

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 97-14654

Chapter 13

MICHAEL E. EAVES
MARCELLA L. EAVES

Debtors

MEMORANDUM

Appearances: Kenneth C. Rannick, Kenneth C. Rannick, P.C., Chattanooga, Tennessee,
Attorney for Debtors

Brent James, Hanzelik & James, Chattanooga, Tennessee, Attorney for
Creditor, Suntrust Bank

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

Debtors' Chapter 13 plan proposes to cure a default on a home mortgage. The plan does not provide for payment of interest on the arrearage (the overdue payments). Suntrust Bank, the mortgage creditor, objects to confirmation on the ground that interest on the arrearage is required.

Bankruptcy Code § 1322(e) applies. 11 U.S.C. § 1322(e). It was one of the 1994 amendments to the Bankruptcy Code. The legislative history reflects that § 1322(e) “will have the effect of overruling the decision of the Supreme Court in *Rake v. Wade*, 113 S.Ct. 2187 (1993) [which] required that interest be paid on mortgage arrearages. . . .” H. R. Rep. No. 835, 103d Cong., 2d Sess. 55 (1994), 140 Cong. Rec. H10,770 (daily ed. Oct. 4, 1994) (remarks of Rep. Jack Brooks) *reprinted* Vol. E, Lawrence P. King, et. al., *Collier on Bankruptcy* Part 9(b) (15th ed. 1997).

Pursuant to § 1322(e), interest must be paid on the arrearage only if required by the underlying agreement *and* applicable non-bankruptcy law. Thus, interest need not be paid on the arrearage if the underlying agreement does not provide for it; in that case, the court need not consider applicable non-bankruptcy law. The creditor contends the underlying agreement — the note and mortgage — require payment of interest on the arrearage in order to cure the default.

The note provides:

In return for the loan that I have received, I promise to pay U.S. \$57,702.00 (this amount is called the “principal”), plus interest. . . .

Interest will be charged on unpaid principal until the full amount of principal has been paid. I will pay interest at the yearly rate of 8.5000%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

Section 3 provides that Debtors will pay the principal and interest by making monthly payments that will be applied to interest before principal.

Paragraph 6(A) provides for a late charge if a payment is not received within 15 days after the due date. The late charge is 5% of the entire payment, including both principal and interest. This paragraph also provides that the late charge is a one-time charge, rather than a continuing monthly charge such as interest.

Paragraph 6(B) defines default as failure to pay the full amount of each monthly payment on the date it is due.

Paragraph 6(C) sets out Suntrust Bank's rights on default. Suntrust Bank can notify Debtors to pay the overdue amount by a certain date, and if Debtors fail to do so, it may require them to pay the full amount due under the note, including principal, interest, and accrued late charges.

The mortgage adds little to the note that is relevant to the question except paragraph 18, titled "Borrower's Right to Reinstate."¹ It allows the borrower (Debtors) to cure defaults before a foreclosure sale or entry of a judgment enforcing the mortgage. Among other conditions, the borrower must pay all amounts due under the note and mortgage *as if no acceleration had occurred* and must pay

¹ **18. Borrower's Right to Reinstate.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earlier of Those conditions are that the Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees; and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender's rights in the Property and Borrower's obligation to pay . . . shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred. . . .

expenses incurred by the creditor in enforcing the mortgage, including reasonable attorney's fees. If the borrower successfully reinstates the mortgage, then the mortgage remains "fully effective as if no acceleration had occurred."

The default provision of the mortgage is essentially the same as the default provision of the note, except that the Debtors must be informed of the right to reinstate the mortgage by curing defaults.

Few courts have considered the exact wording that must be used to require payment of interest on an arrearage. The note requires the Debtors to pay interest on the principal until paid in full. The note also defines default to include failure to make installment payments on time. Finally, the note provides the interest rate will be the same both before and after default. None of these provisions has been treated as requiring payment of interest on an arrearage. *Landmark Financial Services v. Hall*, 918 F.2d 1150, 1156 & note 6 (4th Cir. 1990); *In re Cureton*, 163 B.R. 494, 496 (Bankr. E.D. Mich. 1994); *In re Thompson*, 127 B.R. 717 (Bankr. D. Conn. 1991); *In re Murray*, 116 B.R. 307 (Bankr. M.D. Ga. 1990).

Furthermore, the underlying agreement in this case expressly allows cure without the payment of interest on the arrearage. In this regard, the mortgage and note should be treated as one agreement. *In re Lemka*, 201 B.R. 765 (Bankr. E. D. Tenn. 1996) (Parsons, Bankr. Judge). The reinstatement provision deals specifically with cure. It mentions charges that must be paid in addition to the missed payments. It does not expressly require interest on the late payments. It requires the Debtors to make the payments they would have made if there had been no acceleration. This seems to mean all the installment payments that were missed plus late charges plus the other mentioned charges.

Other methods of cure could be adopted by the contract, but they would probably be more complicated. Likewise, the court might create a different method based on a strained interpretation of the contract, but it would necessarily be more complicated. The court sees no reason to go that far in light of the terms of the reinstatement provision. It can be reasonably construed to require payment only of the missed payments plus the late charges and the other charges specifically mentioned, thereby excluding additional interest. Thus, the court interprets the reinstatement provision to mean that interest on the arrearage is not required.

This reasoning follows traditional methods of contract interpretation.

The first method focuses on what was left out of the contract. It derives from the maxim, “Expressio unius est exclusio alterius.” This means that mentioning one thing excludes the other. *S.M.R. Enterprises, Inc. v. Southern Haircutters, Inc.*, 662 S.W.2d 944 (Tenn. Ct. App. 1983). In this case the most relevant provision of the contract is the reinstatement provision. It sets out items that must be paid to cure a default, but it does not include interest on the late payments. Interest is a charge that might obviously have been included. Leaving it out implies that it was purposely left out because the parties did not intend to require the payment of interest on late payments.

Another rule of contract interpretation is that the specific (the reinstatement provision) controls the general (the general promise to pay interest on the principal). *Davidson v. Davidson*, 916 S.W.2d 918 (Tenn. Ct. App. 1995). As a result, the general promise to pay interest does not require the payment of additional interest on the principal portions of the missed payments.

The third rule may be less to the point but still seems to apply: the court should pick the more reasonable interpretation of the reinstatement provision. *Kreis v. Venture Out In America, Inc.*, 375

F.Supp. 482 (E. D. Tenn. 1973); *Oman Construction Co. v. Tennessee Central Ry. Co.*, 212 Tenn. 556, 370 S.W.2d 563 (1963). In this regard, the attempt to add interest on late payments could lead into a quagmire of calculation. Suppose you add all the principal portions of the late payments. You amortize this total over the cure period with interest at the contract rate. At the same time the debtor will be making the regular installment payments. Will this procedure provide the right amount of additional interest? Maybe, maybe not. It could require a more complicated recalculation to get the right amount. Instead of getting into this kind of problem, the court concludes the reinstatement provision expressly excludes the payment of additional interest.

In light of this decision, the court need not consider applicable non-bankruptcy law.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

The court will enter an order denying Suntrust Bank's objection and will confirm the Chapter 13 plan by separate order.

At Chattanooga, Tennessee.

BY THE COURT

entered March 3, 1998

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 97-14654

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MICHAEL E. EAVES
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ORDER

In accordance with the court's memorandum opinion entered this date,

It is ORDERED that the objection to confirmation of the plan filed by Suntrust Bank, is
OVERRULED.

ENTER:

BY THE COURT

entered March 3, 1998

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE