

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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|-------------------|---|-------------------------|
| IN THE MATTER OF: |) | |
| |) | |
| RANDY C. MELCHER, |) | CASE NO. BK09-40653-TJM |
| |) | |
| Debtor(s). |) | CH. 12 |

ORDER

Hearing was held in Lincoln, Nebraska, on May 5, 2010, on the amended motion for attorney's fees, expenses, and interest filed by Alesa Melcher (Fil. #201) and objections by the Chapter 12 trustee (Fil. #210) and the debtor (Fil. #219). John C. Hahn appeared for the debtor, David E. Copple appeared for Alesa Melcher, and James A. Overcash appeared as the Chapter 12 trustee. Post-hearing briefs have been filed and the matter is now ready for decision.

The motion is denied.

The marriage of Randy and Alesa Melcher was dissolved in August 2008. In connection with the decree of dissolution, the District Court of Madison County, Nebraska, entered a monetary judgment of more than \$400,000.00 against Randy to equalize the distribution of marital equity. The court also ordered Randy to pay \$9,000.00 to Alesa for her attorney fees. On appeal, the Nebraska Court of Appeals adjusted the cash property settlement payment to \$394,481.69. At the time the original motion was filed, he had not made any payments on that debt. Randy filed this Chapter 12 bankruptcy case in March 2009. His proposed plans of reorganization have not been confirmed, in part because the proposed treatment of Alesa's claim has been determined to be unreasonable, unfair, and in bad faith. It is undisputed that sufficient equity exists in the marital assets awarded to Randy, beyond the amount owed to secured creditors, to meet the debt owed to Alesa.

Alesa's attorney has now moved for attorneys' fees pursuant to 11 U.S.C. § 506(b), by which oversecured creditors may recover fees and costs. Counsel requests \$24,688.12 in fees and expenses based on § 506(b)¹ of the Bankruptcy Code and section 42-371² of the Nebraska Revised Statutes,

¹§ 506. Determination of secured status

...

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery [of the trustee's costs of sale], 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 or State statute under which such claim arose.

²The relevant portion of the version of the statute in effect on the dissolution date is as
(continued...)

which creates a statutory lien in favor of a holder of a domestic relations judgment. Property settlements incorporated into dissolution decrees are subject to section 42-371. Lacey v. Lacey, 337 N.W.2d 740 (Neb. 1983).

To recover fees under § 506(b), the creditor must establish that (1) it is oversecured in excess of the fees requested; (2) the fees are reasonable; and (3) the agreement or state statute giving rise to the claim provides for attorneys' fees. First W. Bank & Trust v. Drewes (In re Schriock Constr., Inc.), 104 F.3d 200, 201 (8th Cir. 1997). When the motion has a statutory premise, "the right to attorneys' fees, costs, or charges must be authorized by or provided for in the statute under which the secured claim actually arose." In re Astle, 364 B.R. 735, 741 (Bankr. D. Idaho 2007) (citing In re Davis, 352 B.R. 651 (Bankr. N.D. Tex. 2006)).

Section 42-371 plainly states that all judgments and order for payment of money, in divorce and annulment actions, are liens upon the debtor's property. The Madison Country District Court issued judgments and orders directing Randy to pay certain of Alesa's attorneys' fees. Therefore, section 42-371 does provide for Alesa's attorneys' fees as part of the claim to the extent those fees were included in court orders concerning the dissolution action. However, the statute is not broad enough to extend to the fees requested for efforts to collect the property settlement or pursue Alesa's claim in this bankruptcy proceeding. Therefore, Alesa's attorneys' fees are not recoverable under § 506(b).

Alesa argues in the alternative that the limited exception to the American Rule for "fee shifting as an equitable remedy to further the interest of justice and rectify certain aggravated conduct amounting to abusive or bad faith litigation practices" is applicable here. Seimer v. Nangle (In re Nangle), 281 B.R. 654, 659 (B.A.P. 8th Cir. 2002). Such conduct consists of "the willful disobedience of a court order, bad faith, or vexatious, wanton, or oppressive behavior." Id. While Randy's treatment of Alesa's claim has heretofore been unfair and his plans found to have been proposed in bad faith, he subsequently has sold real property and made payments to Alesa. Accordingly, I cannot find that Randy's actions with regard to Alesa in this case have been vexatious, wanton, or oppressive. For that reason, the motion for attorneys' fees must be denied.

²(...continued)
follows:

§ 42-371. Judgments and orders; liens; release; time limitation on lien; security; attachment; priority.

Under the Uniform Interstate Family Support Act and sections 42-347 to 42-381, 43-290, 43-512 to 43-512.10, and 43-1401 to 43-1418:

(1) All judgments and orders for payment of money shall be liens, as in other actions, upon real property and any personal property registered with any county office and may be enforced or collected by execution and the means authorized for collection of money judgments[.]

IT IS ORDERED: The amended motion for attorney's fees, expenses, and interest filed by Alesa Melcher (Fil. #201) is denied.

DATED: June 9, 2010

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

Notice given by the Court to:

*David E. Copple
John C. Hahn
James A. Overcash
United States Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.