

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
RORY & SHERRY HEATON,) CASE NO. BK92-81363
) A
)
DEBTOR(S)) CH. 13
) Filing No. 58, 73

MEMORANDUM

Hearing was held on June 18, 1993, on the Objection to Claim of River City National Bank by Debtors and Resistance by Claimant. Appearing on behalf of debtors was Ray Aranza of Marks & Clare, Omaha, Nebraska. Appearing on behalf of River City National Bank was John Vodra of Lich, Herold & Mackiewicz, Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

The debtors have objected to the claim of River City National Bank (Bank). The Bank had as security for its loan a security interest in a "stretch limousine." Prior to the petition being filed, the debtors had attempted to sell the stretch limousine but had been unsuccessful. Following the petition being filed, they informed the Bank that they would either surrender the vehicle or attempt to sell it themselves.

In September of 1992, the Bank filed a motion for relief from the automatic stay. While such motion was pending, the debtors took the vehicle to a commission agent in Minnesota and authorized him to attempt to sell it. After relief from the stay was granted and the debtors informed the Bank of the location of the vehicle, the Bank permitted the commission agent in Minnesota to continue to attempt to sell the vehicle.

The debtors and the Bank believed, early in the case, that the property was worth approximately \$25,000.00. The debt was in excess of \$25,000.00 and all parties knew from the beginning that the debt was in excess of the value of the collateral.

The Bank notified the debtors on several occasions that it was negotiating to sell the vehicle for an amount which ranged from \$27,000.00 to \$23,000.00. None of these potential sales were completed, although the Bank had made arrangements to finance most of them, at least to some extent. Eventually the Bank sold the vehicle for \$18,500.00.

The Bank now requests the allowance of an unsecured claim in the amount of \$9,056.93. That amount includes the principal balance plus prepetition interest plus costs to repossess, hold and prepare for sale. Included in such costs are storage fees, physical damage insurance premium, transportation gasoline, body repairs and detailing, attorney fees and court costs, advertising, telephone calls and miscellaneous replacement parts. The total is reduced by a credit life premium rebate and reduced by the sale price of \$18,500.00.

The debtors argue that they were misled into believing that the vehicle would sell for close to the amount of the debt. They, therefore, prepared and obtained confirmation of a plan which provided for full payment of the unsecured claim of the Bank. They anticipated that claim to be approximately \$2,000.00 and have been surprised at the large amount of the claim resulting from the sale of the vehicle at a lower price.

The Court has reviewed all of the affidavits submitted in support of the position of both parties. The Court finds that the Bank acted in a commercially reasonable manner in attempting to and eventually selling the vehicle. The vehicle was marketed properly by a commission agent chosen by the debtors and advertised and vigorously marketed by the Bank, both to limousine operators and hotels and restaurants and other parties in the entertainment business. The Bank rejected offers lower than \$18,500.00 and received no legitimate offers above \$18,500.00.

The Nebraska Uniform Commercial Code, at Section 9-504, provides that a secured party, after default, may dispose of the collateral in a commercially reasonable manner and apply the proceeds to the reasonable expenses of retaking, holding, preparing for sale and, to the extent provided for in the agreement, to the reasonable attorney's fees and legal expenses, and then to the satisfaction of the indebtedness.

In this case, the reasonable expenses of retaking, holding, etc., including attorney fees, amount to less than \$3,000.00. The attorney fee portion is \$1,807.98.

The debtors argue that the only statutory authorization for attorney fees and costs, when making such determination under the Bankruptcy Code, is 11 U.S.C. § 506(b). That section permits the addition of attorney fees and costs to the allowed secured claim if the collateral has a value in excess of the total amount of the debt, and if the contract includes an allowance of such fees and costs.

However, in this case, the parties are not dealing with a secured claim or an addition to a secured claim. Instead, although the claim was partially secured, after the disposition of the collateral any remaining claim against the debtors is unsecured. The promissory note and security agreement provided for attorney fees and costs. The Nebraska statute, UCC § 9-504, provides for the application of the proceeds to such attorney fees and costs. Although the Bankruptcy Code is silent with regard to this issue, case law has interpreted the Code to the effect that if state law provides for such fees and costs and the contract provides for such fees and costs, they may be included as part of an unsecured claim and allowed pursuant to 11 U.S.C. § 502(b)(1). See Liberty Nat. Bank & Trust Co. v. George, 70 Bankr. 312 (W.D. Ky. 1987), and cases cited therein; see also 3 Collier on Bankruptcy ¶ 506.05, at 506-41 to 506-42 and n. 5 (15th ed. 1993).

Therefore, the objection of the debtors to the unsecured claim of the creditor is denied. The unsecured claim is allowed in the amount of \$9,056.93.

Separate journal entry shall be filed.

(X) Clerk to give immediate notice of the Court's ruling to counsel for debtors, counsel for creditor and Chapter 13 Trustee.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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RORY & SHERRY HEATON,)	CASE NO. BK92-81363
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<u>DEBTOR(S)</u>)	
)	CH. 13
)	Filing No. 58, 73
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
)	DATE: July 7, 1993
<u>Defendant(s)</u>)	HEARING DATE: June 18,
)	1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Objection to Claim of River City National Bank by Debtors; Resistance by Claimant.

APPEARANCES

Ray Aranza, Attorney for debtors
John Vodra, Attorney for Bank

IT IS ORDERED:

The objection of the debtors to the unsecured claim of the creditor is denied. The unsecured claim is allowed in the amount of \$9,056.93. See memorandum entered this date.

(X) Clerk to give immediate notice of the Court's ruling to counsel for debtors, counsel for creditor and Chapter 13 Trustee.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge