

SO ORDERED.

SIGNED this 31st day of August, 2015.



Lena Mansori James
LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

In re:)
)
Mark Hauser Badgett) Case No. 15-50146
)
Debtor.)
_____)

ORDER OVERRULING OBJECTION TO CLAIM

This case came before the Court for hearings on July 15 and 29, 2015, upon the Objection by Debtor to Claim Number 10 of First Citizens Bank & Trust. Wendell Wes Schollander, III, attorney for Mark Hauser Badgett (the “Debtor”); Douglas Wickham, attorney for First Citizens Bank & Trust (“First Citizens Bank”); and Kathryn L. Bringle, Chapter 13 Trustee, appeared at the hearings. The Debtor was also present. After considering the Objection, the proof of claim with its supporting documentation, the testimony, and other matters of record, the Court finds and concludes as follows:

BACKGROUND FACTS

The Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on February 19, 2015. On his Schedule A, the Debtor listed his residence in Pinnacle, North Carolina, as well as five other pieces of real property, including property located at 201 E. Dalton Road in King, North Carolina (the “Property”). The Debtor indicated that the Property was encumbered by a deed of trust held by First Citizens Bank in the amount of \$55,000.00. A

historic building is located on the Property, and the Property is zoned for multipurpose use. The Property was previously used by the Debtor as the location for his own law practice; more recently, the Debtor has rented it out for commercial use as a law office and used it personally in the operation of a business.

On March 26, 2015, the Debtor filed a motion for private sale of the Property for \$90,000.00. The Court entered an order on April 24, 2015, authorizing the sale of the Property and ordering the Debtor to pay all outstanding liens, encumbrances, ad valorem taxes, and other customary closing expenses from the proceeds of the sale at closing. The Court further ordered that all net proceeds in excess of the Debtor's claimed \$5,000.00 wildcard exemption be forwarded to the Chapter 13 Trustee.

First Citizens Bank filed its proof of claim on May 1, 2015, in the amount of \$63,428.35.

Documentation attached to the claim included:

- (1) a Promissory Note (the "Note") signed by the Debtor and dated May 23, 2003, in the original principal amount of \$95,000.00 with 59 monthly payments of \$730.81 commencing July 1, 2003, and one final payment of the entire balance remaining on June 1, 2008;
- (2) a Note Modification Agreement for NC Business Loans (the "Note Modification Agreement") signed by the Debtor and dated June 3, 2008, in the outstanding principal amount of \$77,617.11 with 59 monthly payments of \$730.81 commencing July 1, 2008, and one final payment of the entire balance remaining on June 1, 2013;
- (3) a Deed of Trust (the "Deed of Trust") signed by the Debtor and recorded in Stokes County, North Carolina, on May 23, 2003;

- (4) a statement dated January 5, 2015, reflecting a “scheduled payment” of \$50,825.31 and loan expenses in the amount of \$6,232.36;
- (5) a “post maturity statement” dated February 14, 2015, reflecting an amount due of \$60,611.71; and
- (6) a “post maturity statement” dated March 17, 2015, reflecting an amount due of \$60,818.82.

The Property was sold as authorized by the sale order, and the claim of First Citizens Bank was paid in full at closing. On June 10, 2015, after the sale, the Debtor filed his Objection to First Citizens Bank’s claim on the grounds that the \$7,612.53 in attorney fees and the \$1,500.00 appraisal fee included in the claim were higher than the standard fees for these services in this region.¹ In response to the Objection, First Citizens Bank filed additional documents in support of its claim, including:

- (1) an analysis of Proof of Claim showing a breakdown of the charges as \$50,825.31 in principal, \$2,642.95 in interest, \$847.56 in late fees, \$7,612.53 in attorney fees, and \$1,500.00 for an appraisal, for a total of \$63,428.35;
- (2) the Affidavit of John N. McClain, Jr., attorney, itemizing 24.9 hours of attorney time billed at \$250.00/hour for a total of \$6,225.00, plus expenses in the amount of \$182.36;
- (3) the Affidavit of Kristen P. Miller, an attorney with Poyner and Spruill, LLP (“Poyner and Spruill”), itemizing a flat fee for attorney services of \$2,000.00, plus expenses in the amount of \$643.55 for items such as filing fees, recording fees, certified mail charges, and sheriff fees;

¹ The Court finds it curious that no party present at the hearings pursued issues related to the fact that the Debtor had already voluntarily paid the claim in full when he filed his objection. Given that the Objection is overruled, the Court need not address any such issues.

- (4) the Affidavit of Terry G. Beasley, certified real estate appraiser, indicating that he charged \$1,500.00 for the appraisal on the Property and that this amount was lower than the “standard fee” he would have charged for this work on this particular property;
- (5) the Affidavit of J. Barry Dumser, Senior Vice President of First Citizens Bank, with a copy of the appraisal invoice in the amount of \$1,500.00, dated May 23, 2014, attached.

The court has heard the testimony of both John N. McClain, Jr., who represented First Citizens Bank in the prepetition state court proceedings, and the Debtor. The general sequence of events related to the prepetition foreclosure proceedings on this Property is not in dispute. In mid-2014, First Citizens Bank obtained an appraisal of the Property and also retained Poyner and Spruill to represent it in foreclosure proceedings to enforce its rights under the Deed of Trust. A hearing was held in state court before the clerk of court, and an order was entered in favor of First Citizens Bank. The Debtor then appealed the matter to state superior court, at which point First Citizens Bank retained Mr. McClain to represent it in the matter. The Debtor had previously worked in Stokes County as an attorney and then as a judge, and as both the Debtor and Mr. McClain described, none of the judges in that county were willing to hear the matter. As a result, after some time and various communications, the appeal was ultimately transferred to another county. In November, 2014, a contested foreclosure hearing was held in Dobson, North Carolina. The state superior court ultimately entered an order in favor of First Citizens Bank, and the Debtor filed a notice of appeal to the North Carolina Court of Appeals. The Debtor filed his bankruptcy petition shortly thereafter. Additional findings of fact are included below as needed.

DISCUSSION

As set forth above, the Debtor objects to First Citizens Bank’s claim on the grounds that the \$7,612.53 in attorney fees and the \$1,500.00 appraisal fee are significantly higher than the

standard fees for these services in this region. Debtor's Objection at 1. The Debtor requests in the Objection that the claim be reduced to reflect standard fees in the area for foreclosure work and appraisals.

Section 506(b) of the Bankruptcy Code provides:

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 or State statute under which such claim arose.

In order to support a claim for fees and costs under § 506(b), a creditor must show that: (1) the creditor is oversecured; (2) the underlying agreement provides for such fees and costs; and (3) the fees and costs are reasonable and necessary. In re McCormick, 417 B.R. 372, 374-75 (Bankr. M.D.N.C. 2008). Here, there is no doubt that First Citizens Bank holds an allowed secured claim and is an oversecured creditor. The Property has been sold, the claim has been paid in full, and excess proceeds have been remitted to the Chapter 13 trustee. Further, the Debtor does not dispute that North Carolina law allows for the recovery of attorneys' fees from a debtor if provided for by a note or other evidence of indebtedness,² or that the agreement between the parties in this case provides for recovery of attorneys' fees and expenses. The Note provides under "Attorneys' Fees; Expenses" that the

Lender may hire or pay someone else to help collect this Note if Borrower does not pay. . . . This includes, subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals.

Similarly, the Deed of Trust provides:

² See N.C. Gen. Stat. § 6-21.2.

If Lender institutes any suit or action to enforce any of the terms of this Deed of Trust, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees and expenses for bankruptcy proceedings . . . , appeals, and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveyors' reports, and appraisal fees, title insurance, and fees for the Trustee, to the extent permitted by applicable law. Grantor also will pay any court costs, in addition to all other sums provided by law.

The Court will address the Debtor's objections to First Citizens Bank's claims for attorney fees and costs in turn.

A. Attorneys' Fees

First Citizens Bank included \$7,612.53 in attorneys' fees in its proof of claim. The evidence reflects that actual attorneys' fees incurred by First Citizens Bank exceed \$8,225.00; however, pursuant to N.C. Gen. Stat. § 6-21.2(2),³ First Citizens Bank has limited its claim to fifteen percent (15%) of the outstanding balance owed on the Note. The \$8,225.00 amount only includes fees incurred through June 22, 2015, and does not include any fees for the hearings on July 15 and 29, 2015. Further, this amount does not appear to include fees incurred for the

³ The statute provides:

Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

...

(2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

preparation and filing of its proof of claim or the attorneys' fees of Douglas Wickham, who was retained by First Citizens Bank to represent it in connection with the Debtor's Objection and who appeared at both hearings.

The burden of proof to show that requested fees are reasonable is on the creditor. Florida Asset Financing Corp. v. Dixon (In re Dixon), 228 B.R. 166, 178 (W.D. Va. 1998). In this context, the reasonableness of fees is a question of federal law. Countrywide Home Loans, Inc. v. Hoopai (In re Hoopai), 581 F.3d 1090, 1101 (9th Cir. 2009); 4 Collier on Bankruptcy ¶ 506.04[3][b]. See generally Unsecured Creditors' Comm. v. Walter E. Heller & Co. Southeast (In re K.H. Stephenson Supply Co.), 768 F.2d 580 (4th Cir. 1985) (examining the legislative history of § 506(b)). The Fourth Circuit has adopted the twelve "Johnson factors" to determine the reasonableness of attorneys' fees "in any case where such determination is necessary." Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 (4th Cir. 1978). The twelve factors are:

(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Dixon, 228 B.R. at 178 (citation omitted) (applying the Johnson factors to an oversecured creditor in the bankruptcy context).

At the hearing, the Debtor argued that the \$2,000.00 flat fee charged by Poyner Spruill for the initial foreclosure work is unreasonable, as these causes of action are generally mass produced and face little opposition. Counsel for the Debtor pointed out that the hearing before

the clerk lasted only 30 minutes, arguing that \$2,000.00 for 30 minutes of work is not a reasonable charge. As to the Debtor's argument that foreclosures are generally routine matters with little opposition, the record reflects that in this case, the Debtor did in fact oppose the foreclosure at the hearing. Furthermore, as First Citizens Bank satisfactorily explained to the Court, the \$2,000.00 fee also covers due diligence performed prior to initiating foreclosure proceedings, the drafting and filing of the foreclosure action, and preparation for the foreclosure hearing in addition to the representation at the actual hearing before the clerk of court. The Court finds that First Citizens Bank has shown Poyner and Spruill's \$2,000.00 fee in connection with the foreclosure hearing in this case was reasonable.

Also at the hearing, the Debtor indicated that he objected to any postpetition fees, including the \$675.00 in legal fees incurred by First Citizens Bank in responding to the Debtor's Objection. The grounds for this portion of the Objection were not clearly articulated to the Court. Initially, counsel for the Debtor simply stated that the Debtor objected to any attorneys' fees incurred postpetition, without further explanation. In response, counsel for First Citizens Bank pointed out that the Note provides for attorneys' fees and expenses incurred in a bankruptcy proceeding. In closing statements, counsel for the Debtor clarified that he did not object to certain postpetition hours, including those associated with "cleaning up" the appeal pending in state court, but that hours spent dealing with the claim in bankruptcy should be limited to a flat fee of \$350.00. The Debtor argued that if attorneys are allowed hourly rates for dealing with claims, the fees will "mushroom." However, this Court and other courts have acknowledged that oversecured creditors may charge attorneys' fees to the debtor for post-petition services, provided the services are reasonably necessary to protect the creditor's oversecured interest. See McCormick, 417 B.R. at 376; see also In re Shree Mahalaxmi, Inc., 522

B.R. 899, 914 (Bankr. W.D. Tex. 2014) (“The Court finds that the Fifth Circuit’s holding in In re ASARCO does not prohibit an award of reasonable fees to an over-secured creditor under § 506(b) for defending its fee application.”). In McCormick, this Court reduced the creditor’s claim for post-petition legal fees only to the extent “that the time expended by the attorneys was excessive and beyond what was reasonably required to protect the interests of SunTrust,” whose status as a secured creditor was not challenged. McCormick, 417 B.R. at 376. Mr. McClain’s affidavit indicated that some of the services billed to First Citizens Bank were “follow-up actions [required] by the actions of the Debtor,” including \$675.00 incurred in responding to the Debtor’s Objection. McClain Aff. ¶ 6. This Court has reviewed the evidence regarding legal fees incurred by First Citizens Bank post-petition and concludes that the \$675.00 in fees were reasonably necessary to protect First Citizens Bank’s oversecured interest and thus should be allowed.

Lastly, the Debtor argued that Mr. McClain’s bill to First Citizens Bank for 8.5 hours on the day of the hearing in Dobson, North Carolina, is unreasonable. The Court finds Mr. McClain’s testimony that the hearing was contested and lengthy to be credible. The total hours expended on the date of the hearing also include Mr. McClain’s travel time from his office in Raleigh, North Carolina, to the hearing in Dobson. After considering the testimony of Mr. McClain regarding his services on that date as well as the testimony of the Debtor, the Court finds the total number of hours expended in connection with this case on the date of the hearing in Dobson to be reasonable. While the Debtor argues that First Citizens Bank should have employed a local attorney in order to minimize travel time, given the circumstances in this case—including the Debtor’s previous work as an attorney and judge in the Stokes County area and the resulting professional conflicts—the Court finds that employing counsel from Raleigh

was reasonable. The Debtor also argues that the fee for Mr. McClain's travel time should have been billed at a reduced hourly rate. The Court finds this argument to have some merit. After considering the unique circumstances of this case, such as the transfer of the case to another county through no fault of the creditor and the undesirability of the case within the legal community in which the suit arose, this Court finds a reduction in the amount of \$500.00 to be appropriate. However, even with a \$500.00 reduction in Mr. McClain's bill, First Citizens Bank has provided evidence of reasonable fees which exceed \$7,612.53 by more than \$500.00. Therefore, this Court's decision to reduce First Citizens Bank's attorneys' fees by \$500.00 has no ultimate effect on the amount of First Citizens Bank's allowed claim.

In sum, the Debtor objects to First Citizens Bank's attorney fees on the grounds that the fees are unreasonably high for a foreclosure hearing and defense of a bankruptcy proof of claim. However, First Citizens Bank has clearly shown that the proceedings in this case were not standard proceedings in light of circumstances including, but not limited to, an appeal of the clerk of court's order, the transfer of the case to another county, a contested hearing in state superior court, an appeal of the superior court's order, and an objection to claim after the claim was paid in full. The Court finds First Citizens Bank has presented ample evidence that it incurred actual attorneys' fees well in excess of \$7,612.53 and, after considering the factors set forth in Johnson, finds that this amount is reasonable. Therefore, as to First Citizens Bank's claim for attorneys' fees under § 506(b), the Debtor's Objection is overruled.

B. Appraisal

First Citizens Bank incurred the expense of \$1,500.00 to obtain an appraisal of the Property. The Debtor contends that \$1,500.00 is not a reasonable charge for a residential appraisal and argues that a fee of \$350.00, the standard fee for a residential appraisal in the area,

is more appropriate. However, the uncontroverted evidence reflects that at the time of the appraisal, the Property was utilized as a commercial building and was the subject of a commercial loan. Given the facts and circumstances of this case, the Court agrees with First Citizens Bank that a commercial appraisal was reasonable in this instance and overrules the Debtor's objection to this expense.

Therefore, IT IS ORDERED:

The Objection by Debtor to Claim Number 10 of First Citizens Bank & Trust is OVERRULED.

END OF DOCUMENT

PARTIES TO BE SERVED

Mark Hauser Badgett
15-50146 C-13

Mark Hauser Badgett
124 Five Forks Dr.
Ste B
King, NC 27021

Wendell Wes Schollander, III
Suite 308
2000 W. First St.
Winston-Salem, NC 27104-4225

Douglas Q. Wickham
327 Hillsborough St.
P.O. Box 527
Raleigh, NC 27602

John N. McClain, Jr.
P.O. Box 527
Raleigh, NC 27602

Kathryn L. Bringle
P.O. Box 2115
Winston-Salem, NC 27102

First Citizens Bank & Trust
Bankruptcy Notice
P.O. Box 25187
Raleigh, NC 27611-5187