In the United States Bankruptcy Court

for the Northern District of Iowa

EARL L. ROBERTSON, FAY F. ROBERTSON	Bankruptcy No. 94-11876KC
Debtors.	Chapter 11

ORDER RE MOTION FOR DETERMINATION OF SECURED CLAIM AMOUNT

On August 1, 1995, the above-captioned matter came on for hearing on Debtors' Motion for Determination of Secured Claim Amount. Debtor Earl L. Robertson appeared in person with Attorney John Titler. Creditor Collins Credit Union appeared through Attorney Joseph Schmall. Evidence was presented and the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(B).

STATEMENT OF THE CASE

Debtors filed a Chapter 11 bankruptcy petition on November 18, 1994. They admit that their primary motivation for filing the Petition was to prevent a Sheriff's Sale pursuant to a State Court foreclosure proceeding against Debtors' home filed by Collins Credit Union which held a mortgage on this property. At the time Debtors filed their bankruptcy petition, Collins Credit Union was the holder of a judgment from the foreclosure proceeding in the approximate amount of $149,000. In their schedules, Debtors list the property in question as having a value of $235,000.

Collins Credit Union filed a Motion for Rellief from Stay under 362 on December 12, 1994. The matter was heard on January 31, 1995. As a result of that full evidentiary hearing, the Court entered its Order on February 10, 1995 denying Collins Credit Union's Motion. At the time of the hearing, the Court felt the property was worth approximately $210,000 and Debtors should be allowed a reasonable opportunity to market the property. Debtors were given until March 31, 1995 within which to locate a purchaser. Debtors were successful in finding a purchaser and on February 19, 1995, a purchase agreement was executed for the sale of the property in the amount of $235,000. The sale was closed on May 31, 1995 and Collins Credit Union was paid the amount of its judgment. ITT Financial Services, which held a second mortgage, was also paid its claim from the proceeds.

Prior to the closing, Creditor Collins Credit Union sought payment of appraisal fees and attorney's fees arising as a result of its Motion for Relief from Stay. In order to avoid a potential loss of the sale of this property, Debtors escrowed an amount which would cover such fees and the closing was completed. The parties agreed that the issue of the payment of appraisal fees and attorney's fees would be subsequently litigated. The present hearing addresses that issue.

The parties agree that the summary of fees and expenses submitted by Collins Credit Union is accurate. These include attorney's fees in the amount of $3,879.50 with associated legal expenses of $232.59. In addition, Collins seeks reimbursement of appraisal expense paid to Appraisal Associates in the amount of $942.50 and appraisal expense to Mr. David Tingle in the amount of $150. The total sought by Collins Credit Union is $5,204.59.

First, Debtors assert that Collins Credit Union is precluded from reimbursement under 506(b). Citing the case of In re McKillups, 81 B.R. 454, 457 (Bankr. N.D. Ill. 1987), Debtors argue that all of the obligations from the mortgage are merged into the underlying foreclosure judgment and therefore they no longer remain liable for attorney fees under the

mortgage.

Secondly, Debtors assert that even if the Court determines that fees are allowable, the fees in this case are unreasonable. They point to evidence in the hearing on the motion to lift stay that established that the property had net equity. Debtors have consistently maintained that the property was worth $235,000 and, in fact, the property was sold for that amount. They conclude that Collins Credit Union's position was unreasonable and was made precipitously immediately after the filing of the Chapter 11 proceeding. As such, Debtors assert that all attorney's fees and appraisal fees should be denied. Alternatively, Debtor states that if the Court feels that some award is appropriate, the fees should be severely limited. They assert that a fee of more than $1,000 to $1,200 would be excessive.

Collins Credit Union takes the position that the fees are fair and reasonable. It asserts that it is not precluded by its foreclosure judgment from receiving fees under 506(b). It urges that at the time of the proceedings, the homestead appeared to have no net equity, entitling it to relief from the automatic stay to complete the sheriff's sale. Collins Credit Union asserts that analyzing this matter with hindsight is inappropriate and that the Court must examine the facts as they appeared on the record and to the parties at the time of the Motion for Relief from Stay. It argues that, in that light, its application was reasonable and it should not be denied fees under the circumstances. Collins Credit Union asserts that the appraisal fees, as well as the attorney's fees, are reasonable in light of the entire record.

CONCLUSIONS OF LAW

Collins Credit Union seeks payment of attorney fees and appraisal fees under 506(b) which states as follows:

To the extent that 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 for under the agreement under which such claim arose.

In order to be entitled to fees, Collins Credit Union must prove the following four elements from 506(b): (1) it has an allowed secured claim, (2) it is oversecured, (3) the underlying documents provide for the fees and costs and (4) the fees and costs are reasonable. In re West Elecs., Inc., 158 B.R. 37, 40 (Bankr. D.N.J. 1993). In this case, the parties appear to agree that Collins Credit Union has an allowed secured claim and is oversecured.

The next element raises the question of whether, in light of Collins Credit Union's prepetition foreclosure judgment, the underlying agreements providing for fees and costs are still effective. Debtor argues from the McKillips case that the doctrine of merger prohibits Collins Credit Union's claim for fees. The court in McKillips, held that, under Illinois law, a judgment of foreclosure merges the mortgage into the judgment. 81 B.R. at 456 (stating further that this doctrine of merger is also a matter of federal law). Based on that holding, the court denied attorney fees and costs under the applicable mortgage provision because the creditor had already received a foreclosure judgment prior to the filing of the bankruptcy petition. Id.

