UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: **Bky. 95-34575**

Kenneth A. Loesch,

Debtor.

Order on Claim Objection

This matter came before the Court on May 10, 2000 on the Trustee's objection to Claim #8, filed by Louie and Judy Langenfeld in the above captioned case. Appearances were made by: attorney Trustee, John Hedback; Debtor's attorney, George L. May; Creditor Sueellen Loesch's attorney, Gregory J. Schmidt; and, Creditor Louie Langenfeld, Pro se. The Court has jurisdiction over this matter as a core proceeding under 28 U.S.C. § 157(b)(2)(B) and 1334.

I. Introduction

The claim at issue was filed by Creditors Louie and Judy Langenfeld on April 10, 1996, and is docketed in the above captioned case as Claim #8. The claim is listed as an unsecured nonpriority debt in the amount of $44,616.67, and the claim lists the date the debt was incurred at October 4, 1979. Attached to the claim form is a document copy titled "NOTE" which recites the Debtor's promise to pay "the sum of $20,000 with interest at 10% per annum until paid."[1] The note is signed by the Debtor Kenneth A. Loesch. The critical facts, necessary for

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[1]The Note also recites that the "obligation is secured by life insurance policies on the life of the undersigned (Kenneth A. Loesch)." At the May 10 hearing the Trustee offered to withdraw his objections to the extent that the Langenfelds were willing to amend their claim to a secured claim. The Langenfelds contend, and no evidence in the record contradicts their contention, that no life insurance policies exist to provide security for their loan. The Court assumes that the Langenfelds continue to seek payment as unsecured creditors of the estate.

determining validity of the claim, are not disputed[2]. The Trustee conceded at the May 10 hearing that the note is authentic, and to the extent that it remains enforceable, the outstanding balance was $44,616.67 at the filing of Mr. Loesch's case. The parties also agree that Mr. Loesch did make some payments on the loan, but that the last payment received by these Creditors was made on July 1, 1989.

The Trustee argues instead that the note qualifies as a demand note under Minn. Stat. § 336.3-108, and that as a demand note, the statute of limitations under Minn. Stat. § 541.05 to bring an action on the note would have run on either October 4, 1985 (six years after the date of the note), or, July 1, 1995 (six years after the last payment on the note). In addition, the Trustee argues that the note is void as usurious under Minn. Stat. § 334.01 which limited interest on personal loans to 8%.

The Creditors argue (supported by the affidavit of the Debtor) that they relied upon Mr. Loesch's ongoing verbal assurances that the loan would be repaid in granting him forbearance in repayment. The Langenfelds also argue that the note was not usurious because it was below the prime interest rate at the time of 14.5%, and allowable under Minn. Stat. § 334.011.

The two issues before this Court are whether Minnesota law: (1)allows the oral representations of Mr. Loesch to extend of the statute of limitations on the Langenfelds' claim; and, (2)whether the 10% interest agreed to by the parties voids the note.

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[2]As discussed later, the parties do dispute whether the loan was of a personal or business nature. Determining the validity of the note does not require the Court to make a factual determination of the loan purpose. Determining the allowed amount of the claim does, however.

II. Extension of the Statute of Limitations by Oral Representation

The Creditors rely on *In re Giguere*, 366 N.W.2d 345 (Minn. App. 1989) to argue that an oral agreement to repay can extend the statute of limitations. In that case, Mr. Giguere borrowed money on a 90 day note and failed to repay when demand was made at the end of the 90 days. An oral agreement was reached to pay the note when Mr. Giguere sold certain lake property at an unspecified time in the future. The holder of the note made no further demand for payment until after Mr. Giguere's death fourteen years later. The Court of Appeals upheld the trial court's decision to enforce the fourteen year-old obligation noting: "The prevailing rule is that the parties may contract orally to modify their agreements as respects the manner of performance." *In re Giguere*, 366 N.W.2d 345, 347 (Minn. App. 1989). The Court of Appeals drew a critical distinction between the modification of a note's terms and the performance, or payment, under the note:

> An extension of time of payment is a valid and binding agreement to delay the enforcement of a promissory note. An extension may be made by agreement without violating the rule excluding parol evidence to contradict, add to, or vary a written contract because the evidence is admitted only to prove a new agreement. Nor does an oral extension violate the statute of frauds: Our prior decisions hold that an oral agreement that modifies the method of time for performance is valid and not subject to the statute of frauds. Justice Mitchell stated the rule: [T]he distinction must be kept in mind between the contract itself, which is within the purview of the statute, and the subsequent performance, which is not. The oral stipulation for an extension of the time of payment goes simply to the question of performance, constituting an excuse, as it does, for the failure to perform according to the terms of the written contract, and a reason why the defendant had no right to declare a forfeiture on account of such failure. *Id.*

The Trustee argues that to follow *In re Giguere* would give no effect to the six year statute of limitations and relies upon *In re Estate of Fauskee*, N.W.2d 324 (Minn. App. 1993) to argue that Mr. Loesch's promise to pay the Langenfelds is insufficient to modify the note. But

the *Fauskee* Court cited *In re Giguere* with approval and upheld the trial court's holding that "oral acknowledgment of the notes made after the statute of limitations had run tolled the statute of limitations." *In re Estate of Fauskee*, N.W.2d 324, 327 (Minn. App. 1993). The Trustee conceded at the May 10 hearing that Mr. Loesch made repeated oral promises to repay the loan to the Langenfelds. While the objecting Creditor, Sueellen Loesch, raised general issues about the Debtor's credibility, she did not contest Mr. Langenfeld's contention that he relied on the oral promises of Mr. Loesch in foregoing his rights under the note. The only evidence of record is Mr. Loesch's affidavit, filed on April 27, 2000 as part of the Langendorfs' response to the Trustee's objection. In it Mr. Loesch states: "I have always intended to repay my debt . . . I have constantly reassured the Langenfeld's the debt would be repaid. We have had frequent discussions about this debt, as recently as last week."

To the extent that the objection to this claim is based upon the bar of a six year statute of limitations under Minnesota law, it is overruled.

III. Is the Note Void as Usurious under Minn. Stat. § 334.01

The Trustee and objecting Creditor argue alternatively that even if the note is otherwise enforceable at this date, it is usurious under Minn. Stat. §334.01, which states:

> 334.01. Rate of interest
> Subdivision 1. General. The interest for any legal indebtedness shall be at the rate of $6 upon $100 for a year, unless a different rate is contracted for in writing. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than $8 on $100 for one year. Minn. Stat. §334.01.

Relying on Minn. Stat. §334.03 they argue that since the note is usurious, it is void:

> 334.03. Usurious contracts invalid; exceptions

> All bonds, bills, notes, mortgages, and all other contracts and securities, and all deposits of goods, or any other thing, whereupon or whereby there shall be reserved, secured, or taken any greater sum or value for the loan or forbearance of any money, goods, or things in action than prescribed, except such instruments which are taken or received in accordance with and in reliance upon the provisions of any statute, shall be void except as to a holder in due course. Minn. Stat. §334.03.

The Langenfelds argue that their loan to Mr. Loesch was for establishing a car dealership and should be governed by Minn. Stat. §334.011 which allows:

> 334.011. Rates of interest; business and agricultural loans
> Subdivision 1. Notwithstanding the provisions of any law to the contrary a person may, in the case of a contract for the loan or forbearance of money, goods, or other things in action in an amount of less than $100,000 for business or agricultural purposes, charge interest at a rate of not more than 4-1/2 percent in excess of the discount rate on 90 day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district encompassing Minnesota.
> For the purposes of this subdivision, the term "business" means a commercial or industrial enterprise which is carried on for the purpose of active or passive investment or profit. Minn. Stat. §334.011.

The Langenfelds represented at the May 10, 2000 hearing that the prime rate in 1979 at the time of the loan was 14.5%, a representation undisputed by the Trustee or objecting Creditor. Based on those figures the Court notes that §334.011 would have allowed an interest rate of 19%, well above the 10% recited in the note. Assuming that the loan was made for the purpose of purchasing or starting a business, the interest rate charged was legal under Minn. Stat. §334.011.

Even if the note was for a personal loan, the harsh penalty of voiding the note is not required under Minnesota law. *In re Estate of Fauskee,* N.W.2d 324, (Minn. App. 1993), (a case cited by the Trustee) the Minnesota Court of Appeals cites well established Minnesota law that: “In order for a loan to be found void for usury, the court must find . . . (d) the presence of an intent to evade the law at the inception of the transaction.” *Id.* at 328. There is no evidence

before the Court that the Langenfelds had any such intent when they made their initial loan to the Debtor. Nor has either objecting party argued that any existed.

The Langenfelds lent their brother-in-law money, for what they say was a business purpose. Even assuming that the loan was not made for a business purpose, this Court sees no equitable reason to void the loan. Like in *Fauskee*:

> The Court believes it necessary to recognize the specific facts and circumstances of this particular case when applying the law. This is a family transaction. A son was in financial trouble. His 92- year-old mother was willing to help. She borrowed money at 14% and at his suggestion charged him a rate that was no more nor no less. The rate was usurious. However, given the reasoning in the Pearson case, the Court can find no equitable basis for finding the note void. Effa Fauskee had no unlawful intent at the time of the transaction. She had a mother's concern for a son. *Id.* at 329.

Whether the note was for a business or personal purpose will determine the maximum legal interest rate that could be charged at the time the note was signed.

> We also agree with the trial court's equitable decision that the rate that could have been charged lawfully, 13%, should be repaid. See In re Petition for Disciplinary Action Against Kenneth R. Pearson, 352 N.W.2d 415, 420 n. 4 (Minn.1984) (where as a matter of law there was no unlawful intent at the time of the loan, the loan must be repaid at the lawful rate). *Id.*

Mr. Langenfeld appeared Pro se at the May 10, 2000 hearing, he was not sworn to give testimony. He did argue to the Court that the loan was originally made for the purpose of allowing his son-in law to purchase an auto dealership. Neither the Trustee or Suellen Loesch have provided any evidence to the contrary. To the extent that they wish to contest this evidentiary issue the Court will allow either the Trustee or Suellen Loesch fourteen days from the entry of this order to schedule an evidentiary hearing to determine the purpose of the Langenfeld loan.

Based on the foregoing the Court **ORDERS**:

1) The Trustee's objection, joined by Suellen Loesch, to allowance of Claim #8 in the above captioned bankruptcy case, is overruled.

2) The Trustee, or the objecting Creditor Suellen Loesch, has fourteen days from the entry of this Order to schedule an evidentiary hearing to determine if the Langenfeld loan that forms the basis of Claim #8 was a personal or business loan.

3) If no evidentiary hearing is scheduled and noticed within fourteen days after the entry of this Order, then Claim #8 will be allowed in the amount as filed, and an order will be entered accordingly.

4) If an evidentiary hearing is scheduled, the Court will reserve a determination of the allowed amount of Claim #8, pending the hearing and a finding of the maximum legal interest rate allowable over the life of the loan.

Dated: July 25, 2000

By the Court:

/e/ Dennis D. O'Brien
Dennis D. O'Brien
Chief U.S. Bankruptcy Judge

ELECTRONIC NOTICE OF ENTRY AND FILING ORDER OR JUDGMENT Filed and Docket Entry made on July 27, 2000 Patrick G. De Wane, Clerk By SKM Deputy Clerk

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