

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

AL GRAVES and IRENE F. GRAVES,
Plaintiffs,

vs.

**FIRST NATIONAL BANK OF
AINSWORTH,**
Defendant.

Case No. 6841

**ORDER ON MOTION FOR
SUMMARY JUDGMENT**

DATE OF HEARING: (1) August 18, 1999, and,
(2) October 13, 1999.

DATE OF DECISION: October 29, 1999

APPEARANCES:

- For plaintiffs:
- (1) W. Gerald O’Kief with plaintiffs.
 - (2) For evidentiary hearing in open court, W. Gerald O’Kief with plaintiff Irene F. Graves and without plaintiff Al Graves; for telephonic arguments, W. Gerald O’Kief without plaintiffs.
- For defendant:
- (1) Thomas O. Ashby.
 - (2) For evidentiary hearing in open court, no appearance; for telephonic arguments, Thomas O. Ashby.

SUBJECT OF HEARING: Defendant’s motion for summary judgment.

FINDINGS/CONCLUSIONS: The court finds and concludes:

1. The defendant asserts that res judicata bars the plaintiffs’ claim based on two separate and independent judgments or orders.

2. This court’s replevin judgment in Case No. 6556 does not apply. That judgment conclusively determined that the bank had a first security interest, and therefore an existing debt, as of March 16, 1995, the date of commencement of the replevin action. Without deciding any issues regarding the sufficiency of the amended petition in the present case, that amended petition appears to claim a discharge of indebtedness occurring on or about June 30, 1995. The replevin action does not address matters arising after the commencement of the action. Thus, the replevin judgment did not adjudicate the continued existence or nonexistence of any debt after March 16, 1995.

3. The second source of the bank’s res judicata claim concerns an order of the bankruptcy

court of December 4, 1995, which was appealed to the federal district court and affirmed on July 16 or 17, 1996. The affirmed order determined that the bank was entitled to recover attorney fees of \$27,636.90 and expenses of \$2,450.22. This constituted a final judgment. However, the judgment, by its own terms, does not apply to the Graves' claims regarding overpayment.

4. Based only on the limited record produced on the motion for summary judgment, the court cannot determine as a matter of law what the indebtedness of the Graves was at the time of application of proceeds of cattle and machinery (except that it included at least the amounts of attorney fees and expenses allowed by the bankruptcy court) or what proceeds were realized and applied from any such sales.

5. The bank, as the moving party, bears the burden of producing evidence to show that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

6. Except with regard to the preclusive effect of the bankruptcy court order, the bank failed to meet that burden.

7. As to the appropriate preclusive effect of the bankruptcy order, the court is persuaded that summary judgment is not appropriate at this point. It appears that the bar of the prior order can be waived. 50 C.J.S. *Judgments* § 597. The bank has not yet filed an answer to the amended petition. The bank might omit the defense and waive any bar of the prior order. The preclusive effect does not appear on the face of the petition itself. Consequently, the motion should be denied without prejudice to the assertion of such preclusive effect, if any, as the bank may then be entitled to assert by virtue of the bankruptcy court order.

ORDER:

IT IS THEREFORE ORDERED that:

1. The motion is denied without prejudice to assertion of any issue or claim preclusion arising from the bankruptcy court order of December 4, 1995.

2. This order is interlocutory in character and does not constitute a final order.

Dated: October 29, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 19____ by _____.
- 9 Enter judgment on the judgment record.
Done on _____, 19____ by _____.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 19____ by _____.
- : Note the decision on the trial docket as: 10/29/99 Signed "Order on Motion for Summary Judgment" entered.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge