

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 47-1-15 Rdcv

Lake Sunapee, FSB vs. L&L Carter Excavating et al

ENTRY REGARDING MOTION

Count 1, Foreclosure (47-1-15 Rdcv)

Count 2, Foreclosure (47-1-15 Rdcv)

Title: Motion for Attorney's Fees in Excess of 2% (Motion 5)
Filer: Lake Sunapee Bank, FSB
Attorney: Paul S. Kulig
Filed Date: December 1, 2016 and February 9, 2017

No response filed

This is a foreclosure action in which the court has granted a motion for default judgment. Plaintiff seeks to collect attorney's fee not just for this action, but also for (1) an earlier foreclosure that was voluntarily dismissed by Plaintiff, and (2) related litigation that took place in the bankruptcy court.

Plaintiff has failed to point to any statutory or contractual basis for attorney's fees, which is necessary in our legal system. However, the court has found language in the note that provides for attorney's fees. *See, e.g.*, Complaint, Ex. A, Promissory Note ¶ 7(F):

If the Note Holder has required [Carter] to pay immediately in full . . . the Note holder will have the right to be paid back by [Carter] for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

Thus, Plaintiff is certainly entitled to reasonable fees for this case. However, the court does not agree that the fees for the other two cases are recoverable.

First, there is a basic practical reason for the court’s conclusion. A court may not award fees unless it finds that they are reasonable. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (Under bankruptcy code, “[r]ecovery of fees, costs, and charges, however, is allowed only if they are reasonable.”); Ring v. Carriage House Condo. Owners’ Ass’n, 2014 VT 127, ¶ 22, 198 Vt. 109 (Even where contract does not say so, “the unsuccessful party is responsible for paying only reasonably incurred fees”). Generally speaking, a court that has not heard a case has no way to evaluate that. Murphy v. Stowe Club Highlands, 171 Vt. 144, 162 (2000) (“Determining the amount of fees necessarily involves the fact-finder in the details of how the case was prepared and tried, including the tactical choices of the lawyer.”). Foreclosure cases may be an exception in that the fees are generally roughly the same in each case, and the steps taken are generally similar. Thus, the court could review a fee affidavit explaining what was done in the prior foreclosure and roughly determine whether the fees appear reasonable—particularly where the defendant is not objecting to the amount of those fees. However, the same is not true for the bankruptcy case. This court has no expertise in bankruptcy matters, and has studiously avoided learning much in that arena for the last 35 years of practicing law and serving on the bench. There is no way this court can possibly determine whether the fees charged in a proceeding in Judge Brown’s court are or are not reasonable.¹

Second, the court does not read the contractual language providing for fees here as permitting fees for other matters aside from this one. “Costs and expenses in

¹ Moreover, a quick search suggests that the substantive question of whether fees are properly awarded for work done in bankruptcy court is not necessarily a simple question. *See, e.g., In re Williams*, 224 B.R. 523, 527 (B.A.P. 2d Cir. 1998) (lengthy discussion about analysis in determining fee award); *In re Alpine Grp., Inc.*, 151 B.R. 931, 935 (B.A.P. 9th Cir. 1993) (Noting that counsel must satisfy “four elements in order to recover attorney’s fees under section § 506(b): 1.) there is an allowed secured claim; 2.) the creditor is over-secured; 3.) the fees are reasonable under the circumstances; and 4.) the fees are provided for under the agreement.”).

enforcing this note” are those expended to get to the judgment in this case. Ex. A. The note was not “enforced” in the other actions, as they both terminated before coming to a conclusion. Moreover, the bankruptcy case cannot be considered an “enforcement” action. Fourteen Corp. v. Magnoli, No. 13-11803, 2013 WL 6133116, at *4 (E.D. Mich. Nov. 21, 2013) (“bankruptcy case . . . is not an action to enforce the Guaranty or to collect on the note”). Fees could have been negotiated for in the prior foreclosure in exchange for the dismissal, and added to the debt by agreement. Plaintiff having failed to do that, the court sees no basis for awarding them here.

Third, courts do not award attorney’s fees unless the recipient is a “prevailing party.” The two cases that were dismissed before resolution do not meet this test. *Accord*, In re Estate of Drummond, 149 Cal. App. 4th 46, 53 (2007)(“[A]ppellants no more ‘prevailed’ than does a fleeing army that outruns a pursuing one. Living to fight another day may be a kind of success, and surely it is better than defeat. But as long as the war goes on, neither side can be said to have prevailed.”).

Finally, Plaintiff has pointed to no authority for the proposition that a court can award fees expended in litigating other cases. The court rejects such an analysis. *Accord*, Pastore-Borroto Dev., Inc. v. Marevista Apartments, M.B., Inc., 596 So. 2d 526, 526 (Fla. Dist. Ct. App. 1992) (“The bankruptcy court was the proper forum to determine Marevista’s entitlement to attorney’s fees incurred in the bankruptcy proceeding. The [foreclosure] court lacked jurisdiction to award such fees.”); Florida Fed. Sav. & Loan Ass’n v. Sanchez, 553 So. 2d 1254, 1255 (Fla. Dist. Ct. App. 1989) (Rejecting “the proposition that a state trial court may award attorney fees incurred by the mortgagee in a federal bankruptcy court proceeding. Moreover, the appellant furnished no precedent for such an award and, indeed, there is none.”).

Order

The motion to recover attorney's fees for a prior foreclosure case and a bankruptcy case, both of which terminated before judgment, is denied. Only the fees incurred in *this* case will be awarded. As no affidavit has been submitted stating the total for those fees, or what work they were for, please do so.

Electronically signed on March 14, 2017 at 03:25 PM pursuant to V.R.E.F. 7(d).

Helen M. Toor
Superior Court Judge

Notifications:

Paul S. Kulig (ERN 2799), Attorney for Plaintiff Lake Sunapee Bank, FSB
Stephanie A. Lorentz (ERN 3166), Attorney for Defendant Lema F Carter III