

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

THE VALLEY INN, INC.,	)	CIVIL ACTION NO. 5:01CV00087
Appellant,	)	
	)	
v.	)	<u>MEMORANDUM OPINION</u>
	)	
B.O.A. WHOLESale, INC.	)	
Appellee.	)	
	)	JUDGE JAMES H. MICHAEL, JR.

In the above-captioned matter, the debtor, The Valley Inn, Inc. (Valley Inn), appeals the decision of Judge Ross W. Krumm of the United States Bankruptcy Court for the Western District of Virginia, to grant the creditor, appellee B.O.A. Wholesale, Inc. (B.O.A.), attorney's fees and the trustee's commission as a secured debt. Appellant does not challenge the bankruptcy court's decision regarding the trustee's commission, but argues that under the terms of the note appellee forfeited the right to attorney's fees by failing to demand the fees at the time it declared the note in default and requested the entire debt paid in full. Additionally, appellant argues that even if the creditor is entitled to attorneys' fees, the fees are not secured by the deed of trust securing the note. Having thoroughly reviewed the parties' submissions to this court and the entire record, and having considered the parties' oral arguments presented at a hearing on May 22, 2002, the court hereby affirms the judgment of the bankruptcy court and finds that appellee is entitled to reasonable attorney's fees as secured debt under the provisions of the note and deed of trust.

## I.

Appellant purchased from the appellee a house and parcel of real estate in New Market, VA in January of 1997. Appellee agreed to finance Valley Inn's purchase in exchange for two notes, one in the amount of \$130,975 and the other in the amount of \$2,500. Both notes were secured by a deed of trust. Valley Inn paid in full the \$2,500 note, and therefore, that note is not at issue. With respect to the \$130,975 note, Valley Inn made payments on the note in 1997, but defaulted on three monthly payments in late 1998. Appellant made the payments, together with late fees, in January 1999, but subsequently defaulted on the January through July 1999 payments. Although the exact date is not entirely clear from the record, it appears that B.O.A. sent a letter to Valley Inn sometime in the Spring of 1999 exercising its privilege under the note and declared the entire unpaid balance due and payable.

On July 15, 1999, Valley Inn filed for Chapter 11 bankruptcy, thus staying the foreclosure sale of the property. On April 6, 2001, the bankruptcy court confirmed the debtor's First Amended Plan of Reorganization (the "Plan"). By April 13, 2001, Valley Inn satisfied its obligations under the Plan regarding debts owed to B.O.A. On May 15, 2001, appellee filed two motions for attorney's fees. Following a hearing on the matter, on September 11, 2001 the bankruptcy court issued a written opinion awarding to B.O.A. as a secured debt \$3,575.53 as a trustee's commission and \$7,506.51 for attorney's fees. Consequently, appellant filed the instant appeal challenging the award of attorney's fees and the classification of the fees as secured debt.

The court has jurisdiction of this case under 28 U.S.C.A. § 158 (West 2000 & Supp. 2001) (granting United States district courts jurisdiction to hear appeals from final judgments,

orders, and decrees of the bankruptcy court).

## II.

Appellant argues that B.O.A. is not entitled to attorney's fees because it failed to make a timely demand for those fees as provided for in the Note. The clause at issue provides:

Upon default in the payment at the time herein provided, of any installment for a period of thirty days, the holder hereof shall have the privilege to declare the entire unpaid balance due and payable, together with a reasonable attorney's fee; however, failure to exercise said privilege shall not constitute a waiver to exercise the same upon any subsequent default.

(R. D1 - Note Secured by Purchase Money Deed Of Trust.) Valley Inn argues that under this provision of the note, B.O.A. must make a claim for attorney's fees at the time it declares the note in default and that if it fails to demand the unpaid balance and attorney's fees during the default, B.O.A. cannot renew the demand until a subsequent default. As the bankruptcy court concluded, B.O.A. failed to demand reasonable attorney's fees when it declared the note in default and the outstanding balance due and payable. (R. C4, at 6.) Consequently, Valley Inn asserts that under the terms of the note, B.O.A. may only demand attorney's fees upon a subsequent default. (Br. of the Appellant, at 5.) Valley Inn argues that because it fulfilled its obligations under the Plan, *id.* at 7, there was no subsequent default, and therefore, B.O.A. is not entitled to attorney's fees.

The bankruptcy court adopted a somewhat different interpretation of the note's provision than the version proposed by Valley Inn. The bankruptcy court found that "the parties intended to permit B.O.A. to declare attorney's fees due and payable as part of the note." (R. C4, at 6.) Significantly, the court found that the right to demand attorney's fees

“remained until the default was cured.” *Id.* The court held that the default was not cured until the court confirmed the Plan in April of 2001. Significantly, section 4.2 of the Plan provided for a review and approval by the bankruptcy court of B.O.A.’s request for attorney’s fees. (R. D11, § 4.2.) Ultimately, the bankruptcy court found that the May 2001 application for attorney’s fees “is sufficient declaration under the terms of the note and . . . [that] the amount of the request [is] allowable and payable under the confirmed plan.” (R. C4, at 7.)

Valley Inn objects to the bankruptcy court’s conclusion that B.O.A. should receive attorney’s fees even under the court’s interpretation of the note. Appellant agrees that the May 15, 2001 application for attorney’s fees was the first time B.O.A. declared reasonable attorney’s fees. (Br. of the Appellant, at 7.) However, Valley Inn argues that “[a]t the time that the declaration was made, the note was not in default and BOA was not declaring it to be due and payable in full.” *Id.*

The court reviews the bankruptcy court’s findings of fact for clear error and questions of law *de novo*. *In re Biondo*, 180 F.3d 126, 130 (4th Cir. 1999); *In re K&L Lakeland, Inc.* 128 F.3d 203, 206 (4th Cir. 1997). The court will review the bankruptcy court’s interpretation of the Note *de novo* because contract interpretation is a question of law.

*Johannssen v. Dist. No. 1 - Pac. Coast Dist., Meba Pension Plan*, -- F.3d --, Nos. 01-1608, 01-1986, 01-2041, 2002 WL 1012036, at \*10 (4th Cir. May 20, 2002); *Hendricks v. Cent. Reserve Life Ins. Co.*, 39 F.3d 507, 512 (4th Cir. 1994). Under Virginia Law, where the terms of a contract are certain, its plain meaning should be given effect, and the court should not search for meaning beyond the instrument itself. *APCO v. Greater Lynchburg Transit Co.*,

374 S.E.2d 10, 12 (Va. 1988).

The construction of the note's default provision does not support appellant's interpretation. Valley Inn argues that the word "together" in the provision requires the creditor to demand attorney's fees at the same time it declares the note in default and demands the entire unpaid balance due and payable. This interpretation, however, ignores the fact that the clause "together with a reasonable attorney's fee" is separated by a comma from the part of the provision that establishes the creditor's privilege to declare the note in default. (R. D1 - Note Secured by Purchase Money Deed Of Trust.) Thus, reading the provision as a whole reveals that "together with a reasonable attorney's fee" modifies "balance due and payable" and not "the privilege to declare." In other words, declaring the entire unpaid balance of the note due and payable is a condition precedent to obtaining attorney's fees. Rather than requiring two separate declarations, one for the unpaid balance of the debt and the other for attorney's fees, "together with a reasonable attorney's fee" simply indicates that the defaulting debtor is required to pay the creditor's attorney's fees in addition to immediately satisfying his debt. Under the note, attorney's fees become an automatic component of the debtor's obligation when the creditor declares a default. *See In re Va. Foundry Co. Inc.*, 9 B.R. 493, 495 (W.D.Va. 1981) (noting that under Virginia law attorney's "fees are as much a part of the debt as the principal and interest").

Furthermore, section 4.2 of the Plan provides further evidence that the parties presumed that attorney's fees were part of Valley Inn's obligation. The Plan established new rights and obligations between Valley Inn and B.O.A. Section 4.2 of the Plan states that the

“Debtor will demand a strict accounting of these [attorney’s] fees . . . and approval of the bankruptcy court as to those legal fees of B.O.A. Wholesale, Inc. which will be allowed under this proceeding.” (R. D11, § 4.2.) This provision of the Plan further confirms and establishes that Valley Inn is responsible for B.O.A.’s attorney’s fees.

Because B.O.A. exercised its privilege to declare the outstanding balance of the note due and payable, thus satisfying the condition precedent, and because the Plan allowed for the creditor’s attorney’s fees, the judgment of the bankruptcy court awarding B.O.A. Wholesale attorney’s fees of \$7,506.51 is affirmed. The court will not review the bankruptcy court’s finding that the attorney’s fees are reasonable because that question was not presented on appeal. The only remaining issue is whether the attorney’s fees are secured debt under the deed of trust.

### III.

The bankruptcy court held that B.O.A.’s attorney’s fees are secured debt. The court offered two reasons for its finding. First, the court relied on *In re Crafty Fox, Ltd.*, 475 F. Supp. 634, 636 (W.D.Va. 1979) which held that “where provision for stipulated attorney’s fees is made in a note secured by a deed of trust, which deed specifies that it is given as security for said note, such attorney’s fees themselves are part of the secured debt.” Second, the court noted that section 4.2 of the Plan contemplates payment of B.O.A.’s attorney’s fees “as a part of the secured claim owed to B.O.A.” (R. C4, at 5.)

Valley Inn argues that if the court upholds the award of attorney’s fees, the fees are an unsecured debt under the terms of the deed of trust. In pertinent part, the deed of trust

provides that it is given “[t]o secure the payment of the principal sum of ONE HUNDRED THIRTY-THREE THOUSAND FOUR HUNDRED SEVENTY-FIVE DOLLARS (\$133,475) and all interest accruing thereon, evidenced by two (2) notes of even date.” Appellant argues that the deed “secured not the **notes** but **the principal sum** of money owed,” and that the deed does not make any “allowance . . . for any legal fees associated with bankruptcy or any other event other than foreclosure.” (Br. of the Appellant, at 8) (emphasis added). Thus, appellant distinguishes *Crafty Fox* because in that case, the deed of trust “was given ‘to secure payment of . . . one negotiable interest bearing **note**.” *Crafty Fox*, 475 F. Supp. at 634-35 (emphasis added). In response, the appellee argued at the May 22, 2002 hearing that the different language in the deed of trust at issue and the deed of trust in *Crafty Fox* is a distinction without difference. The court reviews the bankruptcy court’s finding *de novo* because resolution of the issue requires interpretation of the deed of trust, which presents a question of law. *See supra* Part II.

Valley Inn’s interpretation of the relevant provision of the deed of trust unduly strains the plain language of the document. As the appellee argues, whether the deed of trust secures a note in a certain amount or secures a certain amount evidenced by a note is a distinction without difference. Furthermore, the argument that the deed of trust only secured the principal amount plus interest and not any of the other obligations under the note contradicts state law. Virginia law provides that unless otherwise provided in a deed of trust, “[t]he deed shall be construed as given to secure the performance of each of the covenants entered into by the grantor as well as the payment of the primary obligation.” VA. CODE ANN. § 55-59(1)

(West 2002).

A closer examination of the Plan also reveals that the attorney's fees are part of Valley Inn's secured debt. The Plan included a discussion of payment of attorney's fees to B.O.A. in section 4.2, a section titled "Secured Claim of B.O.A. Wholesale." (R. D11, § 4.2.) As previously stated, *see supra* Part II, the Plan established new rights and obligations between creditor and debtor. Including a discussion of attorney's fees in the section discussing B.O.A.'s secured claims confirms that the deed of trust secured not only the principal amount (and interest) of the note, but all obligations contained in the note.

Accordingly, the judgment of the bankruptcy court holding that the attorney's fees owed to B.O.A. are part of Valley Inn's secured debt is hereby affirmed.

IV.

For the foregoing reasons, the judgment of the bankruptcy court is hereby affirmed. An appropriate order shall this day enter.

ENTERED: \_\_\_\_\_  
Senior United States District Judge

\_\_\_\_\_  
Date

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

THE VALLEY INN, INC.,	)	CIVIL ACTION NO. 5:01CV00087
Appellant,	)	
v.	)	<u>FINAL ORDER</u>
	)	
B.O.A. WHOLESALE, INC.	)	
	)	
Appellee.	)	JUDGE JAMES H. MICHAEL, JR.

The bankruptcy appeal is before the court pursuant to 28 U.S.C. § 158(a). The debtor appeals the decision by the bankruptcy court awarding the creditor attorney’s fees as part of the secured debt. For the reasons stated in the accompanying memorandum, it is accordingly

ADJUDGED, ORDERED AND DECREED

that:

- (1) The decision of the bankruptcy court shall be, and it hereby is, AFFIRMED.
- (2) The Clerk of the Court is hereby directed to strike the present case from the docket of this court.

The Clerk of the Court is further directed to send a certified copy of this Order to United States Bankruptcy Judge, the Honorable Ross W. Krumm, and to all counsel of record.

ENTERED: \_\_\_\_\_  
Senior United States District Judge  
\_\_\_\_\_  
Date