

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:)
)
JANICE WOLK GRENADIER) Case No. 00-11592-SSM
) Chapter 7
Debtor)

MEMORANDUM OPINION AND ORDER

Before the court is a motion filed by the debtor on April 12, 2002, for reconsideration of an order entered on April 8, 2002, authorizing the chapter 7 trustee, Ann E. Schmitt, to pay Burke & Herbert Bank & Trust Company the sum of \$13,913.00 as attorneys fees. For the reasons stated, a hearing will be set to determine two discrete issues raised by the motion.

Background

The debtor, Janice Wolk Grenadier, filed a voluntary chapter 13 petition in this court on April 10, 2000. This was her third chapter 13 filing in this court since 1998. A plan had been confirmed in her first case but was never consummated. Her second case was dismissed without confirmation of a plan. The present case was converted to chapter 11 on July 17, 2000, on the debtor's motion, but she was unable to obtain confirmation of a plan, and her case was converted to chapter 7 on April 25, 2001. Ann E. Schmitt was appointed as the chapter 7 trustee. Among the debtor's assets was a commercial office building located at 532 North Washington Street, Alexandria, Virginia. This building was subject to a deed of trust in favor of Burke & Herbert Bank & Trust Company ("Burke & Herbert") securing a promissory note dated October 20, 1995, in the original principal amount of \$211,987.73.

The trustee located a purchaser for the North Washington Street property, and on February 5, 2002, an order was entered authorizing the trustee to sell the property for the sum of \$455,000.00. At settlement, Burke & Herbert was paid the principal and interest on its note. However, the trustee, based on objections communicated to her by the debtor, did not pay the claimed attorneys fees at that time. Burke & Herbert ultimately reduced its attorney fee claim to \$13,913.00, which was the amount the trustee sought approval to pay.

Discussion

A.

As an initial matter, the debtor complains that the hearing on the trustee's motion should not have been held in her absence, since she had left telephone messages both with the court and with the trustee stating that she had been called out of town to deal with a family medical emergency. The decision whether to grant or deny a continuance lies within the sound discretion of the trial court. *United States v. Colon*, 975 F.2d 128, 130 (4th Cir 1992). Timely resolutions of disputes are obviously in the public interest; but at the same time there cannot be "an unreasoning and arbitrary insistence on expeditiousness in the face of a justifiable request for delay." *Id.*

In this instance, however, the debtor had not filed a timely response opposing the trustee's motion. Under Local Bankruptcy Rule 9013-1(H)(1), "responses in opposition to motions must be in writing, state with particularity the grounds therefor, be filed with the Court and served upon all parties affected thereby and the United States Trustee." The trustee's motion was set on 21 days notice, with the result that under the local rules any response was required to be filed "not later than five business days before the date of the

hearing.” LBR 9013(H)(3)(b). Additionally, if a timely response is not filed, the court “may deem the opposition waived, treat the motion, application, pleading, or proposed action as conceded, and enter an appropriate order granting the requested relief.” LBR 9013-1(H)(4).

Although it is true that the court does not always strictly apply the rule to *pro se* parties and will occasionally exercise its discretion to consider an opposition first asserted orally at the hearing, no compelling reason has been put forth in this case for the failure to file a timely written opposition prior to the hearing. In the absence of a written opposition setting forth “with particularity” the reason why the court should *not* grant the motion, the court had no basis upon which it could intelligently weigh a request for a continuance of the hearing.¹ Put another way, even if very compelling circumstances rendered it difficult or impossible for a would-be objecting party to attend the scheduled hearing, a continuance would not be justified unless the written opposition made it clear that there was a serious issue that could not be properly addressed unless the continuance were granted. In this case, the court was aware of the debtor’s request for continuance; however, the court determined that the issues raised by the motion were sufficiently straightforward that further delay was not in the public interest, particularly as the debtor had not filed a written opposition identifying any grounds for not granting the motion.

¹ Additionally, of course, a written response provides appropriate notice to the opposing party, who can then be prepared to provide evidence and argument responsive to the objection and not simply be ambushed at the hearing.

B.

Even though the debtor's failure to file a written opposition to the trustee's motion allows the court to treat the motion as unopposed, the court will, out of an abundance of caution, address the issues that the debtor has now raised after the fact.

Under the terms of the Burke & Herbert note, the debtor was obligated to pay "Lender's attorneys fees, and all of Lender's other collection expenses, whether or not there is a lawsuit and including without limitation legal expenses for bankruptcy proceedings." As a general matter, a creditor's allowed claim in a bankruptcy case is determined as of the date of the bankruptcy filing, *see* § 502(b), Bankruptcy Code, with the result that creditors are ordinarily not entitled to post-petition interest or post-petition attorneys fees. There is an exception, however, where a creditor is secured by collateral having a value greater than the amount of its claim. § 506(b), Bankruptcy Code. Such a creditor is entitled to "interest on such claim, and any reasonable fees, costs, or charges provided under which such claim arose." *Id.*

The invoice attached to the trustee's motion reflects legal services provided to Burke & Herbert by David Elsberg of the law firm of McGinley, Elsberg & Hutcheson, P.L.C., from March 3, 1998, through January 31, 2002, in connection with the debtor's three bankruptcy filings, including plan objections and motions for relief from the automatic stay.² The invoice reflects total fees of \$25,372.00, based on 84.15 hours worked at rates ranging from \$200 per

² The invoice appears to be a compendium of earlier separate invoices, some of which were introduced in evidence at the May 10, 2000, hearing on Burke & Herbert's motion for relief from the automatic stay.

hour to \$300 per hour, together with costs (filing fees and title bring-downs) in the amount of \$525.00. Burke & Herbert now concedes, however, that a portion of the invoiced amount had already been paid (apparently in connection with the sale of a piece of property on East Bellefonte Avenue in March 2000), with the result that the attorney's fee claim was reduced to \$13,913.00.

The debtor complains that some of the fees shown on the invoice "where [*sic*] paid at the time of the settlement of Bellefonte Ave;" that any charges relating to the Bellefonte Avenue property should be paid by the Grenadier Investment Company; that charges were incurred for preparing affidavits of default prior to any actual default; and that an hourly rate of \$300.00 is excessive. The first point appears to have been effectively mooted by the reduction of the fee request. Although the arithmetic is not quite exact, it appears that substantially all of the services included in the \$13,913.00 approved by the court were rendered *subsequent* to the sale of the Bellefonte Avenue property in March 2000. As to the second point, even if some or all of the fees related to Bellefonte Avenue should have been paid by Grenadier Investment Company, that does not affect the right of Burke & Herbert to assert such claim against the debtor's bankruptcy estate but merely gives rise to a potential claim by the debtor or the bankruptcy estate against Grenadier Investment Company for contribution or indemnity.

The third issue centers on the various affidavits of default. At the outset of the case, Burke & Herbert filed a motion for expedited relief from the automatic stay seeking the immediate right to foreclose based on the debtor's two prior filings. Although the court denied the motion, the court did condition the automatic stay on the debtor's payment of \$2,086.61 on

the 20th day of each month pending confirmation of a plan. The order further provided that if a payment were not timely made, and if the default were not cured within 10 days of the mailing of a notice of default, Burke & Herbert could file with the court, and serve on the debtor, an affidavit reciting such default, notice and failure to cure, together with a proposed form of order terminating the automatic stay. Unless the debtor filed a sufficient counter-affidavit within 5 days disputing the default, the order terminating the stay could be entered without further notice or hearing.

The invoice reflects *seven* occasions on which the law firm prepared and filed an affidavit of default, for a total of \$2,962.50 in claimed fees:

Sep. 6, 2000	1.5 hours at \$275.00 per hour
Oct. 3, 2000	1.5 hours at \$275.00 per hour
Oct. 30, 2000	1.5 hours at \$275.00 per hour
Nov. 29, 2000	1.5 hours at \$275.00 per hour
Dec. 12, 2000	1.5 hours at \$275.00 per hour
Jan. 10, 2001	1.5 hours at \$300.00 per hour
Jan. 29, 2001	1.5 hours at \$300.00 per hour

The debtor filed a response to the September 6, 2000, affidavit of default, and a hearing was held on September 20, 2000, at which the court declined to enter an order terminating the automatic stay. That ruling was based in part on a finding that Burke & Herbert had improperly rejected a payment tendered by the debtor.

With respect to the subsequent notices, the debtor argues that the November 29, 2000, and January 29, 2001, affidavits could not have been proper. She had through the 20th of the month to make the payment. The earliest the notice of default could have been issued, therefore, was the 21st of the month, and she would have had 10 days from that date to cure the default before Burke & Herbert would have been entitled to file an affidavit of default,

notice, and failure to cure. The debtor's arithmetic is correct, but in reviewing the affidavits, it is clear that Burke & Herbert did not literally follow the sequence of notice, cure period, and affidavit laid out in the original order conditioning the automatic stay.

When the debtor failed (by the bank's records) to make the November 20, 2000, payment,³ the bank waited until November 29, 2000, to send a notice of default to the debtor and her then-attorney. The affidavit of default was filed the same date. That affidavit served no particular purpose that the court can discern, other than to make the default a matter of record. The debtor still had ten days from the mailing of the notice of default before an order terminating the stay could have been entered. Apparently the default was not cured, because on December 12, 2000, Burke & Herbert filed what amounted to a second affidavit of default with respect to the November 20, 2000 payment. This recited the default, the November 29, 2000, notice, and the failure to cure. No proposed order was tendered terminating the automatic stay, and neither the debtor nor Burke & Herbert requested a hearing.

The January 10, 2001, affidavit recites the failure to make the November and December 2000 payments; the only *notice* it references was the December 12, 2000, notice (which would have been premature as regards the December payment, since it was not due for another 8 days), but the January 10, 2001, affidavit (which, like all the affidavits, was served on the debtor) might be viewed as the notice for the by-then-overdue December payment. The affidavit of January 29, 2001, asserted that payments had not been received for November 2000, December 2000, and January 2001. Although the affidavit would have been insufficient

³ The affidavit, as well as all subsequent affidavits filed by Burke & Herbert, reflect a dispute between the debtor and Burke & Herbert over whether the November payment had been made.

at that point as a basis for terminating the stay based solely on failure to make the *January* payment, it could have supported termination of the stay based on the failure to make the November and December 2000 payments.

Basically, then, the picture that emerges is that of a secured lender holding the debtor's feet to the fire as regards late or missed payments. It would have been cleaner if the lender had sent notices of default with respect to each late payment and then waited for the cure period to pass before filing an affidavit of default. Essentially, what the lender did was to prepare and file monthly updates of its previously-filed affidavits for the apparent purpose of building a record that would, at an appropriate point, support termination of the automatic stay. The debtor's motion characterizes this as "harassment." However, given the debtor's erratic payment history, as well as the extended period the lender had been held at bay by the automatic stay through the debtor's three filings, it is easy to see why the lender would legitimately have wanted to be in a position to move forward with relief from the stay if confirmation of the then-pending chapter 11 plan were denied. Be that as it may, the court does question the cost associated with preparing and filing some of the affidavits, since at least two of those (the October 3, 2000, and December 12, 2000, affidavits) seem to have served no function other than that of notice (triggering the 10-day cure period). However, the court believes it inappropriate to make a final determination on this issue except after notice to Burke & Herbert (the motion for reconsideration having been served only on the trustee and not on Burke & Herbert).

The final issue concerns the hourly rate charged by Burke & Herbert's attorney. There is no question that the rate is somewhat high relative to rates routinely approved for attorneys

representing trustees and chapter 11 debtors in the Alexandria Division of the Eastern District of Virginia. Recently, for example, Judge Mayer of this court issued an opinion in which he opined that the maximum rate in Alexandria at the present time for routine legal representation of a trustee was \$265.00 an hour. *In re Powertrust.com, Inc.*, No. 02-80015-RGM (Bankr. E.D. Va., Mar. 21, 2002) (Memorandum Opinion). In this very case, the court recently entered an order approving compensation for the debtor's chapter 11 attorney – a particularly experienced and capable practitioner – at the rate of \$225.00 per hour. It may be that attorneys representing banks in Northern Virginia are routinely compensated at a higher hourly rate; however, on the present record, the court is unable to make that determination.

O R D E R

For the foregoing reasons, it is

ORDERED:

1. A hearing will be held in open court on **May 21, 2002, at 10:00 a.m.** in Courtroom I, Martin V. B. Bostetter, Jr., United States Court House, 200 South Washington Street, Alexandria, Virginia, limited to the following issues raised by the debtor in her motion for reconsideration: (a) whether the time charged for the preparation of seven affidavits of default was appropriate and reasonable and (b) whether rates of \$275.00 per hour for work performed in 2000 and \$300.00 per hour for work performed in 2001 and 2002 are reasonable and, if not, what rate is reasonable.

2. The debtor shall give *at least 15 days written notice* of the date, time, and place of the hearing to the chapter 7 trustee and to Burke & Herbert Bank & Trust Company.

3. The clerk shall mail a copy of this memorandum opinion and order to the parties listed below.

Date: April 23, 2002

Alexandria, Virginia

/s/ Stephen S. Mitchell
Stephen S. Mitchell
United States Bankruptcy Judge

Copies to:

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