

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

IN RE: )  
 )  
D. KEITH WILLIAMS and )  
JEAN WILLIAMS, )  
 )  
Debtors. )  
 )  
D. KEITH WILLIAMS and )  
JEAN WILLIAMS, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
JAMES J. STUMPF, Trustee, )  
 )  
Defendant. )

BK 81-2342  
FILED  
APR 17 1984  
CV 83-0-3301 L. Olson, Clerk  
Deputy

MEMORANDUM AND ORDER

This matter is before the Court on appeal from a judgment of the Bankruptcy Court for the District of Nebraska entered on May 9, 1983. The Bankruptcy Court found that certain funds earned by D. Keith Williams (the debtor) as brokerage commissions constituted property of the bankruptcy estate and not "earnings from services performed by [the] debtor after commencement of the [bankruptcy] case." 11 U.S.C. § 541(a)(6). Appellants, the debtor and his wife, filed their Chapter 7 bankruptcy petition on November 30, 1981.

The debtor, operating as a self-employed machinery and equipment broker, earned commissions in two transactions which are the subject of this appeal. The first involved the sale of a used crane by Delano Granite Company (Delano) to Wyoming Concrete Pipe Company (Wyoming Concrete), and the second involved the sale of a metal lathe from Raco Industrial Corporation (Raco) to Tony's Pizza Corporation (Tony's Pizza), a subsidiary of Schwan's Sales Enterprises, Inc. (Schwan's).

11 U.S.C. § 541(a)(1) provides that property of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." A right to payment which has accrued pre-petition and which derives from the debtor's pre-petition services will be deemed property of the estate even if actual receipt of such income occurs after the filing of the bankruptcy case. In re Sloan, 32 B.R. 607, 611 (Bankr. E.D. N.Y. 1983).

Under Nebraska law, the right to a brokerage commission accrues when the broker has produced a buyer who is ready, willing and able to purchase at a price and upon terms specified by and satisfactory to the seller. See Wisnieski v. Coufal, 188 Neb. 200, 195 N.W.2d 750 (1972) (real estate broker). See also In re Gagne, 16 B.R. 24, 25 (Bankr. N.D. Ohio 1981) (" . . . real estate broker's commission is earned when a contract is entered into which is mutually obligatory on both parties, the vendor and vendee. . . .").

With respect to the crane transaction, the record contains a letter agreement (Exhibit 5(a)) sent by the debtor to Delano on November 10, 1981, and accepted by a Delano vice president on November 18, 1981. The letter confirms the broker sales agreement and all pertinent terms as between the debtor, as broker, and Delano, as seller of the crane, as well as the terms upon which the debtor was authorized to sell the crane.

Exhibits 6(b) and (c) constitute a letter agreement sent by plaintiff to Wyoming Concrete, buyer of the crane, confirming payment terms, describing the property in detail and identifying the carrier selected at the buyer's request to transport the

crane. The letter agreement had been post-dated and had actually been mailed around November 20, 1981, according to the debtor's testimony. On the face of the document, the letter agreement was "accepted by" Ben Weeks, Manager of Wyoming Concrete, on November 24, 1981. Mr. Weeks also noted receipt of the document on November 23, 1981. Exhibit 7 is a copy of the check issued by Wyoming Concrete on November 24, 1981, in full payment of the crane. The debtor did not receive the check or return of the accepted letter, however, until December 3, 1981, three days after commencement of his bankruptcy case.

With respect to the metal lathe, Exhibits 10(a) and 10(b) indicate that the debtor had been retained by Raco as broker for the sale of the lathe. Exhibits 10(b) and 11 reduce to writing the terms of the sale agreement with Tony's Pizza. Exhibit 11, an invoice dated November 16, 1981, leaves no room for doubt that as of that date, Tony's Pizza had inspected and agreed to purchase the lathe. Although Exhibit 11 was not signed by an officer of Tony's Pizza, Schwan's, its parent company, issued a check on November 25, 1981 (Exhibit 12) in full payment of the purchase price for the lathe, on behalf of Tony's Pizza. This check also, however, was not received by the debtor until December 3, 1981.

It is clear from the documentary evidence that prior to November 30, 1981, the debtor had secured written agreements with the two sellers involved and oral commitments from the two buyers for the sale and purchase of the machinery in question. As of the date of the bankruptcy petition, documents and checks were en route to the debtor evidencing the buyers' assent to the sellers' and the debtor's contract terms. See generally Restatement

(Second) of Contracts §§ 22(1), 35(1), 63(a)" (1981). It is obvious that the debtor had produced ready, willing and able buyers pre-petition in both transactions.

The debtor urges, however, that as of November 30, 1981, he was not in possession of signed acceptances or checks from the purchasers of the equipment so that on that date there did not exist contracts binding upon or enforceable against the buyers within the applicable statute of frauds, Neb. Rev. Stat. § 2-201 (1980).

The identical argument was rejected in In re Sloan, 32 B.R. at 610, with which this Court agrees:

[T]he fact remains that the statute of frauds is an affirmative defense which may be waived unless it is duly pleaded [by the party to be charged] . . . . Thus the contract in question was not void ab initio, and the debtor had certain rights thereunder at the time his bankruptcy petition was filed. The statute of frauds does not necessarily constitute a bar to recovery by the trustee, particularly where, as in the present case, the contract has already been honored by the party to be charged.

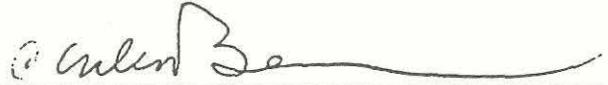
The debtor next asserts that because he had not completed certain shipping functions by November 30, 1981, he had not yet earned his commissions as of that date. He contends that his commissions were conditioned upon a specific event in these transactions, i.e., arranging for shipment of the machinery. However, neither seller required the debtor to assume shipping duties in order to earn a commission. The debtor testified, in fact, that no party to the transaction had requested that he arrange for transportation and that he volunteered to perform this function as part of the service he provides to buyers. ("I did that on my own. It's part of my course of business.") As in

In re Scanlon, 10 B.R. 245, 247-48 (Bankr. S.D. Cal. 1981), contingencies to the payment of the debtor's commissions may have lingered after the date of his bankruptcy petition, but he had by that time performed his part of the contracts, if not completely, then certainly the portion of his obligations which entitled him to his commissions. "[S]ection 541 was not intended to allow the Chapter 7 debtor to deprive his creditors of the fruits of his pre-petition efforts." In re Sloan, 32 B.R. at 610-11.

IT IS THEREFORE ORDERED that the judgment of the Bankruptcy Court is affirmed.

DATED this 29<sup>th</sup> day of March, 1984.

BY THE COURT:



---

C. ARLEN BEAM  
UNITED STATES DISTRICT JUDGE