United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Vicci Tune and Richard Tune**
Case Number: **97-15637**
Chapter : **13**
Judge Code: **SA**
First Meeting Location: **Albuquerque**
Reference Number: **13 - 97-15637 - SA**

Document Information

Number: 60

Description: Findings of Fact and Conclusions of Law Re: [37-1] Motion For Relief From Stay to collect outstanding homeowner association dues and, if necessary, terminate the Latta/Tune Real Estate Contract by Winrock Villas Homeowners' Association, Charlotte Latta, Thomas Latta .

Size: 24 pages (48k)

Date Received: 06/25/1999 11:18:30 AM	**Date Filed:** 06/25/1999	**Date Entered On Docket:** 06/30/1999

Court Digital Signature View History

af 29 e4 e8 70 9b 78 31 93 aa c2 d1 3c 91 29 b9 5d d5 60 4e 71 24 85 0d 83 15 75 84 95 03 1a 79 53 59 f6 0f dc 42 32 67 85 dc 2d 08 49 53 67 59 8e c0 9a a3 32 35 a8 6d 88 f8 bc 5c a2 12 63 72 44 59 1a 2b 41 41 36 fc e3 c1 82 8f 75 38 a4 ad 93 4f 47 3d 02 51 79 f2 0a 46 db 99 4c a8 12 24 78 79 df fc 4c da 8c 1d 3b 50 6a 3b 8c 40 83 87 50 e2 0d a9 92 e5 7c c8 2b a1 e6 c2 ca 73 ff f9

Filer Information

Submitted By:

Comments: Findings of Fact and Conclusions of Law on Motion for Relief from Stay Filed by Thomas and Charlotte Latta and Winrock Villas

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
RICHARD TUNE and
VICCI TUNE,
Debtors. No. 13-97-15637 SA

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION FOR RELIEF FROM STAY FILED BY THOMAS AND CHARLOTTE LATTA AND WINROCK VILLAS

This matter came before the Court on May 12, 1999, for final hearing on the Motion for Relief from Automatic Stay filed by Thomas and Charlotte Latta ("Lattas") and Winrock Villas Homeowners' Association ("HOA"). The Lattas appeared through their attorney Julie J. Vargas. HOA appeared through its attorney Richard P. Jacobs. The debtors appeared through their attorney Ronald Holmes. The Motion seeks relief from the automatic stay to pursue collection of past due homeowners' association dues on a condominium in Winrock Villas, in Albuquerque, New Mexico that the debtors purchased from Lattas.

FINDINGS OF FACT

1. On February 29, 1994, the Lattas, as sellers, and the debtors and Jimmy Palazzi (a relative of the debtors), as buyers, entered into a Real Estate Contract ("Contract") for the purchase and sale of a leasehold estate of Unit I-13 at Winrock Villas. This contract was admitted into evidence as Exhibit 1.
2. The purchase price was $35,500, payable $3,500 down and execution of the Contract in the amount of $32,000. The

Contract provides for monthly payments of $246.00 with interest on the unpaid principal balance at the rate of 8.5% per year commencing April 1, 1994. The Contract also provides a late payment penalty of $15.00 on any payment that is more than fifteen days past due, as additional interest due the sellers. The purchasers agreed to pay a pro rata portion of the estimated insurance premiums on the unit to the Homeowners' Association "as they shall hereafter direct." Exhibit A to the Contract also provides that the conveyance is "subject to all reservations, restrictions, covenants and obligations set forth in the Declaration and the By-Laws, Rules and Regulations of the Winrock Villas Condominium Homeowners' Association, as now or hereafter amended." (Emphasis added.) Payments were to be directed to Sunwest Bank of Albuquerque, N.A. as escrow agent ("Sunwest Escrow"), to be disbursed per instructions from the seller.

3. Exhibit 5 consists of the title sheet/table of contents and page 33 only[1] of the "Declaration of Covenants, Conditions, and Restrictions, Reservation of Easements and Condominium Plan" for Winrock Villas Condominium. The relevant page 33 text follows:

> Common expenses, real estate taxes paid by the Association on the entire Property, utility expenses attributable to the Units and other

[1]This document is at least 57 pages long according to the table of contents that starts on page 1.

> payments collectible by the Association (excluding ground rents payable under Unit Leases), together with interest, costs, and reasonable attorney's fees[2], shall be a charge on and be a continuing lien against each unit involved in the assessment all of which shall be collectible by the Association in any action. Each such assessment, and payment, together with interest, costs, and reasonable attorney's fees incurred in the collection, shall also be the personal obligation of the Unit Lessee involved when the assessment fell due. The personal obligation for delinquent assessments shall not pass to the transferee of the unit unless expressly assumed, but the unit involved shall nevertheless remain subject to the lien.
>
> (Emphasis added.)

3. Debtors commenced this chapter 13 case on September 29, 1997.

4. The debtors list the condominium on their Schedule A as having a value of $29,666.67 (debtors have a 2/3rd interest; therefore the debtors value the entire condominium at

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[2]Conspicuously absent from this list is the term late fees. This omission, however, was not addressed by the parties. The Court therefore assumes that there is no argument that the late fees are not authorized by the bylaws. See Hills v. Greenfield Village Homes Association, Inc. 956 S.W. 2d 344, 350 (Mo. App. 1997)(Home Association agreement provided for a lien to secure assessments, and provided for addition of interest, costs, and reasonable attorney's fees. Court held that there was no provision for "late fees" and no authority for their unilateral imposition.) Exhibit 5 did not contain any material that described the powers of or limitations on the Association. The Court therefore cannot find that late fees are unauthorized under the Declaration of Covenants. See also Board of Managers of Executive Plaza Condominium v. Jones, 251 A.D. 2d 89, 90-91, 674 N.Y.S. 2d 304, 306 (1998) (Condominium late fees recoverable only if fees represent reasonable costs arising from delinquency or if board adopted resolution pursuant to by-laws.)

$45,500), securing claims to Winrock Villas of $31,000 and Thomas Latta of $697.

5. Debtors filed a Chapter 13 plan on November 5, 1997.

6. This plan provided for payment of the Latta arrearage claim in the amount of $700, to be paid by the Chapter 13 trustee with interest at 8%. It also provided for direct payments to Latta (i.e., Sunwest Escrow) for regular postpetition amounts due.

7. On January 20, 1998, debtors filed an amended plan, which provided the same treatment for Latta, and provided for payment to Winrock Villas of arrearage "HOA dues" in the amount of $1,052.52 without interest.

8. On February 9, 1998, HOA objected to the amended plan: a) as incorrectly stating the amount due, which should be $1,086.23; b) claiming that the HOA is secured for both pre- and post-petition assessments, c) for failing to list Winrock Villas as a secured creditor, and d) for plan payments extending past three years.

9. HOA filed a proof of claim on April 17, 1998, claiming $1,086.23 as a secured claim for "arrearages," secured by Unit I-13.

10. The amended plan was confirmed on April 27, 1998. Paragraph two of the confirmation order states "The objection filed on behalf of Creditor Winrock Villas Homeowners Association,

Inc. has been resolved." Attorney for HOA approved the order. The confirmation order contains no language that changes the amended plan or the treatment of any creditor proposed by that amended plan. Paragraph three of the plan treats the real estate contract with the Lattas as assumed.

11. In a letter dated June 19, 1998, HOA gave notice (the "new policy") to the homeowners:

> At the June 16, 1998, the Homeowners Association Board of Directors voted to change the delinquent account policy. The members voted to assess the existing 15% late charge on ***all outstanding balances $1.00 and over regardless of the nature of the charge.***
>
> Please find enclosed a current statement which reflects your outstanding balance. This balance must be paid in full by July 15, 1998 or you will be assessed the 15% on the total outstanding balance.

(Emphasis in original). This letter was admitted into evidence as Exhibit 7. The minutes of the Winrock Villas Condominiums Homeowners Association Board of Directors meeting of July 21, 1998 are attached to Exhibit 7. These minutes evidence a discussion of this issue[3]:

> Topic: Late Fee Assessment
> **Discussion:** Management suggested that a late fee of 15% be assessed on any outstanding balance of $1.00 and

[3]The minutes of the June 16, 1998 meeting were not introduced into evidence. It does not make sense to the Court that if a new policy was decided at the June 16, 1998 meeting it would be discussed as a new matter again at the July 21, 1998 meeting with implementation of the changed policy being further delayed until homeowners were notified.

over in an attempt to collect more of the delinquencies.
Action: A motion was made and seconded that this be put into place once a letter informing owners of the new procedure [was sent?]. Motion carried.

