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ADV. NUMBER:
JUDGE: M. A. Mahoney
PARTIES: Gary Joseph Gamble, Whitney Bank
CHAPTER: 11
ATTORNEYS: C. Kern, R. A. Wright, D. S. Conrad
DATE: 10/22/97
KEY WORDS:
PUBLISHED: No

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

GARY JOSEPH GAMBLE Case No. 96-13890

Debtor.

ORDER

Christopher Kern and Richard A. Wright, Mobile, AL, for Gary Joseph Gamble.
David S. Conrad, Mobile, AL, for Whitney Bank.

This matter is before the Court on Gary Joseph Gamble's objection to the proof of claim filed by Whitney Bank. The 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 is a core proceeding pursuant to 28 U.S.C. §157(b)(2). For the reasons indicated below, Whitney Bank's claim is allowed for $11,127.09.

FACTS

Gary Joseph Gamble (Debtor) owns an automobile body shop located at 7764 Old Shell Road, Mobile, Alabama. Whitney Bank (Bank) has a mortgage on the property. The Debtor filed a chapter 11 case on April 6, 1994 (case no. 94-10657). Payment of the mortgage was provided for in the Debtor's plan of reorganization. The Debtor proposed the following amortization schedule:

> The Debtor will pay Peoples Bank [Whitney Bank] the amount of $600.00 per month in twelve equal installments with the first installment beginning on the 30th day following entry of the Order confirming the Plan of Reorganization. For the next forty-eight (48) months thereafter, the Debtor shall pay Peoples Bank [Whitney Bank] at the rate of $750.00 per month. Thirty (30) days thereafter, the entire remaining indebtedness shall fall due and be paid in one (1) final lump sum payment. The entire debtedness [sic] shall accrue interest at 9% fixed rate. The indebtedness is established as of April 11, 1995, at a principal amount of $67,272.53, and a payoff of $76,629.44.

Debtor's Exhibit. 2. The plan of reorganization was confirmed on May 1, 1995.

The Debtor filed a chapter 13 case on October 22, 1996. In his chapter 13 bankruptcy schedules the Debtor listed the Bank as a secured creditor. Schedule A and Schedule D indicate that the market value of the secured property is $100,000 and the mortgage amount is $73,000. The Debtor's schedules also list the Bank as an unsecured nonpriority creditor. Schedule F indicates that the unsecured claim consists of an arrearage incurred in 1995 and 1996. The Debtor's chapter 13 plan was confirmed on March 27, 1997. The plan provides for payment over a sixty month period. The plan requires that the Debtor pay $216 per month to the trustee and proposes to pay unsecured creditors a 100% dividend. The arrearage owed to the Bank will be paid through the plan. The Bank will also receive a direct payment of $750 per month.

The Bank filed an amended claim for $12,316.51 to be paid as an arrearage claim. Such a claim is paid through the chapter 13 plan. The claim amount was itemized as follows:

AUGUST 28, 1997	
ATTORNEYS FEE TO DATE:	$1,930.00
TITLE WORK	110.00
MOBILE PRESS REGISTER	148.80
APPRAISAL	750.00
UNPAID PAYMENTS	6,950.00
TOTAL ARREARAGE	$9,888.80
INTEREST ON ARREARAGE - REPAID IN 60 MONTHS @ 9%	2,424.71
TOTAL	$12,316.51

Bank's Exhibit 1. The Debtor filed an objection to the proof of claim. The Bank filed a general denial to the objection. A hearing was held on September 3, 1997. Subsequent to the hearing, the parties submitted memoranda of law to the Court.

The parties agree that since the chapter 11 plan was confirmed, the sum of $6,950 became due on the mortgage and was not credited to the Debtor's account. The parties do not agree on

whether the Bank is entitled to reasonable attorney's fees and costs. The Debtor alleges that there is no contractual provision to support the award of attorney's fees and costs. It is the Debtor's position that only the provisions in his chapter 11 and chapter 13 plans constitute the contractual obligation between the Bank and himself. Neither plan has a provision for attorney's fees and costs, nor incorporates the note or mortgage. The Bank alleges that confirmation of the chapter 11 plan did not terminate the note and mortgage, or affect the Bank's contractual right to attorney's fees and costs.

If the Court awards attorney's fees and costs, the Debtor disagrees with the Bank as to when the additional amounts must be paid. The Debtor contends that any additional amounts should become part of the balance being paid outside of the plan, rather than part of the Bank's claim. The Debtor reasons that because the note or mortgage does not require that attorney's fees and costs are immediately due and payable, it is not necessary that they be treated as an arrearage. The Debtor also suggest that attorney's fees and costs cannot properly be categorized as pre-petition default expenses.

Once the amount of the Bank's claim has been established, the Debtor contends that the claim should not accrue interest. The Debtor alleges that the bulk of each monthly payment constitutes interest. If interest were applied to the monthly payments that are in arrears, the result would be the compounding of interest. The Debtor argues that pursuant to 11 U.S.C. § 1322(e), interest cannot be compounded in this case. It is the Bank's position that § 1322(e) is not applicable.

LAW

The first issue presented is whether confirmation of the Debtor's chapter 11 plan terminated

the note and mortgage. The Eleventh Circuit has held that confirmation of a plan of reorganization does not terminate a debtor-creditor contract. *Shure v. Vermont (In re Sure-Snap Corp.), 983 F.2d 1015, 1018 (11th Cir. 1993).*

> There is no statutory support for the district court's conclusion that confirmation of [the Debtor's] Chapter 11 plan "terminated" the Agreement. The Bankruptcy Code provides that "[e]xcept as otherwise provided . . . in the plan, or in the order confirming the plan, the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A) (1988). The confirmation of [the Debtor's] Chapter 11 plan did not terminate the Agreement; rather, confirmation prevented [the Creditor] from enforcing the terms of the Agreement against [the Debtor] to collect pre-confirmation debt.

The Court *In Sure-Snap* awarded attorney's fees to the Creditor after first determining that neither the plan nor the order confirming the plan provided for termination of the Agreement, and then applying state law.

The Bank claims costs and attorney's fees pursuant to contractual provisions in the note and mortgage. The provisions state:

> I agree to pay in the event of my default the costs you incur to collect this note, plus if the amount financed is more than $300.00, your reasonable attorney's fees of up to 15% of the unpaid debt if you refer collection of this note to an attorney who is not your salaried employee.
>
> If default is made hereunder and said note or notes, principal or interest, or any one or more of them placed in the hands of any attorney for collection, the debtor__ agree__ to pay all such reasonable attorney's fees as may be incurred in the collection, whether same be made by suit, foreclosure, or otherwise . . .

Neither the Debtor's chapter 11 plan nor the order confirming the plan terminate the note or mortgage. Pursuant to the note and mortgage, the Court will allow costs in the total amount of $1008.80: $110.00 for title work, $148.80 for publication in the Mobile Press Register, and $750.00 for an appraisal of the property. Alabama law restricts the award of attorney fees to those allowed by statute, contract, or special equity. *Hart v. Jackson, 607 So.2d 161 (Ala. 1992)*. In Alabama,

courts must consider the necessity of the work that serves as the basis of a contractually based fee request. A two-prong test of good faith is used to make the determination. A court must decide: "(1) whether the party claiming the right to attorney's fees, pursuant to a contract, acted reasonably in employing counsel; and (2) were the services, for which attorney's fees are claimed, reasonable under the circumstances." *King v. Calvert & Marsh Coal Co., Inc., 362 So.2d 889, 893 (Ala. 1978)*.

Counsel for the Bank has submitted an itemization of his time, services and charges. The charges total $2,765.00. A total of six hours were spent meeting with the Bank's representative to prepare for the Bank's deposition and to prepare for the 2004 examination of the Debtor. Considering that the preparation took longer than the deposition and there is no indication that the 2004 examination ever took place, the time spent appears to be excessive. The Court concludes that the reduced time of three hours is reasonable. The Court will allow attorney's fees in the amount of $2,345.00.

As stated in Debtor's memorandum of law submitted to the Court, Debtor's confirmed "chapter 13 plan provides for payment of the indebtedness to Whitney Bank in conformity [with] the terms of the chapter 11 plan." The chapter 11 plan requires monthly payments of $750.00 until a final balloon payment is due on or around June 2000. The chapter 13 plan cures Debtor's default, it does not attempt to modify the schedule and/or amounts agreed to in the chapter 11 plan. The costs and attorney's fees were incurred as a result of Debtor's default. In order to place the Debtor in the position as if the default had not occured, the costs and attorney's fees should be paid through the plan instead of being added to the balloon payment. Just as in any arrearage situation, the Court concludes that the costs and attorney's fees should be paid as an arrearage claim.

The final issue is whether the Bank's claim should accrue interest. Section 1322(e) reads as follows:

> Notwithstanding subsection (b)(2) of this section and section 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure this default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

The provision applies only to agreements entered into on or after October 22, 1994. However, the legislative history indicates that this includes refinancing agreements entered into after October 22, 1994. Bankruptcy Act of 1994, Pub.L. No. 103-394, § 702(b)(2)(D), 108 Stat. 4106, 4151 (1994). The Bank contends that because the Debtor signed the note and mortgage on September 12, 1990, the agreement does not fall under the provision. The Debtor alleges that the provision is applicable because it applies to refinancing agreements and the chapter 11 plan was confirmed on May 1, 1995. The Court agrees with the Debtor. To refinance is "to extend the maturity date and/or increase the amount of an existing debt; to arrange for a new payment schedule." *Black's Law Dictionary 6th Ed.* The restructuring of debt in a chapter 11 plan is essentially a refinancing.

Under § 1322(e), the amount necessary to cure the default must be determined in accordance with the note and mortgage, and state law. The Creditor did not dispute the allegation that the payments in arrears are primarily interest payments. Neither the note nor mortgage provides that unpaid interest will accrue interest. Alabama law does not permit the compounding of interest, absent an agreement between the parties. *Burgess v. Williamson, 506 F.2d 870, 874 (5th Cir. 1975).* The Court finds that the Bank is entitled to a claim of $6,950.00 without interest.

THEREFORE, IT IS ORDERED that Whitney Bank's claim to be paid through the plan is allowed for a total amount of $11,127.09: $1008.80 for costs, $2,345.00 for attorney's fees, $823.29 for interest at the rate of 9% on the costs and attorney's fees, and $6,950.00 for mortgage payments.

Dated: October 22, 1997

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MARGARET A. MAHONEY

CHIEF BANKRUPTCY JUDGE