In the United States Bankruptcy Court

for the Northern District of Iowa

RODNEY WRIGHT Debtor.	Bankruptcy No. L91-01588C Chapter 7
NATIONAL BANK OF WATERLOO Plaintiff vs. RODNEY WRIGHT and FRED HAGEN Defendants.	Adversary No. L91-0227C
RODNEY L. WRIGHT Third-Party Plaintiff vs. FRED HAGEN Third-Party Defendant.	

ORDER RE: DEFENDANT HAGEN'S RENEWED MOTION FOR SUMMARY JUDGMENT

The matter before the court is defendant Fred Hagen's (HAGEN) renewed motion for summary judgment on claims against him by the National Bank of Waterloo (BANK) and Rodney L. Wright (WRIGHT). The claims against Hagen relate to his alleged guaranty of a lease for 20 semi-trailers. In April, 1990, the Bank entered into a lease agreement with Rod Wright, Inc., a business entity of which Wright was an officer. Hagen's name and signature appear on the lease guaranty document. Rod Wright, Inc. assigned its lessee's interest in the lease to Hawkeye Refrigerated Services Corp., a trucking business operated by Wright. The lease was in default in December, 1990. Hawkeye discontinued operations in January, 1991. Rodney Wright filed a Chapter 7 bankruptcy petition on August 26, 1991.

On November 14, 1991, the Bank filed a dischargeability complaint against Wright under 11 U.S.C. § 523(a)(2). The Bank alleged that Wright had induced the loan by forging Hagen's signature on the guaranty. Wright answered the complaint and alleged that Hagen authorized Wright to sign Hagen's name. Wright also filed a third-party complaint against Hagen alleging that Hagen orally authorized Wright to execute the guaranty; he sought judgment against Hagen for any amounts held nondischargeable on the Bank's claim against Wright. On May 26, 1992, the Bank filed an amended and substituted complaint adding Hagen as a defendant. The Bank alleged that Hagen orally agreed to guarantee the lease, and that Hagen authorized and directed Wright to affix Hagen's signature to the guaranty. Hagen denied the material allegations of the complaint.

On December 10, 1992, Hagen filed a Motion for Summary Judgment which was denied by order February 8, 1993. Hagen filed the present "Renewed Motion for Summary Judgment" on April 14,

1994. Hearing was held June 8, 1994, in Cedar Rapids, Iowa. The Bank resists the motion. The Bank and Hagen have each filed statements of material fact and briefs. Wright did not file a response to the motion or participate in the hearing.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552 (1986).

I.

Wright's Third-Party Complaint Against Hagen

Hagen argues that Wright's third-party complaint fails to state a claim upon which relief may be granted. Hagen reasons that if the debt to the Bank is found to be dischargeable, Wright will have suffered no legal harm and would not be entitled to damages from Hagen. Conversely, he argues, if the debt is nondischargeable because Wright obtained the debt through fraud, Wright is not entitled to indemnification from Hagen. The court notes that in addition to these possibilities, the facts could be such that Wright mistakenly believed he had authority to sign when in fact he did not. In that situation, the Bank would not be able to recover against either defendant. The debt would be dischargeable by Wright because it would not have been incurred by fraud, and Hagen would not be liable because the guaranty would not be authorized. However, as between Hagen and Wright, this third possibility would be similar to the first. The debt would be dischargeable, and Wright would have suffered no legal harm.

Rule 56(e) requires the nonmoving party to go beyond the pleadings and by affidavits or other evidence, designate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Celotex, 106 S.Ct. at 2553. By his failure to defend Hagen's motion for summary judgment, Wright has failed to show that there is a genuine issue for trial. A defendant may bring a third-party action against a person who is or may be liable to the third-party plaintiff for the plaintiff's claim against the third-party plaintiff. Fed.R.Civ.P. 14(a). Wright has failed to offer any evidence to support his legal theory that Hagen could be liable to Wright if the court determines that Wright obtained money from the bank through fraud. Even assuming an agency relationship between Wright and Hagen, an agent is not entitled to indemnity from the principal for the other's negligence or other fault. See generally Restatement (Second) Agency § 440. Hagen is entitled to summary judgment against Wright, and the third-party complaint should be dismissed.

II.

Bank's Claim Against Hagen

On February 22, 1994, the Bank and Hagen filed a joint pre-trial statement which included a statement of uncontested facts regarding the lease transaction. The court lists the following facts to identify them as facts underlying this decision as to which the parties agree there is no genuine issue:

A. Rodney L. Wright, hereinafter "Wright" is an individual residing in Cedar Rapids, Iowa.
B. Fred Hagen, hereinafter "Hagen", is an individual residing in North Sioux City, South Dakota.
C. The National Bank of Waterloo, hereinafter "Bank", is chartered by the Office of the United States Comptroller of Currency and is headquartered in Waterloo, Iowa.

D. Since 1985 Wright operated a trucking operation out of Cedar Rapids, Iowa, known as Hawkeye Refrigerated Services Corp., hereinafter "Hawkeye".
E. Since 1986 Wright had a banking relationship with Bank, both personally and for his trucking business.
F. During the course of this banking relationship, Bank had entered into numerous lease/loan agreements with Wright and his trucking business.
G. In the spring of 1990, Wright approached Bank about entering into a lease agreement for twenty (20) Dorsey 48 feet long, 102 inch wide, dry van trailers, hereinafter "Trailers", with an aggregate value of approximately $417,000.
H. On or about April 16, 1990, the Discount Committee and Directors Committee of Bank approved entering into a lease agreement with Wright, hereinafter "Lease", conditioned upon Hagen's agreement to guarantee the Lease.
I. On or about April 18, 1990, Zimmerly prepared and dated all documents regarding Lease. Wright's down payment on the trailers was $17,548.35, the security deposit was $27,989.04. The monthly payments were to run for five (5) years at the rate of $8,774.19 per month.
J. On or about April 19, 1990, Zimmerly took the Lease to Hawkeye's offices in Cedar Rapids, Iowa, where all documents were executed with the exception of Hagen's guaranty, hereinafter "Guaranty".
K. On or about April 19, 1990, Zimmerly left the Guaranty with Wright for Hagen's signature.
L. On or about April 24, 1990, the executed Guaranty was delivered to Bank.
M. On or about April 24, 1990, the Bank purchased 20 Dorsey 48' Dry Van Semi-Trailers for $417,000.
N. On or about April 24, 1990, Rod Wright, Inc. assigned its interest in the Lease to Hawkeye.
O. Wright/Hawkeye defaulted on the payments to the Bank in December, 1990.
P. On or about January 1, 1991, Hawkeye ceased operations.
Q. On or about August 1, 1991, the 20 Dorsey dry van semi-trailers were disposed of at auction in Cedar Rapids, Iowa for a gross sales price of $276,250 less sales costs of $21,058.75, leaving a deficiency of $119,417.93 plus interest per diem of $35.17.
R. On or about August 12, 1991, Bank sent a Cure Notice to Hagen based upon the Guaranty, for $119,417.93, the amount of the deficiency. Demand was made upon Fred Hagen to pay the remaining balance by Bank Vice President for Leasing, Dale T. Zimmerly.
S. On or about August 26, 1991, Wright d/b/a Rod Wright, Inc. filed for protection under Chapter 7 of the U.S. Bankruptcy Code.
T. On or about August 27, 1991, Hagen responded to the Bank Cure Notice demand letter denying ever signing Guaranty or authorizing Wright to sign Guaranty.
U. Prior to the default on the Lease and the demand upon Hagen, the Bank was unaware that the signature on the Guaranty and Financial Statement were <u>not</u> Hagen's.
V. Wright originally told the Bank that he would take the guaranty documents to Hagen for his signature over the weekend of April 21, 22, 1990. However, Wright now admits signing Hagen's signature to the documents and also signing the documents as a witness of Hagen's signature. The other witness to the signed documents, Royal Silver, admits that Wright presented the document to him with the other signatures already in place and ordered him to sign as a witness.

* * *

Z. Hawkeye/Wright previously sold "leased" collateral pledged to the Bank prior to the end of the lease term and paid off the outstanding balance.

The parties do not discuss, but do not disagree, that Rod Wright, Inc. was the original lessee under the lease. Wright signed the lease as President of that corporation. Hagen facts, Exhibit H-2. Wright also personally guaranteed the lease. Id. The alleged guaranty by Hagen refers to the original lease. Id. Subsequently, the lease was assigned as stated in Paragraph N above.

A. Written Guaranty

The Bank claims Hagen is liable for the deficiency based on its written guaranty. It is undisputed that Wright placed Hagen's signature on the guaranty. The parties disagree whether the signature was authorized. Wright claims that Hagen gave him oral authorization to sign Hagen's name. Hagen facts, Exhibits I, K (Wright deposition, pages 32-36). Hagen has denied giving such authorization and argues there is no evidence supporting Wright's claim.

At his deposition, Wright was asked about the execution of Hagen's name on the guaranty. Wright stated that he had been signing Hagen's name since 1967 for Hagen's various business interests. Wright said he signed "tariffs" and documents to be sent to the ICC, signed for equipment and was in charge of "moving money around." Hagen facts, Exhibit I (Wright deposition, page 33). Wright's testimony indicates that he had prior authority to sign Hagen's name in Hagen's capacity as a corporate officer. There was no testimony that Wright claimed previous authority to sign Hagen's name in Hagen's personal capacity. Wright did not respond to discovery requests to identify and produce documents to substantiate his claim of authorization to sign Hagen's name. Hagen facts, Exhibit L. Wright was asked why he did not sign the guaranty, "Fred Hagen by Rod Wright." Wright said that he had never signed Hagen's name that way. Wright was unable to explain why he signed as a witness. Hagen facts, Exhibit K (Wright deposition, pages 34-35). Lance Dixon, an officer of Hawkeye, said he had no knowledge of Wright having authority to commit Hagen to the guaranty. Hagen facts, Exhibit O (Dixon deposition, page 32).

The court finds that whether Hagen authorized Wright to sign Hagen's name on the written guaranty is an issue of material fact. Resolution of the issue may depend substantially on the credibility of witnesses. The issue is not appropriate for summary judgment, and the motion should be denied as to Hagen's liability on the written guaranty.

B. Oral Guaranty

The Bank claims alternatively that Hagen is liable by virtue of an oral guaranty of the lease. The Bank alleges that the oral guaranty was made at a meeting on April 12, 1990, at the offices of Hawkeye in Cedar Rapids. The Bank alleges that the guaranty was made by Hagen in statements to Bank officer Zimmerly. Hagen concedes that he attended a meeting in Cedar Rapids at which Zimmerly discussed the lease or purchase of the 20 trailers. Zimmerly said the Bank would need Hagen's guaranty before it would finance the deal. Hagen facts, Exhibit R (Zimmerly continued deposition, page 119). Hagen allegedly responded with words to the effect of, "Write it up that way," and "don't screw the boy on the interest rate."

Hagen first argues that the alleged oral agreement to guarantee the debt of Rod Wright, Inc. is within the statute of frauds, Iowa Code § 622.32(2), for promises to answer for the debt of another. In construing this statute, the Iowa Supreme Court has distinguished between oral promises which are collateral to an already existing contract and those which create an original or primary obligation of their own. Maresh Sheet Metal Works v. N.R.G., Ltd., 304 N.W.2d 436, 438 (Iowa 1981). Determination of whether a promise is "original" or "collateral" is an inquiry into the purpose of the promisor. Id. at 439; Frohardt Bros. v. Duff, 156 Iowa 144, 135 N.W. 609, 611 (1912). If the purpose

is to answer for the debt of another, the promise is collateral to the obligation of the third party. Frohardt Bros., 135 N.W. at 611. However, if the "leading object" or main purpose of the guarantor is to secure some personal benefit or business advantage for himself, the promise is not within the statute of frauds. Maresh, 304 N.W.2d at 439; Wheeler Lumber Bridge & Supply Co. v. Anderson, 249 Iowa 689, 86 N.W.2d 912, 914 (1957). A court may find that a guarantor has made an "original promise" not within the statute when the promise arises out of "some new and original consideration of benefit or harm moving between the newly contracting parties." Maresh, 304 N.W.2d at 439; Wheeler Lumber, 86 N.W.2d at 914.

