

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MONTANA

In re

COPPER KING INN,

Case No. 87-20022

Debtor.

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ORDER

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At Butte in said District this 26th day of November, 1991.

Pending in this Chapter 11 case is the Motion For Payment of Attorney's Fees of Noonan and Patterson As Part of Their Secured Claims under 11 U.S.C. § 506(b). After amendment of the attorney fee, hearing on the Motion and objection thereto by the Examiner was held on November 21, 1991. The basis of the Examiner's objection is that the underlying promissory note of March 11, 1985, upon which the secured claim is based was replaced by another agreement (Amortization Agreement) which does not provide for the payment of attorney's fees. Additionally, the Examiner claims the promissory note calls for payment of attorney's fees only if the secured party "is required to pay someone else to help collect this note if Copper King Inn does not pay, then Copper King will pay Noonan [Patterson] that amount," which includes reasonable lawyers' fees whether or not there is a lawsuit. It is undisputed both secured creditors are oversecured and the record is further clear that the attorney's fees were incurred in the creditor's successful resistance to the Examiner's (and creditor's) challenge to the

secured status of the Noonan and Patterson.

The "Amortization Agreement" dated September 13, 1986, refers to each promissory note of Noonan and Patterson and provides for a payment schedule on each note. I find the amortization schedule is an addendum to each note, and not a novation so as to replace each promissory note dated March 11, 1985.

In re Dalessio, 74 B.R. 721 (9th Cir.BAP 1987) applied § 506(b) to a promissory note of an oversecured creditor which provided:

"If an action is instituted on this note, the undersigned promise to pay such sum as the court may adjudge as attorney's fees."

The Dalessio court held in examining § 506(b):

The legislative history sheds some light on the congressional intent. "Section 506(b) of the House amendment adopts language contained in the Senate amendment and rejects language contained in H.R. 8200 as passed by the House. If the security agreement between the parties provides for attorney's fees, it will be enforceable under title 11 notwithstanding contrary law..." 124 Cong.Rec.H.11095 (daily ed. Sept.28, 1978). See also, 124 Cong.Rec.S. 17411 (Daily Ed. Oct. 6, 1978).

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Hamilton Mortgage argues that the bankruptcy judge does not have discretion to deny attorney's fees to an oversecured creditor when these fees were provided for in the underlying agreement. It cites In re Carey, 8 B.R. 1000 (Bankr. S.D.Cal.1981), for the proposition that the language of § 506(b) does not provide a judge with the discretion to deny fees to an oversecured creditor. We agree that when fees are provided for in the underlying agreement, and when the creditor is oversecured, allowance of the attorney's fees is mandatory. However, this allowance is limited by the reasonableness requirement in § 506(b).

In another recent decision, the district court, affirming the bankruptcy court on the issue of attorney's fees to an oversecured creditor, held in First Brandon Nat. Bank v. Kerwin-White, 109 B.R. 626, 632-33 (D.Vt. 1989) that a provision in a mortgage under "Defaults and Remedies" which allowed for the secured creditor to "take immediate possession of the property" and apply sales proceeds to "your expenses (including costs of repossession, attorneys' fees (if permitted)," did not authorize attorney's fees in bankruptcy proceedings where the secured party received the property through the confirmation of the Chapter 12 Plan. The district court noted:

To be sure, to withstand a challenge, a security agreement need not authorize the recovery of attorneys' fees specifically in bankruptcy proceedings. Indeed, reference to "proceedings" or "actions" brought to collect the debt has been held to be sufficient. See, e.g., In re Mills, 77 B.R. 413, 417 (Bankr.S.D.N.Y.1987). Nonetheless, agreements which allow attorneys' fees only in foreclosure proceedings cannot be interpreted to authorize fees in bankruptcy proceedings. In re Nickleberry, 76 B.R. 413, 425 (Bankr.E.D.Pa.1987). Id.


The Kerwin-White case is not analogous to the case at bar where the oversecured creditors found it necessary to engage counsel to prove their secured status. Without the secured status, the creditors would have lost their security interest in the collateral. Thus, it was necessary to overcome the objections to the security agreement in order to look to the collateral for payment. Such situations is analogous to the facts in Dalessio. I find the underlying agreement between the parties provides for an award of

a reasonable attorney's fee under § 506(b).

As to the reasonableness of the fee, I follow the test articulated in In re Smith, 109 B.R. 421, 423 <sup>6 MONT. B.R. 231</sup> (Bankr. Mont. 1988) and In re Johnson, 110 B.R. 13 <sup>6 MONT. B.R. 11</sup> (Bankr. Mont. 1988). Because of the challenge to the security instruments, Noonan and Patterson's secured claims were at risk. Counsel for these creditors has submitted a fee request of \$9,815.54, which is based on hours expended for legal services incurred before the bankruptcy court, the district court and the Ninth Circuit Court of Appeals, where the creditors eventually prevailed on their claim. The request has eliminated all costs and paralegal charges. Hourly charges are based on \$95 per hour from February, 1989 to September, 1991. All duplication of services has been deleted. The total secured claims finally allowed for payment exceed \$95,000. All matters considered, I conclude the request for reasonable attorney's fees of \$9,815.54 is reasonable, and is entitled to approval under § 506(b).

IT IS ORDERED Alexander, Baucus & Linnell, P.C., is awarded a reasonable attorney fee of \$9,815.54, as part of the secured claim of Noonan and Patterson under 11 U.S.C. § 506(b).

BY THE COURT

  
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 JOHN L. PETERSON  
 United States Bankruptcy Judge  
 P. O. Box 689  
 Butte, MT 59703