

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

September 7, 1989

John Lovald, Esq.
Post Office Box 66
Pierre, South Dakota 57501

James Hurley, Esq.
Post Office Box 2670
Rapid City, South Dakota 57709

William Wyman, Esc4.
624 Sixth Street, #212
Rapid City, South Dakota 57701

Re: Neuhauser Ranch, Inc.
Chapter 12 87-50123
Adversary 88-5005

Dear Counsel:

John Lovald, attorney for Lone Star Cattle Company, has submitted a motion for allowance of attorney's fees stemming from a decision in Lone Star's favor in an adversary proceeding initiated by Neuhauser Ranches, Inc. The facts of the adversary and the outcome thereof may be found in the findings of fact and conclusions of law and judgment entered by the Court on February 17, 1989. Those findings, conclusions and judgment are hereby incorporated by this reference as though set forth in full.

Attorneys William Wyman and James Hurley, representing Neuhauser Ranch, have responded in opposition to Attorney Lovald's request. Having heard argument on the motion and reviewing the facts, briefs, and other applicable case law, the Court hereby grants Attorney Lovald's motion.

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Lone Star's basis for the award of fees is the amended lease of bred cows and heifers entered into by Lone Star and Neuhauser on December 17, 1984. Section 14 of the agreement provides:

ATTORNEY'S FEES

In the event that any action is filed by one party to this lease against the other party in relation to this lease, the unsuccessful party in the action shall pay to the successful party, in addition to all other sums that either party may be called upon to pay, a reasonable sum for the successful party's attorney's fees.

Relying on the above contract language and the South Dakota Supreme Court's decision in NBC Leasing Co. v. Stilwell, 334 N.W.2d 496 (S.D. 1983), Lone Star submits that it is entitled to attorney's fees. Neuhauser counters that the so-called American Rule applies in this determination, that Lone Star failed to brief the issue of costs and expenses, that Lone Star misconstrues NBC Leasing and that Lone Star should be required to "stand upon the existing law that [Attorney Lovald] has put forth.

DECISION

The "American Rule" denies attorney's fees to a litigant in the absence of a contract, applicable statute or other exceptional circumstances. Alyeska Pipeline Service Co. v. Wilderness Society, 420 U.S. 240 (1975). The Eighth Circuit has held that the construction of contracts regarding attorney's fees is a matter of state law. In re Morris, 602 F.2d 826 (8th Cir. 1979). In NBC Leasing, the state Supreme Court held that where parties to an agreement contract for attorney's fees, such fees are recoverable apart from statutory authority governing attorney's fees awarded as costs. See also Lowe v. Steele Construction Co., 368 N.W.2d 610 (S.D. 1985) and Tracy v. T & B Construction Co., 85 S.D. 337, 182 N.W.2d 320 (1970).

In the present case, the amended lease clearly and unambiguously states that attorney's fees, in addition to all other sums that the losing party may be called to pay, are recoverable by the successful party if the parties to the lease engage in litigation pertaining thereto. Based on the deference accorded to state law concerning the payment of attorney's fees and the state

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Supreme Court's decision allowing such payment, this Court holds that Lone Star, as the prevailing party, is entitled to recover attorney's fees.

Attorney Wyman's argument concerning Lone Star's failure to provide authority for the allowance of costs and expenses is not persuasive. First, such a claim ignores the lease agreement's provision for payments of other costs. Section 14 of the agreement makes it clear that the unsuccessful party shall be responsible not only for attorney's fees but also for all other sums that either party may be called upon to pay. Given this clear expression and the import of NBC Leasing, this Court believes that when parties contract for costs, such costs are recoverable apart from statutory authority governing such costs. Further, Attorney Wyman's argument is contra to Bankruptcy Rule 7054(c)'s requirement that every final judgment grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings. Bankruptcy Rule 7054 provides that costs may be allowed to the prevailing party except when a federal statute or another Bankruptcy Rule otherwise provides.

Attorney Hurley argues that Lone Star's claim cannot pass muster under 11 U.S.C. §506. Under §506, attorney's fees and costs may be recovered from the debtor's estate if (1) Lone Star proves that the value of the collateral securing its claim exceeds the fees requested and the amount of the proof of claim, (2) the agreement between Lone Star and Neuhauser provides for such payment of fees and costs, and (3) the fees sought are reasonable in amount. See In re David Rausch, Inc., 41 B.R. 833 (Bkrtcy. D.S.D. 1984), In re Rutherford 28 B.R. 899 (Bkrtcy. N.D. Ill. 1983) and In re Masnorth Corp. 28 B.R. 892 (Bkrtcy. N.D. Ga. 1983).

The Court agrees with Lone Star that the treatment of this claim under §506 is, in this case, secondary to the initial determination of whether the claim can even be awarded. Thus, the Court cannot at this time consider factors (1) and (3) set forth above. It, however, is appropriate that the Court consider factor (2) at this time. Attorney Hurley asserts in his brief that a stipulation entered into between the attorneys for the parties in open court on June 8, 1988 superceded the provisions of the amended lease. The Court disagrees. While the stipulation evidenced Lone Star's insistence that all issues relative to Neuhausers' turnover complaint be litigated before this Court, no evidence has been presented that the stipulation canceled, superceded or otherwise altered the lease. The stipulation merely stated that Neuhausers would bring all claims it possessed against Lone Star into this

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adversary and that Neuhausers' pleadings would be amended accordingly. Such does not serve to abrogate the lease provisions in their entirety.

This constitutes the Court's findings of fact and conclusions of law in this matter. This is a related procedure in which all parties have consented to the jurisdiction of this Court. 28 U.S.C. §157(c). Attorney Lovald is hereby directed to submit to opposing counsel and file with this Court an itemized schedule of costs and fees incurred for which this award is granted, together with any supporting memorandum or documentation. Counsel for Neuhauser shall have ten days within which to respond to the same by serving and filing a written memorandum. The Court will enter an order for the allowance of attorney's fees.

Very truly yours,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:)	CASE NO. 87-50123
)	
NEUHAUSER RANCH, INC.,)	ADVERSARY NO. 88-5005
a Corporation,)	
)	CHAPTER 12
Debtor.)	
)	
NEUHAUSER RANCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	ORDER GRANTING
)	LONE STAR CATTLE
LONE STAR CATTLE Co., a/k/a)	COMPANY'S MOTION
LONE STAR CATTLE LIMITED)	FOR ATTORNEY'S FEES
PARTNERSHIP, a South Dakota)	
Limited Partnership, and)	
KENNETH JONES,)	
Defendants.)	

Pursuant to the letter opinion filed in this matter and executed this same date, and pursuant to the findings of fact and conclusions of law entered by this Court on February 17, 1987,

IT IS HEREBY ORDERED that the motion of Lone Star Cattle Company for the allowance of attorney's fees is hereby granted.

IT IS FURTHER ORDERED that counsel for Lone Star shall submit to opposing counsel and file with this Court an itemized schedule of costs and fees incurred for which this award is granted, together with supporting memorandum or documentation.

IT IS FURTHER ORDERED that counsel for Neuhauser Ranches, Inc. shall, within ten days, respond to the same by serving and filing a written memorandum setting forth any objections to such fees and costs.

Dated this 7th day of September, 1989.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By: _____
Deputy

(SEAL)