

*Adoption of Lucas re: reasonable (A)
fees. Fed, not state, standard*

IN THE UNITED STATES BANKRUPTCY COURT

FILED

FOR THE

at 3 O'clock & 45 min. PM

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

Date 8/30/88

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *PCB*

Chapter 11 Case

Number 487-01063

In the matter of:)
)
THE CEDARS, LTD.)
A Limited Partnership)
)
Debtor)

**MEMORANDUM AND ORDER ON OBJECTION TO CLAIM OF
FEDERAL NATIONAL MORTGAGE ASSOCIATION**

Federal National Mortgage Association ("FNMA") filed its proof of claim in the above case on March 10, 1985 in the amount of \$2,250,095.32. Debtor objected to the claim and sought a determination of the proper amount of the claim. At a hearing to consider the objection the principal disputes centered on (1) attorney's fees; (2) applicable rate of interest; and (3) late charges. After consideration of the argument of counsel and the briefs subsequently filed I find as follows:

FINDINGS OF FACT

1) Debtor owns an apartment complex in Chatham County, Georgia, valued for purposes of this objection at

approximately \$2.2 million.

2) FNMA's claim, as of the date of the hearing, giving credit for post-petition payments, was \$2,373,680.52 including statutory attorney's fees computed pursuant to O.C.G.A. §13-1-11. Debtor asserted the proper figure, as of April 25, 1988, to be \$2,055,598.10 plus an undetermined amount of "reasonable" attorney's fees.

3) The claim of FNMA is "oversecured" in the sense that the property is worth more than the principal and interest due. Statutory attorney's fees would amount to over \$200,000.00 and if allowed in full would exhaust the equity in the property.

4) The contract rate of interest on the note was 14.5% per annum and the rate on payments more than 30 days past due was 15.5%. In addition, the note provides for collection of an additional 5% late charge on all late payments.

5) FNMA properly perfected its claim for attorney's fees under Georgia law pursuant to O.C.G.A. §13-1-11 by letter dated July 8th and delivered July 10, 1987. This case was filed after the ten day notice in that letter expired and

thus the state created right to collect attorney's fees has vested.

CONCLUSIONS OF LAW

(1) Attorney's Fees

The question presented is whether FNMA is entitled to recover the entire amount of statutory attorney's fees which had vested pre-petition without regard to the reasonableness of those fees or the time and effort devoted, the degree of difficulty and associated factors.

Language in the case of In re Eastside Investors, 694 F.2d 242 (11th Cir. 1982), rehearing denied 702 F.2d 214, at 215 (11th Cir. 1983) would support the position of FNMA:

"The filing of a petition for reorganization under Chapter XII of the Bankruptcy Act does not diminish the debtor's obligation for attorney's fees if vested when the petition was filed."

However, as correctly pointed out by my colleague in this District, that holding stated the law in this Circuit prior to

the enactment of the Bankruptcy Code of 1978. In re Curtis, 83 B.R. 853 (Bankr. S.D.Ga. 1988). 11 U.S.C. §506(b) changed prior law and permits an oversecured creditor to recover "any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." The earlier Bankruptcy Act had deferred to state law to determine the enforceability of attorney's fees agreements. See Unsecured Creditors Committee v. Walter E. Heller, 768 F.2d 580, 582 (4th Cir. 1985). In Heller, the court ruled that Section 506 would permit the recovery of a claim for attorney's fees by an oversecured creditor who had not perfected his rights pre-petition. However, from legislative history the court gleaned an intent to permit the collection of "reasonable" fees notwithstanding contrary state law. Thus Section 506 was interpreted in a way which expands the right of an oversecured creditor to collect attorney's fees in a bankruptcy case. The case before me, however, cuts the other direction. Is a right to statutory fees, vested under state law, pre-empted by federal bankruptcy law? Stated in another way, is a state statutory definition of reasonable fees controlling or does a federal standard apply?

Since I find no controlling precedent established by our Circuit Court I have considered decisions reached by other courts of appeals. I find persuasive the

analysis of these decisions that a federal, not state, standard of reasonableness should apply, based on the statutory language itself, legislative history, and policy considerations which seek to protect junior secured creditors, and unsecured creditors as well as first mortgage holders. See In re 268 Ltd., 789 F.2d 674 (9th Cir. 1986); In re Hudson Shipbuilders, 794 F.2d 1051 (5th Cir. 1986).

This conclusion is supported by a number of lower federal court decisions in this state as well. See In re Scarboro, 13 B.R. 439 (M.D.Ga. 1981); In re Davis, 77 B.R. 313 (Bankr. M.D.Ga. 1987); Curtis, supra, at 859-60; In re Standard Bldg. Assoc. Ltd., #A86-08308-SWC (Bankr. N.D.Ga. March 15, 1988); In re Centre Court Apts. Ltd., #87-00911-JB (Bankr. N.D.Ga. April 21, 1988).

In the matter before me a federal standard of reasonable attorney's fees must be applied and those fees awarded under the criteria of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); In re First Colonial Corp. of America, 544 F.2d 1291 (5th Cir. 1977) and Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988).

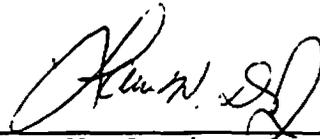
Accordingly, the objection of the Debtor to

FNMA's claim insofar as it includes attorney's fees is sustained. FNMA is granted leave to make application for an award of attorney's fees under 11 U.S.C. Section 506.

(2) Interest Rate and (3) Late Charges

With respect to the proper rate of interest to be charged after default and the collectability of late charges provided for in the note, I overrule the Debtor's objection. First, 11 U.S.C. Section 506(b) places no "reasonable" restriction on interest as it does on attorney's fees and the contract rate should control. See In re 268 Ltd., supra, at 676. With respect to late charges, Debtor's position is adversely controlled by the decisions of In re Lejeune, 73 B.R. 98 (Bankr. N.D.Ga. 1987); Mack Financial Corp. v. Ireson, 789 F.2d 1083 (4th Cir. 1986); and In re LHD Realty, 726 F.2d 327 (7th Cir. 1984). It appears that such a fee was contracted to be paid by debtor and is a reasonable fee charged to compensate for the myriad of problems faced by lenders to whom payments are not timely made. As to the default rate of interest and late payments, Debtor may attempt to have a plan confirmed which restructures the note to deal with these matters in futuro, but as to pre-confirmation indebtedness these elements of FNMA's claim are allowable.

Federal National Mortgage Association is directed to file an amended claim in accordance with the rulings in this Order not later than September 15, 1988.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 21st day of August, 1988.