

UNITED STATES BANKRUPTCY COURT
for the
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 00-11428-MWV
Chapter 13Faith R. Bursey,
Debtor

MEMORANDUM OPINION

The Court has before it Faith R. Bursey's ("Debtor") objection to the proof of claim filed by Revolution Portfolio, LLC ("Revolution"), which was originally filed on September 18, 2000 in the amount of \$118,764.17 and amended on October 5, 2000 to \$217,535.99. Neither proof of claim specifically indicated how the amounts were calculated.

Jurisdiction

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).

Facts

The facts are mainly not in dispute. Revolution is the holder of a note dated March 9, 1990 in the original face amount of \$100,000, which is secured by a mortgage. A prior holder of the note, the FDIC, commenced suit against the Debtor on December 3, 1996 in the Rockingham County Superior Court to collect on the note. Revolution became the substitute plaintiff on April 27, 1998. On or about November 24, 1998, on the eve of trial, an apparent settlement was reached, which was memorialized in a settlement agreement dated January 5, 1999. It is the interpretation of that settlement agreement that is the subject of the Debtor's objection to claim.

A hearing on the objection was held on December 7, 2000. At that hearing, the Court took testimony from the Debtor's attorney, Dorothy Silver, who also represented the Debtor in the settlement agreement, and from Revolution's attorney, James Ogorchock, who likewise represented Revolution during settlement negotiations. The Court also took testimony from the Debtor.

The controversy stems from Articles II, VI and VII of the agreement and whether they can be read together to form a consistent unambiguous agreement. The Court finds that they cannot.

The pertinent part of the agreement reads as follows:

ARTICLE II - PAYMENT TERMS

2.1 Revolution agrees to allow Bursey to resolve this matter in full satisfaction of all claims under the Note and Mortgage for \$100,000 plus post judgment statutory interest running from December 8, 1999.

2.2 Revolution agrees to not institute a motion for periodic payment or attempt to otherwise collection [sic] on the \$100,000 judgment for one year running from December 8, 1998 through December 8, 1999 (the "Non-Collection Period"). However, the Non-Collection Period will not prevent Revolution from taking any action to secure its priority position.

2.3 Revolution will continue receiving the rents on the four duplexes during the Non-Collection Period and thereafter in accordance with the terms of the Court's Order dated November 23, 1998 in Rockingham County Superior Court, docket no. 98-E-0524.

2.4 Ms. Bursey will forward a financial statement prior to January 11, 1999 establishing that she does not have the present ability to pay the \$100,000 judgment.

2.5 On December 8, 1999, Ms. Bursey will provide a financial affidavit with sufficient detail to enable Revolution to determine whether or not collection efforts should resume at that point.

2.6 If Revolution does not commence collection proceedings following the Non-Collection Period, Ms. Bursey will provide a similar financial affidavit on every June 8th and December 8th thereafter to permit Revolution to reassess whether or not to resume collection efforts.

2.7 Ms. Bursey agrees to notify Revolution on a timely basis as to any events that materially affect her ability to pay the \$100,000 judgment; if a material change occurs prior to December 8, 1999, the Non-Collection Period will end at that time.

2.8 Other than Attorney Silver's attorney lien, Ms. Bursey represents that she is unaware of any other creditors that will be attaching her property during the next one year

period or who might obtain a priority position ahead of Revolution (excluding those creditors which have already done so).

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ARTICLE VI - EVENTS OF DEFAULT

Each of the following shall constitute an Event of Default, whatsoever the reason for such event and whether it shall be voluntary or involuntary or be effected by operation of law or pursuant to any judgment or order of any court or under any order, rule or regulation of any governmental or non-governmental body:

6.1 Failure by Bursey to strictly comply with any of the terms of the Note or Mortgage or any Loan Document and/or this Agreement except as modified by this Agreement;

6.2 Failure by Bursey to pay to Revolution \$100,000 on or before December 8, 1999;

6.3 Any representation or warranty made by Bursey in the Note, Mortgage or any of the Loan Documents or this Agreement shall be false or misleading in any material respect on the date it is made;

6.4 Any breach, default or violation by Bursey of any of the covenants, agreements, obligations, terms or any of the provisions under the Note, Mortgage, any of the Loan Documents or this Agreement;

6.5 The creation at any time on or after the date hereof of any lien, mortgage, security interest, attachment or other encumbrance of any kind whatsoever, whether voluntary or involuntary, however arising, on the Property without Revolution's prior written consent;

6.6 Bursey commences any bankruptcy, reorganization, debt adjustment, or other case or proceeding under any state or federal bankruptcy or insolvency law, or any other dissolution or liquidation proceeding, or any such proceeding is involuntarily initiated against her or any trustee, receiver or custodian is appointed for her or a substantial part of her property.

ARTICLE VII - REMEDIES

7.1 Upon the occurrence of an Event of Default, and without notice to Bursey, the full Debt Amount as set forth in Section 1.2 hereof shall automatically and immediately become due and payable.

