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FEB 9 - 2005

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

**UNITED STATES BANKRUPTCY
DISTRICT OF ARIZONA**

In re) Chapter 13
)
8 ARLENE D. &)
9 ALBERT J. PETERSON,) No. 2-04-01846-PHX-EWH
)
10 Debtors.) **MEMORANDUM DECISION**
11)

12 Arlene and Albert Peterson (the “Debtors” or “Petersons”) and Fairbanks Capital
13 Corporation (“Fairbanks”) cannot agree on what charges Fairbanks may properly charge with
14 respect to the Debtors’ mortgage on their home (“Home”). Because Fairbanks has submitted
15 competent evidence which supports its calculation of its charges, those charges will be
16 allowed.
17

FACTUAL AND PROCEDURAL HISTORY

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20 I previously ruled that Fairbanks was bound by the terms of a reaffirmation agreement
21 (“Reaffirmation”) entered into on January 15, 2003 during an earlier Chapter 7 case, between
22 the Debtors and Household Mortgage Services (“Household”), Fairbanks’ predecessor in
23 interest. The Reaffirmation provides that the Debtors are to make monthly payments of
24 \$864.89 (reduced from \$1197.60) at an interest rate of 6.661% (reduced from 10.40%).
25
26 After their Chapter 7 discharge, the Debtors were unable to make the reduced payments or
27 refinance the Home. They eventually filed this Chapter 13 case, pro se, on February 6, 2004.
28

1 On the petition date, the Debtors were over two years in arrears on their monthly
2 payments.¹ On November 17, 2004, the date set on the final hearing on Fairbanks' motion for
3 relief from stay and confirmation of the Debtors' Chapter 13 Plan, Ms. Peterson announced
4 that the Debtors had decided not to pursue confirmation of their Chapter 13 Plan or to contest
5 the lift stay motion, but simply wished adequate time to sell the Home.
6

7 At that hearing, I ordered Fairbanks to file a detailed calculation of the amounts due on
8 the loan within 30 days so that the Debtors could determine what would be needed to pay off
9 Fairbanks in the event Debtors found a buyer for the Home.² A continued hearing was set for
10 January 6, 2004 at which time the Debtors were instructed to bring to the hearing any
11 objections to the accounting.
12

13 Fairbanks filed a supplemental declaration regarding the pay off figure on December 23,
14 2005 which calculated the pay off amount as \$151,402.68 through January 14, 2005. The pay
15 off was calculated using the interest rate of 6.661 provided for in the Reaffirmation and late
16 fees were calculated using the Reaffirmation monthly payment of \$864.89. The Debtors did
17 not file a response but Ms. Peterson appeared at the January 6 status hearing and vigorously
18 objected to the calculation. I gave the Debtors until January 18 to file their written objection.
19 The Debtors filed their written objection on January 12, 2005. Fairbanks filed a declaration
20 in response to the objection on January 21, 2005. The matter is now ready for decision.
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24
25 ¹The Debtors have, pursuant to an earlier order, been making post-petition mortgage payments
26 directly to Fairbanks' local counsel.

27 ²Ms. Peterson announced at the hearing that the Debtors had a buyer but they could not proceed
28 without certainty about Fairbanks' pay off number.

1 **DISCUSSION**

2 The Petersons' objection asserts that Fairbanks is only entitled to a principal balance
3 of \$128,414.00, accrued interest of \$11,740.00 and a NSF fee of \$25.00 for a total of
4 \$140,719.00. They challenge all other charges asserted by Fairbanks on the grounds that such
5 fees are: (1) a "business expense" which Fairbanks has no right to charge (fax fee); not actually
6 incurred by Fairbanks (property inspection, broker price opinion), or because Fairbanks' is not
7 entitled to the charges (unpaid late fees, fees charged by Fairbanks' predecessor in interest,
8 attorneys' fees and costs related to both bankruptcy and foreclosure) due to its alleged bad
9 conduct in not honoring the agreement that the Debtors assert they had with Household.
10

11
12 There are four requirements to the allowance of fees and costs: (1) the creditor must
13 have an allowed secured claim; (2) the creditor must be oversecured; (3) the creditor's
14 agreement with the debtor must provide for fees and costs; and (4) the fees and costs sought
15 must be reasonable. Meritor Mortgage Corp., West v. Salazar (In re Salazar), 82 B.R. 538, 540
16 (9th Cir. BAP 1987). There is no dispute that Fairbanks has an allowed secured claim. The
17 Debtors schedules value the property at \$170,000.00. Fairbanks' pay off amount is
18 \$151,402.68. Therefore, Fairbanks is an oversecured creditor.
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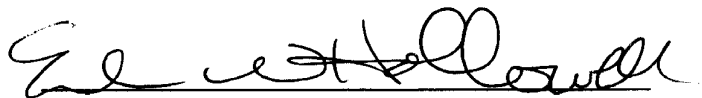
21 A secured creditor has the burden of proving the reasonableness of its claim for fees,
22 whether under 11 U.S.C. § 506(b) or §1322. In re Atwood, 293 B.R. 227, 233 (9th Cir BAP
23 2003). Fairbanks, through its declarations, has provided competent evidence to support all of
24 its fees. It is entitled, pursuant to the terms of the loan agreement with the Debtors, to charge
25 such fees. While the court has the discretion to review the reasonableness of the attorneys
26
27

1 fees charged by the creditor, the Debtors do not challenge the fees and costs based on
2 reasonableness, but rather based on Fairbanks' alleged bad conduct which has not been proven.
3
4 Unproven allegations of bad conduct are insufficient to overcome the evidence presented by
5 Fairbanks.³

6 **CONCLUSION**

7
8 Accordingly, the Debtors' objection to the fees is overruled and the pay off figure due
9 to Fairbanks as of January 14, 2005 is \$151,402.68. Interest continues to accrue at the rate
10 of 6.661%. Fairbanks is also entitled to all other reasonable fees and costs provided for under
11 its loan agreement or deed of trust through any pay off date or date of foreclosure.

12
13 Dated this 9th day of February, 2005.

14
15 
16 EILEEN W. HOLLOWELL
17 UNITED STATES BANKRUPTCY JUDGE

18 Copy mailed this 9th day of February,
19 2005, to:

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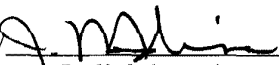
23 Charles Firestein
24 4745 N. 7th Street, #234
25 Phoenix, AZ 85014

26 ³Because the Debtors elected not to proceed with the evidentiary hearing on Fairbanks' lift stay
27 motion and because the stay has now been lifted, this court lacks the jurisdiction to consider the Debtors'
28 allegations regarding Fairbanks' misconduct.

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By 
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