

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

IN RE:)	CASE NO. 90-10074
)	
WILLIAM O. LEPTIEN and)	CHAPTER 13
SUSAN LEPTIEN,)	
)	MEMORANDUM OF DECISION
)	RE: REQUEST FOR TERMS
Debtors.)	

The matter before the Court is a request for costs by Farm Credit Bank of Omaha (FCBO) made in conjunction with FCBO's Motion to Dismiss. It is a core proceeding under 28 U.S.C. § 157(b) (2). This ruling shall constitute Findings and Conclusions as required by Bankr. Rs. 7052 and 9014.

I.

FCBO filed a Motion to Dismiss on July 24, 1990 on the grounds that Debtors had failed to timely pay sums due to the Chapter 12 Trustee pursuant to Debtor's confirmed plan of reorganization. Under 11 U.S.C. §§ 506¹ and 105, FCBO also requested attorneys' fees incurred by the FCBO in bringing the Motion. Debtors did not file a response to the Motion.

A hearing was held August 21, 1990. FCBO withdrew the Motion to Dismiss at the hearing because Debtors in the interim had paid the delinquent sums due. FCBO, however, pursued their request for "terms" in the amount of \$300. Counsel for FCBO was directed to file an

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Section 506 governs valuation of secured claims. The Court is unable to find any basis for an award of attorneys' fees incurred pursuant to a Motion to Dismiss under that statute.

itemization of these costs.

By letter dated August 22, 1990, counsel for FCBO itemized its services in connection with the Motion to Dismiss. These services totaled \$360.

II.

Bankruptcy Rule 7054 states the Court may allow costs to the prevailing party in an adversary proceeding. Pursuant to Bankr. R. 9014, Bankr. R. 7054 is also applicable to contested matters, including motions to dismiss.

Section 1920 of Title 28 of the United States Code sets forth what may be taxed as costs by a "judge or clerk of any court of the United States [.]"

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (in pertinent part).² Attorneys' fees are generally riot included as costs. Obin v. District No. 9 of the International Association of Machinists and Aerospace Workers, 651 F.2d 574, 580 (8th

While a bankruptcy court is not a court of the United States, see 28 U.S.C. § 451, it is an adjunct of the district court which may tax costs under § 1920. Therefore, § 1920 is applicable in bankruptcy cases. See Collier on Bankruptcy, 2ed., ¶7054.07.

Cir. 1981).

Section 105 of the Bankruptcy Code states:

The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a). This section provides the Bankruptcy Court with broad, general powers to grant "such relief as is necessary to effectuate the provisions of the Bankruptcy Code." Otoe County National Bank (In re Easton), 882 F.2d 312, 315 (8th Cir. 1989). Its purpose is to give a bankruptcy court the power necessary to issue equitable orders, such as injunctions and stays, and to punish for contempt. Bird v. Carl's Grocery (In re NWFX, Inc.), 864 F.2d 593, 595 (8th Cir. 1989). While these equitable powers are broad, they are not without limitations. Easton, 882 F.2d at 315. They must be exercised consistent with the provisions of the Bankruptcy Code. Id. "Section 105 does not empower a bankruptcy court to create new substantive rights." NWFX, Inc., 864 F.2d at 595.

III.

The initial question presented is whether costs under Bankr. R. 7054 and 28 U.S.C. § 1920 should be awarded to FCBO as he "prevailing" party on its Motion to Dismiss. Costs to the prevailing party on

motions to dismiss, motions for relief from the automatic stay, or similar contested matters generally have not been awarded as a matter of course in bankruptcy cases in this District. See Local Bankr. R. 402. The Court concludes that the circumstances here do not warrant departure from that procedure.

Second, the Court does not find it appropriate at this time to assert its equitable powers under § 105 to grant FCBO's costs. Debtors are cautioned, however, that any future delay in making payments pursuant to their confirmed plan for which a creditor or the Trustee³ must take legal action to remedy will not be lightly regarded.

An order denying FCBO's request for costs will be entered.

Dated this 11th day of December, 1990.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____

Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

When plan payments to the Chapter 12 Trustee are delinquent, the trustee is the more appropriate party to take action necessary to insure that the payments are made, present the case for dismissal, or oppose discharge. 11 U.S.C. §§ 1202(b) (4), 1208(c), 1202(b) (1), and 704(6).

NORTHERN DIVISION

IN RE:)	CASE NO. 90-10074
)	
WILLIAM O. LEPTIEN and)	CHAPTER 13
SUSAN LEPTIEN,)	
)	ORDER RE:
)	REQUEST FOR TERMS
Debtors.)	

In recognition of the Memorandum of Decision Re: Request for Terms entered this day,

IT IS HEREBY ORDERED that Farm Credit Bank of Omaha's request for costs associated with bringing the Motion to Dismiss filed July 24, 1990 is DENIED.

So ordered this 11th day of December, 1990.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____

Deputy Clerk

(SEAL)