

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

LANCE M. LARAWAY,
Debtor.

Chapter 13 Case
03-11808

Appearances:

Kathleen Walls, Esq.
Middlebury, VT
Attorney for the Debtor

Christopher O’C. Reis, Esq.
Randolph, VT
Attorney for Subject Creditor

ORDER
SUSTAINING THE DEBTOR’S OBJECTION TO CLAIM

I. PROCEDURAL BACKGROUND

Creditor Countrywide Home Loans, Inc. (“Countrywide”) filed an objection to the confirmation of the Debtor’s chapter 13 plan alleging that the Debtor’s plan impermissibly sought to modify Countrywide’s first lien position secured by the Debtor’s residence since the Debtor was proposing to pay less than what was owed Countrywide. See Objection to Chapter 13 Plan (doc. #11). Countrywide alleged that the total arrears due to it equaled \$6,370.20, with that figure including \$1,098.02 for pre-petition legal fees and costs and \$350 for post-petition, pre-confirmation legal fees and costs. At the January 15, 2004, confirmation hearing, the Debtor objected to Countrywide’s proof of claim arguing that Countrywide: (1) was not entitled to pre-petition attorney fees and costs because those expenses were not itemized and they equaled about 20% of Countrywide’s arrears; and (2) was not entitled to post-petition attorney fees and costs because it was undersecured. The Court adjourned the confirmation hearing and directed Countrywide to file an amended proof of claim detailing its claim for pre- and post-petition attorney fees and provided the Debtor the opportunity thereafter to object to said amended proof of claim. See Order dated January 22, 2004 (doc. #15). Countrywide filed an amended proof of claim, see Claims Register, Claim No. 2,¹ to which the Debtor filed an Objection to Claim (doc. #17). Countrywide did not file any reply to the Debtor’s Objection.

¹ Countrywide broke down its claim of \$1,098.02 for pre-petition legal fees and costs as follows:

A.	Pre-petition attorney fees	\$550.00
B.	Filing fees	\$150.00
C.	Recording fees	\$ 35.00
D.	Title fees	\$275.00
E.	Sheriff’s fees	\$ 59.77
F.	Inspection fees	\$ 28.25

The adjourned confirmation hearing was held on March 18, 2004, at which time the Court heard arguments on the Debtor's Objection to Claim. At the hearing, Countrywide stated it took no position on whether it was over- or under-secured. Rather, it stated that it was relying on 11 U.S.C. § 1322(e)² for the collection of its attorney fees and costs, the only issue in dispute. Countrywide informed the Court that it has no foreclosure judgment against the Debtor. The Court confirmed the Debtor's chapter 13 plan subject to the resolution of the Debtor's Objection to Claim, upon which it reserved decision. For the reasons stated below, the Debtor's objection to Countrywide's claim of attorney fees is sustained.

II. DISCUSSION OF THE LAW

The Debtor relies extensively on this Court's decision in In re Taylor, 2003 WL 22282173 (Bankr. D. Vt. 2003), for his position that he is not required to pay Countrywide's pre- and post-petition attorney fees and costs to cure his default with Countrywide. In Taylor, prior to the debtor filing for bankruptcy protection, the creditor-mortgagee had obtained a state court foreclosure judgment against the debtor. Therefore, the mortgage was extinguished by the entry of the foreclosure judgment by the time the debtor filed a bankruptcy petition. It was only through the auspices of chapter 13 of the Bankruptcy Code and her chapter 13 plan that the debtor was able to reinstate her mortgage and cure her arrears due to the creditor-mortgagee. Otherwise, outside of bankruptcy, the debtor would have had to pay the creditor-mortgagee in full to redeem her home. The Court found that, under the framework of 11 U.S.C. § 1322(e),³ which instructs that the amount necessary to cure a default is determined by the underlying agreement and applicable nonbankruptcy law, the debtor was required to pay only those attorney fees that were directly and necessarily related to the reinstatement of the subject mortgage since that was what was required by the terms of the subject loan agreement. See In re Taylor, 2003 WL 22282173, at *3 ("To the extent that [the creditor-mortgagee] 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.*") (emphasis added).

III. THE INSTANT CASE

While Taylor is instructive, the instant case is factually distinguishable from Taylor. Here, there is no foreclosure judgment, meaning the Debtor's mortgage was never extinguished. That, in turn,

² All references to statutes are to Title 11 of the United States Code ("the Bankruptcy Code"), unless otherwise indicated.

³ Since the creditor-mortgagee was undersecured, the Court ruled § 506 was not applicable, meaning the creditor-mortgagee was precluded from recovering its attorney fees under that section.

means there is no need for the Debtor to reinstate the mortgage; rather, he merely needs to “cure” the arrearage. Hence, where debtor Taylor utilized chapter 13 to first reinstate and then cure her arrears with her creditor-mortgagee, here, the Debtor is utilizing chapter 13 solely to cure his default with Countrywide. This is an important distinction because it more narrowly focuses the Court’s analysis of the mortgage and promissory note – the applicable underlying agreements – to which the Court must turn in making its determination about whether Countrywide is entitled to its attorney fees and costs. The other significant, distinguishable factor the Court finds in this case versus the Taylor case is that here there is no evidence in the record that Countrywide accelerated the outstanding balance due to it under the promissory note that was secured by the mortgage. This is crucial because the steps taken by the mortgagee generally determine what attorney fees and costs an attorney may collect under a note and mortgage.

The Court need not address whether Countrywide is entitled to attorney fees under § 506 since Countrywide is relying solely on § 1322(e) for reimbursement of its attorney fees and costs.

A. The Language of the Mortgage

After considering the subject mortgage (hereinafter, the “Mortgage”), the Court finds there are three sections addressing Countrywide’s right to be reimbursed for its attorney fees and costs: sections 9, 19, and 22. However, since sections 19 and 22 deal with reinstatement after acceleration, and since the Court has found that Countrywide never accelerated the debt and the Debtor had no need to reinstate the mortgage, neither of those sections are applicable in this instance. Hence, Countrywide cannot rely upon either section 19 or section 22 of the Mortgage to justify its demand that the Debtor pay its attorneys fees as a condition of curing his default under the Mortgage. Conversely, the Court finds section 9 of the Mortgage does provide a basis for Countrywide’s claim for attorney fees. Section 9 reads, *inter alia*:

9. Protection of Lender’s Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender’s interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender’s interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender’s actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys’ fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. . . .

The Debtor does not contest that he failed to make timely payments to Countrywide. See, e.g., Objection to Claim at ¶2 (doc. #17). Thus, the Court finds this failure is a breach of one of the covenants of the Mortgage, the “Secured Instrument” referenced in section 9 of the Mortgage. As a result of this default, Countrywide was entitled to do and pay for whatever was reasonable or appropriate to protect its interests. According to the terms of the Mortgage, this included, but was not limited to, paying reasonable attorney fees to protect its interest and/or rights under the Mortgage, including protecting those interests within a bankruptcy case. The Court finds Countrywide’s appearance and objection to confirmation fall within the realm of protecting its interests. Thus, the Court finds that according to the terms of section 9 of the Mortgage, Countrywide is entitled to be paid for its reasonable attorneys fees incurred in connection with the Debtor’s curing of his default to Countrywide, in this bankruptcy case. See § 1322(e). The next step, then, is for the Court to determine if Countrywide’s attorney fees are, indeed, reasonable.

Unfortunately, the Court is stymied from moving forward in its examination of the attorneys fees sought because counsel for Countrywide has not provided any detail for the award requested. The controlling case on determining reasonable attorneys fees in this jurisdiction is In re S., T.N. Enterprises, Inc., 70 B.R. 823 (Bankr. D. Vt. 1987). It dictates that “[t]he attorney applying for legal fees in bankruptcy bears the burden of proving the reasonableness of the fees. In order to sustain this burden, the applicant must present a carefully detailed application and supporting documentation.” Id. at 832. Therefore, an attorney’s fees application must clearly identify each discrete task billed, indicate the date the task was performed, identify the precise amount of time spent on the task and by whom it was done, as well as the person’s hourly rate. See id. at 832. Where discrete legal services are merged together, this Court will disallow an application for fees. See id.

Here, Countrywide has presented two lump sums in its amended proof of claim: \$550 for pre-petition attorneys’ fees and \$350 for post-petition attorneys’ fees. Hence, in this instance the Court finds Countrywide has failed to carry its burden; without detailed invoices or time-sheets before it, the Court cannot determine whether the attorneys’ fees Countrywide seeks are reasonable. Cf., In re Taylor, 2003 WL 22282173 (Bankr. D. Vt. Oct. 1, 2003) (determining a portion of the creditor’s attorneys’ fees were reasonable based upon the invoices submitted by the creditor). Thus, the Court cannot award any attorney fees under the subject Mortgage. The same is true of the costs for which Countrywide seeks to be reimbursed; except for the amounts specified in its amended proof of claim, there is no documentation before the Court upon which it can make a determination that the identified costs are reasonable. Therefore, the Court it does not have a sufficient record before it upon which it can award the attorney’s fees or approve reimbursement of the costs incurred by Countrywide, even though fees and expenses, incurred under paragraph 9 of its Mortgage are eligible for payment in this bankruptcy case.

B. The Language of the Note

The Court next examines the language of the promissory note the Debtor executed in conjunction with the Mortgage to determine if said note (hereinafter, the “Note”) authorizes the payment of Countrywide’s attorney fees and cost. The Court finds only one section of the Note addresses Countrywide’s right to be reimbursed its attorney fees and costs: section 6. As the Debtor points out, the attorney fee language of in his Note is identical to that found in the note in the Taylor case:

6. BORROWER’S FAILURE TO PAY AS REQUIRED

...

(E) Payment of Note Holder’s Costs and Expenses

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.

See Note dated Sept. 27, 2002, attached to Countrywide’s original Proof of Claim, Claims Register, Claim No. 1 (emphasis added). Thus, the Court finds Countrywide is entitled to reimbursement of its reasonable attorney fees if Countrywide has required the Debtor to pay the monies due it in full.

Here, the record is void of any evidence that Countrywide made such a demand on the Debtor. Specifically, there is no evidence that Countrywide triggered the condition allowing it to be reimbursed for its reasonable attorney fees and costs under section 6(e) of the Note. Absent such proof, the Court finds on the record before it that Countrywide is not entitled to its reasonable attorney fees or costs under the terms of the Note.⁴

CONCLUSION

Although the language of the Mortgage entitles Countrywide to be reimbursed for its reasonable attorney fees and costs in this case, without sufficient documentation before it to determine reasonableness, the Court is precluded from awarding such attorney fees and costs. Similarly, without evidence that Countrywide required the Debtor to pay immediately in full the amount due under the Note, the Court finds Countrywide’s right to reimbursement of its attorney fees and costs was not triggered. Therefore, based on the record before it, under the terms of the Note, the Court cannot award Countrywide any of the attorney fees or costs it seeks.

⁴ Moreover, even if it were to find evidence that Countrywide triggered the condition allowing reimbursement of reasonable attorney fees and costs, the Court is again in the position of not having adequate information before it upon which to make a determination of the reasonableness of the claimed attorney fees and costs.

Accordingly, for the reasons stated above,

IT IS HEREBY ORDERED that the Debtor's Objection to Claim (doc. #17) is sustained as to Countrywide's requests for attorney's fees and costs, and that portion of the claim which seeks attorney's fees and costs is disallowed.


IT IS FURTHER ORDERED that, in the absence of any objection by the Debtor, the Countrywide proof of claim is allowed to the extent of \$4,922.18, comprised of the following components:

- (A) \$3,076.50 – the amount of missed regular payments;
- (B) \$131.88 – for late charges; and
- (C) \$1,713.80 – to make up the escrow shortage.

IT IS FURTHER ORDERED that the Debtor shall pay \$4,922.18 to Countrywide, through his confirmed chapter 13 plan, within a reasonable time, to cure his arrearage on the Countrywide Note and Mortgage. See 11 U.S.C. § 1322(b)(5).

SO ORDERED.

April 13, 2004
Burlington, Vermont



Colleen A. Brown
United States Bankruptcy Judge