

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	CASE NO. BK03-80023-TJM
)	
THOMAS R. FOSTER and)	CH. 13
DIANNE W. FOSTER,)	
)	
Debtor(s).)	

ORDER

At Filing #162, upon request of the parties, progression of the claim litigation between the Debtors, Wells Fargo Bank and Bank of Nebraska was stayed pending a mediation report. The matter was referred to Magistrate Judge Thomas Thalken for mediation.

Magistrate Judge Thalken, on May 22, 2009, informed this court that the mediation session was unsuccessful. The matter is now before this court.

On April 2, 2007, the court held a hearing on affidavit evidence and oral argument by counsel for the parties. The subject matter of the hearing was whether the Debtors had paid, overpaid, or underpaid the claims of the two creditor banks. On May 21, 2007, at Filing #103, an order was entered determining that there had been an overpayment on the Wells Fargo note in the amount of \$3,272.26. The order also determined that there had been an overpayment to Bank of Nebraska in the amount of \$4,777.50. By order dated June 12, 2007, the May 21, 2007, order was made final. Neither the banks nor the Debtors appealed that final order.

As part of the final order, the lenders were given the opportunity to file an application for administrative expenses concerning post-petition advances for taxes and insurance which had not been included in the calculation submitted on April 2, 2007.

On July 13, 2007, at Filing #111, Wells Fargo Bank filed an application for administrative expenses in the amount of \$11,630.98, representing property taxes paid in 2006 in the amount of \$9,879.98 and insurance premiums paid in the amount of \$1,751.00. Bank of Nebraska did not file an amended claim or an application for allowance of administrative expenses.

On August 1, 2007, at Filing #117, the Debtors objected to the application for administrative expenses filed by Wells Fargo Bank. The Debtors suggested that there was no proof of any of those payments and that no amount should be allowed without actual proof of payment.

Although the contested matter concerning the application for administrative expenses was scheduled for hearing on several occasions, it was continued at the request of the parties or the court with a final hearing date of January 14, 2008. Prior to that date, the Debtors filed a motion for new trial and request for relief from the prior order. The hearing for the motion for new trial and the hearing on the application for administrative expenses was scheduled for February 19, 2008.

The motion for new trial was resisted by both banks on the grounds that the matter had been previously considered by the court and there was no need for a rehearing.

The February 19 hearing was continued to March 17, 2008. The hearing was held and evidence was submitted by Debtors in support of their motion. Evidence was submitted by Wells

Fargo Bank concerning the application for administrative expenses, and, in the oral presentation, counsel for Wells Fargo withdrew that portion of the application dealing with the payment of insurance premiums. Thereafter, briefs were filed by all parties.

On June 4, 2008, at Filing #152, this court granted the motion for new trial but made detailed findings concerning the court's disagreement with the position argued by the Debtors. A trial was scheduled for September 23, 2008. The trial was continued by agreement while the parties attempted to settle the matter. Status reports were filed at Filing #157 on October 17, 2008, and at Filing #159 on January 23, 2009.

A telephonic pretrial conference was held on February 24, 2009, and an order was entered at Filing #161 directing the parties to file a written status report by April 10, 2009, which should include information concerning the employment of litigation counsel, the amount of discovery that needs to be completed, the time frame for completing such discovery, the dates the parties will be ready for trial, the number of witnesses that will be called, and the number of days it is anticipated the case will take to try.

At the telephonic conference, the court urged the parties to settle the matter and suggested that the parties proceed to mediation. Debtors did not agree to mediation at that time. However, on April 10, 2009, the court was informed that all of the parties did agree to mediation and the matter was referred to Magistrate Judge Thalken, as mentioned earlier in this order. The mediation session was not successful.

I have now reviewed all of the materials submitted by the parties and the orders entered by this court concerning this claims litigation. I conclude that granting the new trial was an error on my part. The Debtors based their motion for a new trial on the theory that the interest rate stated on the Bank of Nebraska note was not the blended rate that had been discussed by the Debtors and the loan officer, and because of that, Debtors had overpaid Bank of Nebraska by thousands of dollars. They propose to prove at trial that the terms of the note, executed in 1983, represent a mutual mistake of fact and are asking the court to reform the note to reflect the intentions of the parties at the time of execution. However, even though the Debtors insist the interest rate on the note is not the rate they agreed to, the terms of the note itself are not ambiguous. The parol evidence rule precludes the court from permitting testimony or documentary evidence to vary the terms of an unambiguous twenty-six-year old promissory note. Thrower v. Anson, 752 N.W.2d 555, 561 (Neb. 2008) (parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement; such proof may be used only if the contract is ambiguous).

The order granting the new trial is reconsidered and the motion requesting a new trial is denied. The order previously entered which determined the amount of overpayment is a final order, which no party appealed. Bank of Nebraska has been overpaid \$4777.50. Wells Fargo, before considering the application for allowance of administrative expense, has been overpaid \$3272.26. The application for allowance of administrative expense, as modified at the March 17, 2008 hearing is granted in the amount of \$9879.98. Wells Fargo may offset its overpayment obligation against the allowed administrative expense. Bank of Nebraska shall refund the amount of its overpayment, to the Trustee, who may apply it to the Wells Fargo claim after her administrative fees are deducted. The remaining net amount due Wells Fargo shall be paid through the plan.

IT IS ORDERED that the order granting a new trial, Filing #152, is reconsidered and the motion requesting a new trial, Filing #128, is denied.

IT IS FURTHER ORDERED that the Application for Administrative Expenses, Filing #111, is granted, as modified.

DATED: May 29, 2009

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

Notice given by the Court to:

*John Turco Mark LaPuzza
*Michael Whaley

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