11 USC § 506(b)
ORS 86.753
ORS 81.020
Attorney's fee clause

In re Bennatt, Case No. 688-63579-H7
1/4/90 PSH Unpublished

Debtors objected to oversecured creditor's $20,631 claim which included pre- and post-petition attorney's fees, pursuant to fee clause in promissory note, for attempted foreclosure of $10,000 note secure by trust deed on debtors' residence. After debtors' requests for TRO and preliminary injunction of foreclosure sale were denied by state court, they attempted to cure default within 5 days prior to sale by tendering a check into court. Creditor refused to accept it as inadequate and debtors filed bankruptcy.

HELD: ORS 86.753 limits attorney's fees for foreclosure to $275 each for attorney and trustee if default is cured within 5 days prior to date of sale. Creditor waived his objection to tendered amount by not responding with correct cure amount within reasonable time. Post-petition fees for motion for relief from stay were unreasonable as creditor was protected by large equity. Objections sustained.

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED
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BY alp DEPUTY

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE WILLIAM D. BENNATT and HELEN D. BENNATT, Debtors.	)	Case No. 688-63579-H7 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court makes the following findings of fact:

Before the court is debtors' objection to a claim. The creditor, John C. Hessel ("Hessel"), lent the debtors $10,000 on March 14, 1988, evidenced by a promissory note with interest at 11.75% per annum. The note is secured by a deed of trust on the debtors' residence, signed April 14, 1988. The residence is subject to a senior lien of $7,926.79 for real property taxes. The parties agree the residence has a fair market value of between fifty and sixty thousand dollars. By its terms the note matured on July 13, 1988, with all interest due at maturity. The note also provided for Hessel's reasonable attorney's fees and costs for attempted collection.

On May 26, 1988 Hessel's attorney, Mark Whitlow, as trustee, commenced non-judicial foreclosure by advertisement and sale by

AO 72
(Rev.8/82)

serving Notice of Default and Election to Sell on the debtors. The Notice alleged a default for failure to pay real property taxes as required under the terms of the trust deed, and set September 26, 1988 as the date for the foreclosure sale. Shortly thereafter the debtors requested a statement of the payoff amount necessary to stop foreclosure. Mr. Whitlow replied by letter dated June 7, 1988 that $11,806.91 would pay off the note. This figure included the $10,000 principal; $415.40 in costs; $250.00 for the statutory trust deed foreclosure fee ($125.00 each for attorney and trustee); $286.51 interest at $3.219 per day from March 14, 1988 to June 10, 1988 and $855.00 in attorney's fees for services rendered in preparing the note and trust deed which Mr. Whitlow and Hessel allege the debtor in pre-loan negotiations orally agreed to pay.

On September 12, 1988 the debtors filed suit in state court to enjoin the foreclosure sale and requested a temporary restraining order. The temporary restraining order was denied but the sale was reset for November 28, 1988 with a hearing on the preliminary injunction set for November 22, 1988. Hessel contends that at the hearing on the temporary restraining order the judge also ordered that if the debtors cured the deficiency before sale, they should pay the tender amount plus $1,000.00 attorney's fees. However the record before me is devoid of any such order and no evidence is before me as to what fees the $1,000.00 represents or how the amount was calculated.

By letter dated September 16, 1988 the debtors' attorney, Robert Swift, again requested a payoff amount from Mr. Whitlow. Jeanne McGinnis, Mr. Whitlow's associate assigned to the upcoming

AO 72
(Rev.8/82)

injunction suit, responded by letter dated October 7, 1988 that the payoff through September 26, 1988 would require $16,327.18, which included the $10,000.00 principal, $486.06 interest at $3.219 per day, $841.12 in costs and "approximately $5,000.00" in attorney's fees. The fee amount was not itemized.

On November 18, 1988, the debtors amended their state court complaint, adding an allegation of misrepresentation and claimed damages of not less than $470,000.00.

At the close of the preliminary injunction hearing on November 22, 1988, after denial of the relief requested, the debtors attempted to tender payoff by means of a check made payable to Hessel in the amount of $11,791.88. Mr. Swift arrived at this figure by adding the principal amount, costs quoted in the creditor's October 7, 1988 letter, interest to November 22, 1988 and a $225.00 statutory attorney's fee provided by ORS 86.753(1)(c) in substitution for the $5,000 fee quoted. At that time Mr. Hessel protested, "I don't believe that covers the attorney fees." His attorney, Mr. Whitlow, replied, "We'll discuss it," whereupon Mr. Hessel said, "I don't want to even discuss it. Give it back."[1] The debtors tendered the check into court and the judge concluded the hearing.

Hessel's attorneys had not prepared a payoff amount for the hearing and were surprised by the payoff tender. Right after the hearing Mr. Swift and Mr. Whitlow discussed the shortage of tender.

[1]Transcript of the November 22, 1988 state court hearing on the preliminary injunction at pp. 3-4.

