



ENTERED

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The following constitutes the order of the Court.

Signed September 23, 2004.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: §
DEEP ELLUM DEVELOPMENT, LTD., § CASE NO. 03-81709-SAF-11
DEBTOR(S). §

MEMORANDUM OPINION AND ORDER

Lennar Partners, Inc., as Special Servicer for LaSalle Bank National Association, moves the court for the allowance and award of professional fees and reimbursement of expenses pursuant to 11 U.S.C. § 506(b). Deep Ellum Development, Ltd., the debtor, objects to the amount of fees requested. The court conducted a hearing on the motion on August 30, 2004.

The allowance of a claim under § 506(b) constitutes a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§ 157(b)(2)(B) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

The parties agree that Lennar Partners' allowed secured claim is secured by property the value of which exceeds the claim. Accordingly, under § 506(b), the court "shall allow" Lennar Partners "any reasonable fees, costs, or charges provided for under [the loan] agreement . . ." The Prepetition Agreements provide for attorneys' fees and expenses. Pursuant to §§ 11.1 and 11.3 of the deed of trust, the "Lender" (Lennar) is entitled to engage legal counsel to assist in any lawful action that may be taken by the Lender in connection with, among other things, any voluntary bankruptcy. Further, §§ 11.1 and 11.3 of the deed of trust provide that the Lender is entitled to demand that the debtor reimburse the Lender for such legal fees. Therefore, as required by § 506(b) of the Bankruptcy Code, the deed of trust provides for the payment of attorney's fees by the debtor.

Under this provision, Lennar Partners seeks fees of \$86,209.85 and reimbursement of expenses of \$2,404.18, for a total of \$88,614.03. The debtor contends that those fees are not reasonable.

The Bankruptcy Code permits recovery of "reasonable" fees and expenses. In re Hudson Shipbuilders, Inc., 794 F.2d 1051 (5th Cir. 1986). Counsel may perform services at the request of Lennar Partners. Regardless of what Lennar Partners and its counsel agreed concerning payment for those services, the court must determine whether it is reasonable to charge the debtors

under the loan agreement and the Bankruptcy Code for those services. Brown v. Sullivan, 917 F.2d 189, 192 (5th Cir. 1990). The standard for reasonableness is a federal standard. In re Hudson Shipbuilders, Inc., 794 F.2d at 1056. To determine reasonableness under the Code, the court must consider several factors. Hudson Shipbuilders, 794 F.2d at 1058.

The court must determine the nature and extent of the services rendered by counsel and the value of those services. In re First Colonial Corp. of America, 544 F.2d 1291, 1299 (5th Cir.), cert. denied, 431 U.S. 904 (1977). These two factors comprise the components for the lodestar calculation. Generally, the lodestar is calculated by multiplying the number of hours reasonably expended by reasonable hourly rates. Hensley v. Eckerhart, 461 U.S. 424 (1983). The court may then adjust the compensation based on the Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir, 1974), factors. Blanchard v. Bergeron, 489 U.S. 87, 91-92 (1989). The Johnson factors may be relevant for adjusting the lodestar calculation but no one factor can substitute for the lodestar. Indeed, the lodestar subsumes the first four factors. Shipes v. Trinity Industries, 987 F.2d 311, 321 (5th Cir. 1993).

The Fifth Circuit has directed that this mechanism be used to determine the reasonable compensation for a bankruptcy estate to pay for professional services under § 330(a) of the Bankruptcy

Code. Indeed, the Fifth Circuit requires that federal courts apply the lodestar mechanism to determine reasonable compensation under any federal statute. See, e.g., Associated Builders & Contractors v. Orleans Parish School, 919 F.2d 374, 379 (5th Cir. 1990)(lodestar applies to the Civil Rights Attorney's Fees Awards Act); Brown, 917 F.2d at 190 (lodestar analysis applies to the Social Security Act); Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 323-24 (5th Cir. 1995)(lodestar analysis applies to attorney's fees derived from the Clayton Act and RICO); Alberti v. Klevenhagen, 896 F.2d 927, 930 (5th Cir. 1990)(lodestar analysis applies to attorney's fees in civil rights case); Longden v. Sunderman, 979 F.2d 1095, 1099 (5th Cir. 1992) (lodestar analysis applies to RICO attorney's fees).

Lennar Partners bears the burden of establishing the reasonableness of its claim. Louisiana Power & Light Co., 50 F.3d at 324. Lennar Partners must produce evidence of the appropriate hours expended. Both § 506(b) of the Code and §§ 11.1 and 11.3 of the deed of trust specify that the Lender is entitled to "reasonable" attorney's fees and expenses. In applying § 506(b), a number of factors must be considered. The Fifth Circuit has tested a secured creditor's attorney's fees by the same standards as those applied to counsel employed under 11 U.S.C. § 327 or § 1103. In re Cummins Utility, L.P., 279 B.R. 195, 204 (Bankr. N.D. Tex. 2002). The court may also consider

"the nature of the case and manner of its administration." Id. Finally, the court must determine whether the services performed were duplicative or unnecessary. Id. The court must apply the loan agreement for the payment of fees and expenses in light of the bankruptcy process. While the court accords Lennar Partners some latitude concerning fees and expenses within the loan agreement, Lennar Partners' attorneys work must be necessary to preserve and realize the maximum value of Lennar Partners' collateral during the administration and completion of the bankruptcy process.

Hours

During the bankruptcy case, Deep Ellum never asserted that Lennar Partners did not hold an over secured claim. From its first proposed plan, Deep Ellum stated that it would pay the principal debt, with interest, in full. Yet, the first plan proposed to eliminate a pre-payment penalty, which Lennar Partners believed would affect the market performance of the loan. Lennar Partners had to address that concern. In addition, Deep Ellum found itself embroiled in a partnership management dispute with its former general partner. That dispute produced motions that challenged the Chapter 11 case itself. To protect the management of its collateral, Lennar Partners had to monitor the governance dispute. For that matter, Lennar Partners reported that it could declare a change in partnership control a

default under its deed of trust. Entities related to Deep Ellum purchased a second lien position from the City of Dallas. Lennar Partners monitored that transaction to assure that it had no adverse impact on the value of its collateral or the performance on its loan. Lastly, when Lennar Partners and Deep Ellum reached agreement on a plan, Lennar Partners assisted in the confirmation of that plan. These categories of work were reasonably necessary to preserve and realize the maximum value of Lennar Partners' collateral during the Deep Ellum Chapter 11 case.

Nevertheless, the court cannot find that all the work performed by counsel can be reasonably charged to Deep Ellum. Counsel may have performed services at the request of Lennar Partners and Lennar Partners may have intended to compensate counsel for those services, but that does not result in a finding that the services were necessary to pursue collection of the debt in the bankruptcy case. The court reiterates that while Lennar Partners may determine that it is prudent to request and pay for those services, that does not necessarily make them reasonable under the lodestar analysis regarding payment by the bankruptcy estate.

The application contains several vaguely described work entries. The court cannot determine the reasonableness of vaguely described work. The court must, therefore, disallow those entries from the lodestar calculation. The application

includes two day entries for two attorneys charging the debtor for the same hearing. Lennar Partners has not established the necessity of that duplicative effort. Several time entries contain blanks. At the hearing, Lennar Partners did not explain that work. For the most part, the court could not ascertain the reasonableness of those entries. If the description identified some necessary work clumped with a description with blanks, counsel must accept the court's inference of the amount of that work reasonably charged to the debtor. For some activities, Lennar Partners provided no explanation of why that work was necessary to preserve its collateral or assure payment of the loan. These activities include research on plan voting by the City of Dallas, preparing notebooks and the utility motion. The court can derive no apparent reason from the application or the case history why that work should be charged to the debtor. To assist the court, Lennar Partners' counsel should have exercised reasonable billing judgement. In formulating the claim against the bankruptcy estate, counsel must exclude hours that are excessive, redundant, or otherwise unnecessary. Hensley, 461 U.S. at 434. For purposes of § 506(b), the court disallows these entries, even if Lennar Partners concludes that it should compensate its attorneys for that work.

In a similar vein, and with all due respect to counsel, the court finds no basis for the bankruptcy estate to compensate

Lennar Partners for an attorney charging \$605 per hour, and then \$675 per hour, to monitor and coordinate the work in the case, and consult with the law firm's other attorneys working the case. Given the discreet issues reasonably charged to the estate, as summarized above, the court finds no basis for the involvement of an attorney at that level of compensation, to be paid by the bankruptcy estate. Deep Ellum always proposed to pay the debt in full. Lennar Partners had to negotiate the pre-payment issue, for which it involved an attorney with the experience to command \$340 per hour, increased to \$450 per hour. The other monitoring work in the case was appropriately handled by an attorney charging a lower hourly fee. The court, therefore, disallows almost all the time charged at the \$600 plus per hour rate.

Having addressed the general disallowances, the court turns to a determination of the reasonable hours charged to the bankruptcy estate. Counsel had to attend to the review of the loan documents and the handling of cash collateral issues. From the descriptions on the invoices attached to the motion, the court finds that time valued at \$10,132 reasonable for this work. In reaching this decision, the court disallowed charges for internal loan summary reviews, given the lack of a contest by the debtor. The court finds that time valued at \$1,501 reasonable for work concerning the proof of claim.

As discussed above, counsel had to address the initial plan

proposal, negotiate that issue with the debtor, and then pursue confirmation of an agreed plan. The court finds that time valued at \$15,982 reasonable for plan-related work. In reaching this decision, the court disallows charges of \$813 and \$1,853 for research on modification of non-monetary loan covenants as premature and, given the successful negotiations, unnecessary. If counsel performed that work for their own background and education, then counsel must look to Lennar Partners for compensation. The debtor cannot reasonably be charged with those fees unless Lennar Partners reached an impasse in negotiations with Deep Ellum, which did not occur in this case. The court notes that the motion overstates the issue. The motion refers to a "stark deviation" and "repeatedly threatened" to eliminate the pre-payment penalty. But, Deep Ellum merely floated the idea in an initial plan, which was dropped in subsequent negotiations.

With regard to the governance dispute and resulting litigation and mediation, the court finds that fees may be reasonably charged to the estate. Counsel's stated reason in the motion for this work is not persuasive, however. Counsel stated that Lennar Partners feared that the feuding present and former partners would turn their wrath on the lender. There is no evidence to support that concern. Rather, the explanation given at the hearing concerning management of the collateral and non-monetary defaults is the persuasive reason. While counsel had to

monitor the governance issue, the court finds no reason for the research charged to the estate, for attending depositions or for preparing internal memoranda. Regarding the depositions, information of concern would have been presented at the hearings on the various motions that had been filed as a result of the governance dispute or by reading transcripts or by attending the mediation. The court finds time valued at \$5,856 reasonable to monitor the governance issue.

Counsel had to monitor the administration of the case to assure performance on the loan and preservation of the collateral. Administration tasks include attending the meeting of creditors, reviewing the operating reports, reviewing claims against the estate, rents collected, taxes owed, insurance paid, and so forth. The court finds time valued at \$5,002 reasonable for case administration work. The court further finds \$5,156 reasonable for the preparation, presentation and defense of the § 506(b) motion, as mandated by the Bankruptcy Code.

Based on the above, the court finds the reasonable time to be valued at \$43,629.

Rates

With the disallowance found above, the court finds the remaining blended hourly rate reasonable.

Other Factors and Expenses

No other Johnson factor requires an alteration or adjustment to the lodestar calculation.

The court finds the out of pocket expenses of \$2,404.18 to be actual and necessary.

Order

Based on the foregoing,

IT IS ORDERED that Lennar Partners is awarded a claim under 11 U.S.C. § 506(b) of \$43,629.00 for attorney's fees and \$2,404.18 for reimbursement of expenses, for a total of \$46,033.18.

###END OF ORDER###