2020 Mont. B.R. 137

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **HUNTER ANTON OLSON**, Debtor.	Case No. **19-60465-BPH**

O R D E R

At Butte in said District this 13th day of April, 2020.

In this Chapter 12[1] bankruptcy Western Bank of Wolf Point ("Creditor") filed on March 19, 2020, an Application for Compensation ("Application") at ECF No. 200, and a Notice Requesting Attorneys' Fees Pursuant to Local Bankruptcy Rule 2002-4 ("Notice") at ECF No. 202. Creditor seeks approval of fees incurred by its counsel, Moulton Bellingham PC ("Applicant"). The Notice explains:

> . . . . an application for pre-petition professional fees in the amount of $17,894.50 and pre-petition expenses in the amount of $487.50 and post-petition professional fees in the amount of $62,494.00 and post-petition expenses in the amount of $3,829.16 for a total of 80,388.50 in professional fees and $4,316.66 in expenses.

ECF No. 202. The Notice informs the parties that they have fourteen (14) days to file a response and request a hearing, and that if no response and request for hearing are timely filed, "the Court may grant the relief requested as a failure to respond by any entity shall be deemed an admission that the relief requested should be granted." No objections were filed, and the Court was on the verge of entering an Order on April 10, 2020.

[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

On April 10, 2020, Creditor filed an Amended First Interim Application for Professional Fees, Costs and Notice ("Amended Application").[2] ECF No. 206. The Notice recites:

> . . . . Moulton Bellingham PC has submitted to the U.S. Bankruptcy Court for the District of Montana an application for post-petition professional fees in the amount of $62,494.00 and post-petition expenses in the amount of $3,829.16 for a total of $66,323.16 in professional fees and expenses.

ECF No. 206. This reflects a reduction in fees and expenses of approximately $14,000 from the original Application to the Amended Application. A comparison of the applications indicates, prepetition fees and expenses that Applicant included in the Application are not included in the Amended Application. While this addresses one of the concerns the Court had with the initial Application, the Court continues to harbor broader concerns regarding the extent to which Creditor is oversecured and the reasonableness of the fees.

A. This Court's historic approach to fees and reasonableness.

More than 30 years ago, this Court stated that it had an "independent obligation to review each application for compensation to ensure that applicants provide an adequate summary of work performed and costs incurred." *In re WRB West Associates*, 9 Mont. B.R. 17, 18–20 (Bankr. D. Mont. 1990). This statement has been referred to continually in this Court's fee orders since then. Past decisions by this Court have emphasized the following factors when evaluating whether applicants provided an adequate summary of work performed and costs incurred:

1. a description of the services provided, setting forth, at a minimum, the parties involved and the nature and purpose of each task;
2. the date each service was provided;
3. the amount of time spent performing each task; and,
4. the amount of fees requested for performing each task.

[2] "Interim" suggests Creditor may file additional fee applications. It appears to the Court this should be the final fee application under § 506.

Id. In the past, if the applicant provided an adequate summary of work performed and costs incurred, absent an objection, reasonableness was rarely discussed by the Court. However, when the reasonableness of fees was challenged by a party, this Court addressed it thoroughly.[3]

This Court's independent obligation to review fee applications to evaluate the propriety of the compensation requested serves important institutional purposes. As one court explained:

> [T]he integrity of the bankruptcy system ... is at stake in the issue of a bankruptcy judge's performance of the duty to review fee applications sua sponte. The public expects, and has a right to expect, that an order of a court is a judge's certification that the result is proper and justified under the law.... Nothing better serves to allay [public perceptions that high professional fees unduly drive up bankruptcy costs] than the recognition that a bankruptcy judge, before a fee application is approved, is obliged to [review it carefully] and find it personally acceptable, irrespective of the (always welcomed) observation of the [United States trustee] or other interested parties.

In re Busy Beaver Bldg. Centers, Inc., 19 F.3d 833, 841 (3rd Cir. 1994). The importance of this obligation cannot be overstated, and it extends to all professional persons whose fees the Court must review.

The independent review process is particularly important when oversecured creditors request approval of their fees under § 506(b). It states:

> 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.

The Ninth Circuit has distilled the language of § 506(b) into 4 distinct elements that, if satisfied, entitle a secured creditor to recover attorney's fees:

[3] *See In re Copper King Inn*, 10 Mont. B.R. 146, 148 (Bankr. D. Mont. 1991); *In re Hungerford*, 19 Mont. B.R. 103, 136-38 (Bankr. D. Mont. 2001); *In re Ransom*, 361 B.R. 895, 898 (Bankr. D. Mont. 2007); *In re Duncan*, 2009 WL 1619900 (Bankr. D. Mont. 2009); *In re Covenant Invs., Inc.*, 2011 Mont. B.R. 46 (Bankr. D. Mont. 2011); *In re Tamcke*, 2011 Mont. B.R. 9 (Bankr. D. Mont. 2011); *In re Launderville*, 2012 WL 78713, (Bankr D. Mont. 2012).

> (1) the claim is an allowed secured claim; (2) the creditor is oversecured; (3) the fees are reasonable; and (4) the fees are provided for under the agreement.

Kord Enters. II v. California Commerce Bank (In re Kord Enters. II), 139 F.3d 684, 687 (9th Cir.1998). The burden of proof on the reasonableness of an oversecured creditors' claim for attorneys is upon the creditor. *In re Atwood*, 293 B.R. 227, at 233 (9th Cir. BAP 2003). Absent a close review of a creditor's fees under § 506(b), the provision may function as a "blank check." *See In re Dalessio*, 74 B.R. 721 (9th Cir. BAP 1987).

Local Bankruptcy Rule ("LBR") 2016-1(f) requires an oversecured creditor seeking fees to file a fee application. LBR 2016-1(f) provides:

> If a creditor wishes to recover reasonable post-petition fees, post-petition costs, or post-petition charges provided for under the agreement upon which the claim arose as a portion of the creditor's allowed claim, the professionals retained by such creditor must file a fee application in accordance with the standards set forth in 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016(a). Reasonable fees and expenses of such professionals may be allowed by the Court as a portion of the creditor's allowed claim. Prepetition fees, prepetition costs, or prepetition charges incurred prior to the date of debtor filing the bankruptcy petition shall be itemized in the creditor's proof of claim. If professional fees and costs do not exceed $750.00 for the filing of a motion for relief from the automatic stay pursuant to Mont. LBR 4001-1(a), such fees and costs are presumed to be reasonable, and no application will be required.[4]

Although often overlooked, LBR 2016-1(f), allows for the inclusion of "prepetition fees, prepetition costs, or prepetition charges incurred prior to the date of debtor filing the bankruptcy

[4] The Committee Note to LBR 2016-1(f) explains:

> The Local Rule allowing fees and expenses to a creditor only applies if such creditor seeks reasonable fees and expenses as a portion of the creditor's allowed claim. The Court has no interest in reviewing the fee arrangement or the fees and expenses incurred between the creditor and the professional if the creditor is paying such fees and expenses and is not seeking such fees and expenses as a portion of the creditor's allowed claim.

petition in the creditor's proof of claim," so long as the fees are itemized. LBR 2016-1(f) does not require a fee application for pre-petition fees.[5]

This distinction between prepetition and postpetition fees and their treatment in LBR 2016-1(f), corresponds to a revision to the rule that occurred in 2009. Prior to the revision in 2009, LBR 2016-1(f) did not distinguish between prepetition and postpetition fees of secured creditors and broadly referred to "reasonable fees." The impetus and rationale for this revision to the local rule change was discussed in *In re Ransom*, 361 B.R. 895, 898 (Bankr. D. Mont. 2007). In *Ransom*, Judge Kirscher explained the BAP's reasoning in *Atwood* permitted a creditor to disclose all prepetition fees and costs in the proof of claim without the need to file a fee application.[6] Despite the *Ransom* decision and the 2009 revision to LBR 2016-1(f), many practitioners continue to exclude their prepetition fees from their proof of claim, and include those fees later in a request for approval of fees under § 506.[7]

[5] After filing the initial Application, Applicant must have realized that including prepetition fees in an application under § 506(b) was not required and filed the Amended Application. Despite this late realization, this Order addresses this issue for the benefit of other oversecured creditors and their counsel.

[6] Notably, although the creditor in *Ransom* included the attorney's fees in the proof of claim, approval of the fees was still denied by the Court because, "no fee application was submitted and no hourly itemization exists in the proof of claim and the stated amounts egregiously exceed the fees allowed by statutory limitation." *Ransom* highlights the importance of including adequate documentation of the work associated with the fees.

[7] While this discussion may seem pedantic, differences between the claims allowance process under § 502, and inclusion of postpetition interest, fees, costs or charges per § 506 are distinct and merit consideration. This interplay has been described as:

> Section 506(b) provides that postpetition interest, fees, costs or charges may be added as part of the allowed amount of an allowed secured claim to the extent that the claim is oversecured. For purposes of section 506(b), an "allowed secured claim" is an allowed claim that qualifies as a secured claim as provided under section 506(a). The amount of a creditor's "claim" is typically determined as of the petition date, and includes the principal amount of the obligation plus all matured prepetition interest, fees, costs and charges owing as of the petition date. The allowability of these prepetition amounts as

B. Oversecured Creditors, § 506(b) and reasonableness post 2017.

More recently[8], this Court has noted and emphasized that it has a duty to exercise its discretion and disallow fees that are unreasonable under § 506(b). *In re Dighans*, 2017 Mont. B.R. 253 at 255 (Bankr. D. Mont. 2017). In that chapter 11 case, one oversecured creditor's counsel incurred 122 hours in total time and filed an application for fees that was approved. A second oversecured creditor's counsel billed 261 hours for one timekeeper, and 105 hours for a second timekeeper. A total request of approximately $82,000 by the secured creditor whose counsel billed 3x the other counsel in the case (122 v. 366 hours billed), was denied. However, approximately $46,000 in fees and costs was approved based on the work performed, issues in the case and fees incurred by the other professionals.

Total fees for an oversecured creditor's counsel of $24,697.45 were approved in a chapter 12 case. *In re French*, 2019 Mont. B.R. 19 (Bankr. D. Mont. 2019). In that case, the debtor's attorney fees were approximately $36,000. The oversecured creditor had an underlying claim in excess of $3,000,000. Notably in that case, although the highest billable rate was $465, and that timekeeper incurred approximately 42 hours of time, 28 hours of work were delegated to timekeepers with substantially lower billing rates. As a practitioner's rate increases, so too

> part of the secured creditor's "claim" is not determined by section 506, but is governed by section 502 in conjunction with other provisions of the Code.

4 COLLIER ON BANKRUPTCY P 506.04 (16th 2020). As a practical matter when a creditor has a right to legal fees, inclusion of prepetition attorney's fees in a proof of claim may increase objections to claims, but such an outcome is consistent with the Code. For a discussion that further explores the nuances of a creditor's right to assert and include fees in its proof of claim, see *SNTL Corp. v. Ctr. Ins. Co. (In re SNTL Corp.), 571 F.3d 826, 839–45 (9th Cir. 2009)*.

[8] The period from 2017 forward.

should their efficiency, their delegation of work to timekeepers with a lower rate, and ability to find cost-effective solutions or methodically prepare for a contested hearing.[9]

In contrast to *French*, this Court denied an oversecured creditor's $650 fee application in a chapter 13 case, as unreasonable when:

> . . . . the proof of claim filed by Fifth Third Bank shows that there was no pre-petition arrearage to be paid through the plan, and the Plan treated Fifth Third Bank as an unimpaired secured creditor. Debtor did not object to Fifth Third's proof of claim, or otherwise challenge in any way Fifth Third's claim, or more importantly, Fifth Third's interest in the property securing its claim.

In re Robbins, 2019 Mont. B.R. 130 at 132 (Bankr. D. Mont. 2019). Further, $350 of the $650 sought was incurred in connection with the fee application. Following *Robbins*, this Court emphasized, "[a]n oversecured creditor should not be paid attorney's fees for unnecessary or redundant tasks or for doing the very thing any creditor, unsecured as well as secured, is entitled to do under the Bankruptcy Code." *In re Shalom Farms, LLC*, 2019 Mont. B.R. 202 at 203 (Bankr. D. Mont. 2019). In that case, after considering the Court's introductory remarks at the hearing, debtor and creditor stipulated to an allowance of fees of $5,686.50, and the Court approved the stipulation.

Finally, in an unreported decision in a chapter 13 case, this Court denied approval of an oversecured creditor's fees and costs in the amount of $7,458, and $580.65, respectively, and awarded only $1,100 (total). *In re Ernst*, Case No. 18-60817, ECF No. 136. In *Ernst*, the Court emphasized that the creditor's 262% equity cushion undermined any alleged concern the creditor had regarding the proposed marketing term in debtor's cure by sale plan. *Id*. Collectively, these

[9] The Court acknowledges that many practitioners that appear before it, do not have associates or staff. As a result, it would place less weight on this consideration under those circumstances.

"orders" reflect the Court's increasing scrutiny of oversecured creditor's fee applications under § 506(b) and LBR 2016-1(f).

C. Creditor's Application in this case.

The Amended Application in this Chapter 12 case requests postpetition fees of $62,494.00 and postpetition expenses in the amount of $3,829.16, for a total of $66,323.16, pursuant to § 506(b). Creditor filed its proof of claim and included copies of 3 promissory notes. Proof of Claim 5-2 ("Claim"). The promissory notes include attorney's fees provisions. However, the Claim also includes indications that the Creditor is unsecured on some of the loans, and oversecured on other loans. For example, Part 9 of Form 410, identifies the value of the collateral as $143,396. It further indicates $92,577.92 of its claim is secured, while $16,493.82 is unsecured. On its face, this is difficult to reconcile, but the Court has reasoned that 1 of the 3 loans has a balance as of the petition date of $92,577.92, and the collateral securing that loan has a value of $143,396, while the other 2 loans are unsecured. This reasoning is consistent with the Amended Application for purposes of § 506(b).

Creditor and Debtor filed a stipulation at ECF No. 102 ("Stipulation"), providing for the surrender of Creditor's collateral in full satisfaction of the "Debt."[10] The Stipulation also required Debtor to object to the Pro Co-Op proof of claim and file an adversary proceeding to determine the validity of Pro Co-Op's lien. Debtor complied and filed an adversary case against Pro Co-Op, Creditor, and FSA seeking a determination of the validity of Pro Co-Op's alleged lien interest in Debtor's grain. Although the complaint does not explicitly raise issues of

[10] "Debt" is a defined term under the Stipulation. It reflects the combined balances of the 3 promissory notes and is $115,377.10. This exceeds the filed Proof of Claim which was $109,071.74. Irrespective of this discrepancy, Creditor had an allowed secured claim.

priority, Creditor's answer to the complaint asserts that it "has a superior, first priority lien on Olson's 2018 crops." Thus, the existing record establishes (i) attorneys' fees are provided in the underlying agreements, and (ii) Creditor had an allowed secured claim. It is less clear to the Court that Creditor is oversecured and the fees are reasonable for purposes of § 506(b).