Iowa law, however, does not extend the doctrine of merger to discharge the underlying debt for all purposes. Brenton State Bank v. Tiffany, 440 N.W.2d 583, 585 (Iowa 1989). The Iowa Supreme Court has noted that a mortgage remains a lien until the debt is satisfied and therefore the mortgage is not affected by a judgment taken on the underlying note. Id. Bankruptcy courts have also acknowledged that lien rights under a mortgage are not extinguished until the debt is paid in full, regardless that the note is reduced to judgment. In re Clark Grind & Polish, Inc., 137 B.R. 172, 175 (Bankr. W.D. Pa. 1992). In Clark Grind, the court held that the mortgage contemplated liability for fees to continue until the debt was paid and therefore such fees may be included as part of the secured claim subject to a determination of reasonableness. Id. at 175. Likewise, the court in In re Schwartz, 77 B.R. 177, 180 (Bankr. S.D. Ohio 1987), aff'd, 87 B.R. 41 (S.D. Ohio 1988), held that rights to fees of a creditor who held a mortgage lien were not extinguished by a foreclosure judgment.

See also In re Salisbury, 58 B.R. 635, 638 (Bankr. D. Conn. 1985) (holding that fee provision in mortgage survived foreclosure judgment); In re Harper, 146 B.R. 438, 445 (Bankr. N.D. Ind. 1992) (holding that reasonableness determination under federal law applies even if a claim for attorney fees has been reduced to judgment prepetition).

The Court chooses not to follow the McKillups case. The greater weight of authority recognizes that the mortgage survives a foreclosure judgment. In this case, paragraph 19 of the mortgage provides that Collins Credit Union is entitled to expenses, including reasonable attorney fees, upon Debtors' default. The Court finds that Collins Credit Union has met the third element of 506(b), that the underlying agreements are effective in providing for payment of reasonable fees and costs in these circumstances.

The final element, reasonableness, has two facets: "(1) the itemized fees themselves must be reasonable, and (2) the creditor's actions must be reasonable." West Elecs., 158 B.R. at 40. Fees will not be denied solely because a reasonable motion is unsuccessful. Id. The first facet requires a determination of whether the creditor could have reasonably believed its actions were necessary to protect its interest in the debtor's property. In re Dix, 140 B.R. 997, 999 (Bankr. S.D. Cal. 1992). This Court considered the extent of the creditor's equity cushion and the reasonableness of its opposition to reorganization to find that some postpetition attorney fees were not fully justified in In re W.S. Sheppley & Co., 62 B.R. 279, 281 (Bankr. N.D. Iowa 1986).

In determining whether the itemized fees are reasonable, bankruptcy courts look at multiple factors. West Elecs., 158 B.R. at 42; Clark Grind, 137 B.R. at 175. These include:

(1) necessity of the service; (2) time and labor required; (3) novelty and difficulty of the issues; (4) skill requisite to perform the service; (5) preclusion of other employment; (6) customary fee; (7) whether the fee is fixed or contingent; (8) time pressures; (9) amount involved; (10) results obtained; (11) experience, reputation and ability of attorneys; (12) progress of the case; (13) adequate documentation.

Clark Grind, 137 B.R. at 175. Many bankruptcy courts particularly utilize the "results obtained" factor. West Elecs., 158 B.R. at 42.

In applying the foregoing, the Court concludes that Collins Credit Union's fee application is excessive. Collins Credit Union's actions in seeking to protect its interest in the property can be viewed as reasonable as Debtors had not been making payments on their mortgage and foreclosure proceedings were already complete. See Dix, 140 B.R. at 1000 (stating that motion for relief from stay was necessary to protect creditor's interest because debtor was not paying). The countervailing view is that it had a substantial equity cushion in the property. It held a first mortgage of approximately $149,000 on property valued at either $210,000 or $235,000. The fact that the property was subject to a junior mortgage does not diminish the conclusion that at least 40 percent equity existed protecting Collins Credit Union's interest in the property. On balance, it is fair to conclude that its interest was adequately protected from the start, making a motion for relief from stay unnecessary and inherently unsuccessful.

Debtor argues that appraisal expenses of $1,092.50 and attorney fees and expenses of more than $4,000 are excessive for the type of motion for relief from stay Collins Credit Union filed. The property in question is residential property. It had recently been placed on the market and at least one offer received at an amount close to Debtors' appraisal figure. The Court has reviewed Collins Credit Union's detailed listing of fees and expenses and must conclude that the amount of time spent in preparing for the stay hearing and in researching the legal issues exceeds that which is reasonable for this type of motion.

SUMMARY

The Court finds that the provision for reasonable attorney fees and other expenses found in Collins Credit Union's mortgage survived its foreclosure judgment. However, neither the actions of Collins Credit Union nor the itemized fees themselves are entirely reasonable. Debtors' appraisal of their property at $235,000 has been consistent through this process and has been substantiated by the final sale price of the property. Debtors took a reasonable position and should not be inordinately penalized. However, it was not entirely foreseeable that the property would sell for that price. Collins Credit Union was not completely unrealistic in seeking to protect its interest since Debtors had defaulted and foreclosure had been completed. Its arguments presented at the stay hearing were valid, even though it was not successful in its motion. The Court concludes that reasonable attorney fees of $1,500 plus legal expenses of $232.59, and reasonable appraisal expenses of $400 should be allowed. The remainder of the attorney fees and appraisal expenses are denied.

WHEREFORE, Debtors' Motion for Determination of Secured Claim Amount is GRANTED in part and DENIED in part.

FURTHER, Collins Credit Union is entitled pursuant to 506(b) to collect as part of its allowed secured claim attorney fees of $1,500 plus legal expenses of $232.59, and appraisal expenses of $400.

FURTHER, all other fees and expenses claimed by Collins Credit Union are DENIED.

SO ORDERED this 29th day of August, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge