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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN RE:

BILLY R. SULLIVAN AND
DENALU A. SULLIVAN

U. S. BANKRUPTCY COURT SOUTHERN DISTRICT OF MISSISSIPPI FILED	
APR 25 1991	
MOLLIE C. JONES-CLIFTON DEPUTY	
BY	

NO. 9001553JC

BEFORE: HONORABLE EDWARD ELLINGTON

BENCH OPINION

Taken in the United States Bankruptcy Court, 100
E. Capitol Street, Jackson, Mississippi, on
Wednesday, April 17, 1991.

APPEARANCES:

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NATIONAL BANK

REPORTED BY:

SUSAN M. YEAGER
Certified Shorthand Reporter
Notary Public

ORIGINAL

1 THE COURT:

2 A proof of claim controversy such as we
 3 have today, the procedures and burdens and so
 4 forth are explained in the Fifth Circuit opinion
 5 of In Re: Simmons, 765 Fed 2d 547. That was
 6 written by the Fifth Circuit on July 19, 1985, and
 7 it explains the procedural context in which we are
 8 today. It says, in effect, that a proof of claim
 9 is similar to a complaint in a civil action, and
 10 the objection is similar to a response and answer,
 11 and we came on for hearing in that context.

12 The issues that we are involved in
 13 today really grow out of Bankruptcy Code Section
 14 506, which, in short form, says that a secured
 15 creditor whose security is of greater value than
 16 the debt that is owed to him is entitled to
 17 principle and his interest and attorney fees and
 18 cost of collection if the underlying documents
 19 provide for attorney fees.

20 The case that you could look to in
 21 getting a better explanation of that is In Re:
 22 Hudson Shipbuilders, Inc., reported at 794 Fed 2d,
 23 1051. It was issued on July 23rd, 1986 and,
 24 ironically enough, it grew out of a bankruptcy
 25 case down on the Gulf Coast, but it really

1 explains Section 506 which we're dealing with
 2 today and the right of this court to hear it and
 3 the right of this court to apply federal standards
 4 rather than state standards, for instance, that
 5 the note from this case, I think that the bank
 6 would be entitled to 15 percent for collection
 7 fees, and 15 percent was way beyond any reasonable
 8 attorney fees. And this court can reduce it back
 9 to what would be reasonable, and it doesn't have
 10 to go with the 15 percent, but it does go on to
 11 illustrate the fact that when attorney fee
 12 questions are here, we are to use federal
 13 standards in deciding that issue.

14 The issue of attorney fees has been
 15 litigated, as you might imagine, numerous times,
 16 and frequently and repeatedly, and the Fifth
 17 Circuit has come up with some standards that we
 18 are to try to use best we can. And usually you're
 19 in the context of trying to determine the
 20 reasonableness of the attorney fees for the debtor
 21 in possession, but the standards that were used in
 22 bankruptcy on that issue, really all the courts in
 23 the circuit are to be guided by the case of
 24 Johnson vs. Georgia Highway Express, Inc., 488 Fed
 25 2d, 714, which was issued in 1974, and that case

1 was made applicable bankruptcy cases In the Matter
 2 of First Colonial Corporation of America, 544 Fed
 3 2d, 1291, and it lists 12 items, which I will
 4 touch on again in a minute, and the Johnson
 5 analysis was further defined and refined by Judge
 6 Wisdom writing in the opinion in Copper Liquor
 7 Inc. vs. Adolph Coors Company, 624 Fed 2d 575, and
 8 it was condensed and restated in Cooper Liquor,
 9 Incorporated vs. Adolph Coors Company, 684 Fed 2d
 10 1087 at pages 1090 through 1093, which came out in
 11 1982.

12 In that opinion, I will quote in part,
 13 but not really, but in that case, although the
 14 Fifth Circuit said there were 12 factors for us to
 15 look at, they said that there were four factors
 16 that deserve special heed: One, the time and
 17 labor involved. That was item number 1; no. 5 the
 18 customary fee; item no. 8 the amount involved and
 19 the results obtained; and 9 the experience,
 20 reputation and ability of counsel. And they were
 21 to be considered in the following framework: One,
 22 ascertain the nature and extent of the services
 23 supplied by the attorney; two, value of the
 24 services according to the customary fee and
 25 quality of legal work; and three, adjust the

1 compensation on the basis of other factors that
2 may be of significance in a particular case,
3 relying on First Colonial.

4 I will not go through all of that
5 quote, but there are some other cases that anyone
6 that would be interested in now or on review would
7 want to look at, and that's In Re: Consolidated
8 Bank Shares, Inc., 49 BR 467 and the case of In
9 the Matter of goes back to the First Colonial
10 case, but I'm going to what I consider minor items
11 as opposed to the four major items first and go
12 down those.

13 The first item I want to speak on is
14 the novelty and difficulty of the questions
15 involved. I really saw nothing particularly novel
16 or unusually complex about the services rendered
17 on behalf of the bank. They are complex in the
18 sense that bankruptcy itself is complex, and if
19 you don't have a knowledge of a lawyer knowing
20 what they are doing, they can get in trouble
21 quick, but this wasn't any new issue on the
22 breaking edge of new developments in bankruptcy
23 law. It was important. It was money involved,
24 but it was basically a meat and potatoes type
25 issue.

1 The skill to perform the legal services
 2 properly, as I stated, it did require a good level
 3 of skill to represent the bank in this, not that
 4 it was a novel issue, but the problem was that
 5 they had the cows there, and they had a good first
 6 lien on it, but it seemed like everybody wanted to
 7 keep getting their hands on that cattle, and they
 8 had to be vigilant about that on cash collateral
 9 issues, on the second lien behind them, on the
 10 landlord claiming some lands and things like that,
 11 so they did need experienced legal counsel, and I
 12 think that Mr. Sulser was that.

13 Next item, the preclusion of other
 14 employment by the attorney due to acceptance of
 15 the case. Obviously you can't work on two things
 16 at once, but this was not a mega type case where
 17 Mr. Sulser had to drop all other cases and devote
 18 his time solely to this and run the risk of losing
 19 new, incoming business, so I didn't think that was
 20 of any significance.

21 Next item, whether the fee is fixed or
 22 contingent. Obviously it was not a contingent
 23 matter. Mr. Sulser was going to get paid on a
 24 straight hourly basis by the bank.

25 Time limitations imposed by the client

1 of the circumstances. There was -- and the
2 testimony was, and the docket sheets and files
3 reflected, there was some time limitations imposed
4 in the summer after this -- in June, July, and
5 August when this case was first filed. There were
6 numerous hearings down here that Mr. Sulser did
7 have to attend and be here on behalf of his client
8 on those.

9 The next item, the undesirability of
10 the case, I saw nothing undesirable about
11 representing the bank in this case, and I would
12 think it would be desirable type business that any
13 firm would be pleased to have.

14 The next item, the nature and length of
15 the professional relationship with this client, I
16 gave this no particular great weight, because they
17 were in it a long time in that they started back
18 in '85. I don't remember any testimony about any
19 prior relationship with the bank. Maybe they had
20 represented them for a while, but I saw that had
21 no great significance in setting any fees in this
22 case.

23 Awards in similar cases is that we had
24 two lawyers testify that the hourly rates charged
25 were \$100 an hour, were customary in this area for

1 this type work and perhaps lower than some are
 2 charging. Some of the cases recognized that the
 3 court itself can take notice or use its own
 4 experience on attorney fees. I would say now days
 5 that attorney fees for representation in this type
 6 matter might go as low as \$75 for some attorneys
 7 that would do a good job and certainly not unusual
 8 to see 125 or more charged by other firms that
 9 couldn't do a bit better job than this, so I think
 10 \$100 an hour was in keep with similar cases.

