

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 7
ROBERT C. BERTELS,)
) No. BK 91-50064
Debtor(s).)
)
COMMUNITY FIRST BANK,) Adv. No. 91-5024
)
Plaintiff,)
)
v.)
)
ROBERT C. BERTELS,)
)
Defendant.)

OPINION

On May 31, 1988, Robert C. Bertels ("debtor"), a cashier and vice-president of Community First Bank ("CFB"), created a false and fictitious loan account at CFB for \$107,041.17 in the name of Diana Minardi. The proceeds from the loan were used to pay off a prior loan, also created by debtor, with United Illinois Bank of Collinsville. The misappropriation was discovered, and debtor was criminally charged with willfully and knowingly misapplying funds in violation of 18 U.S.C. §656. Debtor pled guilty and on March 9, 1990, the United States District Court for the Southern District of Illinois ordered debtor to make restitution to CFB in the amount of \$107,041.17.

On January 23, 1991, debtor filed a chapter 7 bankruptcy petition. Subsequently, on April 23, 1991, CFB filed a complaint for

determination of dischargeability of debt, alleging that the debt owed by debtor to it was nondischargeable under §§ 523(a)(2)(A) & (B), 523(a)(4) and 523(a)(6). Debtor failed to answer or otherwise respond to the complaint, and the Clerk's office entered default against him on June 12, 1991.

On July 25, 1991, the Court conducted a hearing to determine the amount of the nondischargeable debt.¹ The Court found (and counsel for debtor conceded) that the principal amount of the debt, \$107,041.17, was nondischargeable. CFB additionally requested that the following amounts be declared nondischargeable: (1) \$28,924.74 in interest, (2) \$11,986.88 in attorney's fees, (3) \$964.65 in costs, and (4) \$9500.00 for "head hunter" fees incurred by CFB in connection with the employment of debtor. The Court denied CFB's request for "head hunter" fees, and granted "reasonable" attorney's fees, subject to the requirement that counsel for CFB submit an itemization of fees and costs for the Court's review. The question of whether CFB should also be awarded interest was taken under advisement.

Creditors who have successfully litigated a dischargeability action are generally not entitled to attorney's fees unless they can establish a statutory or contractual right to those fees. Thus, a creditor who prevails in a dischargeability proceeding "may recover

¹At the time the amended complaint was filed on May 28, 1991, CFB sought an award of \$132,041.17, but it was not clear from the complaint how that amount had been calculated.

attorney's fees when such fees are provided for by an enforceable contract between the creditor and debtor." Transouth Financial Corp. of Florida v. Johnson, 931 F.2d 1505, 1509 (11th Cir. 1991). See also Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir. 1987) (ancillary obligations such as attorneys' fees and interest may attach to the primary debt); In re Martin, 761 F.2d 1163, 1168 (6th Cir. 1985) (creditors are entitled to recover attorney's fees in dischargeability proceedings if they have a contractual right to them valid under state law). Consequently, "the 'debt' excused from discharge in a successful Section 523 action would appear to include a debtor's contractual obligation to pay a creditor's attorney's fees." Transouth Financial Corp of Florida v. Johnson, 931 F.2d at 1507.

In the present case, the loan contract expressly provides that debtor must pay attorney's fees and court costs if CFB is required to hire a lawyer to collect the note.² The debtor contends that "[t]he notes held by Community First were created in Illinois between Community First and other parties," and that "Mr. Bertels is not a party to any of the notes held by Community First, nor has he in any way made an agreement whereby he would be responsible for the payment of interest or principal on any of the notes in question." Debtor's Brief at p. 2. If debtor's reasoning is correct, a "good faith"

²The exact contract language is as follows: "If you hire a lawyer to collect this note, I must pay his or her fee, plus court costs (except where prohibited by law)."

borrower who executes a promissory note would be liable for payment of that note (and any attendant interest and attorney's fees) while debtor, who obtained loan proceeds by means of a false and fictitious loan account, would not be. Such a result is, at a minimum, inequitable. Regardless of whether or not debtor was a "named party" to the transaction with the bank, debtor obtained the benefit of the bargain and should not be able to escape his obligations through his deceit. Accordingly, CFB is entitled to attorney's fees and costs incurred by it in pursuing this dischargeability action. A review of the itemization of time submitted by counsel for CFB indicates that approximately twenty-five hours were devoted to the dischargeability proceedings.³ Based on counsel's rate of \$85.00 per hour, CFB is therefore entitled to attorney's fees in the amount of \$2,125.00.

The itemization of time submitted by CFB in support of its request for fees also includes entries for time spent monitoring debtor's criminal case, as well as entries for time spent on a state court suit filed by CFB against debtor and United Bank of Collinsville before the bankruptcy petition was filed. The Court finds that CFB is not entitled to fees for its work on debtor's criminal case as that case was prosecuted by the United States Attorneys' Office and did not

³An exact calculation is difficult since the Court cannot determine, with certainty, whether some entries apply to the dischargeability proceeding or to a state court suit filed by CFB against debtor.

constitute an action by CFB to "collect the note." With regard to the state court proceeding, that case remains pending and no judgment or award of attorney's fees has yet been entered in favor of CFB. If, however, CFB is granted attorney's fees and costs in that proceeding, this Court holds that those fees and costs would also be nondischargeable.

CFB also seeks interest in the amount of \$28,924.74.⁴ It is well established that "[i]nterest is ... an integral part of the continuing debt, representing the cost of the use of the monies due a creditor and compensation for delay of repayment." In re Kellar, 125 B.R. 716, 721 (Bankr. N.D.N.Y. 1989). Thus, courts addressing the question have repeatedly held that "ancillary debts like interest are nondischargeable if the primary obligation is nondischargeable." Klingman v. Levinson, 877 F.2d 1357, 1362-63 (7th Cir. 1989). See also In re Romero, 535 F.2d 618, 623 (10th Cir. 1976) (interest on a nondischargeable debt allowed from the date of the last advance by the creditor to the date of entry of the bankruptcy court's judgment); Nichols v. Hensler, 528 F.2d 304, 309 (7th Cir. 1976) (interest on a nondischargeable debt takes on the character of the debt itself and is therefore not discharged); In re Hecker, 95 B.R. 1, 3 (Bankr. Dist.Col. 1989) (nondischargeable debt includes attorney's fees and interest).

⁴The interest was calculated from May 31, 1989, the date of the loan, to July 29, 1991, and was based on the contract rate of 12.5%.

As stated by the Kellar court, "the dual policy of making the creditor whole and deterring fraudulent conduct is served by awarding a successful plaintiff in a dischargeability action the contractually agreed upon rate of interest ... until satisfaction of the debt." For the same reasons, this Court finds that CFB is entitled to interest in the amount of \$28,924.74.

Accordingly, for the reasons stated, the Court finds that the amount of the nondischargeable debt owed by debtor to CFB is \$138,090.74 (\$107,041.17 in principal, \$2,125.00 in attorney's fees, and \$28,924.74 in interest), plus attorney's fees and costs, if any, that are recovered by CFB in the pending state court suit filed against debtor and United Bank of Collinsville.

See Order entered even date.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: October 21, 1991