

ENTERED**DEC 03 2004****NH****IN THE UNITED STATES BANKRUPTCY COURT****FOR THE DISTRICT OF SOUTH CAROLINA****FILED**

at 10'clock 5 minutes AM

DEC 03 2004BRENDA K. APPEL CLERK
United States Bankruptcy Court
Columbia, South Carolina (10)

In re:

Alfred H. Agnew and Renadeane Thomas
Agnew,

Debtors.

Case No. 03-01333-jw

Chapter 7

**ORDER CONFIRMING SETTLEMENT AGREEMENT AND ESTABLISHING
AMOUNT OF ATTORNEY'S FEES**

THIS MATTER comes before the Court upon an issue raised in connection with terms for the sale of property which is subject to a mortgage of Pee Dee Federal Savings Bank ("Pee Dee Federal"). On September 22, 2004, the Trustee filed an Application For Sale of Property Free and Clear of Liens (the "Application") which proposed to sell approximately 150 acres of real property located in Marion County, South Carolina (the "Property"), a substantial portion of which is subject to a mortgage held by Pee Dee Federal. Pee Dee Federal filed an Objection to the Application based, in part, on the Trustee's proposal to only pay approximately one-half of the amount of the debt secured by the mortgage on the Property. The Court held a hearing on the Application on November 2, 2004.

At the hearing, Robert F. Anderson, Chapter 7 Trustee, Henry F. Griffin, III, counsel for the Trustee, Suzanne Graham Grigg, counsel for Pee Dee Federal, and Edgar Lloyd Willcox, II, co-counsel for Lorraine Williams-Garrett, announced to the Court that a settlement had been reached which would resolve Pee Dee Federal's Objection and allow the sale of the Property to proceed. The Trustee announced that the parties agreed that Pee Dee Federal's secured claim would be paid in full in the amount of \$63,209.00 (the "Agreed Amount"), which specifically included attorney's fees. Ms. Grigg agreed to send verification of the attorney's fees to the Trustee. Conditioned upon the Trustee's agreement to pay Pee Dee Federal's secured claim in

the Agreed Amount, Pee Dee Federal withdrew its Objection to the Application. Based on this stated settlement, the Court verbally authorized the sale of the Property and instructed the parties to prepare and submit a proposed Order authorizing the sale.

Subsequent to the Hearing, but prior to entry of an order, an issue arose regarding Pee Dee Federal's attorney's fees. Mr. Griffin and Reynolds Williams, co-counsel for Ms. Williams-Garrett, informed the Court that they, respectively, questioned whether Pee Dee Federal was entitled to include attorney's fees and costs in the Agreed Amount. Mr. Griffin and Mr. Williams asserted that Pee Dee Federal was not entitled to attorney's fees because a foreclosure had not been instituted by Pee Dee Federal against Mr. and Mrs. Agnew, the debtors, on the mortgage. The Court held a hearing on November 23, 2004 on the issue of attorney's fees.

Initially, the Court finds that the Trustee and Ms. Williams-Garrett should be equitably estopped from raising a challenge to Pee Dee Federal's entitlement to any attorney's fees subsequent to the Hearing because the parties agreed to specific settlement terms. See In re Varat Enterprises, Inc., 81 F.3d 1310, 28 Bankr.Ct.Dec. 1262 (4th Cir. 1996) (equitable estoppel is designed to protect any adversary who may be prejudiced by attempted change of position). Pee Dee Federal relied on the parties' representations that its secured claim would be paid in the Agreed Amount when it withdrew its Objection to the sale. To allow Mr. Griffin and Mr. Williams to subsequently request denial of all attorney's fees would be contrary to their settlement to pay Pee Dee Federal's claim, which includes attorney's fees. Accordingly, the Trustee and Ms. Williams-Garrett are equitably estopped from challenging the amount of Pee Dee Federal's secured claim as stated at the Hearing.

Notwithstanding the above, the Court finds that Pee Dee Federal is entitled to attorney's fees and costs as an oversecured creditor according to 11 U.S.C. § 506(b); the Note, dated May 5, 2000 (the "Note"); and in the Mortgage, also dated May 5, 2000 (the "Mortgage"), securing

the Note. The Note provides that the Borrower will be in default if, including but not limited to, the Borrower breaks a covenant or promise under the Note or Mortgage or if the Borrower files for bankruptcy. The Note further provides the Pee Dee Federal may retain an attorney to assist with collection of the Note and that the Borrower will pay for such attorney's fees and costs regardless of whether or not a lawsuit is commenced. The Note specifically includes attorney's fees and costs associated with bankruptcy proceedings.

According to the Note, the Note is secured by the Mortgage on the Property. The Mortgage provides that Alfred H. Agnew and Renadeane T. Agnew are indebted to Pee Dee Federal,

in the full and just sum of One Hundred Thousand and no/100 (\$100,000.00) Dollars as evidenced by the certain Promissory Note of even date herewith according to the terms of said Note, with interest, discounts, and payments as set forth in such Note; together with all costs of collection, including a reasonable attorney's fee in case of collection by or through an attorney.

Accordingly, because the Note and the Mortgage both include language providing for attorney's fees and costs, the Court finds that Pee Dee Federal is entitled to include attorney's fees and costs in the payoff amount for this claim.

In further support of the Pee Dee Federal's position, 11 U.S.C. § 506(b) provides,

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

Section 506(b) allows attorney's fees, costs and charges as part of an over-secured creditor's secured claim if they are reasonable and provided for pursuant to a contract. See Colliers on Bankruptcy ¶ 506.04[3]. The Court may also inquire into whether the services in question were reasonably required under the circumstances. Colliers on Bankruptcy ¶ 506.04[3][a].

Here, the Court finds that Pee Dee Federal is entitled to attorney's fees and costs pursuant to 11 U.S.C. § 506(b) and that Pee Dee Federal's retention of an attorney to protect its interest in the Note and Mortgage was reasonable. The Court notes that the Trustee was attempting to sell the Property free and clear of all liens, including Pee Dee Federal's lien, without paying the secured claim. Pee Dee Federal took the necessary actions in order to protect its interest in the Property. See In re Spidel, 207 B.R. 882, 887 (Bankr. W.D. Mo. 1997)(concluding that an oversecured creditor was entitled to collect attorney's fees incurred during the course of a debtor's chapter 13 bankruptcy even though such fees were not directly related to a foreclosure sale). See also In re Thomas, 186 B.R. 470, 478 (Bankr. W.D. Mo. 1995)(holding that an oversecured creditor is entitled to attorney's fees incurred during the course of a chapter 11 bankruptcy so long as the legal work is necessary to protect the creditor's lien).

Based on the foregoing, Pee Dee Federal is allowed \$5,038.00 for attorney's fees and costs through November 2, 2004; \$2,156.00 for attorney's fees and costs from November 3, 2004 through November 22, 2004; \$750.00 for attorney's fees and costs from November 23, 2004; and \$375.00 for preparation of this Order as directed by the Court. Accordingly, Pee Dee Federal will be allowed \$8,319.00 for attorney's fees and costs in addition to the outstanding principal and interest due on the Note in the amount of \$56,631.60. The Trustee shall pay Pee Dee Federal \$64,950.60 at the closing of the sale of the Property or, if Ms. Williams-Garrett exercises her right of first refusal, upon receipt of the funds from her.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
12/3, 2004