



SO ORDERED

A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: May 31, 2019

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

TREMEATRIA D. MONCURE,

CASE NO. 18-04427-NPO

DEBTOR.

CHAPTER 7

TILLMAN FURNITURE COMPANY, INC.

PLAINTIFF

VS.

ADV. PROC. NO. 19-00012-NPO

TREMEATRIA D. MONCURE

DEFENDANT

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR ATTORNEY FEES**

This matter came before the Court on the Motion for Attorney Fees (the "Motion") (Adv. Dkt. 16) filed by Tillman Furniture Company, Inc. ("Tillman"), the plaintiff in the above-styled adversary proceeding (the "Adversary").¹ No response was filed to the Motion.

¹ Citations to the record are as follows: references to the docket in the Adversary will be cited as "(Adv. Dkt. ___)" and references to the record in the associated bankruptcy case, Case No. 18-04427-NPO (the "Bankruptcy Case"), will be cited as "(Bankr. Dkt. ___)."

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Adversary pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I), and (O). Notice of the Motion was proper under the circumstances.

Facts²

Tillman is a locally-owned furniture, appliance, and electronics store that offers in-house financing to qualified customers. On October 16, 2018, Tremeatria D. Moncure (the “Debtor”) signed a Retail Installment Contract and Purchase Money Security Agreement (the “Retail Installment Contract”) (Adv. Dkt. 1-1) to finance the purchase from Tillman of the following household items: a queen-sized headboard, footboard, and rails; a 5-drawer chest; a Concord mattress; and a Gabo Smoke foundation (collectively, the “Furniture”). The loan was in the original principal amount of \$1,098.19 and was to be repaid at an annual interest rate of 23.99% in 14 monthly installments of \$102.63 with the first payment due on November 20, 2018. (*Id.*; Adv. Dkt. 1 at 2). Tillman perfected its security interest in the Furniture pursuant to Mississippi law. (Adv. Dkt. 1 at 2).

The Debtor immediately defaulted on the loan. On November 16, 2018, one month after purchasing the Furniture, the Debtor filed a voluntary petition for relief pursuant to chapter 7 of the Bankruptcy Code (Bankr. Dkt. 1). On Schedule A/B Property, the Debtor proposed to abandon “Furniture” valued at \$100.00 (Bankr. Dkt. 3 at 4), which is apparently the same Furniture she purchased from Tillman because on Schedule D: Creditors Who Have Claims Secured by

² The following constitutes the findings of fact and conclusions of law made by the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

Property, the Debtor listed Tillman as having a claim in the amount of \$1,800.00 secured by “Furniture” valued at \$100.00 (Bankr. Dkt. 3 at 12).

On January 4, 2019, Tillman filed the Motion for Abandonment and Relief from Automatic Stay (the “Motion for Relief”) (Bankr. Dkt. 14), asking the Court to terminate the automatic stay and permit it “to take possession of, foreclose and otherwise exercise any and all of its rights to, and interest in, the [Furniture].” Tillman alleged that the Debtor had agreed to the abandonment of the Furniture, as evidenced by an attached proposed Agreed Order Abandoning Property and Lifting Automatic Stay (the “Agreed Order”) (Bankr. Dkt. 14-2) signed by both the Debtor and her counsel in the Bankruptcy Case. The Court entered the Agreed Order (Bankr. Dkt. 15) that same day.

On February 19, 2019, Tillman filed the Complaint Objecting to Dischargeability of Debt (the “Complaint”) (Adv. Dkt. 1), alleging that the Debtor entered into the loan “within roughly thirty one days of initiating the debtor’s bankruptcy case.” (Adv. Dkt. 1 at 2). In the Complaint, Tillman maintained that the debt owed is non-dischargeable under 11 U.S.C. § 523(a)(2)(C) as a consumer debt “owed to a single creditor and aggregating more than \$500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title.” (Adv. Dkt. 1 at 2-3). Tillman asked the Court to enter an order denying the dischargeability of the Debtor’s debt but did not specify the amount. Tillman also asked the Court for an award of its “attorney’s fees and cost as a result of bringing this action.” (*Id.* at 3).

Despite proper service of the Complaint, the Debtor failed to plead or otherwise defend the Adversary. (Adv. Dkt. 8). The Bankruptcy Clerk thus entered a default against the Debtor on April 5, 2019 (Adv. Dkt. 11), and on April 18, 2019, this Court entered the Default Judgment (the “Default Judgment”) (Adv. Dkt. 14), granting the Motion for Entry of Default (the “Motion for

Default”) (Adv. Dkt. 12) filed by Tillman. In the Default Judgment, the Court ruled that “[t]he debt connected to the October 16, 2018, Retail Installment Contract and Purchase Money Security Agreement executed by [the Debtor] and owed to [Tillman] is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(C).” (Adv. Dkt. 14 at 2). The Court awarded Tillman costs in the total amount of \$362.15, consisting of the filing fee of \$350.00 and postage of \$12.15. The Court granted Tillman 14 days in which to file a motion for attorney’s fees pursuant to Federal Rule of Civil Procedure 54(d)(2)(B) and Local Rule 7054-1.

On May 2, 2019, Tillman filed the Motion seeking attorney’s fees of \$963.00 based on the following provision in the Retail Installment Contract: “In the event this obligation is placed in the hands of an attorney for collection after default is made in the payment of any part thereof, I agree to pay all attorney’s fees.” (Adv. Dkt. 1-1 at 1). Attached to the Motion is the affidavit of Tillman’s counsel (the “Nicols Affidavit”) (Adv. Dkt. 16-3), in which George C. Nicols (“Nicols”) states that he was admitted to practice in Mississippi on October 5, 2005 and has been engaged in the practice of collections law in Copiah County, Mississippi (“Copiah County”). He further states that the hourly rate for reasonable attorney’s fees in collections actions in Copiah County range from \$125.00 per hour to \$350.00 per hour. Attached to the Nicols Affidavit is an invoice that Nicols submitted to Tillman reflecting attorney’s fees in the total amount of \$960.00 (the “Itemization”) (Adv. Dkt. 16-2). Included in the Itemization is a brief description of each task performed by Nicols and the time spent completing each task. The Itemization does not provide the corresponding date on which each task was performed. A review of the Itemization reveals that Nicols charged Tillman \$200.00 per hour for 4.8 hours of work performed for a total of \$960.00 in attorney’s fees. Additionally, Nicols charged Tillman \$3.00 in postage.

Discussion

A. Attorney's Fees

As a preliminary matter, the Court finds that the attorney's fees claimed by Tillman in the Motion exceed the scope of relief requested in the Complaint. Under Rule 54(c) of the Federal Rules of Civil Procedure ("Rule 54(c)"), as made applicable to adversary proceedings by Rule 7054(a) of the Federal Rules of Bankruptcy Procedure, "[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." FED. R. CIV. P. 54(c). As explained by the Fifth Circuit Court of Appeals, "the reason for the rule [is] to insure a party pondering default has meaningful notice, based on the complaint alone, of her exposure in the event of default." *Ditech Fin., L.L.C. v. Naumann*, 742 F. App'x 810, 813 (5th Cir. 2018). In the Complaint, Tillman sought only its "attorney's fees and cost *as a result of bringing this action.*" Based on the descriptions in the Itemization, however, much of the time expended by Nicols was for work performed on behalf of Tillman in the Bankruptcy Case rather than in the Adversary.

According to the Itemization, Nicols expended a total of 4.8 hours. He spent 0.2 hours drafting the Notice of Entry of Appearance of Counsel (the "Notice") (Bankr. Dkt. 12), 0.6 hours drafting the Motion for Relief, and 0.5 hours drafting the Agreed Order, all pleadings filed in the Bankruptcy Case. None of the entries in the Itemization are dated, but these entries form part of the first five entries listed in the Itemization. In addition, there are two other entries that appear to be related to the Bankruptcy Case. The first entry shows that Nicols spent 0.4 hours reviewing the file. The placement of this entry just above the filing of the Notice indicates that "reviewing file" was related to the Bankruptcy Case and not the Adversary. Another early entry shows that Nicols spent 0.3 hours corresponding with the Debtor's bankruptcy counsel. This entry too relates to the Bankruptcy Case since the Debtor did not retain counsel to represent her in the Adversary.

Accordingly, the Court finds that two hours of the 4.8 hours expended by Nicols were spent pursuing the Bankruptcy Case.

The remaining 2.8 hours listed in the Itemization, consisting of the last nine entries, were spent by Nicols litigating the Adversary, including 0.9 hours drafting the Complaint and cover sheet, 0.2 hours drafting the corporate ownership statement, 0.2 hours reviewing the summons and arranging for service of process; 0.2 hours filing the summons return; 0.2 hours researching “selective service,”³ 0.4 hours drafting and filing the application for entry of default, 0.4 hours drafting the Motion for Default, and 0.3 hours drafting the proposed Default Judgment. The Court, therefore, finds that the hours expended by Nicols “as a result of bringing this action” amount to 2.8 hours or \$560.00 (2.8 hours × \$200.00 per hour) in attorney’s fees. Consistent with Rule 54(c), Tillman’s claim for attorney’s fees is limited to \$560.00. As a matter of federal law, the Court cannot award attorney’s fees incurred in the Bankruptcy Case in the absence of meaningful notice in the Complaint that such fees could be awarded in the event of a default. To determine the reasonableness of the attorney’s fees of \$560.00, the Court turns to Mississippi law. *See Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002) (“State law controls both the award of and the reasonableness of fees awarded where state law supplies the rule of decision.”).