12. Exhibit 2, stipulated to by the parties, is a "Balance Sheet Listing" prepared by Sunwest Escrow on the Contract. It shows activity for the time period February 3, 1998, through May 6, 1999. The principal balance on the Contract as of May 6, 1999 was $30,340.11. The exhibit does not reflect a payment made by debtors on May 11, 1999. The parties stipulated that as of the hearing date the Contract was current.

13. Exhibit 3 is a "Historical Owner Ledger" ("Ledger") maintained by HOA. It includes a running balance on fees, late fees, payments, and other charges and credits.

A) Pages three and four are a "Resident History" prepared by the former management company for the period June 1996, through December 2099 (in fact the last entries are dated November 1, 1997). As of November 1, 1997, the document shows $3,789.62 in "billings"[4], payments of $3,090.72, and "adjustments"[5] of $870.52, resulting in a balance due of $1,569.42.

[4]This represents 6 billings in 1997 of $219.58 plus 11 billings in 1998 of $224.74. Two of these billings reflect post-petition charges. The billings are for HOA fees.

[5]"Adjustments" is a general catchall for late fees ($502.86), attorney fees ($298.72), keys, and other charges.

Of this amount, $1,086.23 is prepetition (the balance as of September 1, 1997). The postpetition amount of $483.18 represents the October 1997 billing, a late charge, and the November 1997 billing.[6]

B) The first two pages of Exhibit 3 set out the Ledger for the period January 1, 1998 through April 8, 1999. Pages five and six are identical to the first two pages, except that the period is January 1, 1998 through May 11, 1999 and there are written notations on page five explaining the balances "forwarded" in January. Page one starts with a zero balance, then adds the January 1998 fees of $229.49, a "2-month reserve" charge of $9.50, and "Forwarding balances" of $1,466.89, $265.47, and $158.72[7]. Page one continues with February's through June's monthly fees of $229.49 and monthly late fees of $34.42 (calculated as 15% of the fees of $229.49; no late fees were assessed on accrued late fees, attorney fees, or adjustments). After a reduction for payments received, the balance

[6]Nothing in Exhibit 3 shows a November 1997 late charge or December 1997 billing or late charge. Had these fees and charges been added, the December 31, 1997 total balance due would have been $1,861.58.

[7]Page 5 has handwriting that describes the forwarding balances as assessments (i.e. fees) in 1997, late charges in 1997, and attorney fees (billed August 28, 1997 per the Resident History) respectively. These amounts total $1,891.08, or $29.50 more than the balance projected in footnote 6.

due on June 19, 1998 was $2,664.15. This amount includes the $1,086.23 reflected in the proof of claim. The postpetition amount due was therefore $1,577.92 on that date.

C) On July 1, 1998 fees were added in the amount of $229.49, and on July 2 a payment of $258.49 was posted. On July 8, 1998, the Ledger transfers $158.72, $784.11, and $143.40 to “Tune2 Bnkrpact” (total $1,086.23 as per the proof of claim, and in agreement with the September 1997 Resident History.) This left a balance of $1,548.92 post-petition outstanding on July 16, 1998. HOA then added a late fee of 15% of that amount, i.e., $232.34. On July 16, 1998, the HOA also charged the debtors $7.00 for “Filing Lien Process”, the costs associated with recording a lien against the condominium for its claim.

D) HOA continued to use this method to compute late fees for the remainder of 1998 and 1999 year to date: if there was any outstanding balance on the 16th of the month, 15% of the total amount due would be added as a late fee, whether or not a check for that month’s fees had been received, and whether or not a late fee had already been assessed on a portion of the balance. On February 2, 1999, HOA also charged another $7.00 for a

recording fee to "Update Lien," and on April 8, 1999 added $187.55 attorney fees, and another $4.33 in attorney fees on April 22, 1999. All together, Exhibit 3 shows a balance due of $5,565.42 as of May 11, 1999, which HOA claims continues to accrue late fees at a rate of 15% per month.[8]

[8]At the hearing HOA's representative, who keeps the books, testified that this 15% per month would work out to be 180% per year. In fact, the rate would be higher:

Month	**Amount**	**Amount + 15%**
1	1.00	1.15
2	1.15	1.3225
3	1.3225	1.520875
4	1.520875	1.74900625
5	1.74900625	2.0113571875
6	2.0113571875	2.31306076563
7	2.31306076563	2.66001988047
8	2.66001988047	3.05902286254
9	3.05902286254	3.51787629192
10	3.51787629192	4.04555773571
11	4.04555773571	4.65239139606
12	4.65239139606	5.35025010547

This table shows that in twelve months $1.00 would grow to $5.35, or an annual interest rate of 435%.

E) In all, between the petition date and the date of this hearing, debtors have made eighteen of the twenty[9] required post-petition monthly payments. Although debtors made eighteen payments, they were generally not timely. No payments were received during the months of: October, November, or December 1997, February 1998, May or June 1998, October 1998, January 1999 or March 1999. Debtors made three payments in April 1999 and six in May 1999. In sum, debtors started out this bankruptcy by failing to make the first three post-petition payments, were nine payments behind in March, 1999, and have never gotten more caught up than being two payments behind.

12) Exhibit 4 consists of two pages, the first is a list of all HOA fees due since the bankruptcy filing, without addition of late charges or other costs. It shows that $4,575.55 was due for fees. The second page lists the same HOA fees but includes the "late charges of 15% per annum".[10] This shows that $5,244.03 would have been due with late charges.

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[9]Debtors obligation for post petition payments started on October 1, 1997. Therefore, as of May 12, 1999, twenty payments had come due.

[10]"Per annum" is incorrect. The late charge was assessed on the sixteenth of the month whether the payment was received that day or some time later. The effective interest rate would thus be approximately 360% (15% x 24 half month periods) if the payment plus late fee were paid on the 16th, declining to the 15% rate if paid exactly one year later.

13) Exhibit A, page 4, contains a list prepared by the debtors of payments to both HOA and Sunwest Escrow. This list shows a payment, check 2082, to Winrock Villas on July 31, 1998, which is not reflected on the Ledger. HOA's witness, who maintains the HOA's books and kept the ledger, testified that its absence meant that the check was never received. Debtors did not provide any documentary evidence that the payment was made or received by HOA. The Court finds that this check was never received or credited.

14) Debtors' attorney argued at the hearing that the debtors were current, but alternatively made an offer of adequate protection if debtors were in default: the debtors would cure in a reasonable time.

15) Debtors' attorney also argued that the HOA Bylaws, Rules and Regulations did not apply to debtors because in the deed they took the property "subject to" those conditions rather than "assuming" them. HOA's attorney's position is that both the Lattas and the debtors are responsible for all fees, late charges, and attorneys fees.

16) Movants presented no evidence of what actual damages they may suffer from late payments.

CONCLUSIONS OF LAW

This is a core proceeding under 28 U.S.C. § 157(b)(2)(G). These findings of fact and conclusions of law are entered pursuant to Bankruptcy Rule 7052.

1. **Debtors' Liability**

Debtors argue that they are not liable for the HOA fees. This argument fails. Winrock Villas is a condominium established under the New Mexico Building Unit Ownership Act ("Act"), §§ 47-7-1 to 28 NMSA 1978 (1995 Repl.). The debtors are "unit owners" as defined in Section 47-7-2. Section 47-7-27 provides that "All unit owners ... shall be subject to the act and to the declaration and bylaws of the association of unit owners adopted pursuant to the provisions of the act." Section 47-7-7 provides that "Each unit owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto and shall comply with the covenants, conditions and restrictions set forth in the declaration or in the deed to his unit." Under the Act the bylaws may provide "the manner of collecting from each unit owner his share of the common expenses". Section 47-7-20(G). Therefore, under a plain reading of the statutes, the debtors are liable for the HOA fees because they own the unit.

This conclusion is consistent with the general common law of property. A condominium is a "Common Interest Community" as defined in Restatement (Third) of Property: Servitudes § 6.2 (Tentative Draft No. 7, 1998)("Restatement of Property"). These communities have the power to raise funds by levying assessments that are secured by a lien against the individually owned properties. Id. § 6.5. Because the rights and obligations of

the owners of the individual units relate to that ownership, they are appurtenant servitudes. Id. §§ 1.1, 1.5. In general, an original party or successor to an appurtenant servitude incurs liability on account of the servitude burden for obligations that accrue during the time the party or successor holds the burdened property interest. Id. § 4.4. Thus, under the common law of property the debtors would be liable for all burdens related to the condominium unit during their period of ownership. See In re Raymond, 129 B.R. 354, 363 (Bankr. S.D.N.Y. 1991)(Condominium common charges are a covenant running with the land); In re Case, 91 B.R. 102, 103 (Bankr. D. Co. 1988)(same). Compare 11 U.S.C. § 523(a)(16) (Post-petition condominium fees are not included in the discharge if debtor physically occupies the unit or rents it out.)

The debtors' argument that they took their ownership "subject to" the HOA's Bylaws, Rules and Regulations, rather than "assuming" them also fails. It is true that purchase of property "subject to" a condition generally imposes no personal liability on the purchaser to satisfy the condition. Compare Restatement of Property: Mortgages § 5.1 (1996)(Transfers with assumption of liability) with Id. §5.2 (Transfers without assumption of liability). See also Kuzemchak v. Pitchford, 78 N.M. 378, 379, 431 P.2d 756, 757 (1967) (discussing distinction between "assumption" and "subject to".) See also Del Rio Land, Inc. v. Haumont, 514 P.2d 1003, 1005, 110 Ariz. 7, 9 (Az. 1973). A

purchaser "subject to" does, however, risk loss of the property if the condition is not met. Restatement of Property § 5.2. See also Del Rio Land, 514 P.2d at 1005. Therefore, for the purpose of this stay motion, the distinction of whether the debtors are personally liable for the obligations does not matter. If debtors seek to keep the property, the conditions, i.e. HOA's Bylaws, Rules and Regulations, must be satisfied. In summary, the Court finds that the debtors are in effect liable for the HOA fees.

2. **The motion for relief from automatic stay.**

Movants seek relief from the automatic stay. The relevant statutes are 11 U.S.C. §362(d) and (g):

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay–
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property...if–
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.
>
> ...
>
> (g) In an hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section–
>
> (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and
>
> (2) the party opposing such relief has the burden of proof on all other issues.

The Motion for Relief from automatic stay seeks relief under both 365(d)(1) and (2).

With respect to 365(d)(1), movants alleged and argued that they were not adequately protected because of the history of missed payments, accrual of late fees, and lack of showing that the debtors could continue to make payments. In response, debtors' attorney represented that debtors believed they were current, and if they were not, they would cure within a reasonable time fixed by the Court provided that they were financially able to pay any late fees determined by the Court. There is no evidence before the Court that the asset is depreciating or being wasted. The Court finds that entry of an order 1) giving debtors a reasonable time to cure upon penalty of stay modification, and 2) ordering timely future payments upon penalty of stay modification can adequately protect movants' interests. Therefore, the stay motion under § 365(d)(1) will be denied.

The more difficult issue for the Court revolves around a portion of § 365(d)(2), specifically "equity" in the property. There was no testimony at the hearing relating to value. The burden is on movant to establish a lack of equity. 11 U.S.C. §365(g). Instead of introducing additional evidence of the current value, movants urged the Court to adopt the original purchase price of five years ago as the value, i.e., $35,500. The Court could find that this amount should be entitled little

weight, find that movants have failed to meet their burden, and deny relief on that ground.

On the other hand, the debtors also produced no evidence at the hearing; in fact, they did not appear. They scheduled the asset as worth $45,500 in their bankruptcy schedules. The Court therefore, for the purpose of this motion, finds the value to be somewhere between those numbers.

The debt against the property includes the Contract balance of approximately $30,300.00, the $1,086.23 (provided for by the confirmed plan), and any post-petition amounts due to HOA. The parties disagree on this amount. Debtors claim they are current, and/or they are not liable for the late fees. HOA claims alternatively: a balance due of $5,565.42 including the new policy late fees, attorney fees, lien recording fees, etc. (See Exhibit 3); $688.69 of HOA fees (less reductions of 2 payments of $258.49 for the May 3 and May 11 payments) (and excluding other items) if no late fees are allowed at all (See Exhibit 4 page 1); or $1,357.17 (less reductions of 2 payments of $258.49 for May 3 and May 11 payments) of HOA fees (excluding other items) if late fees are computed at the old rate of 15% the month the payment is due only (See Exhibit 4 page 2).

The Court will deny the $5,565.42 amount. First, the Court finds that the language that implements the new late fee policy is ambiguous. Second, the Court finds that the late charges

assessed under this new policy are excessive, punitive, and unenforceable.

A provision is ambiguous if a Court determines that it is reasonably and fairly susceptible to different constructions. Nearburg v. Yates Petroleum Corporation, 123 N.M. 526, 531, 943 P.2d 560, 565 cert. denied 123 N.M. 446, 942 P.2d 189 (1997); Mark V. Inc. v. Mellekas, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). The Court finds that the new late policy is ambiguous. A reasonable person could read the June 19, 1998 letter in each of the following ways:

a) The current late policy is 15% of assessments only; the 15% will now apply to other items also such as attorney fees, key deposits, etc. A late fee will be applied only one time to any individual charge, consistent with the current policy.

b) There will be a one time 15% late fee applied to all balances, including prior fees and late charges and miscellaneous fees, on July 16th, and the current policy of assessing 15% of late fees will continue.

c) There will be a one time 15% late fee applied to all balances, including prior fees and late charges and miscellaneous fees, on July 16th, and the current policy of assessing 15% of late fees will change to assess 15% on all future balances incurred during that month.

d) The new policy is 15% of outstanding balances including prior months fees and the late fees thereon, compounded monthly.

e) The new policy will be to assess a 15% per year late fee on all outstanding balances effective July 16th.

Furthermore, the new late policy is silent as to how payments should be applied; will they eliminate any late charge for that month, or will they instead be applied to the earliest balance or possibly only to earlier late fees, thereby incurring an additional late fee for the month of payment? The lack of any time period associated with a stated interest rate is also ambiguous.

Reference to the minutes of the Board meeting that implemented this policy offers no further guidance. The minutes say the fee will be assessed, but makes no reference to compounding, application of payments, or to assessing late fees on late fees. An ambiguous contract should be construed against the interest of the party that drafted it. Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S.Ct. 1212, 1219 (1995); Omni Aviation Managers, Inc. v. Buckley, 97 N.M. 477, 482, 641 P.2d 513 (1982); Milk 'N' More v. Beavert, 963 F.2d 1342, 1346 (10th Cir.1992). Although the Bylaws and Regulations of HOA are not a contract, the same rule of law should apply in interpreting a regulation that acts like a contract in its execution. For this

reason, the Court will adopt reading "a" above; i.e., the late fee will be applied to all charges, but only one time.

Another reason supporting this construction of the late fee assessment is the public policy against enforcing penalty provisions in contracts. "A penalty is a term fixing unreasonably large liquidated damages and is ordinarily unenforceable on grounds of public policy because it goes beyond compensation into punishment." Nearburg, 123 N.M. at 532, 943 P.2d at 566 (Citing Restatement (Second) of Contracts § 356 (1981)(Liquidated damages and penalties)); accord, Thomas v. Gavin, 15 N.M. 660, 110 P. 841, 843 (1910). The Restatement (Second) of Contracts § 356 comment, suggests two factors to consider in determining whether an amount fixed as damages is a penalty: 1) anticipated actual loss, and 2) difficulty of proof of loss. Id. If the fixed amount (in this case the 15% "late fee") is reasonable in that it will approximate the actual loss resulting from the breach (in this case late payment), it is less likely to be a penalty. Second, if the actual loss would be difficult to prove, it is less likely that a court would find that a fixed amount was a penalty. Conversely, if the actual loss is easy to establish, less latitude is allowed in fixing the liquidated damage. Id.

In this case, actual loss is not difficult to prove. A late payment results in a loss of the use of money for a certain period of time. This should not be difficult to prove: a simple

interest calculation would suffice. Also, given the lien rights set out in the Bylaws, it appears that eventual payment is reasonably certain, so there is little risk, and there should be a correspondingly reasonable interest rate. Movants provided no evidence of damage resulting from late payment. The Court finds that the 435% rate urged by movant is not reasonable. The Court can conceive of no set of facts under which the actual damages suffered by the HOA would approximate a rate of 435% per year on the use of the fees. Therefore, the Court finds that the proposed 435% late fee is an unenforceable penalty.

It is also interesting to note that the current Condominium Act[11], §§ 47-7A-1 to 47-7D-20 NMSA 1978 (1995 Repl.), fixes 18% per annum as a maximum rate of interest that may be applied to past-due assessments.[12] Id. § 47-7C-15(B). The Condominium Act is New Mexico's adoption of the Uniform Condominium Act as amended in 1980. Section 47-7C-15(B) is a verbatim adoption of section 3-115 of the Uniform act, including the 18% figure.

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[11]This Act was passed in 1982, and applies to condominiums created after the effective date. § 47-7A-2 NMSA 1978 (1995 Repl.) Winrock Villas was established under prior law.

[12]The Building Unit Ownership Act has no similar interest cap, but when this Act was passed in 1963 the state's usury laws, which were repealed effective June 14, 1991, see Century Bank v. Hymans, 120 N.M. 684, 688, 905 P.2d 722, 726, cert. denied 120 N.M. 533, 903 P.2d 844 (1995), were in effect. There would have been no need for the Building Unit Ownership Act to duplicate the usury laws. Compare Oakland East Manors Condominium Association, Inc. v. D. La Roza, 669 So. 2d 1138, 1139-40 (Fl. App. 1996)(Florida condominium bylaws may provide for interest at the highest rate permissible under the usury laws.)

This Act has been adopted in various forms by 21 states. Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 John Marshall Law Review 303, 395 n. 76. (1998). Compare, e.g. Fla. Stat. Ch. 718.116 (1998) (assessments bear interest at rate provided in declaration and may not exceed maximum rate set by law; if nothing in declaration, then 18%; if bylaws provide, association may charge a late fee not to exceed the maximum of $25 or 5% of each late payment; statute also provides how payments are applied to late fees, costs, interest, etc.) and Md. Code Ann., Real Property § 11-110(e)(1)-(2)(1998) (same as Florida, but allows a late charge of the greater of $15 or 10% of the delinquent payment "provided the charge may not be imposed more than once for the same delinquent payment".) It appears that many legislatures have decided that 18%, as a rule, is a reasonable damage resulting from late payment.

In sum, the Court interprets the late fee policy as being a 15% charge on outstanding balances on the 15th of the month, that have accrued during that month only. This effective rate can, as discussed above, be significantly higher than the 18% per annum of the Uniform Laws, but appears to have been adopted by HOA as a regulation and enforced in the past. The decision today draws the limit at compounding late fees.

Additionally, the Court finds that fees for recording liens on July 16, 1998 and February 22, 1999 are disallowed as being filed in violation of the automatic stay. The debtors should not

have to pay for actions taken against them in violation of federal law. The attorney fees charged postpetition, in the amount of $187.55 and $4.33 appear reasonable and will be allowed. There is sufficient equity in the property to cover those fees, which are provided for by the deed. If movants seek additional fees, they may file an application in the form of an affidavit with copies of time records attached, and serve a copy on debtors and their counsel.[13] If no objections are filed to the request for additional fees within twenty days of service (plus three days for mailing), the movants can submit an order approving those fees.

In sum, the debtors owe two postpetition payments of $229.49 each to HOA, twenty late fees each in the amount of $34.42, and

[13]HOA counsel submitted an affidavit (Exhibit 6) stating that HOA had incurred (total?) attorney fees of $1,558.91. It is not clear whether that figure is in addition to the attorney fees already allowed by this decision, or is intended to include fees incurred in appearing at the hearing on May 12. Since HOA counsel is being given the opportunity to submit another, more comprehensive request for fees on behalf of HOA, the Court does not need to interpret Exhibit 6.

$192 of attorney fees. The total claims against the property are therefore:

Contract	$ 30,300
Prepetition paid by plan	1,086
Postpetition attorney fees	192
Postpetition arrearages	459
Postpetition late fees	688
Total	$ 32,725

Since the value is somewhere between $35,500 and $45,500, the Court finds that the debtors have at least a minimal amount of equity in the property, even taking consideration such additional attorney fees that may be awarded[14]. Further, if the debtors abide with the adequate protection order that is being entered herewith, they will have approximately $1,500 more equity within two months. Therefore, the stay motion under § 365(d)(1) will be denied.

Debtors have offered to cure the arrearage. The Court finds that a 90-day time period from an order determining the final amount of attorney fees to bring the contract current would not be unreasonable. That 90-day time period should start to run following the entry of the order allowing the specific amount of

[14]Counsel for debtors also argued that the Debtors needed the home as a residence. However, there was no testimony or other admissible evidence on this issue. Since § 362(g)(2) allocates the burden of proof on this issue to the party opposing the stay relief, Debtors have not met their burden. The Court has instead focused its analysis on the issue of equity only.

the additional attorney fees provided for in this order. A separate Order regarding adequate protection will be entered.

Hon. James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the following: Julie J. Vargas (attorney for Lattas), Richard P. Jacobs (attorney for Winrock Villas), Ronald E. Holmes (attorney for debtors), Kelley Skehen (Chapter 13 Trustee), and the United States Trustee.