UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
DONALD and BEVERLY VANDEWALLE,	)	CASE NO. BK85-144
	)	
DEBTORS	)	A85-197
	)	
RALSTON PURINA COMPANY,	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
DONALD and BEVERLY VANDEWALLE,	)	
	)	
Defendant	)	

MEMORANDUM OPINION

This case has been referred to the Bankruptcy Court by the United States District Court for the District of Nebraska pursuant to Local Rule 51. On December 14, 1984, an order was entered in the United States District Court for the District of Nebraska granting a summary judgment on the question of liability to the plaintiff. The Court ordered the parties to brief the question of interest rate and attorney fees, with an emphasis on the question of the law of which state applied, Iowa or Nebraska. Following the filing of the briefs, the debtors filed bankruptcy and eventually the matter was referred to the Bankruptcy Court for final determination.

On November 8, 1985, a status hearing was held in the Bankruptcy Court. Ralston Purina Company was represented by William Heubaum. Milo Alexander appeared on behalf of Beverly Vandewalle. Donald Vandewalle was not present and was not represented by counsel. Mr. Alexander was granted three weeks to review the briefs which had been previously filed in the District Court and file a responsive brief. Plaintiff was granted ten days thereafter to file its final brief. Both parties declined to file supplementary briefs and submitted the matter on the briefs as filed in the United States District Court for the District of Nebraska.

Factual Background

Defendants are husband and wife and residents of Belgrade, Nebraska, engaged in the business of farming. On March 31, 1982, defendants executed a promissory note, payable to plaintiff in the principal amount of $49,784.52. The note provided for interest at a rate of 19% per annum on the unpaid principal balance, to be paid monthly, and made the principal amount due and payable on March 31, 1987. The note also provided that in the event that monthly interest installments were not paid when due, the holder of the note was entitled to accelerate the entire principal sum and interest. On May 4, 1983, defendants were notified that plaintiff was declaring both the principal and interest immediately due on the grounds of the defendants' failure to make any interest payments during the thirteen-month period in which the note had been outstanding. Specifically, plaintiff demanded the principal sum of $49,784.52, plus the accrued interest to date of $10,507.59, totaling $60,292.11.

On November 21, 1983, plaintiff filed its action, seeking judgment against defendants in the amount of $60,292.11, together with interest at the rate of 24% per annum from May 5, 1983, to date of judgment, and for interest at the rate of 24% per annum or the highest lawful post-judgment interest from the date of judgment to date of satisfaction thereof, together with attorney's fees.

On December 14, 1984, the District Court entered an order granting plaintiff a summary judgment on the question of liability. The Court did not decide the amount due from defendants to plaintiff, because the pleadings and affidavits in support of the motion for summary judgment did not provide sufficient information to make a determination of whether the amount prayed for was valid. From a review of the pleadings and the briefs, this Court concludes that the issue is whether Iowa or Nebraska law applies to this case.

The debtors are residents of Nebraska. The creditor/plaintiff is a Missouri corporation with offices in Iowa. The debtors signed the promissory note in Nebraska and mailed it to the plaintiff's office in Sioux City, Iowa. All interest and principal payments were to be made in Sioux City, Iowa. The promissory note provided for an interest rate of 19% per annum pre-default, 24% per annum post-default and provided that debtors would be liable for reasonable attorney fees for any collection efforts.

Defendants argued in the District Court and defendant Mrs. Vandewalle argues in the Bankruptcy Court that the interest rate stated in the promissory note is usurious under Nebraska law and that if the plaintiff is to recover interest at all, it should be limited to the amount of interest and the rate of interest which is permissible under Nebraska law. In addition, the defendants

argued in the District Court and Mrs. Vandewalle argues in Bankruptcy Court that under Nebraska law contractual provisions obligating a party to pay attorney fees are not enforceable unless authorized by statute or recognized practice and, therefore, the attorney fee provision should not be enforced by this Court.

Plaintiffs argue that Iowa law applies because the note was to be performed in Iowa. Plaintiffs allege that under Iowa law the interest rate provided for in the note, both pre-default and post-default is legal and enforceable and that the contractual agreement with regard to attorney fees is enforceable.

Conclusions of Law

Iowa law applies. The Nebraska Supreme Court, in two relatively recent decisions has analyzed the question concerning which law applies to a note or agreement when the stated interest rate is usurious under Nebraska law. See Exchange Bank and Trust Company v. Tamerius, 200 Neb. 807, 265 N.W.2d 847 (1978); Shull v. Dain, Kalman & Quail, Inc., 201 Neb. 260, 267 N.W.2d 517 (1978).

In the Exchange Bank and Trust Co. v. Tamerius case, the Nebraska Supreme Court affirmed the trial court's entry of summary judgment for plaintiff against defendant's contention that the promissory note sued upon (which was executed in Nebraska and mailed to plaintiff, a Texas bank) was usurious in Nebraska and void against public policy. The Court, citing authority, stated:

> "Where a promissory note is made in one state, to be performed in another state, it is, ordinarily, to be regulated and governed by the law of the place of performance, without regard to the place at which it was written, dated, or signed, unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made." (Citations omitted.)

In this case, the note was signed in Nebraska and mailed to the plaintiff at its Sioux City, Iowa, credit office. The makers promised to pay plaintiff at Sioux City, Iowa, the principal and interest called for. Therefore, the place of performance was Iowa and Iowa law applies.

Iowa Code §535.2(2)(a)(5) (1983) provides that a person borrowing money or obtaining credit for business or agricultural purposes may agree to pay any rate of interest. This promissory note provides for pre-default interest at 19% and post-default interest at 24%.

An agreement to pay a reasonable attorney fee, in case a suit would be necessary to enforce a promissory note is valid and enforceable under Iowa law. See Nelson v. Everett, 29 Ia. 184 (1870); Weatherby v. Smith, 30 Ia. 131 (1870); McGill v. Griffin, 32 Ia. 445 (1871); and First National Bank v. Breese, 39 Ia. 640 (1874).

Judgment

Judgment is entered in favor of the plaintiffs and against the defendants, jointly and severally, in the amount of $60,292.11 together with interest at the rate of 24% per annum from May 5, 1983, to date of judgment and for interest at 24% per annum from date of judgment until paid, together with the costs of this action. Judgment is also entered in favor of plaintiffs and against defendants jointly and severally for reasonable attorney fees, the amount of which shall be determined by supplementary order. Plaintiffs are to file an affidavit within 30 days of the date of this judgment setting forth in detail an itemized statement of time and expenses incurred by plaintiff's attorney and the usual hourly rate charged by such attorney or attorneys. Copies of such affidavit shall be served upon counsel for Beverly Vandewalle and mailed to the last-known address of Donald Vandewalle. Defendants shall have 15 days thereafter to file written objections to the entry of an order concerning attorney fees requested. If no written objection is filed within such time period, the Court, on its own motion, shall enter such an order. If objection is filed within the appropriate time period, a hearing shall be set on such objection.

DATED: March 31, 1986.

BY THE COURT:

Timothy J. Mahoney
U.S. Bankruptcy Judge

Copies mailed to:

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