

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case No.: 06-3006-GLP  
Chapter 13

FRED WINTERS ELLIS, JR.,  
Debtor.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

This case is before the Court upon the objection of Wright Family Properties Limited Partnership to confirmation of Fred Winters Ellis' ("Debtor") Chapter 13 Plan. After hearings held on December 12, 2006, and December 14, 2006, the Court makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. On January 5, 2006, Debtor executed and delivered a promissory note (the "Note") and a mortgage securing payment of the Note (the "Mortgage") to Wright Family Properties Limited Partnership ("Wright") secured by commercial real property located in Jacksonville, Florida, more particularly described as:

Lots 10, 11 and 12, Block 20, NEW SPRINGFIELD, according to plat thereof as recorded in Plat Book 2, pages 69 and 70, of the current public records of Duval County, Florida (the "Property").

The street address of the Property is 2829 Main Street N., Jacksonville, Florida, 32208.

2. The principal amount of the Note is \$137,500.00 plus interest at a rate of ten (10.00%) percent.

3. On July 1, 2006, Debtor defaulted by failing to make payments on the Note. As provided for in the Note, Wright is entitled to reasonable attorney's fees and costs upon non-payment by Debtor. The attorney's fees and costs cover expenses incurred from collection activities and bankruptcy proceedings.

4. On September 29, 2006 (the "Petition Date"), Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Debtor listed Wright on Schedule D of his petition as a secured creditor with a second mortgage

lien on the Property. Debtor listed Wright's security interest in the Property as junior to Jacksonville Bank's security interest in the Property.

6. Based upon Debtor's testimony, that the Property is worth \$535,000.00, Debtor has approximately \$147,500.00 of equity in the Property.

7. On October 3, 2006, Debtor filed an amended Chapter 13 plan ("the Plan") which states that:

The Wright Family Properties, L.P. c/o Akerman Senterfitt ..... has a second mortgage secured claim on the debtor's commercial property located at 2829 N. Main Street, Jacksonville, FL 32206. The balance due on this secured claim is \$146,315.68. The Trustee shall pay this balance, together with interest at the rate of six (6%) percent in equal monthly installments of \$2828.69.

8. On December 8, 2006, Wright filed a proof of claim for \$168,360.00. Wright's claim is comprised of the following amounts:

- Principal balance on Mortgage Note:	\$137,500.00
- Interest at 10% (01/05/06 - 07/01/06):	\$6,666.00
- Interest at 18% from date of default, (07/01/06 - 09/29/06):	\$6,102.00
- Atty. fees/costs (07/01/06 - 09/29/06):	\$15,542.50
- Interest at 18% from date of petition, (09/29/06 - 12/08/06):	\$4,746.00
- Atty. fees/costs (10/01/06 - 11/30/06):	\$3,453.50
- (Payments Rendered):	(\$5,650.00)
<b>- TOTAL:</b>	<b>\$168,360.00</b>

9. On December 11, 2006, Wright objected to confirmation of Debtor's Plan upon the basis that it failed to provide Wright with full payment of the value of its claim.

10. Debtor subsequently objected to the amount of Wright's secured claim, asserting that the claim included excessive attorney's fees and excessive post-petition interest. Debtor claimed that neither the Note nor the Mortgage provided a basis for post-petition interest. Debtor proposed to pay Wright \$146,918.00 over sixty (60) months at \$2840.34 per month, including interest at the market rate of six (6.00%) percent.

11. Debtor testified at the hearings that the appropriate interest rate is six (6.00%) percent. However, Debtor further testified that he did not provide personal financial information in obtaining the six (6.00%) percent interest rate from commercial lenders. Debtor testified that

in his opinion it is unnecessary to apply the prime interest rate because a free market exists for loans on commercial property, with significant equity, while under Bankruptcy Court protection.

12. Wright proffered evidence that the prime interest rate as of December 14, 2006, is eight and one-quarter (8.25%) percent. (Wright Ex. 12).

### **CONCLUSIONS OF LAW**

The issue before the Court for its determination is whether Debtor's Chapter 13 Plan complies with the requirements of 11 U.S.C. § 1325(a)(5)(B). Specifically, the Court will evaluate whether Debtor's Plan proposes an appropriate interest rate, a reasonable amount of pre-petition fees, and reasonable post-petition interest and attorney's fees, according to 11 U.S.C. § 506(b).

11 U.S.C. Section 1325 sets forth the conditions for confirming a debtor's Chapter 13 plan.

#### **11 U.S.C. § 1325(a)(5)(B)**

11 U.S.C. § 1325 states:

(a) Except as provided in subsection (b), the court shall confirm a plan if ---

(5) with respect to each allowed secured claim provided for by the plan ---

(B)(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim;

11 U.S.C. § 1325(a)(5)(B).

11 U.S.C. Section 506 explains the circumstances that entitle secured creditors to collect interest, costs and (attorney's) fees associated with their claims.

#### **11 U.S.C. § 506(b)**

11 U.S.C. § 506 provides:

(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.<sup>1</sup>

11 U.S.C. § 506(b).

Section 1325(a)(5)(B) allows a Chapter 13 debtor to retain property provided that the debtor pays the secured creditor the value of its claim, as of the effective date of the plan, through monthly installment payments. Wright asserts that Debtor's Plan fails to comply with the requirements of Section 1325(a)(5)(B) because the Plan fails to provide Wright with full payment of the value of its allowed secured claim. Further, Wright argues that Debtor's Plan must also provide for interest on the claim at a rate that compensates Wright for the deferred payment of its claim over time, rather than immediately. In support of its position, Wright proffered evidence that the prime rate is currently 8.25%, not 6.00% as Debtor's Plan provides. Additionally, Wright argues that the prime rate should be adjusted slightly upward in bankruptcy cases, by 1-3%, to account for the risk of non-payment. Finally, Wright asserts that it is entitled, as the holder of an oversecured claim, to collect pre-petition fees and post-petition interest and attorney's fees pursuant to § 506(b).

In opposition, Debtor testified at the hearing that the appropriate interest rate is 6.00%. Additionally, Debtor claims that it is unnecessary to adjust the 6.00% figure upward because the collateral is real property, which generally does not depreciate, as opposed to automobiles which do depreciate and warrant an upward adjustment. Finally, Debtor claims that there exists a free market for post-petition loans on commercial property with significant equity while under Bankruptcy Court protection, and therefore, it is unnecessary to apply the prime rate. Thus, Debtor contends the availability of market financing makes the prime rate formula suggested by Wright inapplicable to this case.

The United States Supreme Court has recognized that a debtor's Chapter 13 plan must provide for the full value of a creditor's allowed secured claim, as of the effective date of the plan. Till v. SCS Credit Corp., 541 U.S. 465, 474 (2004). Additionally, the Court in Till adopted the "formula approach" to be used by courts when

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<sup>1</sup> 11 U.S.C. § 506(c) states:

The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of ad valorem property taxes with respect to the property.

11 U.S.C. § 506(c).

determining the appropriate rate of interest on a creditor's secured claim. *Id.* at 478-480. The Supreme Court described the formula approach's application by explaining that it begins, "by looking to the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower," while compensating the creditor for the associated risks of the loan. *Id.* at 479. Further, the Court stated that the formula approach requires bankruptcy courts to "adjust the prime rate accordingly," to account for the greater risk of non-payment associated with bankrupt debtors. *Id.* The Court explained that lower courts must hold a hearing, with the evidentiary burden on the creditor, to determine the appropriate risk adjustment, generally 1-3% upward.<sup>2</sup> *Id.* at 479-480.

This Court agrees with the arguments set forth by Wright. The Supreme Court has clearly recognized that the formula approach, which uses the prime rate as a starting point, must be utilized by courts when determining the appropriate interest rate on a creditor's allowed secured claim. *Till*, 541 U.S. at 478-480. Based upon the evidence presented, the Court finds that the prime interest rate is eight and one-quarter (8.25%) percent, as of December 14, 2006. (Wright Ex. 12). Further, the Court finds Debtor's testimony regarding the six (6.00%) percent market interest rate unreliable because he failed to provide essential financial information to the lenders in obtaining the rate. As the Debtor has substantial equity in the Property, the Court finds that a one (1.00%) percent upward risk adjustment is sufficient in this case. As a result, the six (6.00%) percent interest rate contained in Debtor's Plan is insufficient, and therefore, Debtor's Plan fails to provide for the full value of Wright's secured claim in contravention of 11 U.S.C. § 1325.

In regard to attorney's fees, a court in the Middle District of Florida has previously held that the parties' contractual agreement must expressly and unambiguously provide for the awarding of reasonable attorney's fees to creditors in bankruptcy, pursuant to 11 U.S.C. § 506(b). *In re Woodham*, 174 B.R. 346, 348 (Bankr. M.D. Fla. 1994). In *Woodham*, the court denied an award of attorney's fees to the oversecured creditor because the parties' contractual arrangement did not make "express reference to bankruptcy attorney's fees," in the mortgage or promissory note. *Id.* at 349. The court stated that in order to collect attorney's fees and costs the creditor must show: 1) the

<sup>2</sup> The Court stated that the question of the amount of the risk adjustment was not before it, but noted that other courts generally have adjusted for risk 1-3% upward. *Till*, 541 U.S. at 480. Also, the Court noted that some of the evidence necessary to the determination of the proper risk adjustment "will be included in a debtor's bankruptcy filings." *Id.* at 479.

claim is oversecured, 2) the parties' agreement provides for fees and costs in bankruptcy, and 3) such fees and costs are reasonable. *Id.* at 348. In denying the creditor's request for such fees, the Court reasoned that, "[t]here was nothing to put the [d]ebtor on notice that he would be held responsible for the creditor's attorney's fees in bankruptcy." *Id.* at 349.

In the instant case, Debtor testified that the Property was worth \$535,000.00. Thus, the value of the Property exceeds Wright's secured claim in the amount of \$366,640.00, and therefore, Wright's claim is oversecured. Also, the Note expressly provides for Wright's bankruptcy attorney's fees and costs in the event of non-payment by Debtor. Based upon a review of the invoices, the Court finds that the amount of attorney's fees and costs requested by Wright is reasonable. (Wright Ex. 5, 11). Therefore, attorney's fees and costs in the amount of \$18,996.00 are properly included in Wright's claim.

Finally, this Court has previously allowed the holders of secured claims, like Wright, to collect post-petition interest on their claims provided that the claim is oversecured. *In re Charter Co.*, 63 B.R. 568, 571 (Bankr. M.D. Fla. 1986). Because Wright's claim is oversecured, the Court finds that it is entitled to collect post-petition interest on its claim as provided for in the Note. Therefore, post-petition interest in the amount of \$4,746.00 is properly included in Wright's claim.

### CONCLUSION

Based upon the above, Wright's Objection to Confirmation of Debtor's Chapter 13 Plan is SUSTAINED; therefore, Debtor's case will be DISMISSED as his Plan fails to comply with 11 U.S.C. § 1325.<sup>3</sup> The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

**ORDERED** on January 4, 2007, in Jacksonville, Florida.

/s/ George L. Proctor  
George L. Proctor  
United States Bankruptcy Judge

Copies to:

Debtor  
Bryan K. Mickler, Esq.  
Kevin M. Eckhardt, Esq.  
Mamie L. Davis, Chapter 13 Trustee

<sup>3</sup> Due to the 45 day time limit imposed from the first meeting of creditors under BAPCPA § 1324(b), if a debtor's plan cannot be confirmed within the 45 day period, the case is dismissed.