

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF MISSOURI

IN RE:)	
)	
ANDRE SEAWARD HARVEY and)	Case No. 03-21988
CHARNISE HARVEY)	Chapter 13
)	
Debtors.)	
)	

MEMORANDUM OPINION

This matter is before the Court on the objection of Debtors Andre Seaward Harvey and Charnise Harvey (“Debtors”) to the claim filed by Premier Bank (“Bank”) based on a note and deed of trust held by the Bank on Debtors’ residence. Specifically, Debtors object to attorney’s fees and expenses claimed by the Bank for services performed by the Bank’s counsel in representing the Bank in the Debtors’ Chapter 13 proceeding. Debtors contend that many of the actions taken by the Bank’s counsel were unnecessary to protect the Bank’s interest and that the amount of time spent on these and certain other matters was not reasonable. The Bank contends that many of the tasks performed by its counsel were done in response to pleadings filed by the Debtors including numerous amended plans, the objection itself and discovery requests promulgated in connection with the objection. The Court has jurisdiction over this matter under 28 U.S.C. §§ 1334(b) and 157(a) and (b). This is a core proceeding which the Court may hear and determine pursuant to 28 U.S.C. § 157(b)(2)(B). For the reasons set forth below, the objection is sustained in part and overruled in part. The Court finds that certain actions undertaken by Bank counsel such as the motions to vacate the order of confirmation were unnecessary and that the related fees should not be allowed. The Court does not, however, believe that the motion for relief from automatic stay and related pleadings were unwarranted or filed in bad faith and overrules Debtors’ objection for the fees incurred in that effort. Finally, after

reviewing the application and the detailed billing statement attached to it, the Court finds that certain fees should be disallowed for a variety of reasons including the provision of insufficient detail, duplication of effort, unnecessary services or excessive time.

I. BACKGROUND

On July 12, 2002, Debtors executed a promissory note payable to the Bank in the amount of \$33,200, secured by a deed of trust on their residence. The note matured on August 1, 2003, but the Debtors were unable to pay it. On August 27, 2003, the Debtors filed this Chapter 13 proceeding, along with a proposed plan. As it relates to the claim of the Bank, the plan proposed to pay the claim at the rate of \$400 per month with interest at the contract rate. The plan is a base plan scheduled to run for a period of 55 months. The original plan provided that the payments to the Bank were to be made directly by the Debtors rather than through the Chapter 13 Trustee. The claim of the Bank was characterized as a long-term debt, pursuant to 11 U.S.C. § 1322(b)(5), on which the last payment is due after the date on which the final payment under the plan is due. On Schedule D of their Schedules of Assets and Liabilities, Debtors listed the debt to the Bank in the amount of \$32,211 and scheduled the value of their residence securing the claim as \$40,000.

On October 15, 2003, the Bank filed a motion for relief from automatic stay, alleging that as of the date of the filing, the amount owed was \$32,153.75. The Bank asserted an entitlement to relief from stay on the grounds that the Debtors had failed to make the required post-petition payments, being delinquent for a period of 60 days, and that there was no equity in the real property to provide adequate protection to the Bank. A response to the motion for relief from stay was due on October 30, but none was filed. Accordingly, on November 3, 2003, the Court entered an order granting the motion for relief. On the following day, Debtors filed a motion to vacate the order for relief, alleging that the failure to file a timely response had been inadvertent, that they

had equity in the property and that the Bank had refused tendered post-petition payments. On November 5, the Bank filed an objection to the motion to vacate in which, among other things, it realleged that there was no equity in the real property. On December 1, Debtors filed a motion for permission to file a response to the motion for relief from stay out of time. After a hearing at which both the motion to vacate and the motion to file the answer out of time were considered, the Court entered its order granting both motions.

In the meantime, on November 18, the Debtors filed the first of many amendments to their proposed Chapter 13 plan. As it relates to the Bank, the first amended proposed Chapter 13 plan provided the same treatment as the original plan with the exception that the Debtors proposed that the payments on the Bank's claim were to be made by the Chapter 13 Trustee from the monthly plan payments made by the Debtors. One day later, Debtors filed another amended proposed plan, identical in all respects to the plan filed on November 18 with the exception that the proposed monthly payment to the Bank was increased to \$600.

