

In the United States Bankruptcy Court

for the Northern District of Iowa

J.E. ADAMS INDUSTRIES INC.
Debtor(s).

Bankruptcy No. 98-00167-C
Chapter 11

ORDER RE AMENDED CLAIM

This matter came before the undersigned on May 2, 2000 for hearing on the Amended Claim of Banc One Leasing Corp. Attorney Tom McCuskey represented creditor Banc One. Tom Fiegen represented Debtor J.E. Adams Industries. After the presentation of evidence and argument, the Court took the matter under advisement. The time for filing briefs has now passed and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B).

STATEMENT OF THE CASE

Banc One claims it is entitled to interest, late charges and attorney fees on its oversecured claim as provided for under its four lease agreements with Debtor. Debtor objects to the reasonableness of Banc One's attorney fees and to the additional imposition of late fees.

FINDINGS OF FACT

Debtor entered into lease agreements with Banc One for four pieces of equipment. These agreements are designated as Leases 3, 4, 5 and 6 in the record. By Order filed May 27, 1999, this Court determined that Leases 3 and 4 are true leases; Leases 5 and 6 are security agreements. It is undisputed that Debtor incurred prepetition late charges under the agreements. Debtor filed its Chapter 11 petition on January 21, 1998.

The Court confirmed Debtor's Chapter 11 Plan on March 23, 2000. The confirmation order leaves unresolved the total amount of Banc One's claim. Debtor's Plan assumes the leases and provides for payment of all amounts due under the lease agreements. The Plan also proposes to pay unsecured creditors in full. The parties agree that, to the extent Banc One has a secured claim, the value of the collateral exceeds the amount of its claim.

At the hearing, counsel for Banc One indicated that there was little disagreement between the parties regarding the basic amounts due under the agreements. Banc One offered to submit a side-by-side comparison between its figures and Debtor's figures. After the hearing, Debtor filed a "Spreadsheet of Payments" and Banc One filed a "Summary of Payments and Expenses and Application of Funds". The Court has not received a side-by-side comparison from the parties.

ATTORNEY FEES INCLUDED IN OVERSECURED CLAIM

Generally, a creditor's claim is determined as of the date of the filing of the bankruptcy petition and amounts incurred post-petition are not usually permitted as a part of the claim. In re Waterman, 248 B.R. 567, 573 (B.A.P. 8th Cir. May24, 2000). If a creditor is oversecured, reasonable fees, costs or charges provided for under the agreement are included in the claim under §506(b). Id. A creditor can add post-petition attorneys' fees to the claim to the extent allowed by the security agreement and subject to court review for reasonableness. Id. To recover attorney's fees under §506(b), a creditor must establish: (1) that it is oversecured in excess of the fees requested; (2) that the fees are reasonable; and (3) that the agreement giving rise to the claim provides for attorney's fees. In re Schriock Constr., Inc., 104 F.3d 200, 201 (8th Cir. 1997).

With respect to the reasonableness of attorneys' fees, the ultimate burden of persuasion is on the secured creditor seeking payment. In re Cushard, 235 B.R. 902, 907 (Bankr. W.D. Mo. 1999). The court undertakes a two-part analysis, considering (1) whether the creditor's actions were reasonable and prudent in the circumstances and (2) whether the itemized fees are reasonable. Id. at 906-07. In considering reasonableness of fees §506(b), the court applies multiple factors similar to those applicable when considering attorney fees under §330(a), the "lodestar" analysis. See id. at 907; In re Clark Grind & Polish, Inc., 137 B.R. 172, 175 (Bankr. W.D. Pa. 1992).

A key criterion in determining whether the creditor's actions were reasonable is whether the creditor acted prudently under the circumstances in seeking to protect its interest in its collateral. Cushard, 235 B.R. at 907. Under §506(b), attorneys' fees are reasonable only if they are incurred in protecting the creditor's rights in its collateral. Id. Several courts have held that fees are reasonably expended when the work is reasonably necessary to protect the lien and, in that regard, whether there was a risk of nonpayment of the claim. In re Schriock Constr., Inc., 210 B.R. 348, 351 (Bankr. D.N.D. 1997) (after remand from Schriock Constr., 104 F.3d 200). Courts also consider whether attorneys' fees are cost-justifiable by the economics of the situation. In re Foertsch, 167 B.R. 555, 562 (Bankr. D.N.D. 1994). This Court has refused to allow postpetition attorneys' fees to an oversecured creditor where the services rendered had the effect of delay. In re W.S. Sheppley & Co., 62 B.R. 279, 281 (Bankr. N.D. Iowa 1986). The Court noted the creditor was determined to embark on an "all-out war" to oppose the debtor's efforts to reorganize, notwithstanding a substantial equity cushion assuring ultimate payment of the secured debt. Id.

ALLOWANCE OF BOTH ATTORNEY FEES AND LATE CHARGES

Debtor argues Plaintiff may not recover both attorney fees and late charges. In In re Dixon, 228 B.R. 166, 177 (W.D. Va. 1998), the court noted that the case law is settled: "oversecured creditors may receive payment of either default interest or late charges, but not both." That court allowed a claim for default interest but denied an additional claim for late charges. Id. It remanded the case for the bankruptcy court to apply the lodestar analysis to determine reasonableness of attorney fees. Id. at 179. Thus, claims for both default interest and late charges are not allowed as they are duplicative. Attorney fees are a separate category of claim for an oversecured creditor which are additionally allowable based on their reasonableness.

AMOUNT OF CLAIM ON ASSUMPTION OF LEASE

This Court has previously ruled that two of the parties' agreements constitute "true leases" rather than security agreements. Leases are executory contracts governed by §365 which grants Debtor the right to assume or reject unexpired leases. See In re Shangra-La, Inc., 167 F.3d 843, 849 (4th Cir. 1999). A debtor who assumes a lease does so subject to the existing burdens thereof and may not assume the favorable aspects of the lease while rejecting the unfavorable aspects of the same lease. In re

Entertainment, Inc., 223 B.R. 141, 150 (Bankr. N.D. Ill. 1998). Entitlement to attorneys' fees is dependent on the terms of the lease. Shangra-La, 167 F.3d at 849.

Because Debtor has expressed the intent to assume the "true leases" with Banc One, it must compensate Banc One in accordance with the terms of Leases 3 and 4 regarding late charges and attorney fees. Leases 5 and 6 are security agreements. Because Banc One is oversecured, it is entitled to late charges and attorney fees provided in the agreements. In this situation, it is immaterial whether the agreements are leases or security agreements as Banc One is entitled to late charges and attorney fees under the Bankruptcy Code both as a lessor under Leases 3 and 4 and as an oversecured creditor under Leases 5 and 6.

CONCLUSIONS OF LAW

As to Leases 5 and 6 which are deemed to be security agreements, the parties are in agreement that Banc One is oversecured in excess of the fees and charges requested. The agreements giving rise to the secured claim provide for attorney fees and late charges. Banc One is entitled to both late charges and reasonable attorney fees. The same is true as to Leases 3 and 4, the true leases which Debtor assumes pursuant to its confirmed Plan.

The Court has broad discretion in determining the reasonableness of the attorney fees charged. Banc One's activity in this case included requesting relief from stay which was subsequently resolved by stipulation between the parties. Banc One also objected to Debtor's disclosure statement, report on claims, and confirmation of amended plans. In this case, the Court considers Banc One's pursuit of various issues to be overzealous in the circumstances. The confirmed Plan pays all claims, secured and unsecured, in full. The record does not support a finding that Banc One's claim was in serious jeopardy pending confirmation in this case. The Court understands that Debtor's solvency and ability to repay creditors is, of course, more clear now than at the beginning of the case.

The Court ruled on the status of the parties' agreements as true leases or security agreements pursuant to motion by Banc One. It is difficult to understand the necessity of bringing such a motion. Banc One's rights were not dependent on perfection or enforceability of its interest under the leases, no real issues were raised in the case concerning retention of the leased equipment, and the amount of Banc One's claim is the same regardless if the leases are true leases or security agreements. These are the general categories affected by a determination of an agreement's status as a lease or security agreement in bankruptcy cases. See Robert D. Strauss & Jeffrey J. Wong, Commercial Law Aspects of Equipment Leasing, 727 PLI/Comm 7, at 22-24 (1995).

Banc One seeks total attorney fees of \$28,633.66. As Debtor points out, the fee itemization reveals some duplication of work between the various attorneys employed by Banc One. Banc One asserts the total due on its claim is approximately \$200,000 plus attorney fees. The leased equipment at all times was valued higher than its claim giving Banc One assurance of full payment. In these circumstances, the Court finds reasonable attorney fees allowable as part of Banc One's claim to be \$20,000.

As to the actual amount of Banc One's underlying claim, the record is inconsistent. Banc One's own calculations have drifted since the beginning of the case as shown in various filings, including motions for relief from stay, the joint stipulation in July 1998 and more current payment histories provided to the court. Debtor states the claim is \$125,665.26 plus late fees, interest and attorney fees.

The Court has reviewed all the parties' calculations. Basing its calculations primarily on Appendixes 5 through 8 attached to Banc One's Amended Claim, the Court concludes the total claim is \$175,920

plus \$20,000 allowed as attorney fees. This amount includes \$33,475 in payments and late charges due when Debtor filed its petition; plus \$555,364 due under the parties' agreements and the July 1998 Joint Stipulation; plus \$18,984 postpetition late charges; less total postpetition payments by Debtor of \$431,903.

WHEREFORE, Banc One's Amended Claim equals \$195,920.

SO ORDERED this 30th day of June, 2000.

Paul J. Kilburg
Chief Bankruptcy Judge