7.2 Upon the occurrence of an Event of Default, Revolution shall be entitled to exercise all of its rights and remedies under the Note, Mortgage and/or applicable law.

7.3 By electing any one or more remedies set forth in the Note, Loan Documents and this Agreement, Revolution does not waive any rights to later elect additional remedies

until the Debt Amount is paid in full. If Revolution does not elect any remedy or forbears or fails to take any action upon an event of default, or if Revolution accepts payments after the due date or after a default, unless Revolution agrees in writing to waive its rights and remedies, Revolution may later exercise such rights or remedies as provided in the Note, Loan Documents and this Agreement.

Revolution Memo of Law, Ex. A, at pp. 4-5, 9-11.

The Debtor argues that Article II memorializes the agreement between the parties and that Article VII, specifically Paragraph 7.1, should be disregarded. She supports that position with Debtor's Exhibit 1, a letter from Attorney Ogorchock to Attorney Silver outlining the terms of their agreement. The letter essentially reiterates the terms of Article II of the settlement agreement, in which Revolution agrees not to make any attempt to collect the \$100,000 judgment for one year, and which apparently provides that Revolution will continue to collect rents from the property indefinitely as long as the Debtor provides periodic financial affidavits satisfying Revolution that she does not have present ability to pay the full \$100,000 judgment.

Revolution, on the other hand, argues that the November 24, 1998 letter outlined only the major terms of the agreement and that prior drafts of the settlement agreement contained the language of Articles VI and VII, to which the Debtor did not object. However, the Debtor contends that Articles VI and VII were never discussed in prior agreements as there simply could be no agreement without the substance of Article II because, due to the Debtor's financial condition, she would probably not be able to pay the \$100,000 at the end of the one-year moratorium.

Discussion

The Court finds that the only reasonable interpretation of the agreement is that Article II controls and that the default remedy provisions of Articles VI and VII must fail. The Court's reasoning is as follows:

First, the Court finds that the terms of the agreement, when read as a whole, are ambiguous and thus, parol evidence will be considered. See Appeal of Londonderry School District, 142 N.H. 677, 681, 707 A.2d 137, 140 (1998). When interpreting the agreement, the Court will focus on the intent of the

parties at the time they entered into the agreement. R. Zoppo Co. v. City of Dover, 124 N.H. 666, 671, 475 A.2d 12, 15 (1984).

Attorney Silver testified that at the time the agreement was reached, the Debtor did not have the ability to pay the \$100,000 judgment and that her future ability to pay was conditioned on successful litigation with her husband. Given this background, Article II provides a comprehensive scheme to settle the litigation and provide for payment when the Debtor had the ability to pay. Paragraph 2.1 provides for “full satisfaction of all claims under the Note and Mortgage for \$100,000.” Revolution Memo of Law, Ex. A at p. 4. Paragraph 2.2 states that Revolution will not commence collection activity for a one-year period on the *\$100,000 judgment*. Id. Paragraphs 2.5 and 2.6 provide for the Debtor to give a financial statement at the end of the one-year period and every six months thereafter. Id. at 4-5. Paragraph 2.7 requires the Debtor provide Revolution with notice of any material change in her financial ability to pay the *\$100,000 judgment*. Id. at 5.

Most notably, Paragraph 2.7 is not just limited to the Debtor’s ability to pay the \$100,000 judgment within the one-year moratorium. Rather, it requires the Debtor to provide notice of events that would prevent her from paying the \$100,000 judgment after the one-year moratorium expires as well. Thus, the provision apparently contemplates that the Debtor may not pay the entire \$100,000 prior to December 8, 1999, but that the judgment will remain \$100,000 thereafter.

This comprehensive plan is inconsistent with the provisions of Article VI which provides that failure to pay the \$100,000 on December 8, 1999 is an event of default, and the provisions of Article VII which provides that upon default, the original amount of the debt would, once again, become due and payable. Based on the testimony and evidence presented at the hearing and a review of the pertinent terms of the settlement agreement, the Court finds that at the time the agreement was entered, the parties intended that the comprehensive repayment scheme set out in Article II would govern the Debtor’s repayment obligation to Revolution.

Based on the above, the Court finds that the Revolution claim on the date of the Debtor's filing was \$100,000 plus past due statutory interest at the judgment rate from December 8, 1999. The Court further finds that, since this is the amount of the claim, it is this amount that can and must be cured pursuant to the Debtor's Chapter 13 plan.

There is no question that the Debtor has paid Revolution approximately \$99,000 during the course of this Chapter 13 proceeding. The Debtor further argues that she is due certain credits which Revolution disputes. This issue will be taken up at the continued hearing on January 12, 2001 at 9:00 a.m.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 3rd day of January, 2001, at Manchester, New Hampshire.

Mark W. Vaughn
Chief Judge