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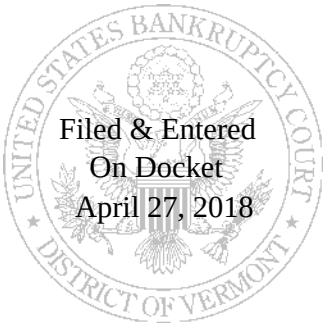
UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:
James T. Theodore, **Chapter 11**
Debtor. **Case # 10-10233**

ORDER
ON APPLICATION FOR ATTORNEY'S FEES OF CREDITOR AMERICAN FIRST FEDERAL, INC.

On March 16, 2018, American First Federal, Inc. ("AFF"), a secured creditor in this case, filed an application for compensation in which it seeks total compensation of $14,760.30[1] ($8,470 for its local counsel, Pratt Vreeland Kennelly Martin & White, plus $6,290.30 for AFF's in-house counsel, Paul J.H. Paschelke) (doc. # 460, the "Application"). On April 12, 2018, the Debtor filed a response to the Application, which raises three objections (doc. # 470, the "Objection"). First, the Debtor asserts if counsel for AFF had not failed to appear at the December 9, 2016 hearing, the appeal – and hence the attorney's fees sought in the instant Application – may not have been necessary. Second, the Debtor argues the expenses AFF seeks related to PACER, electronic research, telephone charges, and photocopying are not reimbursable under applicable law, see In re Fibermark, 349 B.R. 385 (Bankr. D. Vt. 2006). Third, the Debtor contends the fees for in-house counsel are not compensable because they were not incurred as a result of the Debtor's default or conduct in this case, are not authorized under the loan documents, and are not reasonable.

On April 18, 2018, AFF filed a reply to the Objection addressing each of the Debtor's arguments (doc. # 472, the "Reply"). First, AFF asserts that regardless of whether AFF's counsel appeared at the December 9, 2016 hearing, "it is inconceivable that this matter could have been fully resolved at the initial oral argument" due to the complex questions raised by the motion for entry of discharge in this case. Second, AFF responds that it is not seeking reimbursement for the online charges, telephone, or

[1] There appears to be a typographical error in the motion and proposed order, due to AFF counsel including a "Previous Balance" of $270, such that it refers to the amount due as $15,030.30.

copying expenses; it included them in its invoice but did not include them in the Application. Third, with respect to the allowance of fees for AFF's in-house counsel, the creditor insists there is ample case law support for compensating in-house counsel, provided the in-house attorney did more than supervise or act as conduit to local counsel, the hourly rate is properly computed, and the fees sought are reasonable, relying on Nicholas v. City of Binghamton, 2013 WL 6633525 (N.D.N.Y. 2013), and In re Stewart, 2004 WL 3130573 (Bankr D.D.C. 2004). It also avers these fees are permissible under the loan documents.

The Court has considered the arguments counsel have presented in the Application, Objection, and Reply, as well as the record in this case, and the arguments the Debtor and AFF made at the hearing held on April 27, 2018. For the reasons set forth below, the Court sustains in part the Debtor's Objection, and grants in part and denies in part AFF's Application for Compensation. The Court will address each of the three arguments the parties have raised, as well as its assessment of the overall reasonableness of the fees sought in the Application, as required by 11 U.S.C. § 330.[2]

The Debtor premises the first prong of his Objection on there being a necessary nexus between AFF's counsel's failure to appear at the initial hearing, on the one hand, and the need for an appeal and the corresponding memoranda of law and significant legal fees, on the other. While it is never easy, or particularly desirable, to speculate as to what would have happened if events had unfolded slightly differently than they did, in this case, it is necessary to do so. On December 9, 2016, the Court had before it the Debtor's five-paragraph motion, seeking entry of discharge and a final decree (doc. # 413), and AFF's six-paragraph objection to that motion (doc. # 418). At the hearing, the Debtor made no mention of the specific statutory basis for entry of discharge under § 1141, and for the first time stated the lack of a reaffirmation agreement between the Debtor and AFF was fatal to the creditor's position. If AFF had been represented at that December 9th hearing, the Court is convinced the record as to the necessity of a reaffirmation agreement, and the subsection of § 1141 under which the Debtor was seeking relief, would have been much more developed. Certainly, the Court would have asked the parties (i) whether a reaffirmation agreement was an essential prerequisite to excluding AFF's debts from the Debtor's discharge at that time, (ii) whether the Debtor had actually made all payments under the Confirmed Plan (as he asserted in the motion for discharge), and (iii) whether the Debtor was limiting his request for a discharge to a discharge based on completion of plan payments or was alternatively seeking an early (i.e., prior to full payment of plan obligations) discharge, based on a showing of "cause" – and if the latter, what constituted cause under the facts presented. Additionally, the Court is quite confident that, if AFF's

[2] All statutory citations refer to Title 11 of the United States Code (the "Bankruptcy Code"), unless otherwise indicated.

counsel had been present and addressed all of these issues, he and the Debtor's counsel – both of whom are experienced, sophisticated, competent, and pragmatic attorneys – would likely have asked for a continuance of the hearing so they could discuss these issues and explore whether a settlement might have been possible. Though admittedly more speculative, the Court also believes if the parties had not reached a settlement, the Court would have granted the Debtor an early discharge, for cause, under § 1141(d)(5)(A), based upon the lack of reaffirmation agreement. In that event, it is reasonable to assume AFF would have appealed (as it did), Judge Murtha would have affirmed (as he did), and Judge Reiss would have reversed this Court's decision with respect to the need for a reaffirmation agreement under the facts of this case (as she did). However, the reaffirmation issue would have been the sole issue before the District Court, and the scope of the briefs would have been markedly narrower.

An analysis of AFF's filings after December 9, 2016, including the briefs filed on appeal, indicate that AFF focused about 56% of its argument on the Debtor's eligibility for a discharge generally, and devoted about 44% of its argument on the question of whether a reaffirmation was necessary.[3] If AFF's attorney had appeared at the December 9th hearing, it is impossible to know exactly what would have occurred, but the Court is persuaded the scope of the litigation over this individual chapter 11 Debtor's right to a discharge would have, at the very least, been narrowed and streamlined. Therefore, THE COURT FINDS the first prong of Debtor's Objection prevails and warrants a 15% reduction of the legal fee the Court determines to be otherwise reasonable and compensable under § 330. See Torres v. Gristede's Operating Corp., 519 F. App'x 1, 4 (2d Cir. 2013); In re Agent Orange Prod. Liab. Litig., 818 F.2d 226, 237 (2d Cir. 1987).

With respect to the second prong of the Debtor's Objection, contesting the reimbursability of the PACER, electronic research, telephone and copying charges, THE COURT FINDS this to be moot because AFF does not seek reimbursement of these – or any other – expenses.

The final prong of the Debtor's Objection contests AFF's use of in-house counsel, generally, based on the fact that AFF also had local counsel providing legal services. The case law compels the Court to reject this argument. See, e.g., Nicholas v. City of Binghamton, 2013 WL 6633525 (N.D.N.Y. 2013); Video-Cinema Films, Inc. v. Cable News Network, Inc., 2004 WL 213032 (S.D.N.Y. 2004); FDIC v. Bender, 182 F.3d 1 (D.C. Cir. 1999). The Debtor also argues the controlling loan documents do not

[3] Within the argument sections of the Supplemental Memorandum (doc. # 426), the Addendum to the Supplemental Memorandum (doc. # 428), the AFF Appellant Brief, the AFF Reply Brief, and the Motion for Rehearing, approximately 5,551 words, or 44% of the total, was devoted to the question of whether a reaffirmation was necessary. Approximately 56% of the argument sections considered the question of the Debtor's general eligibility for a discharge under § 1141(d)(5).

authorize in-house counsel to perform legal services, at the Debtor's expense, if the Debtor is not in default. This argument fails for two reasons: First, this argument would have to apply to local counsel as well as in-house counsel and the Debtor has not challenged local counsel's fees on this basis. Second, the language of the promissory notes, upon which both parties rely in their memos of law, unequivocally allows AFF to impose attorney's fees on the Debtor in connection with its enforcement of the terms of the various loans. The issue here is whether the Debtor is entitled to discharge his personal liability prior to paying the full amounts he owes to AFF on its allowed secured claims. This is unquestionably an effort to enforce AFF's loan documents and would be included in the "Costs and Expenses" paragraph of the promissory notes, which states as follows:

> Borrower shall pay on demand all expenses and costs, including fees and out-of-pocket expenses of attorneys … incurred by Lender as a result of any default under this Note or in connection with efforts to collect any amount due under this Note, or to enforce the provisions of any of the other Loan Documents …

doc. #460 at ¶ 26; doc. # 470 at ¶ 10. The Debtor's remaining assertion in the third prong of the Objection is that AFF's in-house counsel's fees are not reasonable. However, the Debtor does not point to any particular time entries, or to a cumulative amount of time spent on any specific task, that is unreasonable. For these reasons, THE COURT FINDS the final prong of the Debtor's Objection is unavailing.

Notwithstanding the fact that the Debtor objected to the Application, and the Court has addressed each of the arguments the Debtor presented in his Objection, the Court has an independent duty to review, and assess the reasonableness of, this Application. See, e.g., In re Fibermark, Inc., 349 B.R. 385, 394 (Bankr. D. Vt. 2006); In re West End Fin. Advisors, LLC, 2012 Bankr. LEXIS 3045, *9 (Bankr. S.D.N.Y. 2012); In re Keene Corp., 205 B.R. 690, 695 (Bankr. S.D.N.Y. 1997); COLLIER ON BANKRUPTCY ¶ 330.03 (16th ed. 2018). The Court applies the lodestar approach, and considers the expertise of the attorneys, the time spent, and the billable rate charged in assessing the reasonableness of the fees sought in the Application. See Millea v. Metro-North R.R., 658 F.3d 154, 166 (2d Cir. 2011) ("Both this Court and the Supreme Court have held that the lodestar . . . creates a 'presumptively reasonable fee.'") (internal citations omitted). As a preliminary matter, THE COURT FINDS the billable rates AFF's attorneys charged to be reasonable in light of the expertise of each attorney, and their status in private practice and as in-house counsel, respectively.

The Court turns next to the time each attorney spent. The timesheets reflect that AFF's attorneys performed services with respect to six distinct tasks: (i) AFF's response to the Debtor's motion for discharge, (ii) the appellant's memorandum of law in the appeal before Judge Murtha, (iii) the appellant's reply memorandum of law in the appeal before Judge

Reiss, (v) the rehearing before Judge Reiss, and (vi) preparation of the instant Application for attorney's fees. The Court will examine the reasonableness of AFF's attorney's fees in each of these categories.

(i) AFF's response to the Debtor's initial motion for discharge: AFF's attorneys spent a total of 7.4 hours on, and charged $1,406 for, AFF's response to the Debtor's motion for a discharge. THE COURT FINDS that amount to be reasonable, even though the response was short, in light of the procedural history of this case, and the multiple revisions to the loan documents and plan.

(ii) The appellant's memorandum of law in the appeal before Judge Murtha: AFF's attorneys spent a total of 77.2 hours on, and charged $6,977.03 for, the appellant's memorandum of law in the appeal. Attorney Paschelke's work constituted 56.2 hours of this total, and he devoted about 10 of those hours to research and drafting about the Debtor's right to a discharge under § 1141(d)(5). In light of the paucity of the record on the § 1141(d)(5) issue, and death of case law on this question, significant research may have been necessary. However, THE COURT FINDS the time AFF's attorneys spent drafting this appellate brief to be excessive, particularly in light of the length and scope of the final product, and denies compensation of 15 hours of Attorney Paschelke's time, or $797.25 of the amount sought in the Application.

(iii) The appellant's reply memorandum of law in the appeal before Judge Murtha: AFF's attorneys spent 49.4 hours in the preparation and filing of their Reply to the Debtor/appellee's brief. Attorney Paschelke spent 46.1 hours – the vast majority – of this time. In determining whether this amount of time and the fee for this work are reasonable, the Court takes into account the fact that the Reply brief reiterates many of the arguments AFF had previously made in its initial appellate brief, and nearly half of the cases cited in the Reply were cited in the prior brief. For these reasons, THE COURT FINDS the amount of time AFF's attorneys spent on this task is excessive and will deny compensation of 15 hours of the time spent on, i.e., $797.25 of the fee sought for, this task.

(iv) The motion for rehearing before Judge Reiss: AFF's attorneys spent 7.9 hours in researching and drafting the motion for rehearing. THE COURT FINDS this amount of time to be reasonable in light of the additional research required regarding what AFF needed to show in order to demonstrate a right to rehearing, and the work product they filed for this relief.

(v) The rehearing before Judge Reiss: AFF's attorneys spent 13.6 hours in preparation for this hearing. Attorney Kennelly performed most, 11.3 hours, of these services. THE COURT FINDS this amount of time to be reasonable, and this allocation of responsibility for this task to Attorney Kennelly to be justified, notwithstanding his higher billable hourly rate, since he presented the oral argument before Judge Reiss.

(vi) Preparation of the instant Application for attorney's fees: AFF seeks compensation for 7.5 hours of Attorney Paschelke's time in connection with the computation of in-house counsel's billable hourly rate and preparation of the Application. AFF cites no legal authority supporting its right to charge the Debtor for time it spent determining their in-house counsel's billable hourly rate, and the Court has found none, and therefore will disallow the 4.2 hours spent on this work, or $223.23. The time spent on preparation of the fee application, by contrast is compensable, and THE COURT FINDS the time spent on that task (3.3 hours) is reasonable.

Accordingly, and for the reasons set out above, IT IS HEREBY ORDERED that the Debtor's Objection is sustained in part, and the Application is granted in part and denied in part.

IT IS FURTHER ORDERED that the Debtor must pay AFF's attorney's fees in the amount of $11,001.19, by such date and according to such terms as the parties mutually agree.[4]

SO ORDERED.

April 27, 2018
Burlington, Vermont

Colleen A. Brown
United States Bankruptcy Judge

[4] If the parties cannot agree to the payment terms, upon a joint application of the parties, the Court will set the payment terms.