UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
GERALD and MAXINE McMURPHY,	)	CASE NO. BK91-80321
	)	
DEBTOR	)	CH. 13

MEMORANDUM

Hearing was held on Motion to Determine Proper Payee by Trustee; Resistance by Debtors. Appearing on behalf of debtor was Howard Duncan of Omaha, Nebraska. Appearing on behalf of trustee was Kathleen Laughlin of Omaha, Nebraska. Appearing on behalf of Gary Schmidt and William Lorenz was Mike O'Brien of Omaha, Nebraska. Appearing on behalf of Norwest was David Koukol of Schmid, Mooney & Frederick, 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) and (B).

Facts

On May 13, 1986, William Lorenz, Gerald McMurphy (the Debtor) and Gary Schmidt each executed an absolute and unconditional guaranty to Norwest Bank Nebraska, N.A. (Norwest) as incentive to induce Norwest to make periodic loans to Millard Heating & Air Conditioning. On June 21, 1990, Millard Heating & Air Conditioning, by its president, executed a promissory note to Norwest in the principal amount of $34,000.00.

After Millard Hearing & Air Conditioning defaulted on the promissory note, Norwest exercised its rights by selling the company's assets and applying the proceeds to the debt.

Meanwhile, one of the guarantors, Gerald McMurphy, filed a Chapter 13 bankruptcy petition. Norwest subsequently filed a proof of claim in the amount of $21,724.02, which represented the remaining balance on the note.

Norwest also filed suit against the other guarantors. Norwest obtained a default judgment against Lorenz on July 1, 1991.

Norwest and Schmidt settled Schmidt's liability on the guaranty for $17,500.00 which Schmidt paid. On June 19, 1992, Norwest assigned the promissory note to Schmidt and surrendered Schmidt's guaranty.

On January 14, 1994, Schmidt filed a proof of claim in the amount of $21,724.02. Schmidt contends that the Chapter 13 trustee should cease disbursing funds to Norwest and begin remitting those funds to him.

However, Norwest contends that the trustee should continue remitting payments under McMurphy's Chapter 13 plan to Norwest since Norwest is still owed $4,224.02. Although Norwest is no longer in possession of the promissory note, Norwest contends that McMurphy is still liable on the basis of the guaranty which he executed.

On March 28, 1994, a hearing was held on a Motion to Determine the Proper Payee. The two issues which must be determined are:

1) Whether Norwest may enforce the obligation against McMurphy based solely upon the guaranty?

2) Whether Mr. Schmidt is entitled to contribution through Mr. McMurphy's Chapter 13 plan and, if so, in what amount?

Discussion

A. Does Norwest have a right to payment through the Chapter 13 plan?

According to Nebraska case law, "a guaranty is a collateral undertaking by one person to answer for the repayment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance." Heider & Co., Inc. v. Pawnee Meadows, Inc., 217 Neb. 315, 319, 350 N.W.2d 1, 4 (Neb. 1984) (quoting In re Estate of Williams, 148 Neb. 208, 215-16, 26 N.W.2d 847, 851 (Neb. 1947)). In both cases, the Nebraska Supreme Court defined a guaranty as "collateral" and "independent" of the principal contract being guaranteed. Heider, 217 Neb. at 319, 350 N.W.2d at 4 (quoting Williams, 148 Neb. at 215-16, 26 N.W.2d at 851).

The precise issue of whether a creditor after assigning a promissory note to another, may nonetheless pursue a guarantor of the note based only upon his signed guaranty, does not appear to have been squarely addressed by the Nebraska Supreme Court. However, Nebraska courts and other courts in the Eighth Circuit have considered and resolved the question of whether a guaranty is a separate and distinct entity from the promissory note executed in conjunction with it.

In Bank of Kirkwood Plaza v. Mueller, 294 N.W.2d 640 (N.D. 1980), a North Dakota corporation, Develco, Inc., executed three

promissory notes which were secured with a mortgage to the bank. On the same day, three individuals executed continuing guaranty agreements with the bank in which they individually and unconditionally guaranteed the payment of any obligation between the bank and Develco. Only one guarantor signed the promissory note, while none of them signed the mortgage.

Upon Develco's default, the bank simultaneously instituted foreclosure proceedings on the real property as well as independent actions against the guarantors based upon the guaranty agreement. The guarantors defended by arguing the state anti-deficiency statute barred the actions against them.

The district court held that the "obligations imposed by the promissory notes and mortgages were separate and distinct from the obligations imposed by the guaranty agreement and, consequently, [the bank could continue to maintain both actions]." Mueller, 294 N.W.2d at 642. The North Dakota Supreme Court agreed, holding that the action against the guarantors was not based on obligations imposed by the notes, but on a separate and distinct contract of guaranty. The separate contract of the guarantor was not predicated on the note. Id. at 643. The North Dakota Supreme Court, however, did indicate that the bank was not entitled to double recovery and upon payment by the guarantors, the bank should assign its interests in the property to the guarantors. Id. at 645; see also First Federal Savings and Loan Association of Bismarck v. Compass Investments, Inc., 342 N.W.2d 214 (N.D. 1983) (relying on Mueller and holding guarantees are separate and distinct entities).

Likewise, in an early Nebraska Supreme Court opinion, Schultz v. Wise, 93 Neb. 718, 141 N.W. 813 (Neb. 1913), the court had to determine whether two causes of action, one based upon an agency contract and the other upon the guaranty of the agency contract, could be joined at trial. The Nebraska Supreme Court determined that "the contract of guaranty is a separate and independent contract, and the liability of the guarantor is governed by the express terms of his contract. Id. at 721, 815. Thus, the court concluded that the causes of action could not be joined.

A recent case Ravenna Bank v. Custom Unlimited, 223 Neb. 540, 391 N.W.2d 557 (Neb. 1986), which also dealt with the question of permissible joinder, stated that the principle espoused in Barry v. Wachosky, 57 Neb. 534, 77 N.W. 1080 (1899), has never been overruled: "The contract of guaranty is a separate and independant [sic] contract." Ravenna Bank, 223 Neb. at 545, 391 N.W.2d at 561 (quoting Schultz, 93 Neb. at 721, 141 N.W. at 815).

It appears that the Nebraska Supreme Court would find that a guaranty creates a separate and distinct cause of action upon

which a guarantor could be sued, even though the lender had settled with another guarantor and surrendered the promissory note for which the guaranty was originally signed. In this case, Norwest surrendered the note when paid a portion of the debt by one guarantor. However, Norwest retained the guaranty of Mr. McMurphy. Since Norwest has not been paid in full, it should continue to be paid through the Chapter 13 trustee until it is paid the full amount due including interest to the date of the petition.

B. Is Mr. Schmidt, a co-guarantor who has paid part of the total debt, entitled to contribution from the debtor through the Chapter 13 plan?

Although the case law states the principle in many ways, the general rule is that co-guarantors are entitled to contribution. In Estate of Frantz v. Page, 426 N.W.2d 894 (Minn. App. 1988), the court held a co-guarantor is not liable for more than his pro-rata share of the debt, absent an agreement to the contrary. In In re Westerhoff, 688 F.2d 62 (8th Cir. 1982), the court delineated a two-part test regarding the right to contribution: "the parties must share a common liability or burden, and the plaintiff must have discharged more than his fair share of the common liability or burden." Id. at 63.

Both of the above requirements have been met. Schmidt, Lorenz and McMurphy shared a common liability, and Schmidt has paid more than his fair share. However, this does not end the inquiry.

The next question concerns the point at which Schmidt has a right to contribution. Section five of the guaranty executed by Schmidt states:

> The undersigned will not exercise any right of contribution, reimbursement, recourse, or subrogation available to the undersigned against any person liable for payment of the indebtedness, or as to any collateral security therefor, unless and until all of the indebtedness shall have been fully paid and discharged.

In Layne v. Garner, 612 So. 2d 404 (Ala. 1992), the court held a co-guarantor's action to sue another co-guarantor was premature because the creditor had not been paid in full and because the guaranty had exactly the same language as quoted above. Thus once Norwest is paid in full, Schmidt's right to contribution will mature according to the language of the guaranty.

One final consideration affecting Schmidt's right to contribution is McMurphy's solvency. The Restatement of the Law of Restitution states:

> As long as all remain solvent, available, and liable to contribution, one who pays the entire amount is entitled to recover from each of the others a sum equal to such amount divided by the number of persons participating.

Restatement of the Law of Restitution § 85 cmt. e (1993).

If McMurphy, due to his insolvency, cannot contribute, the Restatement of Restitution provides that Schmidt and Lorenz divide the debt as if the insolvent party had not originally participated. **Restatement of the Law of Restitution** § 85 cmt. h (1993).

However, if McMurphy's Chapter 13 plan can accommodate Schmidt's claim for contribution, Schmidt's current claim for $21,724.02 is greatly in excess of his actual claim, as one third of $21,724.02 is only $7,241.34.

Conclusion

1. Norwest and Schmidt must file amended claims to accurately state the amount due from the debtor.

2. Norwest is the proper payee until the debt is completely discharged at which time Schmidt's right to contribution from McMurphy will mature, and thereafter, the trustee shall make further payment to Schmidt.

Separate journal entry to be entered.

DATED: April 8, 1994.

BY THE COURT:

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

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[ ] Chapter 13 Trustee [ ] Chapter 12 Trustee [ ] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

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GERALD & MAXINE McMURPHY,	)	CASE NO. BK91-80321 A
	)	
DEBTOR(S)	)	
	)	CH. 13
	)	Filing No.
Plaintiff(s)	)	
vs.	)	JOURNAL ENTRY
	)	
	)	
	)	DATE: April 8, 1994
Defendant(s)	)	HEARING DATE:

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Determine Proper Payee by Trustee; Resistance by debtors.

APPEARANCES

Howard Duncan, Attorney
Kathleen Laughlin, Trustee
Mike O'Brien, Attorney
David Koukol, Attorney

IT IS ORDERED:

1. Norwest and Schmidt must file amended claims to accurately state the amount due from the debtor.

2. Norwest is the proper payee until the debt is completely discharged at which time Schmidt's right to contribution from McMurphy will mature, and thereafter, the trustee shall make further payment to Schmidt.

See memorandum this date.

BY THE COURT:

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

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing
[ ] Chapter 13 Trustee [ ] Chapter 12 Trustee [ ] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.