



Entered on Docket
February 24, 2006

Hon. Gregg W. Zive
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re: JOHN SCOTT FINNEY,
KRISTI E. FINNEY,

Debtors.

Case No. BK 03-51940

**MEMORANDUM DECISION RE:
AWARD OF ATTORNEYS FEES
INCURRED BY CREDITOR
CHASE MANHATTAN
MORTGAGE CORPORATION**

Hearing Date: Sept. 7, 2004
Hearing Time: 10:00 a.m.

Creditor Chase Manhattan Mortgage Corporation's ("Chase") Motion for Relief from the Automatic Stay and John Scott Finney and Kristi E. Finney's ("Debtors") Opposition to Motion For Stay Relief came regularly for hearing. The following appearances were made: Michael Lehnert on behalf of the Debtors and Michael Chen (telephonically) on behalf of Chase. At the hearing the parties were able to resolve all issues except for Chase's claim for attorneys fees. The court requested the issue regarding attorneys fees be briefed and continued the hearing. Chase submitted a Supplement to Motion For Relief From the Automatic Stay. At the continued hearing, Debtors, for the first time raised a new argument and the court allowed Chase's counsel to brief the issue. The

1 additional brief raised still a new argument and the Debtors were given the opportunity to file a
2 response to the new issue raised by Chase. The Debtors did not file a response.

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4 The court, having reviewed all the pleadings and exhibits filed in support of and in opposition
5 to Chase's Motion for Relief From Stay and supplemental briefing, all authority cited therein and the
6 electronic recording of the hearing, hereby grants Chase's request for attorneys fees and costs in the
7 amount of \$956.00.

8 **A. Background**

9 **1. Procedural History**

10 Chase filed a Motion For Relief From The Automatic Stay which Debtors opposed. The
11 Debtors agreed to pay the arrears, but disputed the attorneys fees and costs of \$956.00. At the initial
12 hearing the parties were able to resolve all issues except for Chase's claim for attorneys fees and
13 costs. The court requested the issue regarding the recovery of attorneys fees and costs be briefed.
14 Chase submitted a Supplement To Motion For Relief From The Automatic Stay. The Debtors did
15 not file a response. At the second hearing, the Debtors, for the first time, argued that Chase is not
16 entitled to attorneys fees and costs based on the terms of the note executed by the Debtors (the
17 "Note"), specifically because there had been no acceleration under paragraph 6(c) of the Note. Chase
18 contended that acceleration was not possible because it would be in violation of the automatic stay.
19 The court allowed Chase's counsel to brief that issue. Chase also contended for the first time that
20 the language in the Deed of Trust executed by the Debtors (the "Deed of Trust") permitted the
21 recovery of attorneys fees and costs. Despite being provided the opportunity to respond to Chase's
22 new argument, Debtors chose not to.

23 **2. Undisputed Facts**

1 The applicable language contained in Note is as follows:

2 (C) Notice of Default

3 If I am in default, the Note Holder may send me a written notice telling me that if I
4 do not pay the overdue amount by the certain date, the Note Holder may require me
5 to pay immediately the full amount of Principal which has not been paid and all the
6 interest that I owe on the amount. That date must be at least 30 days after the date on
which the notice is mailed to me or delivered by other means. . . .

7 (E) Payment of Note Holder's Costs and Expenses

8 If the Note Holder has required me to pay immediately in full as described above, the Note
9 Holder will have the right to be paid back by me for all its costs and expenses in enforcing
10 this Note to the extent not prohibited by applicable law. Those expenses include, for
example, reasonable attorneys' fees.

11 The applicable language contained in the Deed of Trust is as follows:

12 9. Protection of Lender's Interest in the Property and Rights Under this
13 Security Instrument. If . . . (b) there is a legal proceeding that might significantly
14 affect Lender's interest in the Property and/or rights under this Security Instrument
(such as a proceeding in bankruptcy . . .) Lender's actions can include but are not
15 limited to: . . . (c) paying reasonable attorney's fees to protect its interest in the
16 Property and/or rights under this Security Instrument, including its secured position
in a bankruptcy proceeding . . .

17 Any amounts disbursed by Lender under this Section 9 shall become
18 additional debt of Borrower secured by this Security Instrument. These amounts shall
bear interest at the Note rate from the date of disbursement and shall be payable, with
such interest, upon notice from Lender to Borrower requesting payment.

