

Dated: January 22, 2008
The following is ORDERED:



Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

ROBERT ELTON JONES, SR.,

Debtor.

Case No. 02-36097-L
Chapter 13

ORDER DENYING AWARD OF ATTORNEY FEES

Creditor Republic Bank and Trust Company ("Republic") has made application for an award of attorney fees incurred in connection with its opposition to the Debtor's motion to avoid liens. Republic requests reimbursement of fees in the amount of \$5,544.65. In support of its application, Republic relies upon paragraph 15 in the promissory note signed by the Debtor and his son, Robert Elton Jones, Jr., upon paragraph 16 of the mortgage agreement signed by the Debtor's son, and upon paragraph 12 of the guaranty agreement signed by the Debtor. The Debtor objects to the application for attorney fees on the bases that (1) Republic is not entitled to recovery of attorney fees from the Debtor; (2) the fees requested are excessive; and (3) the record of work performed is inaccurate.

The court conducted a hearing on June 6, 2007, and having reviewed the affidavits and briefs filed by the parties, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The fees for which Republic seeks reimbursement were incurred in connection with Republic's opposition to the Debtor's motion to avoid liens. The motion initially was addressed to two liens: a notice of lien *lis pendens* which was alleged to encumber the Debtor's homestead exemption, and a notice of judgment lien upon property owned by the Debtor's son in Scott County, Kentucky.

The notice of lien *lis pendens* apparently was filed in connection with suit brought by Republic against the Debtor in Shelby County, Tennessee, to collect debts made by the Debtor and his son and guaranteed by the Debtor. The notice of judgment lien resulted from a default judgment taken against the Debtor's son, and attached to the son's property in Scott County, Kentucky.

The Debtor filed his voluntary petition for relief under Chapter 13 of the Bankruptcy Code on September 26, 2002. Republic filed two proofs of claim against the Debtor in the amounts of \$103,866.15 and \$242,052.44. Tr. Exs. 40 and 41. The Debtor's plan as confirmed provided for plan payments of \$1,700.00 per month for 36 months, or a total of \$121,000.00. Order Confirming Chapter 13 Plan, doc. no. 83. The Debtor completed all payments under his plan on or about April 3, 2006, and is eligible for discharge. *See* Trustee's Motion to Reduce Percent to Unsecured Creditors to Amount Paid, doc. no. 95. The Debtor's Motion to Avoid Liens of Republic Bank and Trust was filed on April 24, 2006, and recites that the liens should be removed because of the Debtor's impending discharge. *See* Motion to Avoid Liens, doc. no. 99.

The Debtor's son filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on December 23, 2002, in Kentucky, and received a discharge on May 29, 2003.

Prior to trial on the Debtor's motion to avoid liens, Republic voluntarily released its notice of lien *lis pendens*. After an extended hearing, the court denied the Debtor's motion as to the Scott County property because it found that the Debtor had no interest in that property. *See Order Denying Motion to Avoid Lien*, entered September 22, 2006.

The contracts relied upon by Republic clearly provide for the recovery of expenses for collection, including attorney fees. The promissory note signed by the Debtor provides in pertinent part:

On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Note. Expenses include, but are not limited to, reasonable attorneys' fees as provided by law, and court costs.

Exhibit F to A More Definite Statement of Request for Attorneys Fees, doc no. 145. The mortgage signed by the Debtor's son provides in pertinent part:

On or after Default, to the extent permitted by law, Mortgagor agrees to pay all expenses of collection, enforcement or protection of Lender's rights and remedies under this Security Agreement. . . . Expenses include, but are not limited to, reasonable attorneys' fees as provided by law, and court costs.

Tr. Ex. 35, para. 16. The guaranty signed by the Debtor provides in pertinent part:

On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any instrument executed in connection with the creation of any Debt guaranteed by this Guaranty.

Tr. Ex. 34, para. 12.

At trial, Republic submitted four invoices for which it seeks reimbursement. These total \$6,238.40. Tr. Ex. 31. Attorney George F. Higgs provided legal services to Republic in this case and testified in support of its request. Higgs has been licensed to practice law for twenty-six years. Although Higgs' normal hourly rate is \$225.00, he agreed to provide services in this case for \$150.00 per hour. The Debtor did not dispute the reasonableness of Higgs' hourly rate, but did dispute the reasonableness of some of the time entries. At the hearing, Republic made certain concessions in response to the Debtor's objection. It agreed to reduce its request to \$5,544.65. The Debtor nonetheless disputes the necessity of emails and letters by and between Higgs and his client. Trial exhibits 1-30 consist of documents underlying each of the time entries contained in the invoices submitted to Republic for payment. The court has reviewed these exhibits, and finds that Higgs made reasonable communications to his client about the status and progress of this case. The fees incurred by Republic are reasonable.

During closing argument, Higgs indicated that Republic should be entitled to recover its attorney fees from the Debtor as a sanction for filing a frivolous motion. Upon questioning by the court, Higgs admitted that there had been no prior request for sanctions, and the request was withdrawn.

CONCLUSIONS OF LAW

Under the American system, a party is entitled to recover its attorney fees from an opponent only when provided by statute or in a contract between the parties. *See Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co.*, 127 S. Ct. 1199, 1203 (2007). In support of its request for attorney fees, Republic relies upon the documents signed by the Debtor prior to the filing of his bankruptcy case. The promissory note and guaranty signed by the Debtor entitle Republic to recover

its expenses, including reasonable attorney fees, incurred in connection with collecting its debt after default. The mortgage signed by the Debtor's son also entitles Republic to recover its attorney fees. The recording of a judgment lien against the Scott County property and the notice of the lien lis pendens against the Shelby County property were reasonably calculated to enable Republic to collect its debt. But for the filing of the Debtor's bankruptcy petition, Republic would be entitled to recover its attorney fees from the Debtor pursuant to the terms of the promissory note and guaranty. Notwithstanding the filing of the bankruptcy case, Republic is entitled to recover its attorney fees from the Scott County property pursuant to the terms of the mortgage.

Upon the filing of the Debtor's bankruptcy case, Republic was prevented by the automatic stay from taking further action to collect its debt from the Debtor outside of the bankruptcy process. *See* 11 U.S.C. §362(a). Instead, it was entitled to payment through the Debtor's confirmed plan. Upon completion of his payments under the plan, the Debtor was entitled to the entry of discharge with the effect that the Debtor would have no remaining personal liability to Republic. 11 U.S.C. § 1328(a). The Debtor did not pay the claims of Republic in full however, and thus did not satisfy the debt owed to Republic. Thus, the Debtor was not entitled to release of the lien against his son's property because the judgment lien against that property survived the discharge of the personal obligations of the Debtor and his son. In addition, it became apparent at trial that the Scott County property belonged to the Debtor's son. The Debtor had no interest in that property. This was the basis of the court's prior ruling.

The question now before the court is whether Republic is entitled to recover the attorney fees incurred in opposition to the Debtor's motion from *the Debtor* or merely from the property. Republic reasons that but for the unwarranted opposition of the Debtor, it would not have incurred

these fees. The mere fact that the Debtor filed his motion and lost does not entitle Republic to recover fees, however. That is the American Rule. Further, Republic did not seek recovery of these fees as a sanction pursuant to statute or rule as it admitted toward the end of its argument. Thus, as the American Rule requires the prevailing party to pay its own attorney fees unless an applicable statute or contract provides otherwise, and as Republic points to no statute that entitles it to recover fees from the Debtor, it must rely upon its contracts with the Debtor consisting of the note and guaranty.

Both the note and guaranty were executed prior to the filing of the Debtor's bankruptcy petition. Therefore, any obligation owed by the Debtor to Republic pursuant to those agreements is a prepetition debt. This is so even though the obligation to pay attorney fees resulting from post-petition efforts may have been contingent or unmatured at the time of filing. *See In re Martin*, 761 F.2d 1163, 1168 (6th Cir. 1985) ("a contractual right to attorney's fees is part of the debt and is not dependent on an award of costs."). *See also Keaton v. Boatmen's Bank*, 212 B.R. 587, 591 (E.D. Tenn. 1997) ("by virtue of the contract, [bank] had a pre-petition right to collect attorney fees, albeit an unmatured, contingent right"), *vacated as moot*, 145 F.3d 1331 (6th Cir. 1998). The obligations to Republic were provided for in the Debtor's confirmed plan. *See Order Confirming Chapter 13 Plan*, doc. no. 83. Although the plan as confirmed contemplated payment of 100% of the claims of unsecured creditors such as Republic, that percentage was reduced upon the motion of the Trustee, without objection, by order dated May 3, 2006. *See Order Granting Trustee's Motion to Reduce Percent to Unsecured Creditors to Amount Paid*, doc. no. 102. The Debtor has completed all payments required by his plan and is entitled to entry of discharge. *See 11 U.S.C. § 1328(a)* ("[A]s soon as practicable after completion by the debtor of all payments under the plan, . . . the

court shall grant the debtor a discharge of all debts provided for by the plan.”). This would be true even if Republic were permitted to amend its claim to include its additional request for attorney fees. As provided at section 1327, “[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.” 11 U.S.C. § 1327(a). Once a debtor has completed payments under a confirmed plan, the plan may not be modified. *See* 11 U.S.C. § 1329(a).

Pursuant to the completion of his payments under the confirmed plan, the Debtor has no further contractual obligation to Republic arising out of the note and guaranty agreements. As Republic has pointed to no other basis for it to recover attorney fees from the Debtor, its request for attorney fees is **DENIED**.

cc: Debtor
Attorney for Debtor
Creditor Republic Bank and Trust Company
Attorney for Creditor Republic Bank and Trust Company
Chapter 13 Trustee