

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:)

A83-726
CV 85-0-233

GRAND JUNCTION COMMERCIAL)
PROPERTIES, INC., et al.,)

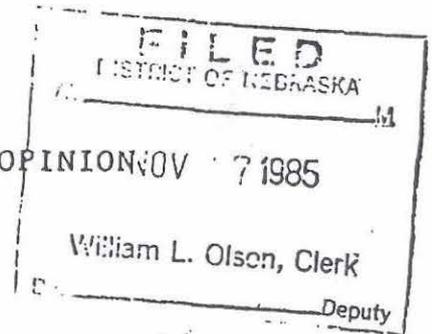
Plaintiffs,)

vs.)

MEMORANDUM OPINION NOV 7 1985

GLENN EARL HATCH,)

Defendant.)



This matter is before the Court on appeal from a judgment of the United States Bankruptcy Court for the District of Nebraska, and the defendant's motion (filing 4) to dismiss. The plaintiffs filed an adversary proceeding pursuant to Bankr. Rule 4004(a) to object to the debtor's discharge as provided in sections 727 and 523 of Title 11, United States Code. At trial before the Bankruptcy Court, the plaintiffs did not present evidence in support of a section 727 non-discharge and the Court properly dismissed the plaintiffs' cause of action relating to section 727. However, the Court did find that the defendant had intentionally defrauded the plaintiffs by inducing them to extend credit to defendant by the use of a fraudulent financial statement. Upon the evidence, the Court concluded that the plaintiffs had proven all of the necessary elements for a section 523(a)(2)(B) non-discharge, but found that the amount non-dischargeable was not the full amount of the plaintiffs' claim filed in the bankruptcy, \$165,000.00, but only \$12,500.00. The plaintiffs have appealed

contending that the Bankruptcy Court improperly assessed the amount of non-dischargeable debt at \$12,500.00, rather than as the entire amount of the creditors' claim.

Motion to Dismiss

Before addressing the merits of the appeal, the Court will address a preliminary matter. The defendant filed a motion to dismiss the appeal for the reason that the plaintiffs failed to file a timely notice of appeal. This adversary proceeding was tried to the Bankruptcy Court on December 3, 1984, at which time the Bankruptcy Court determined that the defendant had fraudulently obtained credit by use of a false financial statement and that one or more of the creditors had been affected by that fraud. The plaintiffs' first motion for amendment of judgment or new trial was filed on December 13, 1984. The judgment of the Bankruptcy Court was actually filed as a journal entry on December 17, 1984. Thereafter, a second motion for amendment of judgment or new trial was filed on December 26, 1984. On January 24, 1985, the Bankruptcy Court entered an order overruling the plaintiffs' second motion for amendment of judgment or new trial, but did not rule on the plaintiffs' first motion for amendment of judgment or new trial. Thereafter, on February 5, 1985, the plaintiffs filed a timely motion for extension of time to appeal, which was denied by the Bankruptcy Court on March 18, 1985. In the meantime, on February 25, 1985, the plaintiffs filed a notice of appeal. On

March 28, 1985, the plaintiffs' first motion for amendment or new trial filed on December 13, 1984, was overruled by the Bankruptcy Court.

Bankr. Rule 8002(a) provides that "the notice of appeal shall be filed with the Clerk of the Bankruptcy Court within ten days of the date of the entry of the judgment, order, or decree appealed from . . ." Id. The ten-day period within which a notice of appeal must be filed begins to run from the entry of the order denying a new trial.

The plaintiffs' motion for extension of time for appeal was filed on February 5, 1985, which was properly filed "before the time for filing a notice of appeal has expired," in compliance with Bankr. Rule 8002(c). However, plaintiff's motion for extension of time for appeal was not ruled upon by the Court until March 18, 1985, which is beyond the date which the Bankruptcy Court could allow a plaintiff to file a notice of appeal. Bankr. Rule 9006 limits the time a Bankruptcy Court may enlarge the time for taking an appeal under Bankr. Rule 8002 to the limits designated in Bankr. Rule 8002. However, the plaintiffs' notice of appeal, filed on February 25, 1985, was filed within the twenty-day extension of time for appeal that the Court was empowered to grant pursuant to Bankr. Rule 8002(c).

The Court finds that the notice of appeal was filed within the time limits necessary to meet the jurisdictional prerequisites of this appeal. The motion for the extension of time to file an appeal was filed ten days from the order denying the second motion

for new trial which had been properly filed. Thereafter, the notice of appeal was filed twenty days from the motion for an extension of time.

Appeal

FACTS

The parties do not dispute the facts in this appeal. The sole transaction between the plaintiffs and the defendant concerns the sale of a grocery business in Castle Rock, Colorado. The plaintiffs are comprised of three individuals, all members of the same family, and their two corporations. The individuals include Thomas H. Naylor; his wife, Mary; and his son, Steve. The Naylors were involved in the ownership of Thriftee Market, Inc., a Colorado corporation. In addition, the Naylors owned Village Commercial Properties, Inc., a Colorado corporation, which merged into a successor corporation entitled "Grand Junction Commercial Properties, Inc., in July, 1983.

In 1978, Thriftee Market, Inc. owned a grocery business called "The Thriftee Market" or "Naylors" which had operated in Castle Rock for fifteen or sixteen years prior to 1978. The grocery store was operated in space leased by Thriftee Market, Inc. from Village Commercial Properties, Inc.

In 1978, the Naylors decided to sell the Castle Rock grocery business. Thomas Naylor in his capacity as president of Thriftee Market, Inc. and of Village Commercial Properties, Inc. together with his son, Steve Naylor, also an officer in both corporations, began negotiating the sale of the grocery business with Glenn Earl

Hatch and his business associate Delbert McKee. Thomas Naylor, as a representative of himself, his corporations, and his family members, requested from Mr. Hatch and Mr. McKee financial statements and Glenn Hatch, a/k/a "Earl," provided a statement in December of 1978.

Based upon the financial information provided, the Naylors and their corporations agreed to sell the grocery business to Mr. McKee and Mr. Hatch who were purchasing the business in the name of their newly established Colorado corporation, Smart Shoppers, Inc. On December 21, 1978, the parties entered into a sale and purchase agreement wherein Smart Shoppers, Inc. agreed to buy the Thriftee Market, to purchase its inventory, to lease the retail location from Village Commercial Properties, Inc. and to purchase all of the existing equipment and fixtures used in operating the grocery business. The equipment fixtures used in the grocery business had been leased by Village Commercial Properties, Inc. under a lease-purchase arrangement with General Electric Credit Corporation. Thomas Naylor, Mary Naylor, Steve Naylor, Village Commercial Properties, Inc., and Thriftee Market, Inc., were all guarantors of the lease-purchase agreement entered into by the General Electric Credit Corporation.

Initially, the parties had agreed that the Naylors and their corporations would be released by General Electric Credit Corporation under the lease-purchase arrangement and that the purchasing corporation, Smart Shoppers, Inc., would be obligated

to fulfill the General Electric contract. When General Electric refused to release the Naylor and their corporations, the parties entered into an addendum to the sale and purchase agreement.

In the sale and purchase agreement and the addendum thereto, Earl Hatch and Delbert W. McKee, together with their corporation Smart Shoppers, Inc., agreed to hold the Naylor and their corporations harmless from the claims of General Electric Credit Corporation in the event that Smart Shoppers, Inc., failed to make the necessary payments under the General Electric Credit Corporation lease. The contract specifically stated in the addendum "it is the understanding of the parties that purchasers must release seller and Village Commercial Properties, Inc., and Thomas H. Naylor of their responsibilities under the General Electric Credit Corporation lease agreement as set forth in this addendum however."

Subsequent to December of 1978, Glenn Earl Hatch, Mr. McKee and their corporation, took possession of the grocery business, its inventory, fixtures and equipment and operated the grocery business for a period of approximately 36 months. In or about November, 1981, Glenn Hatch, Mr. McKee and their corporation closed the store. On or about December 1, 1981, the landlord changed the locks and the defendant no longer had access to the store. At the time the defendant ceased operating the store, all of the items of equipment subject to the General Electric Credit Corporation lease were in working order and in the store.

After the store was closed, General Electric made demand for full payment on the fixtures' agreements. When payment was not forthcoming, General Electric repossessed the equipment and sold it. The demand or claim made by General Electric for the balance due under the General Electric contract, including interest and principal, was approximately \$280,000.00. The equipment brought approximately \$12,500.00 and according to the evidence, the plaintiffs negotiated a settlement with General Electric Credit Corporation for approximately \$165,000.00.

Based upon the evidence adduced, the Bankruptcy Court determined that Mr. Hatch had given a false financial statement which was relied upon by the Naylor and their corporations in entering into the sale of the grocery business to Smart Shoppers, Inc. The Court determined that the necessary elements for a non-discharge under section 523(a)(2)(B) of the Bankruptcy Code were proven but determined that only the amount which General Electric received from the sale of the equipment, \$12,500.00, should be non-dischargeable.

DISCUSSION

The issue before this Court is not whether the debt owed by the defendant to the plaintiffs should be discharged, but rather it is the extent to which the debt is, non-dischargeable.

Title 11, Section 523 of the Bankruptcy Code provides as follows:

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt --

(2) For money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by

(B) Use of a statement in writing --

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive.

The Bankruptcy Court determined the amount of non-dischargeable debt to be \$12,500.00. The Bankruptcy Court apparently determined the amount of non-dischargeable debt should be limited to the amount of property which the defendant obtained from the plaintiffs in the form of the salvage value of the equipment and other property covered by the General Electric Credit Corporation lease. This Court finds that determination to be in error. The plaintiffs were injured in the amount of \$165,000.00 which was the amount they settled with General Electric Credit Corporation.¹ The defendant purchased an on going business from the plaintiffs. As a part of that purchase, the defendant agreed to be obligated to the plaintiffs for the payment

¹This Court does not see how the defendant can seriously argue that the amount of the injury is in dispute. The pre-trial order lists as an uncontroverted fact the claim of \$165,000.00.

of the General Electric Corporation lease. As part of the agreement, the defendant's corporation was to pay the plaintiffs who in turn were to pay General Electric Corporation. This transaction can be characterized as an extension of credit from the plaintiffs to the defendant. The false financial statement given by the defendant to the plaintiff was used to secure this bargain.

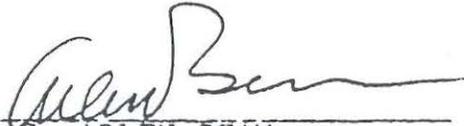
When the defendant failed to pay the General Electric Credit Corporation obligation, approximately \$280,000.00 was left remaining to be paid to General Electric after deducting the sale price of the equipment. General Electric Credit Corporation made a claim against the plaintiffs. The plaintiffs negotiated a settlement with General Electric in the amount of \$165,000.00. This is the amount the plaintiffs were damaged and are entitled to recover under the indemnity provision of the agreement with the defendant. See In re Pollina, 31 B.R. 975 (D. N.J. 1983) (Debtor obtained an extension of credit for benefit of his jewelry business by false representation that jewelry in inventory was free and clear of liens, and thus debtor's guarantee was excepted from discharge.); In re Bradford, 22 B.R. 899, 900, 902 (Bankr. W.D. Okl. 1982) (Bankruptcy Court held that debtor's materially false financial statement in which his income was greatly exaggerated and liabilities markedly understated, which was relied upon by creditor in accepting debtor as guarantor of loan, rendered debtor's obligation to creditor non-dischargeable.); In re Levine, 6 B.R. 54, 56 (Bankr. S.D. Fla. 1980). (The debtor's

business leased five ambulances from the plaintiff on a lease-purchase agreement. The debtor and others jointly and severally guaranteed the obligation. The business defaulted and the plaintiff proceeded to judgment against the debtor for the unpaid balance of the obligation \$154,668.00. The debtor was denied a discharge of the plaintiff's judgment claim because the debtor had given a false financial statement. Id. at 57).

In conclusion, the Court finds that the judgment of the Bankruptcy Court should be modified. The amount of non-dischargeable debt is the entire claim of \$165,000.00. An order will be entered contemporaneously with this Memorandum.

DATED this 7th day of ^{November}~~October~~, 1985.

BY THE COURT:



C. ARLEN BEAM

UNITED STATES DISTRICT JUDGE