In Mississippi, the proper procedure for determining the reasonableness of an award of attorney’s fees requires a calculation of the “lodestar” fees, which is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. “This calculation provides an objective basis on which to make an initial estimate of the value of the lawyer’s services.” *Mauck v. Columbus Hotel Co.*, 741 So. 2d 259, 271 (Miss. 1999) (citation omitted).

³ The Court assumes that “selective service” refers to the Servicemembers Civil Relief Act, 50 U.S.C. § 3901 *et seq.*

Next is consideration of the eight factors enumerated in Rule 1.5 of the Mississippi Rules of Professional Conduct (the “Rule 1.5 Factors”). *In re Estate of Gillies*, 830 So. 2d 640, 646 (Miss. 2002).

The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

MISS. R. PROF. CONDUCT 1.5(a). The Rule 1.5 Factors are nearly identical to the “*Johnson* factors,” articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). In addition to the Rule 1.5 Factors, section 9-1-41 of the Mississippi Code instructs courts to “make the award based on the information already before it and the court’s own opinion based on experience and observation.” MISS. CODE ANN. § 9-1-41.

Nicols expended 2.8 hours at a cost to Tillman of \$560.00 in attorney’s fees to litigate the Adversary. The Court finds that Nicols’ hourly rate of \$200.00 and the total number of hours spent were reasonable and customary in Copiah County for similar legal services. The Court next turns to the Rule 1.5 Factors to determine whether the lodestar amount of \$560.00 should be increased or reduced.

A brief analysis of all but the fourth factor indicates that no departure from the lodestar fee is warranted. Tillman’s dischargeability claim did not present a novel or difficult question or require an inordinate amount of time to litigate, especially given the Debtor’s default. There is no evidence that the acceptance of the employment precluded Nicols from accepting other business. The fee was based on a fixed hourly rate of \$200.00, which is in line with the range of fees

customarily charged by attorneys in Covich County for similar collection services. There is no evidence in the record as to any time limitations or the nature or length of the professional relationship between Tillman and Nicols. Based on the Nicols Affidavit, Nicols is an experienced collections lawyer, having practiced law since 2005.

The Court's analysis of the fourth factor, "the amount involved and the results obtained," requires more discussion. Tillman incurred attorney's fees of \$560.00 litigating the non-dischargeability of a debt in the approximate amount of \$1,700.00. Although the Default Judgment does not set forth the specific amount owed Tillman, the Court estimates that the amount of the debt is \$1,700.00 based on the Debtor's bankruptcy schedules which lists Tillman's claim at \$1,800.00 secured by Furniture valued at \$100.00. The Court makes this estimate of \$1,700.00 only for the purpose of comparing "the amount involved and the results obtained." The Court is satisfied that attorney's fees of \$560.00 is commensurate with the relatively small consumer loan at issue in the Adversary. Here, the fee request is approximately one-third of the estimated debt ($33\% = \$560.00 \div \$1,700.00$). In that regard, the facts here are not similar to those in *Pikco Finance, Inc. v. Staten (In re Staten)*, 559 B.R. 666, 672 (Bankr. S.D. Miss. 2016), where the fee request was nearly quadruple the amount of the underlying debt.

In summary, having considered the lodestar amount and the Rule 1.5 Factors, the Court finds that Tillman is entitled to an award of \$560.00 in attorney's fees. This amount also is consistent with the Court's own opinion based on experience and observation. MISS. CODE ANN. § 9-1-41.

B. Expenses

In the Motion, Tillman seeks reimbursement for postage of \$3.00. As noted previously, the Court awarded Tillman postage of \$12.15 in the Default Judgment. Because of the absence of

any dates in the Itemization or any description of this expense, the Court is unable to determine whether the \$3.00 is included in the postage of \$12.15. The Court, therefore, declines to award Tillman additional postage of \$3.00.

Conclusion

For the above reasons, the Court finds that the Motion should be granted in part and denied in part. Tillman should be awarded attorney's fees in the amount of \$560.00. Tillman is not entitled to any award of attorneys' fees incurred in pursuing its claim against the Debtor in the Bankruptcy Case based on Rule 54(c). Finally, Tillman has not demonstrated that it is entitled to additional postage of \$3.00.

IT IS, THEREFORE, ORDERED that the Motion is granted in part and denied in part. The Motion is granted to the extent that Tillman is awarded attorney's fees of \$560.00, which amount shall be added to the total non-dischargeable debt owed Tillman. The Motion is denied in all other respects.

##END OF ORDER##