UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
CIVIL MINUTE

Case Title : Robert and Chrissy Lazrovich

Case No : **10-50196-E-13L**
Date : 1/25/11
Time : 2:00

Matter : [16] Objection to Confirmation of Debtors' Proposed Chapter 13 Plan by Diversified Financial Services, LLC

Judge : Ronald H. Sargis
Courtroom Deputy : Janet Larson
Reporter : Diamond Reporters
Department : E

APPEARANCES for :
Movant(s) :
Creditor's Attorney - Cheryl Rouse
Respondent(s) :
Debtor's Attorney - Susan Dodds, Talvinder Bambhra (for the Trustee)

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ORDERED: NOT FOR PUBLICATION

Local Rule 9014-1(f)(2) Motion.

Proper Notice Provided. The Proof of Service filed on January 5, 2011, states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee. By the court's calculation, 20 days' notice was provided.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by General Order 05-03, Paragraph 3(c). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further.

The decision of the court is to overrule the objection to confirmation and order the Chapter 13 Plan confirmed. The continued hearing at 1:30 p.m. on

February 1, 2011, which the court set if further oral argument was required is dropped from the calendar.

Creditor Diversified Financial Services, LLC opposes confirmation of the Plan on the basis that debtors' proposed minimal monthly payment of $129.00 on it security interest in a 2005 Bomag Pro Paver does not appear to provide adequate protection for the rate of depreciation of the asset. The creditor also objects to the proposed interest rate of 4.75%. Creditor alleges that because its claim is oversecured, it is entitled to its contractual interest rate of 8.5% per annum.

Diversified Financial Services has provided the declaration of Brian S. Kelley, vice-president. Mr. Kelley testifies that the paving machine which secures Diversified's claim is equipment subject to heavy use and is a depreciating asset. He testifies that the equipment was purchased in 2006 for $71,837.50, and is now valued by the Debtor at $10,000. Mr. Kelley concludes that since this equipment has depreciated substantially during the past five years, extending payment on this creditor's $5,156.22 claim secured by collateral with a value of $10,000.00 with an interest rate of 4.75% does not adequately protect its interests. However, the testimony provides no evidence of the projected decrease in value of this equipment and how that decrease in value compares to the pay down of the $5,156.22 secured claim. Clearly, the decrease in the value of this type of equipment does not occur on a straight line basis, but occurs at a much higher percentage in the first few years of use.

The creditor also argues that since its claim is oversecured, then it is entitled to interest at the contract rate rather than receiving the present value of its claim over the life of the Plan. 11 U.S.C. §1325(a)(5). Creditor asserts that the provisions of 11 U.S.C. §506(b) mandate that a creditor oversecured claim be paid interest at the contract rate. 11 U.S.C. §506(b) states,

> (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 or State statute under which such claim arose.

An early Ninth Circuit case commenting on this provision, In re 268 Ltd, 789 F.2d 674 (9th Cir. 1986) stated in dicta that the interest provision is not subject to the "reasonable" qualification for fees costs and expenses, and the bankruptcy courts apply the contract to determine postpetition interest. Id., at pg. 676. However, *In re 268 Ltd* involved an involuntary Chapter 11 case in which the creditor was allowed to foreclose postpetition, and not treatment of an oversecured claim though a confirmed plan.

The distinction between postpetition interest postconfirmation interest is addressed Collier on Bankruptcy, ¶506.04[2].

> [2] Entitlement to Postpetition Interest
>
> A distinction must be drawn in the chapter 11, 12 and 13

contexts between post petition interest and post confirmation interest. In these contexts, postpetition interest refers to interest that accrues on a prepetition claim for the period measured between the commencement of the case and the effective date of a confirmed plan. Postconfirmation interest refers to any interest that may accrue on a secured claim on and after the effective date of a plan. A secured creditor's entitlement to postconfirmation interest is governed by applicable provisions of sections 1129, 1225 and 1325, any relevant plan, and any relevant order confirming a plan. [FN.19] Section 506(b) thus has no application to a secured creditor's entitlement to postconfirmation interest, other than by assisting in fixing the amount of a secured creditor's claim for confirmation purposes through establishing that the amount of an oversecured creditor's claim shall include postpetition interest. [FN.20] ....

Footnote 19. 11 U.S.C. §§ 1129, 1225, 1325; see chs. 1129, 1225 and 1325 infra.

Footnote 20. *See Countrywide Home Loans, Inc. v. Hoopai* (*In re Hoopai*), 581 F.3d 1090 (9th Cir. 2009) ; *Telfair v. First Union Mortg. Corp.*, 216 F.3d 1333, 1338 (11th Cir. 2000) (quoting Treatise). For additional cases that properly distinguish interest accrual under section 506(b) and the interest payment provisions of section 1325(a)(5)(B)(ii) or its chapter 11 equivalent, section 1129(b)(2)(A)(i)(II), *see, e.g.*, *In re Young*, 15 C.B.C.2d 501, 503, 61 B.R. 150, 152 (Bankr. S.D. Ind. 1986) ; *Gincastro v. Fairlawn Credit Union*, 48 B.R. 662, 664 n.3 (Bankr. D.R.I. 1985) ; *In re Hildreth*, 43 B.R. 721 (Bankr. D. Idaho 1984) ; *In re Corliss*, 12 C.B.C.2d 169, 172, 43 B.R. 176, 179 (Bankr. D. Or. 1984) ; *In re Loveridge Mach. & Tool Co.*, 9 C.B.C.2d 1329, 36 B.R. 159 (Bankr. D. Utah 1983) . Some courts have improperly confused the two standards. *See In re Marx*, 11 B.R. 819 (Bankr. S.D. Ohio 1981) (court applied section 506(b) in a chapter 13 plan context in which section 1325(a)(5)(B)(ii) should have been applied, and concluded that interest accrued at the legal rate); *In re Minguey*, 10 B.R. 806 (Bankr. W.D. Wis. 1981) (court applied section 506(b) in chapter 13 plan context in which section 1325(a)(5)(B)(ii) should have been applied, and concluded that a 10% rate was appropriate); see also *Blinde v. Spader* (*In re Spader*), 66 B.R. 618, 623 (W.D. Mo. 1986) (court appears to apply 11 U.S.C. §§ 506(b) and 1325(a)(5)(B)(ii) in parallel); *In re Laza*, 69 B.R. 669 (Bankr. E.D.N.Y. 1987) (in context in which relevance of section 506(b) was unclear, cited *Marx* and *Minguey* for proposition that interest under section 506(b) is to be decided on a case-by-case basis); In re *Jewell*, 25 B.R. 44, 46 (Bankr. D. Kan. 1982) (court applied section 506(b) in chapter 13 plan context in which section 1325(a)(5)(B)(ii) should have been applied, and concluded that interest should accrue at no less than the contract rate); *Commerce Bank of Joplin v. McLean* (*In re McLean*), 17 B.R. 1, 2 (Bankr. W.D. Mo. 1981) (same misapplication, but the court

concluded that the contract rate is appropriate).

In the Ninth Circuit, *Countrywide Home Loans, Inc. v. Hoopai* (*In re Hoopai*), 581 F.3d 1090 (9th Cir. 2009), clearly holds that the oversecured creditor's rights under 11 U.S.C. §506(b) to contractual interest and fees terminates with the confirmation of a plan. *Id.*, at pg. 1099-1100, citing the Supreme Court in *Rake v. Wade*, 508 U.S. 464, 471, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993), superseded on other grounds by 11 U.S.C. § 1322(e); and consistent with rulings by the Courts of Appeal in the Second, Third, Fourth, Fifth, and Eleventh Circuits.

Diversified Financial Services, LLC has not provided the court with any persuasive evidence that any further adjustment in the 4.75% rate of interest in the plan is warranted. There is a 100% equity cushion protecting this secured claim. No evidence has been provided that the collateral is not properly maintained or subject to loss of value. The objection to confirmation of Diversified Financial Services, LLC is overruled.

The Plan complies with 11 U.S.C. §§1322 and 1325(a). The objection is overruled and the Plan is confirmed.