On December 20, 2003, the Debtors filed yet another amended proposed Chapter 13 plan which made significant changes in the proposed treatment of the Bank's claim. In this amended plan, Debtors provided that the entire amount of the Bank's claim was to be paid in full over the life of the plan, increased the proposed payment to \$701.50 and listed the principal balance of the claim to be \$32,211. Shortly after the filing of this amended plan, on December 31, 2003, the Bank filed a Proof of Claim in which it identified the amount owed as \$36,872.24. On January 5, 2004 the Bank withdrew its motion for relief from stay.

On January 27, 2004, Debtors filed an objection to the Bank's claim, alleging that it included unspecified fees of \$3,381.64 and that the rate of interest payable to the Bank should be the then prevailing 5.37% Chapter 13 Rate, not the 8% rate of interest specified by the contract,

despite the fact that Debtors' plan proposed to pay the claim at the contract rate. The Bank responded to the objection on February 6, 2004 alleging, among other things, that the unspecified fees were attorney's fees and costs incurred by the Bank in the Chapter 13 proceeding, to which it was entitled under the terms of the note and deed of trust and 11 U.S.C. §506(b), as the value of the collateral securing its claim was in excess to the amount of the claim. The Bank further alleged that the fees incurred were necessary to protect the interests of the Bank in the case and were reasonable in amount.

On February 25, 2004, the Debtors made their final amendment to the proposed Chapter 13 plan, which, however, made no changes in the proposed treatment of the Bank's claim. The Court entered an order confirming this final amended plan on March 9, 2004. Later the same day, the Bank filed a motion to vacate the confirmation order, noting the pendency of the objections to its claim and alleging that reconsideration of confirmation of the plan was necessary to insure payment of the proper amount on its claim under the plan. On March 10, 2004, the Court entered its order denying the motion to vacate. On March 16, the Bank filed a motion to reconsider the order denying the motion to vacate, alleging that the amount of the Bank's allowed claim should be resolved prior to confirmation and that the amount to be paid it under the plan should be as stated in its proof of claim, citing an applicable local rule. On March 24, 2004, the Court once again denied the motion seeking relief from the confirmation order, noting that the amount of the Bank's allowed secured claim would be determined by the claim allowance process.

On April 15, the Court held a hearing on the objection to the Bank's claim. At that time, the Court observed that the rate of interest to be paid on the Bank's claim was governed by the plan which had, since the filing of the objection, been confirmed and which is binding on the Debtors as well as the Bank. The plan specifies the Bank's claim is to be paid at the contract rate

of 8%. With regard to the claimed attorney's fees and expenses, the Court ordered the Bank to file an application for allowance and payment within ten days and afforded the Debtor an opportunity to file objections to that application within seven days thereafter. The application and objections have now been filed. In its application, the Bank claims attorneys fees of \$5,521.50 and expenses of \$56.14. Generally, Debtors' object to fees incurred for certain categories of activities by Bank's counsel, particularly the filing of the motion for relief from automatic stay and the Bank's objection to the Debtors' subsequent motion to vacate the order granting that motion. Debtors contend that many of the activities reflected in the application were not necessary to protect the interests of the Bank in the case and that the amount of time spent on certain of those activities was not reasonable and should not be compensated.

II. DISCUSSION AND ANALYSIS

A. Applicable Legal Framework

Pursuant to 11 U.S.C. § 506(b), a secured creditor is entitled to augment its claim by fees, costs and charges incurred if they are reasonable in amount and provided for by the agreement under which the claim arises. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). In order to recover attorney's fees, a secured creditor must establish that: (1) it was secured by property of a value in excess of the amount of the claim; (2) the requested fees are reasonable; and (3) the agreement giving rise to the claim authorizes the recovery of the fees. *White v. Coors Distributing Co. (In re White)*, 260 B.R. 870, 880 (B.A.P. 8th Cir. 2001); *In re Spidel*, 207 B.R. 882, 885 (Bankr. W.D. Mo. 1997). In determining the reasonableness of the fees, the court must consider whether the actions taken were reasonable and prudent in the circumstances in protecting the creditor's interest in the collateral and whether the amounts sought for the services performed are reasonable. *White*, 260 B.R. at 880; *In re Cushard*, 235 B.R. 902,

