NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In the matter of	:	Case No. 04-13563/JHW
Lewis R. Brooks, Sr. and Elizabeth B. Brooks	:	
	:	**OPINION**
Debtors.	:	

APPEARANCES: S. Daniel Hutchison, Esq.
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Before the court for resolution is the debtors' motion to compel the mortgagee to disgorge the legal fees that the debtors were required to pay to the mortgagee as part of the mortgage payoff when they sold their home. The debtors were authorized by this court to sell their residence after the mortgagee received relief from the automatic stay. The mortgagee provided the debtors with the necessary final payoff figures to satisfy their two mortgages on the property. The debtors contend that the amount of post petition attorneys' fees claimed by the mortgagee was excessive and out of proportion to the court's standard fee allowances. They now seek a refund of a portion of the fees paid.

The mortgagee maintains that the attorneys' fees assessed were reasonable under section 506(b), and that the debtors' motion should be denied.

FACTS

Debtors Lewis R. Brooks, Sr. and Elizabeth B. Brooks filed a voluntary joint petition under Chapter 13 of the Bankruptcy Code on February 4, 2004. The debtors scheduled their principal residence as 1007 Sussex Avenue, in Deptford, New Jersey with a market value of $115,000.00. They listed Columbia Bank as a secured creditor holding two liens against the property, a first mortgage in the amount of $81,768.00 and a second mortgage in the amount of $4,157.00.

Columbia Bank filed two proofs of claim on June 1, 2004. As to the first mortgage, Columbia asserted a secured claim in the amount of $83,054.49, and as to the second mortgage, a secured claim in the amount of $4,227.17. Neither proof of claim contained supporting documentation or indicated any arrearages that might be due. The debtors nonetheless recognized that they were behind on both mortgages and they proposed to pay into their Chapter 13 plan $162.00 a month for 60 months to cure arrears in the amount of $1,800.00 owed on the first mortgage and arrears in the amount of $400.00

owed on the second mortgage. The plan also provided for payment of administrative expenses, as well as arrears owed on two automobile loans. The debtors' plan was confirmed on June 24, 2004 without objection.

On September 20, 2005, Columbia Bank moved for relief from the automatic stay, asserting that the debtors were two months (August and September 2005) behind on their first mortgage. The debtors defended with a certification claiming that they were able to bring their account current. The matter was marked as resolved on October 24, 2005, with an order to be submitted. The matter was carried for control purposes for the next several months. Email and fax correspondence between the parties through January 2006 indicated that the debtors slowly made up the missed payments to Columbia, but did not become completely current until February 2006. The parties discussed the possibility of entering into a consent order during this time, but ultimately, Columbia withdrew its motion without the entry of an order after the debtors became current.

On June 14, 2006, Columbia filed a second motion for relief from the automatic stay.[1] This time, the bank asserted that the debtors were now three

[1] The second motion and its supporting documentation were essentially identical to the first set of motion papers.

months (April, May and June 2006) behind on their first mortgage, and two months (May and June 2006) behind on their second mortgage. The order entered on July 14, 2006 provided that the relief would be effective October 31, 2006, but directed the debtors to continue to make current and timely mortgage payments outside of the plan. The debtors were afforded the opportunity to cure their missed payments over a six month period. In the event that the debtors failed to cure their arrearages as provided or missed any of their regular monthly mortgage payments, Columbia was to be granted relief from the automatic stay upon submission of a certification of default.

On June 20, 2006, Columbia also filed a motion for approval of amended proofs of claim (approximately four years after filing their original proofs of claims), this time providing the documentation that had been missing the first time. In its new amended claims, Columbia acknowledged that the original proof of claim was filed in error, because it did not list pre-petition arrearages due. The amended proofs of claim asserted that the debtors were in arrears as of the petition date for two missed payments on their first mortgage, and three missed payments on their second mortgage. The balances due on both mortgages were the same as the balances noted in the original proofs of claim. Both Installment Loan Notes also provided in relevant part: "COLLECTION COSTS: If you sue me to collect this Note, I will pay you all court costs

permitted by law, plus 20% of the amount due as collection costs and attorney fees."

On July 28, 2006, two weeks after the order resolving Columbia's motion for relief from the automatic stay was entered, the debtors moved to sell their property for $260,000. Debtors proposed to pay the two outstanding mortgages in full. In connection with the proposed sale, Columbia provided the debtors with loan payoff statements. On August 9, 2006, Columbia again amended its proofs of claim. This time the bank claimed that the payoff figure on the first mortgage, good through September 1, 2006, was $90,370.54, which included legal fees of $7,740.25 as of August 8, 2006. The payoff figure on the second mortgage, as of August 8, 2006, was $2,102.12, including legal fees of $179.99. The debtors requested and were provided with an itemization of the asserted attorneys' fees. When the sale fell through, debtors refiled their motion to sell their property on August 22, 2006, again for $260,000.00, this time to another buyer. Debtors' motion to sell was granted by order dated September 22, 2006, and the debtors successfully sold the property on or about September 27, 2006.

On November 13, 2006, debtors filed this motion to determine the amount of allowable attorneys fees payable to the mortgagee, and to compel the

disgorgement of funds. The debtors object to the amount of attorneys' fees included by Columbia Bank in its payoff statement as being excessive. The debtors cite to the cap provided under New Jersey state law for foreclosures, found at N.J.Ct.R. 4:42-9, and to the standard fees for relief from stay motions generally allowed by the bankruptcy courts in the District of New Jersey, as potential caps on the fees sought. Because the standard attorney fee allowed for filing a motion for relief from the automatic stay, without requiring itemization, is $300.00, plus the filing fee of $150.00, the debtors contend that Columbia should be awarded a maximum fee of $900 in connection with their two motions for relief from the stay.[2]

Columbia Bank disagrees that the claimed attorneys' fees are excessive. The bank contends that the debtors have been consistently delinquent in their payments, causing the bank to file motions for relief from the automatic stay on two occasions. Each time, the debtors opposed the motion and claimed that they could become current, but Columbia had to continue to pursue the debtors to actually receive payment. Columbia contends that counsel's certification adequately documents the repeated contacts that counsel was

[2] Actually, the standard fee allowed by the bankruptcy courts to mortgagees for a typical motion for relief from the stay without an affidavit of services is $250.00 plus the filing fee.

forced to make to protect the bank's interest.[3]

Columbia also asserts that the $7,795.25 sought in attorneys' fees actually represents a significant discount that has been afforded to the debtors. The actual attorneys' fees incurred were $9,336.68, not including the fees incurred to defend the current disgorgement motion. The debtors were thus given a 17% discount on the fees sought. According to the Installment Note, Columbia contends that it could have sought costs of $16,526.05, or 20% of $82,630.29, the amount due at the time of payoff. Thus, in effect, the debtors were given a 46.83% discount on what could have been asked for. Finally,

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[3] The bank explains that it

> was required to not only file two stay motions because of the Debtors' non-payment, but was also required to deal with the Debtors' improper opposition where their only defense was that they would (prospectively) pay the arrears. This case is marked by the Debtors non-payment of their loan and the legal machinations of their counsel to prevent Columbia from gaining stay relief, even though the Debtors could not afford to make payments. At every turn Columbia sought to limit legal fees by trying to work out an arrangement with the Debtors and avoid Court appearances. . . . Columbia has the right to choose its own counsel and that counsel does not file cookie cutter motions with the Court, but rather believes that at all times, the Court should be completely informed of the facts and law of a case. Each case has its unique characteristics and in order to properly file papers with the Court containing the detail required by the rules, appropriate time and attention needs to be expended.

Oppos. at 5-6.

Columbia maintains that as a matter of law, N.J.Ct.R. 4:42-9 does not apply here since there was no foreclosure action instituted. Columbia contends that its fee request is reasonable under 11 U.S.C. § 506(b).

DISCUSSION

The question before the court is the extent to which the mortgagee is entitled to include post confirmation attorneys' fees in its final payoff calculations. The so-called "American rule," which is followed in New Jersey, generally holds that each party will be responsible for its own litigation costs, including attorney's fees. Smiriglio v. Hudson United Bank, 98 Fed.Appx. 914, 915 (3d Cir. 2004). See also Travelers Casualty & Surety Co. v. Pacific Gas & Elect. Co., 127 S. Ct. 1199, 1203 (Mar. 20, 2007); In re A & P Diversified Technologies Realty, Inc., 467 F.3d 337, 341 (3d Cir. 2006); In re Hatala, 295 B.R. 62, 66 (Bankr. D.N.J. 2003). The courts have recognized two exceptions to that rule: (1) where statutory provisions exist that provide for the fee allowance, or (2) where a contractual provision allocating attorneys' fees exists. See Travelers, 127 S. Ct. at 1203 ("an otherwise enforceable contract allocating attorney's fees (i.e., one that is enforceable under substantive, nonbankruptcy law) is allowable in bankruptcy except where the Bankruptcy Code provides otherwise"); Smiriglio, 98 Fed.Appx. at 915; Hatala, 295 B.R. at 66. See also

Regency Savings Bank, F.S.B. v. Morristown Mews, L.P., 363 N.J.Super. 363, 366, 833 A.2d 77, 79 (App. Div. 2003) ("contractual fee-shifting agreements in the lender/borrower context are generally enforceable"). The fact that the fees were incurred during the bankruptcy process does not make them unrecoverable. See Travelers, 127 S. Ct. at 1206 (it is generally "presume[d] that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed" and there is no "reason why the fact that the attorney's fees in this case were incurred litigating issues of federal bankruptcy law overcomes that presumption").

A. Rules and Statutory Provisions.

1. Rule 4:42-9.

Debtors make reference to New Jersey Court Rule 4:42-9 and contend that if Columbia had sued in foreclosure, its attorneys' fees would have been capped under the state court rules. Debtors acknowledge, however, that a foreclosure action was never filed in this case. A similar argument was posed in Smiriglio v. Hudson United Bank and rejected by the Third Circuit.

In Smiriglio, the debtors planned to cure their mortgage arrears through

their Chapter 13 plan. They objected to the mortgagee's claim for attorneys' fees for services that were rendered during the bankruptcy proceeding. They argued that the mortgagee's fees should be capped under the formula provided in New Jersey State Court Rule 4:42-9. The mortgagee disagreed and claimed that bankruptcy law and section 506(b) trumped the application of Rule 4:42-9. The court concluded that because the debtors were seeking to cure a prepetition default through their plan, section 1322(e) and state law were implicated.[4]

Under New Jersey law, Rule 4:42-9 governs the award of attorneys' fees in foreclosure proceedings. However, the mortgagee in Smiriglio had not filed a foreclosure action. Rather, it had agreed to accept regular payments outside of the plan and the curing of its arrears through the debtors' plan. The court rejected the position that Rule 4:42-9 should be read "as encompassing, not simply foreclosure actions, but also actions related to or connected in some way to the foreclosure of a mortgage." Id. at 916. Instead, the Circuit noted that "there is some indication that the New Jersey Supreme Court intends that the requirement of a 'mortgage foreclosure action' be read literally." Id. at 917

[4] Section 1322(e) provides that "Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. § 1322(e).

(citing to Bergen Builders, Inc. v. Horizon Developers, Inc., 44 N.J. 435, 210 A.2d 65 (1965) (concluding that Rule 4:42-9 was not applicable to a suit on the promissory note, even though the note was secured by a mortgage)). The only issue is whether the court believed that the "lender [was] deliberately trying to engage in procedural manipulations to do an end-run around Rule 4:42-9(a)(4)." Id. at 918.

There is no evidence of an "end-run" here. In this instance, the fees sought are those that were incurred in connection with the two relief from stay motions, the filing of amended proofs of claim, and the mortgagee's attempts to receive payment during the bankruptcy process. Columbia simply seeks to collect according to the terms of the note executed by the debtors. See Smiriglio, 98 Fed.Appx. at 919 (the bank "has engaged in no 'back door' maneuver here; it simply desires to collect on the attorney's fees due to it according to the terms of the notes the [debtors] executed"). Rule 4:42-9 is not a cap to the bank's recovery here.

2. Section 506(b).

In support of its fee request, Columbia Bank contends that its fees are reasonable for purposes of section 506(b). Section 506(b) provides that:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the 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.

11 U.S.C. § 506(b). The debtors insist that the fees are not reasonable in comparison with the usual fees sought for such services in bankruptcy.[5]

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[5] Recently, the district court in Ryker explained that under section 506(b):

> The reasonableness of a fee request "has two facets: (1) the itemized fees themselves must be reasonable, and (2) the creditor's actions must be reasonable." To determine the reasonableness of a creditor's actions, the Court must consider "whether the creditor took the kind of reasonable actions similarly situated creditors would have taken, and whether such actions and fees were outside the range so as to be deemed unreasonable."

Ryker v. Current, 338 B.R. 642, 651 (D.N.J. 2006) (citations omitted).

> To determine the range and reasonableness of the actions themselves, courts employ the following twelve factors: (1) time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstance; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at 651 n.8 (citations omitted).

However, the issue presented here is not framed by the reasonableness requirement in section 506(b). That section is not relevant to the mortgagee's claim for fees, because section 506(b) does not apply to post confirmation attorneys' fees. See In re Henthorn, 127 Fed.Appx. 15, 16-17 (3d Cir. 2005) (citing to Telfair v. First Union Mortg. Corp., 216 F.3d 1333, 1339 (11th Cir. 2000), cert. denied, 531 U.S. 1073, 121 S. Ct. 765, 148 L.Ed.2d 666 (2001)). See also In re Weedling, 205 Fed.Appx. 955, 960 (3d Cir. 2006) ("Attorneys' fees arising post-confirmation are not governed by § 506(b), but rather by the mortgage document itself."); Sponaugle v. First Union Mortg. Corp., 40 Fed.Appx. 715, 716 (3d Cir. 2002).

B. Contractual Provision.

Lacking statutory authority, we turn to the contractual language. The Installment Loan Note provides in relevant part that "If you [the mortgagee] sue me [the borrower] to collect this Note, I will pay you all court costs permitted by law, plus 20% of the amount due as collection costs and attorney fees." Although Columbia did not sue on the Note or commence foreclosure proceedings against the debtors' property, they did file proofs of claim and pursued collection efforts in the context of the debtors' bankruptcy case. The Third Circuit has stated that "'the act of filing a proof of claim is an action to

collect a debt.'" In re Graboyes, No. 06-1776, 2007 WL 470450, *2 (3d Cir. Feb. 14, 2007) (quoting In re Woolaghan, 140 B.R. 377, 384 (Bankr. W.D.Pa.1992)). Motions for relief from the stay would similarly qualify as actions to collect on a debt. I can readily conclude that the provision for attorneys fees in the Note was triggered. In this regard, the debtors do not dispute that the Note provides for an award of attorneys' fees. They only challenge the amount of fees that can be awarded.

To determine the amount of attorneys fees that may be awarded under the Note, we are guided by New Jersey state law. In New Jersey, "[i]t has long since been well settled that our courts will enforce the customary attorney-fee clause in a promissory note or other instrument of obligation to the extent that the attorney fees requested as part of the judgment on the note are reasonable." Hatch v. T & L Associates, 319 N.J. Super. 644, 647, 726 A.2d 308, 309 (App. Div. 1999). In the commercial context, New Jersey courts have recognized 20% to be "a presumptively reasonable figure, subject of course to the borrower's timely exercised right to prove the contrary in the particular circumstances of the case." First Morris Bank & Trust v. Roland Offset Serv., Inc., 357 N.J. Super. 68, 72, 813 A.2d 1260, 1263 (App. Div.), certif. denied, 176 N.J. 429, 824 A.2d 157 (2003) (citing to Alcoa Edgewater No. 1 Fed. Credit Union v. Carroll, 44 N.J. 442, 449, 210 A.2d 68 (1965)). See also Bergen

Builders, Inc. v. Horizon Developers, Inc., 44 N.J. 435, 210 A.2d 65 (1965) (finding 15% to be reasonable); New Jersey Mortgage & Invest. Corp. v. Young, 134 N.J. Super. 392, 341 A.2d 360 (Law Div. 1975) (finding 20% to be reasonable). In the consumer context, New Jersey courts have similarly held that a 20% figure for attorneys fees may be allowed, Alcoa Edgewater No. 1 Federal Credit Union v. Carroll, 44 N.J. 442, 448, 210 A.2d 68, 72 (1965) ("While the fact that the parties agreed to [a 20% provision for attorneys fees] in the note may perhaps be taken as Prima facie evidence that the 20% Figure was here a reasonable one, the defendant was at liberty to show and urge that the particular facts and circumstances demonstrated otherwise."). Notwithstanding the prima facie status of a contractual provision between the parties, the courts have consistently held that "any fee arrangement is subject to judicial review as to its reasonableness." Belfer v. Merling, 322 N.J. Super. 124, 141, 730 A.2d 434, 443 (App. Div.), certif. denied, 162 N.J. 196, 743 A.2d 848 (1999).

Here, the mortgagee is not seeking the 20% of the amount due as collection fees, which would amount to over $16,000. In the invoices presented, the mortgagee has itemized over $9,000 of time expended, but has charged the debtors $7,795.25, which includes $300.88 of costs. The debtors have challenged the amount as unreasonable and excessive for the services

rendered. I agree with the debtors that the charges are excessive and must be adjusted downward to be reconciled with the nature, the extent, and the value of the services rendered.

The services rendered here involved routine matters that pertained primarily to the default by the debtors on payments to the mortgage company after confirmation of their Chapter 13 plan, and the provision of a payoff statement to the debtors in connection with the sale of their house. No complex or unusual issues were presented. Many of the tasks performed were ministerial in nature,[6] charged at the relatively high hourly rate, for consumer cases in the District of New Jersey, of $320. Counsel has reflected in his response to the debtors' objection that he does not file "cookie cutter" motions that fail to accurately and fully inform the court about the facts and circumstances of each case. That approach is certainly commended and encouraged. Nevertheless, the fees charged must fall within a range of reasonableness, considering the nature, the extent and the value of the

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[6] See, e.g., entry from June 20, 2006:

> Prepare amended claim; email to E. Tirone, prepare fax signature certification; email E. Tirone re: same; review docket and discover second claim filed and download; call E. Tirone; prepare changes made to claim by E. Tirone; efile claim; prepare and efile motion to amend claim and direct payment of arrears 2.60; . . . Amount 832.00

services performed.[7]

The legal services performed on behalf of the mortgagee, and the adjustments necessary to the fees charged to the debtor, may be categorized as follows:

a. Two Motions for Relief from the Stay.

The debtors have correctly noted that customarily, we award a mortgagee

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[7] While not directly applicable to the reasonableness assessment required here, the statutory articulation in section 330 of the Bankruptcy Code of the criteria to be considered to determine reasonableness in awarding compensation to professional persons appointed under 11 U.S.C. § 327 is useful:

> (3) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--
>
> (A) the time spent on such services;
> (B) the rates charged for such services;
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
> (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3).

an attorney fee of $250 plus reimbursement for the $150 filing fee for a motion for relief from the stay on a "no-look" basis, meaning that no affidavit of services is required to justify that fee. The practice of awarding "no-look" fees does not preclude the submission of an itemization of services rendered to justify a higher fee, as the mortgagee has done here. However, the juxtaposition of the so-called "standard" fee of $250 for such a motion, and the amounts charged for each of the two motions here (approximately $2,100 and nearly $2,700[8]) is notable. No complex issues are raised in those motions, and the second motion is nearly identical to the first motion, except for the status of the debtors' payments. For the first motion, I will reduce the request to $750, and for the second motion, to $500, with an additional $400 for travel time.[9] In addition, a reimbursement of $300 for filing fees will be allowed.

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[8] The amount of $2,700 includes $1,952 for a court appearance on both the second motion for relief and on the mortgagee's motion to amend the proof of claim. Over $1,200 of the court appearance charge is time traveled to attend court. While the mortgagee is correct that a litigant's choice of counsel must be protected, and that travel time is compensable, such time is customarily compensable at half of the hourly rate charged. See, e.g., Rand-Whitney Containerboard v. Town of Montville, Civ. No. 3:96CV413, 2006 WL 2839236, *22 (D.Conn. Sept. 5,2006); In re McGuier, 346 B.R. 151, 161 (Bankr. W.D.Pa. 2006); In re Vantage Investments, Inc., 328 B.R. 137, 147 (Bankr. W.D.Mo. 2005).

[9] See supra n.7.

b. Motion for Approval of Amended Proofs of Claim and to Direct Debtors to Amend Plan to Provide for Payment of Arrears.

In its motion for approval of its amended proof of claim, the mortgagee acknowledged that the original proofs of claim filed "neglected to set forth the arrears due Columbia", and that the failure was "an oversight and was a clerical error and was excusable neglect." Apparently, although the debtors noted arrearages on each of the mortgages in the amounts of $1,800 and $400 in their Chapter 13 plan, the original proofs of claim filed failed to note arrearages. The amended proof of claim asserted a consolidated arrearage claim of $1,623.42. The mortgagee seeks approximately $1,000 in attorneys fees for the filing of the motion to approve the amended proof of claim. It is not reasonable to charge the debtors for the mortgagee's mistake or oversight. No fee will be awarded in connection with the filing of amended proofs of claim.

c. Services Rendered in Connection with Sale of Debtors' Home.

The debtors filed two separate motions to gain court approval for the sale of their house, because the first proposed sale could not be consummated. Although the Chapter 13 trustee filed objections to each of the motions, the mortgagee did not file any objections. The payoff statement on the two mortgages amounted to under $100,000, while the selling price of the property

was $260,000. For services rendered in monitoring the sale process and providing a payoff statement, the mortgage company seeks approximately $1,750. Because the legal services rendered in this connection should have been nominal, the amount requested is reduced to $400.

d. Review of File and Consultation with Client.

The other categories listed above overlap somewhat with the legal services rendered in reviewing the file and consulting with the client, but an additional amount of approximately $1,000 is sought for frequent contacts between the attorney and the client. Some compensation is appropriate for such contact, but in light of the overlap with the services rendered that are being compensated separately, a reduction is necessary. An additional attorney fee of $300 will be allowed for these services.

To recap, a total award of $2,350, plus $300.88[10] in costs, is allowed.[11] The debtors' motion to disgorge the funds paid by the debtors in excess of the fees allowed at settlement is granted.

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[10] PACER costs of $0.88 were incurred.

[11] No attorneys' fee may be charged to the debtors on account of legal services performed on behalf of the mortgagee in defense of the debtors' objection to the mortgagee's payoff amount.

The debtors' counsel is requested to submit an order in conformance with this opinion.

Dated: April 12, 2007

JUDITH H. WIZMUR
CHIEF JUDGE
U.S. BANKRUPTCY COURT