

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
97 OCT -1 PM 1:46
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 94-14737
)
MICHAEL YANOSCSIK) Chapter 13
KIMBERLY YANOSCSIK,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **MEMORANDUM OF OPINION**

The Leader Mortgage Co. ("Leader") filed a Motion for Relief from Stay on the ground that Debtors Michael and Kimberly Yanoscsik had not made post-petition payments to Leader in accordance with the terms of their confirmed Chapter 13 plan. (Docket 12). At the hearing on the motion, Debtors tendered certain funds to Leader and the parties then entered into an Agreed Order. (Docket 17). That Order resolved all issues between them except for one: whether Leader is entitled to recover attorney fees and costs in connection with the filing and prosecution of the Motion for Relief from Stay. Both parties filed briefs in support of their positions. (Docket 15 and 16). For the reasons stated below, Leader is not entitled to recover its attorney fees from the Debtors and the balance of the Motion for Relief from Stay will, therefore, be denied.

JURISDICTION

The Court has jurisdiction to hear this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A),(G), and (O).

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

FACTS

These are the undisputed facts:

1. Leader is the owner and holder of a promissory note (the "Note") entered into by Debtors in the principal amount of \$72,400. The Note is secured by an open-end mortgage (the "Mortgage") on Debtors' residence. Leader is also the owner and holder of the Mortgage.¹

2. The Note contains this language:

6. BORROWER'S FAILURE TO PAY

* * *

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may . . . require immediate payment in full of the principal balance remaining due and all accrued interest

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

3. The Mortgage contains this provision:

6. Charges to Borrower and Protection of Lender's Rights in the Property.

Borrower shall pay all governmental or municipal charges, fines and impositions that are not included in Paragraph 2. Borrower shall pay these obligations on time directly to the entity which is owed the payment. If failure to pay would adversely affect Lender's interest in the Property, upon Lender's request Borrower shall promptly furnish to Lender receipts evidencing these payments.

¹ Debtors originally entered into the Note and Mortgage with The Huntington Mortgage Company. Huntington then assigned the instruments to Leader.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

If Borrower fails to make these payments or the payments required by Paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in Paragraph 2.

4. Lender is an over-secured creditor as that term is used in 11 U.S.C. § 506(b).
5. Lender requests attorney fees in the amount of \$750² and costs in the amount of \$60. Debtors do not challenge the reasonableness of these amounts.

Lender seeks an award of attorney fees and costs (collectively referred to in the balance of this opinion as "attorney fees") based on the language in the Note and Mortgage quoted above.

Debtors deny that the language is specific enough to justify such an award.

DISCUSSION

The Bankruptcy Code provides that:

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b). "Section 506(b) merely respects the party's contractual rights by allowing the secured party the full extent of [its] bargained for security." *In re D.W.G.K. Restaurants, Inc.* 84 B.R. 684, 686 (Bankr. S.D. Cal. 1988). To recover fees under this statute, the creditor must prove that: (1) it has an allowed secured claim; (2) the claim is over-secured; (3) the underlying

² Of this amount, \$300 relates to the Motion for Relief from Stay and \$450 relates to whether Lender is entitled to recover the fees and costs.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

agreement provides for the borrower to pay the lender's attorney fees; and (4) the fees are reasonable. The contractual language providing that a borrower will pay the attorney fees of the lender must be express in order to provide a basis for an award under this statute. *In re Auto Specialties Mfg. Co.*, 18 F.3d 358 (6th Cir. 1994); *In re Schwartz*, 77 B.R. 177 (Bankr. S.D. Ohio 1987), *aff'd*, 87 B.R. 41 (D.C. S.D. Ohio 1988). An express provision is one that is "clear, definite and explicit . . ." BLACK'S LAW DICTIONARY 580 (6th Ed. 1990). Such a provision "adequately inform[s] the person or persons signing the agreement that they will be responsible for the Creditor's attorneys' fees." *In re LaRoche*, 115 B.R. 93, 96 (Bankr. N.D. Ohio 1990). Contract language that is ambiguous is construed against the drafter. *In re Delta America Re Insurance Co.*, 900 F.2d 890 (6th Cir. 1990).

The parties agree that Leader is an over-secured creditor. Leader is, therefore, entitled to recover its reasonable attorney fees to the extent that the Note and/or the Mortgage expressly provide for such recovery.

1. The Note

Leader relies on the reference in the Note to attorney fees found in paragraph 6. As Debtors point out, however, the plain words of this paragraph state that it only applies in the situation where Leader accelerates a mortgage balance following a default. There is no evidence in the record that such an acceleration took place and Leader does not argue to the contrary. Leader is not, therefore, entitled to recover attorney fees under this provision because it does not expressly provide for a fee award under the facts of this case.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

2. The Mortgage

Leader also contends that it is entitled to attorney fees under the Mortgage because the filing of a bankruptcy petition followed by a motion for relief from stay is a “legal proceeding that may significantly affect [its] rights in the Property.” Mortgage ¶ 6. Leader argues that the automatic stay imposed by 11 U.S.C. § 362 prevents Leader from foreclosing on the property and protecting its rights, as a result of which this proceeding may significantly affect its rights in the property. In opposition, Debtors argue that the language of this paragraph does not reference attorney fees and that, in any event, it applies to a different situation, one where the lender advances money “to protect the value of the real estate upon default by the consumer, or to protect its interests in any lawsuit or bankruptcy proceeding by the debtors or third parties which seeks to impair or set aside Leader’s lien upon the real estate.” (Debtors’ Memorandum at 6-7).

The threshold question is whether this paragraph expressly provides for the payment of attorney fees under any circumstances. In contrast to the language of the Note, this paragraph does not even include the words “attorney fees.” Instead, the paragraph tells Debtors that they are responsible for governmental or municipal charges, fines, and impositions, as well as the taxes, special assessments against the property, leasehold payments, ground rents, and insurance premiums referenced in paragraph 2 of the Mortgage. There is nothing in this language that would put Debtors on notice that they will be responsible for the lender’s attorney fees if they file for protection under the bankruptcy code. The lender, as the drafter of the Note and Mortgage, could have stated that the borrowers would pay the lender’s attorney fees, but it did not. Any ambiguity is resolved against Leader, who stands in the shoes of the drafter of the documents. To extend the existing language to make Debtors responsible for paying Leader’s

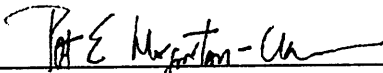
THIS OPINION IS NOT INTENDED
FOR PUBLICATION

attorney fees would be to add words that the parties themselves did not employ to reach a result that they did not express. That would not be enforcing the parties' contract, but creating one. Leader's argument that the language of the Mortgage unambiguously provides for the payment it seeks is, therefore, unavailing.

CONCLUSION

Leader did not meet its burden of proving that the loan documents expressly provide for Debtors to pay Leader's attorney fees and costs under the circumstances presented here. The balance of Leader's Motion for Relief from Stay requesting such an award will, therefore, be denied. A separate Order will be entered in accordance with this Memorandum of Opinion.

Date: 1 October 1997



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: David Altman, Esq.
Sheldon Stein, Esq.
Myron Wasserman, Trustee

By: Joyce L. Gordon, Secretary

Date: 10/1/97

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

97 OCT -1 PM 1:55

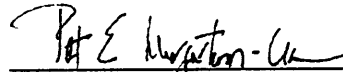
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 94-14737
)
MICHAEL YANOSCSIK) Chapter 13
KIMBERLY YANOSCSIK,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **ORDER**

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that the balance of The Leader Mortgage Co.'s Motion
for Relief from Stay regarding its recovery of attorney fees and expenses is denied.

Date: 1 Oct 1997



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: David Altman, Esq.
Sheldon Stein, Esq.
Myron Wasserman, Trustee

By: Joyce L. Gordon, Secretary

Date: 10/1/97