**United States Bankruptcy Court**
**Northern District of Illinois**
**Eastern Division**

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**Bankruptcy Caption: In re** Carl F. Semrau, D.D.S., Ltd.

Bankruptcy No. 01 B 08648

**Adversary Caption: n/a**

Adversary No.

**Date of Issuance:**

**Judge: John H. Squires**

**Appearance of Counsel:**

Attorney for Plaintiff: David L. Freidberg

Attorney for Defendant: Robert J. Slobig

Trustee : David R. Brown

**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| IN RE: | ) | |
| | ) | Bankruptcy No. 01 B 08648 |
| CARL F. SEMRAU, D.D.S., LTD., | ) | Chapter 7 |
| | ) | Judge John H. Squires |
| Debtor. | ) | |

## MEMORANDUM OPINION

This matter comes before the Court on the objection of Carl F. Semrau ("Semrau") pursuant to Federal Rule of Bankruptcy Procedure 3007 to the claim of American Express Centurion Bank ("American Express"). For the reasons set forth herein, the Court allows the claim of American Express in the sum of $26,012.90 and overrules Semrau's objection.

## I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

## II. FACTS AND BACKGROUND

Carl F. Semrau, D.D.S., Ltd. (the "Debtor") and its sole officer and shareholder, Semrau, filed voluntary Chapter 7 petitions on March 14, 2001. American Express's claim in each case results from an unpaid credit card debt. This debt to American Express was listed on Semrau's Schedule F as disputed in the sum of $31,958.90.

On June 18, 2001, American Express filed an adversary proceeding in Semrau's case under 11 U.S.C. § 523(a)(2)(A) alleging that the debt it was owed by Semrau should be excepted from discharge. The parties settled the matter by way of a stipulated dismissal dated November 21, 2001. Semrau Ex. No. 2. Semrau paid American Express $5,000.00 pursuant to the terms of the stipulated dismissal. *Id.* The document did not contain a release of any claims by American Express. Semrau received a discharge in his bankruptcy case on July 11, 2001.

After the Chapter 7 trustee in Semrau's case liquidated many of the assets in the estate, he filed a motion to abandon various items of personal property, including the shares of stock in the Debtor. The Court entered an order authorizing the trustee to abandon the Debtor's stock. This had the effect of transferring those shares of stock back to Semrau. *See* 11 U.S.C. § 554. The Debtor's shares of stock were listed in Semrau's case on his Schedule B as having no value. No dividend was paid to the unsecured pre-petition claimants on their allowed claims, including American Express on its claim.

In the case at bar, the Debtor listed the debt owed to American Express for the same credit card account in the sum of $31,958.90 on its Schedule F, without any indication that the debt was challenged as contingent, unliquidated, or disputed. American Express Ex. No. 2. Sermrau signed the Debtor's Schedules and Statement of Financial Affairs as its president. American Express timely filed its proof of claim in the Debtor's case on April 8, 2004, in the sum of $26,012.90. American Express Ex. No. 1. The Chapter 7 trustee filed an objection to American Express's proof of claim, alleging that only Semrau owed the debt on the credit card account, not the Debtor. The trustee subsequently withdrew her objection. The Debtor's Schedules show assets of over $104,000.00 and liabilities totaling more than $268,000.00. Thus, the Debtor is

balance-sheet insolvent. The trustee's latest interim report shows that there are enough funds to make a small distribution to the Debtor's pre-petition creditors.

On August 22, 2005, Semrau filed an objection to American Express's proof of claim contending that American Express had agreed to accept the $5,000.00 payment in settlement of the adversary proceeding against Semrau and that there was no evidence that the Debtor was also liable on the credit card account. Further, he alleges that American Express should be estopped by virtue of the settlement from recovering any dividend in the Debtor's case. In response, American Express contends that the credit card account terms and conditions expressly provide that Semrau and the Debtor were jointly and severally liable for repayment of all credit extended on the account and that the claim filed in this case appropriately reflects the $5,000.00 credit for the settlement with Semrau.

A trial was held in this matter on November 10, 2005. The only witness who testified was David P. Sweeney ("Sweeney"), an assignee of a claimant in this case. Sweeney was formerly employed by Semrau and the Debtor to perform forensic accounting work in connection with their respective bankruptcy cases and other litigation in which they were involved. He testified that he had reviewed the voluminous documentation and records of Semrau's dental practice which Semrau conducted through the Debtor. According to Sweeney, there were several American Express credit card accounts including the one at issue. Sweeney testified that he could not find documents in the Debtor's files concerning this account, although the Debtor's general check register and ledger showed payments on the account to American Express and also included entries which indicated that those payments were liabilities due to the Debtor from Semrau. Sweeney further testified that he advised the attorneys who were involved in the

settlement negotiations in the adversary proceeding of his findings. He also stated that he participated in a conference call during which he recommended the $5,000.00 figure. Sweeney testified that it was his understanding that the $5,000.00 payment resulted in a dismissal of all of American Express's claims, not just the claim in the adversary proceeding against Semrau.

## III. APPLICABLE STANDARDS

Pursuant to Federal Rule of Bankruptcy Procedure 3001(f), "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f); *see also* 11 U.S.C. §§ 501 and 502(a). Claim objectors carry the initial burden to produce some evidence to overcome this rebuttable presumption. *In re O'Malley*, 252 B.R. 451, 455-56 (Bankr. N.D. Ill. 1999). "Once the objector has produced some basis for calling into question allowability of a claim, the burden then shifts back to the claimant to produce evidence to meet the objection and establish that the claim in fact is allowable." *Id.* at 456. However, the ultimate burden of persuasion always remains with the claimant to prove entitlement to the claim. *In re Nejedlo*, 324 B.R. 697, 699 (Bankr. E.D. Wis. 2005); *In re Octagon Roofing*, 156 B.R. 214, 218 (Bankr. N.D. Ill. 1993). American Express's properly filed claim constitutes prima facie evidence of its validity and amount. Semrau, the objector, has the burden of presenting evidence to rebut the claim's prima facie validity. If that burden is satisfied, then American Express bears the ultimate burden of proving its claim.

## IV. DISCUSSION

Semrau argues that the credit card account obligation was Semrau's individually, not an obligation of the Debtor. In addition, Semrau contends that his $5,000.00 payment to American Express settled the amount due and owing on the account. At the outset, the Court notes the apt admonition from the United States Supreme Court in a slightly different context involving a contested claim that "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code." *Raleigh v. Ill. Dep't. of Revenue*, 530 U.S. 15, 20 (2000). Thus, the Court must turn its attention in this matter to the credit card agreement, as well as the stipulated dismissal entered in the adversary proceeding. The Court's initial focal point of this or any contract analysis is the language in the contract itself. *See Much v. Pac. Mut. Life Ins. Co.*, 266 F.3d 637, 643 (7th Cir. 2001); *Church v. Gen. Motors Corp.*, 74 F.3d 795, 799 (7th Cir. 1996).

State law determines the rules governing contract interpretation. *N. Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 652 (7th Cir. 1998). Conventional contract principles in Illinois require that "'[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used.'" *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 394 (7th Cir. 2003) (*citing W. Ill. Oil Co. v. Thompson*, 186 N.E.2d 285, 291 (Ill. 1962)); *Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d 882, 884 (Ill. 1999). Accordingly, Illinois courts use the "four corners" approach to contract interpretation, confining their attention to only that which appears within the four corners of the relevant documents. *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1036 (7th Cir. 1998); *see also Neuma, Inc. v. AMP, Inc.*, 259

F.3d 864, 873-74 (7th Cir. 2001) (finding that if a contract is unambiguous, a court "will not look beyond its 'four corners' in interpreting its meaning"). If the language of a contract can be interpreted in only one way, the case is over. *AM Int'l, Inc. v. Graphic Mgmt. Assocs., Inc.*, 44 F.3d 572, 574 (7th Cir. 1995). In the examination of contracts, the overriding concern is to give effect to the intent of the parties. *Church*, 74 F.3d at 799.

A contract that is susceptible to only one reasonable interpretation is unambiguous, and a court must determine its meaning as a matter of law. *Moriarty v. Svec*, 164 F.3d 323, 330 (7th Cir. 1998); *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 565 (7th Cir. 1995). Where a contract's provisions are clear, a court will enforce them according to their ordinary and plain meaning. *Interim Health Care of N. Ill., Inc. v. Interim Health Care, Inc.*, 225 F.3d 876, 879 (7th Cir. 2000); *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 420 (7th Cir. 1998) ("Courts must interpret the express terms of a [contract] 'in an ordinary and popular sense as would a person of average intelligence and experience. . . .'"); *Bourke*, 159 F.3d at 1036 ("'The terms of an agreement, if not ambiguous, should be generally enforced as they appear, and those terms will control the rights of the parties.'").

"Whether a contractual obligation is joint and several, or only several, depends upon the intentions of the parties, as revealed by the language of the contract and the subject matter to which it relates." *Brokerage Res., Inc. v. Jordan*, 400 N.E.2d 77, 80 (Ill. App. Ct. 1980). "'If two or more parties to a contract owe a joint and several duty of performance to another party to the contract and the duty is not performed, each may be liable for the entire damages resulting from the failure to perform.'" *Pritchett v. Asbestos Claims Mgmt. Corp.*, 773 N.E.2d 1277, 1283 (Ill. App. Ct. 2002) (*quoting Brokerage Res.*, 400 N.E.2d at 80).

In the matter at bar, the documentary evidence amply supports allowance of American Express's claim in full. The proof of claim for the total sum of $26,012.90 was timely filed on April 8, 2004. American Express Ex. No. 1. It meets the requirements of Bankruptcy Rule 3001 and is accordingly deemed allowed under § 502. First, attached as an exhibit to the proof of claim was a printout that showed the balances on the account at issue from November 2000 through April 2001. The printout showed an unpaid balance as of March 1, 2001 (about two weeks before the bankruptcy petitions were filed) of $31,958.90. *See also* American Express Ex. No. 4. The printout also showed credits to the account for payments made and, specifically and most significantly, a credit reflecting the $5,000.00 proceeds that American Express received from Semrau for settlement of the adversary proceeding. Moreover, the Debtor's Schedule F listed American Express's debt as of the March 14, 2001 petition date in the sum of $31,958.90 but did not indicate that the debt was contingent, unliquidated, or disputed. American Express Ex. No. 2. The Debtor's Schedules constitute a judicial admission that the Debtor did in fact owe that debt to American Express. *See In re Standfield*, 152 B.R. 528, 531 (Bankr. N.D. Ill. 1993); *see also* Fed. R. Evid. 801(d)(2).

Further, a cursory review of the terms of the credit card account agreement, as well as the language of the stipulated dismissal, leads to the conclusion that both of those contracts are unambiguous. The pertinent portions of the terms and conditions of the credit card agreement establish that both the Debtor and Semrau became jointly and severally liable for the unpaid balance on the account. American Express Ex. No. 3. Specifically, the agreement expressly provides that the Debtor and Semrau "are each jointly and severally responsible for the repayment of all credit extended on the Account . . . ." *Id.* This language clearly and unambiguously

imposes joint and several liability upon both the Debtor and Semrau, the sole officer authorized to use the credit card.

Additionally, review of the stipulated dismissal shows that only American Express's claim against Semrau was settled in the adversary proceeding, not the claim that American Express held against the Debtor. The stipulated dismissal did not contain a release of any claims that American Express had against the Debtor or any other party. Rather, it demonstrates that Semrau, in his individual capacity, entered into the agreed settlement of the adversary proceeding with American Express. The matter between those two parties was resolved in November 2001. The claim at bar, however, had not been filed at the time of the settlement of the adversary proceeding; indeed it was filed over one year after that settlement. Had Semrau and American Express truly intended to also resolve American Express's claim against the Debtor, they could have drafted the documentation to reach that result. Because the Debtor was not a party to that settlement, it cannot benefit therefrom. Moreover, Semrau cannot expand the agreement to cover more than it clearly provides.

The Court finds that the evidence adduced by Semrau is insufficient to outweigh American Express's evidence. Sweeney's testimony at trial about his understanding of the settlement does not overcome the documentary evidence showing the limits of exactly what was settled. Moreover, Sweeney's testimony is weighed in light of his understandable bias in favor of his former employer, Semrau, and the fact that he has acquired one of the other claims in this case and, thus, stands to gain from the disallowance of American Express's claim. In short, Semrau's evidence is insufficient to outweigh American Express's evidence supporting the allowance of

its claim as filed. Thus, American Express's claim against the Debtor as jointly and severally liable for unpaid charges on the credit card account is not barred in this case.

Semrau's argument, first raised in his post-trial submission, that the Debtor should have been named as a necessary party in the adversary proceeding under Federal Rule of Bankruptcy Procedure 7019 is rejected. Any contention that a party was necessary for a just determination in that adversary proceeding should have been raised there, not here in an objection to a claim. Moreover, the issue in the adversary proceeding of whether American Express's claim against Semrau should have been excepted from his discharge under § 523(a)(2)(A) is separate and apart from the issues of whether the Debtor was also liable for the unpaid balance due on the credit card account and whether American Express's claim in this estate should be allowed under 11 U.S.C. § 502(b). Lastly, the Debtor was not a necessary party in the adversary proceeding against Semrau, which sought a determination of whether American Express's claim should survive Semrau's discharge, because the Debtor is an entity– not an individual–and is thus ineligible for a Chapter 7 discharge. *See* 11 U.S.C. § 727(a)(1).

Finally, it is questionable whether Semrau, as the holder of the Debtor's abandoned stock, has standing to bring this objection. Semrau is not listed as one of the creditors of the Debtor. His interest in this case arises as sole shareholder of the Debtor whose stock was abandoned by the trustee in Semrau's case and, therefore, reverted to Semrau. Typically, trustees are the parties who file objections to proofs of claim. They have statutory standing and the duty to file an objection "if a purpose would be served" for "any claim that is improper[.]" 11 U.S.C. § 704(5). Creditors of an estate whose potential dividends could be affected sometimes file claim objections. They have an economic stake in the pool of liquidated assets from which the trustee

draws to pay allowed claims. Thus, such creditors may also have standing to file claim objections. This is in keeping with the general principle that an objector to a claim, like a plaintiff in federal litigation, must have a present, substantial interest in the matter, as distinguished from a mere expectancy or future, contingent interest in order to have standing to litigate the contested matter. *See Wissman v. Pittsburgh Nat'l Bank*, 942 F.2d 867, 871 (4th Cir. 1991). The conditions that endow parties with standing to participate in bankruptcy proceedings are more limited than those that suffice to establish standing under Article III of the United States Constitution, and parties must be "directly and adversely affected pecuniarily" by an order of the bankruptcy court in order to have standing. *In re Andreuccetti*, 975 F.2d 413, 416 (7th Cir. 1992).

Thus, the general rule is that, unlike creditors, Chapter 7 debtors lack standing to object to or appeal from orders of the bankruptcy court because the commencement of liquidation proceedings extinguishes any pecuniary interests they formerly held in the property of the estate. *See In re Schultz Mfg. Fabricating Co.*, 956 F.2d 686, 692 (7th Cir. 1992). The exception to this rule occurs if the order objected to or appealed from may result in a surplus in the estate at the conclusion of the proceedings, which would then afford the debtor standing. *Andreuccetti*, 975 F.2d at 417. To invoke such exception, the debtor must show that a surplus is a reasonable possibility, not just that there is a theoretical chance of a surplus. *Id.*

The same principles that confer standing upon creditors and debtors apply to a successor of an equity interest of stock in a corporate case such as Semrau in the matter at bar. In other words, all allowed claims have to be paid in full under the priority scheme set forth in 11 U.S.C. § 726(a)(1)-(5) before any distribution can be contemplated to the Debtor or Semrau, the sole

shareholder of the Debtor, under § 726(a)(6). Currently, the record and docket do not indicate that there is any likelihood that all creditors' allowed claims will be paid in full. The trustee's last report of assets shows slightly over $25,000.00 to pay costs of administration and pre-petition claims. Hence, it appears that under no likely circumstances will all creditors' allowed claims, plus the costs of administration, be paid in full, thereby leaving any excess for payment to the Debtor or Semrau. Accordingly, Semrau appears to lack standing to maintain his objection to American Express's claim.

## V. CONCLUSION

For the foregoing reasons, the Court overrules Semrau's objection to the claim of American Express and allows the claim in the sum of $26,012.90.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

**ENTERED:**

**DATE:** _____

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**John H. Squires**
**United States Bankruptcy Judge**

cc: See attached Service List