AO 450 (Rev. 5/85) Judgment in a Civil Case ⊕

United States District Court

WESTERN DISTRICT OF NEW YORK

GLENN WILLIAMS, ELETHA WILLIAMS
RONALD GASTON, TONYA GASTON,
KEITH MILLER and KIPPER STEVENS

V.

GEORGE REIBER, ESQ.

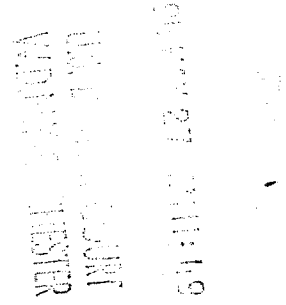
JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-CV-6494L

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Decision and Order of the Bankruptcy Court entered September 13, 1993, as amended September 28, 1993, is affirmed.



May 27, 1994

Date

Rodney C. Early

Clerk

Jacqueline Lawrence

Jacqueline Lawrence

(By) Deputy Clerk

AO 450 (Rev. 5/85) Judgment in a Civil Case ⊕

United States District Court

WESTERN DISTRICT OF NEW YORK

KIPPER STEVENS

JUDGMENT IN A CIVIL CASE

V.

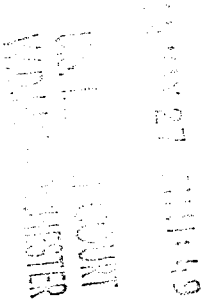
FIRST FEDERAL SAVINGS & LOAN ASSOCIATION

CASE NUMBER: 93-CV-6495L

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Decision and Order of the Bankruptcy Court entered September 13, 1993, as amended September 28, 1993 is affirmed.



May 27, 1994

Date

Rodney C. Early

Clerk

Jacqueline Lawrence

Jacqueline Lawrence

(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FILED
94 MAY 27 AM 11:22:15
U.S. DIST. CT. COURT
W.D.N.Y. ROCHESTER

GLENN WILLIAMS, ELETHA WILLIAMS, RONALD GASTON, TONYA GASTON, KEITH MILLER and KIPPER STEVENS,

Appellants,

v.

GEORGE REIBER, ESQ.,

Appellee.

DECISION AND ORDER

93-CV-6494L

KIPPER STEVENS,

Appellant,

v.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION,

Appellee.

DECISION AND ORDER

93-CV-6495L

#9

This is an appeal from a Decision and Order of the Bankruptcy Court, (John C. Ninfo, II, J.), pursuant to 28 U.S.C. § 158. Judge Ninfo's decision, In re Callahan, is reported at 158 B.R. 898 (Bankr. W.D.N.Y. 1993).

For the reasons that follow, the Decision and Order of the Bankruptcy Court is affirmed in all respects.

PROCEDURAL BACKGROUND

Appellants Glenn and Eletha Williams ("Williams"), Ronald and Tonya Gaston ("Gaston"), Keith Miller, Kipper Stevens, and several others all filed separate Chapter 13 petitions in the Bankruptcy Court, Western District of New York. All of the debtors had filed Chapter 13 plans which proposed to cure defaults on secured home mortgages[1] on each of the debtors' residences. Judge Ninfo consolidated the cases for decision.

All of the proposed Chapter 13 plans provided for the repayment of prepetition arrearages on the home mortgages during the term of the plan, but in each case, there was no provision in the plan for interest or a present value factor as to those arrearages. Because of the failure of the Chapter 13 plans to include these items relative to the home mortgage arrearages, Judge Ninfo rejected the plans. He held that each of the Chapter 13 plans "must provide for the repayment of prepetition home mortgage arrearages over the term of the plan

[1]"Home mortgage" means an allowed claim secured by a security interest in the debtor's principal residence. 11 U.S.C. § 1322(b)(2); see Rake v. Wade, 113 S. Ct. 2187, 2190 n.3 (1993).

together with a present value factor equal to the New York State judgment interest rate until the arrearages are paid in full." In re Callahan, 158 B.R. at 904.

Debtors-appellants Williams, Gaston, Miller and Stevens (hereinafter "debtors") have appealed that order. They claim that Judge Ninfo erred in requiring the Chapter 13 plans to contain provisions for payment of interest on the prepetition home mortgage arrearages.

Debtors object to Judge Ninfo's order requiring payment of interest or a present value factor on unsecured mortgage arrears. They argue that 11 U.S.C. § 506(b)[2] only authorizes interest on mortgage arrears when the arrears are oversecured as described in that section. They contend that the Bankruptcy Code does not provide for a present value factor or interest to be paid on undersecured mortgage arrears.

First Federal Savings & Loan ("First Federal"), the holder of some of the home mortgages, agrees with Judge Ninfo that interest should be added to the arrearages, however, First Federal cross-appeals on the ground that the interest rate chosen by Judge Ninfo, the New York judgment interest rate, is not the proper rate. First Federal contends that the contract rate on the original mortgage should be used to calculate interest or present value on the arrears.

---

[2]All references to sections are sections in Title 11, the Bankruptcy Code, unless otherwise indicated.

Scope of Review

The issue presented in this appeal is whether the Bankruptcy Court erred in requiring the Chapter 13 plans to include interest on prepetition arrearages on home mortgages that were in default. Also challenged is the rate of interest chosen by the Court.

Before examining the merits, however, this Court must determine the appropriate scope of review, especially since the parties disagree as to the nature of that review.

Generally, this Court must accept the Bankruptcy Court's findings of fact unless clearly erroneous, In re Schubert, 143 B.R. 337, 341 (S.D.N.Y. 1992) (citing In re Mansville Forest Prods. Corp., 896 F.2d 1384, 1388 (2d Cir. 1990)), while conclusions of law are reviewed de novo. In re Mansville, 896 F.2d at 1388 (citing Brunner v. New York State Higher Educ. Services, Corp., 831 F.2d 395, 396 (2d Cir. 1987)).

The parties here disagree about the standard of review that should govern this appeal. At argument, debtors argued that this appeal requires review of an issue of law and therefore the standard of review is de novo. The Chapter 13 Trustee and First Federal disagree; they contend that because Judge Ninfo relied on his equitable powers when he required the payment of interest on the prepetition arrears this Court should review that determination under the abuse-of-discretion standard.

The Third Circuit has recently examined this issue concerning scope of review in a similar context in In re Terex Corp., 984 F.2d 170 (6th Cir. 1993). The Court upheld the Bankruptcy Court's decision requiring the debtor to pay interest on unpaid insurance premiums for employees that had not been paid to the debtor's insurance carrier as provided

for in a Chapter 11 plan. The Third Circuit concluded that although the Bankruptcy Court referred to explicit provisions of the Bankruptcy Code, it did not rely on specific provisions of the Code in arriving at its decision. Id. at 172. "[W]e believe that the bankruptcy court interpreted the Plan, and then exercised its equitable powers to breath life into the provisions of the Plan. Accordingly, we review the interpretation of the Plan with full deference, and we review the bankruptcy court's exercise of its equitable powers under an abuse of discretion standard." Id. (citations omitted).

The Ninth Circuit has also concluded that a deferential standard of review is appropriate when a bankruptcy court resolves an issue concerning payment or denial of interest under its equitable powers. See In re Anderson, 833 F.2d 834, 836 (9th Cir. 1987) (as a matter of equity, awards and denials of post-petition interest are reviewed for abuse of discretion).

As the Terex Court did, I must turn to the Bankruptcy Court's decision to determine the basis for the decision. The root problem presented to Judge Ninfo was how to equitably effect a cure of home mortgage defaults as part of Chapter 13 plans. Judge Ninfo determined that "the Bankruptcy Code, court decisions, definitions of cure, and underlying mortgage documents do not provide clear guidance on how to actually effect a cure." In re Callahan, 158 B.R. at 901. In deciding the issue he relied on his equitable discretion.

> Therefore, this Court, in the exercise of its equitable powers and discretion, holds that to meet the requirements of § 1322(b)(5) and, when there is an oversecured mortgage, § 1325(a)(5), unless the parties otherwise agree to the terms of a cure, Chapter 13 plans must provide for the repayment of prepetition home mortgage

> arrearages together with a present value factor equal to the New York judgment interest rate until such arrearages are paid in full.

Id. at 903.

Judge Ninfo's decision rests principally on his equitable powers as part of his approval of the Chapter 13 plans. This is especially true relative to his decision to select the New York judgment interest rate as the proper rate. Therefore, this Court will review this matter under the more deferential, abuse-of-discretion standard.

However, were I to utilize a de novo standard, I would reach the same result and uphold the Bankruptcy Court's decision, since I believe that there is ample authority to require the payment of interest on undersecured home mortgage arrears, as part of a Chapter 13 plan.

Chapter 13 Plans: Confirmation By the Court

On the merits, the debtors argue that § 506(b) authorizes "interest on such claim" only when the value of the collateral is greater than the amount of the claim; that is, when the claim is oversecured. Since all of the mortgages here are undersecured, that is, the value of the collateral is less than the amount due on the notes plus interest, debtors claim that Judge Ninfo erred in directing that the Chapter 13 plans provide for interest on the arrearages that are to be paid off over the life of the plan.

Although § 506(b) must be considered, I believe that the more germane code provisions are § 1322 and § 1325, which specifically deal with the content and confirmation

of Chapter 13 plans. It is principally to those sections that the Court must look to determine whether or not Judge Ninfo properly rejected the plans at issue.

In analyzing this issue, it is also important to recognize, as did Judge Ninfo, that the claims at issue relate to home mortgages which have been given special protection under the Code. Generally, Chapter 13 plans may modify the rights of both secured and unsecured creditors except for "a claim secured only by a security interest in real property that is the debtor's principal residence . . .." § 1322(b)(2).

All of the debtors have fallen behind in making payments on their home mortgages. Judge Ninfo noted that some of these arrearages are substantial, ranging from $18,000 to possibly as much as $39,000. In re Callahan, 158 B.R. at 902 n.3. All of the debtors sought to utilize Chapter 13 plans to pay off these arrearages but in no case did the plan provide for any interest on the arrearages during the pay out period. By filing petitions under Chapter 13, the debtors, by virtue of the automatic stay provisions of the Code, precluded the mortgagees from taking any action to collect on the debt or to initiate mortgage foreclosure proceedings.

Sections 1322 and 1325 describe for the contents of a Chapter 13 plan as well as the requirements for confirmation. When presented with the proposed plans, Judge Ninfo was charged with determining whether the plan met the requirements and whether it was fair to the debtor and sufficiently protected the interest of the creditors.

Traditionally, a bankruptcy court has acted essentially as a court of equity. In re Leasing Consultants Inc., 592 F.2d 103, 107 (2d Cir. 1979); see also Pepper v. Litton, 308 U.S. 295, 304 (1939); Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934). The

equitable power of a bankruptcy court is reflected in 11 U.S.C. § 105(a), which provides, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

Bankruptcy judges have broad discretion when deciding to accept or reject a Chapter 13 plan. See In re Schaitz, 913 F.2d 452, 453 (7th Cir. 1990) (bankruptcy judge can require creditors to accept plan if the plan is in "good faith"); In re AOV Industries, 792 F.2d 1140, 1154 (D.C. Cir.), vacated in part, 797 F.2d 1004 (D.C. Cir. 1986) (noting the bankruptcy court's broad discretion to approve distribution plans).

Generally, a Chapter 13 plan should be confirmed if the plan is proposed in good faith and its terms do not violate the law. See 11 U.S.C. § 1325(a)(3). "The bankruptcy court must utilize its fact-finding expertise and judge each case on its own facts after considering all the circumstances of the case." In re Estus, 695 F.2d 311, 316 (8th Cir. 1982). Section 105(a) grants a bankruptcy court the equitable power necessary to assure that reorganization proceedings are conducted in an orderly manner. In re Baldwin-United Corp. Litigation, 765 F.2d 343, 348 (2d Cir. 1985).

Obviously the equitable power of a bankruptcy court is not without limits. It may only be exercised within the confines of the Bankruptcy Code. Norwest v. Ahlers, 485 U.S. 197, 206 (1988). Where the statute on its face is clear, bankruptcy judges must follow the statute. They have no authority to ignore the plain language of a statute in order to reach a more equitable result. In re Shouline Concrete Co., 831 F.2d 903, 905 (9th Cir. 1987).

The discretionary power of the Bankruptcy Court is evident at all stages of the confirmation process but this is especially true in the case of the "cure" provisions of § 1322.

Section 1322(b)(2) provides that the plan may provide for curing any default and § 1322(b)(5) provides that even as to home mortgages, the plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim . . .." § 1322(b)(5).

Although § 1322 authorizes a plan to provide payments to provide a cure, "nothing in that provision dictates the terms of the cure." Rake, 113 S.Ct. at 2192. Judge Ninfo recognized this lack of direction concerning "the terms of the required cure of a home mortgage in default whether the arrearages are secured or unsecured." In re Callahan, 158 B.R. at 901. In light of the lack of specificity in the Code, it is up to the Bankruptcy Court to determine what constitutes an effective cure for the mortgage in default.

The Second Circuit has stated that "[c]uring a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified. This is the concept of 'cure' used throughout the Bankruptcy Code." In re Taddeo, 685 F.2d 24, 26-27 (2d Cir. 1982). While this accurately describes the cure function, it fails to provide any clear or practicable guidelines for effectuating a cure.

Judge Ninfo acknowledged this lack of guidance and determined that an equitable cure must be fashioned in light of several guiding principles, including:

> (1) The Policy of the Bankruptcy Code to allow debtors proceeding in good faith to cure home mortgage defaults and save their homes whenever reasonably possible; (2) the policy of the Bankruptcy Code, expressed by Section 1322(b)(2), to treat holders of home mortgages in some respects differently and more favorably than other creditors, in order to encourage lenders to continue making home mortgage loans to facilitate the purchase of homes; (3) the need to further an effective Chapter 13 program which accomplishes all of the goals of Chapter 13,

> including allowing debtors to propose and have confirmed plans which allow them to save their homes and to have those plans confirmed in a cost effective manner; and (4) the rights and remedies of the parties outside bankruptcy in state court mortgage foreclosure proceedings.

In re Callahan, 158 B.R. at 902.

Judge Ninfo concluded that it was impracticable to establish the terms of an equitable cure on a case by case basis since such an approach would require increased legal costs, delay the confirmation of Chapter 13 plans, and require the Court to resolve numerous cure related issues. Id. For those reasons, Judge Ninfo invoked his equitable powers and determined that unless the parties stipulated otherwise, "chapter 13 plans must provide for the repayment of prepetition home mortgage arrearages together with a present value factor equal to the New York judgment interest rate until such arrearages are paid in full." Id. at 903.

This conclusion was justified in light of the protections afforded to mortgagees holding home mortgages, together with an analysis of §§ 1322 and 1325 and the recent Supreme Court cases interpreting those sections.

Neither § 1322 nor § 1325 precludes a court from allowing interest as part of an effective "cure" for a default. If the purpose of the cure is to return the creditor to a pre-default condition, it seems entirely reasonable for the court to order that interest be paid as part of the cure. If this is not done, the creditor suffers because he receives no compensation "for the decreased value of the claim caused by the delayed payments." Rake v. Wade, 113 S.Ct. at 2192 n.8.

Debtors claim here that regardless of these equitable concepts, § 506(b) precludes payment of interest on an undersecured claim since that section only authorizes interest on claims that are oversecured.

It is true that when discussing preconfirmation interest, the Supreme Court referred to the interplay between § 1322(b)(5) and § 506(b) and held that a default on a home mortgage could be cured by making payments on the arrearages and, "where the mortgagee's claim is oversecured," id. at 2192 (emphasis added), § 506(b) entitles the mortgagee "to preconfirmation interest on such arrearages." Id.

Although the Supreme Court was not faced with the issue presented here, that is, whether a Chapter 13 plan could include interest on unsecured arrearages, it seems clear that the Court singled out only those claims that were "oversecured" as being entitled to preconfirmation interest on arrearages. Id. That specific reference to "oversecured" mortgages by the Supreme Court is significant, and I believe that reference precludes a court from requiring a plan to pay preconfirmation interest on unsecured claims. Because the Supreme Court emphasized that preconfirmation interest was payable "where the mortgagee's claim is oversecured", I believe that until Congress or the Supreme Court clarifies the matter, preconfirmation interest is precluded on arrearages on undersecured mortgages.

However, I believe the situation is otherwise as to postconfirmation interest, and I believe that the principles established in both Rake and in Nobelman v. American Sav. Bank, 113 S.Ct. 2106 (1993) confirm this.

Justice Thomas made a clear distinction in Rake between preconfirmation interest and postconfirmation interest. Although it is true that the mortgages in Rake were

oversecured, the court did not rely on § 506(b) concerning postconfirmation interest but on the cure provisions of § 1322(b) and § 1325(a)(5). The Court determined that as to "each allowed secured claim" that was "provided for" in the plan, the creditor was entitled to receive the present value of the claim to be distributed pursuant to the plan. The holding of the Supreme Court in Rake is that under § 1325(a)(5), the mortgagee was "entitled to present value of the arrearages," Rake, 113 S.Ct. at 2193, (emphasis added) as an element of an "allowed secured claim provided for in the plan." Id.

Furthermore, in Rake Justice Thomas stated specifically that "§ 1325(a)(5)(B)(ii) guarantees that property distributed under a plan on account of a claim, including deferred cash payments in satisfaction of the claim, see 5 Collier ¶ 1325.06[4][b][ii], must equal the present dollar value of such claim as of the confirmation date." Rake, 113 S.Ct. at 2191. The emphasis here was on protecting the value of the mortgagee's claim and there was no distinction made between oversecured and undersecured mortgagees. If Justice Thomas had relied on the oversecured/undersecured distinction, as he did with reference to preconfirmation interest, then surely that distinction would have been discussed in that part of Justice Thomas' opinion concerning postconfirmation interest.

In determining that the creditors in Rake were entitled to postconfirmation interest on the arrearages, Justice Thomas did not make a distinction between oversecured and undersecured mortgages. If the home mortgage claim was "provided for" in the plan, then the entire amount of the claim should be considered and not just that portion that was covered by the fair market value of the collateral.

Under § 1325(a)(5), the Court held that the creditor was "entitled to the present value" of the arrearages as part of the pay out of the claim pursuant to the plan.

Nobelman is also instructive relative to the nature of the mortgagee's claim where the value of the collateral is less than the amount of the debt. Of course, this is the circumstance in the cases before me. In Nobelman, the debtors attempted to fashion a Chapter 13 plan which bifurcated the claim of the mortgagee into a secured part, up to the value of the collateral, and an unsecured part, which was not covered by the fair market value of the collateral. The debtors there proposed to pay off only that part covered by the fair value of the collateral, a sum far less than the total indebtedness due to the mortgagee. The Bankruptcy Court rejected the plan and, ultimately, the Supreme Court affirmed.

Nobelman focused on § 1322(b)(2)'s protection for home mortgages.[3] Section 1322(b)(2) precludes a plan from modifying the "rights" of creditors holding a "secured claim." Justice Thomas, in Nobelman, determined that the "rights" of the mortgagee would be substantially modified, contrary to § 1322(b)(2), if the debtors were allowed to bifurcate the claim into secured and unsecured portions, with provision only to pay off the secured portion as part of the Chapter 13 plan.

In language relevant to the present appeal, Justice Thomas found that it was "plausible" to interpret § 1322(b)(2)'s phrase "a claim secured only by a [homestead lien]" as

---

[3]In Nobelman the court referred to the security as a "homestead mortgage" or "homestead lien" while the Rake court referred to it as a "home mortgage." Both terms are synonymous for our purposes and means a claim secured only by a security interest in the debtor's principal residence. Section 1322(b)(2).

referring to "the lien holder's entire claim, including both the secured and the unsecured components of the claim." Id. at 2111 (emphasis added). Essentially, Nobelman precludes a debtor from modifying any portion of a secured claim evidenced by a home mortgage as part of a Chapter 13 plan.

If the debtor in Nobelman was precluded from disregarding that portion of his debt that happened to be undersecured, so to the debtors here should be precluded from denying the mortgagees the full "value" of their claim "as of the effective date of the plan", pursuant to § 1325(a)(5)(B)(ii), which includes a present value calculation.

The Bankruptcy Court in In re Brycki, 161 B.R. 915 (Bankr. D.N.J. 1993) relied, in part, on Judge Ninfo's decision in this case and held that the debtors' Chapter 13 plan must include postconfirmation interest on the arrearages due the mortgagee.

The court in Brycki analyzed Rake and Nobelman and distinguished, as I do, between Rake's discussion of preconfirmation interest, covered by § 506(b) for oversecured mortgages, and postconfirmation interest which is based on an interpretation of § 1325.

The Brycki court relied on Nobelman to conclude that interest should be paid on arrearages paid out as part of a Chapter 13 plan. "Since a home mortgage is deemed by Nobelman to be fully secured for purposes of Code § 1322(b)(2), it must follow that such mortgages are fully secured for purposes of § 1325(a)(5)(B) as well." In re Brycki, 161 B.R. at 917. Nobelman protected the rights of the home mortgagee in the sense that it precluded debtors from bifurcating the mortgage debt into secured and unsecured parts. Nobelman recognized the strong congressional policy to encourage financial institutions to enter the home mortgage market. See Nobelman, 113 S.Ct. at 2111 (Stevens, J.,

concurring). That same rational supports protecting the home mortgagee's interest in receiving full value for the amount of the arrearages determined as of the date of confirmation. Under § 1325(a)(5)(B)(ii) a present value factor must be established at confirmation to guarantee that the mortgagee receives the full value for the arrearages.

In Brycki, the court noted that "Code § 506(b) requires a secured creditor to be oversecured to receive interest, but Code § 1325 does not." In re Brycki, 161 B.R. at 916. Brycki, relying on Rake as well as Nobelman held that:

> The claim for arrearages is secured by the mortgage whether the mortgagee is undersecured or oversecured and must be paid to effectuate a cure under Code § 1322(b).

Id.

I agree with that assessment and, therefore, determine that Judge Ninfo's Decision and Order requiring the Chapter 13 plans at issue here to pay postconfirmation[4] interest on the arrearages set forth in the plan is eminently reasonable and well within his discretion under § 1322(b)(5) to effectuate a cure. Furthermore, it is based on a sound

---

[4]Based on my review of Judge Ninfo's decision, the entire file in the Bankruptcy Court, and oral argument, I have assumed that the issue here related only to postconfirmation interest on the arrearages that were to be paid out over time. Justice Thomas, of course, made a clear distinction between preconfirmation interest and postconfirmation interest in Rake. Perhaps because they assumed that the matter only related to postconfirmation interest, the parties and Judge Ninfo were somewhat vague on the matter. However, I assume, and rule accordingly, that the interest due and the present value adjustment relates only to postconfirmation interest.

interpretation of § 1325(a)(5)(B)(ii), Rake, and Nobelman, and guarantees that the mortgagee will receive the full value of its claim, as of the effective date of the plan.

Interest Rate

Judge Ninfo determined that the proper interest or present value factor should be 9%, the New York judgment interest rate.[5] First Federal cross appeals and contends that the original mortgage contract rate of interest should be used in calculating interest on arrearages. Judge Ninfo rejected that argument, and I believe that pursuant to his discretionary and equitable powers, the selection of the 9% state judgment interest rate was entirely appropriate.

In Rake, Justice Thomas explicitly declined to determine the applicable interest rate for arrearages cured pursuant to § 1322(b)(5). Rake, 113 S.Ct. at 2192 n.8.

Judge Ninfo determined that New York's judgment interest rate was appropriate in part because Federal Courts in this district had routinely used that interest rate prior to the Second Circuit's decision in In re Bellamy, 962 F.2d 176 (2d Cir. 1992), which allowed the bifurcation of home mortgage claims prior to the Supreme Court's decision in Nobelman rejecting that practice.

Furthermore, the intent of § 1322(b)(5) is to cure the default and place the creditor in the position he would have been prior to the default event. As Judge Ninfo recognized, had the mortgagee been allowed to proceed after the default to foreclose on the

---

[5]See N.Y. Civ. Prac. L. & R. 5004.

property, it would have obtained, if successful, a judgment of foreclosure and sale which would have accrued interest at 9%. In re Callahan, 158 B.R. at 902 n.5.

Since the Code does not establish a rate of interest, bankruptcy courts must determine the appropriate rate. In Nobelman, the Supreme Court stated that "[i]n the absence of a controlling federal rule, we generally assume that Congress has 'left the determination of property rights in the assets of bankrupt's estate to state law,' since such '[p]roperty interests are created and defined by state law.'" Nobelman, 113 S.Ct. at 2110 (quoting Butner v. United States, 440 U.S. 48, 54-55 (1992)).

Federal Courts have broad discretion in determining the appropriate rate of interest under circumstances where there is no controlling federal statute. In similar circumstances, courts have recognized the broad discretion afforded to federal courts in selecting the appropriate rate of interest.

For example, district courts have discretion in deciding what interest rate to use in awarding prejudgment interest. Cefali v. Buffalo Brass Co., 748 F.Supp. 1011, 1025 (W.D.N.Y. 1990). The Second Circuit has not expressly endorsed any particular prejudgment interest rate. Id. Courts in this and other circuits have used various interest rates including the post judgment interest rate provided by 28 U.S.C. § 1961(a), statutory interest rates, or market rates. See Katsaros v. Cody, 744 F.2d 270, 281 (2d Cir.), cert. denied, 469 U.S. 1072 (1984) (using the rate of prime plus one percent); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1219-20 (8th Cir.), cert. denied, 454 U.S. 968 (1981) (using the Missouri statutory rate); Foltz v. U.S. News & World Report, 613 F.Supp. 634, 648-49 (D.C.D.C. 1985) (using the District of Columbia statutory rate); River

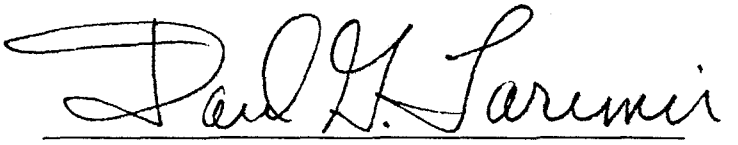
Oaks Marine v. Town of Grand Island, No. 89-CV-1016S, 1992 WL 373533 at *7 (W.D.N.Y. Nov. 24, 1992) (using the adjusted prime rate); Cefali, 748 F.Supp. at 1025 (using the postjudgment rate).

Concerning selection of the interest rate, the scope of review by this Court should be differential and, therefore, I should accept the bankruptcy court's determination unless it is clearly erroneous. Under that standard, Judge Ninfo's decision adopting the New York judgment rate of interest at 9% is clearly proper, and I affirm it in all respects.

CONCLUSION

The Decision and Order of the Bankruptcy Court entered September 13, 1993, as amended September 28, 1993, is affirmed.

IT IS SO ORDERED.



DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

Dated: Rochester, New York
May 27, 1994.

ATTEST: A TRUE COPY
U.S. DISTRICT COURT, WDNY
RODNEY C. EARLY, CLERK
By Jacqueline Lawrence
Deputy Clerk
Original Filed 5-27-94

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Stevens

Plaintiff(s)

v. 6:93-cv-06495

First Federal

Defendant(s)

PLEASE take notice of the entry of an ORDER filed on 5/27/94, of which the within is a copy, and entered 5/27/94 upon the official docket in this case. (Document No. 9 .)

Dated: Rochester, New York
May 27, 1994

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
282 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO:
Peter Schribner, Esq.
Kenneth W. Gordon, Esq.