The following constitutes the ruling of the court and has the force and effect therein described.

United States Bankruptcy Judge

Signed July 05, 2011

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

IN RE:	§	
	§	**CHAPTER 7**
ADINA CLARA WANG,	§	
DEBTOR.	§	**CASE NO. 10-41797 (DML)**
	§	

MEMORANDUM ORDER

Before the court is the *Motion and Brief for Order Granting Surcharge* (the "Motion") of the trustee in the captioned chapter 7 case (the "Trustee") seeking to surcharge AmTrust Bank (the "Bank")[1] pursuant to section 506(c) of the Bankruptcy Code (the "Code")[2] for administrative expenses incurred by the Trustee in connection

[1] The Motion was initially directed at J.P. Morgan Chase Bank, N.A. ("Chase"), as well, respecting the sale of another property. That sale, however, fell through, and the court now addresses the Motion only as to the Bank.

[2] 11 U.S.C. §§ 101 et seq.

with the sale of certain estate property located at 7237 Davis Blvd., North Richland Hills, Texas (the "Property").[3] The court conducted a hearing on the Motion on June 27, 2011, during which the Trustee testified and offered certain exhibits, identified as necessary below, into evidence. This matter is subject to the court's core jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), (K) and (N). This memorandum order includes the court's findings of fact and conclusions of law. FED. R. BANKR. P. 9014 and 7052.

The Trustee sold the Property for $530,000. The Bank was owed $322,715.46, and it was paid this amount at closing. The Bank was thus oversecured.

By the Motion, the Trustee asks that the Bank be surcharged under Code § 506(c) a total of $102,787.17. This amount represents the sum of a realtor's commission of $31,800.00, closing costs of $4,832.60 and legal fees of $66,154.57. *See* Trustee's Exhibit 1. The latter relates to fees incurred in invalidating land trusts and in connection with the sale of the Property.[4]

Section 506(c) of the Code states:

> (c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

11 U.S.C. 506(c) (2006).

As a general rule, surcharges should be awarded against a secured creditor where the estate does not realize value above the secured claim (or at least where the surcharges

---

[3] The Property was originally acquired by Debtor and her husband, who is not a debtor in this case. It was subsequently transferred, improperly, into a land trust (as was the property pledged to Chase). *See* Trustee's Exhibits 5 and 7. In order to sell the Property, it was necessary for the Trustee to invalidate the land trust and so obtain transferrable title to the Property.

[4] The legal fees are attributable to services rendered not only to the Property but also to Chase's collateral.

plus the secured claim exceed the value of the collateral sold). *See* 3 Norton Bankruptcy Law and Practice § 52.13 (2008); *In re Glen Eden Hosp., Inc.*, 202 B.R. 589, 590 (Bankr. E.D. Mich. 1995); *In re Mall at One Assocs.*, 185 B.R. 981, 989 (Bankr. E.D. Pa. 1995); *In re West Post Rd. Props.*, 44 B.R. 244, 247 (Bankr. S.D. N.Y. 1984). While exceptions to this rule of thumb may exist – for example, if the value of the creditor's collateral is increased through the bankruptcy administration or the secured creditor consents to a surcharge – it does not appear that the instant case falls in any such category.

The Trustee asserts that the Bank agreed *sub silentio* to be surcharged. But the Bank contests that assertion and a secured creditor's consent must be clearly and knowingly made. *See, e.g., In re Compton Impressions, Ltd.*, 217 F.3d 1256 (9th Cir. 2000); *In re Blackwood Associates, L.P.*, 153 F.3d 61 (2d Cir. 1998). There is no evidence in the case at bar that the Bank clearly and knowingly consented to any of the charges the Trustee now seeks to impose on it.

Similarly, there is no evidence that suggests the value of the Bank's collateral was enhanced to the benefit of the Bank. Had the Bank foreclosed and itself sold the Property it would have recovered as much as it did through the sale of the Property by the Trustee. Indeed, since the foreclosure would have wiped out any interest held by the land trust some of the work of the Trustee – invalidation of the land trusts – would have been unnecessary had the Bank recovered on the Property through a foreclosure, Most of the cases cited by the Trustee in the Motion are cases involving an undersecured creditor,[5] an entity that shared ownership of an asset with the debtor[6] or a chapter 11 debtor who

[5] *See Hartford Fire Ins. Co. v. Northwest Bank Minn., N.A. (In re Lockwood)*, 223 B.R. 170, 173 (8th Cir. BAP 1998).

[6] *See PSI, Inc. of Mo. v. Aguillard (In re Senior-G & A Operating Co., Inc.)*, 957 F.2d 1290, 1293

contended that the creditor benefited from continued operation of the debtor's business.[7] The only case cited by the Trustee in which an oversecured creditor was surcharged for expenses is *In re Jack Kline Co., Inc.,* 440 B.R. 712 (Bankr. S.D. Tex. 2010). In that case, however, the court found that the secured creditor engaged in improper conduct, a fact not present here. *Id.* at 738. It is thus distinguishable from the case at bar – even if the court determined it should adopt its reasoning.

In sum, the court concludes and holds that the estate, which has received substantial benefit from sale of the Property, should bear the costs sought by the Motion. The Motion must therefore be denied.

It is so **ORDERED**.

END OF MEMORANDUM ORDER # # #

(5th Cir. 1992) (The creditor had a right to production payments amounting to 85% of the debtor's 70% working interest in the collateral, which was an oil well).

[7] *See, e.g., Central Bank of Mont. v. Cascade Hydraulics & Util. Serv. (In re Cascade Hydraulics & Util Serv.)*, 815 F.2d 546, 548 (9th Cir. 1987); *Brookfield Prod. Credit Assoc. v. Borron*, 738 F.2d 951, 951-52 (8th Cir. 1984).