

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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

ORDER

Background

This matter is before the Court on a remand from the United States Court of Appeals for the Eighth Circuit. The remand, published at 9 F.3d 1360 (8th Cir. 1993) directed a new trial on plaintiffs' tortious interference with contract claim. Upon remand, the parties filed an amended preliminary pretrial statement, submitted briefs on the legal issues, presented all of the documentary evidence from the initial trial, all of the depositions and the transcript of the original trial. Then the parties presented oral argument on the legal and factual issues presented. The plaintiffs shall be referred to either collectively as "plaintiffs" or individually as "Hold-Trade," "Rio Del Mar," and "International Grain." The defendant shall be referred to as "defendant" or "bank." The debtor shall be referred to as "Quality."

Issue

Did the defendant tortiously interfere with the contract between the plaintiffs and Quality and, if so, what amount of damages is due from the defendant to the plaintiffs?

Decision

The defendant did tortiously interfere with the contractual relationship between the plaintiffs and Quality and the amount of damages awarded to each plaintiff is as follows:

Rio Del Mar	\$ 96,840.00
Hold Trade	\$113,976.80
International Grain	\$ 88,728.00

Applicable Law

The Nebraska Supreme Court determined in Matheson v. Stork that the necessary elements of tortious interference with a business relationship or expectation are:

- (1) the existence of a valid business relationship or expectancy,
- (2) knowledge by the interferer of the relationship or expectancy,
- (3) an unjustified intentional act of interference on the part of the interferer,
- (4) proof that the interference caused the harm sustained, and
- (5) damage to the party whose relationship or expectancy was disrupted.

239 Neb. 547, 551, 477 N.W.2d 156 (1991).

If all of the necessary elements of tortious interference with a business relationship or expectation are supported by the evidence, the Court must determine damages. Damages include compensation for the injury sustained, including lost profits and other consequential damages. Miller v. Kingsley, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1975); Triple R Indus. v. Century Lubricating Oils, Inc., 912 F.2d 234, 237-38 (8th Cir. 1990); National Farmers Org., Inc. v. McCook Feed & Supply Co., 196 Neb. 424, 431-32, 243 N.W.2d 335, 340 (1976). Under such circumstances, the plaintiffs also are entitled to an amount of damages for cover. Pony Express Cab & Bus, Inc., v. L. W. Ward, 662 F. Supp. 85, 88 (D. Neb. 1987).

Concerning the right to setoff raised by the bank in this case sounding in tort, Nebraska Revised Statute Section 25-816 permits setoff only in contract actions. NEB. REV. STAT. § 25-816 (Reissue 1989); see also Finney v. Gallop, 2 Neb. Unof. 480, 89 N.W. 276-77 (1902).

Finding of Facts

A. The Existence of a Valid Business Relationship or Expectancy

Quality was, at all times in question, in the business of purchasing edible beans from agricultural producers in the western Nebraska area, processing such beans by cleaning, sorting, and bagging, and reselling such beans to trader customers. Plaintiffs are commodity traders who entered into contracts with Quality to purchase Great Northern beans for delivery after the harvest and processing of the 1989 crop. The plaintiffs resold the beans for use by others. The defendant provided financing to Quality for construction of an edible bean processing plant. The loan was secured by Quality's equipment, machinery, inventory and accounts receivable.

In the fall of 1989, Quality had an insufficient cash flow to pay farmers for unprocessed beans before delivering processed beans to its customers. Quality borrowed \$415,000.00 from the bank secured by the same collateral as the prior borrowings to enable it to meet its farmer payment obligations. This loan has been identified by the parties as the operating loan.

At or about the time the fall 1989 harvest took place, Quality entered into written contracts with each of the plaintiffs. In the industry, a contract purchaser of beans could be required by the processor to prepay under certain circumstances. Quality requested prepayment from each of these plaintiffs and received prepayment. Such prepayments were applied to the operating loan. In consideration for prepayment, Quality promised delivery on a priority basis once demand for delivery was made by the plaintiffs.

In late December of 1989 or early January of 1990, each of the plaintiffs requested delivery. Quality was in the process of filling an order with another customer, Berger. The responsible officer at Quality believed there were at that time sufficient beans on hand to complete both the Berger delivery and delivery to the plaintiffs.

The responsible officer at Quality, Joe Hrcka, informed each of the plaintiffs that their contract deliveries would be

completed as soon as the Berger contract was shipped. It is clear that, as between the plaintiffs and Quality, there was a contractual relationship and a business expectancy that, because of the prepayment, Quality would ship to the plaintiffs all of the beans required by the contract immediately following the completion of the Berger delivery in early January of 1990.

B. Knowledge by the Interferer of the Relationship or Expectancy

In mid January of 1990, another customer, Fitzgerald, requested immediate delivery of its contracted for Great Northern bean requirements. Fitzgerald had not prepaid. Mr. Hrcka informed a Fitzgerald official that Quality could not agree to such a delivery schedule without permission or direction from the bank. Fitzgerald then contacted a bank officer. Fitzgerald owed \$89,000.00 to Quality from a prior purchase and promised the bank officer it would immediately pay the \$89,000.00 if Quality would immediately ship the new Fitzgerald contract requirements.

On or about January 16, 1990, the bank officer told Mr. Hrcka to ship the Fitzgerald order. Mr. Hrcka told the bank officer that Quality had an obligation to first fill the orders of the plaintiffs because those orders had been prepaid and the plaintiffs had been promised delivery immediately following the completion of the Berger contract. The bank officer directed Quality to ship to Fitzgerald even though such officer was aware that the plaintiffs had prepaid, the bank had applied the payments to the operating loan, and Quality had promised plaintiffs delivery immediately following the Berger delivery.

Quality followed the directions of the bank because the officers at Quality inferred from the bank's directions that failure to do so would cause the bank to refuse future financing advances and cause the business to close.

As a result of filling the Fitzgerald contract on an expedited basis, the bank received, directly from Fitzgerald, a payment of \$89,000.00 on the pre-existing Fitzgerald obligation. Pursuant to an agreement the bank had made with Mr. Hrcka earlier in the month, those funds were directly applied to the bank operating debt. After completion of the Fitzgerald delivery, the bank also received well over \$200,000.00 from Fitzgerald which was directly applied to the operating debt.

The bank had knowledge of the contractual relationship and the delivery expectancy concerning Quality and the plaintiffs.

C. An Unjustified Intentional Act of Interference
on the Part of the Interferer

The bank had been informed in early January, just prior to the Fitzgerald request, that the debtor had a significant unsecured and previously undisclosed obligation to purchase a different type of beans and deliver such beans pursuant to contracts other than the ones being dealt with in this opinion. Thereafter, the bank took a very serious interest in the operations of Quality and closely monitored both the inventory of Great Northern beans and the contract delivery schedule.

At the time the bank directed Quality to ship to Fitzgerald, the bank believed its construction, equipment and operating loans to Quality were fully secured by all of the collateral pledged by Quality. That collateral included equipment, machinery, inventory and accounts receivable. The bank did not deem itself insecure under its security documents. The bank officers did not believe that the financial condition of Quality was such that any procedures under the Uniform Commercial Code needed to be invoked to protect the interest of the bank. For example, the bank did not give any notice of acceleration of the obligations. It did not file suit for a money judgment or bring an action to foreclose on any security. It had not, prior to the Fitzgerald transaction, required Quality to obtain its consent prior to selling inventory in which it had a security interest.

The action the bank took to direct the Fitzgerald delivery, to monitor, on a daily basis Quality's compliance with its direction, and to do so for the purpose of obtaining from Fitzgerald funds that Fitzgerald already owed to Quality for prior shipments, directly impacted upon the contractual relationship between Quality and the plaintiffs and was unjustifiable. The bank did not resort to legal remedies to protect its interest. There is nothing in any of its security documents or loan agreements that permit it to direct Quality to deliver to particular customers on particular dates. The bank may have had the right, if it acted in good faith and the officers truly believed that the interest of the bank was at risk, to demand consent by the bank prior to any delivery, or to accelerate the loan and attempt to obtain a judgment, either of money or foreclosure of its liens. Instead, its actions were to control the actual operation of the business to the bank's benefit and to the detriment of plaintiffs.

