

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION**

IN RE: **Matthew C. Pearson**                    )  
          **Helen F. Pearson**                    )  
  )  
  )

Case No.: 00-10860 12

**ORDER**

This matter came on for hearing before the undersigned Bankruptcy Judge on January 4, 2001, in Greensboro, North Carolina, after due and proper notice , upon the Application and Amended Application filed by Kilpatrick, Stockton LLP, counsel for Stone Investments, LLC (the "Applicant") for reimbursement of attorney fees and expenses pursuant to 11 U.S.C. § 506(b). The application covers the period from April 12, 2000 through January 3, 2001 and seeks \$1,575.42 as reimbursement for insurance premium payments and \$10,280.29 for attorney fees and expenses. Counsel also seeks an additional \$600.00 for the time and expenses of attending this hearing. Appearing before the court were Allen L. West, on behalf of the Applicant, Robin Palenski, on behalf of the Bankruptcy Administrator, Anita Jo Kinlaw Troxler, Chapter 12 Trustee, and Roger Belanger , Attorney for Debtors. The Bankruptcy Administrator, the Chapter 12 Trustee and counsel for the Debtors raised objections to the attorney fees and expenses, contending that the fees and expenses were not reasonable or necessary.

This court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334 and 157(a) and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A),(B),(K) and (O) which this court may hear and

determine.

After reviewing the file and considering the arguments of counsel for the Applicant as well as the arguments of the Bankruptcy Administrator, the Chapter 12 Trustee and counsel for the Debtor, this court makes the following:

### FINDINGS OF FACT

1. On or about April 12, 2001, Matthew C. Pearson and Helen F. Pearson ("Debtors") filed a Chapter 12 petition Pro Se. The Debtors subsequently obtained counsel, and Anita Jo Kinlaw Troxler was appointed the Chapter 12 Trustee.

2. On or about March 4, 1997, the Debtors executed a promissory note in the original principal amount of \$149,297.76 ("Note") payable to the order of First Union National Bank of North Carolina ("First Union"). The Note is a renewal and modification of the promissory note previously executed on or about April 19, 1995 in the original principal amount of \$167,500.00.

3. The obligations of the Debtors under the Note are secured by a deed of trust dated April 19, 1995 ("Deed of Trust") executed by the Debtors granting to First Union a first priority security interest in all of the Debtors' real estate. The Debtors' real estate consisted of three parcels of land on Forest Road and Soapstone Road in Randolph County, North Carolina as follows:

- A. Approximately 38.48 acres located at 2427 Soapstone Mountain Road, Columbia Township, Randolph County, North Carolina. The Debtors valued this parcel at \$115,400.00 in their schedules.
- B. Approximately 26.73 acres located at 3478 Forest Road in Columbia Township, Randolph County, North Carolina. The Debtors valued this parcel at \$107,500.00 in their schedules.

C. Approximately 2 acres, including their residence, located at 3458 Forest Road in Columbia Township, Randolph County, North Carolina. The Debtors valued this parcel at \$86,000.00.

4. There are also second and third liens against the Debtors' real estate.

5. To further secure repayment of the Note held by First Union, the Debtors executed a security agreement dated March 4, 1997 ("Security Agreement") wherein the Debtors pledged as addition collateral for repayment of the Note, *inter alia*, all crop allotments and acreage allotments (the "Personal Property") with respect to the Real Property.

6. By Assignment and Endorsement Agreement dated June 11, 1999, First Union assigned its right, title and interest to the Note, Security Agreement, Deed of Trust and related documents to Stone Investments.

7. The Security Agreement provides that the Debtors shall be obligated to obtain and keep in force casualty and hazard insurance on the Real Property, and also provides that Stone Investments is authorized to purchase any insurance to protect its interest. In such events, the Debtors agreed to reimburse Stone Investments for the cost of such insurance. The Debtors failed to obtain insurance on the Real Property. Stone Investments obtained and paid for casualty and hazard insurance on the Real Property. Monthly premium payments from April 12, 2000 through December 3, 2000 total \$1,575.42. There were no objections to the reimbursement to the Applicant for the payment of insurance.

8. Stone Investments filed a proof of claim in the amount of \$163,068.00 representing principal in the amount of \$131,320.56, interest through April 12, 2000 in the amount of \$29,222.50, late charges in the amount of \$2,280.00 and insurance in the amount of \$225.06. The proof of claim reflected a per diem of \$33.34.

9. The Debtors submitted their Chapter 12 Plan of Reorganization on July 11, 2000.

The plan proposed to sell two (2) parcels of land: an 8 -10 acre parcel and a 30-acre parcel and estimating the sales price to be approximately \$205,000.00. Various parties objected to the Debtors' plan including the Trustee, counsel for the United States Department of Agriculture, Stone Investments and Household Finance. The Debtors were given an opportunity to modify the plan.

10. On November 7, 2000, the Debtor filed a Motion for Authorization to sell 39.89 acres of land for the sum of \$195,000.00 with the Debtors to retain the twenty-six (26) acre tract and their homeplace. This motion was approved by the court by order dated November 21, 2000. A hearing on the Motion to Disburse proceeds was held on December 7, 2000. Pursuant to that hearing Stone Investments was paid the sum of \$173,878.12 representing payment in full of all prepetition claims as well as payment in full of all postpetition interest. It was agreed that the sum of \$9,500.00 would be held in escrow pending determination of the Section 506(b) application.

11. The loan documents provide as follows:

**ATTORNEYS' FEES AND OTHER COLLECTION COSTS.** Borrower shall pay all of Bank's reasonable expenses incurred to enforce or collect any of the obligations, including, without limitation, reasonable arbitration, paralegals', attorneys' and experts' fees and expenses, whether incurred without the commencement of a suit, in any trial, arbitration, or administrative proceeding, or in any appellate or bankruptcy proceeding.

#### **DISCUSSION**

Section 506(b) of the Bankruptcy Code permits an oversecured creditor to seek reimbursement for its attorney fees and expenses. 11 U.S.C. § 506(b). The section 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 under which such claim arose.” *Id.*

To sustain a claim for fees pursuant to Section 506(b), the creditor must demonstrate that (a) the creditor is oversecured; (b) the underlying agreement provides for such fees and costs; and (c) the fees and costs are reasonable. In re Gwyn, 150 B.R. 150, 154 (Bankr. M.D.N.C. 1993). See also, In re Ward, 190 B.R. 242, 245 (Bankr. D. Md. 1995); In re California Properties No. 1 Ltd., 132 B.R. 191, 192 (Bankr. M.D. Ala. 1991). There is no dispute that Stone Investments was substantially oversecured at all times. Similarly, it is undisputed that the loan documents impose an express obligation on the Debtors to pay the reasonable expenses incurred in the bankruptcy proceeding. The issue that the court must resolve is whether the fees and expenses incurred by the Applicant are reasonable and necessary under the circumstances of the case. “Creditors counsel does not have a blank check for automatic payment of fees and reimbursement of expenses.” In re Ward 190 B.R. at 245. See also, In re Lund, 187 B.R. 245, 251 (Bankr. N.D. Ill. 1995); In re Oliver, 183 B.R. 87, 91 (Bankr. W.D. Pa. 1995); In re Davidson Metals, Inc., 152 B.R. 917, 921 (Bankr. N.D. Ohio 1993). The burden of proving the reasonableness of the attorney’s fees is on the applicant. In re Staggie, 255 B.R. 48, 52 (Bankr. D. Idaho 2000); In re Gwyn, 150 B.R. at 156; In re CVC, Inc., 120 B.R. 877, 880 (Bankr. N.D. Ohio 1990). An oversecured creditor is entitled to recover under Section 506(b) those fees which were reasonably necessary to protect its interest. In re Schriock Const., Inc., 210 B.R. 348, 351 (Bankr. D.N.D. 1997).

It is the Applicant’s position that pursuant to North Carolina law “reasonable attorneys’ fee” means 15% of principal and interest due and owing at the time a suit is instituted seeking to enforce the note or security agreement. N.C. Gen. Stat. § 6-21.2. However, § 6-21.2 is not

controlling in considering a Section 506(b) application.<sup>1</sup>

In order to determine whether the proposed fees and expenses are reasonable, the courts in this circuit are guided by the twelve “lodestar” factors outlined in Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 717-19 (5<sup>th</sup> Cir. 1974) as adopted by this circuit in Harman v. Levin, 772 F.2d 1150 (4<sup>th</sup> Cir. 1985). The factors are as follows:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions raised;
- (3) the skill required to properly perform the legal services rendered;
- (4) the preclusion of other employment by the attorney due to the acceptance of the case;
- (5) the customary fee charged for like work;
- (6) whether the fee sought is fixed or contingent;
- (7) the time limitations imposed by the client or the 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;
- (11) the nature and length of the professional relationship between the attorney and the client; and
- (12) attorney fee awards in similar cases.

Johnson at 717-19.

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<sup>1</sup>The determination of reasonableness under Section 506(b) is controlled by federal rather than state law. Unsecured Creditors’ Comm. v. Walter E. Heller & Co. Southeast, Inc., 768 F.2d 580, 585 (4<sup>th</sup> Cir. 1984). See also, In re Ward, 190 B.R. 242, 245 (Bankr. D. Md. 1995). Fifteen percent of the principal and interest under the Note and Security Agreement is \$23,941.23. Applicant has not requested this amount but only that amount which it contends is equal to the actual attorney fees and expenses incurred.

The reasonableness standard is intended to prevent a creditor from “fail[ing] to exercise restraint in the attorneys’ fees and expenses they incur, perhaps exhibiting excessive caution, over zealous advocacy and hyperactive legal efforts.” In re Gwyn, 150 B.R. at 156. Any “overlawyering” should be borne by the creditor, rather than the debtors. In re Ward, 190 B.R. at 250.

It is important to remember that the Applicant and its counsel are free to enter into any contract for fees and services that they deem appropriate. The court under Section 506(b) must determine what amount of the fees and expenses incurred is a reasonable amount for the Debtors to be required to reimburse the Applicant.

#### **Research Regarding Tobacco Allotments**

In the case before the court, the Applicant had a first deed of trust on all of the Debtors’ real estate. As additional collateral they had a lien on tobacco allotments. The sale of only one (1) of the three (3) parcels of real estate generated more than enough monies to pay the Applicant in full. The Debtors retained twenty-six acres of land, which they valued in excess of \$100,000.00, as well as their homeplace, which they valued at \$86,000.00. The Applicant was never at risk of not being paid in full in this bankruptcy. Irrespective of the equity cushion in the real estate, the Applicant seeks to be reimbursed for the following services:

Date	Entry	Time	Amount
8/16/00 (LEB)	legal research regarding allotment	1.4	\$287.00
8/17/00 (JPG)	legal research tobacco allotments	3.0	\$315.00
8/18/00 (LEB)	conference with Mr. Gibson regarding legal research	.6	\$123.00

8/18/00 (JPG)	legal research tobacco allotments	1.0	\$105.00
9/18/00 (ALW)	research regarding Chapter 12	2.2	\$150.00

The Applicant also seeks reimbursement for the following expenses:

8/16/00	\$2.50	Online legal research
8/16/00	\$72.00	Online legal research
8/17/00	\$90.00	Online legal research
8/18/00	\$45.00	Online legal research
8/18/00	\$59.00	Online legal research
8/24/00	\$29.10	Online legal research on 8/17/00

The court finds that the time and expenses incurred by the Applicant regarding tobacco allotments were not reasonable or necessary and the application will be reduced by those amounts.

#### **Lumping of Services**

The court takes seriously its duty to determine if fees are reasonable. The court can only make an educated determination if counsel properly designates the time expended on tasks performed. When courts are faced with time entries containing multiple tasks, some courts deny each entry in its entirety. In re Breeden, 180 B.R. 802 (Bankr. N.D. W.Va. 1995). Other courts make a percentage adjustment for the lumping. In re Adventist Living Ctrs., Inc., 137 B.R. 701, 706 (Bankr. N.D. Ill. 1991). The Applicant's fee applications contain numerous entries of lumping, for example:



INDEX	ATTORNEY	DATE	STAT	WORKED VALUE		BILLABLE VALUE		
				HOURS	AMOUNT	HOURS	RATE	AMOUNT
12571570	3776 (ALW)	9/21/00	B	6.60	990.00	6.60	150.00	990.00
Representation at hearing on objection to Chapter 12 plan; conference with debtors and creditors regarding modified plan; conference with client regarding same; correspondence with debtor's counsel regarding objections								
12663203	3776 (ALW)	10/16/00	B	2.60	390.00	2.60	150.00	390.00
Conference with client regarding claim and continuance; conference with Mr. Belanger regarding same; correspondence with Mr. Belanger regarding objections to claim; conference with Chapter 12 Trustee regarding claim; review document regarding attorney fees; request and review billing and time of attorney's fees; review documents regarding interest and other fees on POC and other documents; conference with Mr. Behning regarding hearing and claim.								
12727179	3776 (ALW)	11/02/00	B	6.20	930.00	6.20	150.00	930.00
Representation at Chapter 12 confirmation hearing in Greensboro; conference with creditors, trustee and debtor's regarding claim; conference with client regarding status of hearing, preparation of proof of claim; conference with Mr. Behning regarding strategy.								
12796665	3776 (ALW)	11/29/00	B	2.9	435.00	2.90	150.00	435.00
Conference with Mr. Behning regarding upcoming hearing on disbursement of proceeds; conference with Ms. Pankewitz regarding same; preparation for hearing on disbursement of proceeds; preparation of application for fees.								
12807551	3776 (ALW)	11/30/00	B	2.60	390.00	2.60	150.00	390.00
Preparation for application for fees; conferences with debtor's attorney regarding payoff; conference with trustee regarding fees; conference with Mr. Behning regarding preparation of application for fees; conference with client regarding various issues, including application for fees and payoff.								

The court does not dispute that the services rendered were valuable to the creditor but without detail as to the precise time expended, the court must speculate as to the time expended. The court has taken time "lumping" into account in making a final determination for fees in this case.

### Preparation of Fee Application

The court notes that the Applicant filed an initial and then an amended fee application. As reflected in the Bankruptcy Administrator's objection, the original application did not comply with the fee application guidelines published by the Middle District. The court cannot ascertain how much time the applicant expended on preparation of the fee application due to lumping but notes that work was performed on the following dates with the total hours reflected:

Date	Name/Initials	Hours
11/29/00	ALW	2.9
11/30/00	ALW	2.6
11/30/00	LEB	.3
12/4/00	ALW	.5
12/5/00	ALW	.8
12/6/00	ALW	.6
12/13/00	ALW	.4
12/21/00	ALW	.3
1/02/01	ALW	2.5
1/03/01	ALW	1.9
1/03/01	ALW	.3

Based on the time typically expended preparing fee applications, the court finds that the time expended is excessive, and the Debtor should not have to compensate counsel for being unfamiliar with the practices of the district.

### Rates Requested

The court finds that the rates requested are greater than those generally allowed in this district, that there was nothing novel or difficult to justify a higher fee, and that the rates

requested will be adjusted downward<sup>2</sup>. The Applicant's law firm is known to the court to be extremely competent and ethical. The law firm is free to charge whatever rate the Applicant agrees to pay, but this court will not require the Debtors to bear the cost of all the services rendered. The court has broad discretion in determining whether the proposed fees and costs are reasonable. In re Kroh Bros. Dev. Co., 105 B.R. 515, 520 (Bankr. W.D. Mo. 1989).

### CONCLUSION

Based upon the foregoing, the court hereby awards the following fees and expenses:

Name/Initials	Hours	Rate	Total
ALW	36.00	140.00	\$5,040.00
JPG*			
KMD	1.20	60.00	\$72.00
KRD	5.40	60.00	\$324.00
LEB	5.90	180.00	\$1,062.00
RSH	1.00	200.00	\$200.00

\*JPG had four hours in this case all of which were legal research on the tobacco allotment. No fees will be awarded for this undertaking.

Therefore, it is ORDERED, ADJUDGED AND DECREED that the Applicant shall be awarded the following fees and expenses under 11 U.S.C. § 506(b): (a) \$1,575.42 representing insurance premiums; (b) \$6,698.00 in attorney fees; and (c) \$474.69 in expenses.

This the 26 day of January, 2001.

**CATHARINE R. CARRUTHERS**

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Catharine R. Carruthers  
United States Bankruptcy Judge

<sup>2</sup>At the present time, the typical paralegal rate approved is \$50.00 to \$60.00 per hour. Applicant has requested rates of \$85.00 to \$105.00 per hour for paralegals.