UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 01-24624

CHARLES V. RUSSO, JR.,
d/b/a DYNAMIC AUTO SALES,
and NANCY L. RUSSO,

Debtors. **DECISION & ORDER**

BACKGROUND

On December 3, 2001, Charles V. Russo, Jr. and Nancy L. Russo (the "Debtors") filed a petition initiating a Chapter 13 case. In the Schedules and Statements required to be filed by Section 521 and Rule 1007 the Debtors indicated that: (1) they were the owners of a single family residence at 5 Windham Hill, Mendon, New York, which had a current market value of $300,000.00 and was encumbered by a first mortgage in favor of Chase Manhattan Mortgage Corporation ("Chase") with a current balance of $290,000.00 (the "Chase Mortgage"); and (2) they had unsecured, nonpriority claims in excess of $258,000.00.

A Chapter 13 Plan filed by the Debtors on January 16, 2002 provided that Chase was to be paid: (1) $87,315.00, as arrearages on the Chase Mortgage, through the Plan; and (2) $3,116.60, as regular monthly mortgage payments, outside the plan.

On February 1, 2002, Chase filed a proof of claim (the "Chase Claim") which included $106,637.18 as arrearages, consisting of: (1) $46,221.24, representing twenty-six payments of principal and interest at $1,777.74 per month for the months of October 1, 1999 through and including December 2001; (2) $55,705.44, representing escrow advances; and (3) miscellaneous fees.

On March 21, 2002, Chase filed a Motion for Relief from the Stay (the "Stay Motion"), which asserted that: (1) on May 1, 1987, the Debtors had executed a Mortgage Note (the "Chase Note") together with the Chase Mortgage; (2) the current monthly payment due on the Chase Note and Mortgage was $4,908.11; and (3) post-petition arrearages totaled $15,657.93, which included these regular monthly payments, monthly late charges of $43.10 and insufficient fund fees.

On March 25, 2002, the Debtors interposed Opposition to the Stay Motion, which asserted that: (1) on or about June 1, 2000, the Debtors and Chase entered into a Forbearance Agreement (the "Forbearance Agreement")[1] which required the Debtors to pay: (a)

[1] The Forbearance Agreement was entered into after Chase had commenced a State Court mortgage foreclosure proceeding (the "Foreclosure Action"). The Agreement provided for the entry of a judgment of foreclosure and sale that would not be further enforced unless the Debtors were in default under the Forbearance Agreement.

regular monthly payments on the Chase Mortgage of $3,116.60; and (b) a lump sum payment of $20,000.00 and additional monthly payments of $1,160.53 in order to repay escrow advances; and (2) there was no explanation in the Stay Motion for the allegation that the regular monthly payment on the Chase Note and Mortgage was $4,908.11.

On the April 10, 2002 return date of the Stay Motion, the Court was advised that the matter was settled, and on May 6, 2002 the Court entered a Consent Conditional Order which required the Debtors to pay: (1) $3,843.62 in order to cure all post-petition arrearages through April 30, 2002; and (2) regular monthly post-petition mortgage payments of $3,178.08.

On April 17, 2002, the Debtors filed an Objection to the Chase Claim (the "Claim Objection") which alleged that the arrearages due on the Chase Mortgage were $88,111.38, rather than the $106,637.18 alleged in the Chase Claim, computed as follows:

$54,544.91	-	balance due under Forbearance Agreement
$30,449.87	-	payoff balance due for arrearages owed to Chase pursuant to counsel for Chase Bank immediately prior to the filing of the bankruptcy petition
$ 3,116.60	-	December regular monthly payment
TOTAL ARREARAGES		$88,111.38

On May 10, 2002, Chase interposed Opposition to the Claim Objection which asserted that: (1) when the Debtors defaulted under the Forbearance Agreement, as specifically provided for in the Agreement, Chase resumed its Foreclosure Action and scheduled a foreclosure sale for December 4, 2001; and (2) because the Debtors had defaulted under the Forbearance Agreement and Chase had resumed the Foreclosure Action, Chase was no longer required to accept payments under the Forbearance Agreement.

At the May 15, 2002 return date of the Claim Objection, the parties agreed that if the Chase Mortgage arrearages were required by the Court to be determined by reference to the original Chase Note and Mortgage, the arrearages set forth in the Chase Claim were correct, whereas if the arrearages were required to be determined by reference to the Forbearance Agreement, the arrearages in the Claim Objection were correct.

DISCUSSION

I. De-acceleration and Cure of the Chase Mortgage.

The decisions of the Courts in the Second Circuit applying New York law have consistently held that if a Chapter 13 debtor files a petition prior to the completion of a sale in a New York mortgage foreclosure proceeding, even if a judgment of

foreclosure and sale was entered, Section 1322(b)(5)[2] can be utilized to permit the debtor to de-accelerate and reinstate the mortgage by paying: (1) the pre-petition arrearages in full as a secured claim through the plan, along with a present value factor in order to meet the requirements of Section 1325(b)(5); and (2) the regular post-petition payments that would otherwise have been due on the mortgage prior to the debtor's default.[3]

II. Payments Due to Chase after De-acceleration.

The Debtors defaulted twice on their obligations under the Chase Mortgage. Their October 1999 default resulted in Chase declaring the Chase Note and Mortgage all due and payable and commencing the Foreclosure Action. Their default under the Forbearance Agreement, entered into after the Chase Note and Mortgage had been declared all due and payable and a Judgment of Foreclosure and Sale was entered, resulted in Chase continuing

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[2] Section 1322(b)(5) provides that:

> (b) Subject to subsections (a) and (c) of this section, the plan may -
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> (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 any 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[.]

11 U.S.C. § 1322(b)(5) (2002).

[3] See *In re Taddeo*, 685 F.2d 24 (2nd Cir. 1982); *In re Acevedo*, 26 B.R. 994 (E.D.N.Y. 1982).

the pending Foreclosure Action and scheduling a foreclosure sale.

The issue for the Court to determine is, once the Chase Mortgage is de-accelerated by a confirmed Chapter 13 plan, which pre-default conditions do the parties return to, the payments due under the Forbearance Agreement or the payments due under the Chase Note and Mortgage?

I find that the post-petition payments the Debtors are required to make on the Chase Mortgage in order to meet the requirements of Section 1322(b)(5) are those required under the Forbearance Agreement for the following reasons: (1) the payment obligations evidenced by the Chase Note and Mortgage were modified and restructured by the Forbearance Agreement; (2) the Forbearance Agreement provided for the repayment of all of the amounts due on the Chase Note and Mortgage after the Debtors had defaulted and the Chase Note and Mortgage were declared all due and payable, it did not simply provide for a cure of the arrearages over a short period of time and then a return to the terms of the Chase Note; (3) the Chase Note required regular monthly payments through May 1, 2017, and the Forbearance Agreement restructured the then outstanding amounts due after

default to include a regular monthly payment[4] for a period of two hundred four months, also ending on May 1, 2017, the original maturity date; (4) Paragraph 17 of the Forbearance Agreement provided that nothing contained in the Agreement could be deemed to amend, change, modify, supercede, waive or relieve the defendants of any of the provisions of the Chase Note and Mortgage, except as to the payment modifications specifically provided for therein, clearly indicating that the payments required were modified and restructured; (5) the Forbearance Agreement failed to include any language which specifically provided that upon a default under the Forbearance Agreement the payments required would be those provided for under the Chase Note and Mortgage[5]; and (6) by letter dated November 7, 2001, the attorneys for Chase advised the Debtors, after they had defaulted under the Forbearance Agreement, that the Chase

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[4] This payment consisted of unpaid principal, non escrow advance arrearages to the date of the Agreement, continuing interest at 9% and an escrow component which was subject to adjustment based upon the current amounts necessary to pay taxes and insurance.

[5] Even though workout and forbearance agreements are traditionally drafted at least in part in anticipation of a possible bankruptcy proceeding, the Forbearance Agreement did not, as it could have, address the parties' intentions and agreements in the event that there was a Chapter 13 petition filed before a foreclosure sale and the de-acceleration provisions of Section 1322(b)(5) became applicable. The only contingency specifically provided for in the Forbearance Agreement in the event of a default was the continuation of the Foreclosure Action.

Mortgage loan could be reinstated by paying certain attorney's fees and the seven unpaid monthly payments then due under the Forbearance Agreement rather than the amounts that would have been due under the Chase Note.

CONCLUSION

The Claim Objection is sustained. The Chase Mortgage arrearages to be included in the Debtors' plan are $88,111.38 and the post-petition monthly payments to be paid on the Chase Mortgage are those provided for in the Forbearance Agreement.

IT IS SO ORDERED.

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HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE

Dated: June 21, 2002