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JUDGE: M. A. Mahoney
PARTIES: Corliss M. Miller, Franklin L. Miller, First Union National Bank
CHAPTER: 13
ATTORNEYS: S. Olen, S. L. Nicholas, D. J. Stewart, J. N. Leach, R. J. Pope
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

CORLISS M. MILLER
and FRANKLIN L. MILLER,

Debtors.

Case No. 97-12807-MAM

CORLISS M. MILLER
and FRANKLIN L. MILLER,

Plaintiffs,

v.

Adv. No. 99-1137

FIRST UNION NATIONAL BANK,

Defendant.

ORDER GRANTING DEFENDANT'S SUMMARY JUDGMENT MOTION AND DISMISSING CASE WITHOUT PREJUDICE

Steve Olen, Mobile, Alabama, Attorney for the Plaintiffs
Steven L. Nicholas, Mobile, Alabama, Attorney for the Plaintiffs
Donald J. Stewart, Mobile, Alabama, Attorney for Plaintiffs
John N. Leach, Mobile, Alabama, Attorney for the Defendants
Russell J. Pope, Towson, Maryland, Attorney for the Defendants

This matter is before the Court on the Defendant's Motion for Summary Judgment against the Plaintiffs in this case. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is granting the motion of First Union National Bank for summary judgment in this case.

FACTS[1] [2]

First Union Home Equity Corporation made a second mortgage loan to Mr. and Mrs. Miller in the amount of $24,900.00 on August 1, 1994. In March of 1997, the loan was assigned to First Union National Bank. On August 6, 1997 Mr. and Mrs. Miller filed a chapter 13 bankruptcy case in the Southern District of Alabama. The Court confirmed the Miller's plan on September 25, 1997. The plan treated First Union as a secured creditor. It pledged to pay all postpetition payments due to First Union directly to it and to pay the arrearage owed to First Union through the plan.

First Union filed a timely proof of claim, dated September 10, 1997, in the amount of $23,792.80, with an arrearage of $221.20 The arrearage included $150.00 in "bankruptcy fees and expenses," and $9.07 in "property preservation fees" or inspection fees. It is not the general practice of First Union to disclose these fees on the proof of claim, however it was disclosed on the proof of claim in the Miller's bankruptcy case.[3] Plaintiffs did not object to First Union's proof of claim.

On July 12, 1999, this adversary case was filed containing four counts which are:

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[1]The Court formally admits into evidence all exhibits conditionally received at the summary judgment and class certification hearing.

[2]The Court admits into evidence the highlighted depositions taken in the case as submitted by the plaintiff. The defendant asserts that the highlighting is inappropriate and unfair since defendant did not submit highlighted copies of the same depositions. The Court concludes that there is no harm in admitting the highlighted depositions and since the Court reviewed all of the testimony, there is no prejudice to defendant.

[3]As this fact shows, there are viable class representatives who could bring a proper suit against First Union National Bank. The Millers are just not the proper plaintiffs.

1. Fees and charges assessed by the defendant postpetition are not reasonable, authorized, or allowable under the Bankruptcy Code and defendant's claims for any of these feed or charges should be disallowed and any of these fees or charges actually collected by the defendant should be reimbursed with interest.

2. Fees and charges assessed by defendant postpetition are assessable only with specific bankruptcy court approval pursuant to § 506(b) of the Bankruptcy Code, defendants failed to obtain such approval, and these fees and charges collected by defendants after the filing of a bankruptcy petition, which would not have been claimed absent bankruptcy, should be disallowed, and any of these fees or charges collected should be reimbursed with interest where defendants have failed to obtain specific approval of the bankruptcy court as required by law.

3. Defendant violated the automatic stay of § 362 of the Bankruptcy Code by assessing and/or collecting postpetition, fees or charges which would not have been claimed absent bankruptcy, without specific approval of the bankruptcy court and these fees or charges should be disallowed and any of these fees or charges actually collected should be reimbursed with interest where the defendants have failed to obtain specific approval of the bankruptcy court.

4. Plaintiffs are entitled to an order declaring defendant's acts and practices to be in violation of bankruptcy law, and permanently enjoining the defendant from engaging in such acts and practices in the future with respect to any debtor who is, or could become, a member of the class, and an order requiring the defendant to disgorge all amounts collected by defendant as a result of such illegal fees and charges with interest.