AO 72
(Rev.8/82)

Mr. Whitlow was concerned that the offer did not include the $1,000.00 allegedly ordered by the state court and other costs. Mr. Swift disputed the right to the $1,000.00 but did not request another accounting nor did he offer an itemization of his tender amount. The next day they spoke again by telephone but could not resolve the controversy. Mr. Whitlow suggested to Mr. Swift he perhaps would postpone the sale set for the following Monday. Again, Mr. Swift did not ask for a specific amount to be paid nor did he give an itemization of his tender amount. After he hung up Mr. Whitlow gave directions to his secretary to postpone the sale previously set for November 28, 1988. On November 25, 1988, the judge signed the order denying the debtors' motion for preliminary injunction and the court returned the tendered check to Mr. Swift.

Also on November 25, 1988 the debtors filed their Chapter 7 petition. The following Monday by telephone Mr. Swift again encouraged Mr. Whitlow to take the tendered cashier's check. Mr. Whitlow refused to do so as he knew about the bankruptcy filing and took the position he could not take estate property.

On December 23, 1988 Mr. Whitlow's associate, Janet Briggs, who was now in charge of collecting the debt in bankruptcy, filed a motion for relief from stay in order to pursue foreclosure, claiming there was no equity in the property. At hearing on the motion I found Hessel to be adequately protected by the property's equity and denied the motion.

On January 13, 1989 Hessel filed a secured claim in the estate for $20,631.80, which claim is itemized as $10,000.00 principal, $933.80 interest from 3/14/88 to 12/30/88, $9,198.00 in attorney's

AO 72
(Rev.8/82)

fees and costs for the foreclosure action, and $500.00 in attorney's fees and costs for pursuing the debt in bankruptcy.

On February 10, 1989, Mr. Whitlow sent a letter to Mr. Swift in which he confirmed that the sum tendered by Mr. Swift on November 22, 1988 was rejected as insufficient and stated that the correct amount due and owing as of November 22, 1988 was $12,105.74, composed of $10,000.00 principal; $714.62 interest at $3.219 per day from "4/14/88 through 11/22/88"; $814.12 costs; and a $275.00 statutory foreclosure fee each for attorney and trustee.

On June 14, 1989 the debtors tendered a cashier's check for $12,800.00 to Mr. Whitlow. Hessel refused to accept the offer as insufficient and untimely, claiming that since cure was not effected within five days prior to November 28, 1988, he was entitled, as an oversecured creditor, to all reasonable attorney's fees under 11 U.S.C. § 506(b),[2] which allegedly includes fees for loan negotiations, defense of the state court suit, fees incurred in foreclosure and fees incurred in the bankruptcy case.

On July 7, 1989 the debtors objected to Hessel's claim. They stated the amount of the allowed secured claim should be $12,764.90. They reached this figure by adding interest at $3.219 per day from November 22, 1988 to June 14, 1989 to $12,105.74, the amount stated as due in Whitlow's February 10, 1989 letter.

[2]All references hereinafter refer to 11 U.S.C. § 101 et seq. unless otherwise stated.

AO 72
(Rev.8/82)

Conclusions of Law

Normally, an oversecured creditor is entitled under § 506(b) of the Bankruptcy Code to reasonable fees incurred under an attorney's fees clause as part of its claim in the bankruptcy estate to the extent the court finds the services rendered to be encompassed by the language of the clause. The attorney's fee clause in the creditor's note reads:

> If this note is placed in the hands of an attorney for collection, we promise and agree to pay the holder's reasonable attorney's fees and collection costs, even though no suit or action is filed hereon; however, if a suit or action is filed, the amount of such reasonable attorney's fees shall be fixed by the Court, or courts in which the suit or action, including any appeal therein, is tried, heard or decided.

Mr. Whitlow's fees for services rendered in preparing the loan documents are not covered by the attorney's fee clause as they were not incurred in an attempt to collect on the note. Nor has the creditor shown that the fee amount was part of the $10,000 represented by the promissory note and secured by the trust deed. Therefore on November 22, 1988 and thereafter the creditor improperly insisted on inclusion in the tender of this amount to cure the debtors' default under the terms of the note and trust deed.

ORS 86.753 provides:

> **86.753 Discontinuance of foreclosure proceedings after cure of default.** (1) Where a trustee has commenced foreclosure of a trust deed by advertisement and sale, the grantor . . . may cure the default or defaults at any time prior to five days before the date last set for the sale. . . . [I]n addition to paying the sums or tendering the performance necessary to cure the default, the person affecting [sic] the cure shall pay to the beneficiary all costs and expenses actually incurred in

AO 72
(Rev.8/82)

enforcing the obligation and trust deed, together with trustee's and attorney fees not exceeding:

(a) $125 each if the default is cured more than 90 days before the date of sale set in the trustee's notice of sale;

(b) $175 each if the default is cured between 90 and not more than 60 days before the date of sale set in the trustee's notice of sale;

(c) $225 each if the default is cured between 60 days and not more than 30 days before the date of sale set in the trustee's notice of sale; or

(d) $275 each if the default is cured any time thereafter.

