UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

IN RE:

JAMES S. JOHNSTON Chapter 11

Debtor. Bankruptcy No. 03-03495S

MEMORANDUM DECISION DETERMINATION OF SECURED STATUS

U.S. Bank National Association (hereinafter "USB") asks the court to decide the amount of its secured claim by determining allowable attorneys' fees and costs pursuant to 11
U.S.C. § 506(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (K). The motion is filed pursuant to Fed.R.Bankr.P. 3012. Hearing was held May 3, 2005 in Sioux City. Thomas H. Burke appeared as attorney for USB. Donald H. Molstad appeared as attorney for James S. Johnston. James S. Johnston filed his chapter 11 petition on
September 10, 2003. He is a farmer with a substantial farm operation. At the time he filed, Johnston was involved in litigation with USB, which had filed suit to foreclose security interests in much of Johnston's business assets including farm real estate and personalty. The dispute between Johnston and USB had been ongoing since at least as far back as March 2002.

Prior to filing, Johnston sold assets and paid down his debt to USB. At the time he filed his chapter 11 petition, Johnston believed that USB was oversecured. He scheduled USB as a creditor holding a disputed claim in the amount of
$1,300,000.00 secured by assets having a value of
$3,120,695.00. USB did not file a proof of claim. However, there has never been a formal dispute over the validity and principal amount of Johnston's debt to USB. Also there has never been a serious disagreement about the validity and extent of USB's security interests or that USB was oversecured. Duane Strempke, USB's Vice President of Special Assets, testified that at the time of the bankruptcy filing, he believed that USB was secured by a ratio of 1.6 in asset value to 1.0 in debt. Early in the bankruptcy case, Johnston assumed and completed pending pre-petition

sales agreements as to some of his real estate. He paid the net proceeds after costs to USB. Therefore early in the case, Johnston's debt to USB was reduced significantly.

During the case several disputes arose between Johnston and USB. Johnston filed motions to use USB's cash collateral, and USB objected. Johnston moved to incur secured debt with the U.S. Department of Agriculture. USB objected to the use of property it claimed as collateral to secure the loan from the USDA, and Johnston withdrew the motion. USB objected to

an adequate protection agreement between Johnston and General Motors Acceptance Corp. USB filed a motion to dismiss the case. USB and Johnston have litigated the amount of default interest to which USB was entitled in the payment of Johnston's debt and they have litigated the present dispute over the fees and costs component of USB's secured claim.

There were two other major case events in which USB became involved, but in which it did not seriously dispute or try to impede Johnston's efforts. These were two motions to sell real estate against which USB held liens and to pay bank net proceeds of those sales.

There were few other major events in the case, and USB did not involve itself in them. They were a motion for relief from stay filed by Caterpillar Financial Services Corp., a motion by Deere Credit, Inc. to compel Johnston to assume or reject leases of equipment, Johnston's motion to assume farm leases, Johnston's motion to incur secured operating debt, and Johnston's application to pay his attorney $17,325.00 in fees for the bankruptcy case.

Johnston filed three reorganization plans. The initial plan was filed May 6, 2004 (docket no. 103). In it Johnston proposed to execute a new note and mortgage to pay bank's remaining claim of $458,148.90 over 20 years at six per cent interest. Johnston said the exact amount was in dispute. He also stated that he would retain any claims he had against USB. Any recovery, if such claim were pursued, would reduce the balance owed to USB.

Before approval of a disclosure statement, Johnston filed a First Amended Plan on July 2, 2004 (docket no. 121). As with the initial plan, Johnston stated

that USB had maintained that he owed a remaining balance on his debt of $458,148.90.

Johnston asserted that the exact amount was in dispute. Again he proposed to execute a new note and mortgage, paying the balance over 20 years at six per cent interest. The amended plan provided that he would retain any claim against the bank and any recovery would reduce USB's claim.

USB objected to the First Amended Plan. It contended (1) that the amended plan did not meet the best interest test for a hypothetical chapter 7 liquidation, (2) that the interest rate proposed by Johnston did not provide USB with the allowed amount of its secured claim as of the effective date of the plan, (3) that the 20-year repayment period was unfair and inadequate, (4) that the plan did not provide that USB would retain its pre-petition security interests, (5) that the plan did not deal adequately with post-petition defaults, (6) that it did not provide for payment of USB's attorneys' fees and costs, and (7) that it was unfair and inequitable for Johnston to retain any claims against USB.

Johnston filed a Second Amended and Substituted Plan on September 1, 2004 (docket no. 142). Johnston proposed to sell enough real estate to pay USB's claim in full. He proposed to "deaccelerate" the note, cure his default, and to pay the claim at 8 per cent interest from filing. Again, Johnston proposed to retain any claims he had against USB. USB objected to confirmation of the Second Amended Plan (docket no. 151). The dispute between Johnston and USB was about the effective date of Johnston's cure, USB's right to default interest and the date on which such interest could be charged, and the allowance of attorney's fees and costs as part of USB's claim.

Johnston, on separate motion and notice, but in conformance with the plan, sold enough real estate to satisfy USB's claim in full including its claims for interest and fees. The parties agreed that the Second Amended Plan could be confirmed and that they would submit to the court the remaining issues as part of a claims allowance process. The court confirmed the Second Amended Plan on

September 30, 2004. The court determined the amount of the interest component of USB's claim in a decision issued December 20, 2004 (docket no. 170). Now the only remaining issue is the amount of attorneys' fees and costs which are recoverable as part of USB's secured claim.

USB says it has incurred and paid $118,500.99 in attorneys' fees and expenses beginning March 7, 2002, when it retained Thomas Burke of Whitfield & Eddy P.L.C. to foreclose its security interests and recover its claim. The entire representation involved pre-bankruptcy mediation, negotiation of a forbearance agreement, foreclosure litigation, and then representation in the bankruptcy case.

The application does not summarize the fees of each attorney working on the case or the expenses incurred. It provides copies of the invoices and provides a summary of the total of each invoice. The total of fees and expenses is $118,500.99. There are two errors in the Application's summary. Invoice 37315 (Application, exhibit G) dated March 24, 2003 is shown on the summary as being $6,306.01. The underlying invoice erred in multiplying Burke's hours times his hourly rate. The invoice undercharged USB by $3.00. The second error in the summary regards invoice 51789 (Application, exhibit P). It shows the amount of the invoice as $17,261.00. That was the amount of attorneys' fees. The invoice shows also expenses in the amount of $559.94, but these expenses were not included in the summary. The total invoice shown on the Application's summary should be $17,820.94.

The correct total of fees and expenses for the 18 invoices is $119,063.93. I assume this to be the amount of USB's application to the court. The court's breakdown for fees by professional and the expenses incurred is as follows:

Thomas H. Burke, partner:

284.30 hours @ $175.00 = $ 49,752.50
273.60 hours @ 195.00 = 53,352.00
11.00 hours @ 215.00 = 2,365.00

Burke total: 105,469.50 August B. Landis, partner

54.60 hours @ 195.00 = 10,647.00

Jon E. Kramer, associate:

.60 hours @ 175.00 = 105.00

Kara M. Sinnard, associate:

.50 hours @ 175.00 = 87.50

Lou Olson, paralegal:

1.6 hours @ 95.00 = 152.00

Fees: $116,461.00

Expenses: = 2,602.93

Total of Invoices: $119,063.93

No biographical information on the professionals has been provided to the court. The only justification for the hourly rates has been Burke's statement at trial that they are reasonable given the complexity of the case, the experience of counsel, and the prevailing market. Strempke testified also that he was satisfied with the hourly rates. Of the total fees, $76,351.00 are attributable to work in the bankruptcy case (based on 397 hours of work), and $40,110.00 applied to pre-bankruptcy matters (based on 229.2 hours). These charges were incurred over 36 months.

Johnston objects that USB's application for the allowance of fees and expenses as part of USB's secured claim is unreasonable. Several objections have been resolved by concessions made by USB at the hearing.

The following objections to allowance have been resolved.

August 8, 2003--5.5 hours at $175/hour (J-6):	$962.50
December 18, 2002--1.0 hour at $175/hour (F-1):	175.00
April 16, 2002--sheriff's fees (B-9):	63.13
October 29, 2003--.30 hour at $175/hour (K-6):	52.50
December 8, 2003--.20 hour at $175/hour (L-6):	35.00

Bank concedes that the following charges were in error. All page references are to the invoices attached to the application using USB's page reference system.

These amounts will be disallowed. They total $1,288.13.

Several objections remain. They involve the appropriate charges for mileage, charges for travel time, specific charges for researching USB's initiation of an adversary proceeding on Johnston's alleged claim against USB, and the reasonableness of charges in general given the nature of the case.

USB seeks allowance of its attorney's fees and costs under 11 U.S.C. § 506 (b) which permits a creditor having an allowed secured claim to recover as part of its claim interest on its claim and reasonable fees and costs provided under the agreement between the creditor and the debtor. Interest, fees and costs are recoverable as part of the secured claim if the allowed secured claim is secured by property having a value greater than the amount of the claim. Id. That is the case here. No one disputes that USB is fully secured. Johnston's attorney is holding sufficient sums in his trust account from the sale of USB's collateral to pay the allowed fees and costs in full. Principal and interest have been paid.

The notes and security agreements were not introduced into evidence, notwithstanding the requirements of 11 U.S.C. § 506(b) and the court's order requiring such documentation (see docket no. 180). But the parties do not dispute that they provide for some recovery of attorney's fees and costs. Likewise, the parties do not dispute that attorneys' fees are recoverable in such agreements under Iowa law. The amount of any fees and costs recoverable under 11 U.S.C. § 506(b) is determined under federal bankruptcy law and in accordance with federal standards. First Western Bank & Trust v. Drewes (In re Schriock Construction, Inc.), 104 F.3d 200 (8th Cir. 1997); Blackburn-Bliss Trust v. Hudson Shipbuilders, Inc. (In re Hudson Shipbuilders, Inc.), 794 F.2d 1051, 1056-58 (5th Cir. 1986). USB has the burden of proof on the reasonableness of fees. In re Gwyn, 150 B.R. 150, 154 (Bankr. M.D. N.C. 1993).

Expenses

Johnston objects to the mileage charges for two round trips by Burke from Des Moines to Onawa for state court proceedings. The trips took place on May 12 and September 10, 2003. The law firm charged USB $122.76 and $138.24 for a total of $261.00. Using Mapquest on the internet, I measure the mileage at 164 miles one-way or 328 miles round-trip. At the time of the trips, the federal mileage reimbursement rate was .36 cents per mile. I will apply that rate. The reasonable reimbursement was $236.16. The law firm charged USB $24.84 in excess of that, so $24.84 will be disallowed.

Burke made seven trips from Des Moines to Sioux City for bankruptcy hearings or other matters related to the case. These trips took place on October 21, 2003, February 3, 2004, March 2, 2004, June 22, 2004, July 21, 2004, August 20, 2004, and August 25, 2004. Using Mapquest, I estimate the round- trip distance at 400 miles. The total reasonable mileage charge for one round-trip at .36 per mile is $144.00. The total reasonable mileage charge for six round-trips at .375 cents (the federal mileage reimbursement rate in 2004) is $900.00, or a total for seven trips of $1,044.00. The law firm charged USB $1,152.62. Therefore, I will disallow $108.62 of the expense request.

Johnston objects to Burke charging mileage for trips to his client's office in Des Moines. Johnston does not specify any dates. However, I know of no reason why the law firm may not be reimbursed for such an expense. The objection to allowance of this expense is overruled.

Fees

Johnston contends that the application asks for an allowance of fees that are excessive. He points out that USB enjoyed a substantial equity cushion and was not at any serious risk to lose money. He says that it was unnecessary for USB to incur such large legal fees when very little between the parties was disputed. He points out that there were approximately 1,550 phone calls between Burke and Strempke, none taking less than 12 minutes, or .20 of an hour.

This court requires time to be accounted for in one-tenth of an hour increments. Specifically, he points out that the law firm spent 36.2 hours researching how it might bring Johnston's alleged claim against it for determination, and he contends this was not a supportable position.[1] He contends that Burke did not need to appear in court in Sioux City to the extent he did.

Specifically, Johnston objects to allowance of travel time at the attorney's full rate. Molstad points out that this court routinely compensates attorneys for debtors and trustees at 50 per cent of the legal rate for travel time because travel is not legal work. I conclude that because federal standards apply, I may apply the same standard to this application. Burke made six trips from Des Moines to Sioux City for which he billed his full legal rate for travel time. I estimate the round-trip travel time to be 6.5 hours per round trip. I will deduct two hours from the travel component on his August 25, 2004 trip because his itemization states that Burke negotiated on the case while traveling. None of the entries breaks down the time for the trip between legal time and travel time. The total travel time for these six

[1] From the law firm's invoices, I cannot find that much time spent on that issue.

trips is 37 hours charged at the rate of $195.00 per hour. I find that one-half of the charges, or $3,607.50, is therefore excessive.

As to the two trips to Onawa, I estimate travel time from Des Moines to Onawa at 5.0 hours round trip, for 10 hours of travel. The law firm charged $175.00 per hour for these trips. I find that one-half of the charges, or $875.00, is excessive.

Attached to the application are the invoices submitted by the law firm to USB. These have been paid. I do not doubt that the professionals devoted the time itemized on these invoices. Also I accept that the hourly rates charged by these professionals are their regular and customary rates and that these rates were charged to USB.

It would be difficult to examine each time entry on these exhibits and as a result determine that the time spent was reasonable to the task. I construe the reasonableness requirement of 11 U.S.C. § 506(b) to include a requirement that the task also be necessary. But necessary to what end?

In this contested matter proceeding, USB has failed to introduce into evidence the underlying promissory notes and security agreements. In Iowa, attorney fees are not awarded as costs unless authorized by statute. Keeney v. Iowa Power and Light Company, 250 Iowa 887, 96 N.W.2d 918, 920 (1959). Iowa law provides that "[w]hen judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs a reasonable attorney's fee to be determined by the court." Iowa Code § 625.22. I do not have the benefit of examining USB's notes and security agreements to determine the range of legal services that might be covered. Is it merely services for collection of the debt, or is it broader such as fees incurred for the enforcement and protection of the lender's rights?

A failure to submit the agreement for fees arguably is a failure of proof that USB is entitled to an allowance of the fees as part of its secured claim. However, Johnston has not objected on this ground, so the court will allow a reasonable fee as part of the secured claim.

USB may certainly take reasonable actions to collect its claim and to protect its collateral and recover from it.

Various of its actions were directed at these goals. Nonetheless, I find the time spent, particularly the bankruptcy case, was unreasonable and excessive.

Prior to Johnston's bankruptcy, USB entered into mediation with Johnston, negotiated a forbearance agreement

with him, monitored that agreement and began its foreclosure action when it considered Johnston to be in default. USB obtained summary judgment and decree on its claim for relief. Johnston filed bankruptcy on the day of the sheriff's sale.

It was reasonable for USB to scrutinize closely and to act on Johnston's motions to use its cash collateral and his motion to use USB's collateral to secure post-petition debt to another creditor. Also USB was reasonable in dealing

with Johnston's proposed plans to protect itself from any prejudicial impairment. USB filed a motion to dismiss the bankruptcy case. It reasonably may have believed this was in its best interest. USB's limited objections to Johnston's motions to sell real estate appear intended only to ensure that Johnston strictly complied with his agreement with USB on the sales and disposition of proceeds.

But in the bankruptcy case, there seems to have been few events which escaped USB's action or reaction, even events which would appear not to have put USB's claim or its collateral at risk. One example is the motion for relief from stay filed by General Motors Acceptance Corp. (GMAC). GMAC sought to enforce a security interest in a motor vehicle owned by Johnston. Johnston and GMAC entered into an adequate protection agreement. There was no indication at any time that USB had an interest in the vehicle, yet it objected to the settlement. It may be that it was concerned that Johnston would make the agreed-upon adequate protection payments from USB's cash collateral, but the agreement between Johnston and GMAC did not propose that. A letter to Johnston's attorney prohibiting such use would have sufficed. After the court approved the adequate protection agreement, Johnston formally requested that he be able to use USB's cash collateral to make the payment. USB objected, and its objection was overruled.

But that was the earliest time it was reasonable to object on that ground. Nonetheless the law firm charged USB for several reviews of and discussions on Johnston's underlying dispute and settlement with GMAC (see Application, exhibit O, pp. 1, 3).

Another example of excessive effort was the time spent researching how USB might obtain a bankruptcy court ruling on the existence and/or validity of any claims Johnston might hold against it. Each of Johnston's three proposed plans stated that he retained any claims he held against USB. The Second Amended Plan proposed to pay USB's claim in full and to retain any claims against USB. USB became concerned that if Johnston paid USB's claim in full, and USB had to release its loan collateral, USB would be unable to charge the costs of

its legal defense to its security interest in Johnston's property. Thus its attorneys began researching how USB might bring an adversary proceeding against Johnston in the bankruptcy case and ask the court to determine if Johnston had a claim against it. I find such an effort to be bizarre, and in light of Johnston's proposal to pay USB in full on confirmation, I find it was not work to collect its claim or to protect its collateral. It appears that at least 11 hours were spent researching the issue.

It seems to me that there were few significant, principal events in this case. The length of the case was not excessive. Johnston made significant payments on his debt to USB just prior to filing and again early in the case. Throughout the case, USB had a comfortable equity cushion.

USB protected itself when it was necessary, but it exceeded what was reasonable. It micro-managed the entire case. There was nothing that was not regularly examined and re-examined, and then discussed between Burke and Strempke in writing, in person, or over the phone. There were numerous status conferences about every aspect and event in the case. During the case, Burke had status conferences with an attorney for the U.S. trustee. There was no indication what these were about, and no justification was given for them.

Monitoring a case and discussing its status with the client is clearly necessary to protect a secured creditor's interests. But it can be overdone. If that is the requirement of the client, so be it. The client can choose to pay for such close scrutiny. But it does not automatically follow that all of the legal costs are recoverable from the debtor or his estate. A secured creditor is "not entitled to compensation for all possible legal activity associated with the Debtor." In re Gwyn, 150 B.R. 150, 155 (Bankr. M.D. N.C. 1993). Section 506(b) is not a blank check for oversecured creditors to incur any amount of legal fees and have them paid by the debtor. This point was well made in In re Gwyn.

> Section 506(b), recognizing the potential problems that may occur when the selector and user of legal services is separate from the payor of the services, imposes a limitation on the amount of contractually agreed upon fees that may be awarded to an oversecured creditor. *See In re Villa Capri Assocs. Lt. Partnership*, 141 B.R. 257, 262 (Bankr. N.D. Ga. 1992). One purpose of Section 506(b) is to ensure that estate assets are not squandered by oversecured creditors, who, believing that the debtor will be required to

> foot the bills, fail to exercise restraint in the attorneys' fees and expenses they incur, perhaps exhibiting excessive caution, overzealous advocacy and hyperactive legal efforts.

Id. at 155.

I believe that is a fair description of what has happened in this case. USB appears to have given its attorneys carte blanche to monitor and involve themselves with Johnston's case on USB's behalf. I find the resulting fees unreasonable under 11 U.S.C. § 506(b).

Having said that, I must still allow what I believe to be a reasonable amount of attorneys' fees as a component of USB's secured claim. Previously, I indicated that I did not think it appropriate, or even possible, to determine a reasonable allowance from an entry-by-entry examination of the invoices. Work descriptions are often too vague to permit an evaluation of the necessity for the work. But I have no doubt the time was spent by the attorneys and was spent at the behest of and with the approval of USB. I will allow some amount of legal fees to be included in USB's secured claim based on my experience with and knowledge of the case, the importance of the issues and a general examination of the invoices. In consideration of the length of the case, the equity cushion enjoyed by USB in its collateral, the significant payments to USB both before and during the case, and the lack of actual litigation over disputed issues, I determine that a reasonable fee under 11 U.S.C. § 506(b) is $76,000.00. This allowance subsumes the court's specific disallowances of fees.

Deducting for the excessive mileage charges from the expense request, I find reasonable expenses to be $2,469.47.

I therefore will allow $78,469.47 in fees and costs as part of USB's allowed secured claim. This is not a reduction in USB's obligation to its attorneys. This is merely a decision as to how much of the fees and expenses paid to the attorneys are recoverable by USB as part of its secured claim.

IT IS ORDERED that U.S. Bank National Association is allowed $78,469.47 as part of its allowed secured claim under

11 U.S.C. § 506(b). Judgment shall enter accordingly. DATED & ENTERED: June 27, 2005

William L. Edmonds, Bankruptcy Judge