UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

MONROE CARTER, JR. Case No. 93-13327 K

Debtor

The question presented is what the Court should do with the refusal of a debtor and counsel to acknowledge genuine (but minor) defaults on his or her obligations to a mortgagee, and with their insistence that the mortgagee's request under 11 U.S.C. § 362(d) to lift stay was "unreasonable" even though not insupportable.

The parties initially advised the Court that the matter was settled by the Debtor's promise to cure arrears (one or two months of postpetition mortgage payments) within a specific period, but the Court was further advised that the Debtor refused to pay the lender's attorney's fees. Three times the Court instructed the parties to discuss settlement, advising them that the test of "reasonableness" of a mortgagee's conduct in seeking to lift stay is whether the motion was well-founded at the time it was made, and that the test of whether the mortgagee is entitled to attorney's fees (under 11 U.S.C. § 506(b)) is whether the motion could reasonably have been thought by the creditor and its counsel to be necessary for the protection of the creditor at the time it was

made.[1]

The Debtor's attorney insists that M & T Bank's counsel should have sought to resolve this matter with a phone call to him rather than by a § 362(d) motion.

It is very common for a motion to recite that a debtor is in arrears as to several postpetition mortgage payments, and that, therefore, foreclosure should be permitted "for cause" under § 362(d), but for the Court to discover upon hearing that there has been some misunderstanding or misinterpretation which has been substantially cured in one way or another. Such motions are nearly always settled. This one has not.

The Debtor has been in Chapter 13 for nearly a year, having filed on November 8, 1993. He did not pay the November or December 1993 mortgage payment because he thought those would be treated as prepetition arrears to be paid, over time, under the Plan. M & T did not agree to such treatment (if it was aware of it).

Mortgage payments for January through March, 1994 were timely made in cash at M & T branch offices. The April payment was slightly late. M & T has no record of the May payment, and that apparent default as well as the absence of the December

[1]"The controlling inquiry [under § 506(b)] is whether, considering all relevant factors ..., the creditor reasonably believed that the services employed were necessary to protect his interests in the debtor's property." *In re United Merchants & Manufacturers, Inc.*, 674 F.2d 134, 140 (2d Cir. 1982).

payment led it to take steps to assign the file to its outside counsel to obtain § 362 relief.

The motion was filed on August 11, 1994, but in the meantime the Debtor had made his usual cash payments at M & T branches on June 13 and July 21. He also made a payment on August 18, apparently after service of the motion. M & T's counsel was not aware of the June, July and August payments before he appeared to argue the motion on August 24. So, as noted above, it was reported to the Court on that date that the motion was near settlement, except that the parties could not agree as to whether the bank's counsel was entitled under § 506(b) to fees for bringing the motion. After further appearances on September 7 and 21, and further instructions from the Court to attempt to settle the matter, the negotiations fell apart.

The Court inquired of the Debtor's counsel as to whether he is prepared to have the Court rule on M & T's motion to lift stay in light of the fact that the Debtor unequivocally "missed" the December 1993 payment. He responded that he was so prepared, in light of his research to the effect that post-petition but pre-confirmation mortgage payments may, as a matter of right, be treated as "arrears" and paid by the Debtor over the life of the plan.

Is there cause to lift stay under 11 U.S.C. § 362(d), and (since the lender is oversecured) to allow the lender its attorney's fees under 11 U.S.C. § 506(b)?

The Debtor argues that under § 1327, M & T was bound to the Plan which provides that "future" mortgage payments, which the Debtor argues means "post-confirmation payments," will be maintained outside the Plan. The Debtor is incorrect because the Plan must conform to § 1322 and can only do so if construed to comport with that provision's opportunity to "cure defaults" and "maintain payments while the case is pending." (11 U.S.C. § 1322(b)(5) (emphasis added).) Payments must be maintained "while the case is pending," not just after confirmation of the Plan. Were this not so it would behoove a cash-starved debtor to stall confirmation as long as possible, and to put the mortgagee to the burden of a motion to convert or dismiss for prejudicial delay under § 1307(c)(1). That is not what Chapter 13 is about. The proper use of Chapter 13 is to meet current obligations, not to stretch them out by contrivance.

The present motion was well-founded when made, and cause exists to lift the stay. The Debtor has, through counsel, taken an obstinate, groundless position. To say that this bank's counsel, who files thousands of such motions each year, must set up different methods of representing its clients depending upon the magnitude of the default is not supportable.

But this does not mean that the stay must lift. Realistically, there are perhaps four "levels" of cause to be addressed. The first is cause that is sufficient to support the Rule 11 (and Bankruptcy Rule 9011) certification that the motion is

well-founded in law and in fact.[2] The next higher level is cause that is sufficient to support an award of fees to the mortgagee under 11 U.S.C. § 506(b), whether or not the motion is successful or even if the motion turns out to have been unnecessary.[3] The third is cause that is sufficient to bring a possible lift of stay within the ambit of the Court's discretion under 11 U.S.C. § 362(d). The last, and highest, is cause that warrants the exercise of the Court's discretion in favor of the creditor by a lift of stay.

Here, the first three levels of "cause" have been reached, but not the fourth, and the Debtor's failure to acknowledge that the first two levels had been met has multiplied the lender's costs of representation -- three court appearances instead of the one appearance, at which this matter would have been properly resolved but for the Debtor's obstinate assertion of non-existent "rights."

The debtor and counsel who substitute their own judgment for that of the creditor and creditor's counsel as to what is reasonably necessary to representation of the creditor, does so at

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[2]See, e.g. *In re Pizzulo*, 33 B.R. 740 (Bankr. E.D.Pa. 1983), denying a debtor's claim for attorney's fees against a mortgagee who unsuccessfully sought lift of stay.

[3]See this Court's unpublished decision in *In re Senft*, No. 92-12645K, slip op. (Bankr. W.D.N.Y. Feb. 19, 1992).

great peril.

The motion is denied, provided that the Debtor pay, within 30 days, the December 1993 payment, the May 1994 payment (which shall be applied to a future payment when and if the Debtor locates proof of the May 1994 payment) and attorneys fees to the lender in the amount of $600.

If these payments are not made, then the motion shall be and hereby is granted.

SO ORDERED.

Dated: Buffalo, New York
October 7, 1994

/s/Michael J. Kaplan

U.S.B.J.