UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re

RANDY L. GOMM and
KRISTINE R. GOMM,

Case No. 97-30695

Debtors.

Chapter 12

MEMORANDUM DECISION ON ATTORNEY FEES
AND COSTS INCURRED BY PCA AND FLCA

This matter comes before the court in the context of an objection to the claim of an oversecured creditor. Under the terms of the loan agreements between the debtors and creditors, and also under 11 U.S.C. § 506(b), Farm Credit Services of Northeast Wisconsin, FLCA ("FLCA") and Farm Credit Services of Northeast Wisconsin, PCA ("PCA") are entitled to reasonable attorney fees and other charges incurred in connection with collection of the debt. Through July 1999, the attorney for the creditors requests payment of $44,621.45 for PCA and $29,708.92 for FLCA, for a total fees and costs of $74,330.37. Of that amount, $3,064.64 had been approved by the state court in PCA's foreclosure proceedings, which this court accepts under the doctrine of claim preclusion, making the amount at issue $71,265.73. While it is undisputed that the rate of $120 per hour is reasonable, and the attorney did everything he described in his fee applications, the court determines that much of the attorney's work and the amount sought to be collected from the debtor is unreasonable.

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) and (O).

BACKGOUND

Randy and Kristine Gomm filed this case under chapter 7 on October 27, 1997. It was later converted to a chapter 12 case by order dated August 19, 1998. At the time of filing, the debtors were operating the farm that Randy had inherited from his father in 1995. Much of their financial troubles stemmed from a "stray voltage" problem, which was supposedly fixed in 1997. However, by then, much of the damage had been done. When this bankruptcy was filed, Randy testified that he had only 45 cows, some of whom weighed only 1,000 pounds. By December of 1998, they were up to 67 healthy cows who were between 1,300 and 1,400 pounds and milking.

After almost a year without payments, the creditors filed a motion for adequate protection. Upon agreement by the parties, the debtors began paying $3,600 per month. Except for one month when a partial payment was made, the debtors remained substantially current after payments began.

The original claims of FLCA, in the amount of $79,132.66, and PCA, in the amount of $271,836.27, were secured by all of the debtors' farm personal property, the debtors' real estate, the Nancy Porter real estate, and all livestock of the debtors. Randy's mother, Nancy Porter, had previously pledged her farm to Farm Credit Services as additional collateral for the debtors' loan. The debtors' real estate consisted of approximately 109 acres of farm land. Nancy Porter's real estate consists of the debtors' residence, farm buildings and approximately 205 acres of crop land.

The amended chapter 12 plan of reorganization filed by the debtors provides that, upon the effective date of the plan, Nancy Porter will sell her real estate, valued at $198,000, to the debtors on a land contract, and she will be a secured creditor. Porter acknowledges the superior

liens of FLCA and PCA on her land, which are retained pursuant to the mortgages on her real estate. During the pendency of the chapter 12 case, the debtors sold their 109 acre farm valued at $107,000, for $130,800 to Wayne and Rebecca Wickesberg. The debtors' personal property was sold to Nolan Sales, LCC, and Timothy Nolan for $110,000. The creditors released their liens to allow the sales, and all proceeds, net of sale costs, were applied against the allowed amount of FLCA's claim. FLCA is now fully paid, including the amounts of the disputed attorney fees. The portion of remaining indebtedness to PCA, which continues to be fully secured by Nancy Porter's real estate, her guarantee and remaining equipment, is provided for in the proposed plan. The real estate portion is to be amortized over 25 years, and the portion secured by personal property will be amortized over 7 years.

During the hearing on the reasonableness of the claimed fees and costs, the court heard testimony from Paul Anderson, credit manager for Agribank, FCB. FLCA and PCA sent the Gomm's account to Agribank for servicing in September 1997, after a default. The court also heard testimony from Frederick Wieting, attorney for FLCA and PCA, the debtors' attorney, Paul G. Swanson, and the debtor, Randy Gomm.

ARGUMENTS

The debtors argue in their objection to the claim that the assessed attorney fees are unreasonable under the circumstances. The debtors claim that they have cooperated with the creditors to the best of their ability in spite of the creditors' unreasonable demands for inspections of collateral and production of nonexistent documents. The debtors further point out that the creditor brought an adversary complaint objecting to the debtors' chapter 7 discharge and

to the dischargeability of the debt, which was dismissed on the eve of trial.[1] The actions by creditors' counsel is especially unwarranted because the creditors have always been oversecured with a significant equity cushion and the indebtedness is guaranteed. Additionally, the debtors note that their own counsel's fees are less than one fourth the fees requested by the creditors.

The creditors contend, on the other hand, that the attorney services provided were reasonable under the circumstances. Throughout the case, the debtors failed to timely respond to requests of the creditors, pay amounts owed, or perform their various obligations. It is not disputed that the debtors are poor record keepers and failed to provide timely monthly reports and a timely proposed plan. The first plan was then amended when falling milk prices reduced their cash flow. Significant litigation preparation was also necessary to protect the creditors' interests, as the parties were unable to resolve their disputes. Furthermore, the debtors have yet to account for missing cattle pledged to PCA. The debtors also made substantial bank deposits after the petition was filed for which they have no explanation, and the creditors suspect that these were due to the sale of secured property.

DISCUSSION

An oversecured creditor's right to attorney fees and costs as part of an allowed secured claim is governed by § 506(b) of the Bankruptcy Code, which provides:

> 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

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[1]Actually, the § 523 action was dismissed with the consent of the creditors, and the § 727 action was held in abeyance in the event the case converted back to a chapter 7.

reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b). An oversecured creditor is thus entitled to attorney fees as part of its secured claim if four criteria of § 506(b) are established: (1) the creditor holds an allowed secured claim; (2) the claim is oversecured; (3) the underlying documents provide for fees and costs; and (4) the fees and costs are reasonable. *See In re Wire Cloth Prods, Inc.*, 130 B.R. 798, 814 (Bankr. N.D. Ill. 1991). The burden of proof is on the creditor. *In re Danise*, 112 B.R. 492, 494 (Bankr. D. Conn. 1990).

As noted above, in order for a creditor to be entitled to postpetition attorney fees, the creditor must be oversecured. After the first day of trial on the attorney fees for the creditors, PCA filed an affidavit waiving its right to payment as a secured creditor, opting instead to be treated as an unsecured creditor under the plan and pursuing the guarantor instead. The creditor argued that because it was willing to waive its unsecured claim against the debtors, this court lost jurisdiction over the debtor's motion to determine value of the secured claim. The court denied PCA's motion to abstain and ruled that it did have jurisdiction. Because the sale of Nancy Porter's land to the debtors was necessary for the plan to succeed, any claim of PCA against the Porter farm impacted the debtors' ability to reorganize. Additionally, the resolution of the amounts of FLCA and PCA's secured claims ultimately affect the amount of Nancy Porter's subrogated claim against the debtors. *See* 9/29/99 Court Minutes; *see also Matter of Canion*, 196 F.3d 579 (5th Cir. 1999).

It is undisputed that reasonable attorney fees were provided for in the agreement under which the claim arose. As to the fourth element, the reasonableness of claimed expenses appears

not to be disputed. What constitutes a "reasonable" expense is not defined in the text of § 506(b). One bankruptcy court, *In re Lund*, 187 B.R. 245, 252 (Bankr. N.D. Ill. 1995), considered case law decided under §§ 330 and 331 as analogous authority. The court noted that an expense is necessary if it was incurred because it was required to accomplish the proper representation of the client. *Id.* (citing *In re Wildman*, 72 B.R. 700, 731 (Bankr. N.D. Ill. 1987)). Expenses are reasonable in this case.

The other part of the fourth element of § 506(b), the reasonableness of FLCA's and PCA's attorney fees, is the only disputed matter. An oversecured creditor's recovery of fees and costs as part of its secured claim is always limited to "reasonable" fees and costs. The reasonableness limitation of § 506(b) is intended 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." *In re Gwyn*, 150 B.R. 150, 155 (Bankr. M.D.N.C. 1993).

Several courts have espoused a two part analysis to determine the reasonableness of fees and costs – were the secured creditor's actions reasonable, and if so, were the fees spent pursuing such activities reasonable? *See, e.g., In re Lund*, 187 B.R. 245, 251 (Bankr. N.D. Ill. 1995); *In re West Electronics, Inc.*, 158 B.R. 37, 40 (Bankr. D.N.J. 1993). In other words, an oversecured creditor may not use § 506(b) to gain compensation for every action it might choose to take during the debtor's bankruptcy case by claiming that its rights have been affected. *See In re Huhn*, 145 B.R. 872, 876 (W.D. Mich. 1992); *In re Davidson Metals, Inc.*, 152 B.R. 917, 921 (Bankr. N.D. Ohio 1993), *aff'd*, 65 F.3d 168 (6th Cir. 1995). Once the secured creditor

establishes that the activities it undertook were reasonable, it must further establish that the time spent on such activities was also reasonable. *See In re Ward*, 190 B.R. 242, 245-51 (Bankr. D. Md. 1995). The court has broad discretion when deciding upon the "reasonableness" of a secured creditor's claim for attorney fees and costs. *Id.* at 246; *Lund*, 187 B.R. at 251.

Several factors this court may consider in determining the reasonableness of fees under § 506(b) are (1) time and labor required; (2) novelty and difficult of questions; (3) skill requisite to perform legal services; (4) preclusion of other employment by acceptance of the case; (5) customary fee; (6) whether the fee sought is fixed or contingent; (7) time limitations; and (8) the amount involved and results achieved. *Lund*, 187 B.R. at 251.

The creditor's request for fees under § 506(b) must include adequate descriptions of the services performed and the time spent on discrete tasks. *Davidson Metals*, 152 B.R. at 919 (oversecured creditor denied attorney fees to the extent individual time entries in itemization of work were nondescriptive). This court has reviewed the time records of the creditors' attorney. (Statements of Services Rendered, Exhs. 9, 23 & 10, 24). These records are adequately detailed and descriptive, and what they show is illuminating as to how the attorney conducted this case.

Because necessity of the actions taken by counsel is measured, in part, by assessing the likelihood of the secured creditor not being compensated from the estate, another factor this court may consider is whether the fees and costs were reasonably calculated to protect the creditor. *Huhn*, 145 B.R. at 876; *see also Matter of Spohn*, 61 B.R. 264, 268 (Bankr. W.D. Wis. 1986) (noting that court must consider actual benefit to creditor in determining the propriety of the fees). While the attorney testified that the creditors were concerned about becoming unsecured in 1½ to 2 years if the debtors continued (as they alleged) to dispose of assets or to allow the

cows to die, the undisputed value of Nancy Porter's land makes that estimate highly suspect. Moreover, the fact that the debtors were making adequate protection payments throughout most of the pendency of the chapter 12 case would further slow the erosion of the collateral. The attorney asserted that the payments the creditors agreed to were not really adequate, but in spite of the copious activity supposedly required for this case, a motion to increase these amounts was never filed. Given the size of the claims and the value of the real estate and other collateral, the evidence shows that the creditors' secured status was never really in jeopardy (FLCA is already paid in full), and the magnitude of the attorney fees was unreasonable to protect their interests. Furthermore, the activities the attorney chose to pursue were ineffective in accomplishing what the creditors supposedly wished to do, and acts which might have achieved the desired goals were not even attempted.

To be sure, this was a difficult case from the creditors' standpoint. The debtors had few records, and they were not prompt in sharing what they had. They were dreadful record keepers. They failed to respond to requests for information, failed to sign and return requested documents, failed to recover records from third parties that might have them, and failed to explain why, thus exhibiting passive/aggressive behavior that typically drives creditors into a frenzy. They changed dairies, making the creditors chase the milk checks, and they borrowed from the dairies, from Nancy Porter, and from Randy's uncle without permission of the court. They also worked off the farm without adequate records. This partially, but not fully, explains the excess deposits that justifiably aroused Mr. Anderson's suspicions. It is predictable that the attorney fees would be higher than for the usual chapter 12 case, even one that was converted from chapter 7 after adversary proceedings were filed. But they should not be this high.

The problem here is in the implementation of "overzealous advocacy and hyperactive legal efforts" as described in *Gwyn*, 150 B.R. at 155. While the debtors' lack of responsiveness to reasonable requests and lack of explanation for the loss of assets or acquisition of funds does warrant action by the attorney, Mr. Wieting's response to the various problems that arose demonstrate sorely questionable judgment. A few examples are illustrative of hyperactive, but unproductive, legal activity that occurred in this case.

Both Messrs. Anderson and Wieting testified to their attempts to get the debtors to explain why cows were disappearing, beginning in about June 1997. The chapter 7 petition was filed in October of 1997. The motion to conduct a Rule 2004 examination was finally filed in May *1999*, almost two years after the creditors began looking for an explanation of loss of collateral. There were time entries indicating that Mr. Wieting was working on interrogatories and requests for production of documents, but there was never a motion filed to compel discovery. Mr. Wieting stated that he and Mr. Anderson were trying to get the debtors' records so they could get proof of some form of illegal activity. Then they could catch the debtors with their own records. In spite of suspecting that the debtors were selling cattle and pocketing the proceeds, neither Mr. Wieting nor Mr. Anderson called around to livestock auction houses or other farmers to see if this was happening, which might have been even more damning and considerably quicker. Indeed, someone engaged in the surreptitious conversion of collateral is not likely to keep detailed records on the subject, especially when that someone does not keep adequate records of his legal operations. Instead, the summaries of fees prepared by Mr. Anderson (Exhs. 21 & 22) show that 21.10 hours of legal time was allocated to FLCA for "Records (2004)," and 23.25 hours was allocated to PCA for the same task. This is a total of

44.35 hours of legal time, priced at $5,322. A few telephone calls by Mr. Anderson to local dealers, or a few hundred dollars to a private investigator, probably would have revealed whether cattle were indeed being sold, or whether the loss had another explanation. Since the creditors knew before the bankruptcy was even filed that obtaining information from the debtors was problematic, they should have been questioned under oath immediately, and formal demand for records should have been made by subpoena. Of course, having documentation before an examination is the optimum method, but it is not the only one, and it was certainly ineffective in this case. If nothing else were accomplished, the debtors' recalcitrance would have been on the record, and the examination could have been adjourned until after the records presented were reviewed. When the Rule 2004 examination eventually did take place, the time records indicate that questions were submitted by Mr. Anderson, which no doubt reduced Mr. Wieting's preparation time, or should have. In any event, failing to invoke discovery procedures or to involve the court in frustrated discovery attempts for over a year and a half cannot be rewarded with exorbitant fees. Moreover, no evidence of the debtors' sale of collateral has been produced to date.

The fee summaries show that Mr. Wieting spent a total of 207.10 hours for both creditors on general matters concerning the chapter 12 plan, plan terms, feasibility, good faith, the "walkaway" provision, and interest rates. This adds up to $24,852 for a total of two plans with a total of 39 pages, including attachments. Mr. Swanson testified that he spent two to three hours on the two plans submitted, but this was not shown on his billing statements because he apparently forgot to enter it. He stated that the plans were largely "boilerplate" and did not require a great deal of work. What was important to the debtors was how much they would have

to pay per month. Mr. Wieting stated his practice was to develop research files on each topic within the plan before attempting to challenge or negotiate a provision. From the research files, information moved to a trial notebook. One provision that engaged much of his attention was the "walkaway" provision, whereby the debtors could turn collateral back to the secured creditor without a deficiency. Mr. Wieting spent 37.95 hours on this one topic, or $4,554 in attorney fees before bringing it up to Mr. Swanson *at a hearing* that this provision was unacceptable. Mr. Swanson agreed on the record to take it out.[2] The court is mystified how an attorney can spend almost an entire work week on one clause of a plan without asking the opposing attorney if this is a deal breaker. We seriously doubt there is that much law on whether such a clause is confirmable. Granted, both attorneys felt that settlement was unlikely, but electing to charge over $4,000 without attempting to open the door to negotiations is inexcusable.

Mr. Wieting pointed out that the interest and amortization rates proposed by the debtors were contrary to administrative regulations. He spent 9.55 hours on this issue. Mr. Wieting's letter of June 23, 1998, (Exh. 26) lists demands for repayment terms but says nothing about regulations. As Mr. Anderson would have known this, and communications between Messrs. Anderson and Wieting were frequent, it is not clear why over a full work day would have been necessary to determine this, draft an objection, and even argue it to the court.

