

**IN THE UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

UNIVERSAL RESTORATION SERVICES, INC.,	)	
	)	
	)	
Plaintiff,	)	Adversary No. 13-01278
	)	
v.	)	
	)	
GMAC MORTGAGE, LLC,	)	
	)	
Defendant.	)	
	)	
_____	)	
	)	Chapter 11 No. 12-12032
IN RE:	)	
	)	Jointly Administered under No.
GMAC MORTGAGE, LLC,	)	12-12020
	)	
Debtor.	)	
	)	

**NOTICE OF FILING**

PLEASE TAKE NOTICE that on August 23, 2013, the undersigned filed **Universal Restoration Services, Inc.'s Response to GMAC Mortgage, LLC's Motion to Dismiss Adversary Complaint** with the Clerk of the United States Bankruptcy Court for the Southern District of New York, a copy of which is attached hereto and hereby served upon you.

Respectfully Submitted,

/s/ Jonathan P. Friedland

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**CERTIFICATE OF SERVICE**

I, Jonathan P. Friedland, an attorney, hereby state that on August 23, 2013, I caused a true and correct copy of **Universal Restoration Services, Inc.'s Response to GMAC Mortgage, LLC's Motion to Dismiss Adversary Complaint** to be served via ECF to the following parties:

/s/ Jonathan P. Friedland

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Mortgage, LLC in the Adversary Proceeding***



which are being held in trust for Universal pursuant to a court order and are not (nor should they be) subordinated to the claims process.

### **JURISDICTION AND VENUE**

2. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 157 and 1334 and 11 U.S.C. § 541. This is an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7001(1) and a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Venue is proper pursuant to 28 U.S.C. § 1409(a). Pursuant to Local Bankruptcy Rule 7012-1, Plaintiff consents to entry of a final order or judgment by this Court if it is determined that this Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

### **BACKGROUND**

3. As stated in Plaintiff's Complaint, Universal is the plaintiff in a suit presently pending against GMAC in the Circuit Court of Cook County, Illinois, Law Division (Case Number 11 L 004635) (the "State Court Suit"). The State Court Suit arises out of a foreclosure action GMAC filed against Jorge Escobar, Case Number 09 CH 07418 in the Circuit Court of Cook County, Illinois, Chancery Division (the "Foreclosure Action"). (Complaint, Preliminary Statement, ¶ 5).

4. During the pendency of the Foreclosure Action, Mr. Escobar's property was damaged by fire and Escobar and Universal entered into an agreement for Universal to do the necessary repairs. (*Id.*, ¶¶ 9-10).

5. Thereafter, Auto Club Insurance Association ("ACIA"), the insurer insuring the property, issued a check payable to the Escobars, Universal and GMAC in the amount of

\$108,910.52, the amount of Universal's initial estimate for repair work to the property. The check was mailed to Universal's home office. (Id., ¶¶ 12, 15).

6. Counsel for the parties in the Foreclosure Action entered into an oral agreement at a hearing in the Foreclosure Action that GMAC would act as escrowee and in its fiduciary capacity as such, would hold the \$108,910.57 solely for the benefit of Universal. An order was drafted reflecting this Agreement and the order was entered by the court in the Foreclosure Action on September 22, 2009 (the "Foreclosure Order"). A true and correct copy of the Foreclosure Order is attached to the Complaint in this case as Exhibit C. (Id., ¶¶ 17-19).

7. As set forth in Universal's Complaint, Universal agreed that GMAC could take possession of the check for the insurance proceeds based on representations made at the hearing by counsel for GMAC that the funds would be held in escrow for Universal and based on the inclusion of that language in the Foreclosure Order. (Id., ¶ 20).

8. Universal, relying on the aforementioned agreements and the language of the Foreclosure Order, began performing work at the property and sought payment for the initial work performed from the escrowed proceeds being held by GMAC. (Id., ¶ 24).

9. Not only did GMAC refuse to acknowledge Universal's request for payment, but GMAC refused to cooperate with Universal after Escobar vacated the property thereby preventing Universal from completing the remaining work necessary under the scope of its contract with Escobar, as amended. (Id., ¶¶ 25-26).

