THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 98-10787
	)	
ROSALYN JOLLY,	)	Chapter 13
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

This case is before the Court on the Debtor's Objection to the claim filed by UC Lending Corp. ("UC Lending") and UC Lending's response to it. (Docket 13, 15). The Debtor only objects to the request that she pay the creditor's legal fees and costs. For the reasons stated below, the Debtor's Objection is sustained.

JURISDICTION

The Court has jurisdiction to determine 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)(B).

FACTS

The parties waived an opportunity to present evidence and submitted this matter on the pleadings at the November 10, 1998 hearing. Based on the pleadings, these are the agreed facts:

On February 23, 1995, the Debtor and Christopher Jolly signed a promissory note in favor of UC Lending in the principal amount of $26,700 (the "Note"). The Note is secured by a mortgage on certain real property (the "Mortgage"). UC Lending accelerated the debt due under the Note pre-petition and started foreclosure proceedings against the property.

The Note contains this language:

6. BORROWER'S FAILURE TO PAY AS REQUIRED

* * *

(B) **Default**
If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) **Notice of Default**
If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed to me.

* * *

(E) **Payment of Note Holder's Costs and Expenses**
If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law.

The Mortgage provides:

19. ACCELERATION; REMEDIES:

Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property . . . Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 19, including, but not limited to, costs of title evidence.

On February 6, 1998, the Debtor filed for protection under Chapter 13 of the Bankruptcy Code. UC Lending filed a secured claim in the amount of $32,755.56. Of that amount, $7,549.24 is for pre-petition arrearages. The arrearages include $1,784.64 for legal fees and costs (collectively referred to as "attorney fees").

DISCUSSION

I.

The Debtor argues that (a) the Note and Mortgage do not provide for her to pay UC Lending's attorney fees; and alternatively, (b) the amounts requested have not been substantiated.[1] UC Lending contends that it is entitled to recover its attorney fees under the express language of its Note and Mortgage quoted above.

II.

A filed claim is deemed allowed under 11 U.S.C. § 502(a) unless a party in interest objects. Upon objection, "[a] proof of claim executed and filed in accordance with [the bankruptcy] rules shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). Applying this standard, UC Lending's claim is presumed to be valid and the Debtor as the objecting party bears the initial burden of rebutting the prima facie validity. The objecting party does this by bringing "forward evidence equal in probative force to that underlying the proof of claim." *Fullmer v. United States (In re Fullmer)*, 962 F.2d 1463, 1466 (10th Cir. 1992). If the presumption is rebutted, UC Lending bears the ultimate burden of proving its claim. UC Lending also has the burden of proving that the attorney fees it requests

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[1] The Debtor's counsel raised this issue at the hearing and counsel for UC Lending responded as discussed below.

are reasonable. *See First Bank of Ohio v. Brunswick Apartments of Trumbull County, Ltd. (In re Brunswick Apartments of Trumbull County, Ltd.)*, 215 B.R. 520 (B.A.P. 6th Cir. 1998).

III.

UC Lending does not base its request on any Bankruptcy Code section or state law analysis and the Debtor does not challenge that point.[2] Instead, the parties have assumed that if the Note and Mortgage provide for the recovery of attorney fees then they are, in fact, recoverable to the extent that they are reasonable. The Court will proceed on the same assumption and address only the issue raised by the parties.

Ordinarily, parties to a dispute are responsible for paying their own attorney fees under the "American Rule." *Monroe Auto Equip. Co. v. Int'l Union*, 981 F.2d 261 (6th Cir. 1992). The parties can alter this by agreement. Such an agreement must include express language in order to be effective. *Manufacturers National Bank v. Auto Specialities Manufacturing Co. (In re Auto Specialities Manufacturing Co.)*, 18 F.3d 358 (6th Cir. 1994), *First Bank of Ohio v. Brunswick Apartments of Trumbull County Limited (In re Brunswick Apartments of Trumbull County Ltd.)*, 215 B.R. 520 (B.A.P. 6th Cir. 1998). In the context of 11 U.S.C. § 506(b), this Court has held:

> 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

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[2] At the hearing, however, both counsel referenced cases decided under 11 U.S.C. § 506(b). That section states: "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."

(Bankr. N.D. Ohio 1990). Contract language that is ambiguous is construed against the drafter. *In re Delta American Re Insurance Co.*, 900 F.2d 890 (6th Cir. 1990).

In re Williams, 1998 WL 372656 (Bankr. N.D. Ohio June 10, 1998).

UC Lending's proof of claim is prima facie valid under the Bankruptcy Rules. This shifts the burden to the Debtor to rebut the validity. In an effort to do so, the Debtor turns to the language of the loan agreement.

The Note

The Debtor correctly states that the Note does not include any unambiguous provision that she will be responsible for UC Lending's attorney fees. The absence of this language is enough to rebut the prima facie validity of the claim and to shift the burden back to UC Lending to establish that it is entitled to this recovery. UC Lending relies on language in the Note which provides for the Debtor's payment of "costs and expenses" incurred by UC Lending in enforcing the Note. There is nothing in this provision which would put the Debtor on notice that she is responsible for UC Lending's attorney fees. When UC Lending drafted the Note, it could have included such language, but it did not.[3] Moreover, to the extent the terms of the Note are considered ambiguous, that ambiguity must be resolved against UC Lending. The Note does not have a clear, definite, and explicit provision for the payment of attorney fees and, as a result, the Note does not provide a basis for UC Lending's recovery of such fees.

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[3] The Note and Mortgage attached to UC Lending's Proof of Claim indicate that the lender prepared the documents. (Claim No. 3).

The Mortgage

UC Lending also relies on language in the Mortgage which states that the Debtor will pay UC Lending's "expenses" associated with pursuing the remedy of foreclosure (among other remedies). This provision does not expressly create an obligation to pay UC Lending's attorney fees. Instead, it merely indicates that the Debtor is liable for expenses, and cites the costs of title evidence as an example of such a expense. As stated above, to the extent that the language is ambiguous, it is construed against the drafter. In the absence of an express agreement that this borrower is responsible for UC Lending's attorney fees, the Mortgage does not support UC Lending's claim for such fees.

IV.

The Debtor also contends that UC Lending failed to substantiate its request for attorney fees because it has done nothing more than state the total amount of its fees and costs. UC Lending's counsel argued at the hearing that it would not be cost effective to support its request with evidence of reasonableness. Even if the Note or Mortgage had express language requiring the Debtor to pay UC Lending's fees, those fees would only be recoverable to the extent that they are reasonable. Again looking to *In re Williams*:

> The Bank bears the burden of proving that the fees it requests are reasonable. *First Bank of Ohio v. Brunswick Apartments of Trumbull County, Ltd. (In re Brunswick Apartments of Trumbull County, Ltd.)*, 215 B.R. 520 (B.A.P. 6th Cir. 1998). This Circuit uses the lodestar method to determine reasonable attorney fees. That method requires one to determine a reasonable hourly rate for each professional involved in the case and multiply that by the reasonable amount of time expended for each activity. *In re Boddy*, 950 F.2d 334 (6th Cir. 1991). It is not possible to make that assessment in this case because the Bank has not named the time-billers, stated their individual hourly rate, or described the

> professional's experience level to support the hourly rate requested. Neither has it provided sufficient detail of the activities undertaken to permit a reasoned evaluation. *In re Davidson Metals, Inc.*, 152 B.R. 917 (Bankr. N.D. Ohio 1993), aff'd, 65 F.3d 168 (6th Cir. 1995). In the absence of that information, the Bank has not met its burden of proving that the fees are reasonable.

The Debtor effectively rebutted the prima facie validity of the amount of the attorney fees by pointing to the absence of any support for them. UC Lending then had the ultimate burden of proving that the fees are reasonable. It has not done so. This provides an additional basis for denying the attorney fees claim.

CONCLUSION

There is no express provision in the Note or Mortgage for UC Lending to recover its attorney fees from the Debtor. In the absence of such a provision, the fees are not properly allowed as part of UC Lending's proof of claim. Alternatively, even if the fees were expressly provided for in the contract documents, UC Lending did not prove that the amount sought is reasonable. For these reasons, the Debtor's Objection to UC Lending's claim is sustained. A separate Order will be entered in accordance with this Memorandum of Opinion.

Date: 25 Novmb 1998

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Lee Kravitz, Esq.
James Lawniczak, Esq.
Myron Wasserman, Trustee

By: Joyce L Gordon, Secretary

Date: 11/25/98

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ROSALYN JOLLY,	)	Chapter 13
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

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

IT IS ORDERED that the Debtor's Objection to UC Lending's claim is sustained.

Date: 25 Nov 1998

Pat E Morgenstern-Cla
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United States Bankruptcy Judge

Served by mail on: Lee Kravitz, Esq.
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