

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re  
MARIE L. TRILLINGHAM aka MARIE L.  
SCHWARTZ,  
Debtor.

Case No. 92-5-7751-MM

Chapter 7

**MEMORANDUM OPINION AND  
ORDER THEREON**

**I. INTRODUCTION**

Before the Court is the objection of Terra Nova Mortgage, Inc. and Davcar Corporation to the confirmation of the debtor's first amended chapter 13 plan. For the reasons stated below, confirmation of the debtor's first amended chapter 13 plan is denied.

**II. FACTS**

Marie Trillingham filed a chapter 13 petition on November 16, 1992. On May 24, 1991, the debtor executed a Note in the original principal amount of \$33,500 and a Deed of Trust and Assignment of Rents in favor of Terra Nova Mortgage, Inc. ("Terra Nova"), the objecting party. The Deed of Trust is secured by the debtor's real property located at 7265 Dowdy Street, Gilroy, California and the rents generated therefrom. Davcar Corporation is the trustee under the Deed of Trust.

The Note is payable at the rate of 14.75% per annum in interest only monthly installments from July 1, 1991 to June 1, 1994 with a balloon payment due on June 1, 1994. The Deed of Trust

1 provides in pertinent part:

2 Trustor . . . agrees . . . to pay all costs and expenses, including cost  
3 of evidence of title and attorney's fees in a reasonable sum, in any  
4 such action . . . and in exercising any such powers, pay necessary  
5 expenses, employ counsel and pay his reasonable fees, . . . [and]  
6 pay immediately and without demand all sums so expended by  
7 Beneficiary or Trustee, with interest from the date of expenditure at  
8 the rate prescribed in the Note.

9 It does not, however, provide for the payment of interest on arrearages.

10 As of the petition date, the debtor was in default under the Note and Deed of Trust in the  
11 amount of \$1,382.42 for missed payments, interest, and late charges. Terra Nova, which is  
12 oversecured, has also asserted a claim in the amount of \$13,462.96 for foreclosure costs and  
13 advances to the holder of the first deed of trust, including interest thereon in the amount of  
14 \$553.05.

### 15 III. ISSUES

16 A. Whether a secured mortgagee is entitled to interest on pre-petition arrearages  
17 under a chapter 13 plan where the contract between the parties fails to provide that the secured  
18 mortgagee is entitled to such interest.

19 B. Whether a secured mortgagee is entitled to interest on advances and costs under a  
20 chapter 13 plan where the contract between the parties provides that the secured mortgagee is  
21 entitled to interest on costs and advances.

### 22 IV. DISCUSSION

#### 23 A. Debtor's Liability for Interest on Arrearages

24 The decision of the Ninth Circuit in In re Laguna is the controlling law of this circuit. In  
25 re Laguna, 944 F. 2d 542 (9th Cir. 1991), cert. denied, 112 S. Ct. 1577 (1992). Laguna is  
26 controlling with respect to both issues in the case, and this opinion refers to both the Bankruptcy  
27 Appellate Panel decision and the Ninth Circuit decision, which affirmed the panel decision. In  
28 Laguna, the Bankruptcy Appellate Panel held that an oversecured creditor is not entitled to  
interest on arrearages under a chapter 13 plan if the contract is silent with respect to interest.  
Laguna, 114 Bankr. 214, 219 (Bankr. 9th Cir. 1990), aff'd, 944 F.2d 542 (9th Cir. 1991), cert.

1 denied, 112 S. Ct. 1577 (1992). Accord Landmark Financial Services v. Hall, 918 F.2d 1150 (4th  
2 Cir. 1990); In re Capps, 836 F.2d 773 (3d Cir. 1987); In re Terry, 780 F.2d 894 (11th Cir. 1986).  
3 But see Wade v. Hannon, 968 F.2d 1036 (10th Cir. 1992), cert. granted, 113 S. Ct. 459  
4 (1992)(oversecured creditor is entitled to post-petition interest on arrearages under chapter 13  
5 plan, even where mortgage instruments are silent); In re Colegrove, 771 F.2d 119 (6th Cir. 1985).  
6 The Laguna reasoning construes the payment of pre-petition arrearages on a mortgage as a cure  
7 of an existing default under section 1322(b)(5), merely reinstating the parties' original agreement,  
8 rather than as a modification of the underlying mortgage contract under section 1322(b)(2).<sup>1</sup> The  
9 courts that have adopted this reasoning further theorize that the present value test of section  
10 1325(a)(5) does not apply to a cure of default because that section is applicable only to  
11 compensate secured creditors whose rights have been modified. Laguna, 114 Bankr. at 217.

12 However, Terra Nova argues that such a construction fails to account for the time value  
13 of money, which differs from entitlement to interest under the contract. Section 506(b) provides  
14 that an oversecured creditor is entitled to interest on its claim. 11 U.S.C. § 506(b).<sup>2</sup> This right to  
15 post-petition interest is statutory and accrues regardless of the terms of the agreement between  
16 the parties and whether the oversecured creditor's lien is consensual or nonconsensual. United  
17 States v. Ron Pair Enterprises, 489 U.S. 235, 241-245, 109 S. Ct. 1026, 103 L. Ed. 2d 290

---

18  
19 <sup>1</sup> 11 U.S.C. § 1322(b) provides in pertinent part:

20 [T]he plan may -

21 (2) modify the rights of holders of secured claims, other than a claim secured by a security interest in real  
22 property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the  
rights of holders of any class of claims;

23 \* \* \*

24 (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a  
25 reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured  
claim on which the last payment is due after the date on which the final payment under the plan is due. . . .

26 <sup>2</sup> 11 U.S.C. § 506(b) provides:

27 To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the  
28 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.

1 (1989). Also, section 1325(a)(5), the "cramdown" provision, provides that if a secured creditor  
2 has not accepted the plan and the debtor has not surrendered the property, the creditor is entitled  
3 to retain its lien and to receive the present value of the amount of its claim as of the effective date  
4 of the plan. 11 U.S.C. § 1325(a)(5).<sup>3</sup> This provision guarantees a secured creditor the time value  
5 of its money. See In re Terry, 780 F.2d 894, 896 (11th Cir. 1985).

6 Regardless of whether payment constitutes the cure of a default or the modification of a  
7 secured creditor's rights, the plain meaning of section 506(b) requires the payment of interest on a  
8 secured creditor's oversecured claim. Wade v. Hannon, 968 F.2d at 1041. Also, section  
9 1325(a)(5) provides that a secured creditor is entitled to the present value of its claim if its claim  
10 is not paid in full on the effective date of the plan. See In re Catlin, 81 Bankr. 522, 525 (Bankr.  
11 D. Minn. 1987)(section 1322(b) does not supersede 1325(b)). Implicit in the concept of present  
12 value is the necessity of interest payments, which requires discounting a stream of future  
13 payments such that they equal the value of payment in full on the effective date. See Landmark  
14 Financial Services v. Hall, 918 F.2d at 1154; In re Terry, 780 F.2d at 896; In re Colgrove, 771  
15 F.2d at 122; Laguna, 114 Bankr. at 220-21 (dissenting opinion). See also Jess Bressi and Rocky  
16 Tarantello, Determining the Appropriate Discount Rate for Calculating the Present Value of  
17 Deferred Plan Payments: Historical Experience and Theoretical Underpinnings, 17 Cal. Bankr. J.  
18 95 (1989). Only then would the secured creditor that is being coerced to accept the plan under  
19 the cramdown provision receive the benefit of the bargain and be compensated for the time value  
20 of the deferred plan payments. This reasoning, however, appears to have been rejected by the  
21 Ninth Circuit in Laguna, which states the law of this circuit until such time as the United States  
22 Supreme Court determines otherwise upon review of Wade v. Hannon, *supra*. Laguna, 944 F.2d  
23 at 545.

24 \_\_\_\_\_  
25 <sup>3</sup> 11 U.S.C. § 1325(a)(5) provides that if the secured creditor has not accepted the plan and the debtor has not surrendered  
26 the property:

27 [T]he court shall confirm a plan if, with respect to each allowed secured claim provided for by the plan, . . .  
28 the plan provides that the holder of such claim retain the lien securing such claim; and the value, as of the  
effective date of the plan, of property to be distributed under the plan on account of such claim is not less  
than the allowed amount of such claim. . . .

**B. Debtor's Liability for Interest on Costs and Advances**

The Bankruptcy Appellate Panel held in Laguna that an oversecured creditor is not entitled to post-petition interest on pre-petition arrearages when neither the note nor the deed of trust provide for such interest. In re Laguna, 114 Bankr. 214, 219 (Bankr. 9th Cir. 1990), aff'd, 944 F.2d 542 (9th Cir. 1991), cert. denied, 112 S. Ct. 1577 (1992). Accord Landmark Financial Services v. Hall, 918 F.2d 1150 (4th Cir. 1990); In re Capps, 836 F.2d 773 (3d Cir. 1987); In re Terry, 780 F.2d 894 (11th Cir. 1986). The Terra Nova Deed of Trust clearly provides for interest on advances and foreclosure costs. Under Laguna, Terra Nova is entitled to payment of interest on its advances to the holder of the first deed of trust and for foreclosure costs.

The debtor argued that to allow interest on the entire amount of costs and expenses, which includes interest in the amount of \$553.05, would be tantamount to the payment of interest on interest in contravention of Cal. Civ. Code § 1916-2.<sup>4</sup> The Bankruptcy Appellate Panel in Laguna stated:

Absent a clear statutory mandate, to allow an oversecured creditor interest on interest when such an allowance is contrary to state law would impede the bankruptcy goals of fostering financial rehabilitation and equitable distribution among creditors.

Laguna, 114 Bankr. at 216. See also Landmark Financial Services v. Hall, 918 F.2d at 1155-56; In re Colgrove, 771 F.2d at 124 (dissenting opinion cited with approval by the Ninth Circuit in Laguna, 944 F.2d at 545). Because the Deed of Trust provides for the payment of interest on costs and advances, interest will be allowed on only the \$12,909.91 expended for advances and costs. Interest will not accrue on the \$553.05 pre-petition interest accrued on advances and costs.

**V. CONCLUSION**

This Court is required to apply Laguna to this case and, accordingly, concludes that Terra

---

<sup>4</sup> Cal. Civ. Code § 1916-2 provides in pertinent part:

[I]nterest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Nova is not entitled to interest on the debtor's pre-petition arrearages under the plan. However, Terra Nova is entitled to interest on costs and advances as provided for under the Deed of Trust. Since the first amended plan fails to provide for payment of interest to Terra Nova Mortgage on its foreclosure costs and advances, confirmation of the plan must be denied.

Accordingly, IT IS SO ORDERED.