10. As stated in Plaintiff's Complaint, and forming the basis for this adversary proceeding, GMAC, on information and belief, has retained for its own benefit (and now for the benefit of its estate) all the insurance proceeds it received as escrowee, again, in a fiduciary

capacity, which it was obligated to hold only for the benefit of Universal and to pay to Universal pursuant to the escrow agreement reflected in the Foreclosure Order. (Id., ¶ 34).

11. Allowing GMAC to include these proceeds as part of its bankruptcy estate for distribution to all creditors is contrary to a valid and enforceable court order — the Foreclosure Order — and the character of funds in the hands of an escrowee under well-settled law. Therefore, this Court should deny GMAC’s Motion to Dismiss for this and the reasons further set forth herein.

### **ARGUMENT**

12. In its Motion to Dismiss, GMAC first argues that Universal should not be allowed to circumvent the claims process through its adversary proceeding, which GMAC asserts ‘would be a waste of judicial resources... when the claims process is moving the same issues down a parallel track.’ (Motion, ¶ 17, quoting Mondragon v. Circuit City Stores, Inc. (In re Circuit City Stores Inc.), Adv. No. 09-03073, 2010 WL 120014, at \*5 (Bankr. E.D. Va., Jan. 11, 2010)). In no way, however, are the claims process and Universal’s adversary proceeding moving down a “parallel track.” Rather, Universal’s Complaint seeks a determination that money GMAC is holding is being held in trust or in escrow by a fiduciary pursuant to a court order for the benefit of Universal, and thus that such money is not “property of the estate” under § 541 of the Code or subject to the claims process (let alone moving down a track parallel to the claims process).

13. It makes no difference, as GMAC alleges, that the escrow was allegedly entered into in September of 2009, two years prior to GMAC’s bankruptcy. (Mtn., ¶ 18). GMAC fails to cite any authority as to why *when* the escrow was entered into would change the nature or character of the funds being held. This assertion is simply a red herring and does not negate the fact that funds being held in escrow or trust are held for the benefit of another and not property of

the escrowee or trustee. See In re Ocana, 151 B.R. 670, 673 (Bankr. S.D.N.Y., February 17, 1993) (“The [property] retained by the Trustee under the terms of the trust for use to compensate its beneficiaries is not the debtor’s property.”); Begier v. I.R.S., 496 U.S. 53, 59, 110 S.Ct. 2258 (1990) (“Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not “property of the estate”).

14. In Ocana, for example, this Court went on to explain that “[t]he very purpose of establishing such a trust is to take the property outside the settlor’s control.” 151 B.R. at 670. Such was the purpose here.

15. The insurance company check issued by ACIA was made payable to the Escobars, GMAC and Universal. The decision that GMAC would hold the check stemmed from an oral agreement between the parties in the Foreclosure Action that was incorporated in the court order entered in the Foreclosure Action on September 22, 2009 (the “Foreclosure Order”). The Foreclosure Order explicitly states “GMAC is receiving a fully negotiable check for \$108,910.52 for portion of prospective fire repair, *to be held in escrow by GMAC & paid to Universal Restoration Services* with customary draws as work proceeds.” The Foreclosure Order in no way contemplates that the check would be held by GMAC in any way other than as escrowee, in trust, for the benefit of Universal. The plain language of the Foreclosure Order directly contradicts the idea that the check could in any way be considered property of GMAC (or now, its estate).

16. Because the Foreclosure Order unambiguously states that the funds are being held by GMAC for Universal, GMAC’s Motion to Dismiss is centered on arguments that are inapplicable to the instant situation. A turnover of the escrowed funds to Universal would not be unfair to other creditors. Nor would it have any effect whatsoever on other creditors; under no circumstances would GMAC’s general unsecured creditors have a claim to those funds. See In re

Portjeff Development Corp., 128 B.R. 38, 43 (Bankr. E.D.N.Y., March 26, 1991) (“Escrow funds remaining in possession of the debtor are held in trust and are not held for general creditors. Property held in trust by the debtor is not part of the bankruptcy estate”; where the court held that none of the escrowed funds in question belonged to the debtor in possession and therefore the unsecured creditors had no claim to it).

17. Case law cited by GMAC in its Motion is similarly inapplicable. For instance, GMAC cites to Evergreen Solar, Inc. v. Barclays PLC (In re Lehman Bros. Holdings, Inc.), Adv. 08-01633, 2011 WL 722582, at \*7-8 (Bankr. S.D.N.Y. Feb. 22, 2011) for the proposition that a breach of contract claim is not properly brought as an adversary proceeding and should rather be adjudicated through the claims process. Evergreen Solar, however, did not involve funds being held in escrow that would be separate and apart from the debtor’s assets that actually would be subject to the claims process. Furthermore, Universal’s adversary proceeding is not a “breach of contract” claim. Universal’s Complaint clearly states (including at ¶ 37 thereof) that its adversary proceeding is brought under one of the nine categories enumerated in Federal Rule of Bankruptcy Procedure 7001, specifically 7001(1), which states:

“An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017 or Rule 6002.”

Universal’s Complaint does not purport to state a claim for breach of contract, and GMAC’s arguments aimed at a purported breach of contract claim are misguided.

18. Contrary to GMAC’s assertion, Universal’s promissory estoppel claim (Count II of its Complaint) is also not a breach of contract claim. (Mtn., ¶ 22). This claim, again, seeks a



determination relating to the nature and character of the funds GMAC holds, specifically that said funds are not “property of the estate” and thus should not be included within the claims process.

19. GMAC next asserts that the Court cannot resolve this issue because Universal has failed to explain why it is entitled to the entire amount of the proceeds, “other than implying entitlements flowing from its contract with Escobar.” (Mtn., ¶ 23). However, the Complaint adequately sets forth Universal’s positions regarding the escrowed funds and the facts entitling Universal to the relief it seeks. “The appropriate inquiry [when reviewing a motion to dismiss] is not whether a plaintiff is likely to prevail, but whether he is entitled to offer evidence to support his claims.” Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 100 (2d Cir.2005). Universal’s Complaint has clearly set forth (with specificity) its claims and positions in this matter. Asking this Court to rule on Universal’s ultimate request for relief is premature on the part of GMAC and outside the scope of review on a motion to dismiss.

20. In response to GMAC’s remaining arguments, Universal’s declaratory claim does not “essentially seek a money judgment” against GMAC. Instead, Universal’s claim seeks turnover of the monies that were in GMAC’s possession only because they were being held in trust for Universal’s benefit. Neither GMAC nor its creditors have any economic stake in the funds at issue, and therefore it’s difficult to fathom how GMAC’s other creditors could be at a detriment if funds that were never property of the estate to begin with are turned over to their intended recipient.

21. Finally, cases GMAC cites to regarding bankruptcy courts’ reluctance to impose constructive trusts are inapposite here. Universal’s Complaint does not ask this Court to impose a constructive trust in order to take these funds out of the bankruptcy estate. Rather, based on the plain language of the Foreclosure Order and the additional facts asserted in Universal’s Complaint

both surrounding and following the entry of that Foreclosure Order, GMAC is asking this Court to rule that these funds are not (and never were) “property of the estate” as that term is defined in § 541 of the Code.

### **CONCLUSION**

22. The funds being held by GMAC in the amount of \$108,910.52 are clearly being held in trust for Universal and thus are not property of the estate under § 541 of the Code. Thus, these funds should be excluded from the estate and not subject to distribution to GMAC’s general unsecured creditors. The inclusion of these funds in the bankruptcy proceeding would constitute an undeserved windfall for the estate, as GMAC can have no greater interest post-petition in these funds than it had prior to filing.

### **PRAYER**

WHEREFORE, Plaintiff, Universal Restoration Services, Inc., respectfully requests that the Court enter an order denying GMAC Mortgage, LLC’s Motion to Dismiss; requiring GMAC to answer Universal’s Complaint; and for such other and further relief as is just and equitable.

**Dated: August 23, 2013**

By: /s/ Jonathan P. Friedland

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