

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 03-10223-JMD
Chapter 7

Donald and Jean Chase,
Debtors

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MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The Court has before it a motion for relief filed by NationsCredit Financial Services Corporation (“NationsCredit”) on June 13, 2003 (Doc. No. 5). In the motion, NationsCredit seeks relief from the automatic stay so that it may pursue its state law remedies under the note and mortgage with respect to the Debtors’ real property located in Concord, New Hampshire. According to the motion for relief, the mortgage payments for May and June 2003 were outstanding when the motion was filed.¹

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States

¹ Under the terms of the promissory note payments are due on the first of every month with a 15 day grace period. The June payment was still in the “grace period” at the time the motion for relief was filed.

Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.).

This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

At the July 9, 2003, hearing on the motion for relief, NationsCredit indicated that the Debtors had cured the May and June payments, but the July payment had not been paid, but was still within the grace period. The sole issue of contention between the parties was the outstanding legal fees and expenses of \$950, related to the motion for relief. The Court ordered the parties to file supplemental papers in regards to the claim for legal fees and expenses and took the matter under advisement.

The Debtors contend that the charged legal fees and expenses were unjust and unfair because: (1) the Debtors were only one payment in arrears at the time the motion for relief was filed;² (2) the legal fees and expenses are the equivalent of one mortgage payment;³ and (3) the motion for relief was only three pages and there was nothing overly complicated that would justify the amount of the claim for legal fees and expenses.

NationsCredit contends that the Debtors were two months in arrears at the filing of the motion for relief because the payments under the promissory note are due on the first of every month, and therefore the payments are late on the second day of the month, even though the contract does not permit the lender to charge a late fee until after the fifteenth of each month. In essence, the argument is that the existence of a grace period before a late fee may be charged does not change

² The Debtors admit that the May payment was due; however, they insist that the June payment was not outstanding because it still was within the grace period.

³ Mortgage payments are \$954.11 a month.

the due date of the monthly payment. Finally, pursuant to paragraphs 6 and 20 of the mortgage, NationsCredit claims that it is entitled to protect its interest and incur attorneys' fees and the loan documents do not require a "billing statement" to the mortgagor with respect to these attorneys' fees.

III. DISCUSSION

Neither NationsCredit's motion for relief nor its response to the Debtors' objection indicates any loan history or other explanation for the reason it filed its motion for relief when the Debtor was forty-three days in arrears under the mortgage. While the Court recognizes NationsCredit's right to file for relief, the Court points out that there is a fine line between overzealousness and protecting one's rights. However, NationsCredit is correct that at the time it filed its stay relief motion the mortgage was two payments in arrears and it had a legal right to file. Under the terms of the mortgage, if the Debtors fail to promptly pay the promissory note secured by the mortgage, NationsCredit may incur reasonable attorneys' fees for action necessary to protect its interest. See paragraph 6 of the mortgage attached to NationsCredit's stay relief motion (Doc. No. 5). Accordingly, because payments due under the note were not promptly paid, under the terms of the loan documents, NationsCredit is entitled to claim its reasonable fees and expenses in protecting its mortgage interest.

A. Applicable Law

NationsCredit's claim for attorneys' fees and expenses in this proceeding is subject to the provisions of section 506(b) of the Bankruptcy Code.⁴ Section 506(b) preempts state law and only permits claims for postpetition attorneys' fees and expenses as determined solely by federal law. In re Center, 282 B.R. 561, 566 (Bankr. D.N.H. 2002). The Debtors have not challenged the validity or perfection of NationsCredit's mortgage or claimed that the creditor is not oversecured. Therefore, the Court finds that the Debtors' lack of an objection to the allegations in the stay relief motion and the figures contained in the Debtors' schedules support a finding that NationsCredit holds a secured claim which is fully secured.

In Center, this Court reviewed and summarized the requirements of section 506(b):

Section 506(b) requires the Court to review the amount of an oversecured creditor's attorneys' fees to be included in an allowed secured claim to insure that they are reasonable. The purpose of the reasonableness requirement is to insure that an oversecured creditor is not given a blank check to incur attorneys' fees which will be reimbursed out of its collateral. "If proper restraint is not exercised, the costs of any 'overlawyering' should be borne by the Creditor, rather than Debtors." In re Staggie, 255 B.R. 48, 54 (Bankr. D. Idaho 2000). The reasonableness requirement in section 506(b) imposes a standard that is essentially vague and ambiguous. "The court must determine the reasonableness based on all relevant factors and whether the creditor reasonably believed that the steps taken were necessary to protect its interests . . ." Id.