11 I will then go back to the other items
 12 that we had talked about, which are the special
 13 heed factors, you might say. The time and labor
 14 required. In going over the time sheets in here,
 15 I did not -- I feel that the time sheets that were
 16 submitted and the time that is requested was in
 17 keeping with what might be expected under normal
 18 circumstances. Usually what you look for on that
 19 is, to use phrases used in here, sometimes you
 20 hear of padding the bill, fat in there, double
 21 billing, this, that, and the other, but I didn't
 22 see any abuse in those statements. I did not see,
 23 like I see firms do sometimes, on what I -- normal
 24 matter they'll send two or three lawyers down
 25 here. There was one that came. I did not see

1 like I've seen before where you hire a lawyer to
2 represent you, the next thing you see is two or
3 three having a conference about what we're going
4 to do now. I didn't see that in there. I didn't
5 see any excessive use of paralegals, supposedly to
6 save money, but looks like to me running up
7 bills. I didn't see that in there, and I will
8 touch on that again in a minute in an overall
9 review of the case.

10 The experience, reputation, and ability
11 of the attorney. Mr. Sulser testified, and it was
12 stipulated, but he has experience in the field of
13 bankruptcy and has practiced a good bit in this
14 and other courts, and I believe that he is an
15 experienced attorney and has a good reputation.

16 The customary fee we have touched on
17 before and will touch on again, but the \$100 an
18 hour is within the range of the customary fees
19 that are charged for this type work, and it's
20 supported by the testimony.

21 The amounts involved and the results
22 obtained, as far as the results goes, it appears
23 to me that Mr. Sulser protected the interest of
24 his client and got a good result in that sense,
25 which is what they hired him to do.

1 Getting back to the document itself and
 2 the arguments or reservations that were expressed
 3 by Mr. and Mrs. Sullivan and by their attorney in
 4 opening arguments and during testimony, you know,
 5 under the American rule, you just have a lawsuit
 6 of negligence or suing on open account when
 7 there's no statutory provision for it. Each side
 8 has to bear their own attorney fees regardless of
 9 who wins and loses, but that can be varied by
 10 contract, and that is what was done in this
 11 particular case and which is normal that you see
 12 when you borrow from any lending institution and
 13 they get you to sign a promissory note and
 14 security agreement, they customarily provide for
 15 the payment of collection fees, including attorney
 16 fees, if they don't get the money as and when it
 17 becomes due.

18 And I believe that this guage is
 19 controlled by the original note dated May 22nd,
 20 1985 in the original principle amount of --
 21 original amount of \$159,900, and it says that,
 22 "Attorney Fees and Costs, I agree to pay the costs
 23 you incur to collect this note in the event of my
 24 default including your reasonable attorney fees,"
 25 and then it goes down into telling what default

1 is, and it's a list there of several items,
 2 failure to make payments on time and other things,
 3 and I'm not going down the whole list now, but it
 4 mentions bankruptcy being a default.

5 Well, those type provisions where a
 6 note can be accelerated or you are default simply
 7 by filing bankruptcy was not -- they are invalid
 8 under the bankruptcy law so that they couldn't
 9 accelerate them because they filed bankruptcy, but
 10 I believe that when they don't get paid on time
 11 and a bankruptcy is filed and they've got to
 12 protect their interest, then certainly they're
 13 entitled to attorney fees under that note, and
 14 that's not -- that is a matter of contracts under
 15 506 that they're entitled to.

16 Now, going to the fees that have been
 17 requested, the court is of the opinion that the
 18 fees that were requested for, I would say, through
 19 May of 1990, I'm of the opinion that those fees
 20 should not be allowed. For instance, in May of
 21 1985 there are fees in there for I believe
 22 \$330.22, somewhere in that neighborhood. Now, the
 23 next ones I see are in the fall of '89 and early
 24 part of 1990 which, as I understood the testimony
 25 and looking at the statements in there, really had

1 to do with renewing some notes and filing new UCC
 2 filings through the secretary of state and making
 3 sure that their property was -- the priorities
 4 were properly noticed, the third parties and stuff
 5 like that, but I don't really consider those type
 6 legal fees covered under the terms of this note,
 7 under the circumstances of the note.

8 Now, I don't doubt and I think the
 9 proof shows that the note was in default
 10 frequently in the sense that when a payment was
 11 due on a certain day, it wasn't -- technically it
 12 was in default, but basically those are handled by
 13 the bank in-house by working with the debtor,
 14 getting the payment, renewing the note and stuff
 15 like that, and I don't really consider the legal
 16 representation of getting the note renewed and new
 17 UCC filings and stuff like that being attorney
 18 fees.

19 Now, I realize that those were attorney
 20 fees connected with this loan, but if those fees
 21 are to be covered, such as filing fees or if you
 22 want them to pay you to have the title checked and
 23 things like that, that could be part of the loan
 24 agreement and might be part of the loan agreement,
 25 but I don't have that here. I simply have the

1 note, and that's what I'm look at, and I don't see
 2 anything in there to cover normal type commercial
 3 fees for simply you getting your property
 4 protected, so I'm not allowing any of those
 5 through May, but I am going to allow all of the
 6 statements that were filed here beginning with the
 7 one dated June 30, 1990 which had the first time
 8 on it dated June 4, 1990.

9 So the amount that I calculated on the
 10 excluded statements was \$1,735.02, so this is the
 11 way I'm calculating what I am going to allow:
 12 \$16,885.90 less \$1,735.02, which gives you a
 13 subtotal of \$15,150.88 plus I am allowing \$1200
 14 for the time today, which is \$16,350.88, less any
 15 charges for fax machine except \$1 per page
 16 outgoing, and I did not calculate that. Y'all can
 17 calculate it.

18 In my own opinion, for whatever that
 19 is, and this is not legal opinion, but this is a
 20 case that should never have come here except the
 21 fact that you've got a right to bring it here.
 22 But when a person is a debtor on a written
 23 agreement where he is obligated to pay attorney
 24 fees involved with the collection of that note,
 25 unless the fees are extremely high, you find

1 yourself digging your hole deeper quickly because
2 you're having to pay your own attorney, plus you
3 wind up playing the attorney on the other side,
4 and if a person feels strongly about it, of course
5 that's their right to feel that way, but the money
6 is a lot different. But it reminds me of when I
7 was practicing law and I'd have people that were
8 in a divorce and unhappy with each other, and
9 they'd get hung up over furniture in the house and
10 want both lawyers to argue about the price of the
11 furniture, and they'd wind up paying more in
12 attorney fees than all the furniture was worth.

13 We had a matter here that the attorney
14 fees were in dispute in the earlier part of the
15 year, and we wound up burning up a lot more
16 attorney fees arguing about attorney fees, but
17 under the law I believe that what I have decided
18 is in keeping with the law, so if y'all will
19 calculate those final facts and submit a proposed
20 judgment to me, I will appreciate it.

21 (Court concluded at 7:15 p.m.)
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CERTIFICATE OF COURT REPORTER

I, Susan M. Yeager, Court Reporter and Notary Public in and for the County of Madison, State of Mississippi, hereby certify that the foregoing pages, and including this page, contain a true and correct transcript of the testimony of the witness, as taken by me at the time and place heretofore stated, and later reduced to typewritten form by computer-aided transcription under my supervision to the best of my skill and ability.

I further certify that the witnesses were placed under oath to truthfully answer all questions in this matter.

I further certify that I am not in the employ of, or related to, any counsel or party in this matter, and have no interest, monetary or otherwise, in the final outcome of the proceedings.

Witness my signature and seal this the 23rd day of April, 1991.

Susan M. Yeager
 SUSAN M. YEAGER
 Certified Shorthand Reporter
 Notary Public
 My Commission Expires January 6, 1992