

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
|---------------------|---|---------------------|
| IN THE MATTER OF |) | |
| |) | |
| TIMOTHY EGAN, |) | CASE NO. BK92-80664 |
| |) | A |
| <u>DEBTOR(S)</u> |) | |
| |) | CH. 11 |
| |) | Filing No. 117, 129 |
| Plaintiff(s) |) | |
| vs. |) | |
| |) | |
| |) | |
| <u>Defendant(s)</u> |) | |

MEMORANDUM

Hearing was held on April 12, 1993, on Application for Allowance of Compensation and Reimbursement of Expenses and the Objection by the Debtor. Appearing on behalf of Nebraska National Bank was James Frost of McGrath, North, Mullin & Kratz, P.C., 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) (A).

Background

A creditor holding an oversecured claim has applied for pre- and post-petition attorney fees authorized by 11 U.S.C. § 506(b).

Decision

The application for pre-petition fees and expenses is denied. Post-petition fees and expenses are allowed.

Discussion

Section 506(b) of the Bankruptcy Code allows the oversecured creditor interest on its claim and reasonable fees and costs provided for in the agreement under which the claim arose. Attorneys' fees are not specifically mentioned in the section, but caselaw has interpreted the statute to encompass them. See In re Record Enter., Ltd., Neb. Bkr. 86:547 at 548 (D. Neb. 1986) (rev'g 60 Bankr. 791 (Bankr. D. Neb. 1986)).

Debtor argues that no fees are allowable because Nebraska law prohibits them. See, e.g., First Nat'l. Bank v. Schroeder, 218 Neb. 397, 355 N.W.2d 780 (1984). However, because of the

decision in Record Enterprises, which authorizes some fees in spite of state law, the only real issue is whether Section 506(b) allows Nebraska National Bank (Bank) to recover pre-petition attorneys' fees for its collection efforts. The debtor maintains that such fees are not allowable because the note and deed of trust under which the obligation arose provide for construction according to Nebraska law, which does not allow the recovery of attorneys' fees for collection efforts.

While a number of bankruptcy cases have allowed pre-petition attorneys' fees to be included under Section 506(b) (see, e.g., In re Aguirre, 150 Bankr. 922 (Bankr. N.D. Tex. 1993); In re Harper, 146 Bankr. 438 (Bankr. N.D. Ind. 1992); In re Landing Assocs., Ltd., 122 Bankr. 288 (Bankr. W.D. Tex. 1990); In re Smith, 76 Bankr. 426 (Bankr. E.D. Pa. 1987); In re W.S. Sheppley & Co., 62 Bankr. 279 (Bankr. N.D. Iowa 1986)), those cases occurred in states that do not prohibit recovery of attorneys' fees for collection efforts. Apparently, no cases have held that the federal bankruptcy code supersedes state law even in prepetition matters where, but for the fortuity of a bankruptcy filing, the issue of the enforceability of a fee provision would not exist.

The cases from this jurisdiction cited by the parties, Record Enterprises, supra, and In re Haske, 122 Bankr. 372 (D. Neb. 1990), are distinguishable from the present case. Haske is a narrow holding dealing only with the interpretation of one paragraph in a deed of trust regarding calculation of fees in the event of a sale. The issue of the applicability of Nebraska law regarding fee provisions was not addressed. Likewise, Record Enterprises has been read to allow only post-petition fees, not to abrogate the state law prohibition on recovery of attorneys' fees for prepetition collection activities. Despite the expansive language of the district court's opinion in Record Enterprises, the issue in the bankruptcy case was whether the creditor would be allowed any attorneys' fees at all in light of Nebraska law. Upon remand to this Court, the creditor was allowed post-petition fees only, in accordance with Section 506(b) and the district court's opinion. In re Record Enter., Ltd., BK82-1132, filing no. 217 (Bankr. D. Neb. Sept. 3, 1987).

Federal bankruptcy law should only modify state law contract rights to the extent necessary to accomplish bankruptcy goals. In re Alberto, 129 Bankr. 166 (Bankr. N.D. Ill. 1991); Butner v. United States, 440 U.S. 48, 99 S. Ct. 914 (1979). There is no reason for this Court to completely dispense with the contract terms agreed to by the parties well before the bankruptcy was filed, when a slight modification will accomplish the aims of

§ 506(b). Under Nebraska decisional law, the prepetition attorney fees incurred by a creditor in collection activity are not the responsibility of the debtor even if the written contract provides for such fees. The "contract rights" of the creditor are subject to the state law voiding the fee provision in the contract. First Nat'l. Bank v. Schroeder, supra.

Therefore, the Bank's application to the extent that recompense for pre-petition work is requested is denied. Pursuant to Record Enterprises, post-petition fees and expenses are allowed. The Bank's counsel should provide to debtor and file with the Court a statement of the amount of post-petition compensation and expenses to which it is entitled, and submit a proposed order. This decision on Bank's application will not be final and appealable until the later order is entered.

DATED: May 8, 1993.

(X) Clerk to send immediate notice of the Court's ruling to Howard Duncan, James Frost and U.S. Trustee.

BY THE COURT:

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