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HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:	)	BAP No.	HI-06-1328-KMoB
	)		
LEHUA HOOPAI,	)	Bk. No.	04-02511
	)		
Debtor.	)		
	)		
LEHUA HOOPAI,	)		
	)		
Appellant,	)		
	)		
v.	)		
	)		
COUNTRYWIDE HOME LOANS, INC.;	)		
JAMES PELOSI, Co-Trustee of	)		
the Maluhia Trust; MARCELLE	)		
LOREN, Co-Trustee of the	)		
Maluhia Trust.	)		
	)		
Appellees.	)		
	)		

O P I N I O N

Argued and Submitted on January 19, 2007
at Honolulu, Hawaii

Filed - March 28, 2007

Appeal from the United States Bankruptcy Court
for the District of Hawaii

Hon. Robert J. Faris, Chief Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI and BRANDT, Bankruptcy Judges.

1 KLEIN, Bankruptcy Judge:

2
3 The court approved the chapter 13 debtor's \$300,000 sale of
4 property on which she owed \$158,935, but closing was delayed for
5 a year by an appeal designed to revive the creditor's incomplete
6 \$159,000 prepetition foreclosure sale and by the attorneys' fees
7 dispute that is the subject of this appeal. The court ruled, In
8 re Hoopai, 348 B.R. 528 (Bankr. D. Haw. 2006), that the mortgagee
9 was "prevailing party" under Hawaii law and awarded all the
10 mortgagee's requested fees and costs (\$83,542.87), in addition to
11 the \$176,927.72 that had been paid to extinguish the debt at
12 closing. It correlatively rejected the debtor's request for fees
13 and exonerated the foreclosure purchaser's supersedeas bond.

14 We hold that the debtor was "prevailing party" in all post-
15 bankruptcy litigation and VACATE and REMAND because this
16 conclusion materially alters the situation and potentially
17 exposes the mortgagee to a fee award in light of the Supreme
18 Court's decision in Travelers Cas. & Sur. Co. v. Pac. Gas & Elec.
19 Co., 127 S. Ct. 1199, No. 05-1429 (Mar. 20, 2007) ("Travelers"),
20 overruling Fobian v. W. Farm Credit Bank (In re Fobian), 951 F.2d
21 1149, 1153 (9th Cir. 1991).

22 23 FACTS

24 Appellee Countrywide Home Loans held two mortgages on real
25 property owned by appellant Lehua Hoopai in Hawaii, on which a
26 total of \$158,935 was owed as of October 15, 2004, when it
27 auctioned the property to the appellee trustees of Maluhia Trust
28 ("Maluhia") for \$159,000. The nonjudicial foreclosure auction

1 had been rescheduled from April 23, 2004, because Hoopai filed a
2 pro se chapter 11 case that day, which case had procedural
3 difficulties and was voluntarily dismissed on September 8, 2004.

4 Hoopai, who had contracted on September 21, 2004, to sell
5 the property for \$300,000, filed a chapter 13 case on October 18,
6 2004, before title on the \$159,000 foreclosure passed to Maluhia.

7 Countrywide, joined by Maluhia, filed a motion for relief
8 from the automatic stay in order to complete the foreclosure
9 transfer. On January 12, 2005, the court denied the Countrywide-
10 Maluhia motion, rejecting the argument that the auction
11 extinguished the debtor's interest and holding that the residence
12 was property of the estate. Maluhia appealed.

13 On January 24, 2005, the court granted the debtor's motion
14 to sell the property for \$300,000 to her prior purchaser over
15 Maluhia's opposition. Maluhia appealed.

16 The chapter 13 plan was confirmed over Countrywide's
17 objection on February 23, 2005.

18 The court granted Maluhia's motion for stay pending appeal
19 of the stay relief and sale orders, with a supersedeas bond of
20 \$335,000. It ordered the debtor to pay insurance, property taxes
21 and assessments and ordered the debtor's purchaser (already in
22 possession) to pay \$1,250 per month rent into a rent trust fund
23 from which only insurance, taxes, and assessments could be paid.

24 The district court affirmed the stay relief and sale orders
25 in October 2005, but a dispute with Countrywide led the debtor to
26 file a second sale motion, which was granted on terms that
27 required attorneys' fees be held in escrow.

28 Although Countrywide did not participate in Maluhia's appeal

1 and purportedly merely "monitored" the proceedings (348 B.R. at
2 535 n.3), its fee demand rose from the \$36,143.31 in its proof of
3 claim on February 7, 2005, to \$57,211.14 as of December 31, 2005,
4 and, with costs, ultimately rose to \$83,542.87.

5 The sale closed on January 31, 2006, whereupon Countrywide
6 was paid \$176,927.72, representing principal, interest, late
7 charges, trust fund shortages, and miscellaneous charges other
8 than the attorneys's fees and costs to be held in escrow.

9 The instant appeal is from the order resolving the debtor's
10 motion seeking determinations that: (1) Countrywide's attorneys'
11 fees were excessive; (2) the debtor recover her attorneys' fees
12 either from Countrywide or Maluhia; (3) the debtor recover from
13 the Maluhia supersedeas bond mortgage interest, real property
14 taxes, insurance premiums, and repair and trust account expenses
15 accrued during the appeal, and any attorneys' fees that the court
16 awarded to Countrywide; and (4) the trust account funds either be
17 paid to the debtor or to the chapter 13 trustee to fund her plan.
18 Countrywide and Maluhia opposed the debtor's motion.

19 The court ordered that: (1) Countrywide recover from the
20 sale escrow all its claimed \$83,542.87 in attorneys' fees and
21 costs; (2) the debtor recover from the rent trust fund the
22 mortgage interest, property taxes, insurance premiums, and repair
23 expenses incurred during Maluhia's appeal, plus expenses of the
24 rent trust fund; and (3) that there be no recovery against the
25 supersedeas bond.

26 This timely appeal ensued.
27
28

1 JURISDICTION

2 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
3 We have jurisdiction over the final order per 28 U.S.C. § 158(a).
4

5 ISSUES

6 (1) Whether the court correctly concluded that Countrywide
7 was the “prevailing party” for purposes of Hawaii law.

8 (2) Whether the amount of the fee award was excessive.

9 (3) Whether the court correctly refused to shift payment of
10 Countrywide’s attorneys’ fees from the debtor to Maluhia.

11 (4) Whether the court correctly exonerated Maluhia’s
12 supersedeas bond.
13

14 STANDARD OF REVIEW

15 We review findings of fact for clear error and issues of law
16 de novo. Litton Loan Serv’g, LP v. Garvida (In re Garvida), 347
17 B.R. 697, 703 (9th Cir. BAP 2006). Clear error exists when, on
18 the entire evidence, the reviewing court is left with the
19 definite and firm conviction that a mistake has been committed.
20 Easley v. Cromartie, 532 U.S. 234, 242 (2001); Lentini v. Cal.
21 Ctr. for the Arts, Escondido, 370 F.3d 837, 843 (9th Cir. 2004).
22

23 DISCUSSION

24 Although we are presented with a number of issues, the
25 linchpin of this appeal is the bankruptcy court’s determination
26 that Countrywide is “prevailing party” in the manner that
27 qualifies under Hawaii law for honoring the attorneys’ fees
28 provisions in the underlying notes.

The bankruptcy court ruled that the fee award to Countrywide is subject to Haw. Rev. Stat. § 607-14, and the parties agree that this statute is applicable to this appeal.

The basic “prevailing party” analysis is straightforward. The \$300,000 sale price exceeded the Countrywide debt of less than \$176,927.72 at the time of closing, which makes Countrywide an “oversecured” creditor. The Bankruptcy Code provides that an oversecured creditor is entitled to “reasonable fees, costs, or charges provided for under the agreement under which such claim arose.” 11 U.S.C. § 506(b) (2000). The bankruptcy court ruled, correctly, that § 506(b) does not operate to create a right of attorneys’ fees that does not already exist and, accordingly, focused on the underlying agreements that are governed by Hawaii law. Hoopai, 348 B.R. at 535. This comports with the result in Travelers, even though the Supreme Court declined to consider the implications of § 506(b). Travelers, slip op. at 10-12.¹

Countrywide’s notes and mortgages provided that, after default, “Lender may require Borrower to pay costs and expenses including reasonable and customary attorney’s fees for enforcing this Note to the extent not prohibited by applicable law” and that if there is “a legal proceeding that may significantly affect Lender’s rights in the Property (such as a proceeding in bankruptcy . . .), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender’s

¹In light of Travelers, we need not decide whether § 506(b) is essential to a fee award. Countrywide’s oversecured status triggers § 506(b), independent of the Travelers analysis.

rights in the Property” Hoopai, 348 B.R. at 533-34
(emphasis supplied).

The final link is the Hawaii statute, Haw. Rev. Stat. § 607-14, that regulates contractual attorney’s fee provisions:

In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney’s fee, there shall be taxed as attorneys’ fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys’ fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.

Haw. Rev. Stat. § 607-14 (emphasis supplied).

Under this statutory regime, contractual fee provisions are automatically a loser-pays two-way street, are limited to those fees that are determined by the court to be reasonable, and cannot exceed 25 percent of the amount in controversy.

The key requirement, then, is that Countrywide must have been the “prevailing party” for purposes of Haw. Rev. Stat. § 607-14 in order to qualify for any fees.

As the bankruptcy court noted, identifying the prevailing party under Hawaii law can be complex. What is required is that the party have prevailed on the “disputed main issue” and not necessarily on all issues. Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc., 575 P.2d 869, 879 (Haw. 1978); Hoopai, 348 B.R. at 534. The court identifies the principal issues raised by the pleadings and proof and then determines, “on balance, which party

1 prevailed on the issues." Village Park Cmty. Ass'n v. Nishimura,
2 122 P.3d 267, 283 (Haw. Ct. App. 2005) (citation omitted);
3 Hoopai, 348 B.R. at 534.

4 Applying this analysis, the bankruptcy court ruled that, as
5 between Countrywide and Hoopai, the "disputed main issue" was
6 "enforcement of Countrywide's liens and payment of Countrywide's
7 secured claim" and that the issues on which Countrywide litigated
8 and lost in the bankruptcy court were "subsidiary" to lien
9 enforcement and payment. Hoopai, 348 B.R. at 535. We are
10 persuaded with a definite and firm conviction that this
11 determination was, to the extent it is a factual finding, clearly
12 erroneous insofar as it relates to the period beginning with the
13 filing of the bankruptcy case on October 18, 2004.

14 Neither the validity of Countrywide's liens nor the prospect
15 for full payment were ever in question in the bankruptcy case in
16 light of the substantial equity cushion.

17 Countrywide was involved in three substantive disputes
18 (other than the present fee dispute) in the bankruptcy case.
19 First, Countrywide contended that its non-judicial foreclosure
20 auction on October 15, 2004, operated to extinguish Hoopai's
21 interest in the property such that the property was not property
22 of the estate. The court ruled to the contrary. Second,
23 Countrywide contended that there was cause to grant relief from
24 the automatic stay. The court denied the motion. Third, after
25 the court had approved the sale by Hoopai for \$300,000, which
26 would pay Countrywide's mortgages in full through escrow,
27 Countrywide opposed confirmation of Hoopai's chapter 13 plan.
28 The plan was confirmed over Countrywide's objection. In

1 addition, it was not necessary to devote \$20,000 of time to
2 "monitor" and "confer with" counsel in the Maluhia appeal in
3 which the district court affirmed the bankruptcy court's orders.
4 In sum, the "disputed main issue" surrounding all disputes
5 between Hoopai and Countrywide during the chapter 13 case was
6 whether Hoopai would be allowed to complete her \$300,000 sale.
7 She plainly was the prevailing party.

8 Nor can it be said that full payment of the liens was
9 seriously in doubt. Since the \$300,000 sale had already been
10 agreed upon before the outset of the case and was approved
11 relatively promptly, Countrywide could have been paid in full
12 promptly if it had not formed an alliance with Maluhia to try to
13 force through the \$159,000 auction sale and had not thereafter
14 opposed the confirmation of Hoopai's chapter 13 plan. It always
15 stood to be paid in full and was paid all interest and charges
16 that accrued in the interval between the filing of the bankruptcy
17 case and the closing on January 31, 2006, at which time it
18 received \$176,927.72. Moreover, to the extent there was delay,
19 responsibility must be shared by Countrywide which could have
20 been paid a year earlier if it had not tried to force the
21 completion of its \$159,000 auction sale to Maluhia.

22 In addition, the reasonableness of Countrywide's fees is
23 also open to question. The analysis here implicates both Hawaii
24 law and federal law because Haw. Rev. Stat. § 607-14 imposes a
25 "reasonable" requirement, as does Bankruptcy Code § 506(b).²

26
27 ²In light of the disposition of this appeal, we need not,
28 and do not, express views about whether there are any material
differences between what is "reasonable" for purposes of Haw.

1 Although Countrywide asserts that it merely "monitored" the
2 Maluhia appeal of the \$300,000 sale, the assertion is belied by
3 the \$21,067.83 difference between the Countrywide fee request of
4 \$36,143.31 in its February 7, 2005, proof of claim and its
5 December 31, 2005, request of \$57,211.14 (and by its final
6 request of \$83,542.87). Mere monitoring for less than a year
7 does not reasonably cost \$21,067.83 in professional fees.

8 9 II

10 Our conclusion that Countrywide was not the "prevailing
11 party" for purposes of Haw. Rev. Stat. § 607-14 with respect to
12 what occurred during the bankruptcy case requires that the order
13 on appeal be vacated and remanded for further consideration.
14 This so materially changes the overall equation that it is not
15 necessary, and perhaps counterproductive, to determine the other
16 fact-specific issues that have been presented by the appellant.
17 Since the Supreme Court in Travelers overruled the Ninth
18 Circuit's Fobian rule and made clear that contract-based fees
19 incurred in the course of litigating issues of federal bankruptcy
20 law may be awarded pursuant to state law, Hoopai's request for
21 fees under Haw. Rev. Stat. § 607-14 will need to be revisited.

22 On remand, the court might determine that Hoopai is entitled
23 to her reasonable fees as "prevailing party," or it may decide
24 that no fees are reasonable for purposes of the statute and in
25 light of the circumstances of the case and the history of the

26 _____
27 Rev. Stat. § 607-14 and what is "reasonable" for purposes of
28 Bankruptcy Code § 506(b) or whether, in the wake of Travelers,
the result would differ if Countrywide were to be undersecured.

1 prior relationship between Hoopai and Countrywide.³ Moreover,
2 the outcome of that analysis may cause the court to take a
3 different view of whether the Maluhia supersedeas bond should be
4 exonerated. We do not wish to constrain its latitude to deal
5 with matters we have not decided.

6
7 CONCLUSION

8 For the foregoing reasons, we hold that Hoopai was
9 “prevailing party” under Hawaii law with respect to events
10 commencing October 18, 2004, and, accordingly, VACATE and REMAND
11 for further proceedings consistent with this decision.

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27 ³We also note that the record is opaque about how more than
28 25 percent of \$176,927.72 (i.e. \$44,231.93) could have been
awarded in light of the 25 percent limit imposed by Haw. Rev.
Stat. § 607-14.