The Chapter 13 Trustee's motion to strike Debtors' memorandum for record³⁶ is denied.

IT IS SO ORDERED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE

²⁸ Doc. 162.

²⁹ Doc. 65.

³⁰ Doc. 84.

³¹ Doc. 115.

³² Doc. 120.

³³ Doc. 143.

³⁴ Doc. 154.

³⁵ Doc. 172.

³⁶ Doc. 191.