19 **B. Legal Analysis**

20 11 U.S.C. § 506(b) provides as follows:

21 To the extent that an allowed secured claim is secured by property the value of which,
22 after any recovery under subsection (c) of this section, is greater than the amount of
23 such claim, there shall be allowed to the holder of such claim, interest on such claim,
24 and any reasonable fees, costs, or charges provided for under the agreement under
which such claim arose.

25 "[W]hen fees are provided for in the underlying agreement, and when the creditor is
26 oversecured, allowance of the attorney's fees is mandatory" limited by the reasonableness

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1 requirement of § 506(b). In re Dalessio, 74 B.R. 721, 723 (9th Cir. B.A.P. 1987). The case of In re
2 Salazar articulated four elements which must be met to recover attorneys fees under § 506(b): (1)
3 There is an allowed secured claim; (2) The creditor is oversecured; (3) The fees are reasonable under
4 the circumstances; and, (4) The fees are provided for under the agreement. In re Salazar, 82 B.R.
5 538, 540 (9th Cir. B.A.P. 1987). Each element is considered below.

7 1. There is an allowed secured claim.

8 The claims register provides that Chase filed a proof of claim for a secured claim in the
9 amount of \$189,785.11 October 22, 2003. The basis for Chase's claim was the note secured by the
10 Deed of Trust on 14445 Sundance Drive, Reno, Nevada 89511 (the "Real Property"). The Debtors
11 did not file an objection to Chase's proof of claim. Chase has an allowed secured claim.

13 2. The creditor is oversecured.

14 The value of the Real Property listed on the Debtors' Amended Schedule A is \$300,000.
15 Chase is the only lienholder listed on the Real Property. Chase's Motion from Relief From Stay
16 states that in addition to the principal loan balance on the note of \$185,302.92, Debtors owe arrears
17 of \$5,960.18. Debtors do not dispute the amount of the arrears, only the inclusion of attorneys fees
18 and costs. Because the total debt owed to Chase, with or without or attorneys fees and costs, is less
19 than \$192,000, which is less than the reported value of the property, the creditor is oversecured.

21 3. The fees are reasonable under the circumstances

22 The Affidavit of Michael W. Chen, filed as an exhibit to Chase's Supplement To Motion For
23 Relief From The Automatic Stay, sets forth Chase's basis for the recovery of attorneys fees and costs.
24 Attorneys fees were incurred to review loan arrearage figures, prepare and file a proof of claim,
25 prepare and file an objection to plan, prepare and file two motions for relief from stay, and attend
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1 hearings in person and via telephone for a total of 8.05 hours. The Affidavit states that attorney time
2 is billed at a rate of \$150.00 per hour and paralegal time at a rate of \$75.00 per hour. Costs were
3 incurred for filing the motions for relief from stay and miscellaneous copying and mailing costs. The
4 Debtors were in arrears on the obligation when they filed the Petition. The secured creditor was
5 entitled to protect its position. The case was converted from a Chapter 7 to a Chapter 13 and then
6 back to a Chapter 13. The court considers the fees and costs incurred to be reasonable both in time
7 spent and the hourly rate charged.

9 4. The fees are provided for under the agreement.

10 Section 9 of the Deed provides that the Lender may incur fees in a bankruptcy proceeding in
11 order to protect its secured position in the property and that such fees “shall become additional debt
12 of Borrower secured by” the Deed of Trust. It is not disputed that the work performed by Chase’s
13 attorneys, as described in the Chen Affidavit was to protect Chase’s secured position in the Debtors’
14 bankruptcy case. Therefore, the recovery of attorneys fees and costs is proper.

16 **C. Conclusion**

17 Chase’s request for attorneys fees and costs satisfies the four-part test set forth in In re
18 Salazar. Because Chase’s claim for attorneys fees and costs is permitted by Section 9 of the Deed
19 of Trust, the court need not consider whether Chase’s failure to provide for acceleration under
20 paragraph 6(c) of the Note, which in itself could be a violation of the automatic stay, was a bar to
21 accrual of attorneys fees under 11 U.S.C. § 506(b). The court finds Chase is entitled to its attorneys
22 fees and costs of \$956 pursuant to 11 U.S.C. § 506(b).
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