"It is well established in this circuit that a reasonable [attorneys'] fee will first be computed in accordance with the 'lodestar' method, i.e., a reasonable hourly rate applied to reasonable hours expended in rendering the necessary services." In re Elmendorf Board Corp., 57 B.R. 580, 584 (Bankr. D.N.H. 1986) (citing Boston & Maine Corp. v. Moore, 776 F.2d 2 (1st Cir. 1985)); see also Lipsett v. Blanco, 975 F.2d 934 (1st Cir. 1992). The lodestar method consists of calculating the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Lipsett, 975 F.2d at 937. To determine a reasonable number of hours, the Court takes the party's submitted time and then subtracts from that figure all hours which

⁴ In this opinion reference to the "Code" or "Bankruptcy Code" shall mean Title 11 of United States Code.

are duplicative, unproductive, excessive or otherwise unnecessary. Id. The Court then applies hourly rates to each billed task “taking into account the prevailing rates in the community for comparably qualified attorneys.” Id. (quoting United States v. Metro. Dist. Comm’n, 847 F.2d 12, 19 (1st Cir. 1988)). Once established, the lodestar represents a presumptively reasonable fee. Id. That fee may then be modified, upward or downward, based upon consideration of some or all of the twelve factors first announced in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Id. at 941-43; In re Public Serv. Co. of N.H., 160 B.R. 404, 413 (Bankr. D. N.H. 1993).

Center, 282 B.R. at 567. Accordingly, in the First Circuit the determination of a reasonable attorneys’ fee under section 506(b) involves the application of the “lodestar” method. As summarized in Center, the “lodestar” method requires the multiplication of the hours reasonably expended by reasonable hourly rates for the personnel involved to determine a presumptively reasonable fee. The presumptively reasonable fee may then be modified upward or downward based upon a variety of factors.

In its written response (Doc. No. 14) to the Debtors’ objection to the reasonableness of its fees (Doc. No. 12), NationsCredit did not provide the Court with the number of hours or the hourly rate for the attorneys’ fees for which it is seeking payment from the Debtors. Neither did NationsCredit provide an itemization of the expenses incurred. In the absence of such information the Court could easily find that the secured creditor has failed to establish on the record an entitlement to any presumptively reasonable fees or expenses and disallow the entire claim for attorneys’ fees or expenses. However, in this case such a result might be unnecessarily harsh and perhaps inequitable. Counsel for secured creditors should know the legal standards applicable to requests for attorneys’ fees and expenses under section 506(b). Hereafter counsel will be deemed to know that disputes over the reasonableness of postpetition attorneys’ fees and expenses under section 506(b) require the application of the “lodestar” method adopted by the First Circuit Court

of Appeals. The failure to establish a record on which the Court may conduct the lodestar analysis is likely to result in the complete disallowance of such attorneys' fees and expenses.

B. The Record

The record in this case provides no itemization of hours or hourly rates from which this Court can determine that the \$950 in attorneys' fees and expenses is even presumptively reasonable. There is no evidence indicating an adverse loan payment history or other circumstances which warranted an immediate aggressive pursuit of relief from the automatic stay. The motion for relief itself was a routine motion containing no novel legal theories or difficult factual issues. The Court notes that counsel for NationsCredit is experienced in stay relief matters and likely uses computer based word processing to prepare such routine motions quickly and efficiently. While counsel for NationsCredit did attend a hearing, that hearing was necessary only to resolve the issue of legal fees because the Debtor brought the loan current well before the hearing.

In the absence of any better record to base a determination of the amount of reasonable attorneys' fees, the Court must look to the market in this district for legal services in routine consumer bankruptcy cases. The preparation and filing of the stay relief motion in this case and attendance at one hearing should involve no greater amount of time and no higher hourly rate than that charged for the preparation and filing of a routine bankruptcy petition, schedules and statement of affairs.⁵ In this case the Disclosure of Compensation of Attorney for Debtor (Doc. No. 1) reflects that the Debtors' counsel charged \$399.00 for such services.

⁵ Arguably, the preparation and filing of a routine stay relief motion involves less client contact and time than the filing of a bankruptcy petition and schedules. However, the record has not been developed sufficiently for the Court to make any such determination.

NationsCredit's response to the Debtors' objection to the amount of attorneys' fees and expenses indicates that the creditor incurred \$150.00 in expenses, \$75.00 for the filing fee for the stay relief motion and \$75.00 for obtaining a recorded copy of the mortgage and a title run down. The Court can find no explanation in the record as to why the Debtors' should bear the expense of providing the creditor's counsel with a copy of a loan document which should be available in the creditor's files. The expense incurred in the title rundown is unknown because it was not separately itemized.

Accordingly, the Court shall allow postconfirmation attorneys' fees to NationsCredit in the amount of \$399.00 and expenses for the filing fee in the amount of \$75.00, for a total allowance of \$474.00.

Counsel appearing before this Court are advised that the fees and expenses awarded in this decision are based upon the record in this case. The decision in this matter is not a determination of a reasonable fee for the prosecution of a stay relief motion and accordingly the actual award holds no precedential value. Decisions in future cases shall be based upon the record established by the parties in those cases.

IV. ORDER

For the reasons set forth in this memorandum opinion, it is hereby ORDERED:

1. The Debtor's objection to NationsCredit's request for postpetition attorneys' fees and expenses is SUSTAINED in part;
2. The Debtors' shall reimburse NationsCredit \$474.00 for reasonable postpetition attorneys' fees and expenses; and

3. If the parties are unable to resolve the payment of the fees and expenses allowed by this Order by September 5, 2003, either party may file a motion with the Court to determine the terms of payment.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: August 25, 2003

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge