

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-12273-JMD
Chapter 13

Richard Gamache and,
Joanne Gamache,
Debtors

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MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This matter came before the Court on a Motion for Relief from the Automatic Stay filed by creditor Louis Pichette (“Pichette”). Pichette moved to lift stay under 11 U.S.C. § 362(d)(1).¹ A hearing was held on the Motion at which time the Court heard statements of counsel for the parties and testimony of witnesses. Upon consideration of these statements and testimony the Court will deny Louis Pichette’s Motion for Relief from the Automatic Stay and will order adequate protection payments.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

¹ Pichette did not move to lift stay under 11 U.S.C. § 362(d)(2), and as such, the Court will not address the Debtor’s equity in the property or the necessity of the property to effective reorganization.

II. FACTS

The Debtors' own a personal residence located at 497 Kelley Street, Manchester, New Hampshire (the "Property"). On the petition date the Property was subject to a first mortgage in favor of WMC Mortgage Corporation securing an obligation in the amount of \$69,190.00.² The Property was also subject to a second mortgage in favor of Pichette securing an obligation of \$28,866.00. The second mortgage was a short term loan for one year consisting of interest payments of \$327.00 per month and a balloon payment of \$21,900.00 plus accrued interest due on September 16, 2000. The Debtors contend that the reasonable value of the property is \$141,000.00 and Pichette claims that the reasonable value of the property is \$104,000.00

Each party presented testimony by a expert residential appraiser supporting their respective views on the value of the Property. Both appraisers testified that the real estate market in Manchester is good and that property values are currently rising. Both appraisers arrived at their respective opinions by looking at comparable sales in the area.

The Debtors presented the testimony of Anthony Federico ("Federico"), who testified that the value of the Property was \$141,000.00. Federico's testimony was challenged by Pichette on the basis that the comparable sales were not appropriate because the sales, although close in time to the date of the appraisal, were from substantially better neighborhoods than the subject property. To support his claim Pichette presented the testimony of Michael J. Fremeau ("Fremeau") who valued the property at \$104,000.00. Fremeau testified that the comparable sales used by Federico were from substantially better neighborhoods and offered pictures he had taken on the morning of the hearing of the properties used as comparable sales by Federico to support his conclusion. The pictures were admitted into evidence as Exhibit 103 and when compared to the pictures of the comparable sales properties contained in Federico's appraisal showed discrepancies between the two sets of pictures. Despite the fact that the pictures taken by Federico were

² For the purposes of the hearing both parties agreed to the amounts due on the first and second mortgages.

purported to be of the properties contained in his report, the pictures in Exhibit 103 of the same properties taken by Fremeau do not show the same homes as the pictures contained in Federico's appraisal report. Both appraisers agreed that the pictures were not of the same properties. When questioned about the difference in the pictures Federico testified that the pictures contained in his report were taken by an assistant and that he could not explain why his pictures of the comparable sales properties were different than the ones taken by Fremeau. Federico also failed to explain why in his report, comparable sale number one is described as having a garage on a .23 acre lot, but the picture of comparable sale number one in his appraisal report did not show a garage while the picture of comparable sale number one in Exhibit 103 did show a garage. Federico, however, did testify that the factual information contained in his report on the comparable sales came from such reliable sources as MLS records.

III. DISCUSSION

Based upon the testimony at trial and the lack of an explanation regarding the discrepancy of the pictures the Court finds that for purposes of determining adequate protection under 11 U.S.C. § 362(d)(1)³ it must give more weight to the valuation arrived at by Fremeau. Therefore, for the purposes of determining adequate protection under § 362(d)(1) the Court finds that the value of the property is \$104,000.00.

Having valued the property for purposes of § 362(d)(1), the Court must now determine the extent to which adequate protection payments are necessary. With mortgages totaling \$98,056.00 and property valued at \$104,000.00 the equity cushion is a rather small \$5,944.00. The Court, therefore, finds that adequate protection payments are necessary in order to protect the position of Pichette. First, regular payments to the first mortgagee covering the monthly payment and tax escrow are appropriate and are so ordered to be made by the tenth of each month.⁴ Second, the Court finds that Pichette is entitled to at least

³ Unless otherwise indicated, all references hereinafter are to Title 11 of the United States Code.

⁴ For the purposes of this hearing, the parties stipulated to the Debtors' offer of proof that the monthly payment to the first mortgagee is \$678.00 for principal and interest and \$300.00 for real estate tax

some payments to prevent interest from its second mortgage from accruing and thereby reducing the already minimal equity cushion in the property.

To determine the amount necessary as adequate protection the Court must first determine the appropriate interest rate for the period between the filing of the Chapter 13 bankruptcy petition and confirmation of the Chapter 13 plan for an over-secured creditor. It is undisputed that prior to filing the interest rate is the rate provided for by the contract. Further, upon confirmation of a Chapter 13 plan the interest rate may be a cram-down rate approved by the Court. In the case at hand, however, we are dealing with the time between filing and confirmation.

To determine the appropriate interest rate for the period between filing and confirmation the Court turns to § 506(b) and the case law thereunder for guidance. Section 506 allows an over-secured creditor to accrue interest on its claim. Case law has further established “when an over-secured creditor’s claim arises from a contract, the contract provides the rate of post-petition interest.” Bradford v. Crozier (In re Laymon), 958 F.2d 72, 75 (5th Cir. 1992). However, such interest rate could be disallowed if it would produce an inequitable or unconscionable result. Id.

In the case at hand, the mortgage calls for an interest rate of 18%, or a payment of \$327.00 per month. The Debtors have made no argument that this rate of interest is inequitable or unconscionable. Therefore, the Court finds that the 18% rate of interest is appropriate in this case and orders adequate protection payments of \$327.00 per month to be made to Pichette by the fifteenth of each month until such time as a plan is confirmed in this case, or further order of the Court. Pending confirmation of the Debtors’ Chapter 13 plan, they are required to make monthly plan payments to the Chapter 13 Trustee in the amount of \$772.70. The Debtors’ Chapter 13 Plan discloses that \$513.93 of each plan payment is to service their obligation to Pichette. Accordingly, from the date of this Opinion and Order until confirmation of their

escrow for a total of \$978.00. The Debtors also represented to the Court that this payment may increase to include an escrow for insurance. Any increase in the monthly payment to the first mortgagee associated with payments for other than principal, interest and real estate taxes shall not affect their obligations under the terms of this opinion and Order.

Chapter 13 Plan or further order of the Court, the Debtors shall make monthly plan payments to the Chapter 13 trustee in the amount of \$445.70 and adequate protection payments to Pichette in the amount of \$327.00, for a total of \$772.70. If the Debtors Chapter 13 Plan is confirmed, the confirmation order shall provide for appropriate credit to the Debtors for the adequate protection payments.

The Debtors shall provide Pichette with copies of the check, money order, or other form of payment used to pay the first mortgagee its regular monthly payment and tax escrow by the fifteenth day of each month until confirmation of a plan in this case. In the event that the Debtors fail to either provide the monthly adequate protection payment (\$327.00) to Pichette or fail to provide Pichette with copies of the instrument used to pay the first mortgagee said payments by the times specified in this Opinion and Order, Pichette may seek relief from this Court through affidavit under LBR 9071-1.

IV. CONCLUSION

In summary, the Court denies Pichette's Motion for Relief from the Automatic Stay. The Court, however, orders the following adequate protection for Pichette:

1. The Debtors are to make their regular monthly payments to the first mortgagee for principal, interest and tax escrow payments, currently \$978.00, by the tenth day of each month until confirmation of the Chapter 13 Plan, or further order of the Court.
2. The Debtors are to provide copies of the instrument used to make the payments required in paragraph one above to Pichette on or before the fifteenth of each month until confirmation of the Chapter 13 Plan, or further order of the Court.
3. The Debtors are ordered to make adequate protection payments in the amount of \$327.00 to Pichette by the fifteenth day of each month until confirmation of the Chapter 13 Plan, or further order of the Court.
4. The Debtors' monthly Chapter 13 Plan payment shall be reduced by the amount paid to Pichette under paragraph 3 above pending confirmation of the Chapter 13 Plan.
5. In the event that the Debtor fails to deliver the instruments or make the adequate protection payment required under paragraphs 2 and 3 in a timely manner, Pichette may obtain relief from the automatic stay under the provisions of LBR 9071-1.

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 6th day of October, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge