

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

RICKY BROOKS and
GWEN D. BROOKS,

Debtors.

No. 99-21727
Chapter 13

M E M O R A N D U M

APPEARANCES :

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Attorney for Ricky and Gwen Brooks

FREDERICK L. CONRAD, JR., Esq.
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Attorney for First Tennessee Bank

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This chapter 13 case is before the court on the debtors' objection to the claim of First Tennessee Bank, which in addition to a deficiency balance on the repossession of an automobile, includes attorney's fees in the amount of \$2,537.60, based on a percentage attorney's fee provision in the promissory note. The debtors assert that the fee is unreasonable and should be disallowed. The court having concluded that the attorney's fee requested by First Tennessee Bank is subject to review by this court and is in fact unreasonable, the objection will be sustained. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(B).

The petition commencing this case was filed by the debtors on July 7, 1999. Included in Schedule F, the list of unsecured, nonpriority claims, was an obligation to First Tennessee Bank in the amount of \$8,000.00 for a "Deficiency balance on repo/return." The debtors' chapter 13 plan, confirmed without objection on August 16, 1999, provides for unsecured claims to be paid 100%.

The claim at issue was filed on behalf of First Tennessee Bank by its counsel, Frederick L. Conrad, Jr., Esq., in the total amount of \$10,623.53 on July 20, 1999. Attached to the proof of claim is an "Itemization of Accounting" which indicates that this sum is comprised of principal in the amount of

\$7,612.90, interest of \$473.03 (12% from 12/30/98 through 7/07/99), and attorney's fees of \$2,537.60. Prompted by the chapter 13 trustee's motion to dismiss asserting that the plan is no longer feasible because of the higher than expected claim of First Tennessee Bank, the debtor has objected to First Tennessee Bank's claim on the ground that the amount sought for attorney's fees is unreasonable. First Tennessee Bank, through its counsel, filed a response to the objection which states that the promissory note signed by the debtors provided for attorney's fees in the amount of 33 and 1/3%, that First Tennessee Bank referred the account to him for collection on a 33 and 1/3% contingency basis prior to the bankruptcy of the debtors, that only 20 to 30% of First Tennessee Bank accounts placed with Mr. Conrad will be collected, and that virtually all of the state courts in East Tennessee have allowed an attorney's fee of 33 and 1/3% as a reasonable fee.

The debtors' objection to First Tennessee Bank's claim came before the court for hearing on March 21, 2000. Mr. Conrad appeared at the hearing on behalf of First Tennessee Bank, and argued the assertions which had been set forth in the response. Mr. Conrad stated that he had not kept up with his time in the collection matter against the debtors because his agreement with First Tennessee Bank provided for him to be paid a contingency

fee of one-third of all sums collected by him. He acknowledged that his only work on the matter prior to the bankruptcy filing was sending a letter to the debtors informing them that the First Tennessee Bank debt had been turned over to him for collection and a second letter in response to the debtors' request to him for certain documentation. Subsequent to the bankruptcy filing, Mr. Conrad filed a proof of claim and the response to the objection to First Tennessee Bank's claim and traveled to Greeneville for the hearing on the objection. Mr. Conrad estimated that he has spent a total of five to six hours on the account and that his customary hourly rate is \$125.00 per hour. He also estimated that his office will spend 15 to 30 minutes each month monitoring the payments from the chapter 13 trustee and forwarding them to First Tennessee Bank.

First Tennessee Bank's claim for attorney's fees is based on a provision in the promissory note signed by the debtors on November 9, 1996, which states as follows: "If you employ an attorney to collect an amount in default, I agree to pay attorney's fees of 33 1/3% of that amount plus court costs if applicable." First Tennessee Bank asserts through Mr. Conrad that this provision is both enforceable and reasonable. The debtors respond that any claim for attorney's fees is subject to a reasonableness determination by this court, and that the

amount sought by First Tennessee Bank is not reasonable.* The parties submitted the issue to the court for determination and the court took the matter under advisement.

In the case of *In re Martin*, the Sixth Circuit Court of Appeals stated that "creditors are entitled to recover attorney's fees in bankruptcy claims if they have a contractual right to them valid under state law" *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1168 (6th Cir. 1985)(citing *Security Mortgage Co. v. Powers*, 278 U.S. 149,

*No objection has been raised by the debtors as to the allowability of attorney's fees on First Tennessee Bank's unsecured claim, only to the reasonableness of the fee sought. Although the courts have generally recognized that a creditor may have an allowable claim for attorney's fees incurred prior to the bankruptcy filing, if provided for in the contract, the cases are split on whether postpetition attorney's fees are recoverable on an unsecured or undersecured claim. See James Gadsden and Seigo Yamasaki, *Recovery of Attorney Fees As An Unsecured Claim*, 114 Banking L.J. 594, 595 (1997). Courts which have denied such fees have done so based on inferences drawn from 11 U.S.C. § 502(b), which provides that claims are to be determined as of the date of the filing of the petition and § 506(b), which allows oversecured creditors to recover interest and attorney's fees as a part of their claim. See, e.g., *Sakowitz, Inc. v. Chase Bank Int'l (In re Sakowitz, Inc.)*, 110 B.R. 268 (Bankr. S.D. Tex. 1989). Courts allowing postpetition attorney's fees arising out of a prepetition contract have found § 506(b) to be inapplicable to unsecured claims and have reasoned that the creditor has a contingent, unliquidated claim for attorney's fees as of the bankruptcy filing. See, e.g., *In re Keaton*, 182 B.R. 203 (Bankr. E.D. Tenn. 1995), *vacated on mootness grounds*, 145 F.3d 1331 (6th Cir. 1998). Because the debtors have not objected to the allowability of First Tennessee Bank's claim for attorney's fees, only its reasonableness, it is unnecessary for this court to resolve the split.

153-54 (1928); *In re Bain*, 527 F.2d 681, 685 (6th Cir. 1975)). Thus, this court must determine whether the attorney's fee provision in question would be enforced according to its terms under Tennessee law.

In the case of *Dole v. Wade*, the Tennessee Supreme Court considered the question of whether a provision in a promissory note which provided for payment of a 10% attorney's fee was to be enforced according to its terms or was subject to a reasonableness standard. The court concluded:

The law in this state on the issue of the power of the court to determine the reasonableness of an attorney's fee, where such is stipulated in a note by percentage, or otherwise, is that stated by the Court in *Holston National Bank v. Wood*, *Supra*.

Dole v. Wade, 510 S.W.2d 909, 912 (Tenn. 1974). The *Dole* court quoted its holding in *Wood* as follows:

While a stipulation in a note for attorney's fees is valid and will be enforced by this court, the court is not bound by a provision to the effect that any particular amount shall be allowed for such fees, and, no matter what stipulation as to the amount is made in the face of the note, it will not be enforced unless it appears reasonable to the Court.

Id. at 910 (quoting *Holston Nat'l Bank v. Wood*, 140 S.W. 31, 34 (1911)). The Tennessee Supreme Court in *Dole* also quoted with approval the following from 11 C.J.S. *Bills and Notes* § 726:

It is generally held that the amount of fees fixed by the instrument sued on is at least prima facie the sum recoverable, subject to reduction by the court in the

exercise of its sound discretion, where such sum is unreasonable and excessive.

Dole, 510 S.W.2d at 912.

Although *Dole* was decided more than 25 years ago, the Tennessee courts which have considered the issue since then continue to affirm the decision as the controlling authority on the issue. See *Reagan v. Malone*, 1998 WL 209014, at *2 (Tenn. App. April 30, 1998); *National Book Warehouse, Inc. v. Book-Mart of Florida, Inc.*, 1996 WL 605144, at *2 (Tenn. App. Oct. 23, 1996); *First Am. Nat'l Bank v. Robinson*, 1995 WL 731789, at *2 (Tenn. App. Dec. 12, 1995). Accordingly, based on the holding of *Dole*, the court concludes that a percentage attorney's fee specified in a contract may be reduced if found to be unreasonable or excessive.

In determining a reasonable attorney's fee, the Tennessee Supreme Court has noted:

The amount of an award as an attorney's fee is to be determined upon a consideration of all the facts and circumstances presented by the record, primarily the amount involved and available, the nature of the responsibility assumed by the attorneys, and the character and extent of the services which they have performed, not only in the technical litigation itself, but also in matters arising out of and incidental to such litigation.

See *United Medical Corp. v. Hohenwald Bank and Trust Co.*, 703 S.W.2d 133 (Tenn. 1986)(quoting *Tennessee United Paint Store*,

Inc. v. Overmyer, 467 S.W.2d 806, 810 (Tenn. App. 1971)). The court has also delineated a list of guides in fixing a reasonable attorney's fee:

1. The time devoted to performing the legal service;
2. The time limitations imposed by the circumstances;
3. The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
4. The fee customarily charged in the locality for similar legal services;
5. The amount involved and the results obtained;
6. The experience, reputation, and ability of the lawyer performing the legal service;
7. Whether the fee is fixed or contingent; and
8. The nature and length of the professional relationship to the client.

See *United Medical Corp.*, 703 S.W.2d at 136 (citing *Connors v. Connors*, 594 S.W.2d 672 (Tenn. 1980); TENN. SUP. CT R. 8, CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B)). The court in *United Medical Corp.* observed that "[a]n attorney's fee should be greater where it is contingent than where it is fixed." *United Medical Corp.*, 703 S.W.2d at 136 (citing *Hail v. Nashville Trust Company*, 212 S.W.2d 51 (Tenn. App. 1948)).

Of the eight factors suggested as guides for the awarding of attorney's fees, only evidence regarding three, nos. 1, 5 and 7, i.e., the time devoted to performing the legal service, the amount involved, and whether the fee is contingent or fixed, has been offered. From the statements of counsel at the hearing in this matter, it appeared that the parties desired for the court to rule on the objection based on the state of the evidence before it rather than conducting a full evidentiary hearing on the reasonableness of the attorney's fees sought. Accordingly, based on the evidence before it, the court finds a reasonable attorney's fee to be \$750.00.

In the event the parties desire an opportunity to submit further evidence on this issue, a request for an evidentiary hearing shall be filed within ten days of the filing of this memorandum opinion. Absent such a request, the court will issue an order sustaining the debtors' objection to the claim of First Tennessee Bank and disallowing the claim in the amount of \$1,787.60, which is the balance of the additional attorney's fees initially sought.

FILED: April 18, 2000

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE