

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

ORS 311.500
ORS 311.405(1)
11 USC § 101(50)
11 USC § 101(53)
11 USC § 1322(b) (2)
11 USC § 1325(a) (5) (B) (ii)

In re Angela Lynn Howe Case No. 399-33823-rld7
10/5/99 RLD Unpublished

County objected to confirmation of debtor's chapter 13 plan on the basis that it proposed to pay debtor's real property tax arrears on her residence with interest at 9% rather than at the rate of 16% provided by ORS 311.500 for delinquent real property taxes. The County asserted that confirmation of the plan with a reduced interest rate on the property tax arrears would constitute an unconstitutional infringement of its sovereign immunity and the Eleventh Amendment to the U.S. Constitution. The court held that the County was not a sovereign, and because the court could make a complete determination of the issues between the County and the debtor without involvement of state agencies or officers, sovereign immunity did not apply to prevent the court from ruling on the issue of modification through debtor's plan of the interest rate on property tax arrears.

The court determined that by the terms of ORS 311.405(1), the lien for unpaid real property taxes and interest accruing thereon was a statutory lien (as defined by 11 USC § 101(53)), not a consensual security agreement (as defined by 11 USC § 101(50)). Therefore, the statutory interest rate on the unpaid taxes was modifiable under 11 USC § 1322(b) (2).

Finally, the court held that the appropriate interest rate for purposes of 11 USC § 1325(a) (5) (B) (ii) was the market rate, to be determined on a case by case basis, considering the quality of the security and the risk of further default. Based upon the evidence presented the court determined that the appropriate interest rate for the real property tax arrears in the case before it was 15%.

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

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
ANGELA LYNN HOWE,) No. 399-33823-rld13
Debtor.) MEMORANDUM OPINION

This matter is before me on Multnomah County's Objection to Confirmation of Angela L. Howe's ("Debtor") chapter 13 plan (the "Plan"). Specifically, Multnomah County objects to the Debtor's proposal under paragraph 2(b) of the Plan to pay her property tax arrears with interest at 9% rather than at the rate of 16% provided by ORS 311.500 for delinquent real property taxes.

Following the adjourned confirmation hearings held in this case on September 9, and September 23, 1999, I have reviewed my notes, the parties' submissions and relevant legal authorities. The findings that I set forth in this Memorandum Opinion are designated as the court's findings under Fed. R. Civ. P. 52(a), applicable in this contested matter under Fed. R. Bankr. P. 9014.

A. Multnomah County is not a sovereign state and does not have sovereign immunity in this case.

1 At the outset, Multnomah County objects to confirmation of
2 the Plan with a 9% interest rate on its property tax arrears as an
3 unconstitutional infringement of its sovereign immunity and the
4 Eleventh Amendment to the United States Constitution. The short
5 response to Multnomah County's argument is that Multnomah County is
6 not the sovereign and is not entitled to sovereign immunity. As
7 stated by Chief Justice Rehnquist in his opinion for a unanimous
8 United States Supreme Court in Mt. Healthy City School District
9 Board of Education v. Doyle, 429 U.S. 274, 280 (1977):

10 The bar of the Eleventh Amendment to suit in federal
11 courts extends to States and state officials in
12 appropriate circumstances (citations omitted), but
13 does not extend to counties and similar municipal
14 corporations. See Lincoln County v. Luning, 133 U.S.
529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1890); Moor v.
13 County of Alameda, 411 U.S. 693, 717-721, 93 S.Ct.
1785, 1799-1801, 36 L.Ed.2d 596 (1973). (Emphasis
14 added.)

15 Also see Alden v. Maine, 119 S.Ct. 2240, 2267 (1999) (The principle
16 of sovereign immunity "bars suits against States but not lesser
17 entities. The immunity does not extend to suits prosecuted against
18 a municipal corporation or other governmental entity which is not
19 an arm of the State.").

20 Nevertheless, using the above-cited language from the
21 majority opinion in Alden v. Maine as a point of departure,
22 Multnomah County contends that the general principle that sovereign
23 immunity does not protect county governments should not apply in
24 this case. Multnomah County argues that in collecting interest on
25 unpaid real property taxes, the county acts as an "arm" of the
26 state of Oregon, subject to the supervision of the Oregon

1 Department of Revenue, a state agency. See, e.g., ORS 305.102 and
2 306.115. As further support for its position, Multnomah County
3 cites Article IX, Section 1 of the Oregon Constitution, which
4 provides:

5 The Legislative Assembly shall, and the people
6 through initiative may, provide by law uniform rules
7 of assessment and taxation. All taxes shall be
8 levied and collected under general laws operating
9 uniformly throughout the State.

10 Multnomah County argues that because the Oregon Constitution
11 requires that all taxes be levied and collected uniformly
12 throughout the state, when Multnomah County collects 16% interest
13 on delinquent real property taxes, as specified by state law, it
14 acts as an arm of the sovereign state and, accordingly, should
15 benefit from its sovereign immunity.

16 The problem with Multnomah County's argument is that it
17 renders the clear distinction made by the United States Supreme
18 Court in its sovereign immunity decisions between the states and
19 local public entities, including counties, fundamentally
20 meaningless. In context, the Alden v. Maine reference to "an arm
21 of the State" generally relates to state agencies and officers
22 employed directly by the state.

23 County governments in Oregon, as elsewhere in the United
24 States, administer state laws with uniform provisions. That is an
25 inherent part of their reason for being. See Oregon Constitution,
26 Article VI, Section 10 (County officers shall "exercise all the
powers and perform all the duties, as distributed by the county
charter or by its authority, now or hereafter, by the Constitution

1 or laws of this state, granted to or imposed upon any county
2 officer." (Emphasis added.)). If counties take on the mantle of
3 sovereign immunity every time that they act in some sense as agents
4 of the state, the general rule that sovereign immunity does not
5 extend to counties and other units of local government would be
6 emasculated by the exception.

7 Neither the Oregon Constitution nor any of the statutes
8 cited by Multnomah County in this case contains any specific
9 provision purporting to extend sovereign immunity to county
10 government. In fact, Oregon law contemplates that in the event an
11 Oregon personal property tax obligor files for protection under the
12 federal bankruptcy laws, the concerned county will submit itself to
13 the jurisdiction of the federal bankruptcy court by filing a proof
14 of claim. ORS 311.480 provides:

15 If a tax has been levied against personal property,
16 and thereafter and prior to the date the tax becomes
17 due and payable, the person against whom the tax is
18 charged files a petition in bankruptcy, or is
19 adjudged a bankrupt upon an involuntary proceeding,
20 the tax shall become immediately due. The tax
21 collector of the county where the tax was levied
22 shall prepare and present to the bankruptcy court
23 proof of claim of the county for the tax. (Emphasis
24 added.)

25 Unlike the situation concerned in Pennhurst State School &
26 Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67
(1984), I can make a complete determination of the issues between
Multnomah County and the Debtor in this case without any
involvement of Oregon state agencies or officers. In these
circumstances, I find that sovereign immunity does not apply to

1 prevent me from ruling upon whether the interest rate on the
2 Debtor's property tax arrears can be modified in the Plan.

3 B. The statutory interest rate on unpaid real property
4 taxes is modifiable under Section 1322(b) (2) of the Bankruptcy Code
5 because the lien for real property taxes and interest accruing
6 thereon is a statutory lien and not a security interest created by
7 agreement.

8 The Debtor proposes to modify the interest payable to
9 Multnomah County on unpaid real property taxes under the Plan
10 pursuant to the provisions of Section 1322(b) (2) of the Bankruptcy
11 Code, 11 U.S.C. § 1322(b) (2).¹ Section 1322(b) (2) provides that
12 through a chapter 13 plan, a debtor may "modify the rights of
13 holders of secured claims, other than a claim secured only by a
14 security interest in real property that is the debtor's principal
15 residence...." (Emphasis added.) The Debtor concedes as
16 undisputed that the real property concerned in this case is the
17 Debtor's residence. The issue then is whether Multnomah County's
18 lien for unpaid real property taxes and interest thereon is a
19 nonmodifiable "security interest" for purposes of Section
20 1322(b) (2).

21 In Section 101(50), the term "security interest" is defined
22 as a "lien created by an agreement." Section 101(53) defines the
23 term "statutory lien" as a "lien arising solely by force of a
24 statute on specified circumstances or conditions...." Multnomah

25
26 ¹ Unless otherwise indicated, all statute section references
are to the federal Bankruptcy Code, 11 U.S.C. §§ 101 et seq.

1 County's property tax lien is created under Oregon state law.

2 ORS 311.405(1) provides that "all ad valorem property taxes
3 lawfully imposed or levied on real or personal property are liens
4 on such real and personal property, respectively." No agreement
5 with the taxpayer is required for the attachment or perfection of
6 Multnomah County's lien. Since the lien for real property taxes
7 and interest thereon arises solely by statute and not from an
8 agreement with the taxpayer, it is not a "security interest."
9 Accordingly, I find that Multnomah County's lien for interest on
10 unpaid real property taxes on the Debtor's residence property is
11 modifiable under the provisions of Section 1322(b) (2). See Rankin
12 v. DeSarno, 89 F.3d 1123, 1127-28 (3d Cir. 1996), cert. denied, 117
13 S.Ct. 943, 113 L.Ed.2d 832 (1997); In re Mitchell, 39 B.R. 696, 700
14 (Bankr. D. Or. 1984).

15 C. Multnomah County is entitled to a market rate of
16 interest on unpaid real property taxes.

17 Having determined that the Debtor can modify the interest
18 rate payable to Multnomah County on unpaid real property taxes in
19 the Plan, the questions become what standards to apply in
20 determining the appropriate interest rate, and what interest rate
21 is appropriate under the facts of this particular case. The
22 governing section of the Bankruptcy Code is Section
23 1325(a) (5) (B) (ii), which provides with respect to each allowed
24 secured claim in chapter 13 that "the value, as of the effective
25 date of the plan, of property to be distributed under the plan on
26 account of such claim is not less than the allowed amount of such

1 claim...." In the event that a debtor proposes to pay a secured
2 claim under a plan by means of a stream of payments over the life
3 of the plan, as in this case, the present value of the payment
4 stream must equal the amount of the secured creditor's allowed
5 claim.

6 Courts and commentators have not been uniform in their
7 approaches to determining appropriate interest/discount rates for
8 purposes of Section 1325(a)(5)(B)(ii). Contrast the approaches
9 taken by the Third Circuit in Rankin v. DeSarno, 89 F.3d 1123 (3d
10 Cir. 1996), and General Motors Acceptance Corp. v. Jones, 999 F.2d
11 63 (3d Cir. 1993), with the commentary in 8 Collier on Bankruptcy
12 ¶ 1325.06[3][B] at 1325-34 to 1325-38 (15th ed. 1999).

13 The standards applicable in the Ninth Circuit are stated in
14 In re Camino Real Landscape Maintenance Contractors, Inc., 818 F.2d
15 1503 (9th Cir. 1987).² In Camino Real Landscape Maintenance, the
16 Ninth Circuit reviewed bankruptcy court determinations, affirmed
17 without opinion by the district court, of the appropriate interest
18 rates for deferred payments of delinquent federal taxes. The Ninth
19 Circuit specifically rejected the federal government's requested

20
21 ² Although the Camino Real Landscape Maintenance case involved
22 the determination of appropriate interest rates in a chapter 11
23 rather than a chapter 13 context, the relevant sections of the
24 Bankruptcy Code are written in similar terms. Compare §
25 1129(a)(9)(b)(ii) [chapter 11] with § 1225(a)(5)(B)(ii) [chapter 12]
26 and with § 1325(a)(5)(B)(ii) [chapter 13]. As stated by the Ninth
Circuit Bankruptcy Appellate Panel in In re Patterson, 86 B.R. 226,
227-28 (9th Cir. BAP 1988), each of said sections of the Bankruptcy
Code "requires a determination of the present value of a creditor's
claim as of the effective date of the plan. Therefore, an
interpretation of one section applies equally to the interpretation
of the other sections."

1 interest at the rate set by statute, 26 U.S.C. § 6621. Id. at
2 1505. Instead, the Ninth Circuit held that the appropriate
3 interest rate was a market rate to be determined on a case by case
4 basis, considering the quality of security and the risk of a
5 further default.

6 The legislative history of § 1129(a)(9)(C) indicates
7 that the rate of interest on deferred taxes should be
8 the rate of interest that the debtor would pay to
9 borrow a similar amount on similar terms in the
10 commercial loan market. The debtor's characteristics
11 determine the interest rate. The creditor's
12 characteristics are irrelevant. Hence the fact that
13 a particular debt arises from taxes due to the
14 government does not affect the appropriate interest
15 rate. It continues to be determined by the
16 commercial loan market. Id. at 1505-06.

17 Accordingly, I have reviewed the evidence presented by the parties
18 in this case to determine what interest rate would be appropriate
19 on Multnomah County's property tax claim based upon relevant market
20 information.

21 The parties have stipulated to the following facts: The
22 real property (the "Property") concerned in this case is the
23 Debtor's primary residence, located at 4215 S.E. 29th Avenue in
24 Portland, Oregon. The Property has an estimated fair market value
25 of \$120,000. Multnomah County's lien against the Property for
26 prepetition unpaid real property taxes is \$3,792.13. The Property
also is subject to a mortgage in favor of Advanta Mortgage in the
amount of \$103,366, with prepetition arrears of approximately
\$13,000. The Debtor proposes to complete payments under the Plan
by July 2004. According to the Debtor's schedules, the Debtor's
gross income for 1997 was \$12,018 and for 1998 was \$11,445. At the

1 time of the initial evidentiary hearing in this matter on
2 September 9, 1999, Debtor's counsel reported that the Debtor was
3 unemployed. At the time of the second evidentiary hearing on
4 September 23, 1999, Debtor's counsel could not confirm that the
5 Debtor had found employment.

6 With those basic facts in evidence, the parties presented
7 expert witness affidavits and testimony to establish whether
8 financing would be available to the Debtor in the marketplace and,
9 if financing were available, upon what terms.³ Multnomah County
10 submitted the affidavits of three mortgage brokers in support of
11 its objection to the Plan: Brian F. Page, Tom Oughton, and Matthew
12 Burk.

13 Mr. Page is a mortgage broker specializing in the prime
14 residential real estate market as a branch manager of Northwest
15 Mortgage Group, Inc. Based upon his review of the stipulated
16 facts, Mr. Page expressed the opinion that the Debtor would not
17 qualify for conventional home financing under any circumstances and

18
19 ³ In In re Fowler, 903 F.2d 694 (9th Cir. 1990), the Ninth
20 Circuit reviewed and approved a different approach to determining
the "market" rate of interest, based upon the use of a formula:

21 Under this approach, the court starts with a base rate,
22 either the prime rate or the rate on treasury obligations,
and adds a factor based on the risk of default and the
23 nature of the security (the "risk factor"). Id. at 697.

24 In this case, no evidence was presented by the parties to establish
either an applicable base rate or the appropriate risk factor to
25 apply in conjunction with such a base rate to arrive at a market
rate of interest. In any event, as stated by the Ninth Circuit in
26 Fowler, "evidence of market interest rates for similar loans is
relevant in arriving at the appropriate risk factor." Id. at 698.

1 would be unlikely to qualify for subprime financing.

2 Mr. Oughton is a mortgage banker and broker specializing in
3 the subprime residential real estate market working for Western
4 States Mortgage. Based upon his review of the stipulated facts,
5 Mr. Oughton expressed the opinion that the Debtor would not qualify
6 for either conventional or subprime financing while her chapter 13
7 case was pending. However in the unlikely event that the Debtor
8 could obtain subprime financing, Mr. Oughton stated that the lender
9 would charge interest at the rate of approximately 15% plus 10
10 points, for an effective interest rate over the five year term of
11 the Plan of 17%.⁴

12 Mr. Burk is a mortgage banker specializing in the subprime
13 residential real estate market as a managing member of Fairway
14 Commercial Mortgage LLC. In his affidavit, based upon his review
15 of the stipulated facts, Mr. Burk stated that the Debtor would not
16 qualify for either conventional or subprime financing while her
17 chapter 13 case was pending. However, if the Debtor were able to

19 ⁴ Since the Debtor will not have to pay, and Multnomah County
20 will not receive payment of costs for services with respect to a new
21 loan transaction, such as title insurance premiums, escrow fees and
22 underwriting and processing fees, under the Plan, I find that it
23 would not be appropriate to factor such costs into the discount rate
24 to be paid pursuant to the requirements of Section
25 1325(a)(5)(B)(ii). Points are different. Points constitute an up-
26 front interest or profit charge to the borrower by the lender beyond
the monthly accruing interest charges and are an inherent cost of
borrowing properly considered in determining the appropriate
discount factor for purposes of Section 1325(a)(5)(B)(ii). See In
re Camino Real Landscape Maintenance Contractors, Inc., 818 F.2d at
1506 ("To be properly compensated, [the government] must receive the
rate of interest based on the debtor's cost of borrowing...."
(Emphasis added.)).

1 obtain subprime financing, Mr. Burk stated that the lender would
2 charge interest at the rate of approximately 15% plus 5-10 points,
3 for an effective interest rate over the life of the Plan of 16-17%.

4 During the course of his further direct testimony and cross-
5 examination, Mr. Burk was asked if financing would be available to
6 the Debtor on a recourse or nonrecourse basis if the lender could
7 take a first priority secured position (such as is provided for
8 real property tax obligations by statute in Oregon, see
9 ORS 311.405(7)) for a loan of approximately \$4,000. Mr. Burk
10 testified that in his opinion, such financing might be available.
11 On a recourse basis, the interest charged would be 12-13% per
12 annum, and on a nonrecourse basis, the interest charged would be
13 14-15% per annum, with 5-10 points charged in each case for the
14 loan. In those circumstances, the discount rate for such a loan
15 would range from a low of 13% (12% interest plus 5 points) to a
16 high of 17% (15% interest plus 10 points) over the term of the
17 Plan.

18 In opposition to the expert testimony submitted in behalf of
19 Multnomah County, the Debtor submitted the affidavit and testimony
20 of Mr. Steen Claussen. Mr. Claussen is the Vice President,
21 Northwest Region for Budget National Finance Company. He stated in
22 his affidavit that he dealt with both conventional and
23 unconventional lending, but testified that he had a particular
24 focus on lending to chapter 13 debtors. In fact, he testified that
25 he had closed loans for 58 chapter 13 financings during 1999 to the
26 date of the September 23rd hearing in this case.

1 In his affidavit, based upon his review of the stipulated
2 facts, Mr. Claussen stated that a person could get a loan of \$4,000
3 secured by the Property at an interest rate between 10.5 and 13.5%.
4 He further stated that a loan secured in first position on the
5 Property would bear interest at between 8.25 and 9.75%.

6 On cross-examination, Mr. Claussen testified that a \$4,000
7 first lien position loan on the property would cost the borrower 7
8 to 10 points, and in light of the Debtor's income and employment
9 status, such a loan would bear interest at 10.5 to 13.5%, with it
10 likely bearing interest closer to 13.5% than 10.5%. In these
11 circumstances, the discount rate for such a loan would range from a
12 low of 11.9% (10.5% interest plus 7 points) to a high of 15.5%
13 (13.5% interest plus 10 points).

14 In evaluating the foregoing evidence, I have considered that
15 a first priority secured loan in the amount of \$3,792.13 on the
16 Property valued at \$120,000 would be a very safe investment.
17 However, the risks of nonpayment during the term of the Debtor's
18 Plan, considering her history of low compensation and recent
19 periods of unemployment, also are substantial.

20 In light of all these consideration, I find that the Debtor
21 would be able to obtain a first position secured loan in the amount
22 of \$3,792.13 on the Property in the subprime market, and I find
23 that the appropriate interest rate to apply to Multnomah County's
24 claim for real property tax arrears under the Debtor's Plan is 15%
25 per annum. That discount rate is lower than the 17% rate derived
26 from the information included in Mr. Oughton's affidavit, but is

1 within the discount ranges derived from the affidavits and
2 testimony of Mr. Burk and Mr. Claussen, skewed to the high end of
3 Mr. Claussen's range consistent with his testimony.

4
5 **Conclusion**

6 Based upon the foregoing findings of fact and conclusions of
7 law, I find that Multnomah County is entitled to interest of 15% on
8 its allowed claim for real property tax arrears in the Debtor's
9 Plan. Any Confirmation Order entered in this case shall reflect an
10 amendment to the Plan to strike the Debtor's proposed payment of 9%
11 interest to Multnomah County on its allowed real property tax claim
12 and substitute interest at the rate of 15% per annum.

13
14
15 RANDALL L. DUNN
16 Bankruptcy Judge

17
18 cc: Rex K. Daines
19 Jeffrey O. Misley
20 Rick A. Yarnall, Trustee