

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
RANDALL EUGENE FRANZEN and)
KIMBERLY SU FRANZEN,) CASE NO. BK99-82682
) A00-8018
)
DEBTOR(S))
)
DEERE CREDIT, INC.,) CH. 7
Plaintiff(s))
vs.)
)
RANDALL EUGENE FRANZEN and)
KIMBERLY SU FRANZEN,)
)
Defendant(s))

MEMORANDUM

Hearing was held on Adversary Complaint. Appearances: Eric Wood for the plaintiff and Howard Duncan for the defendant. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Introduction

This adversary proceeding was brought by Deere Credit, Inc., requesting a finding of nondischargeability under 11 U.S.C. § 523(a)(6) of a debt owed by the debtor, Randall Eugene Franzen, to the plaintiff resulting from Mr. Franzen's sale of leased property owned by the plaintiff, without permission of the plaintiff, and his failure to pay the proceeds therefrom to the plaintiff. During the pendency of this bankruptcy case, the plaintiff, in consideration of a payment of \$22,000.00 from the buyer of the equipment, assigned the plaintiff's right, title and interest in and to the equipment in question and the lease which was the contractual vehicle by which Mr. Franzen obtained possession of the equipment and which provided for his contractual obligation to pay annual lease payments. Although the rights of the plaintiff were assigned to the buyer, this adversary proceeding was tried in the name of Deere Credit, Inc., as

plaintiff, with the buyer simply assuming the rights of Deere Credit, Inc.

Law

To establish nondischargeability under 11 U.S.C. § 523(a)(6), a plaintiff must prove that the injury was both "willful" and "malicious." Barclays Amer./Bus. Credit, Inc. v. Long (In re Long), 774 F.2d 875, 880-81 (8th Cir. 1985); Siemer v. Nangle (In re Nangle), 257 B.R. 276, 282 (B.A.P. 8th Cir. 2001); Durns v. Dawson (In re Dawson), 264 B.R. 13, 17 (Bankr. N.D. Iowa 2001).

The seminal United States Supreme Court case on the "willful" prong of Section 523(a)(6) is Kawaauhau v. Geiger, 523 U.S. 57 (1998). In that case, the Supreme Court of the United States made it clear that to obtain a judgment of nondischargeability under that statutory section, a creditor must show that the injury was willful, that is, that the debtor intentionally injured the creditor, not merely that the debtor's action was deliberate, but that the injury was deliberate or intentional.

To qualify as "malicious," the debtor's actions must be targeted at the creditor, at least in the sense that the conduct is certain or almost certain to cause financial harm. Hobson Mould Works, Inc. v. Madsen (In re Madsen), 195 F.3d 988, 989 (8th Cir. 1999) (citing Barclays Amer./Bus. Credit, Inc. v. Long (In re Long), 774 F.2d 875, 880-81 (8th Cir. 1985)).

The facts in this case lead me to find that the injury, that is, the financial harm, to the owner of the property was intentional and malicious and therefore the obligation to the owner, and its assignee, is nondischargeable.

Facts

The lease between Mr. Franzen and Deere Credit, Inc., was entered into in October of 1994 and included an initial payment of \$9,589.79 and five annual payments thereafter in the same amount. The lease included an option to purchase at the end of the term for a little less than \$13,500.00.

Mr. Franzen made the initial payment and the payments due in 1995, 1996 and 1997.

As a result of a bad farming year in 1997, Mr. Franzen determined that he needed to raise some cash and decided to sell the equipment to meet his cash needs. Prior to sale, he contacted the plaintiff and requested a "pay off," but the plaintiff's representative was unable to provide him with such information at the time of the call. Nonetheless, in February of 1998, Mr. Franzen advertised the equipment for sale. He received more than one inquiry as a result of the advertisement and, in the middle of February 1998, he sold the equipment to Wayne Nichols for \$40,000.00.

Upon receipt of the proceeds, he paid the proceeds to his mother on a pre-existing debt obligation. He did not notify the plaintiff of the sale and he did not turn over any of the cash proceeds to the plaintiff.

In the fall of 1998, he contacted the plaintiff to let a representative of the plaintiff know that his 1998 lease payment would be late. Neither at that time, nor at any time prior to the bankruptcy filing in 1999, did he inform a representative of the plaintiff that the equipment had actually been sold and was no longer in his possession.

Bankruptcy was filed in late 1999. At the time of the bankruptcy petition, the debtor had failed to make the annual payments in 1998 and 1999. According to a stipulation entered into at trial, on the petition date, Mr. Franzen owed the plaintiff past-due rent in the amount of \$23,294.89.

The plaintiff did not discover that Mr. Franzen had sold the equipment until the bankruptcy was filed and did not determine the name of the buyer of the equipment until the deposition of Mr. Franzen was taken on August 17, 2000. Thereafter, plaintiff pursued its rights under the Uniform Commercial Code and entered into a stipulation with the buyer, Wayne Nichols, in April of 2001, whereby the plaintiff assigned all its right, title and interest in the lease and in the equipment to Mr. Nichols for \$22,000.00.

In the spring of 1998, the date of the conversion of the plaintiff's property, the value of the equipment was at least \$40,000.00, the amount received by Mr. Franzen when he exposed the equipment to the market.

On the date Mr. Franzen sold the equipment, he was aware that he did not own the equipment. He knew that the equipment belonged to Deere Credit, Inc., and that his possessory interest was based upon a lease. Even with such knowledge, he decided that his cash situation was such that he needed to and did sell the equipment without notice to or consent by the owner. Then, with knowledge that he was not the owner of the equipment and had no right to the proceeds, he paid the proceeds to another creditor, to the detriment of the plaintiff, the true owner.

The sale of the equipment was willful and intentional. The transfer of the proceeds to a creditor other than the owner was malicious, in the sense that such action intentionally caused injury to the owner. The owner was deprived of the equipment itself, and then was deprived of the ill-gotten proceeds of the equipment. Not only did Mr. Franzen fail to notify the owner that the sale was anticipated, and obtain consent from the owner, but once the sale was completed, he transferred the proceeds to another creditor, failed to inform the owner concerning the transaction and even contacted the owner in the fall of 1998 to request an extension of time to make the 1998 lease payment. All of these actions by the debtor support the factual finding that the injury to the owner was deliberate.

Mr. Franzen suggests that he did not intend to hurt the owner, but that he needed cash quickly and, because he had the specific intent to continue farming, he believed that he would eventually be able to complete the payments on the lease obligation to the owner. Such intention, and "hope for the best," is not sufficient to overcome his deliberate actions. He knew at the end of the 1997 crop year that his farming operation was in trouble, and that he had insufficient funds to pay both his lease obligations to the owner and other credit obligations. He intentionally chose to pay creditors other than the owner, and thereafter misrepresented the situation to the owner.

Application of Law to Facts

The act that caused the injury in this case was the conversion of the owner's property, whether by sale of the equipment or by transfer of the proceeds of the equipment to a creditor other than the owner. Generally, the case law, both under the Bankruptcy Code and under Nebraska state law, holds

that the proper measure of damages is the value of the converted property at the time of the conversion. Fremont Nat'l Bank & Trust v. Collateral Control Corp., 724 F.2d 1410, 1415 (8th Cir. 1983) (the measure of damages for conversion is the market value plus the legal rate of interest from the date of the conversion, if the amount of the claim is actually liquidated); Call Fed. Credit Union v. Sweeney (In re Sweeney), 264 B.R. 866, 873 (Bankr. W.D. Ky. 2001); Harry Ritchie's Jewelers, Inc. v. Chlebowski (In re Chlebowski), 246 B.R. 639, 645 (Bankr. D. Or. 2000); Imperial Empire Trading Co. v. City of Omaha, 246 Neb. 919, 921, 524 N.W.2d 314, 316 (1994); Chadron Energy Corp. v. First Nat'l Bank, 221 Neb. 590, 603, 379 N.W.2d 742, 750 (1986).

The value of the equipment at the time of the conversion was \$40,000.00, the amount the debtor received in an arm's length transaction. That amount, with interest at the federal judgment rate from February 17, 1998, is the amount of damages suffered by the owner and is the amount that is nondischargeable.

Separate judgment shall be filed.

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

20 DUNCAN, HOWARD T.
08 WOOD, W. ERIC

Copies mailed by the Court to:

United States Trustee
Law Clerk

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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CH. 7
Filing No. 44

JUDGMENT

Judgment is entered in favor of the plaintiff's assignee, Wayne Nichols, and against defendant, Randall Eugene Franzen, in the amount of \$40,000.00 plus interest at the federal judgment rate from and after February 17, 1998. This judgment is nondischargeable in bankruptcy.

See Memorandum entered this date.

DATED: December 6, 2001

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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