UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

IN RE:	)	
	)	
KENNETH HAROLD BRETT and	)	**Case No. 18-30512**
KATHLEEN HELEN BRETT,	)	
	)	
Debtors.	)	
	)	

ORDER SUSTAINING, IN PART, DEBTORS' OBJECTIONS TO TABLE ROCK COMMUNITY BANK'S and THE ROYAL VISTA CONDOMINIUM ASSOCIATION'S APPLICATIONS FOR POSTPETITION FEES, EXPENSES AND CHARGES

This matter comes before the court on the Applications by Table Rock Community Bank and the Royal Vista Condominium Association for postpetition fees, expenses, and charges pursuant to 11 U.S.C. § 506(b). Debtors Kenneth and Kathleen Brett object to certain of the attorney fees being requested by each creditor. At a status conference held on September 1, 2020, the parties agreed to waive the right to put on evidence or file supplemental briefing and to submit the matter based on the filed papers.

Background

The debtors filed this chapter 13 case on September 5, 2018. They listed a condominium located in Branson, Missouri, as their residence. Their initial chapter 13 plan, filed on October 3, 2018, proposed to cure an arrearage and maintain ongoing payments on their mortgage with the Bank, and to pay an arrearage to the Condo Association "*pro rata*" as a long term debt. The chapter 13 trustee moved to deny confirmation on several grounds, including that the proposed treatment of the Condo Association debt was unclear.

The debtors amended their plan twice, proposing to pay the Condo Association's arrearage claim through the plan and to pay ongoing fees and assessments directly to the Association as they

come due. In addition, because the debtors were having trouble making the plan payments, the debtors proposed to sell a boat slip and turn the proceeds over to the trustee. The plan was ultimately confirmed on January 8, 2019.

The debtors sold the boat slip, and the trustee disbursed the proceeds totaling $21,000 to pay his trustee fee, priority and non-priority unsecured creditors and the debtor's attorney fees. However, the debtors continued to struggle making plan payments, resulting in multiple motions to suspend the payments. The Bank eventually objected to additional suspensions of plan payments.

At a hearing held in November 2019, the debtors' attorney announced that the debtors were going to sell their condo because they could not afford the payments. At a continued hearing in December, however, the debtors' attorney advised that debtors had decided not to sell the condo after all, and would be making a proposal to catch up delinquent plan payments. Debtors were unable to comply with their proposal, so in April 2020, they again announced a plan to sell the condo. They filed a motion to sell the property for $299,000, along with a motion for payoff of the chapter 13 plan. The court approved the motion to sell on May 8, 2020. That sale fell through, however.

Meanwhile, on June 1, 2020, the Bank filed a motion for relief from stay. The debtors responded, proposing adequate protection in the form of continuing to make their regular ongoing plan payment of $2,350, and selling their adjacent garage unit, which was subject to the Bank's lien, back to the condo developer for a net price of $18,500. The debtors proposed to use the net sale proceeds to get current on the past due mortgage payments.

The Bank opposed the sale of the garage to the condo developer, in part because the Bank believed the debtors could get a more favorable price if the garage unit was sold along with the

condo itself. The Condo Association also objected, alleging that the debtors' indebtedness to it had grown due to ongoing postpetition regular assessments, a special assessment, and the accrual of attorney fees.

The debtors then announced at a June hearing that they intended to relist the condo unit, along with the garage, for the lower price of $280,000, which would still be enough to pay off the case and leave a little surplus.

Following a hearing in July, the debtors filed an amended motion to sell the condo unit, along with the garage, for $280,000, which the court granted. The court also lifted the stay as to the Bank, with stay of execution until August 19, 2020, to allow the sale to close.

On August 14, 2020, with the court's authorization, the debtors sold their condominium for a gross price of $280,000. It is undisputed that the Bank holds a first lien against the proceeds, and the Condo Association holds a second lien, and that both creditors are oversecured.

