

DOCKET NUMBER: 00-11069

ADV. NUMBER: None

JUDGE: M. A. Mahoney

PARTIES: Jan C. Robinson

CHAPTER: 11

ATTORNEYS: A. R. Maples, Jr., J. Dorgan

DATE: 3/6/01

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

JAN C. ROBINSON,

Case No. 00-11069-MAM

Debtor.

**ORDER OVERRULING THE OBJECTION TO CLAIM NO. 1
AND ALLOWING THE CLAIM AS FILED**

A. Richard Maples, Jr., Mobile, Alabama, Attorney for the Debtor
James Dorgan, Mobile, Alabama, Attorney for Larry W. Tangeman

This matter is before the Court on Debtor's objection to claim no. 1 of Larry W. Tangeman. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 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 overruling Debtor's objection to claim no. 1 of Larry W. Tangeman.

FACTS

On November 19, 1998, Debtor executed a vendor's lien contract in favor of Larry W. Tangeman in the amount of \$97,665 plus interest. Under the contract Ms. Robinson was to make monthly payments in the amount of \$816.91. The contract also provided that upon default, if Tangeman "shall foreclose . . . or shall otherwise resort to litigation for the recovery of the sums hereby secured, or employ an attorney to collect said sums, [Ms. Robinson] will pay all reasonable costs, expenses and attorney's fees thus incurred." Robinson defaulted on the loan and Tangeman began foreclosure proceedings. Tangeman hired attorney Martha Durant Hennessy to represent him in connection with the foreclosure. Tangeman agreed to pay the law firm of Ms. Hennessy an hourly rate of \$145 plus costs and expenses. Ms. Hennessy provided to

this Court a statement reflecting all time and services rendered to, as well as expenses incurred on behalf of, Tangeman. The statement indicates that Hennessy's firm charged Tangeman the total amount of \$1,197.14, which includes expenses in the amount of \$144.17.

On March 16, 2000, before foreclosure was completed, Robinson filed for relief pursuant to chapter 11 of the Bankruptcy Code. Tangeman hired attorney James Dorgan to represent his interest in the vendor's lien, attorney's fees, principal and interest, costs, expenses, and late charges. Tangeman agreed to pay and did pay the Law Office of James Dorgan, P.C. for services on a set fee basis totaling \$1,750.00 plus costs and expenses.

On April 11, 2000, Debtor filed a motion to approve employment of a real estate broker and a motion to approve a commercial lease of the property. Tangeman responded with a motion for relief from stay and objected to the employment of a real estate broker and the proposed commercial lease. Tangeman objected to the lease on the grounds that he was not adequately protected and argued that the lease was not likely to be successful because it was to a new business, the property had low visibility, and it was formerly a residence. The lease to the new business would also require renovations to the property, which Tangeman argued would make the property less marketable. Tangeman had received no payments from Debtor for the months of March, April or May 2000. A hearing was held and this Court approved the employment of the real estate broker and the commercial lease of the property. Tangeman's motion for relief from stay was conditionally denied. The conditions of the denial were that Robinson make monthly adequate protection payments to Tangeman in the amount of \$816.91 per month and file her plan and disclosure statement within nine months from the date on which the order for relief

was entered in this case. Since that time, the real property was sold by approval of this Court for the sum of \$140,000. All principal and interest due to Tangeman was paid from the proceeds of the sale.

Dorgan provided to this Court an invoice reflecting all time and services rendered to, as well as expenses incurred on behalf of, Tangeman. The invoice reflects 38 hours and 5 minutes expended by Dorgan and 7 hours and 15 minutes expended by Dorgan's secretary on behalf of Tangeman. The invoice also lists expenses in the amounts of \$55 for courier delivery, \$1,150 payment to Wheldon Payne, and \$75 in court costs for filing a motion for relief from stay. Wheldon Payne is a certified appraiser and was paid as an expert witness for his report and appearance in court.

LAW

Debtor filed this motion objecting to the claim of Larry Tangeman on the basis that the fees and charges claimed were not reasonably incurred and are not reasonable in amount. Debtor's attorney cited *In re Circle K Corp.*, 165 B.R. 649 (Bankr. D. Ariz. 1994) for the assertion that "[a]n oversecured creditor is not given a blank check to incur fees and costs that will automatically be reimbursed" and that "[d]ebtors do not pay for the education of the creditor's attorneys or legal fees for issues decided adversely to the creditor." *Id.* at 653. The *Circle K* case explains that the attorney for an oversecured creditor is allowed fees pursuant to § 506 (b) if four elements are present: "(1) an allowed secured claim, (2) an oversecured creditor, (3) reasonable fees, and (4) a fee provision in the agreement." *Id.* There is no dispute in this

case that Mr. Tangeman has an allowed secured claim, is oversecured, and there is a fee provision in the agreement. The issue is whether the fees are reasonable.

Debtor's attorney further cited *In re Tierra Petroleum, Inc.*, 173 B.R. 106 (Bankr. E.D. Tex. 1994) which stated that the lodestar method should be used to determine the reasonableness of fees. Lodestar can be calculated by multiplying the hours spent on a case times a reasonable hourly rate for each attorney involved; then adjusting the lodestar by considering twelve subjective factors. These factors include:

the time and labor involved; the novelty and difficulty of the questions; the skill required to perform the legal services properly; the exclusion of other employment due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or circumstances; the amount involved and results obtained; the experience, reputation and ability of the attorney; desirability of the case; the nature and length of the professional relationship with the client; and awards in other cases.

Id. at 108. The *Tierra Petroleum* court further asserted that when determining the reasonableness of fees incurred by an oversecured creditor the court should determine whether the fees were "necessary to the protection of the creditor's claim." *Id.* The *Tierra Petroleum* court noted that in that case there was no significant risk of nonpayment. In *Tierra*, the creditor charged over \$20,000 for unspecified actions. It did not appear a relief from stay motion was filed nor were any other motions.

Each fee will be discussed in turn below. The standards set forth in *Circle K* and *Tierra Petroleum* will be used to determine reasonableness.

Tangeman hired Hennessy to proceed with a foreclosure prebankruptcy. She charged her normal hourly rates which appear to be reasonable rates. She submitted a detailed accounting of

her time and expenses in the matter. Tangeman needed counsel to proceed with foreclosure because he lived in California and was not a lawyer. The Court concludes Ms. Hennessy's fees and expenses are reasonable. Upon default, Tangeman was entitled to foreclose on the property pursuant to the contract Robinson had signed. Hennessy was a lawyer skilled in foreclosure in Baldwin County.

As to Mr. Dorgan's representation, Debtor's attorney argues that because Tangeman was oversecured, there was no significant risk of nonpayment. There must be a good faith necessity to justify full compensation of attorney's fees. *In re West Electronics, Inc.*, 158 B.R. 37, 42 (Bankr. D.N.J. 1993). The amount must be "commercially reasonable." *Id.* at 41. Tangeman received no payments for the first three months that Robinson was in bankruptcy and was concerned that the business to which Debtor had proposed to lease the property would not be successful. In addition, the proposed lease required renovations to the property which Tangeman believed would lower the value of the property. If he had to foreclose after the new lessee was in the property, that could be more difficult. Mr. Tangeman lived very far away from the property and relied on the advice of his attorneys as to whether he was adequately protected and what actions he should take. Tangeman did have appropriate concerns at the filing of the case which properly caused him to file a motion for relief from stay. He could not foresee the later sale.

Dorgan hired an appraiser, Mr. Payne, to value the property. He concluded that Tangeman was not adequately protected. The appraisal testimony was necessary for the relief from stay hearing to establish the value of the property and whether it was maintaining its value. The expense of hiring Mr. Payne was necessary and reasonable.

As to the amount of fees Dorgan charged, Dorgan is not as experienced in bankruptcy matters as some counsel are who appear in this court very frequently like debtor's counsel, Mr. Maples. As noted above, debtors should not pay for the education of the creditor's attorneys. *In re Circle K Corp.*, 165 B.R. 649, 653 (Bankr. D. Ariz. 1994). Dorgan spent over 38 hours representing Tangeman. If Dorgan had charged his normal hourly fee of \$100 the bill would have been \$3,800. However, knowing he would have to expend extra time due to his inexperience, Dorgan charged a flat fee of only \$1,750 plus costs and expenses. That is the equivalent of only 17.5 hours of work at his normal rate and does not take into consideration his secretary's time. Seventeen hours is not excessive for filing a proof of claim, filing and prosecuting a relief from stay motion in a chapter 11 case, and monitoring the case. Even experienced counsel might incur this much time and expense. In *Tierra*, counsel billed 12-13 times this amount for what appears to be much less work!

CONCLUSION

The fees and expenses charged by Ms. Hennessy, Mr. Dorgan and Mr. Payne fall within the scope of the fee provision of the contract between Debtor and Mr. Tangeman. The actions taken by Mr. Tangeman were reasonable and the amount of fees and expenses charged were reasonable.

THEREFORE, IT IS ORDERED AND ADJUDGED the objection of Jan C. Robinson to Claim No. 1 of Larry W. Tangeman is OVERRULED and the claim is allowed as filed as a secured claim as follows:

Principal and interest at filing	\$ 97,255.91
Stone Granade (legal fees & expenses)	1,197.14

James Dorgan (legal fees)	1,750.00
Expenses	130.00
Wheldon Payne (fees)	<u>1,150.00</u>
TOTAL	\$101,483.05

Dated: March 6, 2001

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE