

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>95-10205</u>
MAMIE C. BOSTIC)	
)	
Debtor)	
_____)	
)	
FLEET FINANCE, INC.)	
)	
Movant)	
)	
vs.)	
)	
MAMIE C. BOSTIC, Debtor)	
AND BARNEE C. BAXTER,)	
CHAPTER 13 TRUSTEE)	
)	
Respondents)	

ORDER

Fleet Finance, Inc. ("Fleet") the holder of a secured claim in this Chapter 13 case objects to confirmation of the debtor's proposed plan and seeks relief from the stay of 11 U.S.C. §362(a) in order to foreclose its security interest in the debtor's homeplace. The debtor, Mamie C. Bostic objected to the amount of the Fleet Finance, Inc. claim as it pertains to the component of the

claim for attorney's fees.¹ Fleet's objection and motion for relief contends that the debtor's proposed plan violates the provisions of 11 U.S.C. §1322(b)(2), (b)(3) and (b)(5) and is brought in bad faith. At hearing, Fleet questioned feasibility. This case represents the second Chapter 13 filing by this debtor in this court. The debtor brought her first case (case No. 90-11588) on September 18, 1990. The debtor's plan was confirmed by order entered June 28, 1991 which plan provided for the payment of all claims in full including the claim of Fleet. The debtor voluntarily dismissed on December 14, 1994 after 41 months which paid approximately 78% of the allowed secured claims, the priority unsecured claims, and nothing on general unsecured claims.²

Objection to Claimed Attorney's Fees

The remaining issue on the debtor's objection to claim is the amount of reasonable attorney's fees to be allowed Fleet. In this case Fleet has filed a secured claim in the amount of \$8,438.04 supplying a breakdown of the claim as

¹In addition to the objection to the attorney's fees, at hearing the debtor also objected to the calculation of interest on the claim, but in supplemental brief submitted after hearing, the debtor withdrew the objection as it pertains to the accrued prepetition interest as calculated by the creditor.

²The court may take judicial notice of prior bankruptcy filings by the debtor and the content of those filings. Allen v. Newsome, 795 F.2d 934 (11th Cir. 1986) (district court may take judicial notice of prior habeas corpus applications filed by petitioner in proceeding on habeas corpus petition).

Principal balance \$7,511.05
Accrued interest \$ 349.96
Attorney's fees \$ 577.03

Total \$8,438.04

The debtor concedes that Fleet is an oversecured creditor as contemplated under 11 U.S.C. §506(b)³ and is therefore entitled to an award of reasonable attorney's fees. The issue is the definition of reasonableness. The debtor contends that an award of attorney's fees "under the agreement under which such claim arose" as described in §506(b) in Georgia is limited by the provisions of Official Code of Georgia Annotated (O.C.G.A.) §13-1-11.⁴ Under debtor's analysis

³11 U.S.C. §506(b) provides:

(b) To the extent that an allowed secured claim is secured by property the value of which . . . 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.

⁴O.C.G.A. §13-1-11 provided:

(a) Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, shall be valid and enforceable and collectible as a part of such debt if such note or other evidence of indebtedness is collected by or through an attorney after maturity, subject to the following provisions:

(1) If such note or other evidence of indebtedness provides for attorney's

fees in some specific percent of the principal and interest owing thereon, such provision and obligation shall be valid and enforceable up to but not in excess of 15 percent of the principal and interest owing on said note or other evidence of indebtedness;

(2) If such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees without specifying any specific percent, such provision shall be construed to mean 15 percent of the first \$500.00 of principal and interest owing on such note or other evidence of indebtedness and 10 percent of the amount of principal and interest owing thereon in excess of \$500.00;

(3) The holder of the note or other evidence of indebtedness or his attorney at law shall, after maturity of the obligation, notify in writing the maker, endorser, or party sought to be held on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker, endorser, or party sought to be held on said obligation has ten days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, endorser, or party sought to be held on any such obligation shall pay the principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement. The refusal of a debtor to accept delivery of the notice specified in this paragraph shall be the equivalent of such notice.

(b) Obligations to pay attorney's fees contained in security deeds

the attorney's fees claim is limited to 15% of the first \$500.00 equaling \$75.00 and the balance at 10% of the remaining outstanding principal balance of \$4,154.00 (\$4,654.00⁵ less \$500.00) equaling \$415.40 for a total maximum attorney's fee award of \$490.40. This issue has been decided in this court. See In re Curtis, 83 B.R. 853 (Bankr. S.D.Ga. 1988). In Curtis I found that State law plays no part in the consideration of reasonableness of a fee award once it is established that the creditor is oversecured and the underlying contract calls for reasonable attorney's fees. O.C.G.A. §13-1-11 does not, in bankruptcy cases, define a statutory right or limitation for an award of attorney's fees. Id. at 859-61. "[T]he bankruptcy court is compelled to determine the allowability of a claim for attorney's fees as a portion of a secured creditor's claim

and bills of sale to secure debt shall be subject to this Code section where applicable.

⁵The parties show only a minor discrepancy as to the initial principal balance. Fleet cites a balance of \$4,654.44 in brief, while debtor uses the rounded figure of \$4,654.00. The balance is determined as follows:

claim	\$ 8,348.04	- Total amount shown on Fleet's proof of
principal	- 3,433.64	- Disputed attorney fees included in
		amount of claim
claim	- <u>349.96</u>	- Disputed accrued interest from proof of
	\$ 4,654.44	

Because the difference between the figures is immaterial to my ultimate decision, I accept the rounded figure for purposes of the above discussion.

with reference to the reasonableness standard under Bankruptcy Code §506(b) . . ." Id. at 860. The reasonableness of an attorney fee claim is a matter of federal law under the Bankruptcy Code, not State law.

Under the Bankruptcy Code the "lodestar method" of fee determination, the reasonable time expended by counsel in performing the reasonably required services rendered multiplied by a reasonable hourly rate, is the required analysis. See Grant v. George Schumann Tire and Battery Co., 908 F.2d 874, 878-79 (11th Cir. 1990); Norman v. Housing Authority of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983)).

A reasonable hourly rate is determined by the prevailing market in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience and reputation. Blum v. Stenson, 465 U.S. 886, 889 N.11, 104 S.Ct. 1541, 1547 N.11, 79 L.Ed.2d 891, 900 N.11 (1984). Accord Gaines v. Dougherty County Board of Education, 775 F.2d. 1565, 1571 (11th Cir. 1985). The relevant legal community used in determining the prevailing market rate by this court is the legal community within the Southern District of Georgia. See In re S.T.N. Enterprises, Inc., 70 B.R. 823 (Bankr. D.Vt. 1987). While the applicant bears the burden of producing satisfactory evidence that the requested hourly rate is in line with prevailing market rates, NAACP vs. City of Evergreen, 812 F.2d 1332, 1338 (11th Cir. 1987), this court has previously established, from competent evidence presented, that an hourly rate not exceeding One Hundred and No/100 (\$100.00) Dollars per hour represents a reasonable hourly rate for competent legal services in this community. In

re Lighting Galleries, Chapter 11 case No. 87-10455 (Bankr. S.D.Ga. 1987).

In re Burke Manufacturing Co., Inc., Chapter 11 case No. 91-10468, slip op. at 2-3 (Bankr. S.D.Ga. Dalis, J. September 10, 1991) (citing In re Georgian Arm Properties and Windover Properties, consolidated Chapter 11 case No. 89-10313 slip op. at 5-6 (Bankr. S.D.Ga. Dalis, J. April 20, 1990)). By subsequent order the lodestar hourly rate was increased to \$125.00 per hour effective March 28, 1995. See In re Barger et al., 180 B.R. 326 (Bankr. S.D.Ga. 1995).

At hearing, counsel representing Fleet revealed that Fleet claims a total of \$3,433.64 in attorney's fees and related costs which fees and costs were added to the principal balance of the loan upon maturity April 1994. Counsel did not explain the discrepancy between the attorney's fees disclosed in the proof of claim filed as set forth above and the attorney's fees and costs added to the principal balance in 1994.

A proof of claim is sufficient to establish prima facie proof of a valid debt for purposes of distribution from estate assets. Whitney v. Dresser, 200 U.S. 532 (1906); 11 U.S.C. §502(a); Bankruptcy Rule 3001(f). The allegations of a proof of claim are taken true if ". . . those allegations set forth all the necessary facts to establish a claim and are not self-contradictory . . ." 3 Collier on Bankruptcy ¶502.02, pp. 502-22 [sic] -- 502.23 (15th ed. 1993). Therefore, the initial burden of persuasion rests upon the party objecting to the claim to come forward with sufficient evidence to defeat the allegations contained in the proof of claim. Id. The objecting party

must produce evidence equal to the probative value of the proof of claim itself. Id. Although the burden of persuasion shifts, the burden of proof always rests upon the claimant. Id. Once the objector produces evidence equal to the weight given to the claim itself, the claimant must carry the burden of proof of demonstrating the validity of the claim by a preponderance of the evidence. Id.

In re Williams, Chapter 13 case No. 92-50546 at pp. 2-3 (Bankr. S.D.Ga. Walker, J. March 30, 1994).

In this case, the debtor as the objecting party has overcome the initial burden of persuasion on the objection to claim by demonstrating that the filed proof of claim carries a component for attorney's fees without any showing as to reasonableness either pursuant to O.C.G.A. §13-1-11 or under a federal lodestar analysis.

The ultimate burden of proof rests with Fleet, the claim proponent, to establish the reasonableness of its overall attorney's fee request. In response to the objection, Mr. Mark Cleary, attorney for Fleet has submitted copies of his bills for service in representing Fleet in both of debtor's Chapter 13 cases. Although Mr. Cleary concedes that the original proof of claim submitted includes in the principal balance a claim for \$3,433.64 for attorney's fees and related costs, his proof submitted only accounts for 15.2 hours billed at a rate of \$125.00 per hour equaling \$1,900.00 together with \$120.00 as filing fees paid to the clerk of this court and \$12.05 for copying and postage expenses for a total of \$2,032.05. Mr. Cleary's fee request does not provide any

evidence to support a deviation from the lodestar hourly rate established of \$100.00 per hour for attorney's fees incurred prior to March 28, 1995. A review of the billing statement submitted reveals a reasonable time expended of 15.2 hours in representing Fleet in this and the debtor's previous Chapter 13 case in performing reasonably necessary services for the creditor. Based upon the evidence presented the appropriate fee award is \$1,520.00 (15.2 hours x \$100.00 per hour) together with \$120.00 representing filing fees paid to the clerk of this court and \$12.05 copying and postage expenses for a total fee award of \$1,652.05.

A recalculation of the allowed claim requires a determination of the true principal balance outstanding as of the date of the debtor's filing, February 8, 1995. The proof of claim asserts a balance of \$7,511.05; however, this balance includes claimed attorney's fees and expenses of \$3,433.64 which should be deducted from the balance of the loan resulting in a true principal balance of \$4,077.41. A true calculation of an allowable claim amount is as follows:

\$4,077.41	- principal balance
349.96	- accrued interest
<u>1,652.05</u>	- attorney's fees and costs
\$6,079.42	- allowed claim of Fleet

Objection to confirmation and motion for relief from stay.

Fleet's objection to confirmation and motion for relief

from stay are brought on basically the same grounds.⁶ In essence, Fleet questions the good faith of the debtor in bringing this case and her ability to propose a feasible plan giving rise to a "for cause" basis for relief from stay pursuant to 11 U.S.C. §362(d)⁷ and a valid objection to confirmation pursuant to 11 U.S.C. §1325(a)(1), (a)(3) and (a)(6)⁸. The debtor bears the burden of proof by a

⁶At hearing, Fleet conceded that its objection to confirmation contending the debtor's plan failed to comply with the provisions of 11 U.S.C. §1322(b)(2), (b)(3), and (b)(5) was meritless in view of the October, 1994 amendments to the Title 11 United States Code. See 11 U.S.C. §1322(c)(2) (permitting modification of claim secured by debtor's principal residence beyond original contractual term).

⁷11 U.S.C. §362(d)(2) provides in pertinent part:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay --

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest . . .

⁸11 U.S.C. §1325(a)(1), (3) and (6) provide in pertinent part:

(a) . . . the court shall confirm a plan if --

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title; . . .

(3) the plan has been proposed in good faith and not by any means forbidden by law; . . .

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

preponderance of the evidence on both opposition to stay relief pursuant to 11 U.S.C. §362(g)⁹ and plan confirmation. In re Johnson, 145 B.R. 108, 111 (Bankr. S.D.Ga. 1992), rev'd on other grounds, 165 B.R. 524 (S.D.Ga. 1994) (proponent of plan bears ultimate burden of proof on all confirmation criteria). Central to a determination of good faith and feasibility is an analysis of the recent decisions of the Honorable James D. Walker, Jr., Judge of this Court in In re Hunter, No. 93-41649, 1994 W.L. 329315 (Bankr. S.D.Ga. 1994) and In re Green, 169 B.R. 480 (Bankr. S.D.Ga. 1994). The issue presented is whether a debtor may seek bankruptcy protection in multiple Chapter 13 filings or conversions from a Chapter 7 for a period exceeding 60 months. In Green, Judge Walker found that nothing in the Bankruptcy Code requires that multiple Chapter 13 plans remain within a cumulative time frame of 60 months where the debtor has (1) multiple filings or (2) a reconversion from

⁹11 U.S.C. §362(g) provides:

In any hearing under subsections (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section --

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

a Chapter 7 case back to a Chapter 13 case. Green, supra at 483 n.8. Nonetheless, Judge Walker in Green did restrict the debtor to a cumulative period of 60 months based upon a finding that extending the period beyond a total 60 months would be considered unreasonable delay and evidence of bad faith. Id. at 483 (relying on Hunter, supra (allowing a debtor to remain under bankruptcy protection for longer than the limit of a single plan is evidence of bad faith)). I find Judge Walker's analysis in Green and Hunter compelling and will consider a proposal by debtor to remain in a subsequent Chapter 13 plan beyond a cumulative 60 months under circumstances where the debtor failed to receive a discharge in a prior case as evidence of bad faith, but not conclusive. A full analysis of whether a plan is proposed in good faith must still be undertaken with all factors given due weight. See generally Kitchens v. Georgia Railroad Bank & Trust Co., 702 F.2d 885, 888 (11th Cir. 1983);¹⁰ In re Estus, 695

¹⁰The Kitchens decision basically set forth 13 factors to be considered on the question of good faith:

1. The amount of the debtor's income from all sources;
2. The living expenses of the debtor and his dependents;
3. The amount of attorney's fees;
4. The probable or expected duration of the debtor's Chapter 13 plan;
5. The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
6. The debtor's degree of effort;
7. The debtor's ability to earn and the likelihood of fluctuation in his earnings;
8. Special circumstances such as inordinate medical expenses;
9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors;
10. The circumstances under which the debtor has contracted his

F.2d 311, 316-17 (8th Cir. 1982); Deans v. O'Donnell, 692 F.2d 968, 972 (4th Cir. 1982). These 13 factors must be considered in determining the good faith of the debtor under the totality of the circumstances of each case.

Whether the debtor can put forth a feasible plan is in large part controlled by whether the debtor's plan in this case may proceed for a full 60 months. At hearing, I determined that under the current budget of the debtor it was feasible for the debtor to make the required Chapter 13 plan payments to sufficiently fund this case over a period of 60 months and that pursuant to 11 U.S.C. §1322(d) the debtor has established a for cause basis to approve a period of payment longer than 3 years, in order to save the debtor's homeplace.

Considering the totality of the circumstances of debtor's prior Chapter 13 case and her current case, the debtor is proceeding in good faith. Under the debtor's prior case, she made payments to the Chapter 13 plan for 41 months with payments totaling

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- debts and his demonstrated bona fides, or lack of same, in dealings with his creditors;
11. The burden which the plan's administration would place upon the trustee;
 12. The substantiality of repayments; and
 13. The potential nondischargeability of debt in a Chapter 7 proceeding.

Kitchens v. Georgia Railroad Bank & Trust Company, supra at 888-89.

approximately 78% of allowed secured claims. The debtor has to my satisfaction explained her inability to meet her prior Chapter 13 plan payment and through her budget and examination at hearing established sufficient income to currently fund the plan which would include full payment to Fleet.

It is therefore ORDERED that the debtor's objection to the claim of Fleet is sustained and the claim is ORDERED reduced to \$6,079.42 as a secured claim;

further ORDERED that the motion for relief from stay is denied; and

further ORDERED that Fleet's objection to confirmation is ORDERED overruled.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this _____ day of August, 1995.