

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
)	CASE NO. BK03-80023-TJM
THOMAS R. FOSTER and)	
DIANNE W. FOSTER,)	CH. 13
)	
Debtor(s).)	

ORDER

Hearing was held in Omaha, Nebraska, on April 2, 2007, regarding Filing No. 59, Objection to Claims of Bank of Nebraska and Commercial Federal Bank/Wells Fargo, filed by the debtors. Thomas Kenny appeared for the debtors, Michael Whaley appeared for Wells Fargo, and Mark LaPuzza appeared for the Bank of Nebraska.

In 1983 the debtors assumed a note payable to Commercial Federal Savings & Loan which was secured by a deed of trust. The note called for interest at 8.5% per year. Because of the high market interest rates at that time, and in order to complete the purchase of the property, the debtors entered into a loan agreement with Bank of Nebraska which the parties have called a "wrap loan." The note executed by the debtors was payable to Bank of Nebraska at a principal amount of \$54,400 and an interest rate of 11.5%. A portion of that principal amount represented the unpaid balance of principal and accrued interest on the Commercial Federal note in the amount of \$34,750.

Although the note does not appear to provide for it, the procedure followed by the parties was that the debtors would pay one monthly payment to Bank of Nebraska and Bank of Nebraska would divide the payment between the amount necessary to pay the Commercial Federal monthly installment and the amount necessary to pay the Bank of Nebraska monthly installment. Bank of Nebraska would then forward the appropriate amount to Commercial Federal. Over the years, the debtors made significant payments on the obligation, but occasionally became delinquent. Eventually they filed a Chapter 13 bankruptcy. During that bankruptcy, both lenders incurred costs and attorney fees. However, before any such expenses were approved in the first bankruptcy, the case was dismissed.

In early 2003, the debtors filed this Chapter 13 case. They proposed a plan which required them to pay enough to the Chapter 13 trustee on a monthly basis so that both notes could be paid in full. The plan that was eventually confirmed listed the obligation to Bank of Nebraska at 11.5% interest. It did not mention the obligation to Commercial Federal or the interest rate which should be paid to Commercial Federal by the trustee. Both lenders filed proofs of claim. In each, the claimants included principal plus accrued interest plus attorney fees and bankruptcy expenses they had incurred in the first bankruptcy. In addition, Bank of Nebraska included the total amount still due on the Commercial Federal note.

The debtors have paid to the trustee \$59,313 between April 2003 and July 2006. The trustee has disbursed those funds separately to Commercial Federal and then to Wells Fargo, its assignee, and to Bank of Nebraska, based upon their filed claims, and has calculated interest on those claims at 11.5%.

The debtors would like to pay off the remaining balances, if any, by selling their home or refinancing it. However, the parties cannot agree on the remaining outstanding balances. Counsel have met and worked hard to resolve the issue, but have not been able to come to an agreement. Therefore, a hearing was held and counsel presented affidavit and documentary evidence supporting each of their positions with regard to the issue.

To resolve the matter, the actual amount of the claim, as of the petition date, which was to be amortized over the life of the plan, must be determined. As mentioned, Bank of Nebraska had included in its claim what it believed to be the balance owing Commercial Federal. It also included pre-petition attorney fees and bankruptcy costs which had accrued in the earlier bankruptcy case. The pre-petition attorney fees and bankruptcy costs must be deducted from the claim. They may be eventually allowed upon a review of an amended claim, but for the purpose of determining what exactly was owed on the petition date, they need to be deducted. After such deduction, the balance due Bank of Nebraska on the petition date was \$17,981.02. The balance includes approximately \$8,000 that Bank of Nebraska paid to Commercial Federal to cure payment delinquencies earlier in the life of the loan. Interest accrues at the rate of 11.5%. Any post-petition advances for escrow, bankruptcy fees, inspection fees, property tax or any other add-ons post-petition are excluded in the calculation used to determine the current balance.

Filing No. 92 is a spreadsheet prepared by counsel for the debtors which shows the beginning balance, the payments received from the Chapter 13 trustee, and the application of those payments to interest at 11.5% and principal. From this calculation it appears, on a straight amortization schedule, not including any post-petition advances, that Bank of Nebraska has received \$4,777.50 more than it was owed. Once a final order is entered on this matter, including a final determination with regard to both Bank of Nebraska and Wells Fargo, Bank of Nebraska will be permitted to file an amended claim itemizing its post-petition advances and pre-petition and post-petition expenses incurred.

The claim filed by Commercial Federal included the principal balance, accrued interest, and estimated escrow advances for payment of property taxes and insurance over the life of the plan. That estimated amount was \$7,766.61. Because that amount had not been advanced as of the petition date, it should not be included in the claim for purposes of this calculation. At a later date, when a final order has been entered concerning the current issue before the court, Wells Fargo may file an amended claim to show the post-petition advance for taxes and insurance plus expenses incurred during the pendency of this bankruptcy and the prior bankruptcy. After notice and hearing, a final determination of the post-petition amounts allowable will be made.

After deducting from the claim filed by Commercial Federal the estimated amount for taxes and insurance, and deducting pre-petition attorney fees and bankruptcy fees of \$1,147.18, the starting balance is \$11,818.75. Filing No. 93, a spreadsheet prepared by counsel for the debtors concerning the Commercial Federal/Wells Fargo loan, contains amortization charts using several different interest rates, but does not provide an amortization using the 8.5% interest rate due Commercial Federal per its note. Mr. Kenny, counsel for the debtors, is requested to provide the court with a spreadsheet beginning with that amount and applying trustee payments with the interest at 8.5%.

When that spreadsheet is received, an order will be entered making a tentative finding with regard to the current balances and giving all parties an opportunity to comment. Thereafter, a final order will be entered. Once the final order is entered, the two lenders will be permitted to file an

amended claim showing the pre-petition items they believe should be allowed and the post-petition advances and expenses incurred. Debtors will be given an opportunity to object to any amounts they believe are inappropriate.

IT IS ORDERED: Counsel for the debtors shall file a spreadsheet concerning the current balance of the Commercial Federal claim by June 1, 2007. The debtors' objection to the claims of Bank of Nebraska and Commercial Federal Bank/Wells Fargo (Fil. #59) will then be ready for a preliminary ruling.

DATED: May 17, 2007

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Thomas Kenny
Michael Whaley
Mark LaPuzza
Kathleen Laughlin
U.S. Trustee

Movant (*) is responsible for giving notice of this order to other parties if required by rule or statute.