

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In Re:

Joseph F. Dissottle, and
Linda M. Dissottle,

Chapter 12
Case No: 98-12889

Debtors.

APPEARANCES:

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Standing Chapter 12 Trustee
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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum, Decision & Order

Before the court is a motion by the Debtors seeking to redirect the application of adequate protection payments.

Jurisdiction

This court has jurisdiction over the parties and this controversy pursuant to 28 U.S.C. §§ 157(b)(2)(B) and (L) and 28 U.S.C. § 1334(b).

Facts

The undisputed facts, subject to a stipulation executed by both parties, are:⁽¹⁾

- The case was commenced by the filing of a voluntary Chapter 12 petition on April 24, 1998.
- By Notice of Motion and supporting application dated May 6, 1998, HSCB Bank U.S.A. (hereinafter "Creditor") moved for relief from the automatic stay and to enjoin the Debtors' use of cash collateral (hereinafter "Motion").
- The Motion was settled on an interim basis by an Adequate Protection Order dated July 1, 1998, pursuant to which the Debtors were to make regular monthly payments to the Creditor for adequate protection.
- The Debtors filed their proposed Chapter 12 Plan of Reorganization on July 13, 1998.
- On November 6, 1998, the Creditor filed a written objection to confirmation of the Debtors' Plan.
- A contested confirmation hearing was scheduled for February 1, 1999.
- At the hearing, the parties stipulated to a settlement of the Creditor's objection and the treatment of its claims. The terms of the stipulation were incorporated into the Confirmation Order dated March 8, 1999.
- The agreed-upon terms as reflected in the stipulation of the parties and incorporated into the confirmation order follow:⁽²⁾

<u>Creditor</u>	<u>Security</u>	<u>Claim/Value</u>	<u>Interest</u>	<u>Amount Pd. through Plan</u>
Marine Midland Bank ⁽³⁾	Cattle	\$39,050.00	7%	\$35,362.20 ⁽⁴⁾
Marine Midland Bank	Equipment	\$40,050.00	7%	\$36,675.00 ⁽⁵⁾
Marine Midland Bank	Real Property	\$96,000.00	7%	\$38,321.40 ⁽⁶⁾

(Creditor's Pretrial Statement Ex. A-C)

- At the Debtors' request, the Creditor agreed to provide an accounting of the Adequate Protection Payments received prior to the confirmation.
- The accounting provided that the adequate protection payments were applied as follows:

<u>Date</u>	<u>Received</u>	<u>Amount Interest</u>	<u>Principle</u>
12/26/97	\$2,679.00	\$2,218.57	\$460.43 ⁽⁷⁾
08/11/98	\$2,679.00	\$1,713.06	\$965.94
08/27/98	\$2,679.00	\$2,679.00	\$0.00

09/26/98	\$2,679.00	\$2,679.00	\$0.00
10/27/98	\$2,679.00	\$2,679.00	\$0.00
11/27/98	\$2,679.00	\$2,679.00	\$0.00
12/31/98	\$1,500.00	\$1,500.00	\$0.00
01/22/99	\$2,679.00	\$2,679.00	\$0.00
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	\$20,253.00	\$18,826.63	\$1,426.37

- The Debtors promptly sought reallocation of this money.⁽⁸⁾

Arguments

The Creditor argues that the reallocation of payments would, in effect, modify the previously agreed-upon value of the collateral. It argues that this type of modification is barred because, "[the] terms of the confirmed Plan are *res judicata* to any issues that were or could have been raised in connection with the Confirmation Order." (Creditor's Pretrial Statement ¶ 2.)

The Debtors argue that because the Creditor is undersecured the adequate protection payments should have been applied to the principal, not the interest, of the secured debt.

Discussion

The Debtors rely on *United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365 (1988), to support their contention. The Creditor does not supply any law to the contrary. In *Timbers*, the Supreme Court determined that undersecured creditors "[fall] within the general rule disallowing postpetition interest." *Id.* at 372. The Court stated,

To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors. (citation omitted.) It was considered unfair to allow an undersecured creditor to recover interest from the estate's unencumbered assets before unsecured creditors had recovered any principal. (citations omitted.) ...Moreover, it is incomprehensible why Congress would want to favor undersecured creditors with interest if they move for it under § 362(d)(1) at the inception of the reorganization process - thereby probably pushing the estate into liquidation - but not if they forbear and seek it only at the completion of the reorganization. *Id.*

The Supreme Court's determination that payments received by undersecured creditors should be applied to the principal of the secured debt is controlling and has been consistently echoed. *See Confederation Life Ins. Co. v. Beau Rivage Ltd.*, 126 B.R. 632 (Bankr. N.D. Ga. 1991); *In re Canaveral Seafoods Inc.*, 79 B.R. 57 (Bankr. M.D. Fla. 1987); *In re Maun*, 95 B.R. 94 (Bankr. S.D. Ill. 1989); *In re Kain*, 86 B.R. 506 (Bankr. W.D. Mich. 1988). As previously noted, the Creditor does not provide any law to counter this argument. Rather, it contends that by applying the payments to the principle of the secured claim the Debtor is in effect modifying the previously agreed upon values.

The court disagrees, it is the amount due on the agreed values that are being adjusted and not the values themselves; the manner in which these payments should have been applied has been dictated by the Supreme Court. The Debtors' request to have the \$17,500.00 reallocated to the principal of the secured debt is granted.

It is so ORDERED.

Dated:
Albany, New York

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge

1. A majority of the stipulated facts articulated in this opinion are taken verbatim from the stipulation of the parties. However, facts regarding the agreed-upon values and their payment through the plan are derived from the stipulation of the parties as incorporated into the confirmation order.

2. *See* n.1.

3. HSBC Bank U.S.A. was formerly known as Marine Midland Bank.

4. "That the claim of Marine Midland Bank, secured by cattle, shall be modified and paid the secured value of \$39,050 over seven (7) years with interest at seven percent (7%) per year. The monthly payment of \$589.37 shall be paid through the plan for the first five years and thereafter directly by the Debtors for the remaining two (2) years. The balance of the debt shall be treated and paid as an unsecured non-priority creditor through the plan..." *See* n.1.

5. "That the claim of Marine Midland Bank, secured by equipment, shall be modified and paid the secured value of \$40,500 over seven (7) years with interest at seven percent (7%) per year. The monthly payment of \$611.25 shall be paid through the plan for the first five years and thereafter directly by the Debtors for the remaining two (2) years. The balance of the debt shall be treated and paid as an unsecured non-priority creditor through the plan. Marine Midland shall retain its lien until paid in full." *See* n.1.

6. "That the claim of Marine Midland Bank, secured by real property, shall be modified and paid the secured value of \$96,000 shall be amortized over thirty (30) years with interest at seven percent (7%) per year and a balloon payment due at the end of fifteen (15) years. The monthly payment of \$638.69 shall be paid throughly [sic] the plan for the first five years and thereafter directly by the Debtors for the remaining ten (10) years with a balloon payment on all outstanding principal and accrued interest, if any, due at the end of fifteen years. The balance of the debt shall be treated and paid as an unsecured non-priority creditor through the plan. Marine Midland shall retain its lien until paid in full." *See* n.1.

7. This payment is prepetition, therefore, the court's decision does not pertain to it.

8. The motion further requested that the Debtors be allowed to modify their plan. However, the Debtors' attorney has requested, in a submitted affidavit, that the Motion to Modify be held in abeyance until the issue of the allocation of the adequate protection payments has been determined.