

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 11
JOHN R. BAUER and)
JO BETH BAUER,)
) No. BK 85-30045
)
Debtor(s).)

O R D E R

This matter is before the Court on a Motion for Accrediting (sic) Attorney Fees to Debt filed by debtors John Edward Bauer and Jo Beth Bauer ("debtors"). Debtors allege that payments they made under their Chapter 11 Plan of Reorganization to the Production Credit Association ("PCA") are not being credited in full towards reducing their debt to PCA. Instead, PCA is allegedly applying a portion of each of debtors' payments towards its attorney's fees.

After reviewing an affidavit submitted by Bruce Burkey, PCA's former attorney, which shows his billing of PCA in connection with debtors' case, the Court ordered PCA to file a brief explaining the basis for its position that it was entitled to attorney's fees. Debtors were also given leave to file a brief in response.

In its brief, PCA argues that it has met the prerequisites for the recovery of its attorney's fees under §506(b) of the Bankruptcy Code. These prerequisites are: (1) the claim is an allowed oversecured claim; (2) the fees are provided for in the agreement; and (3) the fees are reasonable. In re Salazar, 82 B.R. 538, 540 (9th Cir. BAP 1987).

In response, debtors argue that PCA's deduction of attorney's fees from the payments under the Plan was unlawful because it was done without prior approval of the Bankruptcy Court.

Section 506(b) provides that;

[t]o the extent an allowed secured claim is secured by property the value of which, ... 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 under the agreement under which such claim arose.

The legislative history of §506(b) makes it clear that it applies to the recovery of attorney's fees by an oversecured creditor when the fees are provided for in the agreement under which the creditor's claim arose and when the fees are reasonable. See, In re Salazar, supra, citing, In re Carey, 8 B.R. 1000, 1004 (Bankr. S.D. Cal. 1981); Matter of Kennedy Mortgage Corp., 23 B.R. 466, 469 (Bankr. D. N.J. 1982). Section 506(b) represents an exception to the "American Rule" which requires each party to bear its own attorney's fees. In re B&W Management, Inc., 63 B.R. 395, 401 (Bankr. D. Dist. Columbia 1986).

Debtors have not cited, nor has the Court been able to locate, any authority to support their claim that PCA acted unlawfully in deducting its attorney fees without first requesting permission of the Court to do so. Nevertheless, the language of §506(b) appears to require that requests for attorney's fees be submitted to the Court at some point

for a determination of whether they are "reasonable." See, e.g., Matter of 268 Ltd., 789 F.2d 674, 676 (9th Cir. 1986); In re Stanwood Devries, Inc., 72 B.R. 140, 142 (Bankr. D. N.J. 1987).

In the present case, PCA does not dispute the fact that it neglected to submit its fees to the Court for a reasonableness determination. However, it should be noted that debtors have also been negligent because PCA has been deducting attorney's fees for several years without any complaint being registered by debtors until now.

Given the apparent lack of any firm requirement that fee requests under §506(b) be submitted to the Court for a reasonableness determination prior to the deduction of fees from payments made under a plan of reorganization, and also given debtors' delay in raising this issue, the Court will not unilaterally deny PCA its fees. However, the Court will review PCA's fee request to see if it meets the prerequisites for recovery of attorney's fees under §506(b).

The first of the three prerequisites under §506(b), that the claim is an allowed, oversecured claim, appears to have been met in this case. PCA's proof of claim was not objected to by debtors and is, therefore, prima facie valid. Bankruptcy Rule 3001(f). Additionally, debtors noted in paragraph 3.2 of their Fourth Amended Plan that PCA is oversecured and debtors have not objected to PCA's allegation that the value of the collateral far exceeds the amount owed it by debtors.

The second prerequisite under §506(b) is that the fees are

provided for in the agreement. The promissory note between PCA and the debtors (as best as can be made out from the copy supplied to the Court) contains the following provisions concerning attorney's fees:

In the event this Note is placed in the hands of an attorney for collection, or suit is brought, on the same or any portion thereof, or if collected by court proceedings, the undersigned, jointly and severally, further agree to pay reasonable attorney's fees, reasonable expenses incurred by the holder... its attorneys in collection and costs of collection.

The undersigned parties hereby irrevocably authorize and empower any attorney of any court of record to appear for them, or any of them in any court any time after this Note shall become due and payable, in term time or vacation, and to confess judgment hereon, in favor of the holder, against any or all the undersigned for such amount as may appear to be unpaid hereon, with attorney's fees and expenses of collection as aforesaid, and to waive and release errors in such proceeding, and to consent to immediate execution upon such judgment.

PCA has never stated exactly how much in attorney's fees it believes it is entitled to. However, the affidavit submitted by Bruce Burkey shows that he billed PCA a total of \$8,195.52 in attorney's fees and costs.

Attached to the affidavit are three exhibits, each of which is an itemized statement showing the services rendered by Burkey for PCA in cases involving the debtors. Exhibits "A" and "C" are statements for Burkey's representation of PCA in state court foreclosure actions brought by two different banks in which PCA was named as a defendant.

The total amount charged by Burkey for his fees and costs in the two actions was \$2,802.80.

The promissory note indicates that the debtors are liable for fees relating to the collection of the amounts due PCA under the note. However, it does not appear from Burkey's affidavit or the statements that the charges listed in exhibits "A" and "C" had anything to do with collection actions by PCA against the debtors.

If there are any ambiguities in the promissory note provisions regarding attorney's fees they must be construed against PCA as the drafter of the note. Matter of Kennedy Mortgage Co., *supra*, 23 B.R. at 473. Although PCA may have intended to make all its fees related to debtor's case recoverable, such intent is not clearly stated in the promissory note and the note must be interpreted against PCA in this regard. *Id.* Thus, only attorney's fees which were generated because of collection efforts against the debtors are recoverable under the agreement between PCA and the debtors. Since \$2,802.80 in fees involved activities other than collection efforts against the debtors, the Court finds that these fees are not recoverable under §506(b).

The remaining \$5,392.72 in requested fees are for Burkey's representation of PCA in debtors' bankruptcy case and are sufficiently related to "collection" so as to be included in the parties' fee agreement. However, to qualify under §506(b) the remaining fee must also be reasonable.

In determining whether the fees requested are reasonable under §506(b), the following factors should be considered: (1) time and labor required; (2) novelty and difficulty of questions; (3) skill requisite to perform legal services; (4) preclusion of other employment by acceptance of the case; (5) customary fee; (6) whether the fee sought is fixed or contingent; (7) time limitations; and (8) amount involved and results achieved. Matter of Calzaretta, 35 B.R. 92, 94 (Bankr. N.D. Ill. 1983). See also, In re Wonder Corp. of America, 72 B.R. 580, 588-9 (Bankr. D. Conn. 1987).

The Court, having reviewed the requested attorney's fees generated in connection with the representation of PCA in debtors' bankruptcy case, finds that they are reasonable within the meaning of §506(b). Therefore, the Court will allow PCA to deduct \$5,392.72 in attorney's fees from the payments made under debtors' Plan of Reorganization.

Accordingly, IT IS ORDERED that PCA's fees and expenses in the amount of \$5,392.72 are ALLOWED. To the extent that PCA has deducted fees from debtors' payments in excess of that allowed, those amounts shall be credited towards the debt owed to PCA by the debtors.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: May 26, 1988