In the United States Bankruptcy Court

for the Northern District of Iowa

LAVERN KUEHL and CORA MAE KUEHL	Bankruptcy No. 87-01102D
Debtors.	Chapter 13

MEMORANDUM OF OPINION AND ORDER RE: STATUS OF OBJECTOR'S CLAIM

LaVern Kuehl and Cora Mae Kuehl, Debtors, filed their Chapter 13 plan on May 21, 1987. Monticello State Bank (Bank) filed an Objection to Confirmation of Plan on June 25, 1987 claiming inter alia that the plan makes no provision for any payments to Bank for the value of its secured claims. The matter now before the Court by consent of these parties is a determination of the enforceability of any claims of Bank against Debtors and whether the claims, if enforceable, are secured.(1) The parties waived any procedural objection to not having the issue determined as an adversary proceeding. A hearing was held November 12, 1987 in Cedar Rapids, Iowa and submitted to the undersigned for consideration. The Court now issues this ruling which shall constitute Findings and Conclusions as required by Bankr. R. 7052. This is a core proceeding pursuant to 28 U.S.C. section 157(b)(2)(B) and section 157(b)(2)(K).

I.

On October 5, 1977, Debtors traveled from their home near Garnavillo, Iowa to meet with Mr. Patton, a representative of Bank, at the home of their son-in-law and daughter, Keith and Judith Koth, on the Debtors' Clayton County farm. The Koths leased Debtors' farm. On that day, Debtors signed a "GUARANTY" to enable the Koths to obtain a line of credit with Bank. This agreement provides:

FOR VALUE RECEIVED, AND FOR THE PURPOSE OF ENABLING

> Keith Koth and/or Judith Koth hereinafter designated "Debtor" to obtain money and credit from the Monticello State Bank, Monticello, Iowa, hereinafter designated "Bank," (or to secure further extensions of time on present existing indebtedness due said Bank, or both) the undersigned hereby guarantee the prompt payment of any kind whatsoever, whether as principal, co-maker, surety, endorser, or otherwise, now due, or which may hereafter become due from said Debtor to said Bank, whether evidenced by notes, overdraft, endorsements, surety, guarantor, or otherwise and agree to pay all costs and expenses paid and incurred in collecting same, it being the intention that this shall be a continuing, inexhaustible guarantee.
>
> The liability of the undersigned hereon shall not, at any time, exceed the sum of $100000.00 and all expenses hereinbefore mentioned, but the liability hereon shall not be released or affected if at any time the indebtedness exceeds that amount and the Bank may apply all sums received by it from the Debtor, from collateral (in case of death, insolvency, or bankruptcy of the Debtor) from claims against Debtor's estate and from any other source, first, in payment of such excess.
>
> Notice of acceptance of this guaranty and of any indebtedness or liability accepted during its existence is hereby waived.
>
> This guaranty shall remain in full force and effect and binding upon the undersigned until written, registered notice of its discontinuance shall be received by said Bank at its banking house in Monticello, Iowa, and thereafter until any and all indebtedness or liability accepted before receiving said notice of revocation, shall have been fully paid.

> The undersigned further agree and authorize said Bank to extend or renew the several or joint obligations due said Bank from or transferred to said Bank by the said Debtor, and to take additional or exchange security and to release any or all security without in any manner impairing the liability of the undersigned, and notice of such acts is hereby waived.
>
> Demand for payment, notice of default or non-payment, protest, and notice of protest, as to any obligation arising hereunder is waived. It is agreed that said Bank shall not be required to first proceed against or exhaust its remedies against said Debtor before proceeding to collect under this instrument, but the undersigned hereby agree to pay promptly at any time, upon either written or verbal request, any and all sums or amounts due and owing said Bank by said Debtor during the life of this agreement the same as if said obligations were direct and primary obligations of the below subscribed.

Both Mr. Kuehl and Mrs. Kuehl testified that they thought the Guaranty was like a note upon which Bank could demand payment if the Koths defaulted.

On October 13, 1977, Bank issued Koths a $148,128.47 line of credit. Louis Morf, President of Bank, testified that the Koths' credit was entirely dependent on a guaranty by Debtors; either the full amount sought by the Koths would be lent if Debtors provided a guaranty or none would be lent if no guaranty was given.

Mr. Kuehl testified that he knew the Koths were borrowing a substantial sum of approximately $148,000. He also stated that it was his understanding that the Koths' cattle, machinery and feed provided some security for the note. Mrs. Kuehl, however, testified she did not realize her son-in-law and daughter were borrowing such a large amount of money.

Both Kuehls testified that Mr. Patton promised that Bank would report to them on the status of the Koths' loan every six months. Regular reports apparently were not made nor were Debtors formally notified of any increase in the Koths' debt. In 1980, Mrs. Kuehl inquired whether their "names could be taken off the Guaranty" since she felt that the Koths now had sufficient property to secure the loan. She testified that Mr. Patton asked Mr. Morf and Mr. Morf declined such action. In response to the Debtors' inquiry about the continued necessity of the Guaranty and the status of the Koths' loan, however, Mr. Patton later inspected the Koths' farming operation.

Mr. Kuehl testified that he did not ask the Koths about their financial condition and that he had no need to ask while the Koths made their farm rent payments. Mrs. Kuehl said her inquiries were soundly resisted by her son-in-law.

On December 7, 1978, Debtors borrowed $45,000 from Bank. Four documents were executed:

(1) a Promissory Note for $45,000;

(2) an Assignment of Contract;

(3) a Second Real Estate Mortgage on Debtors' Clayton County farm; and

(4) a Real Estate Mortgage Note for $100,000.00.

The Assignment of Contract and the Second Mortgage were filed in Clayton County on December 8, 1978.

Mr. Morf testified that it was Bank's policy to obtain a real estate mortgage note whenever a real estate mortgage was taken. According to Bank's Liability Ledger for Mr. Kuehl, only the indebtedness of $45,000.00 was entered on December 7, 1978 against Debtors. The Second Real Estate Mortgage was conditioned to be void upon payment of the $100,000.00 note dated December 7, 1978.

By December of 1978, the Koths' debt to Bank had increased. Mr. Morf testified that the Koths' debt, when added to Debtors' new loan from Bank, totaled more than $200,000. He stated that Bank therefore looked to the Second Real Estate Mortgage, the Real Estate Mortgage Note, and the Assignment as security for the new loan made to the Debtors as well as for the Guaranty previously executed by Debtors on behalf of the Koths.

All of the financial documents executed by Debtors in their dealings with Bank were drafted by Bank. The Assignment of Contract included the following language (emphasis added):

> For value received, we hereby sell, assign [sic] and set over to the Monticello State Bank of Monticello, Iowa all sums due or to become due us under a certain contract of purchase and sale entered into on the 30th day of October, 1973, by and between Walter M. Meier and Iona L. Meier, sellers and LaVern Kuehl and Cora Mae Kuehl, buyers, said contract recorded on October 31, 1973. . . .
>
> This assignment il given as collateral security to our note given this day to the Monticello State Bank and to any and all indebtedness which said bank may now hold or in the future acquire against us, direct or contingent, secured or unsecured.

The Assignment was signed by both Mr. and Mrs. Kuehl.

Mr. Morf testified he erred in drafting the Assignment since the language "all sums due or to become due us" is more appropriate for an assignment by a seller, not buyers, as were Debtors. Mr. Morf stated, however, that the intent of the document was that Debtors would assign their complete interest in the property being purchased by the Debtors subject to the sellers' interest.

Over the next several years, Debtors renewed their previous year's loan and borrowed additional sums. A new note was drawn each year and the prior one surrendered. By June of 1984, Debtors owed Bank more than $120,000.00. Debtors' last Promissory Note to Bank of June 27, 1984 was for $120,546.63.

Both Mr. and Mrs. Kuehl testified that they misunderstood the nature and potential ramifications of the Assignment. Mr. Kuehl stated that he did not realize he was "signing away" their homestead or that the Assignment was "like a mortgage." Mrs. Kuehl stated that she did not know the Assignment could result in the loss of her home or she would not have signed it.

Bank stands on the documents signed by the Debtors and presents a secured claim, in the aggregate, for $267,910.72.

Debtors contest the enforceability of the Guaranty and the Assignment of Contract. They argue that both the Guaranty and Assignment are void for lack of consideration and because Bank failed to disclose material facts to Debtors and to inform Debtors of Bank's "conflict of interest." Debtors further argue that the Guaranty is unenforceable because it is uncertain and vague and because it is a contract of adhesion and unconscionable. Debtors also contend the Guaranty is unenforceable because Bank (1) failed to protect its position and to properly monitor the Koths' financial condition; (2) increased Debtors' risk; and (3) failed to keep promises made to Debtors. Finally, Debtors argue the Assignment is a nullity because of incorrect language in the document.

Debtors first argue that the Guaranty is unenforceable because it is uncertain and vague. Most specifically, Debtors find that nothing is being guaranteed and that no identifiable rights and obligations are created therein.

Vagueness indefiniteness, and uncertainty are matters of degree and each case must be decided upon its own particular circumstances. Palmer v. Albert, 310 N.W.2d 169, 172 (Iowa 1981). Every effort should be made by a court to avoid finding a contract unenforceable for uncertainty. Id. The terms of an agreement are sufficiently definite if a court can determine with reasonable certainty the parties' duties and the conditions of performance. Id.

It takes little effort here to conclude that this Guaranty is not unenforceable for vagueness. The nature and purpose of the agreement as well as the obligations and conditions imposed therein are clear.

The Court also concludes that the Guaranty is not unconscionable. While some clauses therein may be ones of adhesion, that alone does not render the agreement unconscionable. Home Federal Savings and Loan Association v. Campney, 357 N.W.2d 613, 619 (Iowa 1984).

> A bargain is unconscionable "if it is 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" Casey v. Lupkes, 286 N.W.2d 204,

> 207 (Iowa 1979)(quoting Hume v. United States, 132 U.S. 406, 411 (1889).

Smith v. Harrison, 325 N.W.2d 92, 94 (Iowa 1982). When considering a claim of unconscionability, the court should examine assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness. Home Federal Savings and Loan Association, 357 N.W.2d at 618. The Court's examination of those factors leads to but one conclusion: the Guaranty is not unconscionable. No indecent terms have been identified nor is any substantive unfairness shown. See id. Moreover, the doctrine of unconscionability does not exist to rescue a party from what it may perceive as a mere bad bargain. Smith, 325 N.W.2d at 94.

To address Debtors' complaint that both the Guaranty and Assignment are void because of Bank's failure to disclose material facts or inform Debtors of any "conflict of interest," the relationship between Debtors and Bank must first be examined. If a confidential or fiduciary relationship exists between the parties, their dealings must be closely scrutinized and Bank, as the party asserting the validity of the agreements, will be burdened to establish by clear and convincing evidence that the transactions were entered into voluntarily by Debtors. In re Estate of Samek, 213 N.W.2d 690, 692 (Iowa 1973).

The existence of a fiduciary relationship must be determined on a case-by-case basis. Kurth v. Van Horn, 380 N.W.2d 693, 696 (Iowa 1986). Generally,

> [a] fiduciary relationship imparts a position of peculiar confidence placed by one individual in another. A fiduciary is a person with a duty to act primarily for the benefit of another. A fiduciary is in a position to have and exercise, and does have and exercise influence over another. A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary.

Id. at 698 (quoting Denison State Bank v. Madeira, 230 Kan. 684,

692, 640 P.2d 1235, 1241 (1982)(emphasis added therein)); see also First National Bank v. Curran, 206 N.W.2d 317, 321-22 (Iowa 1973).

In Kurth, the court was asked to find, as a general rule, that a fiduciary relationship arises between a bank and a borrower. Kurth, 380 N.W.2d at 696. It declined to so rule. Id. Instead, the court maintained each case must be decided on its own facts and concluded, following the definitions of a fiduciary relationship quoted above, that there was insubstantial evidence that the bank acted as an investment advisor for the borrower or that the borrower relied on the bank for financial advice concerning the transaction in question. Id. at 698.

