U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS

IN RE:	§	
	§	
CARL ROBERT PARSONS, JR. AND CYNTHIA GAYLEEN PARSONS,	§	CASE NO. 98-43043-DML-13
	§	
	§	CHAPTER 13
Debtors.	§	
	§	
COUNTRYWIDE HOME LOANS, INC. ITS ASSIGNS AND/OR SUCCESSORS IN INTEREST,	§	
Plaintiff,	§	
	§	
v.	§	ADVERSARY NO. 02-4291
	§	
CARL ROBERT PARSONS, JR.; CYNTHIA GAYLEEN PARSONS; BLUE STAR TITLE. INC.; AND TIMOTHY TRUMAN, TRUSTEE,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the court is Defendant Blue Star Title, Inc.'s ("Blue Star") Amended Motion for Summary Judgment (the "Motion") filed by Blue Star in the above-captioned adversary proceeding (the "Adversary"). The court also has before it a response and a memorandum of points of authority in opposition to the Motion, both filed by Plaintiff Countrywide Home Loans, Inc. ("Countrywide"), and Blue Star has filed a brief in support of its position. The court has been provided with summary judgment evidence consisting of exhibits and affidavits. On January 27, 2004, the court held a hearing on the Motion in which Blue Star and Countrywide participated. The parties have agreed

that the court may consider the record in this chapter 13 bankruptcy case in deciding the Motion.[1]

This matter is subject to the court's core jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(2)(K) and (O). This memorandum opinion constitutes the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

I. Background

On May 21, 1998, Defendants Carl Robert Parsons, Jr. and Cynthia Gayleen Parsons (hereinafter sometimes referred to as "Debtors") filed for relief under chapter 13 of the Bankruptcy Code (the "Code").[2] Debtors listed in their schedules a loan secured by a lien against their home located at 6737 Woodsmoke Way in Fort Worth, Texas ("Woodsmoke").[3]

Pursuant to Debtors' plan, the Standing Chapter 13 Trustee (the "Trustee") made payments for the account of Debtors to the lien holder, including, following transfer of the loan, to Countrywide. By letter dated December 21, 2001 (the "December 21 Letter"), Countrywide returned one of those payments to the Trustee. In the December 21 Letter, Countrywide referenced the loan by an internal control number, 1163354, and

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1 As discussed below, the Adversary was brought largely due to prior proceedings in Debtors' chapter 13 case.

2 11 U.S.C. §§ 101 *et seq.*

3 At the time of filing the bankruptcy petition, Season's Mortgage Group, Inc. apparently serviced the home loan. At some point thereafter, the loan was transferred to Countrywide.

listed four possible reasons for returning the payment.[4] The second reason was completed, stating that the loan was "paid off on 03/27/1987."[5]

On February 21, 2002, the Trustee filed a Notice of Intention to Stop Paying Creditor (the "Stop Payments Notice"),[6] a copy of which the Trustee sent to Countrywide which Countrywide admits receiving. In the Stop Payments Notice the Trustee indicated he intended to cease paying Countrywide on the Woodsmoke loan.[7] Debtors filed an objection to the Stop Payments Notice (the "Objection") on February 28, 2002. The Objection was served on Countrywide by Debtors' counsel by mail the same day. On March 21, 2002, the court held a hearing on the Objection. Countrywide also received notice by certified mail of the March 21 hearing but failed to appear. On March 22, 2002, the court issued its Order on Objection to Trustee's Notice of Intention to Stop

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4 The December 21 Letter was a form, which listed reasons for returning the payment to the Trustee as follows:

> Countrywide obtained relief from the automatic stay
> Loan paid off
> Bankruptcy case was dismissed
> Service released (forward future disbursements to the below address)

No date was given for relief from the automatic stay or a dismissal, and no forwarding address was listed.

5 The court noted at the hearing on the Stop Payments Notice, described below, that the year, 1987, could be a typographical error.

6 The Stop Payments Notice was a form which listed four possible reasons for stopping payments:

> ____ Order Lifting Stay or a Notice of Termination of Automatic Stay
> ____ Release of claim or a letter withdrawing claim for the creditor
> ____ Creditor returned funds to our office indicating they were no longer entitled to, or no longer accepting funds on this claim
> ____ Other

Only the first reason was checked by the Trustee. As there had been no motion for relief from the stay, at the March 21, 2002 hearing on the Notice to Stop Payments, the court concluded that the Trustee's selection was made in error.

7 The Stop Payments Notice did not make reference to Countrywide's internal control number.

Paying Creditor (the "March 22 Order")[8] by which the court held that "loan #1163354 relating to [Woodsmoke] is deemed paid in full" and that "Debtors have no further obligation to [Countrywide]." Countrywide neither requested the court to reconsider the March 22 Order nor did Countrywide timely appeal the March 22 Order.

Meanwhile, Debtors were attempting to close a sale of Woodsmoke. Blue Star was the title company used for the closing. On or about April 16, 2002, Countrywide faxed a payoff demand statement for the sale of Woodsmoke to Blue Star and a copy of the March 22 Order.[9] From the evidence it appears that Blue Star noticed that the loan number in the March 22 Order was different from the loan number in Blue Star's records concerning Woodsmoke.

On April 16, 2002, the court entered its Order Lifting Stay as requested by Debtors at the behest of Blue Star. The court's record does not reflect whether notice was sent to Countrywide of Debtors' request.

On May 6, 2002, Debtors filed their Motion to Sell Property Free and Clear of Liens (the "Motion to Sell") and asked that the court hear it on an expedited basis. Relief on the Motion to Sell was a prerequisite to Blue Star releasing the funds from the sale of Woodsmoke to Debtors. Countrywide received notice of the hearing on the Motion to Sell on May 9, 2002. It failed to appear, however, at the hearing on the Motion to Sell held on May 10, 2002.

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8 All orders of the court were noticed by the clerk to Debtors' attorney, to whose charge dissemination of the orders was left. The court has no evidence before it as to whether or not counsel sent the orders to Countrywide or its counsel, but Countrywide's possession of the March 22 Order, discussed below (n.9 and accompanying text) is consistent with such conduct.

9 It could be inferred that Debtors' attorney sent the March 22 Order and therefore other orders, to Countrywide.

During the May 10 hearing, the court noted Countrywide's absence and apparent lack of interest in the various proceedings regarding Debtors and the Woodsmoke loan. By its Order to Sell Property Free and Clear of Lien (the "Sale Order"), the court granted Debtors' Motion to Sell. Having deemed Countrywide's loan on Woodsmoke paid in full and having held that Debtors had no further obligation to Countrywide in its March 22 Order, the court ruled in its Sale Order that Debtors were authorized to sell Woodsmoke "free and clear of any primary mortgage lien held by Countrywide." Countrywide did not request that the court reconsider and did not timely appeal the Sale Order. On May 13, 2002, Blue Star released the funds held in escrow to Debtors.

On May 20, 2002, the court entered its Order Discharging Debtor After Completion of Chapter 13 Plan (the "Discharge Order"). The Trustee sent notice of the Discharge Order to Countrywide on May 23, 2002.

On August 23, 2002, Countrywide filed a motion for relief from stay and on August 29, 2002, Countrywide filed its Expedited Motion for Relief from Order to Sell Property Free and Clear of Liens Pursuant to FRCP 60(b) (the "Motion for Relief"). The court held a hearing on Countrywide's two motions on September 12, 2002, at which time Countrywide for the first time informed the court that Debtors had had a previous loan with Countrywide pertaining to a property other than Woodsmoke. The earlier loan was paid off in 1987 and the loan number referenced in the December 21 Letter was for the previous loan rather than the Woodsmoke loan. When Countrywide had checked its

records for Debtors' names[10] the Countrywide employee conducting the search apparently found the file pertaining to Debtors' prior, paid-off loan and looked no further. Countrywide returned payment to the Trustee in error by the December 21 Letter.

The court dismissed Countrywide's motion for relief from stay as moot since Debtors had already been discharged and the Bankruptcy Case had been closed by order entered on September 9, 2002. The court orally[11] denied the Motion for Relief "without prejudice to Countrywide to file any motion that it may determine is needed in the future." On December 9, 2002, Countrywide filed its complaint commencing the Adversary.

II. Positions of the Parties

In its complaint, Countrywide alleges that Blue Star negligently breached a general duty of care, statutory duties and regulatory duties Blue Star owed Countrywide by not withholding and remitting to Countrywide funds from the sale of Woodsmoke to Countrywide when Blue Star knew that Countrywide held a first lien mortgage against Woodsmoke.

Citing the court's March 22 Order and Sale Order, Blue Star does not admit it "knew" of Countrywide's lien. It also denies that it owed a legal duty to Countrywide. It thus argues it could not be liable to Countrywide for negligence.

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10 The payment by the Trustee did not reference a loan number. When the Trustee sends a payment to a creditor, the Trustee does not list account numbers assigned by the creditor. The Trustee in making payments to creditors only references the bankruptcy case number and the name of the debtor. In the case at bar, in any case, neither the Trustee nor the court knew (or could have known) of Countrywide's internal control number for the Woodsmoke loan or of Debtors' prior relationship with Countrywide.

11 A written order was later submitted to the court and was entered on January 15, 2003.

III. Discussion

A. Standard for Summary Judgment

Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). *Jenkins v. Chase Home Mortgage Corp.*, 81 F.3d 592, 595 (5th Cir. 1996). It is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In the instant case, the parties agree that the facts are not in dispute. The court concurs. Except for the need to interpret documents, the court is not here required to weigh contradictory evidence. Summary Judgment is thus appropriate.

B. Negligence of Blue Star

Under Texas law, the elements for a cause of action of negligence are: (1) a legal duty; (2) breach of that duty; (3) damages proximately resulting from the breach. *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 710 (Tex. 2003); *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 274 (Tex. 2002); *Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex. 1998). Duty is a threshold issue. *Solomon,* 106 S.W.3d at 710; *Van Horn*, 970 S.W.2d at 544. Nonexistence of a duty "ends the inquiry into whether negligence liability may be imposed." *Id.* Whether a duty exists is a question of law. *Solomon*, 106 S.W.3d at 710.

Countrywide asks this court to hold that Blue Star owed Countrywide a duty with respect to the real estate transaction by which Debtors sold Woodsmoke. Pursuant to an escrow agreement entered between Blue Star and Debtors on April 25, 2002 (the "Escrow Agreement"), Blue Star served as escrow agent in the Woodsmoke transaction. Countrywide cites no authority, nor has this court found authority, that supports Countrywide's position that Blue Star owed a duty to Countrywide even though Countrywide was not a party to the Escrow Agreement.

There is, however, authority under Texas law for Blue Star's duty to the parties to the Escrow Agreement. *Zimmerman v. First American Title Ins. Co.*, 790 S.W.2d 690, 694-95 (Tex. App.--Tyler 1990, writ denied) (holding that "an escrow agent is in a fiduciary relationship with the *contracting parties*") (emphasis added). "Among the duties of the escrow agent are: (1) the duty of loyalty; (2) the duty to make a full disclosure; and (3) the duty to exercise a high degree of care to conserve the money and pay it only to those persons entitled to receive it." *Id.*

Blue Star owed a duty to the parties involved in the Woodsmoke transaction, including to the signatories to the contract for the sale of Woodsmoke and the Escrow Agreement, to conserve the money held in escrow and ensure that those entitled receive payment from the money placed in escrow. The duty does not, however, run to Countrywide since Countrywide was not a party to any of the contracts involved in the Woodsmoke transaction. Furthermore, Blue Star, having accepted the obligation to handle the closing of the Woodsmoke transaction, "assumed the responsibility to close the transaction in accordance with" the terms of the contracts involved therein. *Id.*

The contract by which Debtors sold Woodsmoke[12] states that Debtors were to secure a release of their loan liabilities.[13] Woodsmoke contract, ¶ 12.A(1). The Woodsmoke contract also included a representation by Debtors "that as of the closing date, there will be no liens . . . which will not be satisfied out of the sale proceeds." Woodsmoke contract, ¶ 19. As of March 22, 2002, pursuant to the March 22 Order, of which Countrywide clearly had knowledge by the times of sale, Debtors had "no further obligation to Countrywide" with respect to Woodsmoke.

Pursuant to Exhibit "C" of the Escrow Agreement, Blue Star was to hold the funds from the sale of Woodsmoke until this court issued an order authorizing sale of Woodsmoke "free and clear of all liens." The Escrow Agreement also specifically referenced a recorded lien to Countrywide as recorded in the deed records of Tarrant County, Texas, but did not reference Countrywide's loan number. In the March 22 Order, the court held that the loan held by Countrywide relating to Woodsmoke was deemed paid in full. The May 10 Order authorized Debtors to sell Woodsmoke "free and clear of any primary mortgage lien held by Countrywide." Thus, Blue Star was under no duty to pay Countrywide from the funds it held in escrow as part of the Woodsmoke transaction. When Blue Star released the funds to Debtors, Blue Star acted consistently with the March 22 Order, the Sale Order, the May 10 Order and the Escrow Agreement, thereby performing its duty to ensure that the funds were paid to those entitled to receive them.

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12 The Woodsmoke Contract was the One to Four Family Residential Contract (Resale) (TREC No. 20-5, October 29, 2001) form contract promulgated by the Texas Real Estate Commission.

13 The court reaches no conclusion as to whether Debtors owed a duty to Countrywide which they breached.

The essence of Countrywide's argument is that Blue Star should have somehow concluded from the different loan numbers and conflicting dates in its files that the loan referenced in the various orders the court entered was not the Woodsmoke loan. However, any failure by Blue Star to recognize the difference between the numbers or dates of the two loans serviced by Countrywide is more than balanced by Blue Star's very reasonable reliance on this court's orders.

Countrywide also argues that "[p]rior to June 2002, Countrywide was not aware that there was a problem with the Woodsmoke" loan because the March 22 Order and the May 10 Order include references to Countrywide's internal control number for a previous, paid-off loan to Debtors. Countrywide further argues that the orders and notices were "in no way related" to the Woodsmoke loan since they referenced the previous loan number.

The court is not persuaded by Countrywide's arguments. In each of the court's orders, the court referenced, in very clear language, the loan relating to Woodsmoke. In the March 22 Order, the court held that *Countrywide's loan relating to Woodsmoke* was deemed paid in full and that *Debtors had no further obligation to Countrywide.* By no later than April 16, 2002, Countrywide was aware of the March 22 Order.

Transmission of the March 22 Order to Blue Star by Countrywide shows the latter was aware of its relevance to Woodsmoke. Countrywide may not have received notice of the Order Lifting Stay. Countrywide received notice of the May 10, 2002 hearing on the Motion to Sell but failed to appear. Though the notice of the hearing was received only on May 9, 2002, and Countrywide, arguably, may not have had time to prepare for and appear at the May 10, 2002 hearing, Countrywide did have time to contact the court to

seek a continuance, to request that the court reconsider the order or to appeal. Countrywide took no action until it filed its motion for relief from stay over three months later. By then, Blue Star had distributed the funds held in escrow, Debtors had received their discharge and the bankruptcy case had been closed.

C. Blue Star Satisfied the Standard of Due Care

Assuming, arguendo, that Blue Star's "duty to exercise a high degree of care to . . . pay [the sales proceeds] to those persons entitled to receive [them]" (*Zimmerman*, 790 S.W.2d at 695), somehow obligated Blue Star to Countrywide, Blue Star satisfied that obligation. Faced with a lengthy record of court proceedings indicating that Countrywide's lien on Woodsmoke had been extinguished, Blue Star nevertheless required Debtors to obtain two additional orders from this court to ensure Countrywide was not entitled to sales proceeds. At least one of those orders (the Sale Order) was entered on notice to Countrywide. Yet it was not until *more than three months after entry of that order* that Countrywide acted (on August 23, 2002) for the first time in Debtors' bankruptcy case to protect its rights – rights which required protection because of Countrywide's error in sending the December 21 Letter. Even Countrywide's single communication to Blue Star, the April 16 payoff statement, was ambiguous, as it was accompanied by a copy of the March 22 Order.

Blue Star can hardly be held negligent based on the record before the court. If Countrywide was not paid from the sale, it was the result of its own gross, continuing negligence. Even if Blue Star were negligent and so responsible in part for Countrywide's loss, any failure of the title company is so overshadowed by

Countrywide's inattention to its affairs as to have been an inconsequential element in the cause of Countrywide's distress.[14]

IV. Conclusion

For the above stated reasons the Motion must be GRANTED, provided, however, each party shall hear its own costs.

It is so ORDERED.

Signed this 17th day of March 2004.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

[14] See the Texas Proportionate Responsibility Statute (Tex. Civ. Prac. & Rem. Code Ann. §§ 33.001-33.017 (LEXIS, through 2003 Sess.)). Under Texas law, "a claimant may not recover damages if his percentage of responsibility is greater than 50 percent" (§ 33.001) which applies to "any cause of action based on tort in which a defendant . . . is found responsible for a percentage of the harm for which relief is sought" (§ 33.002).