Mr. Wieting complained that he was often surprised in court, such as when the case was to be converted and when the plan was to be amended. There was a delay in Mr. Swanson's submitting the order of conversion, which supposedly had Mr. Wieting working on both chapter

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[2]The provision was still in the first amended plan, a mistake according to Mr. Swanson. However, since its removal was agreed to on the record, the problem was over.

7 and chapter 12 matters, but the time records do not reveal substantial extra work attributable to this delay. Indeed, work on the § 727 action continued even after counsel became aware of the conversion to chapter 12. (*See* Exh 23; entries dated 8/24/98, 8/25/98.)

After the conversion, Mr. Wieting was prepared for full scale litigation on his 17 point objection to confirmation, and the debtors announced that the plan would be amended. When the court questioned why the plan was not negotiated, his excuse was that the debtors' counsel had conveyed a "take it or leave it" attitude at the § 341 meeting, and besides, the debtors' attorney did not call him to negotiate either. Meanwhile, $4,000 to $5,000 in legal fees were being incurred each month in his office. Since this work was largely invisible outside Mr. Wieting's office, it is no wonder that the debtors had no idea they were running up this kind of expense[3]. In this day of increased awareness of the need for inexpensive and noncombative methods of dispute resolution, attorneys who do not like each other still need to communicate to try to find a common ground. They at least need to keep in touch with each other to learn developments in the case that might affect their activity, such as falling milk prices making a plan obsolete. The attorney planning to spend many thousands of dollars worth of time to object to confirmation of a plan should try to find out if that work needs to be done, particularly if time has passed since the plan was filed, and the creditor well knows that milk prices are falling. If negotiations do not work, preparation for legal warfare makes sense, but it must be a last resort. Proof that negotiations failed (i.e., "Telephone call to debtors' counsel; told to drop dead.") must be evident from the billing statements.

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[3]The attorney's statements were not revealed to debtors' counsel until the beginning of this hearing, despite requests made in court at prior hearings.

In this case, the attorney for the creditors chose the most ineffectual methods of supposedly protecting his clients' interests, whose interests had relatively little need for protection, and he did not try what forseeably had a much better chance of working. He had a sophisticated client in Mr. Anderson, and the extensive investigation and analysis of documents (which the debtors eventually produced) by Mr. Anderson should have greatly reduced the work needed to be done by the attorney. Mr. Wieting's failure to conduct appropriate discovery, including use of effective methods and motions to compel compliance by the debtors, or to communicate with debtors' counsel, resulted in unnecessary work and unnecessary surprise. Hence, a substantial portion of the attorney fees was unreasonable.

CONCLUSION

For the reasons discussed above, this court finds that a fifty percent reduction in attorney fees is appropriate. Therefore, the oversecured claim of FLCA shall be reduced by $14,123.50[4] and the oversecured claim of PCA shall be reduced by $20,193.[5] The court will not reduce disbursements, as the amount requested does not appear to be unreasonable given the size and length of the case.

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[4]This amount is 50% of $28,247, the total amount of fees accrued by FLCA through July 6, 1999. *See* Exhibit A to PCA's & FLCA's Brief in Support of Approving Attorneys' Fees and Costs Incurred by PCA and FLCA, filed 1/3/00.

[5]This amount is 50% of $40,386. $40,386 is arrived at by subtracting fees of $2,634, which were previously approved by the state court in PCA's foreclosure proceedings, from $43,020, the total amount of fees accrued by PCA through July 6, 1999. *See* Exhibit A to PCA's & FLCA's Brief in Support of Approving Attorneys' Fees and Costs Incurred by PCA and FLCA, filed 1/3/00. The 50% reduction in fees shall not apply to the amount approved by the state court.

This opinion constitutes the court's findings of facts and conclusions of law in accordance with Federal Rules of Bankruptcy Procedure 7052. A separate order shall be entered in accordance with this opinion.

Dated at Milwaukee, Wisconsin, February 9, 2000.

BY THE COURT:

Honorable Margaret Dee McGarity
United States Bankruptcy Judge