The circumstances presented here do not warrant a conclusion that Bank's representatives exercised a position of superiority over Debtors or that any peculiar confidence was placed in them by Debtors. There is no evidence that Bank acted as Debtors' financial advisor when either the Guaranty or Assignment was made; there is no evidence that the relationship was anything more than lender borrower. Kurth, 360 N.W.2d at 696-98; Kolb v. Naylor, 658 F.Supp. 520, 526 (N.D. Iowa 1987).

Absent a special confidential relationship then, Bank owed no special duty to disclose[(2)]

or to protect Debtors. Moreover, Debtors admit they were not precluded from seeking independent counsel regarding these transactions.

The burden remains on Debtors to show that any omission of information by Bank constituted such fraud or deceit as would defeat the validity of either agreement. Charlson v. Farmers' State Bank, 201 Iowa 120, 123, 206 N.W. 812, 813 (1926). Since Debtors have made no claims of fraud or deceit nor presented any indicative evidence of what material facts were withheld or what " conflict of interest" existed, the Court must conclude that neither the Guaranty nor the Assignment is defeated by any failures to disclose material facts by Bank.

Debtors next argue that the Guaranty and Assignment are both void for lack of consideration.[(3)]

An alleged failure of consideration must ordinarily be total in order to be a complete defense to the return performance of the other party. Union Story Trust & Savings Bank v. Sayer, 332 N.W.2d 316, 322 (Iowa 1983). One attacking a written agreement for lack of consideration must show it. Krcmar v. Krcmar, 202 Iowa 1166, 1170, 211 N.W. 699, 701 (1927). Debtors have failed in this burden against both the Guaranty and Assignment.

The Guaranty specifically states that it is "FOR VALUE RECEIVED, AND FOR THE PURPOSE OF ENABLING Keith Koth and/or Judith Koth . . . to obtain money and credit" from Bank. A benefit to a third party is sufficient consideration. Moench v. Hower, 137 Iowa 621, 624, 115 N.W. 229, 230 (1908). Here, a third party--the Koths--clearly benefited. Thus, adequate consideration for the Guaranty was given.

The Assignment states that it is "[f]or value received" and that it "is given as collateral security to our note given this day . . . and to any and all [future] indebtedness. While Debtors may doubt the enforceability of the Agreement on several grounds, the consideration stated therein is quite clear.

Debtors next contend Bank failed to protect its (the Bank's) position and that it increased Debtors' risk. It is true that a guarantor is discharged from his obligation by any act of the guarantee which increases the guarantor's risk or which injures his rights or remedies. Fidelity Savings Bank v. Wormhoudt Lumber Co., 251 Iowa 1121, 1126, 104 N.W.2d 462, 466 (1960). Though a guarantee owes no affirmative duty of diligence to a guarantor of payment,[(4)]

Id.; Miller v. Geerlings, 256 Iowa 569 581, 128 N.W.2d 207, 214 (1964), if the guarantee does some affirmative act which diminishes other security that may be available to pay the debt or which otherwise injures the guarantor's rights and remedies, such acts will discharge the latter to the extent of the loss incurred. Fidelity Savings Bank, 251 Iowa at 1126, 104 N.W.2d at 466 (emphasis added); see Iowa Code Annot. section 554.3606.

As highlighted above, an impairment of security or an increase in Debtors' risk, if any, will discharge Debtors only "to the extent of the loss incurred." The entire agreement is not defeated. Since the only issues before the Court are the enforceability and secured status of the Bank's claim, the amount of Bank's claim, after consideration of any recoverable losses by Debtors occasioned by Bank's impairment of security, if any, is not further addressed herein. See infra p.1, note 1.

Debtors' next contention is that Bank failed to keep its promise to Debtors to monitor the Koths' financial situation and make regular reports to Debtors. The agreement itself does not provide that Bank was obligated to make these reports. However, Debtors argue that such a condition was part of the bargain made.

