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JUDGE: M. A. Mahoney

PARTIES: Alamex, Inc., Turnpoint Basin Properties

CHAPTER: 11

ATTORNEYS: C. M. Smith, R. W. Tapscott, Jr.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

ALAMEX, INC.

Case No. 94-11834-MAM-11

Debtor

**ORDER OVERRULING OBJECTION OF DEBTOR TO CLAIM NO. 22
OF TURNPOINT BASIN PROPERTIES AND ALLOWING CLAIM**

C. Michael Smith, Mobile, AL, Attorney for the Debtor

Robert W. Tapscott, Jr., Birmingham, AL, Attorney for Turnpoint Basin Properties

This case is before the court on the objection of the Debtor to Claim No. 22 of Turnpoint Basin Properties (“Turnpoint”). A hearing was held. Appearances are as noted in the record. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is overruling the objection and allowing Claim No. 22 in the amount of \$449,329.64 as an unsecured claim.

The Court does not need to recite the facts. The parties filed a pleading entitled “Proposed Stipulated Facts” on May 5, 1997 which is incorporated by reference. The parties agree that the issue is whether Turnpoint’s claim should include prepetition interest at a default or nondefault rate. The difference is \$121,074.00. Alamex claims that the default interest is inappropriate because it is an unenforceable penalty or, alternatively, on waiver or estoppel grounds.

I.

The claim is for prepetition principal and interest only. Therefore, Section 502 of the Bankruptcy Code, entitled “Allowance of claims and interests,” applies. Section 502, in relevant part, states that the Court shall allow claims:

except to the extent that--

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured . . .

11 U.S.C. § 502(b)(1).

The parties agree that the debt owed by Alamex to Turnpoint went into default prepetition and Turnpoint accelerated the note as allowed by the agreement. According to the mortgage note, this allowed Turnpoint to increase the interest rate by 4%—from 10.5% to 14.5%.

Under 11 U.S.C. § 502(b)(1), the claim must be unenforceable “under any agreement or applicable law” to be disallowed. Neither the note nor applicable nonbankruptcy law make the 4% increase inappropriate. The agreement clearly provides for the interest. Alabama law does not preclude a 10.5% or 14.5% interest rate on a loan such as this one. ALA. CODE § 8-8-5 (1975). *See, Williams v. E. F. Hutton Mortg. Corp.*, 555 So.2d 158 (Ala. 1989). The Court is aware of no federal nonbankruptcy law limitations on this loan and none were cited by counsel.

The only possible “applicable law” which might bar the default interest rate is bankruptcy law. Alamex asserts that 11 U.S.C. § 506(b) and case law interpretations of it make disallowance appropriate. However, the Court concludes that Section 506 and the case law interpreting it do not govern prepetition interest on unsecured claims. Section 506, entitled “Determination of secured status,” governs valuation of creditors’ secured and unsecured claim

amounts as of the date of the valuation. 11 U.S.C. § 506(a). The entire prepetition claim is allowed pursuant to 11 U.S.C. § 502. Once the total claim is determined, the court then may determine, for certain purposes, how much of the claim is secured and how much is unsecured pursuant to 11 U.S.C. § 506. If the creditor is found to be oversecured at such a valuation, then “reasonable fees, costs or charges” incurred postpetition may be added to the claim as well to the extent of the oversecurity. Section 506 does not govern prepetition interest claims. *See, In re Johnson*, 184 B.R. 570, 572 (Bankr. D. Minn. 1995).

Even if Section 506 did govern determinations of the propriety of prepetition default interest claims, the Court concludes the rate is reasonable. The *Johnson* case listed factors to be considered in determining reasonability:

- (1) the difference between the default and nondefault rates;
- (2) the reasonableness of the differential between the rates;
- (3) the relative distribution rights of other creditors and whether enforcement will do injustice to the concept of equitable distribution of the estate’s assets; and
- (4) the purpose of the higher interest rate.

Id. at 573.

Since a 14.5% interest rate is allowable under Alabama law, the rate should not be lightly overturned. There is also a presumption in favor of the contract rate unless rebutted. *Id.* at 572. The evidence is not sufficient to make the rate a penalty. The *Johnson* case had a 2% differential—from 12.625% to 14.625%. The increase of 4% in this case is not so jarring as to be inequitable considering the size of the loan. For every month of default, Turnpoint was unable to utilize over \$5,000,000. This is a significant loss. It is also significant that Turnpoint, as hindsight showed, was undersecured, increasing its risk in a manner the oversecured creditor in *Johnson* did not experience. A higher default interest rate is always meant to be a type of

penalty to encourage compliance. This is not the type of penalty *Johnson* finds potentially inappropriate. This penalty bears a relationship to loan risk. Finally, Alamex argues the additional claim amount of \$121,074 will prejudice other creditors. It does. The plan proposes a fixed sum payable to all unsecured creditors. The claim will lower other unsecured creditors' recoveries, but without further evidence of overreaching, this prejudice alone cannot preclude allowance. Turnpoint complied with all applicable nonbankruptcy law.

II.

Alamex argues that Turnpoint is estopped from asserting the claim for default interest or waived it. Turnpoint first filed a proof of claim on December 1, 1994 and that claim did not seek default interest. On October 1, 1995, Turnpoint filed an amended proof of claim which sought default interest. On April 4, 1995, Turnpoint filed a motion for relief from stay seeking to foreclose on the mortgaged property. Turnpoint filed a brief in support of the motion on July 31, 1995 which stated in footnote 3, page 6:

Turnpoint Basin filed a proof of claim in this case on December 22, 1995 (sic), as an oversecured creditor, requesting the contract rate of interest both pre-petition and post-petition, through December 21, 1995 (sic). The total outstanding indebtedness of the Debtor to Turnpoint Basin is subject to a dispute regarding the propriety of calculating interest at a default rate or at the Mortgage Note rate. Turnpoint Basin reserves the right to assert a claim for interest at the "default rate" if this motion is unsuccessful . . .

The motion for relief from stay was granted on August 1, 1995. Therefore, Alamex asserts the claim for default interest made on October 1, 1995 was invalid since the motion was successful. The claim had been waived.

The Court concludes the waiver or estoppel argument is incorrect. A creditor may always amend its claim freely prior to the establishment of a bar date for claims filing. None had been established in the Alamex case prior to October 1, 1995. Waiver or estoppel must also be a

clear, voluntary, intentional act. *Trane Co., a div. of American Standard, Inc. v. Whitehurst-Lassen Constr. Co.*, 881 F.2d 996 (11th Cir. 1989); *Matter of Garfinckle*, 672 F.2d 1340 (11th Cir. 1982); *Schifano v. Greene County Greyhound Park, Inc.*, 624 So. 2d 178 (Ala. 1993) (“[T]here must be a clear, unequivocal, and decisive act of the party showing such a purpose [of waiver].’ AMER. JURIS., ‘WAIVER’ § 17, p.118”). There cannot be an unknowing waiver. The footnote is not a clear intentional statement of a relinquishment of a right to default interest. Turnpoint had the right to amend its claim in any manner it wished at the time it made the statement in its brief, regardless of the reservation. A footnote in a brief written in support of a motion for relief from stay should not constitute a waiver .

THEREFORE IT IS ORDERED that the objection of the Debtor to Claim No. 22 of Turnpoint Basin Properties is OVERRULED and the claim is allowed in the amount of \$449,329.64 as an unsecured claim.

Dated: May 16, 1997

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE