UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
JAMES PAUL KENNEDY,	)	CASE NO. BK92-81355
	)	
DEBTOR	)	CH. 12
	)	Filing No. 368

MEMORANDUM

This matter is before the Court on Motion to Amend Order or for Partial New Trial filed by First Nebraska Bank of Stanton, Nebraska (Bank). Appearing on behalf of Bank was James Cavanagh of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., Omaha, Nebraska. Appearing on behalf of debtor was Mark Johnson of Norfolk, 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).

Background

On November 8, 1994, at Filing No. 366, this Court issued a journal entry and memorandum denying confirmation of an amended Chapter 12 plan and refusing to rule on the Bank's application for allowance of attorney fees and expenses under 11 U.S.C. § 506(b) because this judge believed that the dismissal of the action made the fee application moot and any order authorizing fees to be unenforceable. The Bank has filed a motion to alter or amend such determination and convincingly points out that the dismissal of a case after the allowance of Section 506(b) fees and expenses does not make the award of such fees and expenses either moot or unenforceable.

Decision

Because this judge believes that the legal analysis by the Bank is correct, the motion to alter or amend is granted.

The Bank is to submit to the Court a supplement to its last Section 506(b) application to include fees and expenses incurred since the date of such last application, including the attorney fees and expenses incurred preparing for and trying the confirmation issues.

Conclusions of Law

A decision of the Court of Appeals for the Eighth Circuit, Dahlquist v. First Nat'l. Bank (In re Dahlquist), 751 F.2d 295, 298 (1985) is the authority for this Court to grant Section 506(b) fees and expenses although the case is being dismissed. The Court of Appeals, in discussing whether a dispute over the

reasonableness of fees allowed in a dismissed case was moot, stated:

> The principle which we find operative in these cases and others is this: while the dismissal of a bankruptcy action indicates discontinuation of the attempt to restructure the debtor's financial affairs under the auspices of a federal court, it does not necessarily moot all issues collateral or ancillary to the bankruptcy proceedings. Dismissal of the underlying bankruptcy proceeding may indicate that no case or controversy remains with respect to issues directly involving the reorganization of the estate, but it does not necessarily indicate that no controversy exists with respect to any collateral or ancillary issues.

Id. at 298.

The Court went on to rule upon the appropriateness of the attorney fee allowance in the dismissed case.

Apparently, the Nebraska state courts will recognize as a final judgment for the purpose of collateral estoppel, res judicata and "full faith in credit" an order allowing attorney fees and expenses as an administrative expense in a bankruptcy case, even after that case is completed. Metco, Inc. v. Huffman, 2 Neb. App. 506, 511 N.W.2d 780 (Neb. App. 1994). Although the Metco case dealt with an allowance of administrative expenses in a Chapter 7 case, and not necessarily in a bankruptcy case that had been dismissed, the logic of Metco when coupled with the determination in Dahlquist that dismissal did not moot such an order, convinces this judge that the issue of allowance of attorney fees and expenses under 11 U.S.C. § 506(b) is a live issue, even though the underlying case is being dismissed.

In this case, the debtor and the Bank entered into one or more agreements which provided for attorney fees and expenses upon default and the institution of collection proceedings. Section 506(b) of the Bankruptcy Code has been interpreted in this District to mean that if the document reflecting the agreement between the parties concerning the claim of the creditor specifically authorizes attorney fees, then, notwithstanding state law which prohibits the award of such attorney fees, the bankruptcy court shall allow such reasonable attorney fees to be included as part of the claim. In re Record Enterprises, Ltd., Neb. Bkr. 86:547 (D. Neb. 1986). The district court in Record Enterprises did not reach the issue of whether the prepetition attorney fees and expenses incurred by the creditor were reimbursable pursuant to the authority of 11 U.S.C. § 506(b). This bankruptcy judge has consistently taken the

position that Section 506(b) does not make attorney fees and expenses which were incurred prior to a bankruptcy case and which were unenforceable under state law prior to the bankruptcy case being filed, allowable, awardable and enforceable simply because a debtor becomes involved in a bankruptcy case after such fees and expenses were incurred. See In re Egan, Neb. Bkr. 93:231 (Bankr. D. Neb. 1993). Counsel for the Bank has suggested that there is, both in this district and in the circuit, contrary authority which should cause this Court to reconsider its position in Egan.

The Court of Appeals for the Eighth Circuit has held that obligations consisting of attorney fees, interest and costs relating to prepetition mortgage foreclosures may be recovered by a creditor. Jennen v. Hunter (In re Hunter), 771 F.2d 1126 (8th Cir. 1985). However, that case did not deal with 11 U.S.C. § 506(b). That case dealt with the nondischargeability of a particular debt due to fraud by the debtor. The court said that under some circumstances, prepetition attorney fees and costs incurred by a creditor as a result of fraud by the debtor may be assessed as part of the nondischargeable obligation. It made no final determination on the issue because there were insufficient facts before it to permit it to determine whether all or some of the prepetition attorney fees should be deemed nondischargeable. Hunter is not authority for the proposition that Section 506(b) converts prepetition attorney fees and expenses into allowable and enforceable amounts in or outside of a bankruptcy case.

The case of In re W. S. Sheppley & Co., 62 B.R. 279 (Bankr. N.D. Iowa 1986) specifically authorizes prepetition attorney fees and expenses to be included in the allowed secured claim of an oversecured creditor. However, the court cited no authority from the Northern District of Iowa, the Eighth Circuit or any other jurisdiction for the allowance of such amount. In addition, the court did not analyze Iowa law with respect to whether or not the attorney fees and expenses would have been enforceable outside of the bankruptcy case. Since there was no analysis of either Iowa law or bankruptcy law, but simply a statement that the prepetition fees and expenses were allowable, this judge is not convinced that W. S.Sheppley was correctly decided.

Finally, the Bank cites In re Haske, 122 B.R. 372 (D. Neb. 1990), for the proposition that the district court allowed and authorized payment of all prepetition attorney fees and expenses related to foreclosure of the deed of trust in question. The Bank may be correct that such was the result of the decision by the district court. However, the issue before the district court was not directly related to the question of prepetition versus post-petition attorney fees. The issue was whether, as a matter of law, the language of the deed of trust concerning the award of attorney fees limited the amount of attorney fees which could be awarded. At the bankruptcy court level, the contractual language

was interpreted to contain a limitation on the total amount of fees which could be claimed by the creditor. See In re Haske, Neb. Bkr. 89:634 (Bankr. D. Neb. 1989). The issue before the bankruptcy court and the district court did not relate to the reasonableness of the fees, the specific amount of the fees, or whether some or all of prepetition fees should be allowed. Therefore, the decision of the district court, although perhaps resulting in the allowance of prepetition fees because neither party brought the question back to the bankruptcy court for final resolution, is not considered by this Court to be authority for the proposition presented by the Bank.

This judge, under the circumstances of this case, declines to vary from the determination made in Egan that prepetition attorney fees and expenses which are not enforceable under state law continue to be unenforceable in a bankruptcy case. This results in a reduction of the fees and expenses requested by the Bank in the amount of $3,103.00.

Procedure

Once the final supplemental fee application is submitted to the Court, this judge will make a determination of the reasonableness of the fees in total and make an award consistent with this opinion. Until such order is entered, there is no final appealable order on this issue.

Bank is directed to submit the final supplement within fifteen days and debtor is granted fifteen days thereafter to make specific objections to the supplemental material. The Court considers the arguments for and against allowance of earlier amounts to have been made and will consider those arguments without additional arguments being made concerning those amounts.

DATED: January 25, 1995

BY THE COURT:

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

Copies faxed by the Court to:

JOHNSON, MARK	8-402-379-1221
CAVANAGH, JAMES	344-4006

Copies mailed by the Court to:
Richard Lydick, Trustee
Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.