UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JERENE ANN COSTELLO, CASE NO. 88-00249

Debtor Chapter 13

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On February 18, 1988, Jerene Ann Costello ("Debtor") filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code, 11 U.S.C.A. §§101-1330 (West 1979 & Supp. 1988) ("Code"). The forty-eight month plan submitted with the petition provided for monthly payments to the Chapter 13 Trustee, Warren V. Blasland, Esq., of $134.00, the difference between her monthly net income and expenses.

Debtor's petition, Schedule A-2, listed Norstar Bank of Central New York ("Norstar") as the holder of the only secured claim in

the amount of $3,760.00, with its security being a 1984 Pontiac Sunbird valued at $3,175.00. Schedule A-3 contains nine unsecured claims totalling $9,822.00. Debtor lists property in the amount of $3,945.00.

Norstar filed an objection to the confirmation of the plan on April 25, 1988. It alleges that pursuant to a pre-petition retail installment contract executed August 8, l984, it, as a successor in interest, holds a secured claim of $3,125.00 at a fourteen per cent rate of interest and an unsecured claim of $420.40. Norstar contends that Debtor's plan violates the "present value" requirement of Code §1325(a)(5)(B)(ii) in providing for re-payment of its secured claim at a six per cent rate of interest over thirty-six months. Objection To Confirmation, para. 12 (Apr. 22, 1988).

Norstar posits that in such a "cramdown" scenario, the interest rate or "discount factor" must, at minimum, equal the "market rate" of interest, which in the case of consumer auto loans to creditworthy borrowers, is currently eleven and one-quarter per cent. See Affidavit of James Kennedy (Apr. 22, 1988) (Senior Vice-President, Norstar). It further submits that legislative history supports the interest for this secured claim at the higher contract rate of fourteen per cent, given the Debtor's history of payment defaults subjecting it to a higher credit risk. In the alternative, Norstar asks for an interest rate of eleven and one-half per cent - the average of the nine per cent legal rate of interest in New York and the contract rate. Memorandum Of Law, 5-

6 (May 16, 1988).

At oral argument in Syracuse, New York on May 3, 1988, the Trustee stated that he was amenable, subject to the Debtor's counsel's consent, to adjusting the interest rate to nine per cent. He attested that such loans were available, depending on the bank. Norstar held fast to its position.

JURISDICTIONAL STATEMENT

The Court's jurisdiction of this core proceeding is based on 28 U.S.C.A. §§1334(b) and 157(a), (b)(1) and (2)(L) (West Supp. 1988). The within Memorandum-Decision constitutes findings of fact and conclusions of law as guided by Rules 7052, 3020(b) and 9014 of the Federal Rules of Bankruptcy Procedure.

ISSUE

What is the proper rate of interest to apply to a secured claim to generate its "present value" through a stream of payments in the life of a Chapter 13 plan, pursuant to Code §1325(a)(5)(B)(ii)?

DISCUSSION AND CONCLUSIONS OF LAW

The Court is in accord with Norstar's position inasmuch as it finds that a six or nine per cent interest rate applied to the

secured claim, over a period of thirty-six or forty-eight months, does not provide "present value" under Code §1325(a)(5)(B)(ii).

The weight of authority indicates that "[t]he applicable interest rate to determine the present value of the secured claim is the market rate of interest at the time of confirmation." In re Mothershed, 62 B.R. 113, 115 (Bankr. E.D.Ark. 1986). See Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427, 431 (6th Cir. 1982)(current market rate of interest for similar loans in region); Federal Land Bank of Lousiville v. Gene Dunavant And Son Dairy, 75 B.R. 328, 335 (M.D.Tenn. 1987); In re Corley, 83 B.R. 848, 851 (Bankr. S.D.Ga. 1988); In re Wilkins, 71 B.R. 665, 670 (Bankr. N.D.Ohio 1987); 5 COLLIER ON BANKRUPTCY §1325.06 at 1325-38 (L. King 15th ed. 1988). "The facts to be applied in determining prevailing market rates of interest are (1) the length of the payout, (2) the quality of the security and (3) the risk of subsequent default." In re Corley, supra, 83 B.R. at 851 (citing to In re Southern States Motor Inns, 709 F.2d 647 (11th Cir. 1985)); see also In re Mitchell, 39 B.R. 696, 701-702 (Bankr. D.Ore. 1984).

Legislative history surrounding the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, demonstrates that the contract rate does not control, although it may be considered if it approximates the creditor's current cost of funds or if the transaction of which it is part of was in "close proximity" to the effective date of the plan. See In re Corley, supra, 83 B.R. at 853; 5 COLLIER ON BANKRUPTCY, supra, §1325.06 at

1325-37 to 1325-38 (noting that Congress specifically rejected an amendment requiring the contract rate of interest to be paid). See also In re Mitchell, 77 B.R. 524, 527 (Bankr. E.D.Pa. 1987)(contract rate should be a cap on what lender may collect).

Moreover, any increased risk that might distinguish the Debtor, who allegedly has a history of defaults, from "creditworthy" borrowers is offset by the absence of new transaction costs incurred in this "cramdown" - a forced contract modification. See 5 COLLIER ON BANKRUPTCY, supra, ¶1325.06 at 1325-37. The creditor should not be able to profit from the debtor's filing, rather, it should be placed in the same economic position it would be in if the debtor exercised the alternative option of surrendering the collateral under Code §1325(a)(5)(C). See id. at 1325-38; In re Corley, supra, 83 B.R. at 852; In re Mitchell, supra, 77 B.R. at 529; In re Klein, 10 B.R. 657, 661 (Bankr. E.D.N.Y. 1981). Thus, the current market rate of interest for a consumer auto loan accurately reflects the applicable interest rate to be applied to this secured claim, assuming the plan has a life of four years.

As the plan proponent, the Debtor bears the burden of proving compliance with Code §1325(a). See Amfac Dist. Corp. v. Wolff (In re Wolff), 22 B.R. 510, 512 (Bankr. 9th Cir. 1982); In re Hogue, 78 B.R. 867, 872 (Bankr. S.D.Ohio 1987). Once an objection to confirmation under Code §1325(a) is raised and competent proof is received in support thereof, the burden is still on the Debtor to prove that confirmation is tenable. See In re Fries, 68 B.R. 676, 683-685 (Bankr. E.D.Pa. 1986)(comparing burden of proof between

subsections (a) and (b) in Code §1325 and noting that different language and policy concerns of each mandate that while both prongs of the burden of proof - burden of persuasion and burden of going forward - never shift in (a), the initial burden of going forward under (b) rests on the objector because "even without creditor objection, the requirements of subsection (a) are at issue"); In re Wolff, supra, 22 B.R. at 512. See also In re Gathright, 67 B.R. 384, 391-392 n.8 (Bankr. E.D.Pa. 1986). Contra In re Mendenhall, 54 B.R. 44, 45-46 (Bankr. W.D.Ark. 1985)(party objecting to confirmation has burden of persuasion and debtor only has burden of going forward) (citing cases of both schools of thought).

Neither the Debtor nor the Trustee has offered a scintilla of evidence on the six or nine per cent interest rate, other than an unsupported assertion as to nine per cent, nor have they rebutted the credible affidavit evidence presented by Norstar. Additionally, the fourteen per cent "contract" rate of interest was executed in a transaction four years ago, clearly not in "close proximity" to the effective date of the plan, and no evidence has been presented to contradict the Debtor's valuation of the vehicle or question its condition. The Court concludes that the applicable rate of interest to be applied to the secured claim in question is eleven and one-quarter per cent.[1]

[1] Assuming arguendo that Norstar does have the entire burden of proof on its objection, the Debtor has totally failed to meet her burden of producing evidence to rebut or cast into doubt the affidavit. See In re Mendenhall, supra, 54 B.R. at 46.

Based on the foregoing, it is hereby

ORDERED:

1. That Norstar's objection is sustained, with the plan to be confirmed upon amendment consistent with this Memorandum-Decision.

Dated at Utica, New York

this day of August l988

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STEPHEN D. GERLING
U.S. Bankruptcy Judge