

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
QUALITY PROCESSING, INC.,	)	CASE NO. 8:CV95-110
	)	BK90-80491
DEBTOR	)	A90-8068
	)	
HOLD-TRADE INTERNATIONAL, INC.,	)	
INTERNATIONAL GRAIN TRADE, INC.,	)	
and RIO DEL MAR FOODS, INC.,	)	
	)	CH. 7
Plaintiff/Appellees	)	
vs.	)	
	)	
ADAMS BANK AND TRUST,	)	
	)	
Defendant/Appellant	)	

ORDER

BACKGROUND

This matter is before the bankruptcy court on remand from the United States District Court by order dated October 23, 1995. The memorandum opinion and order of Judge Cambridge directed me to reconsider the issue of justification for the bank's interference in the contractual arrangements between the debtor and the plaintiffs, in light of the Nebraska Court of Appeals decision in Hoschler v. Kozlik, 3 Neb. App. 677, 529 N.W.2d 822 (Neb. Ct. App. 1995). In addition, Judge Cambridge has directed that the justification issue be reconsidered in light of the Eighth Circuit reference to the common law concept that "[g]enerally speaking, a secured party is justified in interfering to protect a superior security interest." See Hold-Trade Int'l., Inc. v. Adams Bank & Trust (In re Quality Processing, Inc.), 9 F.3d 1360, 1365 (8th Cir. 1993) (citations omitted).

This order contains the results of such reconsideration.

I. Hoschler

In Hoschler, the Nebraska Court of Appeals considered the factors contained in Section 766 and 767 of the Restatement (Second) of Torts to determine whether an act of interference is improper or unjustified. 529 N.W.2d at 826-27. Section 766 of the Restatement states:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND) OF TORTS § 766 (1979).

Section 767 of the Restatement identifies the factors to be considered in determining whether interference is improper. That section states:

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

RESTATEMENT, supra, § 767.

The comments following Section 767 of the Restatement provide guidance with regard to the weight to be given to each of the above-listed elements.

Nature of Conduct. The comment with regard to clause (a) includes the statement: "[T]he issue is not simply whether the actor is justified in causing the harm, but rather whether he is

justified in causing it in the manner in which he does cause it." RESTATEMENT, supra, § 767 cmt. c.

In my order of January 20, 1995, on page 5, paragraph 3, I implied that had the bank exercised its legal remedies under its contract and security documents to foreclose upon its collateral, thereby causing the debtor to be unable to complete its contract with the plaintiffs, such actions by the bank would not have been improper or unjustified because the bank had a legal right to take such action. However, the testimony of the bank officers, as contained in the trial transcript from page 282 to 495, is that the bank officers, at all times during the applicable period in January and February of 1990, felt that the bank had sufficient collateral value, even in the face of a bean inventory shortage, to cover QPI's outstanding loan obligation. Both bank officers testified that the bank intentionally refrained from exercising its legal rights under its contractual and security documents because it was not concerned about the inadequacy of its collateral.

The bank officers did, once they were informed on approximately January 15 or January 16, 1990 that QPI might have a previously undiscovered liability of \$1.5 million, closely monitor the inflow and outflow of funds from QPI's checking account, because the bank officers wanted to assure themselves no funds were diverted for purposes inconsistent with the general operations of the company and/or payment of the bank debt.

As directed by Judge Cambridge, I have considered this element of the Restatement and do find as a fact that the conduct of the bank in directing the fulfillment of the Fitzgerald contract, and authorizing the shipment of beans to Fitzgerald upon receipt of a wire transfer of funds from Fitzgerald which were due under a prior contract, were not actions justified by the bank's contractual rights or security interests and were not actions taken to protect any perceived interest in its loan position.

Motive. The comment to clause (b) of the Restatement explains that "the injured party must show that the interference with his contractual relations was either desired by the actor or known by him to be a substantially certain result of his conduct." RESTATEMENT, supra, § 767 cmt. d. The comment on clause (b), when discussing intent of the actor, states, in part, "if there is no desire at all to accomplish the interference and it is brought about only as a necessary consequence of the conduct of the actor engaged in for an entirely different purpose, his knowledge of this makes the interference intentional, but the factor of motive carries little weight toward producing a determination that the interference was improper." Id.

In Iowa, the Supreme Court has ruled that to establish improper interference, a showing is required that the actor's predominant purpose was to injure or destroy the plaintiff's business. Nesler v. Fisher & Co., Inc., 452 N.W.2d 191, 196 (Iowa 1990); Wilkin Elevator v. Bennett State Bank, 522 N.W.2d 57, 61 (Iowa 1994). (Emphasis added.) However, under Nebraska law, motive is just one factor to be considered, as is shown by the Court of Appeals' reliance on the Restatement in Hoschler. Although the Nebraska Supreme Court has recently decided that the decisions of the Nebraska Court of Appeals have no precedential value, it also stated that such decisions may be cited and followed if their logic is persuasive. Metro Renovation, Inc. v. State, 249 Neb. 337, 346, \_\_\_ N.W.2d \_\_\_ (1996). The Nebraska Supreme Court has determined that one element of tortious interference with a business relationship is "(3) an unjustified intentional act of interference on the part of the interferer." Matheson v. Stork, 239 Neb. 547, 551, 477 N.W.2d 156 (1991). It seems logical that a consideration of numerous factors, including, but not limited to motive, as articulated in the Restatement, aids a fact finder in determining whether the interference was justified or not. Therefore, I believe the Nebraska Supreme Court would, if given the opportunity, adopt the Restatement factors as a guide to the fact finder, just as has the Nebraska Court of Appeals. It is for this reason that I distinguish and disregard the Iowa authority and find more persuasive the Hoschler analysis.

Mr. Christensen, the president of the bank, had a discussion with a representative of the plaintiffs in mid-January, 1990, after he was informed of the potential \$1.5 million previously undisclosed liability. Mr. Christensen was aware that the plaintiffs had prepaid their contracts and that they wanted and expected their contracts to be filled immediately. Within days of that conversation, the bank officers were informed by Mr. Hrcka, of QPI, that there were insufficient beans to fulfill both the Fitzgerald contract and the contracts of the plaintiffs. I previously found that the bank officers, nonetheless, directed the Fitzgerald contract to be filled. The bank, through its officers, had knowledge at the time they directed the Fitzgerald contract to be filled, that contracts of the plaintiffs would not be able to be filled and that harm would be caused to the plaintiffs as a result.

I find as a fact that the bank officers had no specific desire to harm the plaintiffs, but that they knew such interference and harm would be a necessary consequence of fulfilling the Fitzgerald contract.

Interests of others. The comment on clause (c) states, in part:

The actor's interference would be improper if it involved persuading the third party to commit a breach of an existing contract with the other .... The result ... is due in part to the greater definiteness of the other's expectancy and his stronger claim to security for it and in part to the lesser social utility of the actor's conduct.

RESTATEMENT, supra, § 767 cmt. e.

Applying the comment in the context of this case causes me to find as a fact that the bank's actions in inducing QPI to deliver to Fitzgerald, rather than to plaintiffs, caused QPI to commit a breach of an existing contract with the plaintiffs. Such action by the bank, according to the Restatement, should be given significant weight in determining whether the interference with a contractual relationship was improper or unjustified.

Interests sought to be advanced. Concerning clause (d), I find as a fact that the bank's interest in taking the action it did was to immediately receive \$89,000 on account receivable due from Fitzgerald. Since the bank already had an assignment of QPI's rights in the Fitzgerald contract, and the bank had a security interest in all accounts receivable, what the bank gained by its actions appears to be the immediacy of the payment. The bank also gained an additional Fitzgerald account receivable for the contract it authorized to be filled, and it eventually collected that account receivable and applied it to the debt. The bank, therefore, sought by its action, and actually received as a result of its action, monies from Fitzgerald for the shipment which it would not have received if the plaintiffs' contracts had been fulfilled. This factor should be given significant weight.

Social interests. Clause (e) of the Restatement requires the court to consider the social interests of the parties. There does not appear to be any particular social or public interest with regard to the actions taken by the bank.

Proximity to the interference. Clause (f) requires a consideration of the proximity or remoteness of the actor's conduct to the interference. In the bank/QPI matter, the act of interference caused QPI not to perform its contract with the plaintiffs. The interference is an immediate consequence of the conduct. Significant weight should be given to this particular factor.

Relations between parties. Clause (g) requires a consideration of the relationship between the parties. The relation in this case is that the bank was a lender to QPI. The bank had a perfected security interest in all assets of QPI. The bank had the power to exercise its contractual rights and

foreclose on its collateral if it deemed itself insecure. It had the power to, and eventually did, refuse to permit the debtor to use the proceeds of its receivables in the operation of its business. The bank had the power to refuse any further advances for operations.

Concerning the relationship between the bank and the plaintiffs, the bank had an assignment of, and a security interest in, the contracts between QPI and the plaintiffs. The bank had knowledge of the terms of the contracts. The bank had knowledge that the plaintiffs had prepaid to the debtor all of the funds due under the contracts from the plaintiffs to the debtor, assuming that the debtor would deliver the commodities required by the contracts. The bank had knowledge in the middle of January, 1990, by virtue of a telephone conversation with a representative of the plaintiffs, that the plaintiffs expected delivery shortly. The bank also had knowledge that QPI, by Mr. Hrcka, had promised plaintiffs that their contracts would be filled next.

The bank, although holding the purse strings for QPI, was not a financial or legal advisor to QPI. It had no privilege to advise or cause the debtor to breach the contract with the plaintiffs.

#### SUMMARY OF FACTUAL FINDINGS

As directed by the District Court, I have considered each of the elements, (a) through (g) in Section 767 of the Restatement (Second) Torts in an attempt to determine whether the interference by the bank in the contractual relationship between QPI and the plaintiffs was improper. I conclude that such interference was improper.

#### II. A SECURED PARTY IS JUSTIFIED IN INTERFERING TO PROTECT A SUPERIOR SECURITY INTEREST.

The Eighth Circuit Court of Appeals in its remand of this matter directed this court to consider the question of justification for interference by reference to Restatement (Second) of Torts Section 773. Quality Processing, 9 F.3d at 1365-66. That section provides as follows:

One who, by asserting in good faith a legally protected interest of his own ..., intentionally causes a third person not to perform an existing contract ... with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

RESTATEMENT, supra, § 773.

The comment to Section 773 states:

The rule stated in this Section gives to the actor a defense for his legally protected interest. It is of narrow scope and protects the actor only when (1) he has a legally protected interest, and (2) in good faith asserts or threatens to protect it, and (3) the threat is to protect it by appropriate means. Under these circumstances, his interference is not improper although he knows that his conduct will cause another to break his contract or otherwise refuse to do business with a third person. If any of these elements is lacking, the rule stated in this Section, does not apply ....

Id. cmt. a.

The Appeals Court cited several cases which I have now reviewed. See Quality Processing, 9 F.3d at 1365-66 (listing cases in support of § 733 of Restatement).

In Langeland v. Farmers State Bank, 319 N.W.2d 26, 32-33 (Minn. 1982), the court found that one party owed the other party a debt and, the second party, by collecting the debt through redemption of certain real property acted in an entirely legal manner and in furtherance of a right that was superior legally to the rights of the complaining party.

In Caven v. American Fed. Sav. & Loan Assoc., 837 F.2d 427, 431-32 (10th Cir. 1988), the court found that the defendant that had insisted on an increase in an interest rate before it would allow the assumption by a third party of a mortgage, acted with an absolute right under its contract. Because the defendant acted with an absolute right under its contract, its action could not be improper under Restatement (Second) of Torts Section 767.

