

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT HAMMOND

S-25CC

IN RE: )  
ERNEST ISENHOUR TORRALBALLA )  
 ) BANKRUPTCY NO. 08-21352  
 )  
Debtor )

**ORDER**

Prehearing Conference held on September 4, 2008 on Objection by Debtor filed on June 23, 2008 to Claim No. 2-1 by Mortgage First, L.L.C., and the Response thereto filed by Mortgage Electronics Registration Systems Inc., as nominee of Mortgage First L.L.C. on August 29, 2008 (“MERS”).

Debtor appears by Attorney Dabertin.

MERS appears by Attorney Bengs.

Trustee appears by Attorney Hoham.

The body of the Objection by the Debtor challenges the validity of the alleged lien of the MERS as set out in its Secured Claim. Federal Rule of Bankruptcy Procedure 7001(2) states that a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Fed. R. Bk. P. 4003(d), **shall** be by Adversary Proceeding (emphasis supplied).<sup>1</sup> In addition, Fed. R. B.R. P. 3007(b) expressly provides that a party in interest shall not include a demand for relief of a kind specified in Rule 7001 in any objection as to the allowance of a claim.

As a general rule, the challenge by the Debtor to the validity of the lien of the Claimant through the vehicle of an Objection to Claim of the Claimant as a contested matter in the main case pursuant to Fed. R. Bk. P. 3007 and Fed. R. Bk. P. 9014 is improper. See Cen-Pen Corp. v. Hanson, 58 F.3d 89, 93 (4<sup>th</sup> Cir. 1995); In re Commercial Western Finance Corp., 761 F.2d 1329, 1336-38 (9<sup>th</sup> Cir. 1985); In re Kinion, 207 F.3d 751, 757 (5<sup>th</sup> Cir. 2000); In re Golden Plan of California, Inc., 829 F.2d 705, 711-12 (9<sup>th</sup>

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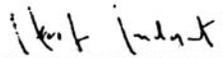
<sup>1</sup> The failure to file an Adversary Complaint pursuant to Fed. R. Bk. P. 7001 is not jurisdictional, and a party may waive its right to object for failure to file an adversary proceeding. Matter of Pence, 905 F.2d 1107, 1009 (7<sup>th</sup> Cir. 1990).

Cir. 1986); In re McMillan, 251 B.R. 484, 488-90 (Bankr. E.D. Mich. 2000); Wright v. Commercial Credit Corp., 178 B.R. 703, 705-707 (E.D. Va. 1995), appeal dismissed, 77 F.3d 472; In re K. Fabricators, Inc., 135 B.R. 654, 658 (Bankr. D. Colo. 1991); In re Beard, 112 B.R. 951, 955-56 (Bankr. N.D. Ind. 1990).

Therefore, the Objection by the Debtor to the validity of the lien of the Claimant as set out in the Secured Claim of the Claimant is hereby denied without prejudice, and leave is hereby given to the Debtor to file an appropriate Adversary Proceeding versus the Claimant pursuant to Fed. R. Bk. P. 7001(2) on or before November 24, 2008.

**SO ORDERED.**

Dated: October 22, 2008

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**JUDGE, U. S. BANKRUPTCY COURT**

Distribution:

Debtor, Attorney for Debtor  
Attorney for Claimant  
Trustee