1. Oversecured.

With the record before it, the Court cannot discern whether the Creditor will remain (or ever was) "oversecured," if the adversary proceeding is resolved in Pro Co-Op's favor. Perhaps more importantly the amount of Creditor's Claim as of the petition date and the value of Creditor's collateral for § 506(b) purposes is unclear to the Court. First, all indications in the record are that until the Court rules on the validity of Pro Co-Op's lien, there is no way to determine whether Creditor qualifies as "oversecured" for § 506(b) purposes. If the Pro Co-Op lien is valid and senior to Creditor's lien in the crops, Creditor may be unsecured. How these issues intersect is not clear to the Court with the record before it.

Second, with the information available, the fees requested greatly exceed any equity that might be available. In this case, the Amended Application seeks approval of postpetition fees and expenses totaling $66,323.16. Without a valuation of the collateral, this Court has no way to determine the extent to which the Creditor is oversecured. This determination is important because the Creditor is only entitled to those reasonable fees that correspond to the available equity in its collateral. As explained by a leading commentator:

> For example, suppose that a creditor holds a lien on an office building owned by the estate to secure a debt of $1 million. Assume that the value of the building is $1.1 million. Because the value of the building is $100,000 greater than the amount of the secured claim, the secured creditor's claim is "oversecured" by $100,000 (provided, of course, that there are no senior liens on the property). Accordingly, pursuant to section 506(b), the creditor would be entitled to add up to $100,000 worth of postpetition interest and allowed fees, costs or charges to the amount of its secured claim. However, any amount of postpetition interest and allowed postpetition fees, costs or charges that

> exceeded $100,000 would not be included in the creditor's secured claim. The excess portion representing postpetition interest would be subject to disallowance under section 502(b)(2).

4 COLLIER ON BANKRUPTCY P 506.04 (16th 2020). Setting aside the lien issues with Pro Co-op, if Creditor is alleging its secured claim is $92,577.92, and the value of the collateral securing that is claim is $143,396, up to $50,000, in reasonable postpetition fees could be added to its claim, not $66,323.16. If this Court were to blindly approve the Amended Application, the total allowed secured claim would exceed the alleged value of the collateral by $15,505.

2. Reasonableness.

In its more recent Orders, this Court has consistently cited *In re Dalessio*, 74 B.R. 721 (9th Cir. BAP 1987), and its observation that, "An oversecured creditor should not be paid attorney's fees for unnecessary or redundant tasks or for doing the very thing any creditor, unsecured as well as secured, is entitled to do under the Bankruptcy Code" (emphasis added). *Id*. at 724. This Court's emphasis on excluding from § 506(b) fee applications, fees for tasks that any creditor might undertake is new. Although the emphasis is new, the reasoning is not novel. Oversecured creditors obliged to defend their secured status were awarded their fees under § 506(b) in *In re Copper King Inn*, 10 Mont. B.R. 146, 148 (Bankr. D. Mont. 1991). In *Copper King*, Judge Peterson reasoned that the fees were "incurred in the creditor's successful resistance" to the challenge to the creditor's secured status. Not every creditor, or even every secured creditor in a case will be called upon to defend their secured status.

This Court will not delineate a list of tasks that are universal to all creditors in a case, but generally, universal tasks would include, filing a notice of appearance, filing a proof of claim, reviewing pleadings, including plans, routine motions (stay relief depending on the circumstances), and generally advising the client of the status of the matter. Along with

distinguishing between tasks, some courts have delineated lists of factors to consider when evaluating the reasonableness of a fee application under § 506(b). These factors include:

> (1) the nature, extent, length and value of the services rendered;
> (2) the bankruptcy and non-bankruptcy experience, reputation, and ability of the attorneys;
> (3) awards in similar cases;
> (4) the novelty and difficulty (or lack thereof) of the questions presented;
> (5) the skill requisite to perform the legal services properly;
> (6) the customary fee;
> (7) professional time actually spent;
> (8) amount involved in potential risk;
> (9) the results of the cases;
> (10) specialty in which the attorneys may be practicing;
> (11) fees sought to be applied;
> (12) distinction between partner and associates time;
> (13) costs of comparable services;
> (14) use (or lack thereof) of paralegals; and
> (15) duplication of efforts.

In re Wanechek, 349 B.R. 836, 844 (Bankr. E. D. Wash. 2006). Although not delineated in the list, the *Wanachek* court also identified "proportionality" as a factor to consider, explaining, "[T]he proportion of fees sought in relation to the total claim must be considered by the court." *Id*. at 847. Here, the Amended Application seems to seek approval of fees and expenses that are 71% of its actual claim. Ultimately, there will never be a "bright-line" test for determining the reasonableness of attorney's fees[11], but these factors, and the distinction between tasks that all

[11] Some courts employ a lodestar method that calculates a reasonable number of hours by a reasonable rate. Although more formulaic, this still requires the Court to make a reasonable determination of hours and rates. Judge Kirscher rejected a rate "locality" rule in favor of a market driven approach explaining:

> [T]he Court believes fixed, local hourly rates may be detrimental to a professional who wishes to develop an expertise in a particular area of the law as such rates may lag behind those rates that a professional may be able to develop in nonbankruptcy areas, which are established by one's clients and the competition between professionals. Establishing rates other than by a market approach unduly restricts the determination of reasonable compensation for actual and necessary services which are reasonably likely to benefit the estate.

creditors must undertake, and those that are unique to the secured creditor seeking fees under § 506(b) are all worthy of consideration when determining reasonableness.

The Application and Amended Application have caused this Court to ponder whether there are any circumstances in which a secured creditor could establish that attorney's fees and expenses totaling $80,388.50, or $$66,323.16, are reasonable when the claim is $92,577.92, or even $115,377.10, (per the parties' Stipulation). The Court's initial inclination is, "no." However, in order to afford Creditor, the Applicant and any other party in this case, an opportunity to address the Court's concerns, a hearing on the Amended Application will be conducted and, at a minimum, the Court would seek from Applicant clarity on the following, and anything else Applicant would like the Court to consider in conjunction with the Amended Application.

1. Can this Court rule on the Amended Application without deciding the pending adversary case?
2. What is the alleged value of the collateral, the amount of the secured claim, and the alleged "equity" in the collateral available for purposes of § 506(b)?
3. Do distinctions between § 502 and § 506(b) limit § 506(b) fees to just postpetition fees?[12]
4. Should Debtor be responsible for fees incurred in the adversary case, which although initiated by Debtor, seems to be an intercreditor dispute?
5. Absent a locality rule, do "proportionality" and task differentiation become important criteria in a fee reasonableness determination?
6. Does § 506(b) exclude post confirmation fees?[13]

Accordingly,

In re Jore, 10 Mont. B.R. 158 at 166-167 (Bankr. D. Mont. 2019). This Court continues to adhere to a market approach to rates, but professionals must exercise discretion, taking into account the circumstances of the case, the proportionality of the fees requested, and other factors the Court is likely to consider in its approval or denial of fee applications.

[12] The Amended Application suggests Creditor will respond in the affirmative.

[13] *Countrywide Home Loans, Inc. v. Hoopai (In re Hoopai)*, 581 F.3d 1090 (9th Cir. 2009).

IT IS ORDERED that a hearing on Creditor's Amended Application filed at ECF No. 205 will be held **Tuesday, April 28, 2020, at 09:00 a.m.**, or as soon thereafter as the parties can be heard, in the ELLA KNOWLES COURTROOM, 4TH FLOOR ROOM 4805, JAMES F. BATTIN UNITED STATES COURTHOUSE, 2601 2ND AVENUE NORTH, BILLINGS, MONTANA.

BY THE COURT:

Hon. Benjamin P. Hursh
United States Bankruptcy Court
District of Montana