In Ford v. C.E. Wilson & Co., Inc., 129 F.2d 614, 617 (2d Cir. 1942), the court found that the lender had a right to take a security interest in inventory to protect its advances, even if, by taking such security interest, it would cause the claims of other creditors to go unpaid. The court stated that the bank had a privilege to interfere with the plaintiff's contracts and expectancies because it was acting under an equal or superior right when seeking security for its own advances.

In In re Ashby Enters., Ltd., 47 B.R. 394, 397 (D.D.C. 1985), a creditor of the debtor that refused to enter into a pre-bankruptcy composition agreement and insisted upon full payment of the debt was not liable for tortious interference in the

contractual relations of the debtor and other creditors because it had a right to protect its financial interest by demanding that its debt be paid in full.

In Spencer Cos., Inc. v. Chase Manhattan Bank, 81 B.R. 194, 204 (D. Mass. 1987), the bank dishonored checks of the debtor and set off certain accounts. The debtor claimed that by such action the bank knowingly caused a prospective investor to withdraw an offer of venture capital and the bank disrupted the good relationship the debtor had enjoyed with its employees and creditors. The court found that the complaint failed to state a cause of action for interference because there was no allegation that the bank acted with intent to interfere with existing employee and creditor relations and because there was no allegation that the bank was motivated by a desire to interfere apart from its desire to obtain repayment of a \$3.2 million debt.

None of the cited cases has facts similar to this case.

In this case, the bank had a security interest in all of the assets of the debtor, and, if it had deemed itself insecure, could have taken action to liquidate its collateral and apply the proceeds of such liquidation to the debt. However, the bank did not act to protect that financial interest. Instead, it is the direct testimony of both bank officers that at the time of the interference, the bank was not worried about its collateral position or its ability to obtain full payment of the debt. There is no other evidence that the bank's actions with regard to the Fitzgerald contract and the plaintiffs' contracts, were motivated by a desire to protect its "superior interest" as represented by its loan and security documents.

The bank officers testified that they did not direct the shipment to Fitzgerald, although the documentary evidence and the testimony of the officer of QPI supports my earlier factual finding that the bank did involve itself in the Fitzgerald transaction. Furthermore, the only concern expressed by the bank officers with regard to the security of the bank was that the bank officers wanted to make certain that proceeds of the contracts for delivery of beans actually went into the QPI checking account and were applied to the bank loan. There is absolutely no evidence that the interference by the bank in the contract between QPI and the plaintiffs was justified because the bank was attempting to protect its collateral position or was attempting to make certain that accounts receivable in which the bank had an interest were actually paid.

As found in the earlier section of this order, the only motivation for the bank's action that can be inferred from the evidence is that the bank wanted to speed up the collection of one particular account receivable and obtain a new account

receivable. Such motive is not consistent with acting to protect a superior legal right.

CONCLUSION

After full consideration of the applicable law, the Restatement, and the evidence presented at trial, I find as a fact that the interference by the bank with the contractual relations between QPI and the plaintiffs was unjustified and improper.

PROCEDURE

The Clerk of the Bankruptcy Court is directed to file the original of this opinion in Volume 3 of A90-8068. The Clerk should then transmit to the District Court all of the files, exhibits and the transcript, including the District Court file, to the Clerk of the District Court. The Clerk should provide a copy of this order to the Clerk of the District Court with a cover letter explaining that this opinion is supplemental to my January 20, 1995, order and is in response to the Memorandum and Order of Judge Cambridge of October 23, 1995, remanding the matter for a limited purpose.

Copies of this opinion should also be provided by the Clerk of the Bankruptcy Court to counsel of record, Bart McLeay, on behalf of plaintiffs, and Steve Davidson, on behalf of the bank.

DATED: February 28, 1996

BY THE COURT:

Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies mailed by the Court to:

Bart McLeay, 1650 Farnam St., Omaha, NE 68102-2186  
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United States Trustee

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.