

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

Hearing was held in Omaha, Nebraska on March 17, 2008, regarding Filing #128, Motion for New Trial and Relief from Prior Order, filed by the debtors; Filing #133, Resistance, filed by Wells Fargo Bank, N.A., successor by merger to Wells Fargo Home Mortgage, Inc., f/k/a Norwest Mortgage, Inc., assignee of Commercial Federal Bank, FSB; and Filing #134, Resistance, filed by Bank of Nebraska. John Turco appeared for the debtors, Michael Whaley appeared for Wells Fargo Bank, N.A., and Mark LaPuzza appeared for Bank of Nebraska.

On May 17, 2007, at Filing #101, and on May 21, 2007, at Filing #103, orders were entered determining that the debtors had overpaid Bank of Nebraska and Wells Fargo Bank on two promissory notes secured by deeds of trust. The banks were given the opportunity to file an amended claim to include any unpaid advances that had not been dealt with by the orders.

Bank of Nebraska did not file an amended claim, but Wells Fargo Bank did, asserting that it had advanced real estate taxes and property insurance premiums totaling \$11,630.98, which had not been reimbursed. Wells Fargo Bank requested an administrative claim allowance in that amount.

The debtors resisted on the basis that no evidence of payment had been attached to the motion. A hearing was scheduled, but before it could be held, the debtors filed a "Motion for New Trial and Relief from Prior Order" addressed to the orders at Filing #101 and #103. The motion contained an attachment purportedly showing that the various accountings and documents showing the application of funds received by the two banks over the years were inaccurate. Both banks resisted the motion on the basis that all the matters raised in the motion had been previously addressed by the court and there was no need for additional litigation concerning the matter.

A hearing was held on both the application for administrative expenses and on the motion for new trial on March 17, 2008. Thereafter, counsel for the debtors filed a "Motion for Leave to Submit Brief and New Evidence and Defer Entry of Order" because debtors had found an original document that indicated the Bank of Nebraska calculations began with an erroneous starting balance amount for the Wells Fargo loan. Briefing by all parties occurred thereafter and discovery occurred. At Filing #150, counsel for the debtors filed a supplement to the original brief and argued that the interest rate used by Bank of Nebraska to amortize its loan was erroneous, that there should be no "shadow loan" as claimed by Bank of Nebraska in the amount of \$8,046.00, and that the order determining the overpayment by Bank of Nebraska included the "shadow loan" even though there was no such loan.

After a detailed review of all of the materials used for the determination of the overpayments in the orders of May of 2007, I agree that the motion for new trial should be granted. However, I do not necessarily agree with the assertions made by counsel for the debtors. For example, the debtors argue that there was no "shadow loan." The records of both banks reflect payments

representing the advances made by Bank of Nebraska on May 1, 2001, to bring both loans current. On the payment records of Bank of Nebraska attached to Filing #98, Exhibit C, there are twelve payments shown as made on May 8, 2001, and May 9, 2001. A significant portion of those payments was applied to interest which had accrued on the Bank of Nebraska loan, but it cannot easily be determined what interest rate was applied.

At Filing #96 on the payment record provided by Wells Fargo Bank, the entry for May 25, 2001, shows eleven payments.

The total payments shown on May 8 and 9, and May 25, 2001, approximate the \$8,046.00 claimed by Bank of Nebraska. In Filing #150, attachment 7, a letter from Bank of Nebraska regarding the payoff of the Foster loan, dated January 6, 2003, Bank of Nebraska acknowledges that that \$8,046.00 advance "has been accruing interest at 0%."

Filing #150, Exhibit 8, is a document that was considered by the court when determining the amount of overpayments. The court assumed the Bank of Nebraska balance as of the petition date at \$17,981.02, including the \$8,046.00. Since Bank of Nebraska was accruing interest at 0% on the \$8,046, the court should not have included the \$8,046.00 "shadow loan" as accruing interest at 11.5%. Alternatively, the court should have determined the amount of the \$8,046.00 "shadow loan" which was applied to interest on the Bank of Nebraska original loan. No interest should have been charged against the amount applied to interest on the original loan because Bank of Nebraska does not have a right to interest upon interest. The term "shadow loan" has been used by Bank of Nebraska to identify and keep a separate accounting for the advances made to itself and to Commercial Federal Bank ("CFB") on May 8, 2001.

Counsel for the debtors objects to the use by Bank of Nebraska of the 11.5% interest rate. The promissory note executed by the debtors for \$54,400.00 has a stated rate of 11.5%. The amount of the loan included \$22,370.88 (Fil. #150, ex. 6) advanced by Bank of Nebraska and \$32,029.12 (Fil. #139, ex. D) as the balance then due Commercial Federal Bank. According to the terms of the Bank of Nebraska \$54,400 note, it was a "wrap" loan. That meant that debtors were to pay to Bank of Nebraska the amount necessary to keep the amount of its advance current and pay Bank of Nebraska the amount necessary to keep the Commercial Federal Bank/ Wells Fargo Bank note current on principal, interest and escrow. If debtors made the payments as required, Bank of Nebraska would forward the CFB payment to CFB. Because Bank of Nebraska, per its \$54,400 note, became the servicer for CFB, it had a right to receive 11.5% interest on the total of the two outstanding balances, effectively giving itself a rate in excess of 11.5% on its own advance. In some of the documents submitted earlier, it appears that effective rate was approximately 15%.

One of the many problems with this case is that when it was filed, the plan that was confirmed provided that all payments would go to the Trustee. Since both banks filed proofs of claim and they were not objected to, the Trustee made separate payments to each bank, rather than one payment to Bank of Nebraska to be divided by it according to the original terms of its note. As a result, Bank of Nebraska did not receive sufficient funds to pay principal, interest, and escrow to CFB. That also means it did not get its contractual 11.55% interest on the balance owed CFB.

From the payment records submitted by Wells Fargo Bank showing the payment history of its loan, both when held by it and when held by CFB, on the petition date CFB was owed \$8,888.33 in principal, a small amount of interest, and an escrow shortage on the petition date. (Fil. #128 at 2). Since it did not begin receiving payments from the Trustee immediately, interest accrued and taxes plus insurance premiums were paid by it. When Trustee payments were received, they were

initially applied to interest, so it took quite awhile for the principal to be reduced. Then, as time went on, payments from the Trustee were in irregular amounts, frequently insufficient to keep the obligation from becoming delinquent. Wells Fargo Bank eventually, on May 11, 2006, advanced several thousand dollars to pay taxes and penalties. There is nothing in the record to show taxes or insurance have been paid by Wells Fargo Bank or the debtors since the last advance.

In the original orders in May of 2007, it was determined that Bank of Nebraska had been overpaid \$4,777.50 and Wells Fargo Bank had been overpaid \$3,272.26. The orders were interlocutory, so an eventual appeal by either bank is still a possibility. That total of \$8,049,76 is not too far short of the \$11,630.98 requested by Wells Fargo Bank in FILING #111, its request for allowance of administrative expense claim.

Debtors will be granted a new hearing, but sometimes one needs to be careful what relief one requests. This matter could be over, without additional litigation, if the overpayments were used to offset the Wells Fargo Bank advances. Bank of Nebraska could pay the amount determined it owed to Wells Fargo Bank and Wells Fargo Bank could apply its determined overpayment to the advances. The balance could be paid over several months through the Trustee to be applied on the advances. Debtors' payments to Trustee would be reduced. They could directly pay the county on delinquent or current taxes and pay for the insurance. They could get on with life, not happy about their ordeal, but done with it.

On the other hand, the litigation can go on. The court can review all the prior evidence and any new evidence presented on behalf of debtors and the banks. The court can apply the adjustments referred to above, both reducing the interest on the \$8,046 and, perhaps, increasing the interest payable to Bank of Nebraska due to its contractual right to 11.5% on the total outstanding debt to both banks. Other adjustments may be required in favor of debtors and against debtors.

This court does not often push settlement, and won't be offended if none is forthcoming here. However, this case cries out for settlement. It will cost all parties significant sums to retry the matter, with possible appeals, leaving the outcome uncertain to all, when it can be settled for so little.

IT IS ORDERED: The debtors' motion for new trial and relief from prior order (Fil. #128) is granted. The clerk shall schedule the matter for a one-day hearing on live and affidavit evidence.

DATED: June 4, 2008

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*John Turco
Mike Whaley
Mark LaPuzza
United States Trustee

*Movant is responsible for giving notice of this order to other parties if required by rule or statute.