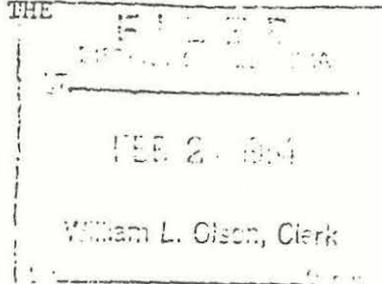


IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEBRASKA



IN RE )  
 )  
RICCI LEE ROSS and )  
CHERLYN ANN ROSS, )  
 )  
Debtors. )  
 )  
RICCI LEE ROSS and )  
CHERLYN ANN ROSS, )  
 )  
Appellants, )  
 )  
v. )  
 )  
FIRST NATIONAL BANK OF OMAHA, )  
 )  
Appellee. )

CV. 83-0-513

BK. 81-1216

A. 82-0142

## MEMORANDUM OPINION

This action is presently before the Court on appeal from a judgment<sup>1</sup> of the United States Bankruptcy Court for the District of Nebraska, entered on June 29, 1983. Appellant-debtors, Ricci Lee Ross and Cherlyn Ann Ross (hereinafter debtors) appeal a portion of the bankruptcy court's judgment which upheld the withholding of \$398.75 in attorney fees by appellee, First National Bank of Omaha (hereinafter bank), from the proceeds of an automobile insurance policy. In the adversary proceeding, debtors had alleged that the bank's use of the insurance proceeds, without prior bankruptcy court approval, constituted a post-petition transfer of property voidable under 11 U.S.C. § 549 (1982). In addition, the debtors had alleged that the bank acted contrary to the automatic stay imposed following the filing of the Chapter XIII petition for relief.

1. The Honorable David L. Crawford, Bankruptcy Judge, presiding.

After submission of briefs and an agreed statement of facts, the bankruptcy court, through a memorandum decision, dismissed the debtors' complaint. This Court, after reviewing the record submitted on appeal and the briefs filed by the respective parties,<sup>2</sup> is of the view that the judgment of the bankruptcy court should be affirmed for the reasons hereinafter stated.

The facts are these. On June 19, 1981, the debtors filed their voluntary petition for relief under Chapter XIII of Title 11 of the United States Code. On that date, the bank held a security interest in a 1979 Buick Electra automobile, owned by the debtors, in the amount of \$5,558.87. In a pleading dated July 8, 1981, the bank moved the bankruptcy court for an order prohibiting use of the automobile for the reason that the debtors had allowed insurance coverage to lapse. The bank's motion was subsequently settled by oral stipulation which, when reduced to writing, provided that the debtors would obtain collision and comprehensive insurance protecting the automobile and designating the bank as an additional named insured. In addition, the stipulation provided that the debtors would amend their plan of arrangement so as to provide that they would pay to the bank the sum of \$180 per month for thirty-six (36) months as payment in full of the secured claim. This amendment was confirmed by an order of the bankruptcy court entered on September 16, 1981. After confirmation of the amended plan, the automobile was destroyed and a claim was made with the insurance company. In December, 1981, the debtors received a check from their insurer in the amount of \$6,348 payable jointly to

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2. Although Bankruptcy Rule 809 makes provisions for oral argument on appeal, no request was made, and the Court is of the opinion that the issues are well briefed and no argument is necessary.

the debtors and to the bank. The debtors endorsed the check and delivered it to the bank in January, 1982. Without approval or authorization by the bankruptcy court, the bank withheld \$5,531.59, which constituted the net pay-off amount on the original note, \$398.75 in attorney fees, and remitted the balance of \$417.66 to the debtors.

On February 17, 1982, the debtors filed their complaint to void the bank's application of the insurance proceeds, alleging that such application constituted a post-petition transfer of property voidable under 11 U.S.C. § 549. Therefore, the debtors sought an accounting and turnover of such insurance proceeds as were improperly held by the bank. In its decision, the bankruptcy court held that no proceeds were improperly held and, therefore, entered judgment in favor of the bank.

Thereafter, a timely appeal was filed by the debtors and is now before this Court. On appeal the debtors argue that the decision of the bankruptcy court is erroneous in that it failed to order an accounting and return of the amount withheld for attorney fees, namely, \$398.75.

Before this Court addresses the merits of the appeal, it is prudent to state the standard of review that controls the court in matters such as this. Although on appeal the bankruptcy judge's findings of fact "are entitled to stand unless clearly erroneous," where there are presented for consideration mixed questions of law and fact, the clearly erroneous rule is not applicable, *In re American Beef Packers, Inc.*, 457 F.Supp. 313, 314 (D.Neb. 1978), and the bankruptcy judge's decision cannot be approved without this Court's independent determination of the law. *In re Werth*, 443 F.Supp. 738, 739 (D.Kan. 1977), citing *Stafo v. Jarvis*, 477 F.2d 369, 372 (10th Cir.), cert. denied, 414 U.S. 944 (1973).

Although the debtors attempt to raise several issues on appeal by way of argumentation in their briefs, this appeal is limited to a single narrow issue: Could the bank withhold an essentially insubstantial amount of the insurance proceeds for attorney fees? It is this single issue which is stated by the debtors in their designation of the record, and it is the only issue which is addressed by this Court on appeal. Therefore, whether retention of the insurance proceeds as a whole constituted a post-petition transfer, or whether such retention violated the automatic stay, or whether the insurance payment was property of the estate, are not at issue here. Since these matters are not appealed, this Court must accept the bankruptcy court's decision that the insurance proceeds, to the extent representing a net payoff amount on the original note, i.e., \$5,531.59, were not wrongfully withheld by the bank.

Given this as a basic premise, an analysis of the propriety of retaining attorney fees may be made. Title 11, U.S.C. § 506, provides in pertinent part as follows:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to set-off under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to set-off, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set-off is less than the amount of such allowed claim. \* \* \*

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, 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 under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

Since, upon total destruction of the automobile, the insurance company presented a check in the amount of \$6,348 payable jointly to the debtors and the bank, and the bank withheld \$5,531.59 as a net pay-off amount on the original note, it is clear that the bank was an over-secured creditor under § 506(b). Therefore, under the subsection, the bank would be entitled to receive "any reasonable fees, costs or charges provided under the agreement under which such claim arose." Although the original security agreement between the bank and the debtors respecting the automobile is not made a part of the designated record on appeal, the bank's proof of claim is part of such record. The proof of claim reflects that the original installment sales contract called for payments of principal, interest, costs and attorney fees up to the full value of the collateral. At no time was the accuracy of this claim by the bank challenged. Therefore, the fees retained by the bank in this case were done so properly under 11 U.S.C. § 506. Thus, this Court concludes that the bankruptcy court did not err in its judgment allowing the bank to retain \$398.75 as reasonable attorney fees.

Accordingly, a separate order affirming the June 29, 1983, judgment of the bankruptcy court and dismissing the appeal will be entered contemporaneously with this memorandum opinion.

BY THE COURT:

*Albert B. Peltz*

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JUDGE, UNITED STATES DISTRICT COURT