LAW

A.

This is a motion for summary judgment filed by the defendant pursuant to Fed. R. Bankr. P. 7056. It states that the Court shall grant summary judgment to the moving party if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Bankr. P. 7056(c). The moving party bears the burden of proving that there is no issue of material fact. In *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court found that a judge's function is not to determine the truth of the matter asserted or weight of the evidence presented, but to determine whether or not the factual disputes raise genuine issues for trial. *Anderson*, 477 U.S. at 249. In making this

determination, the facts are to be looked upon in the light most favorable to the nonmoving party. *Id.; Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). All inferences are resolved in favor of the nonmoving party. *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 848 (11th Cir. 2000); *Stewart v. Happy Herman's Cheshire Bridge, Inc*., 117 F.3d 1278, 1285 (11th Cir. 1997).

B.

The overriding issue to be considered is whether there is any requirement that a creditor seek bankruptcy court approval, pursuant to § 506(b) or any other section of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, of fees added to a secured claim against a principal residence of debtors in chapter 13 cases.[4] This Court concludes a creditor needs to disclose fees if the fee claim arises preconfirmation and the debtor proposes to pay any mortgage arrearage in the plan. The disclosure may be in the proof of claim filed by the creditor or in a separate application for fees.

I.

a.

The Bankruptcy Code section at issue in this case concerning postpetition/preconfirmation fee claims is § 506(b). It states:

> 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.

[4]At oral argument on the summary judgment motion, plaintiffs' counsel stated that the only charges at issue at this point in the case were postpetition attorneys fees.

The plaintiffs assert that secured creditors must file applications seeking approval of any fees sought under this section. Otherwise, without such an application and a court order specifically approving the fees, the fees cannot be charged to the debtor. First Union asserts that no fee application is needed for the fees. In fact, unless First Union wants to have the fees paid from the bankruptcy estate, no disclosure of the fee is necessary at all. The fee can be charged later outside the bankruptcy case.

The Court concludes that the U.S. Supreme Court case of *Rake v. Wade* controls and the fees must be disclosed and claimed in the proof of claim or a separate fee application if a chapter 13 debtor proposes to pay all preconfirmation mortgage arrearages in his or her plan. *Rake v. Wade*, 508 U.S. 464, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993). In *Rake v. Wade*, the Court dealt with how postpetition/preconfirmation interest on oversecured creditors' claims was to be handled. The Court concluded that chapter 13 plans that proposed to cure prepetition mortgage arrearages through payments in the plans should include in the proposed cure amount the postpetition interest accrued preconfirmation on the arrearages.

> [W]hile payments of principal and interest on the underlying debts were simply "maintained" according to the terms of the mortgage documents during the pendency of petitioners' [debtors'] cases, each plan treated the arrearages as a distinct claim to be paid off within the life of the plan pursuant to repayment schedules established by the plans. Thus, the arrearages, which are a part of respondent's home mortgage claims were "provided for" by the plans.

Rake, 508 U.S. at 473.

Since "interest" and "fees" are both included in § 506(b), the treatment of postpetition/preconfirmation interest and fees should be the same. There is no logical reason for any distinction. *Telfair v. First Union Mortgage Corp*., 216 F.3d 1333, 1339 (11th Cir. 2000); *In re Harko*, 211 B.R. 116, 119 (2d Cir. BAP 1997).

In this case, First Union assessed a $150 bankruptcy fee. Is this a postpetition/ preconfirmation claim? A "claim" is "a right to payment." 11 U.S.C. § 101(5). The claim for a bankruptcy fee arose when the attorneys did the work for which First Union claims a right to payment. This is not clear from the evidence presented to date. For summary judgment purposes, the Court gives the nonmovant --the debtor-- the benefit of the doubt.

First Union asserts that the claim arose when it paid its counsel, not when the work was done. Considering the evidence in the light most favorable to the Millers for summary judgment purposes, the fees appear to be a preconfirmation claim. A creditor cannot dictate when a claim arises simply by controlling when it pays a bill. *In re First Jersey Securities, Inc*., 180 F.3d 504 (3d Cir. 1999). When the work was done on First Union's behalf is the operative fact. Therefore, the Court assumes for purposes of this motion that the bankruptcy fee is a postpetition/ preconfirmation fee, and all of the *Rake v. Wade* ramifications inure to the claim. The Millers' chapter 13 plan provided that the First Union arrearage claim would be paid through the plan. First Union needed to claim its bankruptcy fee on its proof of claim or in a separate application.

b.

The conclusions stated above also are consistent with the Eleventh Circuit's ruling in a recent case which dealt with a related issue. *Telfair v. First Union Mortgage Corp*., 216 F.3d 1333 (11th Cir. 2000). In the *Telfair* case, the Eleventh Circuit held that a creditor could apply postconfirmation loan payments made outside a chapter 13 plan directly to the creditor to postconfirmation attorneys fees and costs without obtaining any court approval of the fund's application or the fees. The Court concluded that § 506(b) applied only to postpetition/ preconfirmation fees and interest relying on the reasoning of the U.S. Supreme Court in *Rake v*

Wade. The Court found that the attorneys fees assessed by First Union for postconfirmation work done by its attorneys due to a postconfirmation delinquency in postpetition mortgage payments were not part of First Union's secured claim.[5] "[T]hey arose apart from the plan and after confirmation." *Telfair* at 1339.

Therefore, in a chapter 13 case, a creditor must file a proof of claim or fee application if it wishes to collect postpetition/preconfirmation interest, fees, charges or expenses if the debtor's plan provides that any arrearage will be paid through the plan. If the interest, fees, charges or expenses are not included in the creditor's proof of claim or fee application, then they are discharged when the debtor completes his or her plan payments and the amount cannot be collected from the debtor after the bankruptcy case without violating the bankruptcy discharge. *Telfair* only applies to fees arising postconfirmation.

In the instant case, First Union filed a proof of claim and included the fees in the arrearage as *Rake* would require. A breakdown of the arrearage was included with the proof of claim. The breakdown specified that the $150 fee was for bankruptcy fees and expenses. Amounts claimed on the proof of claim as bankruptcy fees and expenses and claimed as an arrearage must be attributable at least in part to prepetition/postconfirmation fees. The Millers had adequate notice that the claim of First Union included prepetition/postconfirmation bankruptcy fees and expenses and should have objected if there was a question as to the reasonableness of those fees and expenses. The Millers did not object.

c.

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[5]The *Telfair* case also found that the fees were not being paid from property of the estate because the plan did not provide that any assets of the debtor remained property of the estate except monies paid to the chapter 13 trustee as plan payments. *See* §§ 1306 and 1328.

In order to be paid, the fees must be claimed in a manner appropriate under the Bankruptcy Code and Rules. *Rake v. Wade* did not speak to this issue. *Rake v. Wade*, 508 U.S. 464, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993).

The Bankruptcy Code, at § 503, contains a procedure for allowance of administrative expenses. Administrative expenses are postpetition claims against the bankruptcy estate. Allowable administrative expenses are not just those listed in § 503(b). Pursuant to case law, they are expenses which benefit the estate.[6] *Burlington Northern Railroad Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.*), 853 F.2d 700 (9th Cir. 1988); *In re Mid-American Waste Systems, Inc*., 228 B.R. 816, 821 (Bankr. D. Del. 1999). Section 503 expenses include compensation to professional persons approved by the Court and professionals employed by creditors whose services benefit the estate. 11 U.S.C. §§ 503(b)(2) and (b)(3)(A)-(D). The fees of a creditor that has a claim under § 506(b) are not like the claims allowed under § 503. Payment of a secured creditor's attorneys fees do not benefit the estate as a whole.

By the same token, secured creditor's attorneys fees are not prepetition claims which fit the scheme established under 11 U.S.C. § 502 either. Some postpetition claims are specifically included in § 502, but §506(b) claims are not listed. *E.g.*, 11 U.S.C. § 502(f), (g), (h) and (i).

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[6]There is an Eleventh Circuit case, *Alabama Surface Mining Commission v. N.P. Mining Co., Inc. (In re N.P. Mining Co., Inc.),* 963 F.2d 1449 (11th Cir. 1992), that states that an administrative expense need not be "[a] connection to some benefit to the estate." The Court found that administrative expenses include certain expenses that result from the ordinary operation of a business, even if they are not beneficial to the estate. The Court reasoned that trustees must operate an estate in compliance with state law. Otherwise a debtor could file bankruptcy and knowingly continue violating laws while avoiding the full penalties for those violations. Even if this Court were to extend its analysis to include as administrative expenses those that are ordinarily incident to the operation of a business, regardless of their benefit to the estate, the § 506(b) expenses at issue here still would not fall under § 503.

The difficulty with these claims and the reason lawsuits such as this one have arisen is that there is no specific procedure established in the Bankruptcy Code for treatment of § 506(b) claims. Courts have simply not been asked to deal with the issue until recently in cases in this court and others around the country. *E.g.*, *Tate v. NationsBanc Mortgage Corp. (In re Tate)*, 253 B.R. 653 (Bankr. W.D.N.C. 2000); *Manley v. Bank United*, No. 99-70632, AP99-70084 (Bankr. N.D. Ala. June 30, 2000) (one of five pending class action cases under Judge C. Michael Stilson). The Court concludes that either filing an application for fees in compliance with § 503 and Rule 2016 or filing a proof of claim which very specifically claims the postpetition fee is sufficient to comply with due process requirements for payment. Due process requires that the debtor not be "deprived of a protected interest without sufficient process." *New Concept Housing, Inc. v. Poindexter (In re New Concept Housing, Inc.)*, 951 F.2d 932, 938 n.7 (8th Cir. 1991); *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995). Notice must be given which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Filing a fee application and filing a proof of claim both satisfy due process concerns or the procedures would not be the statutory and procedural means used for twenty years to deal with claims. In both situations, a debtor has an opportunity to object and be heard. The fact that the debtor must file the claim objection and bears the initial burden of proof if the creditor puts the fee in its proof of claim, and the creditor bears the burden of proof in a fee application does not change the fact that both afford the parties due process.

There is support in a well known bankruptcy treatise and in the Eleventh Circuit for the position that a claim for § 506(b) expenses on a proof of claim is sufficient. Collier on

Bankruptcy, § 506.04[6] acknowledges the uncertainty with § 506(b) claims and states in a section entitled, "Filing of Proof of Claim Advisable":

> Technically speaking, the Code and Rules do not require the filing of a proof of claim with respect to postpetition interest, fees, costs and charges. At times, however, courts have appeared to assume otherwise. (footnotes omitted). Accordingly, any secured creditor intending to seek allowance of postpetition amounts under section 506(b) would be well advised to make that fact clearly known in its proof of claim.

Collier on Bankruptcy, 15th Edition, § 506.04[6], p.506-121 (King, et al, ed. Matthew Bender & Co., 2000). The Eleventh Circuit acknowledged in *Fawcett v. U.S. (In re Fawcett*), 758 F.2d 588 (11th Cir. 1985), that a claim of postpetition interest under § 506(b) on a creditor's proof of claim was sufficient notice of the claim to make the debtor liable for the interest in a chapter 13 case.

The Court therefore respectfully disagrees with *Tate v. NationsBanc Mortgage Corp. (In re Tate)*, 253 B.R. 653 (Bankr. W.D.N.C. 2000). The requirement of a fee application in all cases is too narrow a holding. Section 503 and Fed. R. Bankr. P. 2016 do not cover secured creditors' fees any more clearly than § 502 and Fed. R. Bankr. P. 3001, 3002, 3003, and 3007 do. The key issue is notice. If sufficient notice of the claim is provided, the claim should be allowed unless, after objection by a party in interest, the court disallows the claim.

In this case, First Union's claim disclosed a "bankruptcy fee" was being charged. This is a sufficiently specific description of the fee for notice purposes. The proof of claim was filed according to proper procedures. The claim was not objected to by the debtor. Therefore it can and should be paid through the Millers' plan. The fee should not be paid outside the plan.

Summary judgment is due to be granted in favor of the Defendant in this matter.

II.

Does § 506(b) give a chapter 13 debtor a cause of action for damages if a creditor has not properly treated a claim for postpetition/preconfirmation fees? First Union asserts that, even if it

had not filed a proper proof of claim, the Millers would have no right under § 506(b) for damages. The creditor asserts this is true based on a case which has so held. *Radke v. First National Bank of Liberal, Kansas*, 1986 U.S. Dist. LEXIS 17483 (D. Kan. Nov. 19, 1986). It also relies on the reasoning of other cases which held that there was no private cause of action under other provisions of the Bankruptcy Code. *E.g.*, *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417(6th Cir.) (no private right of action under § 524); *Bessette v. Avco Financial Services*, 240 B.R 147, 155 (D.R.I. 1999) (no private right of action under § 523(d)); *Smith v. Keycorp Mortgage, Inc*., 151 B.R. 870, 876 (N.D. Ill. 1993) (no private cause of action under § 1322); *Costa v. Welch (In re Costa)*, 172 B.R. 954, 965-66 (Bankr. E.D. Cal. 1994) (no private cause of action under § 524). The cases conclude that Congress knew how to spell out such a right if it intended one. Section 362(h), which does explicitly contain language providing for a private cause of action shows that Congress could provide such a right if it wanted to do so. ("An individual injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances may recover punitive damages.").

If this Court were to look to § 506(b) for a remedy for the Millers, it would conclude that § 506(b) does not meet the criteria for an implied right of action either. In *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), the U.S. Supreme Court set forth four factors which must be met if a court is to imply a private right of action from a federal statute. The factors are: (1) whether there is any express or implicit indication of congressional intent to provide a private remedy; (2) whether the plaintiff is a member of the class for whose benefit the statute was enacted; (3) whether a private remedy would be consistent with the underlying purpose of the statutory scheme; and (4) whether the cause of action is typically left to state law.

This Court agrees that § 506(b) does not meet these criteria. *See also, Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir.).

However, this argument misses the point. The Court does not need to imply a right of action under § 506(b) of the Bankruptcy Code to be able to consider an injunction or damages on the debtor's behalf. Section 105(a) of the Bankruptcy Code states that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Section 105 has been used by courts to give relief to debtors under many sections of the Code, including § 506(b). *E.g.*, *Bessette v. Avco Financial Services, Inc*., 230 F.3d 439 (1st Cir.) (relief under § 524)*; In re Tate*, 253 B.R. 653 (Bankr. W.D.N.C. 2000) (relief under § 506(b)).

This Court concludes that the *Bessette* and *Tate* cases, finding relief available to debtors through §105(a), are well reasoned decisions and adopts their rationale. Section 105 does not give bankruptcy judges expanded powers; but it does give them all necessary power to insure that no provision of the Bankruptcy Code can be ignored because violation of it is without penalty.

III.

The Miller's contend that First Union violated the automatic stay when it posted the proof of claim fee and the inspection fee to the debtor's account. Section 362(a) provides that the following are improper:

> (3) any act to obtain possession of property of the estate or of property from the estate . . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . .

No matter what action First Union took (or did not take), it could not violate § 362(a)(6) while the case was in chapter 13. Its claim for a postpetition proof of claim fee or inspection fee cannot be a prepetition claim.

As to § 362(a)(3), a creditor cannot post a postpetition/preconfirmation fee against "property of the estate." 11 U.S.C. § 541 (1991). Filing a proof of claim which discloses the fees as part of the postpetition mortgage arrearage is not a violation of the stay. The posting of the fees to the debtor's account is a different matter. In this case, if the fees were undisclosed in the proof of claim and not included in the mortgage arrearage claim where it should have been, it would not have been properly payable and would have to be removed from Mr. and Mrs. Miller's account balance. Without payment outside of the plan, it would not violate the stay however. The posting does not constitute any act to obtain possession of property of the estate. It would not be an assessment of a prepetiton charge under § 362(a)(3); it would not be an attempt to take property of the estate or to obtain possession of property from the estate unless paid.

CONCLUSION

Mr and Mrs. Miller filed their chapter 13 case and sought to pay all mortgage arrearages in their plan. First Union added a $150.00 proof of claim fee and a fee for property inspection to the proof of claim arrearage and disclosed the purpose of those fees with enough specificity to give the Miller's adequate notice. If these fees were not reasonable, the Millers should have objected to the claim at that time. They did not and now the claim must be allowed as filed.

Based upon the reasoning above, the evidence in the record, reviewed in the light most favorable to the plaintiffs, dictates the motion of First Union for summary judgment be granted.

THEREFORE, IT IS ORDERED AND ADJUDGED:

1. The motion of First Union National Bank for summary judgment is GRANTED;

2. The case is DISMISSED without prejudice.

Dated: December 29, 2000

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE