UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 98-23213

WILLIAM L. SAWERS, JR. A/K/A
WILLIAM L. SAWERS,

Debtor(s). **DECISION & ORDER**

BACKGROUND

On August 28, 1998, William L. Sawers, Jr. (the "Debtor") filed a petition initiating a Chapter 13 case. On September 8, 1998, Chase Manhattan Mortgage Corp. ("Chase"), which holds a first mortgage on the Debtor's residence, filed a proof of claim (the "Chase Secured Claim"). The Chase Secured Claim included mortgage arrearages which Chase alleged must be paid through the Chapter 13 plan: (1) a property appraisal fee of $350 (the "Appraisal Fee"); and (2) legal fees and costs in the amount of $3,653.15 (the "Chase Expenses") incurred by Chase in connection with a pre-petition state court mortgage foreclosure proceeding (the "Foreclosure Proceeding").

On October 1, 1998, the Debtor filed an Objection to the Chase Secured Claim (the "Objection") which alleged that: (1) the Appraisal Fee was excessive and unreasonable; and (2) the Chase Expenses were: (a) not itemized; (b) not fair and reasonable for an uncomplicated foreclosure proceeding; and (c) if allowed in full, burdensome and onerous to the Debtor who was supporting six children.

On October 13, 1998, Chase interposed an Affirmation in Opposition to the Objection (the "Opposition") which had attached as exhibits copies of: (1) an August 17, 1998 appraisal of the Debtor's residence that included photographs of the interior of the residence, comparables, and an extensive narrative; (2) an August 18, 1998 invoice for an appraisal (the "Appraisal") of the Debtor's residence in the amount of $350; (3) a July 8, 1998 Judgment of Foreclosure and Sale (the "Foreclosure Judgment"), signed by The Honorable Frederic T. Henry, Jr. ("Judge Henry"), which awarded Chase: (a) $1,255 for statutorily authorized costs and disbursements; (b) a statutorily authorized $300 additional allowance for costs; (c) $1,800 as reasonable attorney fees incurred by Chase's attorneys, and directed that a public notice of a foreclosure sale of the Debtor's residence be published in the Canandaigua Daily Messenger; and (4) an invoice in the amount of $298.15 from the Canandaigua Daily Messenger for publishing the public notice of the foreclosure sale.

The Opposition alleged that the Chase Expenses, consisting of the $298.15 for publication, as required by the Foreclosure Judgment, and the $3,355, awarded in the Foreclosure Judgment, were based upon the specific findings and directions of Judge Henry, and the Bankruptcy Court should not look behind those findings.

At the hearing on the Objection, the parties addressed whether the Bankruptcy Court should or could exercise its equitable powers to disregard the preclusive effect of the Foreclosure Judgment. At the request of the Court, the parties made submissions on the doctrines of *res judicata* and *collateral estoppel* as they applied to the facts of this contested matter.

DISCUSSION

A. The Appraisal Fee

I have reviewed the August 17, 1998 Appraisal prepared by Kenneth M. Benedict of LeRoy, New York, and find the appraisal fee of $350 to be a fair and reasonable fee for its preparation. I further find that obtaining the Appraisal was a reasonable and necessary expense incurred by Chase in connection with the Foreclosure Proceeding, so that it is an allowable component of the Chase Secured Claim.

B. The Chase Expenses

We know from the Decision of the United States Court of Appeals for the Second Circuit in *Kelleran v. Andrijevic*, 825 F.2d 692 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) ("Andrijevic") that: (1) in accordance with 28 U.S.C. §1738, Bankruptcy Courts are required to give preclusive effect to state court judgments whenever the courts of that state would do so; (2) Bankruptcy Courts may look beyond a state court default judgment only where the judgment was procured by fraud or collusion, or where the court which rendered the judgment lacked jurisdiction; and (3) bankruptcy proceedings may not be used to re-litigate issues already resolved in a court of competent jurisdiction.

In this case, there have been no allegations that the Foreclosure Judgment was procured by fraud or collusion, and it is clear that, because the Debtor was personally served in the Foreclosure Proceeding, the state court had both subject matter and personal jurisdiction.

It is also clear that the principal component of the Foreclosure Judgment that the Debtor disputes, the reasonable attorney fees incurred by Chase, were specifically addressed and determined by Judge Henry. Included as an exhibit to the Opposition was a copy of the Affirmation of

Regularity in Support of the Motion for Default Judgment (the "Affirmation") that was presented to Judge Henry in connection with the Foreclosure Judgment. The Affirmation detailed 32.25 hours of time that had been or would be expended in connection with the prosecution of the Foreclosure Proceeding, and it requested the allowance of reasonable attorney fees of $4,031.25, representing 32.25 hours of time at the rate of $125 per hour. Judge Henry, after reviewing the request, awarded the attorneys for Chase $1,800 as reasonable attorneys fees.[1] Although it is unclear whether Judge Henry determined that $1,800 represented a reasonable fee because he believed that the hourly rate requested was too high, the hours expended or to be expended were excessive, an award should not be made for prospective services, or some combination of these reasons, he did finally resolve the issue of a reasonable fee in the Foreclosure Judgment. This Court, as part of a contested matter to allow or disallow the Chase Secured Claim, will not upset that determination and resolution. *See* *Andrijevic* and *Matter of Farrell*, 27 B.R. 243 (Bankr. E.D.N.Y. 1982).

The Debtor contends that what is a reasonable attorney fee is a particular issue or determinative fact within the Foreclosure Judgment, so that it is the doctrine of *collateral estoppel* which must be considered by the Court, rather than the doctrine of *res judicata*, when determining whether this issue can be re-litigated between the same parties. Conceding to the Debtor for the purposes of this Decision & Order that the determination of what is a reasonable attorney fee is a determinative issue of law or fact, and the doctrine of *collateral estoppel* applies, under the four-part test adopted by this Court is its unpublished Decision & Order in *In re Noble,* A.P. No. 92-2007

[1] The services enumerated in the Affirmation included 11 hours of time in connection with the sale and the completion of the Foreclosure Proceeding after the sale. These services were never performed because the automatic stay went into effect at the time of the filing of the Debtor's petition prior to the scheduled foreclosure sale.

(Bankr. W.D.N.Y. 1992),[2] clearly Judge Henry's determination in the Foreclosure Judgment, which was not appealed, meets the test and bars the re-litigation of what is a reasonable attorney fee as a component of the Chase Secured Claim in this contested matter.

The principal contention of the Debtor as to whether the doctrine of *collateral estoppel* should apply, is that, since the Foreclosure Judgment was obtained by default, the Debtor had no input as to what was a reasonable attorney fee. However, as this Court stated in its unpublished Decision & Order in *In Re Colombo*:

> Further, the Second Circuit has held that what is required is not necessarily the full and complete litigation of an issue but that there was a full and fair opportunity to litigate the issue in a prior action or proceeding. That Court has held that the "proverbial 'right to a day in court' does not mean the actual presentation of the case in the context of a formal, evidentiary hearing, but rather 'the right to be duly cited to appear and to be afforded an opportunity to be heard.'" *Mitchell v. National Broadcasting Co.*, 553 F.2d 265, 271 (2d Cir. 1977) (citing *Olsen v. Muskegon Piston Ring Co.*, 117 F.2d 163, 165 (6th Cir. 1941)

In re Colombo, A.P. No. 93-2225 (Bankr. W.D.N.Y. 1994).

In this case the Debtor was personally served in the Foreclosure Proceeding, and, even if he did not believe he could contest liability, he could have requested specific notice of the application

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[2] The generally accepted four-part test for *collateral estoppel* is:

1) The issue sought to be precluded must be the same as that involved in the prior action;
2) The issue must have been actually litigated;
3) It must have been determined by a valid and final judgment; and
4) The determination must have been essential to the final judgment.

Noble, A.P. No. 92-2007 at p. 2-3.

for the Foreclosure Judgment. However, he failed to do so. In every way he had the opportunity to litigate the issue of the reasonable attorney fees to be included in the Foreclosure Judgment, but he failed to take advantage of that opportunity. Furthermore, if he failed to obtain competent counsel[3], that is the Debtor's responsibility and he must accept it.

CONCLUSION

The Chase Secured Claim is allowed in full for the Appraisal Fee and the Chase Expenses included in the Foreclosure Judgment. The allowance is without prejudice to the right of the Debtor to move in state court to have Judge Henry reconsider: (1) the issue of reasonable attorney fees to the extent that the amount awarded might be contingently reduced because it included an allowance for services which were never performed due to the filing of the Debtor's Chapter 13 case; or (2) whether the statutorily authorized additional allowance of $300 should be allowed in full when a foreclosure is not completed because of a bankruptcy filing.[4]

IT IS SO ORDERED.

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[3] In a November 17, 1998 Letter Memorandum of Law submitted on behalf of the Debtor, it was alleged that after being served with the Summons & Complaint in the foreclosure proceeding, the Debtor hired and paid a New York City law firm to respond to the pleadings and negotiate a settlement, however, only a matter of days before the foreclosure sale he was advised by them that nothing could be done.

[4] Any reduction would presumably be for the purposes of a Chapter 13 plan, but would be inapplicable if the plan were not completed or the stay otherwise terminated and the pending Foreclosure Proceeding continued.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: January 5, 1999