

11 USC §506(b)
ORS 23.096
Attorney fees

In re Rubottom

Case No. 391-31383-H11

6-23-92

The court held that under In re Fobian, 951 F.2d 1149 (9th Cir. 1991, and other 9th circuit case law, creditors, including oversecured creditors, are not entitled to attorney fees for litigating issues "peculiar to bankruptcy" notwithstanding §506(b) and the presence of an attorney fees clause in the underlying contract. Specifically, the creditor was not entitled to add fees to its claim for successfully objecting to confirmation and for seeking relief from the stay since both these are peculiar to bankruptcy law.

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1 Metropolitan objected to confirmation of the proposed plan
2 and filed a motion for relief from stay. Both the objection to
3 confirmation and the motion for relief were based on
4 Metropolitan's contention that bankruptcy law did not allow the
5 debtor to stay Metropolitan's foreclosure efforts beyond the
6 maturity date of the note. See 11 U.S.C. §1322(b)(2); In re
7 Seidel 752 F.2d 1382 (9th Cir. 1985); In re Vanasen, 81 B.R. 59
8 (Bankr. D. Or. 1987); and In re Rubottom, 134 B.R. 641 (9th Cir.
9 BAP 1991).

10 Metropolitan's objections to confirmation were ultimately
11 successful on appeal and the motion for relief was not pursued
12 after the debtor converted the case to a chapter 11 case.
13 Metropolitan amended its claim to include post petition attorney
14 fees for litigating the objection and motion. Metropolitan also
15 sought to add certain insurance premium advances and interest on
16 the insurance premiums advanced.

17 The parties have agreed that the insurance premiums and
18 interest thereon should not be allowed. Thus, the only
19 remaining issue is the allowance of the attorney fees incurred
20 by Metropolitan in objecting to confirmation and filing the
21 motion for relief from stay.

22 Metropolitan contends that it is an oversecured creditor
23 and that under 11 U.S.C. §506(b), it is entitled to attorney

1 fees as provided in the agreement.² Metropolitan apparently
2 argues that its efforts in the bankruptcy court were taken to
3 enforce the provisions of the subject contract, specifically,
4 the provision concerning the maturity date of the note.
5 Metropolitan contends that since it is oversecured and was
6 enforcing the provisions of the contract, it is entitled to
7 attorney fees pursuant to §506(b) and the contract.

8 The debtor objects to the allowance of attorney fees on the
9 ground Metropolitan is not entitled to post petition attorney
10 fees for litigating "issues peculiar to federal bankruptcy law"
11 under the rule announced in In re Fobian, 951 F.2d 1149, 1153
12 (9th Cir. 1991). The debtor characterizes Metropolitan's
13 efforts as ones peculiar to bankruptcy and therefore not
14 compensable.

15 In Fobian, a chapter 12 debtor's plan proposed to pay a
16 certain sum over time to a secured creditor in full satisfaction
17 of the claim or to return the collateral in full satisfaction of

² 11 U.S.C. §506(b) 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 reasonable fees, costs, or charges provided for under the agreement under which such claim arose."

1 the debt. The creditor in Fobian objected on the ground the
2 debtor's plan failed to provide for its unsecured claim as
3 required by §1225(a)(4).³ The bankruptcy court overruled the
4 creditor's objection and confirmed the plan. The creditor
5 appealed. The Bankruptcy Appellate Panel ("BAP") reversed the
6 bankruptcy court's order of confirmation and the Ninth Circuit
7 Court of Appeals affirmed the BAP's ruling.

8 After affirming the BAP's ruling in Fobian, the Ninth
9 Circuit turned to the issue of attorney fees. In refusing to
10 award fees to the successful creditor, the court stated that
11 "where the litigated issues involve not basic contract
12 enforcement questions, but issues peculiar to federal bankruptcy
13 law, attorney's fees will not be awarded absent bad faith or
14 harassment by the losing party." Id. at 1153.⁴ The court cited
15 In re Coast Trading Co., 744 F.2d 686 (9th Cir. 1984) and In re
16 Fulwiler, 624 F.2d 908 (9th Cir. 1980) in support of its

³ Section 1225(a)(4) provides:

"[T]he court shall confirm a plan if the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date"

⁴ Neither of the parties seeks an award of fees on the grounds of bad faith or harassment.

1 holding.

2 The final case cited by the Ninth Circuit in support of its
3 holding is In re Johnson, 756 F.2d 738 (9th Cir. 1985). The
4 Fobian court summarizes Johnson as follows: "because creditor's
5 request for relief from the automatic stay pursuant to Section
6 362(d) was not an 'action on the contract,' debtor was not
7 entitled to attorneys' fees for defense against the request."
8 Fobian at 1153.⁵

9 Metropolitan argues that Fobian dealt with attorney fees
10 sought by an undersecured creditor. Since §506(b) only applies
11 to "oversecured" creditors, Metropolitan reasons that
12 undersecured creditors are not allowed to recover fees
13 regardless of the issues litigated. Thus, Metropolitan argues
14 that the broad language about attorney fees in Fobian is dicta
15 and not binding on this court.

16 While Metropolitan's analysis of the law is persuasive, its
17 interpretation of Fobian is not. Although it appears the
18 creditor in Fobian was undersecured, it also appears that such
19 was not the basis for the court's ruling. Nowhere in the
20 opinion does the court mention the language of §506(b) nor the

⁵ In Johnson, the court was interpreting a California statute that is very similar in language and, apparently, identical in effect, to O.R.S. 20.096. Both statutes, for example, use the phrase "action on a contract."

1 implication that undersecured creditors are not entitled to
2 recover attorney fees under that section. If such were the
3 basis for the ruling, surely this reasoning would have been made
4 clear.

5 Instead, it appears the holdings of the Ninth Circuit have
6 been fairly consistent from Fulwiler, Coast Trading and Johnson
7 in the 1980's to Fobian in 1991: No creditor or debtor will be
8 allowed attorney fees for litigating issues related to a
9 contract if those issues are "peculiar to bankruptcy."⁶

10 It should be noted that there is merit in Metropolitan's
11 contention and this court does not consider Metropolitan's
12 argument to be frivolous. Outside of bankruptcy, if an
13 agreement contains an attorney fee clause, a creditor (such as
14 a vendor, mortgagee, trustee of a trust deed, payee, lessor,
15 franchisor, etc.) can receive attorney fees as provided in the

⁶ The creditor cites Matter of 268 Limited 798 F.2d
674 (9th Cir. 1986) to illustrate that the Ninth Circuit
Court of Appeals recognizes an oversecured creditor's
right to attorney fees (as provided in a contract) for
litigating bankruptcy issues. The debtor points out,
however, that in 268 Limited the primary issue was the
reasonableness of the fee and not the creditor's right to
fees. In 268 Limited, the court does not mention In re
Coast Trading and In re Fulwiler, both of which preceded
268 Limited and both of which dealt with the issue at
hand.

Moreover, to the extent 268 Limited stands for the
proposition that fees may be allowed to oversecured
creditors under §506(b), it seems to have been implicitly
overruled by the more-recent and more-pointed opinion in
Fobian.

1 agreement without the need to find support in a statute. A
2 prayer for attorney fees in an action or suit on the agreement
3 is merely a request that the terms of the agreement be enforced.
4 It is not necessary that the creditor rely upon O.R.S. 20.096 or
5 any other statute.

6 O.R.S. 20.096 was not enacted to limit what the parties
7 might define in their agreement as circumstances giving rise to
8 recovery of attorney fees. Thus, if the agreement provided for
9 attorney fees to obtain relief from stay in a bankruptcy case,
10 O.R.S. 20.096 would not render such an agreement void.

11 On the other hand, the debtor (such as a vendee, mortgagor,
12 grantor of a trust deed, payor, lessee, franchisee, etc.) in an
13 action or suit brought by the creditor might not be entitled to
14 recover attorney fees by relying on the provision for attorney
15 fees in the agreement because its literal language might only
16 apply for the benefit of the creditor. O.R.S. 20.096 was
17 enacted to level the playing field so that if the agreement
18 provides for attorney fees, such fees may be recovered by the
19 prevailing party whether that party is the creditor or the
20 debtor and in spite of the fact that the language of the
21 attorney fees clause speaks only of the creditor.

22 In this case, since the express language of the attorney
23 fee clause in the note and trust deed specifically applies for

1 the benefit of Metropolitan and Metropolitan prevailed, O.R.S.
2 20.096 (and the phrase "action on a contract" contained therein)
3 is not applicable. The only questions should be whether
4 Metropolitan is oversecured under §506(b) and whether the
5 contractual language in this case is broad enough to include
6 fees for actions taken in the bankruptcy court.

7 There seems no dispute that Metropolitan is oversecured.
8 The contract in question provides that the trustee is entitled
9 to attorney fees "in connection with or in enforcing this
10 obligation" This language is broad enough to include
11 actions such as were taken in the bankruptcy court to enforce
12 the provisions of the contract concerning the maturity date of
13 the note.

14 Further support for Metropolitan's position may be found in
15 Collier's on Bankruptcy. In discussing whether post petition
16 interest, fees and costs will be allowed under §506(b),
17 Collier's writes:

18 In cases in which the holder of an
19 allowed secured claim has been found to
20 have collateral therefor in excess of the
21 amounts of principal and prepetition
22 interest [footnote 2 omitted] on such claim
23 and any recovery under section 506(c) with
24 respect thereto, the courts have in almost
25 every instance allowed the holder as an
26 additional part of its secured claim
27 postpetition interest and reasonable fees,
28 costs and charges as provided for under the
29 applicable agreements [footnote 3 omitted]

1 here but discussed below.] Although the
2 cases decided under the 1978 Code have also
3 uniformly disallowed such interest, fees,
4 costs and charges as secured claims when
5 the value of the collateral is less than
6 the amount of principal and prepetition
7 interest [footnote 4 omitted], there is
8 still substantial authority for the
9 proposition that contractually-based
10 unsecured claims for prepayment premiums
11 and reasonable attorneys' fees may be
12 allowed if such contractual rights are
13 enforceable under applicable state law
14 [footnote 5 omitted]. Collier's on
15 Bankruptcy, 15th Ed. pp.506-41-42, ¶506.05.
16

17 In footnote 3 (mentioned above) Collier's cites 30 cases
18 for the proposition that "the courts have in almost every
19 instance" allowed postpetition attorney fees, costs or interest
20 to oversecured creditors if the agreement so contemplates. The
21 author then states in footnote 3:

22 "[I]solated cases have improperly carved-
23 out exceptions from the application of 11
24 U.S.C. §506(b). *** Johnson v. Righetti
25 (In re Johnson), 756 F.2d 738, 741 n.3, 12
26 C.B.C. 2d 573 (9th Cir.), cert. denied, 474
27 U.S. 828, 106 S. Ct. 88, 88 L. Ed. 2d 72
28 (1985)." [Some citations omitted.]
29

30 Thus, in addition to the logic of its argument,
31 Metropolitan finds support in the most-recognized treatise on
32 bankruptcy law.

33 This court, however, is bound by the holdings of the Ninth
34 Circuit Court of Appeals. In Johnson, the court did not allow
35 fees to the debtor for successfully defending the creditor's

1 motion for relief from stay because a motion for relief from
2 stay was not an "action on a contract." Thus, it appears that,
3 even if the creditor in Johnson had prevailed, the court would
4 not have allowed attorney fees. Johnson at 740.

5 In Fobian, the court was not concerned with the language of
6 attorney fees clause in the contract or whether the creditor was
7 oversecured under §506(b). Instead, the creditor was not
8 allowed attorney fees for successfully litigating an objection
9 to confirmation because an objection to confirmation was not a
10 "basic contract enforcement question." Fobian at 1153.

11 Since Metropolitan seeks fees for litigating the same
12 issues (relief from stay and objections to confirmation), the
13 result must be the same. Therefore, upon presentation by the
14 debtor's counsel, the court will enter an appropriate order
15 sustaining the debtor's objections to Metropolitan's claim and
16 allowing the claim subject to the limitations discussed herein.

17
18 DATED this _____ day of June, 1992.

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22 _____
23 Henry L. Hess, Jr.
24 Bankruptcy Judge

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26
27 cc: David D. Park
28 Tim Zimmerman