(Cite as: 1998 WL 272874 (Bankr.D.Vt.))

In re Melanie B. PORTER Debtor.

No. 97-11868 FGC.

United States Bankruptcy Court. D. Vermont.

May 27, 1998.

J.R. Canney, III, Rutland, VT, and J. Ward, Holliday & Associates, P.C., Dallas, TX, for Nissan Motor Acceptance Corp. ("Creditor").

T. Taylor, Law Offices of Todd Taylor, P.C., Burlington, VT, for Melanie B. Porter ("Debtor").

MEMORANDUM OF DECISION DENYING CHAPTER 13 PLAN CONFIRMATION

CONRAD, Bankruptcy J.

***1** We are asked to decide whether an oversecured creditor is entitled to interest on arrears calculated at the contract rate. We hold [FN1] that Creditor is not entitled to interest at the contract rate, but, insofar as Debtor's plan does not provide for any interest, we deny confirmation.

> FN1. Our subject matter jurisdiction over this controversy arises under 28 U.S.C. § 1334 (b) and the General Reference to the Court under Part V of the Local District Court Rules for the District of Vermont. This is a core matter under 28 U.S.C. § 157(b)(2)(A), (B), (L) and (O). This Memorandum of Decision constitutes findings of fact and conclusions of law under Fed.R.Civ.P. Rule 52, as made applicable by Fed.R.Bkrtcy.P. Rule 7052.

FACTS

Debtor purchased a 1993 Subaru Legacy Wagon from Creditor in October of 1993, and financed $16,698.87 amortized at 8.5% over 60 months. Debtor fell behind in her payments, and filed a chapter 13 petition on December 23, 1997. Her plan of reorganization, filed on January 8, 1998, provides for the arrearage of $1,715.04 to be "retired" in 36 plan payments without interest or attorney's fees, while usual monthly payments are to be made directly to Creditor according to the original terms of the contract. Creditor listed $4,623.18 on its proof of claim as secured. The current market value of the Subaru is disputed, but that dispute is of

no consequence. Creditor claims the retail market value of the Subaru is $9,975, Debtor claims it is $8,500. In any event, Creditor is oversecured. Creditor objects to the plan because the deferred payments on its allowed secured claim do not include interest at the contract rate.

DISCUSSION

Debtor seeks plan confirmation despite Creditor's objection. A chapter 13 plan may be confirmed over the objection of a secured creditor if either the collateral securing the claim is surrendered, or the creditor retains the lien securing the property and "the value, as of the effective date of the plan, of the 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). Such confirmation over objection is termed a "cramdown." See generally In re Goodyear, 218 B.R. 718, 1998 WL 58528 (Bankr.D.Vt.). Here, Debtor intends to retain the collateral, so she must pay Creditor the "present value" of its claim. We must decide whether "property to be distributed under the plan" on Creditor's oversecured claim includes interest calculated at the contract rate.

The sole claim at issue in this case is the $1,715.04 arrearage. The principal balance of the loan is being paid outside the plan according to the terms of the contract. The contract provides for interest as determined by Creditor and agreed to by the parties at the time the contract was entered into. We also note that an arrearage provided for under a plan may be treated as a distinct secured claim in and of itself. Rake v. Wade, 508 U.S. 464, 473, 113 S. Ct. 2187, 2192-2193, 124 L.Ed.2d 424 (1993). Thus, the question is reduced to: what rate of interest is required, if any, for Creditor to receive the present value of its claim, ie. the arrearage, in order to satisfy § 1325(a)(5)(B)(ii)?

It has been established that an oversecured creditor is entitled to interest. 11 U.S.C. § 506 (b); Rake v. Wade, supra; [FN2] United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). The amount of interest, though, will differ pre-petition, post-petition-pre- confirmation, and post-confirmation. Key Bank v. Milham (In re Milham), 1998 WL 164834, 1 (2nd Cir.N.Y.). Pre-petition interest is necessarily contract rate, because prior to the filing, payments were made, or at least due, in accordance with the contract signed by the parties. Once Debtor filed a petition under chapter 13, she sought the protection of the Bankruptcy Code and the terms of the contract were no longer set in stone. [FN3] Interest accumulating in the period between the filing date and the confirmation date is termed "pendency interest." Id. Section 506(b) accords an oversecured creditor the right to pendency interest on its claim. Id; 11 U.S .C. § 506(b). "Pendency interest" permitted on an oversecured claim, however, does not equate to contract interest. Key Bank v. Milham (In re Milham), supra. Although the language of the statute may appear to grant interest to an oversecured creditor at the contract rate, [FN4] the court in Milham noted that "the phrase 'provided for under the agreement under which the claim arose' does not modify the phrase 'interest on such claim." ' In re Milham, supra at 2 (citing United States v. Ron Pair Enters.,

Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). Accordingly, the court held that the rate of pendency interest is not necessarily based on the contract but is within the "limited discretion of the court." Id.

FN2. Rake v. Wade was expressly overruled by Congress' enactment of § 1322(e) for all agreements entered into after October 2, 1994. HR Rep 103- 834, 103rd Cong., 2nd Sess 39 (Oct. 4, 1994); 140 Cong. Rec. H10770 (Oct. 4, 1994). The agreement in the present action was entered into on November 1, 1993, and we are therefore bound by Rake v. Wade.

FN3. The bankruptcy courts are essentially courts of equity, and administer justice according to fairness within the confines of the Bankruptcy Code and Rules as well as precedents set by higher courts. The Code acknowledges this equity power by permitting the alteration of state law rights to effectuate fairness. For example, a reorganizing debtor may modify the rights of a secured claimant (other than a claim secured solely by real property that is the debtor's principal residence in chapter 11 and 13), thereby altering valid, pre-petition contracts. § 1123(b)(5); § 1222(b)(2); § 1322(b)(2).

FN4. "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, then 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 under which such claim arose." 11 U.S.C. § 506(b) (emphasis added).

***2** While § 506(b) defines the extent of an oversecured creditor's claim, treatment of that claim is governed by § 1325(a)(5). Id. Section 1325(a)(5) requires Creditor to receive the present value of the arrearage paid under the plan "as an element of 'allowed secured claim provided for by the plan." ' Rake v. Wade, supra at 475. "Present value" includes an "appropriate amount of interest to compensate [Creditor] for the decreased value of the claim caused by the delayed payments." Id, at 472, fn. 8. The Second Circuit instructs as to how to calculate "present value" for purposes of confirmation in Milham.

[A] bankruptcy court confirming a Chapter 13 plan that invokes the cramdown option would undertake the following calculation: first, the court would determine the sum of the principal amount (including section 506(b) interest) that would be due if it were to be paid in total on the date of confirmation; next the court would determine the schedule of installment payments to be made pursuant to the plan; finally, the court would impose interest at a rate equal to that necessary to recoup the value of the secured claim determined in the first step. In re Milham supra at 3.

Creditor's claim is $1,715.04, to be paid in 36 months. The Second Circuit has advised that

the appropriate rate of interest is "the rate on a United States Treasury instrument with a maturity equivalent to the repayment schedule under the debtor's plan of reorganization" which should also "include a premium to reflect the risk to the creditor in receiving deferred payments." In re Valenti 105 F.3d 55, 64 (2d Cir.1997). The current rate of interest for United States Treasury instruments with 36 month maturity is 5.57%. However, wedecline to add a risk premium, as one is not appropriate.

Armed with the Supreme Court's decision in Rash, we decided in In re Goodyear, --- B.R. ---- (Bkrtcy.D.Vt.1998), 218 B.R. 718, 1998 WL 58528, that interest rate adjustments do not offset the risks occasioned by a debtor's retention of the collateral, but the replacement valuation of the property "accurately gauges the debtor's 'use of the property," ' thus providing for present value. In re Goodyear, --- B..R. ---- (Bkrtcy.D.Vt.1998), 218 B.R. 718, 1998 WL 58528 (citing Associates Commercial Corporation v. Rash, --- U.S. ----, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997)). "If the risks of depreciation occasioned by a debtor's retention and use of the collateral are 'accurately gauge[d]' in the valuation process, then there is no occasion to provide additional compensation for the same risk when determining the appropriate interest rate." In re Goodyear, supra at 4. Here, Creditor is oversecured. There is enough of an equity cushion to account for the potential risks to Creditor. Insofar as Valenti held that a risk premium should be applied above the U.S. Treasury rate, it is inapplicable, and Creditor is not entitled to a risk premium, or, alternatively, the premium is set at 0.

CONCLUSION

***3** We hold that Creditor is entitled to interest on the arrearage intended to be "retired" by Debtor through her plan at the U.S. Treasury instrument rate with no risk premium. Debtor's plan, failing to provide for any interest, is hereby denied. Creditor shall settle an order in conformity with this memorandum within 5 days.

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