

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 the remaining issues concerning the Debtor's objection to the proof of claim of Revolution Portfolio, LLC ("Revolution"). This Court, in its January 3, 2001 opinion and order, established that the claim of Revolution for principal and interest was \$100,000 plus statutory interest accruing from December 8, 1999.

Pursuant to that order, the Court set a hearing for January 12, 2001, which was continued to January 18, 2001, to take evidence and hear arguments on the remaining issues related to Revolution's claim, namely, credits alleged to be due to the Debtor and attorney fees allegedly due Revolution. Although the parties agree that Revolution received \$98,771.82 from the sale of property of the Debtor which is credited to its claim, they disagree about the application of Revolution's attorneys fees to its claim and various credits claimed by the Debtor. At the conclusion of that hearing, the Court requested counsel for Revolution to file a statement of its legal fees, which it did on January 25, 2001.

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).

DISCUSSION

By order dated November 9, 1998 by the Rockingham County Superior Court (the “Superior Court”) and pursuant to a January 5, 1999 settlement agreement between the parties, Revolution was entitled to collect rents from four rental properties owned by the Debtor which would be applied to its mortgage note and related expenses. It is Revolution’s actions with regard to the management of those properties that is the subject of this dispute.

The Debtor, pursuant to her Exhibit 1, alleges that, in fact, Revolution owes her \$6,704.36 following the \$98,771.82 payment and several credits for expenses incurred by her and lost rental income while the property was under Revolution’s control. The Court believes the figure actually to be \$12,159.66, calculated as follows:

Claim pursuant to January 3 order	\$100,000.00
Statutory interest	<u>7,491.67</u>
Total	\$107,491.67
Less payment to Revolution	<u>98,771.82</u>
Balance on claim for principal & interest	<u>\$ 8,719.85</u>
Credits:	
Property held by Revolution	\$ 8,351.78
Expenses paid by Debtor	5,455.30
Loss of income	5,560.00
Flood damage	<u>1,512.43</u>
Total credits	\$ 20,879.51
Less balance on claim	<u>8,719.85</u>
Total	<u>\$ 12,159.66</u>

On the other hand, Revolution has filed, as Exhibit 101, its accounting of income and expenses pertaining to the rental property and its claim. That accounting shows income of \$150,986.82, which includes rents of \$52,215.00 and the \$98,771.82 payment. It also shows expenses of \$101,562.41, including expenses, other than legal, of \$45,664.32 and legal fees of \$55,898.09.

The Debtor objects to Revolution's legal fees and appraisal fees. Revolution objects to Debtor's alleged credits.

In order to render its opinion, the Court has reviewed the January 5, 1999 settlement agreement between the Debtor and Revolution, the Superior Court's November 9, 1998 order (Exhibit 102), and the Superior Court's February 8, 2000 opinion (Exhibit 103). For the reasons set out below, the Court finds that Revolution has a current claim of \$34,826.20.

I. Revolution's Legal Fees and Expenses.

The Debtor argues that the prior note and mortgage merged into the January 5, 1999 settlement agreement, which does not provide for legal fees. The Court disagrees in part. This Court, in its January 3, 2001 opinion, found that the settlement agreement fixed the principal amount at \$100,000 plus statutory interest. It did not find that the note and mortgage merged into the settlement agreement. In fact, paragraphs 7.2 and 8.8 of the settlement agreement make it clear, to the extent they were not inconsistent with the settlement agreement, the provisions of the note and mortgage survived. Thus, this Court holds that the settlement agreement contemplated that at the end of the collection moratorium, should Revolution seek to collect the \$100,000 principal plus statutory interest, it would be entitled to its costs, including reasonable attorney fees. However, the \$55,898.09 in legal fees included in the proof of claim included fees and expenses incurred prior to or in connection with the settlement agreement in the total amount of \$23,246.06 (Items 1 through 15 of Revolution's January 25, 2001 statement). The Court finds that these pre-settlement fees and expenses did in fact merge into the settlement agreement and cannot now be asserted. This leaves a balance of legal fees of \$32,652.03. The Court has reviewed the time entries and finds them to be reasonable for the work performed.

The Court finds that there is a surplus of rents over non-legal expenses of \$6,550.68. Because the Superior Court order of November 9, 1998 provided Revolution with certain discretion as to the applications

of the rent received, the Court will allow the surplus to be credited against the legal fees, leaving a balance of \$26,101.35.

II. Credits to Debtor.

The Superior Court's November 9, 1998 order set out the rights and duties of Revolution regarding the collection of rental proceeds. Paragraph 2 and 4 are as follows:

2. The rents received from the properties shall be applied in the first instance to pay Mortgages [sic] on the properties to the extent necessary to prevent foreclosure, to pay real estate taxes, to the extent necessary to prevent tax deeding, and, thereafter, in the discretion of Revolution Portfolio, L.L.C.

....

4. Revolution Portfolio, L.L.C. shall provide an accounting to Faith Bursey on a quarterly basis, showing receipts and expenses paid. Revolution Portfolio, L.L.C. and [sic] shall have complete and sole control of the properties with respect to the tenants, including the ability to evict tenants, execute leases, and amend leases with new or current tenants, and to take any other actions of a landlord in the usual course of business as deemed necessary by the mortgagee.

(Exhibit 102).

The Debtor seeks a credit for amounts she paid in connection with the premises. She also seeks a credit for rent not received, alleging that more income could have been generated if the premises were constantly fully leased. Finally, she seeks a reimbursement for flood damage, allegedly promised by Revolution.

The Court denies all of these requests. Paragraph 2 of the November 9, 1998 order gave Revolution discretion in the application of rental proceeds after certain expenses were paid. It specifically noted that Revolution was not responsible for expenses if the rents were insufficient. (See Exhibit 102). Furthermore, the Superior Court ruled on February 8, 2000, on a motion for contempt brought by the Debtor for the Defendant's failure to pay for property insurance, that "all rent monies received have been paid in accordance with the Court's past order." (See Exhibit 103). This Court will not alter that ruling.

Additionally, Paragraph 4 of the November 9, 1998 order provided Revolution with discretion in its actions as landlord. The Court cannot find that it abused that discretion.

Finally, the Debtor alleges that Revolution promised to reimburse her for flood damage for which there was no insurance. Although copies of correspondence admitted into evidence indicate that this was a topic of discussion or negotiation between the parties, there is no evidence that Revolution ever agreed to the reimbursement as alleged. (See Exhibit 104).

Based on the above, Revolution's claim is calculated as follows:

Principal	\$100,000.00
Interest	7,496.67
Attorney Fees	<u>26,101.35</u>
Total	\$133,598.02
Less Payment	<u>98,771.82</u>
Total Claim	<u>\$ 34,826.20</u>

Accordingly, the Debtor's Chapter 13 plan must deal with Revolution's claim in the amount of \$34,826.20.

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 7th day of February, 2001, at Manchester, New Hampshire.

Mark W. Vaughn
Chief Judge