In Maresh, a sheet metal firm, Maresh, had performed services for N.R.G., the debtor corporation, but refused to do further work when N.R.G. did not pay its bill. A major stockholder of the corporation, Russell, personally guaranteed payment, and Maresh performed additional work. These facts led the court to conclude that the guarantor's promise was an original one, not within the statute of frauds. The court stated:

> The purpose of the guaranty was to assure N.R.G. a source of vital supplies and an established line of credit. Both were essential to the company's survival; neither was available without Russell's guaranty.
>
> Maresh allowed N.R.G. to continue in business only because of Russell's promise, which clearly arose out of "some new and original consideration" moving between Russell and Maresh.

Id. The court said the promise could be described as an independent undertaking of the guarantor rather than a promise to pay the corporation's debt. The guarantor's purpose was to secure a benefit or business advantage for himself. Id.

Whether Hagen's alleged promise was collateral to an existing contract or created a primary obligation on the part of Hagen is a question of fact. Maresh, 304 N.W.2d at 440. The Bank argues that the lease was a new and original obligation for which Hagen's guaranty was part of both the inducement and the consideration. The Bank also argues that Hagen's involvement in Wright's business affairs and his family relationship as Wright's former father-in-law show that Hagen's main purpose in guaranteeing the trailer lease was to protect his own interests. Hagen filed a proof of claim in Wright's Chapter 7 case in the amount of $1,089,825.70 owed on a number of promissory notes over several years. It is not known when Wright and Hagen's daughter divorced. Hagen argues there was not enough new consideration given for the alleged promise to be outside the statute of frauds. He also argues that he gained no personal benefit from the alleged oral guaranty.

The applicability of the statute of frauds appears to be a disputed factual issue. The court believes, however, that it is unnecessary to decide the issue. If the court were to find that the statute of frauds is not applicable, the Bank could bring oral evidence to attempt to prove the contract. The next issues, then, would be whether the parties were bound by the alleged oral agreement even though they intended to reduce the agreement to writing, and whether the oral agreement was sufficiently definite to be enforceable. For the reasons discussed below, the court finds and concludes that Hagen is entitled to summary judgment against the Bank as to the alleged oral guaranty.

The Bank argues that when a written guaranty is found not to be whole, the oral guaranty which is the basis for it can still be binding on the parties. "A binding oral contract may exist even though the parties intend to memorialize their agreement in a fully executed document." Continental Laboratories, Inc. v. Scott Paper Co., 759 F.Supp. 538, 540 (S.D. Iowa 1990). However, even if

parties have worked out all the specific terms of an agreement in negotiation, a binding contract will not exist if either party intends not to be bound until a written document is executed. Continental Laboratories, 759 F.Supp. at 540; Emmons v. Ingebretson, 279 F.Supp. 558, 566 (N.D. Iowa 1968). The parties' intent, viewed objectively from their words and actions within the context of the situation and surrounding circumstances, determines the time of the contract formation. Continental Laboratories, 759 F.Supp. at 540-41. The court in Continental Laboratories listed the following factors which tend to indicate the parties' intent:

1. Whether the contract is of a class usually found to be in writing;
2. Whether it is of a type needing a formal writing for its full expression;
3. Whether it has few or many details;
4. Whether the amount is large or small;
5. Whether the contract is common or unusual;
6. Whether all details have been agreed upon or some remain unresolved; and
7. Whether the negotiations show a writing was discussed or contemplated.

Id. at 541.

The Bank clearly intended to reduce the agreement to writing because it in fact did so. The issue is whether the Bank or Hagen intended to be bound prior to executing written documents. The Bank argues in its brief in resistance to the motion that the agreement was a simple contract to become secondarily liable on the lease between Bank and Wright, and that the contract had few details. If the alleged agreement was simply a contract to become secondarily liable on the debt of another person, the first factor listed in Continental Laboratories supports a finding that the parties did not intend to be bound until a written document was executed. Such a contract is usually found to be in writing because it is within the statute of frauds. Iowa Code § 622.32(2); Frohardt Bros., 135 N.W. 609, 611. On the other hand, if, as the Bank has also argued, the lease was new consideration in exchange for the guaranty, the contract would not be complete until the Bank agreed to finance the lease.

The undisputed facts support a finding that neither party intended to be bound until written documents were executed. The Bank did not intend to be bound by the oral agreement. The Bank loan committee had to approve the deal and wanted to evaluate a written financial statement from Hagen before doing so. Bank facts, Exhibit C (Zimmerly deposition, page 41); Hagen facts, Exhibit H-1 (loan committee "lease presentation"). The loan committee approved entering into the lease, conditioned on Hagen's agreement to guarantee the lease, on April 16, 1990. Pretrial facts, H. Zimmerly emphasized that he was not promising that the deal would be approved, even with Hagen's guaranty. Bank facts, Exhibit C (Zimmerly deposition, page 48). Zimmerly testified that he did not rely on the oral guaranty, as a bank officer, until he received a written guaranty. Hagen facts, Exhibit R (Zimmerly continued deposition, page 123). The Bank did not purchase the trailers until it received the executed lease documents. Pretrial facts, I-M.

The deal itself was a commercial transaction involving equipment valued at approximately $417,000.00. The Bank needed a writing to protect its interest in the trailers by listing the trailers' serial numbers, both in the lease documents and in the financing statement. Bank facts, Exhibit A; Hagen facts, Exhibit H-1. At the April 1990, meeting in Cedar Rapids, the parties had discussed the lease of 20 trailers for five years at a certain purchase price. They did not discuss any other terms, such as rate of repayment. Hagen facts, Exhibit R (Zimmerly continued deposition, pages 118-23). Hagen's comment about the interest rate shows he would want to review the terms before making a final commitment to the deal. The court concludes that the parties did not intend to be bound at the

time of the alleged oral guaranty. Hagen is entitled to summary judgment that the alleged oral guaranty is not enforceable.

C. Nature of the Transaction/Notice

After defaulting on the lease, Wright sold the trailers at auction. The Bank is now looking to Hagen for the deficiency. Hagen argues that, even if the guaranty is enforceable, the "lease" was actually a secured transaction. He claims he is not liable for the deficiency because the Bank did not give him notice of the disposition of the collateral. The Bank argues that the transaction was a true lease. The Bank admits it did not send Hagen a written notice until after the trailers were sold. The Bank also conceded at the hearing on the motion that if the transaction created a security interest, it should have given Hagen written notice even though the auction was not conducted by the Bank. The Bank was involved to some extent in urging the sale. Exhibit H-2 (Zimmerly notes from loan file); Exhibit G. See Stockdale, Inc. v. Baker, 364 N.W.2d 240, 243 (Iowa 1985) (sale by debtors was a disposition of collateral by a secured party; creditor demanded payment and forced the sale). Regarding the Bank's right to a deficiency if the guaranty is enforceable, the court finds there is a genuine issue of material fact as to the nature of the transaction (true lease or secured transaction) and concludes that Hagen is not entitled to judgment as a matter of law.

As to a secured transaction, a creditor that fails to provide the notice required by Iowa Code § 554.9504(3) is barred from obtaining a deficiency judgment against the debtor. Knierim v. First State Bank, 488 N.W.2d 454, 456 (Iowa App. 1992). The court concludes that the exception to the "absolute bar rule" recognized by the Iowa appellate courts would not be applicable in this case even if it were found that the agreement was a secured transaction. See Knierim, 488 N.W.2d at 457 (failure to give notice is not an absolute bar when the transaction is not a purchase money loan, amount of collateral sold is small fraction of total collateral, and debtor is still able to protect against inadequate sale price as to most of the collateral).

A guarantor is a "debtor" entitled to notice of an intended disposition of collateral for purposes of determining the creditor's right to a deficiency judgment. United States v. Jensen, 418 N.W.2d 65 (Iowa 1988). The Bank's guaranty document (Hagen facts, Exhibit E) contains language waiving various notices. However, a waiver of notice executed before default is invalid. Iowa Code § 554.9504(3); Jensen, 418 N.W.2d at 65. Oral notice is not sufficient; written notice is required. Van Ness v. First State Bank of Ida Grove, 430 N.W.2d 109, 110-11 (Iowa 1988).

The notice requirement is contained in Iowa's enactment of Article 9 of the Uniform Commercial Code, which is not applicable to leases. Iowa Code § 554.9102; Towe Farms, Inc. v. Central Iowa Production Credit Association, 528 F.Supp. 500, 504 & n.2 (S.D. Iowa 1981). Hagen has cited A.L.C. Financial Corp. v. Ray, 437 N.W.2d 593, 595 (Iowa App. 1989), for the proposition that the notice protection has been extended to the guarantor of a true lease as well as the guarantor of a secured sales transaction. The court disagrees with Hagen's reading of that case. Although the court in A.L.C. Financial used the word "lease," it did not decide whether the transaction was a true lease or a lease intended as security.

Whether a lease is intended as security is to be determined by the facts of each case. Iowa Code § 554.1201(37). If at the end of the lease term the lessee may become the owner of the property for a nominal option price, the lease is one intended for security. Id. However, if the option price at the end of a lease term is other than nominal, the economic realities of the transaction still may show the deal is intended as a secured transaction. Krana v. Equilease Corp., 3 UCC Rep. Serv.2d 750, 754-55 (N.D. Iowa 1986), quoting Matter of Fashion Optical, Ltd., 653 F.2d 1385, 1388-89 (10th Cir. 1981).

One test of the "economic realities" of a transaction is to compare the option price to the fair market value of the equipment at the end of the lease term. "The more closely the option price resembles the property's fair market value, the more likely the rental charges were intended to compensate the lessor for the loss of value during the lease's term and the option is a real one." Brown v. Kempker (In re Kempker), 104 B.R. 196, 203 (Bankr. W.D. Mo. 1989), citing Fashion Optical. However, if the option price is much less than the fair market value of the property, then "the lessor has recognized an equity in the lessee, and the lease was intended as a security instrument." In re Wallace, 122 B.R. 222, 227 (Bankr. D. N.J. 1990). See also Kempker, 104 B.R. at 203 (option price proportionately small in relation to total rental payments may indicate a lease intended as security).

The parties have presented conflicting evidence regarding the nature of the transaction. The lease document indicates the transaction was a true lease. The Bank retained title to the equipment. Bank facts, Exhibit A (lease 3). At the end of the lease term, Hawkeye was not obligated to purchase the trailers and was entitled to a return of its security deposit. Lease 14. Hawkeye could exercise the purchase option at the expiration of the lease for the fair market value of the equipment at that time. Lease 15.

However, the parties' conduct in previous trailer leases with the Bank did not strictly follow the lease document. Hawkeye sometimes sold "leased" collateral prior to the end of the lease term. Pretrial facts, Z. Royal Silver, an officer of Hawkeye, testified that Hawkeye never returned leased trailers at the end of the lease term. He kept track of the trailers' value and the amount necessary to pay off the lease. When Hawkeye wanted to sell the equipment, the Bank would quote a purchase option price. Hawkeye then sold the equipment, paid off the lease, and kept any profit for itself or made up the difference from its security deposit. See Bank facts, Exhibit E (Silver deposition). It was apparently profitable in most cases for Hawkeye to sell the trailers in this manner. Lance Dixon, another officer of Hawkeye, testified that "nine times out of ten . . . it would be foolish for you not to buy [the lease] out at the end." Hagen facts, Exhibit C (Dixon deposition, page 25).

The parties cannot determine from the lease documents what the option price will be. There is no evidence that the parties used the appraisal procedure described in lease paragraph 15 to determine fair market value. The Bank bases the lessee's option price on the manufacturer's buy-back figure. Bank facts, Exhibit C (Zimmerly deposition, pages 91-92). After Hawkeye sold trailers, it did not necessarily give the Bank the "fair market value" established by the actual sale. According to the testimony of Silver and Dixon, the Bank received something more or less than that amount. Bank facts, Exhibit E; Hagen facts, Exhibit C.

Bank officer Zimmerly testified that leases were set up using a "residual value," the projected value of the asset at the end of the lease term. Hagen facts, Exhibit B (Zimmerly deposition at 81-82). Wright testified that the leases were structured so that the security deposit plus accruing interest would equal the buyout amount at the end of the lease. Hagen facts, Exhibit A (Wright deposition, pages 16-17); see also Exhibit B (deposition exhibit, "lease pricing summary"). Hagen argued the deposit was similar to a pre-paid purchase option. See Krana v. Equilease, 3 UCC Rep. Serv.2d at 752, 755. Zimmerly said Hawkeye could purchase trailers at the end of a lease if the fair market value was less than the residual value. Bank facts, Exhibit C (Zimmerly deposition at 89-90). Silver testified that Hawkeye could not apply the security deposit to the option price; it would have to sell the trailers first, pay off the lease, and then get the deposit back. Bank facts, Exhibit E (Silver deposition, pages 39-40).

Dixon testified the leases were treated as purchases by Hawkeye's accounting department. Hagen facts, Exhibit C, page 26. The Bank held title to the trailers. Bank facts, Exhibit C (Zimmerly

deposition, page 28). A security deposit is set aside in a separate account and is paid interest at a rate equal to the Bank's net after tax profit. The money is returned to the customer at the end of the lease. Id. at 88.

The court finds that there are issues of material fact regarding how the lease was treated and whether the option price was nominal in a relative sense or whether it was closely related to the fair market value of the trailers. The motion for summary judgment will be denied as to the issue of the nature of the transaction and the requirement that Hagen be given notice of the auction sale.

Hagen is entitled to a jury trial on Bank's claims against him. See the court's Order re Motion to Strike Jury Demand dated November 25, 1992. The court will recommend withdrawal of the reference by the U. S. District Court for resolution of Hagen's liability to Bank and for resolution of Bank's claim against Wright.

ORDER

IT IS ORDERED that Hagen's renewed motion for summary judgment is granted in part and denied in part. As to Rodney L. Wright's third-party complaint against him, Hagen's motion is granted. Judgment shall enter accordingly.

IT IS FURTHER ORDERED that as to the Bank's claim against Hagen on an oral guaranty, the motion is granted. As to Bank's claim against Hagen on the written guaranty, the motion is denied.

SO ORDERED ON THIS _____ DAY OF AUGUST, 1994.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U. S. mail to: Eric W. Johnson, Thomas Fiegen, Rodney Wright and U. S. Trustee.

United States Bankruptcy Court

for the Northern District of Iowa

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RODNEY L. WRIGHT	

Third-Party Plaintiff

vs.

FRED HAGEN
Third-Party Defendant.

RECOMMENDATION FOR WITHDRAWAL OF REFERENCE

The Bankruptcy Court, having determined that defendant Fred Hagen is entitled to a jury trial on plaintiff's claim against him,

IT IS RECOMMENDED that the United States District Court withdraw the reference of this adversary proceeding for the purpose of trial as to plaintiff's claims against Hagen and as to the related claim of plaintiff against debtor/defendant Rodney Wright.

SO ORDERED ON THIS 17th DAY OF AUGUST, 1994.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order by U. S. mail to: Eric W. Johnson, Thomas Fiegen, Rodney Wright and U. S. Trustee.