

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

In re:

Bk. No. 99-12728-JMD
Chapter 13

Terence M. Brailsford and
Maryellen Ballou-Brailsford,
Debtors

Michael S. Askenaizer
LAW OFFICES OF MICHAEL S. ASKENAIZER
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Attorney for Secretary of Veterans Affairs

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On November 1, 2000, the Court held a hearing regarding a Motion for Relief from Stay (the "Motion") filed by the Secretary of Veterans Affairs ("VA"). Included within the VA's motion was a request for an award of attorney's fees and expenses associated with the Motion. At the hearing it was brought to the attention of the Court that certain pages of the mortgage document were missing and that without them the VA had no right to recover fees and expenses associated with the Motion. Accordingly, the Court gave the VA until November 8, 2000 to produce the missing pages and took the matter under advisement.

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).

II. FACTS

On May 19, 2000, this Court confirmed an amended Chapter 13 plan of the Debtors. One of the purposes of the amended plan was to provide for payment through the plan of post-petition arrearage owed to the VA. On August 14, 2000, the VA filed its motion for relief alleging that the Debtors had failed to make the July 1, 2000 and August 2, 2000 payments and were thus two payments behind. In the Motion the VA included in its itemization of the post-petition arrearage a \$300.00 appraisal fee, a \$75.00 motion filing fee, and \$350.00 in attorney's fees, all incurred in connection with the filing of the Motion. In response to the Motion, the Debtors claimed that they were current on the post-petition payments. At the hearing on November 1, 2000 it became apparent from an accounting provided by the VA that there had been a mix up and that the Debtors were actually behind by one payment.¹

Although agreeing that they were one payment behind, the Debtors objected to the appraisal fee, motion filing fee, and attorney's fees that the creditor sought to charge on the grounds that the Motion should never have been filed. The Debtors claimed that neither they nor their counsel had been contacted and that they did not know there was any sort of a problem until the VA filed the Motion. The Debtors claim that had they been notified of the problem the matter could have been resolved without all the expense associated with the Motion. Therefore, the Debtors claimed that the fees and expenses should be disallowed as unreasonable.

On November 8, 2000, the VA filed the missing pages of the mortgage. See Doc. No. 31. The mortgage states that,

On failure of the performance of any of the said conditions, the full sum or any unpaid balance of the mortgage debt hereby secured, shall become due and payable, and Mortgagee, may advertise said mortgaged premises, or any part thereof, notify the Mortgagor as provided by law in such case, and sell the same at public auction at some place in the town where the land is situated in one or more lots, at one or several sales, to the highest bidder. Mortgagor hereby appoints the mortgagee

¹ The Court notes that it could be argued that the Debtors were two payments behind at the time the Motion was filed as the August 1, 2000 payment had not been received. However, under the provisions of section 2(c) of the mortgage, any deficiency in the August payment would not constitute an event of default, or trigger the four percent late fee, until the first day of the following month.

and his successors in such office as such, and his or their assigns and his or their designates or either of them, his agent and attorney in fact to convey the premises so sold to the purchaser by indefeasible title, discharged of all rights of redemption. Mortgagee shall apply the proceeds of such sale as follows: First, to payment of the expenses of sale, including reasonable attorney's fees

See Doc. No. 31 (emphasis added). In response to the VA filing the missing mortgage pages, the Debtors have further objected to the fees and expenses of the VA on the grounds that the clause in the mortgage referring to attorney's fees was not broad enough to cover motions for relief and that the VA was not entitled to the fees under New Hampshire Revised Statutes Annotated ("RSA") 361-C:2.

III. DISCUSSION

When a mortgagor is the debtor in a Chapter 13 proceeding, the mortgagee is prevented by the automatic stay arising under section 362 of the Bankruptcy Code from initiating any foreclosure sale. In such circumstances, the first step in commencing a foreclosure sale is to obtain relief from the automatic stay. The expense of obtaining relief from the stay is as much a necessary expense of a foreclosure sale as any other step in the foreclosure process mandated by the terms of the mortgage or applicable law. Accordingly, under the terms of this particular mortgage, the VA is entitled to recover attorneys fees and expenses in connection with seeking relief from the automatic stay, so long as such expenses are "reasonable."

Foreclosure sales in New Hampshire must be conducted in accordance with state law in order to obtain the mortgagee's desired remedy. The desired remedy is, of course, a conveyance of the mortgaged real estate free and clear of junior liens and encumbrances and the mortgagee's equity of redemption. RSA 479:18 provides that:

All lands conveyed in mortgage may be redeemed by the mortgagor, after the condition thereof is broken, by the payment of all demands and the performance of all things secured by the mortgage and the payment of all damages and costs sustained and incurred by reason of the nonperformance of its condition, or by a legal tender thereof, before foreclosure.

Under New Hampshire law there are three methods of foreclosing upon a property and cutting off the right of redemption for a broken condition. A mortgagee may foreclose and thereby cut off the right to redeem by (i) entry under process, (ii) entry and publication, or (iii) possession and publication. See RSA 479:19. All three of these methods of foreclosure require the mortgagee go through the long and time consuming process of obtaining peaceful possession of the property and maintaining such possession for one year before the right to redeem will be cut off. See RSA 479:19. There is an alternative form of foreclosure that cuts off the right of redemption without a one year requirement of peaceful possession. If the mortgage allows a mortgagee to foreclose for a breached condition under the “statutory power of sale” a mortgagee may foreclose by sale under RSA 479:25 and thereby cut off the right of redemption in a much shorter time period. See RSA 477:29.

It appears that the VA’s mortgage does not grant to it the statutory power of sale. While there is mention of the right of the mortgagee to have a public auction, the Court notes that this, by and of itself, is not a remedy which will terminate the right of redemption under New Hampshire law. Therefore, the Court assumes that should the VA wish to foreclose on the Debtors’ property, the VA would have to use one of the three methods of foreclosure requiring peaceful possession of the property for one year. As the property is the Debtors’ residence and as one of the Debtors’ reasons for filing under Chapter 13 was obviously to retain their home, the Court assumes that in order to gain peaceable possession of the property the VA would have to first go through the process of evicting the Debtors.

Accordingly, in order to foreclose upon the Debtors’ property the VA would apparently be required to go through a long and drawn out process of at least twelve to eighteen months, during which time the Debtors could redeem the property at anytime. In the face of such a process the Court finds that it was completely unreasonable of the VA to have not made any attempt to contact the Debtors’ attorney to find out why the overdue payment for July had not been received.

If the mortgagors were not in bankruptcy, the Court assumes that the VA would have communicated with the mortgagors to warn them of the mortgage default or notify them of the exercise of

the VA's option to accelerate the mortgage note due to the payment default for the July installment. While the automatic stay would prevent any such communication to the mortgagors in this case, the VA offered no explanation for not communicating with the mortgagors attorney only a few months after confirmation of the Chapter 13 plan. Once the mortgagors' attorney was contacted through the filing of the Motion, the misunderstanding over the status of payments was quickly corrected. The Court has no reason to believe that the same result could have been obtained at no significant expense through a letter or telephone call to the mortgagors' counsel by the VA.

The Court finds that the commencement of foreclosure proceedings by filing the Motion was unreasonable on the facts of this case and, therefore, any expenses thereby incurred by VA are not reasonable. If the VA did not intend to commence the foreclosure process, then under the terms of its mortgage, it would not be entitled to any reimbursement of expenses and attorneys fees. In light of the aforementioned findings, the Court need not consider the Debtors argument under RSA 361-C:2.

IV. ORDER

For the aforementioned reasons, the VA's request for payment by the Debtors of the appraisal fee, filing fee, and attorney's fees associated with the Motion is hereby **denied**.

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

DATED this 22nd day of December, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge