

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:) Bankr. No. 97-50639
)
CHELSEA D. FERGUSON) Chapter 11
aka Chuck D. Ferguson)
dba Action Sanitation)
dba Fergie's Place)
dba Ferguson Construction)
Soc. Sec. No. 503-64-4956)
)
and) DECISION RE: ATTORNEYS' FEES
) OF FULLY SECURED CREDITOR
)
DONNA M. FERGUSON)
Soc. Sec. No. 502-52-6046)
Debtors.)

The matter before the Court is the request for attorneys' fees and costs by Clifford L. Brown, a fully secured creditor. This is a core proceeding under 28 U.S.C. § 157(b)(2). This decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Brown's request must be reduced from \$11,041.49 to \$5,520.76.

I.

Chelsea D. and Donna M. Ferguson filed a Chapter 11 petition on December 17, 1997. Among their secured creditors they scheduled Clifford Brown, who was holding a partially secured claim of \$218,891.89. Blanche Ferguson was listed as a co-debtor on Brown's claim.

On March 2, 1998, Brown moved for relief from the automatic stay so that he could continue a foreclosure action pending in state court. Brown alleged that Debtors had defaulted on the loan payments and that the mortgaged property was not necessary for an effective reorganization. Michael V. Wheeler of Morrill, Thomas, Nooney & Braun, L.L.P., served as Brown's counsel.

Debtors responded on March 27, 1998. They stated that Brown's claim may be satisfied from property mortgaged by Blanche Ferguson and that their (Debtors') property was necessary for reorganization. Debtors also argued that Brown's foreclosure on the property mortgaged by Blanche Ferguson would or had entirely extinguished the existing debt.

Brown replied on March 31, 1998. He stated that his claim against Debtors is separate from his claim against Blanche Ferguson and that no judgment against Blanche Ferguson had been entered. He said that an appraisal of the Blanche Ferguson property was pending and that a deficiency debt would likely exist after a foreclosure sale of that property.

A hearing was held March 30, 1998. The matter was continued to May 4, 1998 to allow a final judgment in Brown's state court foreclosure action against Blanche Ferguson to be entered. At the continued hearing on May 4, 1998, the matter was again continued to allow Brown to obtain an appraisal. On June 1, 1998, the matter was again continued, this time to allow Blanche Ferguson's probate estate to obtain an appraisal. The matter was continued yet again on July 13, 1998 to allow the appraisal to be completed. The Court

directed the written appraisal to be completed by August 24, 1998, the date of the continued hearing. Through the July 13, 1998 hearing, Attorney Wheeler continued to represent Brown.

At the August 24, 1998 hearing, Brown's new attorney, Timothy L. Thomas, also of the Morrill Thomas firm, reported that the appraisal had been completed but not written. The matter was continued again to October 16, 1998. No appearance for Brown was made at the October 16, 1998 hearing. Attorney John H. Mairose, counsel for Debtors, stated that some discovery was needed. A sixth continued hearing was set for November 23, 1998. On that day, the parties reported they were working on a settlement. Penny Tibke Platnick, another attorney from Morrill Thomas, appeared for Brown. The matter was continued to February 1999 when it was to be heard with the final approval of Debtors' disclosure statement and confirmation of their proposed plan.

Debtors did not get their disclosure statement filed soon enough for the matters to be heard at the February term of court. Consequently, Brown's relief from stay motion was continued from February to March. At confirmation on March 16, 1999, Brown, now represented by John K. Nooney, also of Morrill Thomas, withdrew his relief motion.

After further delays arising from the sale of estate assets and after a dismissal motion was filed by the United States Trustee, a plan was finally confirmed on September 28, 1999. A Plan as Confirmed was filed October 25, 1999. It recognized that Debtors had sold property mortgaged to Brown and had remitted

proceeds of \$164,154.42 to him. The Plan provided that Brown's remaining claim of \$84,458.32 would be paid over seven years with 12% interest. It also acknowledged that the foreclosure on Blanche Ferguson's property would be stayed during the repayment term, so long as a default did not occur. The plan also acknowledged that Brown's claim was fully secured and that he was entitled to attorneys' fees and costs under 11 U.S.C. § 506, subject to later objection by Debtor to the reasonableness of the fees and costs.

Brown filed his application for attorneys' fees and costs under § 506(b) on December 8, 1999 and itemized and requested \$10,416.50 in fees and \$624.99 in sales tax on the fees, for a total request of \$11,041.49. In addition to the attorneys who appeared of record, the application indicated that Greg Bernard and Ryan Taylor, two more members of the Morrill Thomas firm, also had rendered services for Brown.

Debtors objected on December 27, 1999. They argued that the total fees sought were excessive, especially since no substantial litigation was precipitated to enforce Brown's rights in either state court or the bankruptcy court. In particular, Debtors objected to fees totaling \$9,586.50.

A hearing on the fee application was held January 25, 2000. The parties indicated they would attempt a settlement. The Court was advised by letter dated February 11, 2000 that a settlement could not be reached. The matter was taken under advisement. Thereafter, the Court requested and received from Debtors a supplemental pleading that set forth the particulars of their

objection regarding those services that they deemed unnecessary or excessive. In his reply to the supplement, Brown stated that the services rendered were not excessive in light of the complexity and nature of the case and the fact that Debtors wanted Brown to avoid foreclosing on Blanche Ferguson's property.

II.

Section 506(b) of the Bankruptcy Code allows fully secured creditors to recover certain post-petition costs, including attorneys' fees and costs. The creditor must establish: (1) that it is over secured in excess of the fees requested; (2) the parties' agreement provides for the fees; and (3) the fees requested are reasonable. *First Western Bank & Trust v. Drewes (In re Schriock Construction, Inc.)*, 104 F.3d 200, 201 (8th Cir. 1997) (citing *In re Foertsch*, 167 B.R. 555, 562 (Bankr. D.N.D. 1994) (cites therein omitted)); *In re Cushard*, 235 B.R. 902, 906 (Bankr. W.D. Mo. 1999) (creditor bears burden of proving reasonableness of fees sought under § 506(b)); *In re Kroh Bros. Development Co.*, 105 B.R. 515, 520 (Bankr. W.D. Mo. 1989) (creditor bears burden of proving reasonableness of the request).

In this case, Debtors concede that Brown's claim is secured in excess of the attorneys' fees that he has sought under § 506(b). There is also no dispute that the parties' agreement provides for the payment of these fees. Thus, the only issue present is the reasonableness of the amount sought.

The "touchstone" for determining the reasonableness of the fees is what the creditor would have spent if the creditor were paying rather than passing the fees and costs onto the debtor. In *re Smoots*, 230 B.R. 140, 143-44 (Bankr. D. Minn. 1996). They include those fees that are necessary to the collection and protection of the creditor's claim. *Kroh Bros.*, 105 B.R. at 521. The fees and costs should bear some reasonable relationship to the claim being protected and the risks born by the creditor if the debtor's plan failed. *Smoots*, 230 B.R. at 143. Attorneys' fees incurred by a creditor are inherently unreasonable if they are "not cost-justifiable either by the economics of the situation or necessary in order to preserve the creditor's interest in light of the legal issues of the case." *Foertsch*, 167 B.R. at 562. Fees may be disallowed if the services rendered were not necessary or were the result of excessive caution or overzealous advocacy. *Kroh Bros.*, 105 B.R. at 521. A balance must be struck between moderation in the interest of the estate and the need to be generous enough to encourage lawyers to render the "necessary and exacting services that bankruptcy cases often require." *Id.* at 520 (quoting *In re Henning*, 55 B.R. 682, 694 (Bankr. D.S.D. 1985) (discussing the allowance of attorneys' fees under § 330)).

Several factors¹ may be considered. *Kroh Bros.*, 105 B.R. at

¹ After the court determines whether the creditor's attorneys' actions were reasonable and prudent under § 506(b), some

521. Those relevant here include: (1) whether the legal services were necessary to promote the creditor's interest; (2) whether the legal services were permitted under applicable law, including the Bankruptcy Code; (3) whether the legal services were compatible with bankruptcy policy as derived from relevant provisions of the Code and case law interpreting it; (4) whether the time spent was commensurate with the complexity of the task; (5) whether the hourly rate is appropriate under applicable bankruptcy standards; (6) whether the service was rendered in a competent, cost-effective manner; and (7) whether the fee should be adjusted to reflect the nature of the case and the manner of its administration. *Id.* (citing *In re Wonder Corp. of America*, 72 B.R. 580, 588-89 (Bankr. D. Conn. 1987), *aff'd*, 82 B.R. 186 (D. Conn. 1988)). The first six factors are related to the reasonableness of the fees sought; the last reflects the court's discretion. *Id.* See also *Cushard*, 235 B.R. at 907.

III.

Brown's law firm's fee application does not demonstrate that all services were rendered in a competent, cost-effective manner. See *Kroh Bros.*, 105 B.R. at 521. Instead, the application shows

courts, when deciding whether the *itemized* fees are reasonable, have looked to the twelve factors used to review attorneys' fees under 42 U.S.C. § 1988 set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (cited in *Winter V. Cerro Gordo County Conservation Board*, 925 F.2d 1069, 1073-74 and 1074 n.8 (8th Cir. 1991) (cited in *Cushard*, 235 B.R. at 902 (emphasis therein))).

that the file was passed around the firm. Significant unproductive time was spent by attorneys "getting up to speed" on the case and conferring with other members of the firm on the file only to soon after pass it to another. Also, the time spent on some services appears excessive. For example, justification for the several hours in drafting a foreclosure summons and complaint and for the several hours of research on general topics has not been provided by Brown.

Further, under the guidelines of *Kroh Brothers* and *Foertsch*, the high fees requested by Brown under § 506(b) cannot be justified by the economics of the situation. While it is true that Brown's claim took a long time to resolve and that some delay may have been occasioned by Debtors' desire to minimize the expose of the property mortgaged by Blanche Ferguson, the record does not show that Brown's claim was ever in danger of becoming unsecured, even after the payment of attorneys' fees.

The law firm's fee application contained very limited descriptions of many of the services rendered. Were the Court to eliminate, line by line, those services that were not rendered in a cost effective manner, not justified by the economics of the situations, and not adequately described (thus not permitting the Court to determine if they are reasonable), few compensable services would remain. Thus, a 50% deduction will be made on all the services. This will permit a fair allowance under § 506(b) without over penalizing Morrill Thomas, whose exposure to the requirements of a fee application in bankruptcy proceedings is limited, for their inadequately itemized fee application. The

resulting allowance of \$5,208.25 in compensation for services, plus sales tax of \$312.51, is reasonable and in line with what Brown would spend if he were footing the bill. *Smoots*, 230 B.R. at 143-44.

An appropriate order shall be entered.

So ordered this 31st day of March, 2000.

BY THE COURT:



Irvin M. Hoyt
Bankruptcy Judge

ATTEST:

Charles L. Nail, Jr., Clerk

By: [Signature]
Deputy Clerk



NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

MAR 31 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

MAR 31 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota

By: [Signature]

Case: 97-50639 Form id: 122 Ntc Date: 03/31/2000 Off: 3 Page : 1
Total notices mailed: 8

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