UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

Filed & Entered
On Docket
10/01/03

In re:

Leilani Taylor, **Chapter 13 Case**
Debtor. **# 02-10695**

Appearances:

Rebecca A. Rice, Esq.	*Jan M. Sensenich, Esq.*	*S. Stacy Chapman, III, Esq.*
Cohen & Rice	*White River Jct., VT*	*Chapman & Kupferer, Ltd.*
Rutland, VT	*Chapter 13 Trustee*	*Rutland, VT*
Attorney for the Debtor	*Pro Se*	*Attorney for Creditor VHFA*

MEMORANDUM OF DECISION
RULING ON OBJECTION TO CONFIRMATION AND DETERMINING ATTORNEY'S FEES

The issue before the Court is whether the Debtor may be required, pursuant to either 11 U.S.C. § 506(b) or § 1322(e)[1] to pay the attorney's fees incurred by her mortgagee post-petition, as a condition to confirmation of her chapter 13 plan.

This Court has jurisdiction over this contested matter under 28 U.S.C. §§ 157(b)(2)(L) and 1334.

I. PROCEDURAL BACKGROUND

On July 16, 2002, Creditor Vermont Housing Finance Agency ("VHFA") filed an objection to confirmation of the Debtor's plan (doc. #14) (hereinafter, "the Objection") asserting that: (1) the Debtor was not entitled to reinstate the subject mortgage under Canney v. Merchants Bank (In re Canney), 284 F.3d 362 (2d Cir. 2002); and (2) even if the Debtor had the right to reinstate the subject mortgage through her chapter 13 plan, the plan could not be confirmed unless she paid all attorney's fees incurred by VHFA in connection with her mortgage.[2] The first issue has been resolved by virtue of an earlier decision of this Court, followed by a decision of the United States District Court and a further order of this Court implementing the District

[1]All statutory references herein refer to Title 11 of the United States Code ("the Bankruptcy Code") unless otherwise indicated.

[2]For convenience, the Court shall refer to the subject mortgage as "the Mortgage" and the corresponding promissory note as "the Note".

Court's ruling.[3] Hence, the only matter pending before the Court at this time is whether the Debtor must pay VHFA the full attorney's fees it seeks as a condition of confirmation. For the reasons set forth below, VHFA's request for attorney's fees is allowed to the extent of $2,075.

The Debtor's Second Amended Plan ("the Plan") was filed on December 19, 2002 (doc. #39), and an order confirming the Plan and approving the terms therein, was entered on February 26, 2003. See Findings and Order Confirming Chapter 13 Plan (hereinafter, "the Confirmation Order") (doc. #47). The Confirmation Order specifically provided:

> The Second Amended Chapter 13 Plan, dated December 19, 2002 is hereby confirmed, subject to the right of VHFA to submit a memorandum on the issue of to what degree, if any, its attorneys fees in the Bankruptcy case and its appeal to the District Court become part of its secured mortgage claim and whether there were any additional property taxes paid by VHFA that should become part of the VHFA mortgage arrearage claim. Those issues are preserved for a later ruling and the debtor shall move to modify the Plan, if necessary, to reflect the Court's ruling on those issues. Other than with respect to the above referenced issues, the objection to confirmation by VHFA is overruled.

Id. at 2, ¶1. VHFA filed a Supplemental Memorandum Concerning Reinstatement and Expense (doc. #42), and the Debtor and Chapter 13 Trustee each filed responsive memoranda (docs #45 and 46, respectively). The Court held an evidentiary hearing on February 27, 2003, at which VHFA presented testimony relating to the reasonableness of the attorney's fees sought. At the conclusion of that hearing, the Court took the matter under advisement.

II. FACTUAL BACKGROUND

The facts are not in dispute and have been articulated in this Court's decision, see doc. #17, and the decision of the United States District Court, see doc. #35.[4] Therefore, familiarity with the facts of this case is presumed and I will set forth only those facts pertinent to the narrow issue presented.

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[3] See Decision Sustaining Vermont Housing Finance Agency's Objection to Debtor's Chapter 13 Plan (July 25, 2002) (doc. #17); Taylor v. Vermont Housing Finance Agency (In re Taylor), No. 1:02-cv-214, slip op. (D. Vt. Dec. 3, 2002) (doc. #35); Order Implementing Appellate Decision of United States District Court and Setting Hearing on Confirmation of Plan (Dec. 6, 2002) (doc. #36), respectively.

[4] The district court's decision is docketed in this case as doc. #35. (Citation of the district court's decision is found in note 2, supra.) The district court's recitation of this case's factual background is found at pages 1–3 of the decision.

As of July 16, 2002, VHFA was seeking attorney's fees and costs in the amount of $2,315.74. See VHFA's Mem. Supp. Objection to Chapter 13 Plan at 4 (doc. #14). This was approximately $1,200 more than the amount that had been set forth in the state court Judgment Order and Decree of Foreclosure.[5] VHFA's Proof of Claim set forth a total claim of $57,355.58, but it did not provide a breakdown of how that figure was computed. Rather, VHFA attached to its Proof of Claim, *inter alia*, the Decree of Foreclosure, which provided an accounting of the amount claimed. An examination of the Decree of Foreclosure shows the redemption figure included an amount of $1,103.31 for attorney's fees, plus $209.14 in court costs and $378.05 for taxes paid on behalf of the Debtor. Under the terms of the confirmed Plan, the Debtor paid VHFA $9,887.58 in the first month of the plan – enough to cure the Note arrearage and VHFA's foreclosure-related attorney's fees and costs. (The balance of the $12,000 paid by the Debtor in the first month of the Plan, plus $24.47 per month paid over the following 35 months, is to be applied to priority and general unsecured claims.) See doc. #39. In its Supplemental Memorandum Concerning Reinstatement and Expense, doc. #42, VHFA articulated the basis for the argument it had posited on the record at the December 19th confirmation hearing, specifying that it was seeking attorney's fees in excess of those set forth in the Decree of Foreclosure, to reimburse it for the fees incurred subsequent to the entry of the Decree of Foreclosure, in the amount of $11,778.50. See Invoices,[6] attached as exhibits to doc. #42. VHFA asserts that the Debtor is required to pay these fees as a condition of confirmation pursuant to § 1322(e), because it is a *quid pro quo* for reinstatement of the mortgage.

VHFA asks that the Court sustain its objection to confirmation and direct the Debtor to pay VHFA its post-petition attorney's fees in the amount of $11,778.50 – a sum which is greater than the default amount of $9,887.58. The Debtor counters that there is no provision either in the Bankruptcy Code, or in the Mortgage or Note, that entitles VHFA to recover post-petition, post-judgment attorney's fees.

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[5] See Vermont Housing Finance Agency v. Daniels [n/k/a Taylor], No. 550-9-01Rdcv, Judgment Order & Decree of Foreclosure (Vt., Rut. Sup. Ct. Nov. 21, 2001) (including $1,103.31 in attorney's fees in the redemption amount), attached to #02-10695 Claims Register, Claim No. 2 at 12-14 (hereinafter, "the Decree of Foreclosure").

[6] VHFA attached five invoices from its attorney, S. Stacy Chapman, III, totaling $11,778.50. These invoices show fees incurred each month in the following amounts:

Invoice Date:	Invoice Total Amount Due:
July 17, 2002	$ 550.00
Aug. 16, 2002	$ 3,175.50
Sept. 17, 2002	$ 60.00
Oct. 24, 2002	$ 1,715.00
Nov. 18, 2002	$ 6,278.00
	$11,778.50

III. DISCUSSION OF THE LAW

None of the memoranda of law filed in this contested matter cite to any case in the Second Circuit which has addressed the question of allowance of post-judgment or post-petition attorney's fees in a chapter 13 case, nor allowance of attorney's fees at all, under § 1322(e). Whether, and to what extent, the holder of a reinstated mortgage may be awarded attorney's fees for post-petition litigation certainly appears to be an issue of first impression in this District. Moreover, in addition to the uniqueness of the legal issue raised, this particular reinstatement has unusual facts as well: the Debtor's confirmed Plan pays the full default amount, including all the attorney's fees and costs awarded under the Decree of Foreclosure, in the first month of the Plan. Hence, as defined by state law, the default was cured in the first month of the Plan. Therefore, the Court interprets the issue presented as whether the Debtor must pay, through the Plan, the attorney's fees and costs the mortgagee incurred post-petition, notwithstanding that its mortgage arrears have already been cured, as a condition of confirmation.

The two Bankruptcy Code provisions addressed by the parties regarding the allowance of attorney's fees in this scenario are § 506(b)[7] and § 1322(e).[8]

A. Bankruptcy Code §§ 506 and 1322(e) Must Both be Considered

The Court finds that, as of the date of the bankruptcy filing, VHFA was not an oversecured creditor. As both the Debtor's schedules and VHFA's Motion for Relief from Stay (doc. #15) indicate, the subject collateral (the Debtor's residence) had a value of $55,000 and VHFA's claim had a balance due of $57,355.58. See § 506(a). Only an oversecured creditor is entitled, as a matter of right, to include reasonable attorney's fees as a part of its secured claim. See § 506(b). Thus, there is no provision in § 506 that would entitle VHFA to collect attorney's fees from the Debtor as part of its secured claim.

However, the fact that VHFA was not an oversecured creditor does not disqualify it from collecting attorney's fees under § 1322(e). See In re Plant, 288 B.R. 635 (Bankr. D. Mass. 2003); In re McMullen, 273 B.R. 558 (Bankr. C.D. Ill. 2001). While there was previously some dispute about whether § 1322(e) applied to attorney's fees, commentators and recent decisions appear to be in consensus that the statute does, indeed,

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[7]Section 506(b) reads:

(b) 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.

[8]Section 1322(e) reads:

(e) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

apply to attorney's fees. See, e.g., 2 LUNDIN, KEITH M., CHAPTER 13 BANKRUPTCY: THIRD ED. § 138.1 (2000); In re Landrum, 257 B.R. 577, 581 (Bankr. S.D. Ohio 2001). This Court agrees that § 1322(e) applies to all costs incurred in the curing of a default, including reasonable attorney's fees. Under § 1322(e), in order to be a mandated component of the cure through a chapter 13 plan: (1) the attorney's fees must be required to be paid in order to cure the default under the original agreement; and (2) the collection of such attorney's fees cannot be prohibited by state law. See In re Lake, 245 B.R. 282 (Bankr. N.D. Ohio 2000). Collection of attorney's fees in foreclosure actions is not *per se* prohibited in Vermont. See V.R.C.P. 80.1(f). Thus, the inquiry becomes what sums must be paid to "cure the default." To the extent that VHFA is entitled to attorney's fees under the Bankruptcy Code, it would be pursuant to § 1322(e); and such fees would be limited to the attorney's fees which are necessary to cure the default, under the terms of the loan agreement.

We turn then to the issue of whether the loan documents require the borrower to pay the lender's reasonable attorney's fees in order to cure the default. The attorney's fees language in the Note[9] does not support VHFA's position that it may compel the Debtor to pay its post-petition attorney's fees. The Note addresses collection of attorney's fees only in the situation where the borrower pays the mortgage balance in full. See Note at ¶6(E), attached as an exhibit to VHFA's Motion for Relief from Stay (doc. #15). As the Mortgage has been reinstated through the confirmed Plan in this case, the Debtor has not been required to pay the Mortgage balance in full. Therefore, the Court finds the attorney's fees provision in the Note has not been triggered. By contrast, the attorney's fees provision that VHFA relies upon in the Mortgage is applicable since it specifically addresses the borrower's obligation regarding attorney's fees in the event of a reinstatement. The language of the Mortgage unequivocally requires the borrower to "pay all expenses incurred in enforcing this [Mortgage], including, but not limited to, reasonable attorney's fees" in the event of reinstatement. Mortgage at ¶18, attached as an exhibit to VHFA's Motion for Relief from Stay (doc. #15).

This Court finds that the attorney's fees incurred to "cure the default," for purposes of § 1322(e), would include the reasonable attorney's fees incurred herein in connection with the reinstatement of the Mortgage. Under the District Court's decision in this matter, it is clear that the law in this District is that a debtor may reinstate a mortgage by filing a chapter 13 case, provided the case is filed *prior* to the expiration

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[9] The applicable language of the Note reads:

> 6. BORROWER'S FAILURE TO PAY AS REQUIRED
>
> . . .
>
> (E) Payment of Note Holder's Costs and Expenses
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> If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

of the redemption period:

> In Vermont, under its strict foreclosure law, the mortgagee's ownership of the subject property following a foreclosure judgment remains encumbered until the date of redemption specified in the foreclosure judgment had passed. . . . Accordingly, the operative date of the 'foreclosure sale' specified in Section 1322(c)(1) is the date on which all of the debtor's rights in the subject property are extinguished, including the rights of redemption. In this case, Taylor filed for Chapter 13 relief prior to the expiration of her equity of redemption, making Section 1322(c)(1) available.

Taylor v. Vermont housing Finance Agency (In re Taylor), No. 1:02-cv-214, slip op. at 12-13 (D. Vt. Dec. 3, 2002) (internal citation omitted) (doc. #35). There is no dispute that the Debtor filed her chapter 13 case prior to the expiration of the redemption period, nor is there presently any doubt that the Debtor has the legal right to reinstate her mortgage through a chapter 13 case. Id.

B. The Reinstatement of the Mortgage Determines Eligibility to Collect Attorney's Fees

Under the instant Mortgage, VHFA has the right to collect attorney's fees in the event of reinstatement. As of the date of the Decree of Foreclosure, no attorney's fees were due in connection with reinstatement because the mortgage had not been reinstated. When the Debtor reinstated her Mortgage through the auspices of her chapter 13 Plan, she reinstated the Mortgage as it existed on the date it was terminated, i.e., as of the date of entry of the Decree of Foreclosure. It is my finding that there is no basis in the Mortgage to allow any attorney's fees incurred in the context of the chapter 13 case that were not directly and necessarily related to the reinstatement of the Mortgage. It is my determination that the only attorney's fees which were related to reinstatement are those that dealt directly and primarily with the Debtor's right to reinstate and those that dealt directly and primarily with the amount due in order to reinstate. Accordingly, the attorney's fees VHFA incurred: (I) in the preparation and filing of its proof of claim; and (ii) in objecting to the confirmation of the Plan when it perceived that the Plan did not provide for payment of the full arrears due VHFA; should be allowed, to the extent they are reasonable. After reviewing the time sheets filed by VHFA's counsel, I find that this warrants an award of $1,715.[10]

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[10] The Court allows $520 of the $550 billed July 17, 2002. See Chapman & Kupferer, Ltd. Invoice dated July 17, 2002, attached as exhibit to doc. #42. The Court has reduced the July 9, 2002, entry by 1/4 hour (or $30) for the time spent in conference with the Bankruptcy Court Clerk. This Court has ruled that such time is appropriate for non-legal staff and, therefore, will not grant attorney's fees for time spent on such tasks. See In re French, 2003 WL 21288644, at *8 (Bankr. D. Vt. 2003). Further, the Court allows the fees charged from July 16, 2002, through July 25, 2002 (the date of the original confirmation hearing), which total $1,195. See Chapman & Kupferer, Ltd. Invoice dated August 16, 2002, attached as exhibit to doc. #42. Thus, the total of the allowed attorney's fees from the July 2002 Invoice and the August 2002 Invoice is $1,715.

Because of the complexity and novelty of the issues litigated in this case, determining exactly how much was necessary to reinstate the Mortgage and determining the reasonable attorney's fees is rather thorny. I turn, therefore, first, to the language and principles of the Bankruptcy Code for guidance. It is evident that § 1322(e) is intended to put the mortgagee in the same position it would be in if the borrower were not in bankruptcy. As one court has so eloquently stated: "The mortgagee is entitled to receive the benefit of its bargain – not more, but not less." See In re McMullen, 273 B.R. at 564-65, n.6. Likewise, the Debtor is not required to pay more in a bankruptcy case than he or she would be required to pay outside a bankruptcy case. See In re Hatala, 295 B.R. 62 (Bankr. N.J. 2003). If the Debtor had not needed to file bankruptcy, but instead had the funds to reinstate the Mortgage outside of bankruptcy, VHFA would not have filed its objection to the chapter 13 case; nor would it have had to defend an appeal to the District Court. It is the attorney's fees VHFA incurred in pursuing these matters that are challenged by the Debtor and Trustee. Since these fees exceed the attorney's fees VHFA would have been entitled to outside of bankruptcy, they should be disallowed under the McMullen rationale.

I also look, though, to the touchstone concept that when a court is called upon to determine the reasonableness of an attorney's fees, it does so in its equitable role. See generally McGuire v. Russell Miller, Inc., 1 F.3d 1306 (2d Cir. 1993) (instructing that a jury may decide whether a party is entitled to attorneys fees, but the court, in its equitable role, determines the reasonable of the fees to be awarded) (citing Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240 (1975)). It is the court's role to determine, *inter alia*, the reasonableness of the amount charged, as well as the amount spent on a specific task. See id. ; see also In re S.T.N. Enterprises, Inc., 70 B.R. 823, 842 (Bankr. D. Vt. 1987).

I find Attorney Chapman's billable rate of $120 per hour to be reasonable. Moreover, it is important to observe that as a general rule it is reasonable for attorneys to be compensated for the reasonable time they spend justifying attorney's fees they have a legitimate basis to collect. Therefore, I also find it reasonable to allow VHFA three additional hours of time in its pursuit of an award of attorney's fees. This is reasonably and necessarily related to the reinstatement of the Mortgage. See, e.g., In re Crowley, No.99-11572, slip op. at 3 (Bankr. D. Vt. May 7, 2003) (citing In re Wonder Corp. of America, 82 B.R. 186 (D. Conn. 1988) Therefore, the award of attorney's fees to VHFA will be increased by $360 (3 hours at $120 per hour) for a total award of $2,075, in addition to the attorney's fees ordered through the Debtor's confirmed Plan.[11]

[11]The Court notes the amount paid through the Plan includes all of the attorney's fees awarded in the Decree of Foreclosure.

C. The Mortgage May be Properly Categorized as a Contract of Adhesion

As further support for my interpretation of the Mortgage's attorney's fees provision allowing only those reasonable attorney's fees related directly and necessarily to reinstatement, I rely on those cases which have described mortgages as contracts of adhesion and, therefore, instruct that such provisions must be interpreted strictly against the mortgagee. See In re Parker, 269 B.R. 522 (2d Cir. 2001).

D. Reasonableness of the Fees Requested Includes Consideration of Amount in Controversy and Impetus for Legal Services

This Court's disallowance of a significant portion of the attorney's fees sought by VHFA is also a reflection of its assessment of the equities to be weighed in determining and awarding reasonable attorney's fees. The Court finds that attorney's fees in excess of the amount in controversy is *prima facie* unreasonable. The burden of persuasion in such instances is upon the creditor to demonstrate that extenuating circumstances warrant a finding of reasonableness. VHFA has made no such showing in this case. It was clear from the Debtor's original chapter 13 plan (doc. #8) that VHFA would be paid the full default amount in the first month of the Plan.[12] Once that was established, any action taken by VHFA was for a purpose other than ensuring the collection of the amount due upon reinstatement.

In light of the fact that the Canney decision was very new, it is quite understandable that VHFA was interested in testing the holding of that case against the facts of this case. However, the Court finds VHFA's choice to "test the waters," so to speak, was a business judgment based upon the larger legal issue rather than upon the circumstances of this particular case. Thus, it would be wholly unreasonable and inequitable to assess all of the associated legal fees solely against the Debtor. The Court finds these attorney's fees are a cost of doing business, not an expense that is properly characterized as part of the Debtor's reinstatement obligation under the Mortgage.

In sum, the Court finds neither the amount of time spent on these objection and appellate matters to be unreasonable nor the hourly rate charged by VHFA's counsel to be unreasonable; but, it does find that it would be unreasonable to assess all of these fees against just one borrower who happened to have a case pending at the time a "hot" legal issue was presented. "It is inherently unreasonable to ask a debtor to reimburse attorneys' fees incurred by a creditor that are not cost-justified either by the economics of the situation or necessary to preservation of the creditor's interest in light of the legal issues involved." Matter of Nicfur-Cruz Realty Corp., 50 B.R. 162, 169 (Bankr. S.D.N.Y. 1985). "Under the 'American Rule' parties generally bear the responsibility for their own fees and costs in litigation, absent enforceable contract language

[12] The Debtor had proceeds from a personal jnjury lawsuit which she was using to cure the VHFA default.

allowing fee-shifting." In re Parker, 269 B.R. at 529-30 (citing Alyeska Pipeline Serv. Co. v. The Wilderness Society, 421 U.S. 240, 247-71 (1975)); see also In re Hatala, 295 B.R. 62 (Bankr. N.J. 2003). The subject Mortgage does not contain a fee-shifting provision. In the absence of an express provision or statute authorizing attorney's fees to be assessed against another party, each party must pay its own attorney's fees.

E. State Law Provides Guidance in this Analysis

In a recent bankruptcy case from our sister court in New Jersey, the court addressed a very similar issue. See In re Hatala, 295 B.R. 62 (Bankr. N.J. 2003). It summarized the guiding principles for the court's analysis, succinctly highlighting the interplay between state and federal law:

> In the state law context, once a mortgagee obtains a foreclosure judgment, its rights are limited to satisfaction of the judgment. If a debtor tenders the amount of the judgment to the mortgagee immediately upon entry of the judgment, the debtor is entitled to have the judgment marked satisfied. Even after a sheriff's sale takes place, a debtor may redeem the property by tendering the amount of the judgement, accrued interest and costs together with interest on the deposit made at the sale. There is no reason why the debtor should have to pay more in bankruptcy than outside of it. In fact, such a result would provide a windfall to secured creditors and harm the interests of unsecured creditors who then receive a smaller percentage of the debtor's income towards their claims. . . . To the extent that actions taken by [the secured creditor], namely filing a proof of claim in [the] case and a pro forma objection to the debtor's plan . . . relate to the . . . obligations signed by the debtor, they relate back to the foreclosure proceeding. . . . [W]ork done in a bankruptcy proceeding does not amount to post-judgment collection efforts. Actions taken in bankruptcy proceeding are part of a unique, separate matter governed by the bankruptcy code. In fact, once a debtor files for bankruptcy, all efforts by creditors to collect on pre-petition debts must immediately stop because of the automatic stay. Nor is there any "general right to attorney's fees for actions in bankruptcy." Fees may be awarded only where: (1) a contract provides for payment of attorney's fees; (2) a statute provides an allowance of attorney's fees; (3) a recovered fund or property confers a "common benefit" as in a class action suit; (4) a party willfully disobeys a court order; or (5) a court finds that the losing party has acted "'in bad faith, vexatiously, wantonly or for oppressive reasons.'" In order for [the secured creditor] to be able to collect fees for the work performed in the bankruptcy cases, it would have to show that it was entitled to such fees under one of the exceptions above.

Id. at 67-69 (internal citations omitted). This rationale applies to the instant case and leads me to the conclusion that the Debtor can be required to pay the subject attorney's fees only if either: (1) the contract between VHFA and the Debtor requires this; or (2) a statute requires the Debtor to pay them. I do not find the Mortgage or the Note require the Debtor's payment of all of the attorney's fees VHFA incurred post-petition. Nor do I find any provision of state law or in the Bankruptcy Code to require such payment.

None of the parties have provided the Court with any state law which addresses the specific issue raised herein. In my own research into Vermont state law, I find no cases addressing the question of allowance of attorney's fees related to either mortgage reinstatement or mortgage foreclosure for services rendered post-judgment. However, there is guidance from the Vermont Supreme Court on the general principles underlying the determination VHFA has asked this Court to make. First, it is clear that an award of attorney's fees in mortgage foreclosure actions is discretionary, even where the mortgage deed contains an agreement on the part of the mortgagor to pay the mortgagee's attorneys fees in the event of foreclosure. See Retrovest Assocs., Inc. v. Bryant, 153 Vt. 493, 501 (1990). It is within the discretion of the trial court to deny attorney's fees to a plaintiff upon foreclosure, as provided for in the mortgage, if it deems it inappropriate or inequitable to award such fees. See, e.g., In re Proctor Trust Co., 137 Vt. 346, 353 (1979). Thus, there is no automatic right of counsel to collect its attorney's fees in a foreclosure action under Vermont state law. Vermont state courts look at many factors and must consider the overall circumstances of the case, the expertise of the attorney, and the prevailing rates of attorneys with similar expertise handling similar matters. Id. Although there is no specific guidance from the state courts as to the relationship between the amount of the attorney's fees sought and the amount of the underlying judgment (or settlement), the Vermont Supreme Court has upheld the reduction of an award of attorney's fees below the minimum set forth in the bar association's minimum fee schedule when the underlying settlement was twelve times greater that the fees allowed. See Young v. Northern Terminal, Inc., 132 Vt. 125, 130-31 (1974). This leads me to believe that the state courts would be at least very hesitant, if not actually resistant, to awarding attorney's fees which exceed the amount in controversy, such as are sought here.

Federal law controls on the question of an award of attorney's fees in a bankruptcy case. However, since the federal statute in question, § 1322(e), provides that "the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law," it would seem prudent for bankruptcy courts to look to the respective state courts for guidance in interpreting the underlying agreement and to look to relevant state laws to ascertain what the applicant would have been likely to have been awarded if the question were posited before the state court. See, e.g., In re Hatala, 295 B.R. 62 (Bankr. N.J. 2003).

In this regard, both parties have called the Court's attention to the state statute that creates the mortgagee's right to collect attorney's fees, namely V.R.C.P. 80.1(f). That statute sets a cap for attorney's fees that the foreclosing mortgagee can collect from the mortgagor at 2% of the amount due under the mortgage. However, this provision addresses the amount to be collected in the context of the foreclosure action only and, hence, is not relevant to the question of allowance of attorneys fees incurred post-judgment.

F. No State Law Authority for Allowance of Post-Judgment Attorney's Fees

As noted above, one of the factors that makes VHFA's request extraordinary is that it is seeking reimbursement of attorney's fees incurred for services rendered after the Decree of Foreclosure was entered, after the bankruptcy case was filed, and after a Plan was filed that proposed to pay VHFA its full default amount immediately. There is no provision in V.R.C.P. 80.1(f), no case presented by VHFA, and no case that I have found, that would support VHFA's position that it is entitled to post-judgment attorney's fees under Rule 80.1(f). On the contrary, the Vermont Supreme Court has held that a party may be awarded only post-judgment attorney's fees if the statute specifically authorizes such an award, and even then, only where such an allowance would not cause unfair surprise or prejudice to the affected party. See In re Downs, 159 Vt. 467 (1993) *(*citing White v. New Hampshire Dep't Employment Security, 455 U.S. 445, 452 (1982)). Here, there is nothing in the applicable statute, Rule 80.1(f), that provides for an award of post-judgment attorney's fees. Therefore, I find that there is no state law authority for an award of attorney's fees in excess of that provided for under the Decree of Foreclosure.

IV. CONCLUSION

Having found that the American Rule applies herein; that V.R.C.P. 80.1(f) allows an award of attorney's fees only for services rendered prior to the entry of the Decree of Foreclosure; that VHFA is not entitled to an award of attorney's fees under § 506(b) because it was not oversecured on the date of the bankruptcy filing; that it is entitled to an award of attorney's fees for the preparation of the proof of claim, objection to confirmation, and pursuit of its attorney's fees related to these tasks, under § 1322(e); and that this Court must determine reasonableness of attorney's fees based upon equitable principles; the Court holds that VHFA is entitled to an additional award of attorney's fees in the amount of $2,075.

Therefore, VHFA's objection is sustained to the extent of this additional allowance of fees. The balance of VHFA's request for attorney's fees is disallowed and the balance of VHFA's objection is overruled.

This Memorandum of Decision constitutes the Court's findings of fact and conclusions of law and resolves the only outstanding issue raised in VHFA's objection to confirmation.

September 30, 2003
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge