UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

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In re:

ANDREW JOHN NEWELL and JESSICA ANN NEWELL,

Debtors.

Case No. DG 07-07254
Chapter 13
Hon. Scott W. Dales

_____________________________________/

In re:

GREGORY JOHN PROMINSKI,

Debtor.

Case No. DG 07-09014
Chapter 13
Hon. Scott W. Dales

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MEMORANDUM OF DECISION

The court consolidated these confirmation objections by agreement of the parties because of common factual and legal issues. The objecting mortgagees contend that the court should deny confirmation of each Chapter 13 plan on the grounds that escrowing fifty dollars each month for anticipated administrative expenses (chiefly legal fees of the Debtors' counsel) renders the mortgage arrearage cure periods unreasonable, and impermissibly modifies the rights of the objecting mortgagees. On the present record, I cannot agree.

Andrew and Jessica Newell[1] filed a Chapter 13 bankruptcy petition on October 2, 2007. On that same day they filed their Chapter 13 Plan of Reorganization (the "Newell Plan"). On October 8, 2007, MFM – the Newells' mortgagee -- filed an Objection to the Newell Plan.

Gregory Prominski filed a Chapter 13 bankruptcy petition on December 3, 2007, together with a Chapter 13 Plan of Reorganization (the "Prominski Plan"). Prominski's

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[1] For convenience, I will refer to Andrew and Jessica Newell (the "Newells") and Gregory Prominski ("Prominski") collectively as the "Debtors," and I will refer to their respective Chapter 13 Plans as the "Plans." I will refer to the objecting mortgagees, JP Morgan Chase Bank, N.A. ("JP Morgan") and Member First Mortgage, LLC ("MFM") collectively as the "Creditors."

mortgagee, JP Morgan, filed an Objection to the Prominski Plan on December 19, 2007. The court heard oral argument in both cases on February 6, 2008.

In their Objections, the Creditors urged the court to deny confirmation because the escrow provision diverts money from the payment of the Creditors' pre-petition mortgage claims into an escrow to pay administrative expenses (including future attorney fees), thereby failing to cure the Debtors' arrearages within a reasonable time as required by 11 U.S.C. §1322(b)(5). In addition, JP Morgan asserts that although the Newells' property has an equity cushion, Prominski's property does not. Therefore, according to JP Morgan, the escrow provision in the Prominski Plan would modify its rights as mortgagee by increasing its risk, contrary to 11 U.S.C. §1322(b)(2).

It is worth noting that – in both cases – the Creditors do not appear to object to the cure periods that would apply in the absence of the proposed escrows. Consequently, the respective mortgagees appear to concede that a thirty-five month cure period is reasonable in the Newell matter, and a thirty-one month cure period is reasonable in the Prominski matter. Each objection, therefore, is premised on the supposed legal principle that there is only one reasonable cure period -- the shortest period possible – and that the delay resulting from the escrow provisions renders the cure periods unreasonable as a matter of law.

A Chapter 13 debtor, as the plan proponent, must persuade the court by a preponderance of the evidence that the plan complies with statutory requirements. In re Aguirre, 174 B.R. 233 (Bankr. E.D. Mich. 1994) (debtor bears burden); In re Brown, 244 B.R. 603 (Bankr. W.D. Va. 2000) (preponderance standard applies). The courts are not entirely clear about the burden, if any, that an objecting creditor assumes by filing a plan objection, and the rules do not address the point, saying only that an objection to confirmation creates a contested matter. See Fed. R. Bankr. P. 3015(f). To the extent Rule 3015(f), by referring to Rule 9014, analogizes a plan objection to a motion, the supposed "motion" seems to me more akin to one under Fed. R. Civ. Pro. 56(b), which authorizes the motion "with or without supporting affidavits," and simply puts the opposing party to its proofs. In other words, because the objecting Creditors are not seeking affirmative relief, but instead are opposing relief that the Debtors request, the Debtors continue to bear the burden of persuading me that their Plans meet the confirmation standards. Of course, objecting creditors who offer facts and law to support their objections will likely fare better than those who do not.[2]

[2] The Creditors have not attempted to establish that their mortgages fall within the protection of 11 U.S.C. § 1322(b)(2), apparently because the parties agree that the anti-modification rule applies. If the issue were in dispute, it might be fair to require an objecting creditor to establish its right to the statutory protection.

Specifically in these two cases, the Debtors must persuade me that the Plans propose to cure the mortgage arrears within a "reasonable time" and that they comply with 11 U.S.C. §1322(b)(2).

Without the escrow provision, the Debtors concede that the arrearages could be paid in a shorter amount of time. They argue, however, that as long as the cure period does not exceed the life of the Plan, it is reasonable. For this proposition they cite Nobleman v. American Savings Bank, 508 U.S. 324, 330 (1993), and the Means Test Form (Form B22C), arguing that the Supreme Court and Congress implicitly approved sixty-month cure periods. Neither argument is persuasive. The Supreme Court in Nobleman was not called upon to decide the issue, and I am unwilling to draw any similar inference from the Means Test Form. From Nobleman I infer only that the cure may take significantly longer than the cure period bargained for in the transaction – many months rather than several days. If Congress had intended sixty months to be reasonable *per se*, it would have said so directly. Moreover, the Debtors' argument is inconsistent with the case-by-case approach described below.

The Bankruptcy Code does not define "reasonable time" as used in 11 U.S.C. §1322(b)(5), nor does the legislative history shed light on the question. Thus, the bankruptcy courts must, in their discretion, determine what is a reasonable time on a case-by-case basis. Central Federal Savings and Loan Association v. King (In re King), 23 B.R. 779 (9th Cir. BAP 1982); In re Tudor, 342 B.R. 540, 564 (Bankr. S.D. Ohio 2005), aff'd sub nom. Chase Manhattan Mortgage Corp. v. Tudor, Slip Op., 2007 WL 4322187 (S.D. Ohio Dec. 7, 2007); In re Dockery, 34 B.R. 95 (Bankr. E.D. Mich. 1983).

In fact, courts have seemingly rejected every invitation to attach a precise meaning to what appears to be a flexible term. In re Coleman, 2 B.R. 348, 350 (Bankr. W.D. Ky.) aff'd, 5 B.R. 812 (W.D. Ky. 1980). For almost every case holding that a certain number of months is a reasonable time within which to cure the default, there is another on different facts holding that that period is not reasonable. See In re Cole, 122 B.R. 943 (Bankr. E.D. Pa. 1991)(60 months is reasonable); In re Miller, 53 B.R. 100 (Bankr. S.D. Ohio 1985)(60 months is not reasonable); In re Sidelinger, 175 B.R. 115 (Bankr. D. Me. 1994)(36 months is reasonable); In re Acevedo, 9 B.R. 852 (Bankr. E.D.N.Y. 1981)(36 months is not reasonable); In re Lapp, 66 B.R. 67 (Bankr. D. Colo. 1986)(24 months is reasonable); In re Pollasky, 7 B.R. 770 (Bankr. D. Colo. 1980)(24 months is not reasonable). Like these courts, I cannot and will not adopt a bright line or a presumptively reasonable period, as much as that might benefit practitioners in our district. Debtors and mortgagees deserve *ad hoc* rulings. I must determine in each case whether each Debtor has proposed to cure the arrearages within a "reasonable time."

Taking a page from the criminal law play book, and given the flexibility of the word "reasonable," it may be fair to say that a "reasonable time" is one "based on reason." Jackson v. Virginia, 443 U.S. 307, 317 (1979) (saying the same of "reasonable doubt"). Here, the asserted reason is the Debtors' desire to provide for future costs of

administration, including fees for Debtors' counsel, by setting aside fifty dollars each month for that purpose. In the Newell case, the escrow delays the cure for three months; in the Prominski case, for twelve to thirteen months. I find the three month extension in the Newell case eminently reasonable and, although the twelve to thirteen month delay in the Prominski case presents a closer call, under the circumstances I will approve that as well.

First, the amount of the escrow – fifty dollars per month – is a relatively modest sum of money, compared to the mortgage payments that the Debtors intend to make to their Creditors.

Second, providing a fund for post-petition administrative expenses, in the modest monthly amount proposed in each case, is a good reason for postponing the cure beyond the period that the Creditors apparently concede would otherwise be reasonable. Chapter 13 debtors, like Chapter 11 debtors, exercise specified rights and powers of a trustee under 11 U.S.C. §363, and remain in possession of property of the estate. See 11 U.S.C. §§ 1303 & 1306(b). The Plans both provide (albeit without much specificity) that, notwithstanding confirmation, substantial property will remain in the estate, including "(i) future earnings of the debtor; (ii) additional disposable income, if any; and (iii) other property necessary to the plan . . ." See Newell Plan at ¶ (I)(F); Prominski Plan at ¶ (I)(F).

Because the Debtors continue as debtors in possession, it is not unreasonable for them to set aside a fund for continued administrative expenses, including attorney's fees, to assist them in carrying out their fiduciary duties. Over the three-year life of the Newell Plan and the five-year life of the Prominski Plan, the Debtors, as the Plans' fiduciaries, will likely need legal counsel on matters affecting the Plans and the property of each estate.

In my short time on the bench, I have seen many post-confirmation motions to obtain replacement transportation so the Debtors can get to work; to approve refinancing or property sales; and to amend plans to accommodate unforeseen changes in disposable income. I have also seen post-confirmation claim objections brought with the assistance of counsel, and many other post-confirmation requests for legal relief. Indeed, in reviewing JP Morgan's Proof of Claim, it occurs to me that Mr. Prominski's counsel may spend some time seeking an explanation as to why the prepetition arrearage includes approximately $553.00 in post-petition charges and whether JP Morgan is properly adjusting the mortgage payment effective February 1, 2008, as the lender indicated in its Objection and Proof of Claim.[3]

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[3] The Note that JP Morgan attached to its Proof of Claim says (at Section 4) that the interest rate will not adjust before January 1, 2010. Although the payment changes mentioned in JP Morgan's Objection and Proof of Claim may reflect factors other than interest rate adjustments, it would behoove Mr. Prominski to fully understand the components of his monthly mortgage payments, given his razor thin budget and recent articles describing the difficulties some mortgagees have experienced in calculating monthly

Moreover, when Congress authorized courts to allow compensation for Chapter 13 debtors' counsel from estate assets, it recognized the important contribution that attorneys make to the success of Chapter 13 reorganizations. See 11 U.S.C. §330(a)(4)(B). In general, bankruptcy stakeholders benefit when Debtors have legal counsel. Escrowing funds for future costs of administration encourages post-confirmation representation. This strikes me as reasonable and, in the cases under consideration, so are the resulting cure periods.

Nor am I troubled by MFM's suggestion that the Bankruptcy Code "has no provision that would allow monies paid to the trustee to be set aside for services which have not been rendered, may never be rendered, and remain purely speculative." See MFM Br. Supp. at 1. Congress did not burden Chapter 13 debtors with many statutory requirements precisely to encourage them to craft flexible repayment plans to meet their needs, preserve their homes and other assets, and otherwise administer property of the estate. Debtors need not cite specific Code sections as authority for various plan provisions, including the escrow provisions at issue here; instead, debtors have a free hand in drafting their plans, so long as the plans do not transgress the provisions of Chapter 13 and the applicable provisions of the Code. See 11 U.S.C. §§ 1322(b)(11) & 1325(a)(1). Congress does not write Chapter 13 plans, debtors do.

I also reject the argument that the arrearages must be paid as soon as possible, and that because it is possible to accelerate the cure by eliminating the escrows, the Debtors must do so. The phrase "a reasonable time" in 11 U.S.C. §1322(b)(5) suggests to me that there may be more than one reasonable time, and that a debtor can select "a" reasonable time from among a range of reasonable times. When drafting 11 U.S.C. §1325(b)(5), Congress might have used a term such as "immediately" or "as soon as possible" or even "promptly," suggesting greater haste than the phrase "a reasonable time." Instead, Congress chose a term that the courts have understandably interpreted as giving them considerable discretion at confirmation to take into account a variety of issues.

I also discount JP Morgan's argument that the lack of an equity cushion in the Prominski case means that the escrow provisions modify its rights. Although I can appreciate that the lack of equity in the Prominski case affects JP Morgan's risk, the remedy for such risk requires a motion for relief from stay, not an objection to confirmation.

All parties, whether debtors, unsecured creditors or secured creditors involved in any bankruptcy case, benefit from the proper administration of estate assets. The

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payments and other charges. See, e.g., Judge Lectures Countrywide but Decides Not to Punish It in Texas Mortgage Case, N.Y. Times, March 6, 2008, at C3.

escrow provisions in these Plans allocate that burden to the Debtors (by requiring them to advance funds for administrative costs), to the unsecured creditors (by treating administrative expenses within the class of unsecured claims), and to the mortgagees (by extending the cure periods). The escrow provisions tend to encourage post-confirmation representation by relieving to some extent the uncertainty that Debtors' attorneys experience with respect to such representation.

In the end, if the Debtors perform under their Plans and respective mortgages, they will repay the principal and interest and other charges included in the arrearage claims long before the last payments on the mortgages become due, and the Creditors will receive most of what they bargained for, losing only the opportunity costs associated with an extended cure period. It is also conceivable that the Creditors will offset their lost opportunity costs to some extent with late fees, if bargained for and if authorized under applicable non-bankruptcy law. 11 U.S.C. §1322(e). Under the circumstances, the cure period in each Plan is reasonable.

Because the parties have narrowed the confirmation issues to the dispute over the escrow provisions, and because I find that the Plans (including the escrow provisions) conform to statutory requirements, I will confirm them both.

The court will enter a separate order overruling the Objections and confirming the Plans.

Dated: March 10, 2008
at Grand Rapids, Michigan

_/s/___________________________
Scott W. Dales
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
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In re:

ANDREW JOHN NEWELL and JESSICA ANN NEWELL, Debtors. _______________________________________/	Case No. DG 07-07254 Chapter 13 Hon. Scott W. Dales

In re:

GREGORY JOHN PROMINSKI, Debtor. _______________________________________/	Case No. DG 07-09014 Chapter 13 Hon. Scott W. Dales

ORDER

For the reasons set forth in the Memorandum of Decision dated March 10, 2008,

IT IS HEREBY ORDERED as follows:

1. The Objection to Confirmation of Member First Mortgage, LLC in In re Newell, Case No. 07-07254 is OVERRULED;

2. The Objection to Confirmation of JP Morgan Chase Bank, N.A. in In re Prominski, Case No. 07-09014 is OVERRULED;

3. The Debtor's Plan of Reorganization in In re Newell, Case No. 07-07254 is CONFIRMED;

4. The Debtor's Plan of Reorganization in In re Prominski, Case No. 07-09014 is CONFIRMED;

5. A copy of this Order and the Memorandum of Decision shall be entered in the dockets of Case Nos. 07-07254 and 07-09014.

IT IS FURTHER ORDERED that the Clerk shall serve a copy this Order and the Memorandum of Decision pursuant to LBR 5005-4 upon Andrew and Jessica Newell, Gregory Prominski, Rebecca L. Johnson, Esq., Member First Mortgage LLC, JP Morgan Chase Bank N.A., and James W. Batchelor, Esq.