

FILED

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

JUL 07 1998

I N R E

JED G. WEINTRAUB
CLERK OF COURT
WESTERN DISTRICT OF TENN.

**CHARLES A. TIMS
MELODY M. TIMS,**

CASE NO. 94-11621

Debtors.

CHAPTER 13

**MEMORANDUM OPINION AND ORDER RE
REQUEST BY NATIONSBANC MORTGAGE CORPORATION
FOR ATTORNEY'S FEES PURSUANT TO THE
MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

This Court conducted a hearing on NationsBanc Mortgage Corporation's Request for Attorney's Fees Pursuant to the Motion Relief from the Automatic Stay on June 4, 1998. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b), this is a core proceeding. The following shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

FINDINGS OF FACTS

The monthly Chapter 13 Plan payment in this case is \$570.00. Of this amount, \$414.49 is paid to NationsBanc Mortgage Corporation, ("NationsBanc"), as the ongoing monthly mortgage payment on the debtor's home. In addition to the ongoing payment, NationsBanc also receives a monthly disbursement from the Chapter 13 Trustee's office as payment on its arrearage claim of \$5518.13.

The debtors, Charles A. and Melody M. Tims, ("Tims"), failed to make their December 1997 and January 1998 plan payments. As a result, NationsBanc did not receive their ongoing payment of \$414.49 in either month nor did they receive their December, January, February or

March arrearage payments. In February 1998, NationsBanc contacted their attorney about the default.

In order to make up the missed payments, the debtors made three plan payments of \$570 to the Chapter 13 Trustee between the end of January and the beginning of March. The first payment was posted to the debtor's account on January 28, 1998, the second on February 18, 1998, and the third on March 2, 1998. As a result of these payments, the Chapter 13 Trustee disbursed \$1243.47 to NationsBanc on March 10, 1998. This payment cured the debtors' defaults on their home mortgage.

Despite the March 10th disbursement, NationsBanc filed a Motion for Relief from the Automatic Stay on March 23, 1998. The Certificate of Service for this motion was filed by NationsBanc on April 9, 1998. The Court conducted a hearing on this motion on April 16, 1998. At that time, NationsBanc conceded that lifting the stay was not necessary since the debtors had cured the default. NationsBanc did, however, ask the Court to award attorney's fees of \$575.00 for filing the motion. At that time, NationsBanc alleged that it was entitled to such fees by virtue of language found in the deed of trust note executed by the debtors. Such language reads: "If the note is collected by an attorney at law, the undersigned agrees to pay all costs of collection, including a reasonable attorney's fee."

NationsBanc filed an Itemization and Request for Attorney's Fees Pursuant to Motion for Relief from Automatic Stay on June 12, 1998. According to this motion, NationsBanc's attorney contacted the Chapter 13 Trustee's office prior to filing the Motion for Relief from the Automatic

Stay to see if the debtors had made up the missed payments. NationsBanc's attorney did not give a date for this inquiry, but did state that at the time of the inquiry, the debtors had not made the missed payments. Based on the Chapter 13 Trustee's records, NationsBanc's inquiry must have been made prior to March 2nd, since by that date the debtors had made up the missed payments. No proof was presented at the hearing on NationsBanc's request for attorney's fees that the debtors were alerted to NationsBanc's intent to file the Motion for Relief from the Automatic Stay prior to the debtors' self-induced cure.

CONCLUSIONS OF LAW

The deed of trust note executed by the debtors in this case states that NationsBanc is entitled to attorney's fees "if the note is **collected** by an attorney" (emphasis added). After reviewing the evidence, the Court finds that the note was not **collected** by an attorney in this case, but rather was paid by the debtors of their own free will. As a result, NationsBanc is not entitled to an award of attorney's fees and their request for such will be denied.

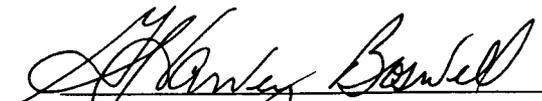
In the case at bar, the debtors failed to make their December and January plan payments NationsBanc contacted their attorney about the missed payments in February 1998. By March 2, 1998, the debtors had caught up their defaults. On March 10, 1998, the Chapter 13 Trustee disbursed over \$1200 to NationsBanc, which had the effect of curing the December and January missed mortgage payments. As a result of these payments and disbursements, NationsBanc's March 23rd Motion for Relief from the Automatic Stay had no affect on the collection of any missed payments. The debtors had made the missed payments well before the motion was filed.

ORDER

It is therefore **ORDERED** that NationsBanc Mortgage Corporation's Request for Attorney's Fees Pursuant to the Motion for Relief from the Automatic Stay is **DENIED**.

IT IS SO ORDERED.

BY THE COURT,


G. HARVEY BOSWELL
United States Bankruptcy Judge

Date: July 7, 1998

cc:

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Mailed on 7-7-98 **DN**
 Debtor, debtor's attorney and trustee
 above listed parties
Sandy Beck, Administrative Secretary
United States Bankruptcy Court