

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

THARON T. LEE, and
MARGARET B. LEE,

BK #85-20896-WHB
Chapter 11

Debtors.

MEMORANDUM OPINION AND ORDER
ON MOTION FOR DETERMINATION OF BALANCES DUE
AND OWING MORTGAGE HOLDERS

The debtors filed a motion on February 6, 1990 to determine the amounts owing to each mortgage holder on certain property of the debtors in Fayette County, Tennessee, known as a 641 acre tract, which property was sold pursuant to a Court order entered January 29, 1990. The motion originally was set for hearing on February 15, 1990, and was finally concluded on March 8, 1990. It now appears that the only mortgage balance in dispute is that owing to Union Planters National Bank of Memphis. The debtors have reached agreement and paid the first lienholder, John Hancock Mutual Life Insurance Company, and the second lienholder, Evelyn B. Ogle, M.D. and estate of William S. Ogle, M.D. Therefore, the Court has before it the issues surrounding how much principal and interest and attorney's fees are owing to the Union Planters National Bank arising out of its third mortgage lien on the said 641 acre tract.

This case has a long history, the petition having been filed by the debtors on March 5, 1985. The debtors plan was confirmed by former Chief Judge William B. Leffler on February 4, 1986; however, subsequent orders modifying the confirmation have been entered, and the Court has retained jurisdiction because of numerous disputes over the debtors' payments under the confirmed plan. Many of the disputes arose out of the mortgages against the 641 acres, which finally resulted in the Court entering an order on September 14, 1989 setting a schedule for the sale of the 641 acre tract and the satisfaction of mortgages

against that property. That schedule was further modified, ultimately culminating in the order approving the sale of the 641 acre tract for \$557,670.00 cash, said order entered January 29, 1990.

A review of the Court's case file and representations of the debtors' counsel in open court indicate that many of the creditors listed in the debtors' schedules and plan have been satisfied in full. The Court is aware that there are still outstanding claims of Joe D. Whisenhunt and Milton Schaeffer, which claims may be disputed by the debtors. Further, there is an outstanding debt owing to National Mortgage Company, secured by a first mortgage on the debtors residence, which mortgage was represented to the Court by counsel for National Mortgage Company to be current at the present time. The Court is not aware whether the tax claims of the Internal Revenue Service and of the Tennessee Commissioner of Revenue have been satisfied nor whether the unsecured claims have been satisfied. The Court is not intending to make any findings about satisfaction of any claims in this Order, other than the claim of the Union Planters National Bank. However, the Court mentions the potential outstanding claims for the purpose of directing the debtor to file a statement of which claims listed in the confirmed plan, as modified, have been satisfied in full and which claims remain outstanding. This information is necessary in order to ascertain who should receive notice of any future hearings, including hearings on attorney's fees or other administrative expenses.

INTEREST RATE

As to the Union Planters obligation, it arose from a June 19, 1981 note in the amount of \$250,000.00 payable to Union Planters National Bank of Memphis (Bank); however, this note was a guaranteed note through the United States Small Business Administration (SBA), and Union Planters has continued to act as the collecting agent for SBA. (See Exhibit 1) On September 29, 1985, SBA paid Union Planters the guaranteed portion of the note; however, the note continued to accrue interest in its entirety with Union Planters being obligated to pay SBA for any of the guaranteed portion of the principal and interest recovered by Union Planters. The note provides for an interest rate of 20.5%; however, after each full calendar quarter subsequent to the date of the note, the interest would float at 1 and 1/2% above New York prime as published in The Wall Street Journal. The lender, under the note, was required to give written notice both to SBA and

to the borrowers of each increase or decrease in interest rate within ten days after the effective date of the change, with the effective date being the first day of each calendar quarter. The note further had a default provision as follows:

"If undersigned shall be in default in payment due on the indebtedness herein and Small Business Administration purchases its guaranteed portion of said indebtedness, the rate of interest on both the guaranteed and unguaranteed portions herein shall become fixed at the rate in effect as of the initial date of default. If the undersigned shall not be in default in payment when SBA purchases its guaranteed portion, the rate of interest on both the guaranteed and unguaranteed portions herein shall be fixed at the rate in effect as of the date of purchase by SBA."

The conflict in the present setting is whether the interest rate to accrue on the principal balance is a fixed rate, as espoused by the Bank, or a floating rate throughout the term of the note until payment, as espoused by the debtors. SBA has made no separate appearance in these hearings, but has continued to have its interest represented by Union Planters. The position of the Bank is that the note contract speaks for itself and controls. The position of the debtors is that the debtors relied upon the floating interest rate, despite the fact that at the time of the filing of their bankruptcy petition in 1985, the interest rate was high. Obviously, the interest rate has since declined, if the floating rate is applied.

The stipulated proof introduced is that the principal amount due and owing is \$77,676.06 through the present date. The parties have agreed that all payments have been applied properly. However, as to the interest rate, the Bank asserts that a total of \$96,110.02 in interest is due through March 2, 1990 at a 14.5% default interest rate. (See Trial Exhibit 4) In contrast, the debtors assert that under the floating interest rate, the total interest due through March 7, 1990, is \$74,093.44. (See Trial Exhibit 8)

While normally the Court would look only to the contract between the parties, in the present case there is other evidence which the Court must consider. If the Court should apply the default interest rate under the terms of the note, there must be a determination of when the debtors were declared in default under the note, since that is the method for calculation sought by the Bank. The Bank does not rely upon the date of purchase of the SBA guaranteed portion as being the date of fixing of the rate of interest. Rather, the Bank

introduced Exhibit 6 as being a letter declaring the note in default as of November 27, 1984. That Exhibit states that the interest "per diem accrual is \$66.32." That figure was the 12.75% prime rate plus 1 and 1/2%, and that figure appears on both Trial Exhibits 4 and 8 for the appropriate period in 1984. Trial Exhibit 6 does not put the Lees on notice that the interest rate would be fixed at that per diem. The proof established that the Lees continued to receive statements from Union Planters, at least through November 3, 1986, which statements reflected that the interest rate was fluctuating. (See Trial Exhibit 2) The Bank's explanation for this was that there was an error in its computer which failed to reflect the proper interest rate, that there was improper information put into the computer, and that the Bank's software at that time did not permit a fixed rate of billing. As a consequence, the Lees continued to receive a floating rate billing. While such a mistake is understandable and would not normally estop the Bank from relying upon its contractual terms, in this instance, there is proof which contradicts the Bank's date of default in Trial Exhibit 6. Trial Exhibit 3 is a letter dated April 14, 1982 from a bank officer to the Lees, which letter states that the "loan remains in default." That letter goes on to state that the loan is "on accelerated basis." There was no proof as to whether the April 14, 1982 default had been cured, but certainly that letter places in doubt when an actual default date occurred. The debtor testified that he had received several notices of default from Union Planters. The reality is that after the April 14, 1982 letter, and the November 27, 1984 letter, the Bank continued to bill the Lees and hold out that the note was accruing interest on a floating rate. (See Trial Exhibit 4 and Trial Exhibit 2.)

The Court has also examined the proofs of claim file which reflects a proof of claim filed on behalf of Union Planters Bank on May 1, 1985, showing a principal balance due of \$170,337.44 as of the bankruptcy petition filing date, and further showing interest as of April 2, 1985, at \$57.17 per diem. (See reverse side of Proof of Claim No. 5) It was stipulated that there have been no objections filed to the Bank's proof of claim. The proof of claim is certainly taken as prima facie proof of the Bank's claim. Bankruptcy Rule 3001(f) The statement on the proof of claim as to interest reflects that the Bank was, on April 2, 1985, of the opinion that its interest rate was on a floating rate. On Trial Exhibit 8, the interest rate is shown at a floating percentage

for the end of March, 1985 at \$57.17 per day, the same amount as in the proof of claim. In contrast, under the default interest rate shown on the Bank's Trial Exhibit 4, for 1985 the interest rate would be \$66.50 per day.

The Court believes there is sufficient evidence to indicate that the Bank treated the loan as being one accruing at a floating rate for such an extended period of time that the Bank is estopped from now altering its own treatment. The Court is aware that the Bank at a hearing on January 16, 1990, indicated that it was willing to support a sale of the 641 acres for \$407,000.00, which was at that date the highest cash offer in hand. Under that sales price there would have been insufficient funds to pay Union Planters in full, yet the Bank was willing to accept that sales price in order to realize as much recovery as possible. Through the efforts of the debtor and realtors, the offer was improved significantly, so that now with cash in hand from the sale of the 641 acres there are sufficient funds to pay the Union Planters Bank claim in full. The Court does not find it equitable to permit Union Planters to now claim an error was made dating back to 1984 and to permit Union Planters to recalculate the interest at a default interest rate, nor does the Court find that such a position is justified by the proof presented to the Court. The Bank is being made whole, despite the fact that the Bank had already written off 25% of this loan under banking regulations.

The Court therefore finds that the Bank should be allowed payment of its principal of \$77,676.06 plus its interest at the floating rate as shown on Trial Exhibit 8, of \$74,093.44, plus \$25.54 per diem from March 8, 1990 through the date of payment.

ATTORNEY'S FEES

As a part of its proof, Union Planters introduced as Exhibit 7 copies of the billing statements from its attorneys, McDonald, Boyd, Smith & Solmson, through January 1990 totalling \$27,405.20. Further, there was testimony that the February 19, 1990 billing from the attorneys was \$695.75 in fees and expenses of \$46.55. Counsel for the Bank testified as to the nature of the work, specifying that the billings were broken down into three major areas. From the date of filing through April, 1987, most of the firm's time was spent with matters concerning the Bank's claim, relief from the stay, and plan negotiations at an average hourly rate of \$81.00. From May, 1987, through March, 1989, the majority of the firm's time was spent in attempting to

recover the Bank's claim, which involved an adversary proceeding and other disputes with Mr. Schaeffer and Mr. Whisenhunt and with C & I Bank. The average hourly rate for this period of time was \$61.75. From March, 1989, through the present time, the firm's time was devoted to efforts to lift the automatic stay and to accomplish a sale of the 641 acre tract, at an average hourly rate of \$113.00.

There is no question but that the Bank is presently oversecured, since the sale proceeds realized sufficient monies to satisfy the prior lienholders in full. See 11 U.S.C. §506. Further, as an oversecured creditor, the Bank is entitled to its interest, previously discussed by the Court, and "any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." 11 U.S.C. §506(b). The note (Exhibit 1) does provide for "reasonable attorney's fees and costs." Therefore, the only question before the Court is whether the fees requested for reimbursement to the Bank are reasonable. The Court notes that all of the work reflected in the billings in Exhibit 7 appear to be for necessary work related to the Lees' Chapter 11 case. This case has become complex and time consuming for the debtors and debtors' counsel (as evidenced by the recent filing by debtors' counsel for interim fees of \$47,235.00), and the only proof presented in opposition to the Bank's request is that of Mr. Lee, the debtor, who simply and understandably stated that he disagreed with the amount of the fees.

The Court believes that the proper procedure for an oversecured creditor seeking approval of its fees is to file a motion for such approval, with notice to appropriate parties, including the United States Trustee. See, In re BAB Enterprises, Inc., 100 B.R. 982 (Bankr. W.D. Tenn. 1989). However, in this case, there are very few creditors, if any, remaining, and the fee application arose as a response to the debtors' motion to determine the amount owing to Union Planters National Bank. Therefore, the Court will rule upon the attorney's fees and expenses, subject to an opportunity for the United States Trustee to seek a further hearing.

Based upon the entire circumstances of this case, including the difficulties faced by Union Planters Bank in being paid, the Court finds that the fees paid by Union Planters Bank to its counsel, including the fees not billed for February, 1990, are reasonable, and the said fees will be approved as a part of the Bank's secured claim, said fees and expenses being in the amount of \$28,147.50.

IT IS THEREFORE ORDERED that the claim of Union Planters Bank is allowed in the principal amount of \$77,676.06. The interest claim is allowed, at the floating rate, evidenced in Trial Exhibit 8, through March 7, 1990, in the amount of \$75,093.44, plus \$25.54 per diem from March 8, 1990 through the date of payment. The Bank's claim is also allowed in the amount of \$28,147.50 for attorney's fees and expenses through February, 1990. This total claim of Union Planters National Bank may therefore be paid by the debtors from the remaining proceeds of the sale of the 641 acre tract.

After payment of the Union Planters claim, the debtors shall not make further distribution of the funds remaining from the sale until further orders of the Court. Prior to the distribution of any further funds, the debtors are instructed to file with the Court a report of which claims under their confirmed plan, as modified, have been paid, and which report shall also reflect the claims that remain outstanding and in what amounts.

The debtors counsel shall serve notice of his application for interim fees and expenses, to be set by the Court, upon all creditors who continue to have claims outstanding against the debtors under their confirmed plan.

A copy of this order shall be served upon the United States Trustee for this District, which office shall have ten days to review the fee statements for counsel on behalf of Union Planters National Bank (Exhibit 7) and to request a further hearing if that office wishes to comment upon the reasonableness of those fees.

SO ORDERED this 9th day of March, 1990.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

cc:

Mr. and Mrs. Tharon Lee
5376 Hayne Circle, North
Memphis, Tennessee 38119

Mr. W. Clark Washington
Attorney for Debtors
109 N. Mid America Mall
Memphis, Tennessee 38103

Mr. Robert Miller
Attorney for Union Planters
National Bank
Union Planters Building
12th Floor
Memphis, Tennessee 38103

Ms. Julie Chinn
Assistant United States Trustee
969 Madison Avenue
14th Floor
Memphis, Tennessee 38104

Mr. Russell J. Hensley
Attorney for Milton T. Schaeffer
and Joe D. Whisenhunt
245 Wagener Place
Suite 280
Memphis, Tennessee 38103

Mr. James Harpster
Attorney for National Mortgage Co.
100 North Main Building
Suite 3217
Memphis, Tennessee 38103