UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: GLENN V. GRAY, DEBTOR CASE NO. 03-16360

OPINION

On consideration before the court is a motion for reimbursement of attorney's fees filed by the McGarrh Agency, Inc.,/Delta Plaza Partners, Inc., (referred to collectively hereinafter as "Delta Plaza Partners"); a response thereto having been filed by Glenn V. Gray (hereinafter "debtor"); and the court, having considered same, hereby finds as follows, to-wit:

I.

The court has jurisdiction of the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A), (B), and (O).

II.

Delta Plaza Partners leased certain non-residential real property to the debtor, who is the proprietor of a business located at the leased premises. The McGarrh Agency, Inc., is the property manager and agent for Delta Plaza Partners. The debtor originally filed a Chapter 13 voluntary petition on October 2, 2003, but the case was converted to Chapter 7 on January 5, 2005.

Delta Plaza Partners seeks reimbursement of its attorney's fees and expenses, incurred pursuant to §22 of the lease which provides in full as follows:

> SECTION 2. ATTORNEYS' FEES: Tenant covenants that in the event Landlord is compelled to resort to court action in connection with any action arising under the terms

> of this Lease or the relationship between the Landlord and the Tenant or growing out of said relationship, Tenant agrees that if Landlord is the prevailing party in such action, Tenant will pay all costs of said proceedings, including reasonable attorney's fees, both trial and appellate, incurred by Landlord.

At the hearing, the attorney for movant, R. Brittain Virden, submitted an affidavit with contemporaneous time sheets attached. The total amount requested is $11,456.00 in attorney's fees and $643.40 in expenses as of November 30, 2004.

In his response, the debtor argues that §22 of the lease became inapplicable once he filed for bankruptcy protection. Alternatively, he contends that, at all times, he has been willing to negotiate in good faith a renewed lease agreement. Accordingly, he asserts that the landlord has not been "compelled" to resort to court action and is not a "prevailing party."

On March 14, 2005, Delta Plaza Partners filed an unsecured priority proof of claim in the amount of $9,767.80, representing that it was owed holdover rent for December, 2004, and January, 2005, at the monthly rate of $3,000.00, in addition to outstanding rent arrearages of $2,473.00, maintenance charges of $1,235.00, and interest of $59.80.

An earlier proof of claim had been filed on June 18, 2004, for a rent arrearage in the total sum of $18,000.00. Attached to this proof of claim was a copy of an order entered by this court on November 24, 2003, discussed hereinbelow, which, inter alia, provided that the $18,000.00 arrearage should be cured within twelve months beginning December 1, 2003, in the amount of $1,500.00 per month. Since the proof of claim did not reveal whether it was secured, unsecured priority, or unsecured non-priority, it was docketed by the clerk's office as an unsecured claim.

III.

Oversecured creditors may rely on §506(b)[1] to assert a claim for attorney's fees. However, there is a split of authority as to the allowance of attorney's fees for an undersecured or unsecured creditor. The majority view is that these fees are allowable if they are based on a contract enforceable under state law. See, United Merchants and Manufacturers, Inc. v. Equitable Life Assurance Society of the United States (In re United Merchants and Manufacturers), 674 F.2d 134 (2nd Cir. 1982); Martin v. Bank of Germantown (In re Martin), 761 F.2d 1163, 1168 (6th Cir. 1985); Fobian v. Western Farm Credit Bank (In re Fobian), 951 F.2d 1149, 1153 (9th Cir. 1991), cert. denied, 505 U.S. 1221 (1992); Transouth Financial Corp. v. Johnson, 931 F.2d 1505, 1507 (11th Cir. 1991).

The minority view holds that post-petition attorney's fees of an unsecured or undersecured creditor are barred if the debtor is insolvent. See, Sakowitz, Inc. v. Chase Bank, Int., 110 B.R. 268 (Bankr. S.D. Tex. 1989); In re Woerner, 19 B.R. 708, 713 (Bankr. D. Kan. 1982); In re Mobley, 47 B.R. 62 (Bankr. N.D. Ga. 1985); In re Saunders, 130 B.R. 208, 210-11 (Bankr. W.D. Va. 1991). This court adheres to the majority view and concludes that attorney's fees are allowable if the underlying contract, which is otherwise enforceable under state law, provides for such fees. Within the State of Mississippi, the contractual imposition of attorney's fees is recognized. See, Theobald v. Nosser, 752 So.2d 1036 (Miss. 1999), Estate of Baxter v. Shaw Associates, Inc., 797 So.2d 396 (Miss. App. 2001), Trilogy Communications, Inc. v. Thomas Truck Lease, Inc., 790 So.2d 881(Miss. App. 2001).

---

[1] All case citations herein are to the United States Bankruptcy Code unless otherwise indicated.

IV.

The court finds that §22 of the lease does not suffer from any infirmities that would prevent it from being enforceable under Mississippi law. Nevertheless, it must be construed according to its terms which are conditional. Delta Plaza Partners must be "compelled to resort to court action" and must be the "prevailing party in such action" before the debtor becomes liable to pay costs and "reasonable attorney's fees." The court has reviewed the case file, not only to examine the pleadings filed by Delta Plaza Partners, but to ascertain the outcome of each proceeding to determine whether the requirements of §22 have been met.

A.

The debtor's bankruptcy case was filed on October 2, 2003, the eve of an eviction proceeding. Delta Plaza Partners filed a motion to require the debtor to either assume or reject the lease on October 10, 2003. Since the lease was in arrears and eviction remedies had already been initiated, Delta Plaza Partners was obviously "compelled to resort to court action." This particular motion was resolved by the entry of an order, dated November 24, 2003, allowing the debtor to assume the lease. However, the order also required the debtor to pay the regular monthly rental payments of $3,000.00 per month, as well as, to cure the $18,000.00 arrearage within twelve months at the additional rate of $1,500.00 per month. The order contained a "default" provision permitting the termination of the automatic stay should either the regular monthly rentals or the arrearage payments become more than thirty days past due. The order further provided that the lease would remain in effect through December 1, 2004, at which time the parties would consider negotiating a new lease arrangement. Although both parties received

relief as a result of this motion, Delta Plaza Partners could certainly be considered a "prevailing party" as contemplated by the lease agreement.

B.

On February 5, 2004, Delta Plaza Partners filed a document entitled, "Notice of Contingency Occurrence," which asserted that the "default" provision of the November 24, 2003 order had been activated because the debtor had failed to make the payments required by that order. In conjunction with the filing of this document in the bankruptcy court, Delta Plaza Partners reinstituted an eviction action against the debtor in state court. The debtor responded by filing a complaint seeking to enjoin the eviction and seeking sanctions against Delta Plaza Partners for violating the automatic stay. The sanctions feature of the complaint was dismissed by the debtor on April 1, 2004, and the adversary proceeding was dismissed without prejudice by the debtor on February 3, 2005.

C.

On April 12, 2004, Delta Plaza Partners filed a motion denominated, "Motion to Lift Stay, or in the Alternative, Motion to Modify a Court Order." In this pleading, Delta Plaza Partners alleged that the automatic stay should be lifted because the debtor had failed to provide assurances of continued performance and had failed to produce the monthly sales reports required by the court's November 24, 2003 order. In the alternative, the motion sought to modify the court's November 24, 2003 order to direct the debtor to make common area maintenance payments, as well as, "percentage rental" payments, both of which were required under the lease. The debtor filed a response setting forth various defenses as to why the common area maintenance charges and the percentage rent should not be considered binding obligations. After

hearing the evidence, the court concluded that no pre-confirmation common area maintenance charges would be allowed since no proof of claim had been filed requesting these charges. However, post-confirmation common area maintenance charges would be required as set forth in the lease. The court further held that monthly reports and an annual report should be furnished by the debtor so that Delta Plaza Partners could calculate whether the percentage rent would be owed in the future. On July 8, 2004, an order was entered which held that the automatic stay would remain in effect so long as the debtor timely paid the common area maintenance charges and timely submitted the monthly and annual reports. Shortly thereafter, an ancillary dispute arose regarding the calculation of the common area maintenance charges. A subsequent hearing was held at which the court determined that the common area maintenance charges had been properly calculated as provided under paragraph 3 of the lease. Accordingly, as to these proceedings, the court finds that Delta Plaza Partners was "compelled to resort to court action" and should be considered the "prevailing party."

D.

On July 14, 2004, the debtor filed a motion to modify his Chapter 13 plan to incorporate the court's earlier decision following the hearing on the motion to lift the automatic stay. This motion drew a response from Delta Plaza Partners which essentially stated that the common area maintenance charges should have been no surprise to the debtor, and that the plan should not be modified. The motion to modify was eventually granted. Accordingly, the court finds that the response to the debtor's motion was not "compelled," and that Delta Plaza Partners did not "prevail." Accordingly, the fees and/or expenses charged in connection with contesting this motion will not be allowed.

E.

On November 1, 2004, Delta Plaza Partners filed a second "Notice of Contingency Occurrence" asserting that the "default" provisions of the November 24, 2003 order had been triggered by the debtor's failure to pay the monthly rent for September and October, 2004. This notice evidences Delta Plaza Partners' efforts in continuing to monitor the performance of the debtor under the terms of the lease.

On November 16, 2004, Delta Plaza Partners filed a motion to require the assumption or rejection of a new commercial lease. This complied with the provision set forth in the November 24, 2003 order. A proposed renewal lease was attached to this motion and a hearing was held on December 20, 2004. Although the circumstances have now changed significantly, the proceeding memo reflects that the revised lease agreement was accepted by the debtor.

Lastly, on November 23, 2004, Delta Plaza Partners filed the present motion for reimbursement of its attorney's fees. This motion is mandated by the Bankruptcy Code.

The court is of the opinion that the attorney's fees related to the services discussed in the three preceding paragraphs are compensable under the lease agreement.

V.

Having discussed whether the various pleadings were "compelled" and/or whether Delta Plaza Partners was the "prevailing party," the court must now look to whether the requested attorney's fees are reasonable, which is also expressly required by the lease agreement.

The court finds that the following time entries, relating to the Chapter 13 trustee's motion to vacate which was withdrawn, should not be assessed against the debtor, to-wit:

1/22/2004	RBV	Preparations for hearing on motion to reconsider filed by trustee	.60 hrs.
1/22/2004	RBV	To federal courthouse for hearing on trustee's motion to set aside	.90 hrs.
1/22/2004	RBV	Correspondence to debtor's counsel and trustee regarding hearing, Judge Houston's ruling, and final notice non-payment	.20 hrs.
1/22/2004	RBV	Telephone conference with Mr. McGarrh regarding order denying motion set aside and 30 day grace period prior lifting stay	.20 hrs.

The following time entries relate to the filing of a motion to continue a hearing scheduled on a motion to lift the automatic stay. The request for the continuance was necessitated by a scheduling conflict applicable to Delta Plaza Partners' attorney. It was not opposed by the debtor. Accordingly, the attorney's fees should not be assessed against the debtor, to-wit:

4/22/2004	RBV	Receipt and review notice of hearing on motion lift or modify and notice to clerk of conflict	.20 hrs.
4/26/2004	RBV	Receipt and review approval of new hearing dates and correspondence to Judge Houston confirming continuance and new settings	.20 hrs.

The following time entry is related to Delta Plaza Partners' opposition to the debtor's motion to modify the Chapter 13 plan. As discussed hereinabove, the objection to this modification was unwarranted and the attorney's fees charged in responding to the motion are not allowable, to-wit:

7/20/2004	RBV	Receipt and review debtor's motion to modify plan and preparation of response in opposition	.40 hrs.

The total reduction in attorney's hours totals 2.70 hrs. The time was billed at the rate of $135.00 per hour, which mandates a total reduction of $364.50.

VI.

Based on the foregoing, the court finds that the requested attorney's fees of $14,207.00, shall be reduced by the sum of $364.50, for a total allowed attorney's fee of $13,842.50. Costs and expenses in the amount of $734.47, shall be allowed in full.

An order will be entered contemporaneously herewith.

This the12th day of May, 2005.

/s/ DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE