UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
ANNIE F. MURPHY WOODS, Case No. 99-28731-L
Debtor. Chapter 13

OPINION

THIS MATTER is before the court upon an Objection to Confirmation and Request for Attorneys Fees filed by Boshwit Brothers Mortgage Corporation on August 3, 1999. The central issue raised by the objection is whether the debtor's plan must provide for the payment of interest on Boshwit Brothers's arrearage claim. Secondarily, Boshwit Brothers asks the court to award it attorneys fees incurred as the result of the filing of the debtor's Chapter 13 case. For the reasons set forth below, the court concludes that the plan must provide interest only on the portion of the arrearage claim relating to insurance premiums. In addition, the court will award attorneys fees in the amount of $300. This is a core proceeding. *See* 28 U.S.C § 157(b)(2)(L) and (O).

I.

On or about March 6, 1997, the debtor executed a promissory note payable to the order of Boshwit Brothers in the principal sum of $48,750.00. The note is payable is 156 monthly installments of $312.50. The note is secured by a deed of trust upon real property known as 932 Claybrook, Memphis, Tennessee, which is the debtor's residence. The total loan proceeds paid to or for the benefit of the debtor were $13,021.65. The total loan amount included pre-computed interest in the amount of $33,778.35 and

a loan processing fee of $1,950.00.

The debtor, Ms. Woods, is a domestic worker who made payments to Boshwit Borthers until she was laid off from her job. The last payment made by the debtor prior to the filing of her Chapter 13 petition was credited to the March 1999 payment. Boshwit Brothers commenced publication for foreclosure on July 23, 1999. The debtor filed her petition on that day. The debtor's plan proposes that the Chapter 13 trustee will disburse ongoing mortgage payments in the amount of $312.50 beginning October 1999, and will pay $40.00 per month to Boshwit Brothers on the arrearage of approximately $2,188.00. The plan does not propose to pay any interest on account of Boshwit Brothers' arrearage claim. Ms. Woods estimated that the value of her home is $42,000 based upon her property tax assessment.

Boshwit Brothers filed a proof of claim on July 28, 1999, in the total amount of $2,362.95. At the hearing on November 30, 1999, Boshwit Brothers asserted that it would amend its proof of claim to $3,362,61, which consists of the following:

A. Past due principal	$2,353.04
B. Unpaid fire insurance premium	$272.00
C. Foreclosure, etc.	$692.57
D. Attorney fee proof of claim	$45.00
TOTAL	$3,362.61

Boshwit Brothers asserts that it should receive interest on its claim at 12 % per annum, and that a payment of $65.00 per month is necessary to pay its arrearage claim within a reasonable time. Boshwit

Brothers further asserts that it should receive an attorney fee in the amount of $600.00 in addition to the charge made for preparation of its proof of claim. The claim for an attorney fee was made by Boshwit Brother's counsel, Mr. Felix Bean. Mr. Bean informed the court that he had not kept any time records in connection with his work, but that he estimated that he had expended approximately 6 hours and that he should be compensated at the rate of $100.00 per hour. Mr. Bean indicated that Boshwit Brothers has not actually paid any attorney fee beyond the $45.00 paid for preparation of its proof of claim.

The testimony of Mr. Buck Boshwit, president and chief operating officer of Boshwit Brothers, indicated certain discrepancies in the claim amount. Mr. Boshwit calculated that the past due amount consisted of six installments of $312.50 plus a late charge of $15.63 per installment for a total amount of $1,968.78. Mr. Boshwit also candidly admitted that he had included the fire insurance premium together with the foreclosure expenses, and that the foreclosure expenses actually consisted of a $222.75 publication fee and a $150.00 title search fee, for a total of $372.75. Mr. Boshwit indicated that he had paid Mr. Bean $45.00 for the preparation of the company's proof of claim after the filing of the debtor's petition, and that the fire insurance premium was also actually paid after the filing of the debtor's petition. Thus Boshwit Brothers' claim actually consists of the following:

A. Past due principal	$1,968.78
B. Unpaid fire insurance premium	$272.00
C. Foreclosure, etc.	$372.75
D. Attorney fee proof of claim	$45.00
TOTAL	$2,658.53

Mr. Boshwit testified that Boshwit Brothers is registered as an industrial loan and thrift company under the Tennessee Industrial Loan and Thrift Companies Act (TENN. CODE ANN. § 45-5-101 et. seq.), and that it had operated as an industrial loan and thrift company for at least twenty-five years. Mr. Boshwit further testified that the cost to Ms. Woods of her loan was 24% per annum interest plus a 4% service charge, which is not refundable upon early payment. The Federal Disclosure Statement provided to Ms. Woods when her loan was closed indicates that the annual percentage rate is actually 28.011% based upon an amount financed of $13,021.65 and a finance charge of $35,728.35. With permission of the court, Mr. Boshwit supplemented the record after the close of the hearing with a calculation of the pay-off amount as of the date of filing. Mr. Boshwit calculated that the pay-off amount as of July 23, 1999, was $16,416.56.

II.

A.

The requirements for confirmation of a Chapter 13 plan are set out at 11 U.S.C. § 1325. 11 U.S.C. § 1325(a) provides in pertinent part:

> (a) [T]he court shall confirm a plan if–
>
> > (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;
> >
> > (5) with respect to each allowed secured claim provided for by the plan–
> > (A) the holder of such claim has accepted the plan;
> > (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
> > (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of

> such claim is not less than the allowed amount of such claim; or
> (C) the debtor surrenders the property securing such claim to such holder; . . .

One of the applicable provisions of chapter 13 that must be complied with is 11 U.S.C. § 1322(b) which provides:

> (b) Subject to subsections (a) and (c) of this section, the plan may–
>
> > (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; . . .
> >
> > (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on an unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due; . . .
>
> In 1994, 11 U.S.C. § 1322(e) was amended to provide as follows:
>
> (e) Notwithstanding subsection (b)(2) of this section and sections 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 the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

To determine whether the debtor's plan is capable of confirmation, the Court must first determine whether the debtor's proposed payment of $40 per month is sufficient to cure the default within a reasonable period of time. Boshwit Brothers contends that $40 is insufficient because that amount does not include any interest on the arrearage claim.

The Supreme Court held in *Rake v. Wade*, 508 U.S. 464, 113 S. Ct. 2187 (1993), that pursuant

to § 506(b) of the Bankruptcy Code, an oversecured creditor is entitled to pre- and post-confirmation interest on arrearages paid off under the debtor's chapter 13 plan, even if the mortgage instruments were silent on the subject and state law would not have required interest to be paid. *Id*. at 2193. In 1994, Congress amended § 1322 and added subsection (e), which overruled the *Rake* decision to the extent that no interest is required to be paid on arrearages unless such interest charges are required under the original agreement and are not prohibited by state law.[1] *See In re Bagne*, 219 B.R. 272, 275 n. 3 (Bankr. E.D. Calif. 1998); *see also* 8 COLLIER ON BANKRUPTCY, 15th ed. rev. ¶ 1322.18.

First, the Court must determine if state law permits interest upon the arrearage claim. Since the arrearage claim includes interest on the principal amount of the loan, allowing interest on the arrearage claim would result in interest upon interest. TENN. CODE ANN. § 45-5-403(4) specifically allows an industrial loan and thrift company to charge a one-time delinquent charge of 5% on each payment made 5 days or more late.[2] There is no provision in the Act, however, regarding interest on arrearages. Boshwit Brothers has pointed to no other statutory authority that would permit it to charge interest in addition to the late

[1] Section 1322(e), however, applies only to those contracts entered into after October 22, 1994. Bankruptcy Reform Act of 1994, P.L. 103-394, § 702(b)(2)(D), 108 Stat. 4106, 4151. Because the parties in this case entered into the contract in question on March 6, 1997, the Court must analyze the question of interest pursuant to § 1322(e).

[2] TENN. CODE ANN. § 45-5-403(4) provides:

> (4) Registrants may also charge a handling or delinquent charge of five cents (5¢) for each default in the payment of each one dollar ($1.00), or fraction thereof, or ten dollars ($10.00), whichever is greater, at the time any payment on any loan made hereunder becomes past due for a period of five (5) or more days; provided, that such charge shall not be collected more than once for the same default.

charge. As a result, it appears that Boshwit Brothers does not have a statutory right to interest on its arrearage claim.

Tennessee common law, however, allows interest upon interest. In *Hale v. Hale*, 41 Tenn. 233, 1860 WL 3043 (1860), the Supreme Court of Tennessee concluded that no rule of law would be violated by permitting the parties to agree at the time of the loan that any missed interest payments could be treated as principal and bear interest. *Id*. at *2. As a result of the *Hale* decision, if Boshwit Brothers and Ms. Woods agreed to the payment of interest upon interest at the time they entered into the contract, it would be allowed under state common law.

Section 1322(e) also necessitates that interest or charges be required under the original agreement. This Court has carefully reviewed the Deed of Trust and the Promissory Note supporting the loan by Boshwit Brothers to Ms. Woods. The remedies contemplated in the Deed of Trust include acceleration of the balance of the loan and foreclosure. *See* Tr. Exh. 2 at ¶ 2. The Deed of Trust also requires the borrower to pay interest upon any sums expended by the lender necessary to comply with any lien prior and paramount to its own lien. *Id*. Further, the Deed of Trust requires that interest be paid at the highest rate legally chargeable on any sums advanced by the lender to "satisfy taxes, maintain insurance and repairs, and protect and preserve the property." *Id.* at ¶ 4. Finally, the Deed of Trust provides for the payment of attorney's fees for any action taken to enforce the contract. *Id*. at ¶ 9. The Promissory Note provides for the acceleration of the entire balance of the principal amount due and owing as well as attorney's fees. *See* Tr. Exh. 1 at ¶¶ 6-7. In addition, the Note expressly provides for a 5% late charge for payments made 5 or more days late. *Id.* at ¶ 2.

The arrearage claim consists of four parts: (1) unpaid principal; (2) fire insurance premium; (3)

foreclosure costs; and (4) attorney fee for proof of claim. The Court notes that insurance premiums, foreclosure costs and attorneys' fees are appropriately included in the arrearage claim, *see Rake*, 113 S. Ct. at 2193 n.12. Pursuant to the provisions found in the loan documents, the Court finds that only the fire insurance premium is entitled to interest pursuant to the original agreement. While contracting for interest upon interest is permitted in Tennessee, the underlying loan documents do not provide for such interest regarding the past due principal amount ($1,968.78), foreclosure costs ($372.75), or the attorney fee for preparing the proof of claim in this cause ($45.00). As a result, the debtor is not required to pay interest upon $2,386.53 of the arrearage claim. The debtor's proposed payment of $40 per month is sufficient to cure this portion of the arrearage claim in full during the life of the debtor's chapter 13 plan.

The Deed of Trust, however, specifically allows Boshwit Brothers to charge interest at the highest rate legally chargeable for any sums paid to maintain insurance. Boshwit Brothers asked that it be permitted to charge interest at the rate of 12% on its arrearage claim. The debtor shall be required to pay interest at the rate of 12% on the $272.00 spent by Boshwit Brothers for the insurance premium.[3] Because the debtor's plan does not provide for interest upon this portion of the arrearage claim, Boshwit Brothers' objection to confirmation is GRANTED without prejudice to the debtor's amending her plan within 30 days to sufficiently provide for the payment of interest on this portion of the arrearage claim.

[3] The Court notes that both the insurance premium and the attorney fee for filing the proof of claim were paid by Boshwit Brothers post-petition. Section 1325(a)(5) provides for the curing of *any* default, whether incurred pre- or post-petition. *See In re Davis*, 110 B.R. 834, 836 (Bankr. W.D. Tenn. 1989) (stating that "§ 1322(b)(5) is not specifically limited to prepetition defaults"); *In re Gadlen*, 110 B.R. 341, 343 (Bankr. W.D. Tenn. 1989) (adopting *In re Davis*); *In re McCollum*, 76 B.R. 797 (Bankr. Ore. 1987). Boshwit Brothers expended these sums because of the debtor's default. As a result, these sums are properly considered part of the arrearage claim. *See Rake*, 113 S. Ct. at 2193 n.12.

B.

The second issue before the Court is whether counsel for Boshwit Brothers is entitled to attorney fees and, if so, in what amount. Section 506(b) of the Bankruptcy Code provides that an oversecured creditor can add a reasonable attorney fee to its secured claim if the agreement allows it.[4] 11 U.S.C. § 506(b). The bankruptcy court determines the reasonableness of the fee sought. The agreement between the parties and state law set an upper limit on the amount that is a reasonable fee. *See In re Hart*, 80 B.R. 107, 109 (Bankr. E.D. Tenn. 1987).

Ms. Woods testified at the hearing that the fair market value of her residence is approximately $42,000. Mr. Boshwit calculated that the pay-off amount as of July 23, 1999, was $16,416.56. Based upon Ms. Woods' testimony and Mr. Boshwit's pay-off calculation, the Court finds that Boshwit Brothers is an oversecured creditor as contemplated by § 506(b).

---

[4] Section 506(b) of the Bankruptcy Code provides:

> (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b).

The Industrial Loan and Thrift Companies Act specifically allows its registrants to require the borrower to pay "any reasonable and actual attorneys' fees and other costs incurred in the collection or enforcement of any loan contract." TENN. CODE ANN. § 45-5-403(6). Boshwit Brothers and Ms. Woods contracted for the payment of attorney fees in the Promissory Note. (Tr. Exh. 1 at ¶ 7) and the Deed of Trust (Tr. Exh. 2 at ¶ 9).

At the hearing, Mr. Bean presented no proof concerning attorney fees or costs other than his statement that he spent approximately six hours of his time in this cause. He requested a fee of $100 per hour.[5] Mr. Bean admitted that he did not keep time records. While the Court notes that the fee of $100 per hour is reasonable, without time records, the Court is unable to determine how Mr. Bean actually spent his time, and as a result, the Court will not award fees for six hours. Practitioners who plan to seek attorneys fees must keep accurate time records that the Court, the debtor, and other interested creditors can review. The Court is aware that Mr. Bean spent some time on this As a result, the Court will allow fees for three hours of his time at $100 per hour, or $300, to reimburse Boshwit Brothers for attorneys fees actually paid to Mr. Bean.

[5] Mr. Bean informed the Court that he had already received $45.00 from Boshwit Brothers for his time in preparing and filing the proof of claim on behalf of his client.

III.

The Court will enter an order GRANTING Boshwit Brothers' objection to confirmation without prejudice to the debtor's amending her plan within 30 days in accordance with this memorandum. The plan should provide for the payment of interest at the rate of 12% per annum on $272.00 af the arrearage claim. The plan should provide for the payment of the remaining balance of $2,386.53 without interest. In addition, the order will allow an attorney fee of $300 to reimburse Boshwit Brothers for attorneys fees actually paid to Mr. Bean.

BY THE COURT,

_____
JENNIE D. LATTA
United States Bankruptcy Judge

Date:_____

cc: Annie F. Murphy Woods
923 N. Claybrook
Memphis, Tennessee 38107

Joseph D. Fox
Attorney for Debtor
147 Jefferson, Suite 806
Memphis, Tennessee 38103

Boshwit Brothers
c/o Mr. Buck Boshwit
2308 Union Avenue
Memphis, Tennessee 38104

Felix H. Bean, III
Attorney for Boshwit Brothers

100 N. Main Building, Suite 2519
Memphis, Tennessee 38103