

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF) CASE NO. BK00-42256
) A
GOLD'S LIMITED PARTNERSHIP,)
) Chapter 11
DEBTOR(S))
_____) Filing No. 76
)
)
Plaintiff(s))
vs.) **MEMORANDUM OPINION**
)
)
) DATED: December 11, 2002
Defendant(s)) TRIAL DATE: August 26 and 27, 2002
_____)

Trial was held on August 26 and 27, 2002, regarding Debtor's Objection to Claim of U.S. Bank; Amended Claim of SN Commercial L.L.C. No. 11 with its Amendment No. 13; Amended Claim of SN Commercial L.L.C. No. 12 with its Amendment No. 14. Appearances: Victor Covalt for Debtor, Stephen Nelsen and Michael Washburn for SN Commercial, and Douglas Quinn for Official Committee of Equity Security Holders. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

Background

This contested matter concerns an objection filed by the debtor to a portion of the claim previously held by U.S. Bank and now held by SN Commercial, L.L.C. The portion of the claim objected to is the amount of \$1,155,601.93 which is the amount of accrued interest as of July 31, 1995, on the note designated as the 1990 "B Note." The objection asserts that such amount was not included in the 1995 "B Note," which was substituted for the debtor's obligation on the 1990 "B Note," and is not payable by the debtor. In addition, the objection asserts that interest on the 1995 "B Note" accrued at 7 percent per year from its effective date to July 31, 2000, and that no interest accrued thereafter.

Applicable Law

Nebraska law governs the agreement. It is the law of Nebraska that when the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties, are not in dispute, the proper construction of such a contract is a question of law. Mecham v. Colby, 156 Neb. 386, 397, 56 N.W.2d 299, 304-05 (1953); Meyers v. Frohm Holdings, Inc., 211 Neb. 329, 333, 318 N.W.2d 716, 719 (1982); Spittler v. Nicola, 239 Neb. 972, 978, 479 N.W.2d 803, 808 (1992).

Whether a contract is ambiguous is a question of law to be determined by the trial court. ACTONet, Ltd. v. Allou Health & Beauty Care, 219 F.3d 836, 843 (8th Cir. 2000), *cited with approval in* Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1040 (8th Cir. 2000). In the Nebraska Public Power District v. MidAmerican Energy Company case ("NPPD"), the Eighth Circuit Court of Appeals performed an exhaustive review of Nebraska contract case law. The court outlined general principles of Nebraska law with regard to construction of a contract. Those principles are summarized, without additional citation, as follows:

1. The terms of the contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
2. A contract must be interpreted to give effect to the parties' intent at the time the contract was drafted.
3. The contract must be construed as a whole, and if possible, effect must be given to every part thereof.
4. A party may not pick and choose those portions that favor its positions.
5. In reading a contract for ambiguity, the specific governs the general.
6. In determining whether a contract is ambiguous, under Nebraska law, a court may look to course of performance evidence.

7. When so read, a contract is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.

8. A court must determine the meaning of an unambiguous contract without resort to extrinsic evidence. However, if the contract is ambiguous – that is, if it may objectively be understood in more than one way – then extrinsic evidence is admissible.

234 F.3d at 1040-41.

Decision

The agreement unambiguously provides that the debtor, upon execution of the 1995 "B Note," is required to pay, at the expiration of the term of the note on July 31, 2000, the principal amount of \$3,526,217.29 owed on the 1995 "B Note" plus interest accruing from and after execution of the 1995 "B Note" at the rate of 7 percent per annum through and including a date certain, July 31, 2000. The objection to claim is therefore granted.

Facts

In the joint pretrial statement, the parties stipulated to the following facts:

A. The outstanding indebtedness on the 1990 "B Note" as of August 1, 1995, was \$3,526,217.29 principal and \$1,155,601.93 accrued interest.

B. The debtor paid the accrued interest on the 1990 "A Note" set forth in Section 1.2 of the Third Modification in the amount of \$39,285.51.

C. The 1995 "A Note," 1995 "B Note," and the "Third Modification to Loan Documents" were executed by debtor in March 1996 at the same time and as part of the same transaction between the debtor and U.S. Bank, along with other documents.

D. The principal balance due on the 1995 "A Note" was \$4,714,261.29 as of November 3, 2000, and the principal balance due on the 1995 "B Note" was \$3,292,583.26 as of November 3, 2000 (the petition date).

E. U.S. Bank is a successor in interest to FirstTier Bank and was the owner and holder of the 1995 "A Note" and the 1995 "B Note" prior to June 2001. (U.S. Bank purportedly conveyed its interest in the claim to SN Commercial, L.L.C., prior to trial.)

Discussion

The "B Note" at issue is one part of a "series of agreements" between the parties entered into between 1986 and 1995 to initially finance and eventually restructure the financing of the Gold's building redevelopment in downtown Lincoln, Nebraska. The "series of agreements" includes the original loan documents, construction documents, Deed of Trust, and the original and substituted promissory notes. All of the documents executed by the parties are considered as part of the "agreement" being construed.

In 1987, the developer of the Gold's building and a predecessor to SN entered into certain contractual arrangements representing a loan of approximately \$12.5 million. The parties had, in 1986, entered into the original loan agreement and, therefore, the 1987 arrangement was identified as the "First Modification."

In 1990, the balance due was \$13,437,281.12 and the parties entered into the "Second Modification." At that time, they divided the outstanding indebtedness into three notes: the "A Note" for \$5 million, the "B Note" for \$3,528,995.89, and the "C Note" for \$4,908,325.23. The "C Note" was assigned to an entity separate from but related to the developer. The "C Note" contained certain provisions which would restrict payment on the "C Note" indebtedness until the "A Note" and "B Note" were paid.

The 1990 "B Note" provided for specific terms with regard to the payment requirements, the interest rate, the default interest rate and the total amount anticipated to be due at maturity, July 31, 1995. In addition to provisions for payment of interest and principal, the 1990 "B Note" (Trial Ex. 12, Fil. #288), in the middle of paragraph 4, provides:

[S]hould interest not be paid when due, it shall thereupon be treated like principal and bear like interest as the principal. Additionally, in the event of any default under this Promissory Note, the interest rate provided for herein shall immediately, without notice, increase to the Interest Rate then in

effect plus two percent (2%) per annum (the "Default Rate").

The "Second Modification," at Section 2.1(a)(ii), contained terms consistent with the 1990 "B Note." The amount anticipated to be due at maturity included the outstanding principal amount plus accrued interest at the non-default rate.

Effective August 1, 1995, the parties entered into the "Third Modification" (Trial Ex. 13, Fil. #289). By its terms, the "Third Modification" provides for renewal and extension of the "A Note," the "B Note," and the "C Note." Although the "C Note" was no longer held by the bank which held the "A Note" and the "B Note," the "C Note" extension and renewal were a part of the 1995 transaction because the debtor/obligor on all of the notes was restricted from making payment on the "C Note" until and unless all payments had been made on the principal and accrued interest of the "A Note."

The "Third Modification" provided for new notes to be substituted for the 1990 "A Note," "B Note," and "C Note." The "Third Modification," although renewing and extending the "B Note," also specifically changed the terms of the "B Note." The 1995 "B Note" contains no default rate of interest, in contrast to a default rate of interest of 2 percent above the "note rate" in the 1990 "B Note." The 1995 "B Note" specifically provides for interest to begin to accrue, on the specified principal amount, on a date certain, and terminate on a date certain. The 1995 "B Note" contains no language concerning capitalization of accrued and unpaid interest at the maturity date. The 1990 "B Note" contained very specific language about capitalization of interest upon maturity.

The "Third Modification" was executed March 12, 1996, and effective August 1, 1995. At that time, as stipulated in the pretrial statement, the accrued and then-unpaid interest on the "A Note" was paid in full. The "A Note" was renewed at the principal balance of \$4,714,261.29. The "A Note" and the "Third Modification" made specific reference to retroactive changes in the computation of and payment of interest from August 1, 1995, to the date of signing. Terms were inserted for additional payment of interest, part of which was to be paid monthly and part of which was to be paid quarterly. The "A Note" provided for post-maturity interest at the default rate of 2 percent over the combined "A Note" interest rate of 10 percent per annum. There apparently is no dispute with regard to the "A Note." The

record reflects that the debtor made all payments due on the "A Note" until July 2000.

The 1995 "B Note" (Trial Ex. 10, Fil. #286) executed in conjunction with the "Third Modification" was in the principal amount of \$3,526,217.29. The "Third Modification" acknowledges the accrued and unpaid interest on the 1990 "B Note" as of July 31, 1995. However, both the "Third Modification" and the 1995 "B Note" provide that the principal amount of the 1995 "B Note" was to be \$3,526,217.29, with no further reference to the pre-existing accrued but unpaid interest on the 1990 "B Note." In addition, the "Third Modification," when discussing the 1995 "B Note," in contrast to its treatment of the 1995 "A Note," does not require or provide for payment of any interest accruing on the "B Note" prior to August 1, 1995.

The 1995 "B Note" provides for interest on the principal balance at 7 percent per year "beginning as of August 1, 1995. Interest shall accrue on the unpaid balance on the B Note from and including the date hereof through and including July 31, 2000 ("Maturity Date")."

The 1995 "B Note," in contrast to the "A Note," does not provide for a default rate of interest and does not provide for any interest after July 31, 2000.

Consistent with the exclusion of pre-1995 accrued interest being payable by virtue of the "Third Modification" or the 1995 "B Note," the "Third Modification" included an agreement by the bank to accept \$2.2 million, rather than the remaining principal and accrued interest amount due on the 1995 "B Note." If such amount was paid by the debtor prior to the July 31, 2000, maturity date, all payments would be applied to principal and the 1995 "B Note" would be assigned to an entity called "New Investor L.L.C." The agreement concerning the willingness of the bank to accept \$2.2 million and assign the "B Note" to New Investor L.L.C. does not refer to any amount of interest accrued prior to August 1, 1995, nor does it suggest that the bank would assign any interest accrued prior to August 1, 1995, to New Investor L.L.C. The document providing for the assignment, which was agreed to by the bank and the debtor, specifically states that interest would start on August 1, 1995, as stated in the "B Note" and, upon assignment, would allow recomputation and capitalization of the interest accruing from and after August 1, 1995.

There is nothing in the "Third Modification" or the 1995 "B Note" specifically referencing a promise to pay more than a million dollars in interest which had accrued on the 1990 Note as of July 31, 1995. The 1995 "B Note" expressly provides the exact principal amount to be paid. That principal amount does not include any accrued interest, whether capitalized or not. The 1995 "B Note" does not include any interest after July 31, 2000, although its companion note, the "A Note," does provide for default interest following maturity. The specific terms of the 1995 "B Note" represent the clear intent of the parties and must be considered to override the general statement contained in Section 1.2 of the Third Modification that the terms of the 1990 "B Note" were "extended" by the 1995 "B Note."

Conclusion

Considering the terms of the note and the "Third Modification" according to their plain and ordinary meaning, giving effect to every part of the "Third Modification" and the 1995 A and B Notes, and acknowledging that specific terms govern over general terms, the contract is not ambiguous.

Having found that the agreement between the parties is not ambiguous, the intent of the parties is determined from the actual language of the documents. The actual language of the 1995 "B Note" is that the debtor promises to pay a principal amount of \$3,526,217.29 plus interest at 7 percent from and after August 1, 1995, to and including July 31, 2000. The language does not contain a promise to pay any pre-existing accrued interest on the 1990 "B Note," nor does it require payment of interest post-maturity, either at the regular note rate or at any default rate. As part of the group of documents executed at the same time, the bank agreed that if it received \$2.2 million on the "B Note" during the time period from August 1, 1995, to July 31, 2000, it would apply all such payments to principal and assign its rights in the 1995 "B Note" to a third party. That portion of the agreement allowed for recomputation of interest from August 1, 1995, to July 31, 2000, and capitalization of such interest, but no reference was made to payment of, the capitalization of, or the assignment of any interest pre-existing August 1, 1995, on the "B Note."

The objection should be and is hereby sustained. The allowed amount on the "B Note," as of November 3, 2000, the petition date, is \$3,292,583.26 plus accrued interest of

\$1,033,889.11 for a total allowed "B Note" claim of
\$4,326,472.37.

Separate order will be entered.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Victor Covalt III
Michael Washburn
Stephen Nelsen
Douglas Quinn
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties not listed above if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
) CASE NO. BK00-42256
GOLD'S LIMITED PARTNERSHIP,)
) CH. 11
Debtor.)

ORDER

IT IS ORDERED:

The claims of SN Commercial, L.L.C., are allowed:

- "A Note": \$4,714,261.29 principal plus accrued interest as of petition date, November 1, 2000, of \$270,589.71.
- "B Note": \$3,292,583.26 principal plus accrued interest of \$1,033,889.11 from August 1, 1995, to and including July 31, 2000.

The claim for accrued interest of \$1,155,601.93 on the 1990 "B Note" is disallowed.

See Memorandum Opinion entered this date.

DATED: December 11, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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Douglas Quinn
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