> [I]n order to predicate the discharge of one of the contracting parties upon breach of condition by the other, the party claiming discharge must show the condition breached constituted the entire agreed exchange by the other party, or was expressly recognized in the bargain as a condition for the other's performance. See Canfield Lumber Co. v. Kint Lumber Co., 148 Iowa 207, 127 N.W. 70 (1910). Otherwise the non-performance of the other party is a mere breach of contract for which the remedies is damages. [Citations omitted.]

Union Story Trust & Savings Bank, 332 N.W.2d at 322. Thus, to be a complete defense, Debtors needed to show that the alleged breach of condition (not stated within the agreement) was such that the entire agreed upon exchange was defeated. Id. The evidence presented does not do so; the Court finds no basis on which to conclude that Bank's failure to make regular reports to Debtors defeats Debtors' obligation under the Guaranty. Id. at 322-23.

Debtors' strongest argument is that the Assignment is a nullity because of an incorrect or ambiguous phrase in the document. The agreement assigned "all sums due or to become due" to the Debtors ("buyers") of a contract for the sale and purchase of specified real estate which is Debtors' home. All parties agree that the phrase "all sums due or to become due" would be a more proper assignment of a seller's interest in the proceeds from the sale of property rather of than a buyer's equity in the property. However, the parties disagree on the effect, if any, the imprecise language has on the validity of the Assignment.

An assignment is a contract to which rules of construction germane to contracts apply. Broyles v. Iowa Department of Social Services, 305 N.W.2d 718, 721 (Iowa 1981). It is with great reluctance that a court rejects any agreement as

insensible or unintelligible. T. M. Sinclair & Co. v. National Surety Co., 132 Iowa 549, 557, 107 N.W. 184, 187 (1906).

> One of the canons of construction is to give effect to every provision of a contract, if possible and practicable; for the reason that the parties themselves evidently intended something thereby, and it is not for courts to reject the same unless it be so vague and uncertain that neither a general nor a particular intent can be gathered therefrom. In other words, a contract should be so construed, if possible, to give effect to each and every provision thereof. [Citations omitted.] As between two constructions, each reasonable, one of which will accomplish the intention of the parties and make the contract an enforceable one, and the other which will make it unenforceable and meaningless, the former is to be preferred.

Id. Accordingly, the Court must, if possible, rely on that construction which will fulfill the intentions of the parties and render the agreement valid.

There are no special words necessary to make an assignment effective (absent an applicable statute which prescribes a particular mode). Petty v. Mutual Benefit Life Insurance Co., 235 Iowa 455, 465-66, 15 N.W.2d 613, 618 (1944). Any language, however informal, if it shows the intention of the assignor, is sufficient to vest the interest in the assignee. Id.; see also Fischer v. Klink, 234 Iowa 884, 889, 14 N.W.2d 695, 698 (1944).

Where the wording of an agreement is concise and unambiguous, it must control. Tucker v. Leise, 201 Iowa 48, 50, 206 N.W. 258, 259 (1925). However, if the wording is ambiguous, or susceptible of two or more constructions, the situation and conduct of the parties as well as the circumstances surrounding the transaction and the subject matter of the agreement must be considered in order to ascertain the parties' intention. Id. (citing Bridgeport Malleable Iron Co. v. Iowa Cutlery Works, 130 Iowa 736, 107 N.W. 917 (19061); T. M. Sinclair & Co., 132 Iowa at 557, 107 N.W. at 187. Further, the contract is to be considered in its entirety to arrive at the intention of the parties. State v. Sprague, 225 Iowa 766, 771, 281 N.W. 349, 351 (1938).

Any ambiguity, of course, is resolved against Bank, the drafter. T. M. Sinclair & Co., 132 Iowa at 557, 107 N.W. at 187. However, "this rule is resorted to only when all other tenets of construction fail." Id.

The phrase "all sums due or to become due," is certainly not ideal language for an assignment of Debtors' interest under the real estate contract. However, when the agreement is considered as a whole, it cannot be rejected as unintelligible. That the parties intended that Debtors assign their interest in the identified real estate contract is readily ascertained. Further, an examination of the situation of the parties, the circumstances of the transaction, and the subject matter of the agreement fully support the parties' intentions as constructed from the agreement. Therefore, the Court concludes that the Assignment is not rendered a nullity by any imperfect language therein.

At trial and in brief, Debtors' counsel argues that the ignorance of both Mr. and Mrs. Kuehl concerning the effect of the Assignment precludes a finding of any intent by Debtors in the execution of the document. Neither the Debtors nor this Court in its consideration of this matter have identified any rule which limits a party's liability to his own understanding of or intention in making a contract. White v. Van Horn, 19 Iowa 189, 191 (1865). Absent fraud or deceit or unless it was shown that Bank had reason to believe Debtors had a different intent by the Assignment so as to negate Debtors' consent, Debtors' ignorance of the effect of the signed agreement does not affect Debtors' liability. Id.; Haddock v. Woods, 41 Iowa 432, 435 (1877); Wagner v. Wagner, 242 Iowa 480, 486, 45 N.W.2d 508, 511 (1951); Schlosser v. Van Dusseldorp, 251 Iowa 521, 527-28, 101 N.W.2d 715, 719 (1960); see also Rochholz v. Farrar, 547 F.2d 63, 66 (8th Cir. 1976).

III.

Having concluded that both the Guaranty and Assignment are valid agreements, the Court is next asked to determine whether Bank's claims are secured.

Neither the Assignment nor the Second Real Estate Mortgage specifically identifies itself as security for the Guaranty or the Debtors' Promissory Note. The Second Real Estate Mortgage expressly recognizes the $100,000 note executed on December 7, 1978 as the debt secured. The mortgage also contains a "dragnet" clause:

> It is further expressly agreed that this mortgage shall stand as security for any other indebtedness, direct or contingent, that the mortgagee may now hold or in the future during the life of this mortgage acquire against the said mortgagors, or either or any of them.

Since Bank has not claimed Debtors are indebted under the $100,000 Real Estate Mortgage Note,[(5)] the Court must consider whether this dragnet clause encompasses both the Promissory Note and Guaranty.

The Assignment refers to a contemporaneously executed note and also contains a dragnet clause:

> This assignment is given as collateral security to our note given this day to the Monticello State Bank and to any and all indebtedness which said bank may now hold or in the future acquire against us, direct or contingent, secured or unsecured.

Since two notes were executed on the same day as the Assignment, the Court must determine to which note--the Promissory Note or the Real Estate Mortgage Note--the Assignment refers. The applicability of this dragnet clause to the Guaranty must also be considered.

Principles of interpretation and construction which govern contracts apply. Freese Leasing, Inc. v. Union Trust and Savings Bank, 253 N.W.2d 921, 924-25 (Iowa 1977). The object is to determine the meaning of the words used in these security agreements. Id. (citing Connie's Construction Co. v. Fireman's Fund Insurance Co., 227 N.W.2d 207, 210 (Iowa 1975). In searching for the meaning or intention of the parties expressed, extrinsic evidence is admissible "to shed light on the situation of the parties, antecedent negotiations, attendant circumstances, and the objects the parties were striving to attain." Freese Leasing, Inc. 253 N.W.2d at 924-25 (citing Hamilton v. Wosepka, 261 Iowa 299, 306, 154 N.W.2d 164, 168 (1967)); Padzensky v. Kinzenbaw, 343 N.W.2d 467, 471 (Iowa 1984). Therefore, to determine whether the Second Real Estate Mortgage or the Assignment were intended as security for the antecedent Guaranty and the contemporaneously executed Promissory the Court must examine the dragnet clauses and the available extrinsic evidence to find the parties' intent expressed in each.

A dragnet clause may be valid but is not favored by the law. Farmers Trust and Savings Bank v. Manning, 311 N.W.2d 285, 289 (Iowa 1981); First v. Byrne, 238 Iowa 712, 716-17, 28 N.W.2d 509, 511 (1947). Such a clause should be "carefully scrutinized and strictly construed." First Bank & Trust Co. v. Welch, 219 Iowa 318, 321, 258 N.W. 96, 97 (1934)(quoted in Byrne, 238 Iowa at 716, 28 N.W.2d at 511). It will, however, be enforced to the extent it appears to have been within the intent of the parties, Brose v. International Milling Co., 256 Iowa 875, 879, 129 N.W.2d 672, 675 (1964), but the language of the dragnet clause is not conclusive of the parties' intent. Freese Leasing, Inc., 253 N.W.2d at 926.

The intent of parties as expressed in a dragnet clause has been determined on several occasions by the Iowa courts. Extrinsic evidence considered relevant in determining the parties' intent has varied. In First v. Byrne, the Iowa Supreme Court held an antecedent debt was not covered by a dragnet clause because, inter alia, it was a debt unknown to the mortgagor. 238 Iowa at 718, 28 N.W.2d at 512-13. In Brose v. International Milling Co., the same court, in holding a dragnet clause covered debts of the business other than the one incurred at the time the mortgage was executed, gave weight to the interrelatedness of a series of transactions based on the parties' method of doing business. 256 Iowa at 880, 129 N.W.2d at 675. In Corn Belt Savings Bank v. Kriz, the court focused on whether the mortgagor was aware of the clause before she signed it. 207 Iowa 11, 19, 219 N.W. 503, 506 (1927). In First Bank & Trust Co. v. Welch, the Iowa Supreme Court took exception to the "indefinite and uncertain" nature of the dragnet clause and held it did not operate as a wife's acquiescence to coverage of future debts her husband may incur. 219 Iowa at 321-23, 258 N.W. at 97-98.

Finally, in Freese Leasing, the court looked at the relationship between a real estate note specifically covered in a mortgage and the auto loans arguably covered by a dragnet clause in the same mortgage. 253 N.W.2d at 926. The court also considered whether independent security existed for the auto loans and concluded the auto loans were not covered by the dragnet clause. Id. at 927. The court adopted a modern standard for ascertaining whether a dragnet clause[(6)] includes a particular debt:

> [I]n the absence of clear, supportive evidence of a contrary intention a mortgage containing a dragnet type

> clause will not be extended to cover future advances unless the advances are of the same kind and quality or relate to the same transactions as the principal obligation secured or unless the document evidencing the subsequent advance refers to the mortgage as providing security therefor.

Id. (quoting Emporia Bank & Trust Co. v. Mounkes, 214 Kan. 178,

184, 519 P.2d 618, 623 (1974)).

The parties in this matter presented some evidence which aids the Court in determining their intent of what was to be covered by the dragnet clauses in the Assignment and the Second Real Estate Mortgage. On its face, the note states it is secured by the "ASSIGNMENT CONTRACT" and "R. E. MTGE." Debtors do not dispute that the Assignment discussed herein and the Second Real Estate Mortgage of December 7, 1984 are the security to which the note refers. There is no evidence that it was not the parties' intent that the Promissory Note be secured by the Assignment and Mortgage. Mr. Kuehl testified that he understood the Promissory Note was secured by the Assignment and Second Real Estate Mortgage. Mrs. Kuehl stated that she was "too naive" to understand the nature of the documents. Mr. Kuehl's testimony is consistent with Mr. Morf's testimony and the notation on the note. Therefore, any ambiguity about which note of December 7, 1978 (the Promissory Note or the Real Estate Mortgage Note) the Assignment specifically covered is, therefore, resolved by the parties' testimony and the Court concludes that the Assignment and Second Real Estate Mortgage secure Debtors' Promissory Note of June 27, 1984 (the note now representing Debtors' Promissory Note of December 7, 1978).

A decision on whether the Guaranty is secured is not so easily reached. Mr. Morf clearly testified that the Guaranty, as well as the Promissory was secured by the Second Real Estate Mortgage and the Assignment. That this was the intent of the parties as expressed in the dragnet clauses is supported by several attendant circumstances: Debtors knew the Guaranty existed when they executed the Second Real Estate Mortgage and the Assignment; the Guaranty, Assignment, Promissory and the Second Real Estate Mortgage all principally arose from the same business financing needs; each dragnet clause, while broad, is not indefinite or uncertain; and the amount of the Real Estate Mortgage Note and the Mortgage equal the amount of the Guaranty.

