

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re

MALACHY G. McNAMARA and
STEPHANIE A. McNAMARA,

Debtors.

Case No. 03-00315
Chapter 13

Re: Docket No. 36

**MEMORANDUM DECISION ON
MOTION FOR RELIEF FROM AUTOMATIC STAY**

This case involves the problems of accounting for post-petition mortgage payments under a “cure and maintenance” chapter 13 plan. The mortgage lender filed a motion for relief from the automatic stay, contending that the chapter 13 debtors had not timely paid their post-petition mortgage payments. The debtors claim that they never defaulted, or at least never committed a substantial default. Both parties agree that the debtors are now current. The only remaining issue is whether the lender is entitled to attorneys’ fees and, if so, what amount is reasonable.

The debtors commenced this case on February 5, 2003. On the same day, they proposed a chapter 13 plan. As is common, the plan provided for “cure and maintenance” of the mortgage on the debtors’ residence. The debtors would continue to make the contractual post-petition mortgage payments and would also

make payments to the chapter 13 trustee which would be used in part to cure the delinquent pre-petition payments. The mortgagee, Countrywide Home Loans, Inc. (“Countrywide”), did not object to confirmation of the plan. The court confirmed the plan by order entered on May 27, 2003.

All went well at first. The debtors made their payments to the chapter 13 trustee and to Countrywide in a timely fashion for over a year. (In fact, the debtors’ monthly payments to Countrywide were a few dollars more than was required. Countrywide accounted for the excess by recording it in a “partial payment account.”)

During the fall of 2004, however, the debtors began to fall behind. On December 30, 2004, the chapter 13 trustee moved to dismiss the chapter 13 case on the ground that the debtors had failed to make their plan payments on time. The debtors were able to cure their default and, on March 29, 2005, the trustee withdrew his motion.

The debtors also began to fall behind in the mortgage payments in August 2004. The debtors continued to make irregular and partial payments and did not fall more than two or three payments behind, but they were consistently in default.

Eventually, on April 26, 2005, Countrywide filed a motion for relief

from the automatic stay to foreclose its mortgage, alleging that the debtors had missed the payments for February, March, and April 2005, and that the arrearage totaled \$5,553.48. The debtors disputed Countrywide's allegations and demanded substantiation for Countrywide's claims. The parties agreed to continue the hearing on the motion several times to exchange information about the accounting issues. In the meantime, the debtors made additional payments to Countrywide which Countrywide acknowledges were sufficient to cure the default. The debtors continued to insist that they were never in substantial default and that Countrywide's accounting was confusing, unreliable, and inaccurate.

Countrywide's initial responses to the debtors' requests were indeed confusing. Countrywide's statements and internal accountings are cryptic and hard to follow, primarily because they do not make it easy for the uninitiated to distinguish cash payments from noncash accounting entries or to verify that cash payments were timely applied to amounts actually owed rather than placed in a "suspense" account. Eventually, however, Countrywide filed (on July 22, 2005) a relatively simple and straightforward accounting showing the receipt and application of all of the debtors' post-petition payments.¹

¹Even this accounting leaves something to be desired. There are two columns, labeled "Applied to Contractual" and "Applied to Post-Petition" that appear to show the due dates of the installments to which payments were applied. At a hearing, Countrywide's counsel stated that the "Applied to Contractual" column was for Countrywide's internal purposes and that the

At a hearing on July 25, 2005, the court directed the debtors to file by August 8, 2005, a memorandum stating and supporting all of their objections to the July 22 accounting. The court allowed Countrywide to file a response by August 22.

The debtors' August 8 filing simply repeats their assertion that they were never in default and refers to the debtors' prior declarations and supporting information. Although this statement does not comply with the court's direction, the court has independently compared the debtors' prior filings with the July 22 accounting. All of the payments which the debtors claim to have made are reflected on the accounting. (In one respect, Countrywide's accounting is more generous than the debtors' own records; the accounting shows a payment of \$482.76 on October 7, 2004 from "Source Unknown" which does not appear in the debtors' records.) Thus, the undisputed facts in the record demonstrate that the debtors were in material default when Countrywide moved for relief from the automatic stay.²

"Applied to Post-Petition" column was the only relevant column. The data in the accounting confirm this explanation, but the presentation would have been more clear without the "Applied to Contractual" column.

²According to the accounting, when the debtors made partial payments, Countrywide recorded them in a "partial payment" account but did not apply them to the debt until the partial payment account held enough to make a full contractual payment. It is not clear that the note, mortgage, or applicable law permit the lender to refuse or defer application of partial payments. The debtors have not challenged this treatment, however, and they would have been in material

Because the loan was in default, Countrywide was entitled to seek relief from the stay, and there can be no serious dispute that Countrywide is entitled to reasonable attorneys' fees for doing so. The question remains, however, of what amount is reasonable.

Countrywide seeks the following fees and costs:

Fees and costs for Countrywide's current Hawaii counsel, Clay Chapman Crumpton Iwamura and Pulice	\$4,559.78
Fees and costs for Countrywide's prior Hawaii counsel, Leu Okuda & Leu	4,026.05
Fees and costs for Countrywide's mainland counsel, McCalla, Raymer, Padrick, Coff, Nichols, Clark LLC	2,890.00
TOTAL:	\$10,975.83

Although the debtors do not object to any of these charges, the court should and will review them independently.

The fees and expenses requested are too high for several reasons.

First, much of the delay and expense in this case is attributable to Countrywide's inability to provide a simple and understandable accounting in a timely fashion. The debtors had the right to demand that Countrywide provide evidence in support of its motion. Given that Countrywide's initial responses were confusing and cryptic, the debtors properly demanded clarification and further

default when Countrywide filed its motion even if all partial payments had been applied to the debt immediately.

substantiation. It simply should not take an institutional mortgage lender almost three months to come up with an accounting which a reasonably intelligent person can understand.

Second, Countrywide decided to replace its Hawaii counsel while its motion was pending. Countrywide was entitled to do so, but it is not entitled to shift to the debtors the expense which is necessarily attendant upon a change of counsel. The timesheets establish that Countrywide's original counsel charged about \$385.00 in connection with the change of counsel and that successor counsel charged at least \$400 for the same purpose. The total cost of the transition, including all "catch-up" time spent by replacement counsel, was probably higher.

Third, Countrywide decided to involve mainland counsel in this relatively small and entirely commonplace case. Countrywide certainly has the right to hire as many lawyers and law firms as it wants, but it is only entitled to charge reasonable fees to the debtors. Countrywide is not entitled to charge mainland counsel's fees to the debtors, and the time charged by its Hawaii counsel to communicate with mainland counsel should also be deleted.

Based on a careful review of the attorneys' billing records, the history and circumstances of this case, and the court's experience with many other cases, the debtors should pay reasonable attorneys' fees and costs in the amount of

\$2,500.00.

The parties are directed to attempt in good faith to agree upon a schedule for the payment of this amount. If no agreement is reached, Countrywide may arrange for a further final hearing on its motion for relief from the stay.

DATED: Honolulu, Hawaii, August 30, 2005.



/s/ Robert J. Faris
United States Bankruptcy Judge