906-07 (Bankr. W.D. Mo. 1999). To determine whether the actions of counsel were necessary to protect the creditor's interest, the court typically looks at: (1) whether, and to what extent, the creditor was oversecured; (2) whether the debtor provides for payment of the secured claim; and (3) whether the creditor faced a risk of nonpayment. *In re Thomas*, 186 B.R. 470, 478 (Bankr. W.D. Mo. 1995). Secured creditors are not entitled to be reimbursed for fees incurred in every action taken by their counsel. *Thomas*, 186 B.R. at 478; *In re Kroh Brothers Development Co.*, 105 B.R. 515, 521 (Bankr. W.D. Mo. 1989). The creditor bears the burden of proof on each of these various elements. *White*, 260 B.R. at 880; *Cushard*, 235 B.R. at 906; *Kroh*, 105 B.R. at 520. An applicant must provide supporting documentation that describes the nature of the services in sufficient detail to permit the court to determine that they are authorized by the agreement, necessary and reasonable. *Spidel*, 207 B.R. at 887. Courts have held that this requires that detailed time records describe the purpose, nature and substance of telephone calls, conferences and legal research. *Kroh*, 105 B.R. at 522. When insufficient detail has been provided, the court may disallow requested compensation. *Kroh*, 105 B.R. at 522. The court may also disallow or reduce entries it finds are duplicative or unnecessary. *Spidel*, 207 B.R. at 887. Overall, the court has broad discretion in determining the amount of fees to be allowed. *Thomas*, 186 B.R. at 477; *Kroh*, 105 B.R. at 520.

B. Allowance of Requested Fees

Although the promissory note and deed of trust have not been provided to the Court, Debtors do not appear to dispute that the fees and expenses sought are authorized by those governing documents. Similarly, the Debtors do not dispute that the value of the property, which they scheduled at \$40,000, is sufficient to cover the principal and accrued interest as well as the amount of attorney's fees sought by the Bank. The dispute centers on whether the amount of fees

sought is reasonable. The requested fees relate to one of several activities in which the Bank's counsel have been involved in the case, including the preparation and filing of a motion for relief from automatic stay and related motions, responding to the objection to the claim and related discovery requests and preparation and filing of motions to vacate the order confirming Debtors' Chapter 13 plan. The Court will consider each of these issues separately.

Debtors contend that the filing of the motion for relief from stay was completely unnecessary, primarily because they have equity in the property sufficient to protect the Bank's claim and that the validity or priority of the Bank's security interest was never questioned. Debtors also point out that the allegations in the motion for relief from stay were in some respects inaccurate. As an example, they cite the allegation that the Debtors lacked equity in the property, arguing that the Bank knew or should have known that it was, as it now alleges, oversecured.

While the Court agrees that the Bank has spoken out of both sides of its mouth in this case, and has some concern about that, after consideration of all the circumstances, the Court does not believe that the motion for relief from automatic stay was asserted in bad faith or was unwarranted or unreasonable. As noted above, the existence of equity in the collateral is only one of the factors the Court should consider in determining whether actions taken by secured creditor's counsel were necessary to protect the creditor's interest. Another is whether the Debtors propose payment of the claim. In this case, the Debtors' original plan and some of the subsequent iterations of that document raised questions about the Debtors' proposed treatment of the claim and its payment in full. The Debtors originally characterized the Bank's claim as a long-term debt on which the last payment was due after the date of the last plan payment, pursuant to 11 U.S.C. § 1322(b)(5), listed no arrearage amount and offered a monthly payment of \$400. That characterization was obviously inaccurate, because the claim had matured prior to the filing of the case. As such it would have to

be paid in full during the term of the plan, a realization Debtors came to only later in the process. At the rate of \$400 per month, as proposed in the original plan, even the unpaid principal balance of \$32,211 would not have been paid in full under the original plan. Although the Bank filed no objection to the original plan or any of the amended plans, doubtless an objection could have been so filed. The Court cannot say that it was unreasonable for the Bank to choose the motion for relief from automatic stay as its vehicle for raising concerns about the Debtors' proposal for payment of its claim. The Court notes that the Debtor amended the plan no less than four times, making various changes to the proposed treatment of the Bank's claim, including its classification and amount, the monthly payment and the applicable rate of interest.

Debtors complain about the allegation in the motion that they had not made post-petition payments. It evidences, they say, a misunderstanding of the process, because they proposed to make payments through the plan and it had not yet been confirmed. The problem with this contention, however, is that the original plan, the one on file at the time the Bank filed its motion, proposed that the Debtors make payments directly. Only later was the plan amended to provide that the monthly payment to the Bank would be made through the trustee.

Debtors cite the withdrawal of the motion prior to a hearing as evidence that it was not filed in good faith. The withdrawal, however, was apparently prompted by the filing of Debtors' fourth plan which finally characterized the debt as one to be paid in full under the plan at the contract rate of interest, listed the full principal balance and increased the monthly payment to just over \$700, an amount which was reasonably likely to result in retirement of the entire claim over the proposed 55-month term of the plan.

Debtors also object to the time spent by counsel in opposing the motion to vacate the order for relief, suggesting it was petty and unnecessary. Of course, no such filing would have been even

possible had the Debtors filed a timely response to the motion for relief and not been required to file a motion to vacate. While this action may have exhibited, as Debtors put it, a “lack of comity,” the Bank was within its rights in resisting the motion and the Court does not consider the opposition to be a “sharp practice.” Moreover, in reviewing the itemized fee statement submitted by the Bank as part of its application, the Court notes that Bank counsel began to prepare foreclosure documentation immediately upon the entry of the order granting the motion for relief from stay. Because the Bank thus incurred fees preparing to do something it was at that time entitled to do, the Court understands why it might have opposed the motion to vacate.

Debtors also contend that the Court should deny all fees relating to the Bank’s response to the objection to its claim. Their reasoning in making this assertion is that the objection was only made necessary by the fees claimed which were generated by the Bank’s unreasonable and unnecessary motion practice. Since the Court does not agree that the Bank’s fees on these matters should be disallowed in their entirety, the Court likewise does not agree that the Bank was unreasonable in responding to the objection and thus preserving the possibility of allowance of the fees or some portion of them. Moreover, the Court notes that, in addition to seeking disallowance of the fees, the objection also suggests that the Bank’s claims should be paid at the Chapter 13 Rate rather than the contract rate. The Bank would have been justified in responding to the objection, if for no other reason than to point out that the Debtors’ own pending proposed plan (later confirmed and now binding on the Debtors as well as the Bank) specifies that the claim is to be paid at the 8% contract rate.

The fees incurred relating to the motions to vacate the order confirming the plan are another matter, however. The Court agrees with Debtors that these motions were completely unnecessary and the fees incurred in preparing them, therefore, unreasonable. The plan confirmed by the order

entered on March 9, 2004 provided for the Bank's claim to be paid in full over the life of the plan in monthly payments at the contract rate of interest. Although the amount specified to be paid did not include the Bank's post-petition fees, in this district, the amount of the claim to be paid under the plan is determined by the claim allowance process. At the time of the entry of the confirmation order, the Debtors' objection to the Bank's claim and the Bank's response were still pending before the Court. The outcome of that proceeding would determine the amount the Bank would be paid under the plan. For that reason, it was not necessary to vacate the confirmation order. The Bank, however, sought to do so not once, but twice. This activity was not necessary in order to protect the Bank's interest and the fees incurred in the process will not be allowed.

The Court has reviewed the itemized statement of fees and expenses attached to the application in detail. After that review, the Court has concluded that certain of the entries on the fee statement should not be allowed or should be allowed in an amount less than the amount stated. In some instances, the descriptions of the services rendered are not sufficiently specific to permit the Court to determine precisely what was done, whether it was necessary and whether the amount of time spent was reasonable. In some cases, more than one attorney was involved in performing the same tasks, such as research or a conference call, in a matter that the Court regards as uncomplicated and not requiring the services of multiple counsel. In certain other instances, the Court believes that the amount of time expended on a described matter was more than reasonable. Attached to this opinion as Exhibit A is a chart identifying those additional entries which the Court believes should be disallowed in whole or in part and the reason for that disallowance.

III. CONCLUSION

For the reasons stated, Debtors' objection to the Bank's application for attorney's fees is sustained in part and overruled in part. Specifically, the Court overrules Debtors' objection

insofar as it seeks disallowance in their entirety of fees incurred by Bank's counsel in preparing and prosecuting a motion for relief from automatic stay and the ancillary objection to Debtors' motion to vacate the order granting that motion. Similarly, the Court overrules Debtors' objection to the fees of Bank's counsel for responding to Debtors' objection to the Bank's claim and to the discovery requests relating to that objection. The Court does agree that the fees incurred relating to the two motions filed by the Bank to vacate the order confirming Debtors' Chapter 13 plan were unnecessary. The Court, therefore, sustains Debtors' objections to those fees in the amount of \$671.00, and they are disallowed. Finally, the Court also disallows those specific fees associated with the additional activities described on Exhibit A attached to this order in the amount of \$1,227.00, for the reasons stated therein.

This Memorandum Opinion contains the Court's Findings of Fact and Conclusions of Law on Debtors' objection to the Bank's application for attorney's fees, pursuant to Rule 9014(c) and Rule 7052 of the Federal Rules of Bankruptcy Procedure. A separate order will be entered on the objection in accordance with Rule 9021.

/s/ Dennis R. Dow
Bankruptcy Judge

Date: _____

Copies to:

Noel Bisges
Jonathan C. Browning
Rick Fink

EXHIBIT A

Date	Hours	Amount	Comments
Insufficient Detail			
11/19/03	1.6	\$176.00	No description of subject matter of conferences, telephone conferences and correspondence. Partially duplicative of corresponding entry on same date by TSS.
12/17/03	.2	22.00	No description of subject matter of correspondence and conference.
12/30/03	.1	11.00	Entry of JCB; no description of subject matter of call and conference
3/3/04	.2	22.00	No description of subject matter of telephone call, conference and correspondence.
Subtotal		\$231.00	
Duplicative Time			
12/22/03	.6	\$78.00	Both counsel meeting with client; no demonstration of need for participation by both.
1/5/04	.2	26.00	Both counsel participating in telephone call with debtors' counsel; no demonstration of need for participation by both.
1/27/04	.6	78.00	Both counsel performing legal research on recovering fees and costs; no demonstration of need for performance by both.
Subtotal		\$182.00	
Unnecessary Tasks			
Motions to Vacate Order of Confirmation			
3/9/04	.4	\$66.00	See text of Memorandum Opinion.
3/11/04	2.5	275.00	See text of Memorandum Opinion.

3/12/04	.8	88.00	See text of Memorandum Opinion.
3/15/04	1.0	110.00	See text of Memorandum Opinion.
3/16/04	1.2	132.00	See text of Memorandum Opinion.
Subtotal		\$671.00	
Miscellaneous			
12/16/03	.7	\$77.00	No indication of need to review Beasley case; not related to issues with Bank's claim.
2/18/04	1.0	110.00	No demonstration of need for legal research on hypothetical remedies, including default on plan not yet confirmed or conversion of case to Chapter 7.
Subtotal		\$187.00	
Excessive Time			
11/5/03	2.1	\$231.00	No justification for amount of time spent on uncomplicated two-page objection to motion to vacate (time entry includes time on other matters, but not separately identified).
11/17/03	1.1	121.00	No indication of need for legal research on uncomplicated two-page objection to motion to vacate (time entry includes time on other matters, but not separately identified).
12/17/03	2.5	275.00	Combined with entry on 12/15, total of 4.8 hours on legal research on § 1322(b)(2) (time entry includes time on other matters, but not separately identified).
Subtotal		\$627.00	
TOTAL		\$1,898.00	