The Bank's response to the debtors' motion to determine the creditors' postpetition claims[1] asserted a total payoff of $226,200.23, consisting of $213,500 unpaid principal, $5,227.21 in interest through August 11, late charges in the amount of $335.90, and $7,137.12 in "loan fees," consisting largely of attorney fees and some small costs. This calculation contains a mathematical error. The Bank concedes that the "loan fees" are overstated by $1,000 when compared to the invoices for attorney fees, so the amount should be reduced by $1,000.[2]

The Condo Association requests a total of $18,860.72, consisting of $3,850.28 in postpetition regular assessments, $5,000 for a postpetition special assessment, interest in the amount of $717.44, and attorney fees totaling $9,293.[3]

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[1] ECF No. 162.
[2] *See* Response to Debtors' Objection to Application for Post-Petition Fees, Expenses and Charges (ECF No. 176) at ¶ 4.
[3] ECF No. 164.

The debtors do not object to any of the principal, interest, or late charges of either creditor. Rather, they object only to portions of each of the creditors' claims for attorney fees.

Discussion

The allowance of claims under 11 U.S.C. § 506(b) arises under title 11 and neither party disputes this court's jurisdiction or authority to enter a final order on this dispute. *See* 28 U.S.C. § 157(b)(2)(B); *In re Price*, 403 B.R. 775, 779 (Bankr. E.D. Ark. 2009) (holding that a § 506(b) cause of action arises under title 11, "and accordingly, the Court undoubtedly has jurisdiction over those claims.").

Section 506(b) governs the allowance of postpetition fees and expenses for oversecured creditor. That section provides:

> 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 or State statute under which such claim arose.

11 U.S.C. § 506(b). "In order to recover attorney's fees [under § 506(b)], 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." *In re Woods Auto Gallery, Inc.*, 379 B.R. 875, 884 (Bankr. W.D. Mo. 2007); *U.S. v. Ron Pair Enters., Inc.*, 109 S.Ct. 1026, 1030 (1989). *See also First Western Bank & Trust v. Drewes* (*In re Schriock Constr., Inc.*), 104 F.3d 200, 201 (8th Cir. 1997).

The debtors do not dispute that each of these creditors is oversecured, or that the creditors' respective agreements provide for the recovery of fees. Rather, the issue here is whether the requested fees are reasonable. The court in *In re Woods Auto Gallery* explained the determination of reasonableness under § 506(b):

> 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. 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.

Woods Auto Gallery, 379 B.R. at 884 (citations omitted). "The creditor bears the burden of proof on each of these various elements." *Id.*

> Secured creditors are not entitled to be reimbursed for fees incurred in every action taken by their counsel. In determining whether a secured creditor should be reimbursed for its attorneys' fees, the bankruptcy court has the responsibility of preventing overreaching by attorneys in their attempts to be paid attorneys' fees from the estate. While creditors ... are entitled to engage counsel and pay for constant, comprehensive and aggressive representation, ... where services are not reasonably necessary or where action is taken because of an attorney's excessive caution or overzealous advocacy, courts have the right and the duty, in the exercise of their discretion, to disallow fees and costs under § 506(b). It is unreasonable to seek reimbursement for fees that are not cost justified either by the economics of the situation or necessary to preservation of the creditor's interest in light of the legal issues involved.

Id. (citations and internal quotation marks omitted).

> 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. Accordingly, whenever the itemization of work performed is not sufficiently specific to identify the services rendered, the charges for those services will be disallowed. Courts have required applicants to state the specific purpose, nature and substance of telephone calls, conferences, legal research, court appearances, depositions and preparation for court appearances or depositions before fees may be awarded for them. An applicant may not circumvent the requirements of detail by "lumping" a number of activities into a single entry. Each type of service should be listed with the corresponding specific time allotment, and the task descriptions set out in the application should be sufficiently clear that the court can determine whether the tasks related meaningfully to the protection of the creditor's interests. When

> insufficient detail has been provided, the court may disallow requested compensation. The court may also disallow or reduce entries it finds are duplicative or unnecessary. Overall, the court has broad discretion in determining the amount of fees to be allowed.

Id. at 884-85 (citations and internal quotation marks omitted). Fees under § 506(b) may be disallowed if not related to the protection of the creditor's secured claim. *McGehee v. Cox* (*In re Griffin*), 310 B.R. 610, 617 (B.A.P. 8th Cir. 2004).

The starting point for an attorney fee reasonableness determination typically starts with a lodestar method which requires the court to multiply the number of hours reasonably expended by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983). "Courts are in agreement that an attorney's customary billing rate is the proper starting point, assuming it is not sharply at odds with the prevailing market rate." *In re Schriock Const., Inc.*, 210 B.R. 348, 350 (Bankr. D. N.D. 1997) (citing *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). The lodestar formula encompasses whether the attorney's rates and hours expensed were reasonable given the attorneys' expertise and the complexity of the case presented. *White v. Coors Dist. Co.*, (*In re White*), 260 B.R. 870, 880 (B.A.P. 8th Cir. 2001).

The Reasonableness of the Bank's Requested Fees

At the outset, the debtors filed this chapter 13 case on September 5, 2018. Two of the bills for the Bank's attorney fees, filed as Exhibits B and C to the Bank's response to the debtors' objection to the Bank's application,[4] reflect fees totaling $1,509.72 which were charged for prepetition foreclosure-related costs and services. Courts have expressed doubt as to whether § 506(b) applies to prepetition costs and services and, therefore, the court doubts those invoices are even subject to any reasonableness determination. *See, e.g., Woods Auto Gallery*, 379 B.R. at 882-

[4] ECF No. 176-2 and 176-3.

83 (holding that § 506(b) does not apply to prepetition fees, costs or expenses, but that the court had to review said fees, costs and expenses for reasonableness under both Missouri law and the controlling language in the loan documents).

But even taking those prepetition fees and costs into account, the court finds, with one exception to be discussed below, the Bank's fees and costs are reasonable. Turning to the lodestar method, the Bank's attorney stated at the hearing that he charges $225 per hour. By comparison, the debtors' attorney said she charges $250 per hour. The court finds the rate charged by the Bank's attorney to be reasonable. And, although the Bank's attorney's fees are lumped in the billing statements, making it difficult for the court to determine the reasonableness of the fees charged for each specific task, the court finds that the total hours counsel billed (approximately 20 - 25 hours) to be reasonable for the tasks performed by the Bank to protect its lien, which included scheduling the prepetition foreclosure sale, dealing with multiple proposed chapter 13 plans, responding to more than one motion to sell the condo and garage, and filing the motion for relief from stay.

These tasks and fees are reasonable, with one exception: Counsel charged the Bank a quarter hour each time he received a check from the chapter 13 trustee and forwarded it to the Bank. The court finds that charging for those services is not reasonable under these circumstances, nor were they necessary to protect the Bank's interests. The courts sees eight instances where counsel charged the Bank for forwarding the checks, so the Bank's claim will be reduced by two hours at $225 per hour, or $450. The Bank's claim, as reduced by the $1,000 error, will therefore be allowed in the amount requested of $225,200.23, less $450, or a total allowed oversecured claim of $224,750.23.

The Reasonableness of the Condo Association's Fees

The Condo Association is requesting $9,293 in postpetition attorney fees.[5] Its attorney stated at the hearing that the attorneys billing on the file charged between $225 to $320 per hour, and that paralegals billed $105 to $135 per hour. The total number of hours billed by professionals to the Condo Association postpetition exceeded 35 hours.

The court acknowledges that the firm was required to spend additional time responding to the debtors' back-and-forth proposals to sell the condo and garage, and to address the debtors' sometimes unclear motions to sell. That said, the court finds that the total amount of time spent on the file under the circumstances is not reasonable under a § 506(b) standard. As the debtors point out, there are multiple entries where attorneys within the firm corresponded with each other about the file. In addition, the firm charged for paralegals to print out documents. The court finds some of these items were not necessary to protect the Association's security interest. The court also finds it significant that the Association incurred $9,000 in attorney fees, which is roughly equal to the amount of the claim itself, and that the Association incurred more fees than the Bank did, despite the fact that the Bank's fees include prepetition foreclosure expenses and filing a motion for relief from the stay.

The Condo Association lumped its tasks, again making it difficult to for the court to determine on a line-by-line basis whether the time charged was reasonable for each task performed. Thus, having reviewed the court file and the Association's fee statements, the court finds that twelve hours at $250 per hour is reasonable under the lodestar method. The court will therefore

[5] The Condo Association's total claim included $3,850.28 in principal for postpetition regular assessments; $5,000 in principal for postpetition special assessments; plus interest of $717.44, or a total of $9,567.72, in addition to the claim for attorney fees.

allow attorney fees in the amount of $3,000, making the Condo Association's total allowed oversecured claim of $12,567.72.

Federal Rule of Bankruptcy Procedure 3002.1

In addition to the reasonableness argument, the debtors argue that a portion of the fees should be disallowed on the grounds they were submitted untimely. Specifically, § 506(b) notwithstanding, the debtors assert that attorney fees claimed more than 180 days after the date the fees were incurred are untimely because the creditors did not file notices as required by Federal Rule of Bankruptcy Procedure 3002.1.

Rule 3002.1 requires creditors who are secured by a security interest in a debtor's principal residence, and for which a chapter 13 plan provides that either the trustee or debtor will make contractual installment payments on such claims, to file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. Fed. R. Bankr. P. 3002.1(a) and (c). The notice is required to be served within 180 days after the date on which the fees, expenses, or charges are incurred. Fed. R. Bankr. P. 3002.1(c). Neither the Bank nor the Association filed and served such a notice in this case, so the debtors assert any attorney fees incurred more than 180 days ago be disallowed. In the Bank's case, the debtors assert the disallowed amount should be $3,953.22, and the Association's claim should be reduced by $1,375. The creditors assert the Rule does not apply to them.

Rule 3002.1 does apply to both creditors. Each of them holds a claim that is "secured by a security interest in the debtor's principal residence" and "for which the plan provide[d] that either

the trustee or the debtor will make contractual installments." Fed. R. Bankr. P. 3002.1(a).[6] In short, the creditors should have filed Rule 3002.1 notices.

That said, Rule 3002.1(i) sets out the consequences for failing to file and serve these notices, and expressly permits the court to allow such claims for postpetition charges if the court "determines that the failure was substantially justified or is harmless." Fed. R. Bankr. P. 3002.1(i).

Here, despite the fact the debtors had initially proposed a plan to cure and maintain payments to these creditors, it became clear fairly early in this case that the debtors were going to have to sell the condo. It was also clear that the creditors were oversecured. The purpose of Rule 3002.1 is to allow the trustee and parties to monitor and adjust changes to consumer debtors' home mortgages so as to avoid surprises at the end of the case.[7] The Rule also benefits secured creditors because it permits them to communicate with debtors about postpetition payments without violating the automatic stay.[8] The Rule is not intended to give a windfall to debtors. Given the fact that the debtors proposed to, and did, sell the condo, the court finds the creditors' failure to give the Rule 3002.1 notices was both substantially justified and harmless.

ACCORDINGLY, IT IS THEREFORE ORDERED:

(1) The Debtors' Objection to Table Rock Community Bank's Application for Postpetition Fees, Expenses and Charges (ECF No. 168) is SUSTAINED, IN PART; the Bank's claim will be allowed in the total amount of $224,750.23; and

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[6] Although the court need not decide the issue here because the court is going to excuse the lack of notice, this court tends to agree with the court in *In re Felipe* that, based on the language of the rule itself, Rule 3002.1 notice requirements apply to condo associations with claims secured by the debtor's residence, despite the fact that the Advisory Committee Note refers to "home mortgages." 549 B.R. 252, 254-55 (Bankr. D. Hawai'i 2016).

[7] *See* 2011 Advisory Committee Notes to Fed. R. Bankr. P. 3002.1; *In re Felipe*, 549 B.R. at 255.

[8] *Id.*

(2) The Debtors' Objection to the Royal Vista Condominium Association's Application for Postpetition Fees, Expenses and Charges (ECF No. 169) is SUSTAINED, IN PART; the Association's claim will be allowed in the total amount of $12,567.72.

To the extent the Bank and Condo Association were paid in excess of these amounts at closing, the Court grants the debtors' request that the Bank and Condo Association be ordered to refund any surplus amounts to the Chapter 13 Trustee within 14 days. All other requests for relief are DENIED.

IT IS SO ORDERED.

/s/ Cynthia A. Norton
Judge Cynthia A. Norton

Dated: September 10, 2020