Attendant circumstantial evidence which indicates that neither dragnet clause was intended to encompass the Guaranty includes the fact that each security agreement specifically refers to a note. Moreover, if the Guaranty is secured by the Mortgage (as evidenced by the fact they are for the same amount), it can reasonably be argued, following the rationale of Freese Leasing, 253 N.W.2d at 926, that the Guaranty is not intended to also be secured under the dragnet clause of the Assignment. There is, however, no testimony by Debtors that they were or were not aware of either dragnet clause or that they understood or did not understand that the Second Mortgage and Assignment were to secure the Guaranty. Bank offered no evidence other than Mr. Morf's testimony on this matter and confused the question further in its post-trial brief by addressing only the secured status of the Promissory Note.

Ultimately, then, the Court must look to which party had the burden of proof. Since this hearing was in the nature of a contested matter to resolve Debtors' objection to Bank's claim, the rules which govern such an objection are appropriately considered here.

Under Bankr. R. 3002(f), Bank's proof of claim, properly executed and filed, constitutes "prima facie evidence of the validity and amount of the claim." Debtors have failed to present sufficient evidence to at least meet this presumption and shift the ultimate burden of persuasion to Bank to establish its secured status. See Cookeville Production Credit Association v. Frazier (In re Frazier), 16 B.R. 674, 682 (Bankr. M.D. Tenn. 1981); see also In re Wells, 51 B.R. 563, 566-68 (Bankr. D. Colo. 1985).

Therefore, based on the testimony of Mr. Morf and the attendant circumstances described above which sustain Bank's claim that the Guaranty is secured, the Court concludes the Guaranty is secured via the "dragnet" clause in the Second Real Estate Mortgage and the "dragnet" clause of the Assignment.

ORDER

IT IS THEREFORE ORDERED that a Judgment be entered declaring that the GUARANTY dated October 5, 1977, and the ASSIGNMENT OF CONTRACT dated December 7, 1978 are valid agreements between Lavern Kuehl and Cora Mae Kuehl, Debtors, and Monticello State Bank and that the GUARANTY described above as well as the PROMISSORY NOTE executed by Debtors to Monticello State Bank on June 27, 1984 are secured by the SECOND REAL ESTATE MORTGAGE executed by Debtors on December 7, 1978 and the ASSIGNMENT OF CONTRACT described above.

SO ORDERED ON THIS 8TH DAY OF FEBRUARY, 1988.

William L. Edmonds
Bankruptcy Judge

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1. The Court does not determine herein the amount of Debtors' indebtedness to Bank nor the value of the security provided. Debtors' arguments focused on the enforceability of the documents which created Bank's claim. Moreover, the evidence necessary to determine the allowed amount of Bank's secured claim was wholly insufficient.

2. Neither the Truth in Lending Act, 15 U.S.C. section 1603 (as effective prior to - subsequent to 1980 amendments) nor the Iowa Consumer Credit Code, Iowa Code Annot. Ch. 537, are applicable since the credit transactions here are primarily for agricultural purposes and exceed the maximum indebtedness covered by these acts. See Hawkeye Bank & Trust Co. v. Michel, 373 N.W.2d, 127, 130-31 (Iowa 1985). Also, Iowa Code Annot. section 561.22, which requires a prescribed homestead exemption waiver in a written contract, was not effective until May 30, 1986.

3. Consideration for all contracts in writing is implied, Iowa Code Annot. section 537A.2, unless it is specifically set forth. North v. Manning Trust and Savings Bank, 169 N.W.2d 780, 786 (Iowa 1969).

4. A guaranty of payment is one in which "the obligation is an absolute undertaking with the imposition of liability on the guarantor immediately upon default of the principal debtor, and regardless of whether any legal proceedings or steps are taken to enforce liability of the principal debtor, or whether notice of default is given to the guarantor, and regardless of the solvency or insolvency of the principal debtor." Preferred Investment Co. v. Westbrook, 174 N.W.2d 391, 395 (Iowa 1970).

5. The Real Estate Mortgage Note is not part of Bank's claim and so its status is not determined herein.

6. While this standard focuses on future indebtedness, the principles espoused therein are nonetheless applicable to antecedent debts.