On November 22, 1988, pursuant to the terms of ORS 86.753 Hessel was entitled to $10,000.00 principal, plus interest at $3.219 per day from 3/14/88, uncontested $841.12 foreclosure costs and $275.00 each for attorney's and trustee's fees. The statute severely limits fees a creditor may otherwise collect under an attorney's fee clause in a promissory note if a tender is made within the stated time frames. The correct amount of tender was easily calculable from the creditor's incorrect October 7, 1988 itemization. Mr. Swift attempted to make this calculation. However, the $11,791.88 amount he tendered was slightly shy of the mark. A simple calculation by Mr. Whitlow at the time would have revealed that Mr. Swift apparently applied the wrong statutory attorney's fee of $225.00 instead of $275.00 as provided in ORS 86.753(1)(d), and also neglected to include the $275.00 statutory trustee's foreclosure fee.

ORS 81.020 provides:

81.020 Objection to tender. The person to whom a tender is made shall <u>at that time specify any objection</u> the person may have to the money, instrument or property or the person shall be deemed to have waived it; and if the objection is to the amount of money, the terms of the instrument or the amount or kind of property, <u>the person must specify the amount</u>, terms or kind <u>which the person</u>

AO 72
(Rev.8/82)

requires or be precluded from objecting afterwards. (emphasis supplied)

The language of ORS 81.020 suggests that once a debtor tenders a good faith offer to cure, a creditor may not frustrate the statutory limits on its attorney's fees by simply refusing to accept the tender or stalling its response as to what constitutes the correct amount until after the time to cure has expired. Debtors' attempted to cure timely and in good faith on November 22, 1988, six days before the "date last set for the sale." Thus, Hessel could only refuse the tender if inadequate, and he was bound to inform debtors of what amount would be acceptable. This court believes Hessel was required to provide this information within a reasonable time. By not coming forward with the correct amount until two and one-half months later, Hessel by statute is deemed to have waived his objection to the amount tendered on November 22, 1988.[3]

Hessel argues he was forced to incur exceptional fees in defending against debtors' amended complaint, which sought promissory estoppel based on Hessel's alleged misrepresentations when he made the loan. Yet a review of his attorneys' time records uncovers no extraordinary charges incurred because of the amendment to the complaint. The amended complaint was filed on November 18, 1988, a mere six days prior to the hearing to enjoin the foreclosure sale. The bankruptcy was filed shorty thereafter.

[3]The court also notes Hessel's attorney postponed the sale beyond the 28th of November. Therefore, at the time the debtors filed bankruptcy the debtors were not within five days before the date last set for the sale.

AO 72
(Rev.8/82)

What the timesheets reveal is that from May 26, 1988 through November 22, 1988, Hessel's attorneys incurred overly disproportionate expenses in relation to the debt they were attempting to collect, especially in light of the fact that the debtors could limit those fees by statute by timely curing their default. Hessel's proof of claim, filed January 13, 1989, seeks $9,198.00 for attorney's fees/costs for foreclosure and $500.00 for attorney's fees/costs in bankruptcy. However, the affidavit of David Pickett, submitted with the time records for services rendered to Hessel as of July 26, 1989, reflects actual fees incurred are $6,041.50, and costs are $1,489.68. The fees reflect charges for approximately 93.5 hours, with 51.3 hours expended between August 18, 1988 and November 23, 1988, presumably for the foreclosure action, and 42.2 hours expended between November 28, 1988 and July 26, 1989, presumably to collect the debt in bankruptcy. No time is shown for attending the hearing on the claim objection. If it were included this court would not find it reasonable as the creditor's attorneys' legal position has always been untenable.

The creditor's fees incurred post-petition for filing the proof of claim and attempting settlement under § 506(b) are allowable as reasonable. The motion for relief which the creditor filed was unnecessary as a very large equity protected Hessel. Therefore fees incurred for that service are not reasonable.

As an oversecured creditor Hessel is allowed post-petition interest pursuant to the provisions of § 506(b). Debtors' objection to the claim is sustained. The creditor's claim shall be

AO 72
(Rev.8/82)

allowed to include $10,000.00 principal, $550.00 statutory foreclosure fees, $841.12 costs, $500.00 post-petition attorney's fees and interest at $3.219 per day from March 14, 1988 until paid.

I wish to comment on a matter not directly related to the legal issue before me. In reviewing the documents presented by the parties I noted that Mr. Swift and Mr. Brian Green, the debtors' bankruptcy attorney, obtained a trust deed on the debtors' property at issue on August 19, 1988 to secure a note in the amount of $20,000 and obtained a second trust deed on the property on November 23, 1988 to secure a note in the amount of $12,000. This court is concerned that the attorneys, by obtaining their own financial interest in the property at issue, created either an actual or potential conflict of interest in representing the debtors. This court can imagine a circumstance where quick resolution of the controversy with Hessel would benefit the debtors but not necessarily the subordinate lien holders.

This memorandum opinion contains the court's findings of fact and conclusions of law and pursuant to Bankruptcy Rule 9014, which incorporates Rule 7052, they will not be separately stated.

An order consistent herewith shall be entered.

POLLY S. HIGDON
Bankruptcy Judge

cc: Deb(s), Deb(s) Atty., Tr. Tr., Atty., Tr. Acct., J. Hessel, J. Briggs, Portland Bankruptcy Ct., UST, if applicable ALP

AO 72
(Rev.8/82)