

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

In re:

Bk. No. 01-12705-JMD  
Chapter 7

Steven J. Weeks, and  
Tammy J. Weeks  
Debtors

Chase Manhattan Mortgage Corporation,  
Movant

v.

CM No. 01-777

Steven J. Weeks and  
Tammy J. Weeks,  
Respondents

*Charles W. Gallagher, Esq.*  
*HAUGHEY, PHILPOT & LAURENT, P.A.*  
*Attorney for Movant*

*Jennifer Rood, Esq.*  
*BACKUS, MEYER, SOLOMON, ROOD & BRANCH*  
*Attorney for Debtor*

**MEMORANDUM OPINION**

**I. INTRODUCTION**

The Court has before it a motion for relief filed by Chase Manhattan Mortgage Corporation (“Chase”) on October 30, 2001. In the motion, Chase seeks relief from the automatic stay so that it may pursue its state law remedies under the note and mortgage with respect to the Debtors’ real property located at 33 Rosedale Avenue in Manchester. According to the statement of indebtedness attached to Chase’s motion, the payments for September and October 2001 were outstanding when the motion was filed.

Subsequent to the motion being prepared and filed, Chase received a payment, which, according to the Debtors, was for October 2001.

At the November 28, 2001 hearing on the motion, Chase indicated that the Debtors had missed the May 2001 payment. This payment and the October 2001 payment that was outstanding when the motion was prepared were the two outstanding payments referred to in Chase's motion. In addition, Chase noted that at least one of the Debtors' postpetition payments was for the incorrect amount, leaving a further deficiency of approximately \$100.00.

The Debtors disputed at the hearing that they failed to make the May 2001 payment. They stated that the May 2001 payment was made, albeit late. They further argued that Chase was unreasonable in filing its motion for relief based on, at most, one missed payment. For that reason, they objected to paying Chase's attorney's fees for bringing the motion.

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**

Due to the confusion over the payment history, the Court took the motion under advisement and ordered the parties to submit statements regarding the Debtors' payment arrearage. The Debtors submitted a statement indicating that the Debtors were behind one month when they filed their bankruptcy petition on August 27, 2001, not because they failed to make the May 2001 payment but rather because they failed to make the July 2001 payment. The statement also indicated that between the Debtor's bankruptcy filing on August, 27, 2001 and the date of the hearing on November 28, 2001, the Debtors made four mortgage payments.

Chase also submitted a statement setting forth the Debtors' payment history since April 23, 2001. Chase's statement also reflects that at the time of the Debtors' bankruptcy filing the Debtors were behind one month. In Chase's view, the Debtors were delinquent for August 2001 as it applied the August 16, 2001 mortgage payment to the payment due for July 2001. Below is a chart setting forth each parties' view of when payments were made and in what amounts.

Date Due	Amount Due	Chase's View re: Date Paid	Chase's View re: Amount Paid	Debtors' View re: Date Paid	Debtors' View re: Amount Paid
04/01/01	\$1,132.53	04/23/01	\$1,132.53		\$1,132.53*
05/01/01	\$1,132.53	06/05/01	\$1,156.82		\$1,132.53*
06/01/01	\$1,132.53	07/05/01	\$1,132.53		\$1,132.53*
07/01/01	\$1,132.53	08/16/01	\$1,132.53		\$0
08/01/01	\$1,132.53	09/19/01	\$1,132.53	08/15/01	\$1,132.53
08/27/01					
09/01/01	\$1,142.58	10/26/01 11/16/01 12/04/01	\$1,132.53 \$1,100.00# \$42.58	09/15/01	\$1,132.53
10/01/01	\$1,142.58	12/04/01	\$1,100.00	10/16/01	\$1,132.53
10/29/01					
11/01/01	\$1,142.58	12/04/01	\$1,142.58	11/09/01	\$1,143.58
12/01/01	\$1,142.58		\$0	11/27/01	\$1,142.58
Total	\$10,232.97		\$9,104.63		\$9,081.34

\* The Debtors simply made a statement that these amounts were paid as of June 30, 2001.

# Chase did not apply this payment until December 4, 2001, apparently because it was insufficient in amount to cover a full payment.

The chart does reflect some discrepancies in the payment history. However, it appears that at the time Chase prepared its motion for relief the Debtors' mortgage remained unpaid for two months: September 2001 in Chase's view (and July 2001 in the Debtors' view) and October 2001. It also appears that the

October 2001 payment was received by Chase one business day before Chase's counsel mailed its motion for relief to the Court.

There also is a dispute over the current amount of the Debtors' arrearage. In their statement, the Debtors indicate that as of November 28, 2001, they owed late fees of \$24.29 per month, but they fail to indicate for how many months they owe the late fees. There is also reference to an amount of \$177.16 owing postpetition. Chase merely states that the late charges amount to \$212.61. Chase also indicates, for the first time, that there is an escrow shortage of \$775.49. In addition, Chase seeks its attorney's fees and costs of \$525.00. The amount of \$1,142.58 may also be outstanding if the Debtors have not yet made their December 1, 2001 mortgage payment.

The payment statements submitted by the parties conflict over the timing and the application of some of the payments. However, those statements constitute each party's position on the payment history of the mortgage note and, as indicated at the hearing, are accepted by the Court as an offer of proof by each party. Accordingly, such payment statements are the only payment evidence before the Court.

### **III. DISCUSSION**

At the time that Chase filed its motion for relief, it believed that the Debtors were two months behind in their payments. In light of the Debtors' payment history and the pending Chapter 7 bankruptcy proceeding, the Court does not find it unreasonable for Chase to have filed a motion for relief. Based upon a review of the evidence and the arguments of counsel at the hearing, the Court finds that the Debtors have not paid the late fees associated with the payments for April, June, July, August, September, October, and November. Accordingly, the Debtors owe \$170.03 for these seven late payments, which amount must be paid as set forth below.

The Court also finds that the Debtors owed \$9,090.39 for principal, interest, and escrow, for the period from April 1, 2001 through November 28, 2001.<sup>1</sup> Chase's records reflect that the Debtors made payments totaling \$9,080.34<sup>2</sup> on account of these payments. This results in a shortage of \$10.05, which the Court will find outstanding and which amount the Debtors must pay as outlined below.

Chase indicates that there is an escrow shortage of \$775.49. This amount was not set forth in the statement of indebtedness attached to Chase's motion for relief nor was this amount mentioned at the preliminary hearing on the motion for relief. The Court further notes that this shortage is not set forth in the printout attached to Chase's payment statement. For these reasons, the Court will find that Chase has not presented enough evidence in these proceedings to support its escrow shortage claim. Accordingly, the Court will not order the Debtors to pay this amount. However, this does not foreclose Chase from later demonstrating, in some other proceeding, that such amount is due and owing.

The last element of Chase's arrearage claim is its attorney's fees and costs in the amount of \$525.00. Paragraph 7 of the mortgage provides:

If . . . there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorney's fees and entering the Property to make repairs. . . . Any amounts disbursed by Lender under this Paragraph 7 shall become additional debt of Borrower secured by this Security Instrument.

The Court finds that this provision of the mortgage entitles the holder of the mortgage to recover attorney's fees to the extent that they are necessary to protect the "value of the Property" and the holder's "rights in the Property" during a bankruptcy proceeding, which would include the filing of a motion for relief for a

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<sup>1</sup> \$1,132.53 x 5 months (April to August) = \$5,662.65 plus \$1,142.58 x 3 months (September to November) = \$3,427.74. Together these total \$9,090.39.

<sup>2</sup> The Debtors' statement reflects payments of \$9,081.34. This is due to an alleged payment of \$1,143.58 in mid-November, which is \$1.00 more than the monthly payment amount. Without a copy of the canceled check before it, the Court believes that the Debtors' statement may contain a typographical error and therefore will treat that payment as having been made in the amount of \$1,142.58, not \$1,143.58.

debtor's failure to make payments both prepetition and postpetition. Since the Court has found that Chase did not act unreasonably in filing its motion for relief, the only issue is the reasonableness of the amount of attorney's fees. The Court finds that Chase's attorney's fees and costs in the amount of \$525.00 are reasonable under the circumstances.

#### **IV. CONCLUSION**

The Court shall enter a separate order denying Chase's motion for relief and requiring the Debtors to make regular mortgage payments due on and after December 1, 2001 on or before the fifteenth day of each month and to cure the arrearage of \$705.08<sup>3</sup> on or before January 31, 2002. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 17<sup>th</sup> day of December, 2001, at Manchester, New Hampshire.

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J. Michael Deasy  
Bankruptcy Judge

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<sup>3</sup> The arrearage consists of late fees of \$170.03, the shortage of \$10.05, and the attorney's fees and costs of \$525.00.