11 USC § 502(b)
28 USC § 1738
Res judicata
ORCP 71 B
Arbitration clauses
ORCP 68 C
Attorney fees

In re Fick, Case No. 394-35390-elp13

1/11/96 ELP Unpublished

Debtor objected to a claim that was based on an arbitration award that was entered as a state court judgment. The court considered only those objections that fell within the enumerated exceptions in 11 USC § 502(b). Debtor's argument that the arbitration award was obtained through fraud and collusion was considered an objection that the claim was unenforceable under state law. Because the arbitration award had been entered as a state court judgment, the court gave full faith and credit to the judgment, 28 USC § 1738, including applying Oregon rules regarding res judicata. Because the award had been entered as a final judgment and otherwise met the Oregon requirements for the application of res judicata, debtor was not able to challenge the validity of the award. If debtor's argument was that the judgment had been obtained through fraud, her remedy was to seek to set aside the state court judgment pursuant to ORCP 71 B. The court also noted that arbitration awards are enforceable in bankruptcy.

Debtor's objection to the portion of the claim that represented

postarbitration attorney fees was sustained in part. The reasonable value of the services, ORCP 68 A, included only those fees incurred in enforcing the arbitration award, including fees related to obtaining specific performance of the contract that was the subject of the arbitration.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	Case No. 394-35390-elp13
	)	
NANCY M. FICK,	)	MEMORANDUM OPINION ON
	)	CLAIM NO. 4 OF MARK
Debtor.	)	WILSON AND MARY WILSON

Debtor has objected to Claim No. 4, filed by Mark Wilson and Mary Wilson. After reviewing the evidence and hearing the testimony, I conclude that the claim should be allowed in the amount of $27,225.78.

The Wilsons originally filed their proof of claim for $29,701.10 on October 24, 1994, before the claims bar date. That proof of claim included amounts they assert they are owed on a judgment entered September 9, 1994, in Multnomah County on an arbitration award, plus $7,968.95 for attorney fees and costs incurred after the arbitration award was entered. On December 6, 1995, they filed an "Amendment and Supplemental Statement of Claim" for $29,685.78, in which they included a corrected amount

owing on the state court judgment plus $5,639.63 in attorney fees and costs incurred between the date of entry of the arbitration award and the date debtor filed her Chapter 13 petition.

Debtor objects to the amendment of the claim, asserting that it is late and is an attempt to file a new claim rather than amend the original claim. The original claim was timely filed, and the court will allow the amendment. The amendment merely corrects the calculations relating to the arbitration award and correctly deletes a claim for any attorney fees incurred after the date debtor filed her Chapter 13 petition. The amendment is not a masked attempt to file a new claim after the claims bar date.

Debtor raises numerous bases for her objection to the Wilsons' claim. After hearing debtor's questioning of the witnesses and her argument to the court, it is apparent that many of debtor's objections are grounded in her lack of understanding about how real estate transactions work.

On the objection form that debtor filed, debtor asserted numerous technical objections, including that the proof of claim did not contain a copy of the judgment on which the claim was based. The technical objections are either without merit or have been cured by debtor's submission of the state court judgment docket and by the Wilsons' submission of a detailed statement of the attorney fees and costs that they claim.

Debtor next raises various objections, all of which relate to the accuracy of the underlying arbitration award and judgment entered on that award. The claim is based in part on a judgment entered in state court after an arbitration award was entered against debtor. The court will allow the claim unless it falls within one of the enumerated exceptions set out in 11 U.S.C. § 502(b). See In re Murgillo, 176 B.R. 524 (9th Cir. BAP 1995). I do not have equitable power to add other bases for disallowance. Id. Debtor claims that the arbitration award was obtained through fraud and collusion. I understand that to be an argument that the claim is unenforceable under state law. 11 U.S.C. § 502(b)(1).

Debtor's objections relating to the arbitration award and judgment are an attempt to relitigate the issues decided in the arbitration. However, the arbitration award has been entered as a judgment in state court. Accordingly, under the Full Faith and Credit provision of 28 U.S.C. § 1738, I must give full faith and credit to the state court judgment. That includes applying Oregon rules regarding finality of judgments and res judicata. In re Nourbakhsh, 67 F.3d 798 (9th Cir. 1995); see also In re Dutton, Case No. 394-36575-elp7 (Bankr. D. Or., October 13, 1995) (Perris, B.J.). Under Oregon law, when an action has been prosecuted to final judgment, a party is barred from relitigating matters that are based on the same factual transaction as the

first litigation and that are of such a nature as could have been joined in the first action. Drews v. EBI Companies, 310 Or. 134, 795 P.2d 531, 535 (1990). Here, all of the requirements have been met. A final judgment has been entered. The matters that debtor seeks to relitigate are precisely the same matters that were determined by that judgment. Any issues regarding fraud or collusion in the arbitration award could have been litigated in the state court action. See ORS 36.355. Having allowed the judgment to become final, debtor cannot now challenge the determination that was made in the arbitration.

Debtor does not appear to be claiming that the judgment itself was obtained through fraud, only that the arbitration award was fraudulently entered. If she means to assert that the judgment was obtained through fraud, her remedy was to seek to have the judgment set aside in state court pursuant to ORCP 71 B. The bankruptcy court is not authorized to set aside the state court judgment under ORCP 71 B, because it is not the court in which the judgment was entered. In re Baker, Civ. No. 94-6162 (D. Or. 1994) (Hogan, J.). Debtor did not seek to have the state court judgment set aside within the one year provided by ORCP 71 B, and the judgment is no longer subject to challenge on the basis of fraud.

Finally, arbitration clauses are enforceable in bankruptcy. E.g., Hays and Co. v. Merrill Lynch, 885 F.2d 1149

(3d Cir. 1989); In re Gurga, 176 B.R. 196 (9th Cir. BAP 1994). If debtor had filed her petition before this dispute went to arbitration, I would have had to abstain and would have sent the matter to arbitration. It should not matter that the arbitration occurred before the bankruptcy petition was filed.

Debtor's last category of objections relates to the amount of postarbitration attorney fees claimed. She asserts that the earnest money agreement on which the request for attorney fees is based does not provide for fees incurred in enforcing a judgment, that the attorney fee provision in the earnest money agreement does not provide that the bankruptcy court can determine fees, that the fees relate to real estate advice rather than to enforcement of the state court judgment, and that the fees relating to negotiating with the bank regarding the loan for the Wilsons to purchase the property are improper, because the earnest money agreement does not contemplate financing. I understand her to be asserting that the amount of fees exceeds the reasonable value of such services. ORCP 68 A(1).

I conclude that the earnest money agreement does provide for attorney fees for the enforcement of the state court judgment. Under Oregon law, a party is not entitled to attorney fees unless provided for in a statute or contract. In this case, the earnest money agreement provided that any dispute related to that agreement would be resolved through arbitration, and that

the prevailing party was entitled to attorney fees. The agreement provided:

> "The prevailing party in the arbitration shall be entitled to recover reasonable costs and attorney's fees in connection therewith, and the determination of who is the prevailing party, what are reasonable costs, and the amount of attorney's fees to be paid to the prevailing party shall be decided by the arbitrator(s) (with respect to all recoverable attorney's fees incurred prior to and during the arbitration proceedings) and by the court or courts, including any appellate court, that hears any exceptions made to an award submitted to it for confirmation as a judgment or that determines any application to stay arbitration or to compel arbitration with respect to a Claim (with respect to attorney's fees incurred in such court proceedings)."

Attorney fees are defined in ORCP 68 A(1) as "the reasonable value of legal services related to the prosecution or defense of an action." In Johnson v. Jeppe, 77 Or. App. 685, 713 P.2d 1090, 1091 (1986), the Court of Appeals held that "[t]he enforcement of a judgment and final collection of money due are 'legal services related to the prosecution or defense of an action' and may be considered in awarding attorney fees." Accordingly, the Wilsons are entitled to reasonable attorney fees in enforcing the judgment entered on the arbitration award. This court is authorized to make that determination, because debtor filed her Chapter 13 petition, thereby staying any action in state court, before the state court could determine the reasonable attorney fees and costs incurred after the entry of the arbitration award.

In determining the amount of attorney fees to allow in the Wilsons' claim, I will consider what the state court would have awarded had the matter been resolved there.

Debtor next argues that a portion of the attorney fees sought by the Wilsons are not allowable, because they relate to real estate advice the Wilsons received from their attorney rather than to the arbitration or enforcement of the arbitration award or judgment. She also asserts that any fees related to negotiations with the bank regarding financing for the Wilsons should be disallowed, because the earnest money agreement did not contemplate financing for the transaction.

I agree with debtor that any fees relating to the giving of real estate advice are not allowable. However, fees related to obtaining specific performance of the earnest money agreement in accordance with the arbitration award and judgment, including work with the bank to secure financing, are recoverable. Debtor's assertion that the earnest money agreement did not contemplate financing is contrary to the finding of the arbitrator that:

> "The full purchase price for the property was to be paid in escrow at the date fixed for closing which by modifications of the agreement became November 5, 1993. It was understood and agreed that none of the parties' obligations was contingent on the terms of any arrangements between claimants and third parties to obtain the funds necessary to close the sale in escrow, but at all times respondent knew that claimants would have to obtain

> some portion of the purchase money from one or more third parties and signed the agreement with that knowledge. Claimants were responsible for having sufficient funds available at the time of closing."

Accordingly, the Wilsons' counsel's charges for contacts with Maureen Goeth, a representative of the lender that loaned money to the Wilsons to purchase debtor's property, are allowable. Expenses incurred in negotiating an indemnification agreement, however, are not expenses that should be allowed. The escrow company required that the Wilsons sign an indemnity agreement because the appeal period had not run on the denial of the exceptions to the arbitration award. Attorney fees incurred as a result of the Wilsons' desire to close the transaction before the appeal period had expired are not reasonably related to the prosecution or defense of the action.

After reviewing the attorney fee statement submitted by the Wilsons, I conclude that they are entitled to an allowed claim of $27,225.78, which includes the amount of the state court judgment, $68,401.23, plus $2,985.10 in postarbitration, prebankruptcy attorney fees, plus $194.53 in costs, less credit from the closing of $44,355.08. I have disallowed all amounts that are related to the indemnification agreement, amounts for secretarial work and all amounts that were either not segregated from nonallowable amounts or for which the description was inadequate to allow me to tell whether the work was allowable.

This resulted in a disallowance of $2,460.00. Attached to this Memorandum Opinion is a copy of the pertinent billing statements with the disallowed items underlined.

The court will enter a separate order in accordance with this Memorandum Opinion, allowing Claim No. 4 in the amount of $27,225.78.

This Memorandum Opinion shall constitute Findings of Fact and Conclusions of Law as required by Fed. R. Bankr. P. 7052 and they shall not be separately stated.

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ELIZABETH L. PERRIS
Bankruptcy Judge

cc: Nancy M. Fick
Richard Mario
Robert W. Myers