Such action by the bank was an unjustified intentional act of interference.

D. The Interference Caused the Harm Sustained

Upon completion of the Fitzgerald contract delivery, Quality literally ran out of inventory. It was unable to complete the contracts with the plaintiffs. Had the Fitzgerald delivery not been placed ahead of the delivery to the plaintiffs, the contracts with the plaintiffs could have been fulfilled, at least to the extent of 7,720 bags of the 8,500 bags which should have been, but were not, delivered to plaintiffs.

E. Damage to Party Whose Relationship
or Expectancy was Disrupted

Seven thousand seven hundred twenty bags of Great Northern beans were shipped to Fitzgerald. When that shipment was completed, there were insufficient beans available to complete the contract with plaintiffs. The bank takes the position that of the 7,720 bags that went to Fitzgerald, 2,389 bags were actually purchased from a third party (Peterson) by a direct payment from Fitzgerald to Peterson and Quality as joint payees. If that is the case, the bank argues that Quality did not have on hand those 2,389 bags without such a third party purchase and the bank, even if it did interfere with the plaintiffs' contracts, should not be held responsible for those bags of beans. The problem with the position the bank takes is that the bank officer in charge of this account did not know whether the payment from Fitzgerald to Quality and Peterson had anything to do with the 2,389 bags in question. See Transcript at p. 333. The bank has presented no credible evidence that any quantity of beans was required to be purchased from Peterson to complete the Fitzgerald contract. On the other hand, the evidence presented by the plaintiffs by reconstructing the records of Quality concerning receipt of beans and delivery of beans shows that at or about the time the bank directed Quality to complete the Fitzgerald contract, there were at least a sufficient quantity of beans to fill the Fitzgerald contract of 7,720 bags.

The plaintiffs presented evidence on the fair market value of the beans at the time that their contract should have been completed. They presented evidence of the amount that they prepaid pursuant to the terms of the contract, their cover damages and lost profits. The evidence presented by plaintiffs is sufficient for the Court to find the following damage amounts for each plaintiff:

Rio Del Mar	\$ 96,840.00
Hold Trade	\$113,976.80
International Grain	\$ 88,728.00

The bank suggests that certain payments due Quality from two of the plaintiffs on other non-related contracts were withheld and, therefore, the bank should receive the benefit of a setoff for the withheld amounts. If this case was simply a breach of contract dispute, the position of the bank would have some merit. However, this action sounds in tort as a claim for damages for tortious interference with contract. Statutorily, the bank has no setoff right. See NEB. REV. STAT. § 25-816 (Reissue 1989).

A separate judgment shall be entered in favor of plaintiffs in the above-listed amounts and against the defendant.

DATED: January 20, 1995

BY THE COURT:

Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

Steven Turner/Steven Davidson
KELLY, PHILIP

344-0588
8-308-635-1387

Copies mailed by the Court to:

Bart McLeay/Marlon Polk, 1650 Farnam St., Omaha, NE 68102

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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RIO DEL MAR FOODS, INC.,)	
)	CH. 7
Plaintiff)	
vs.)	
ADAMS BANK AND TRUST,)	
)	
Defendant)	

JUDGMENT

Judgment is entered in favor of plaintiffs and against the defendant in the following amounts:

Plaintiff Rio Del Mar Foods, Inc.	\$ 96,840.00
Plaintiff Hold-Trade International, Inc.	\$113,976.80
Plaintiff International Grain Trade, Inc.	\$ 88,728.00

Interest shall accrue from January 16, 1990, to this date at the federal rate determined as of January 16, 1990. Post-judgment interest shall accrue at the current rate.

Each party shall be responsible for its own costs.

DATED: January 20, 1995

BY THE COURT:

Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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