

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
STEVEN & DEBORAH CONLEY,) CASE NO. BK93-81059
)
DEBTOR) A93-8183
_____)
JAMES B. WILLIAMS, JR., and)
VIRGINIA M. WILLIAMS,)
) CH. 7
Plaintiff)
vs.)
)
STEVEN & DEBORAH CONLEY,)
)
Defendant)

MEMORANDUM

Hearing was held on December 10 and 11, 1996, on the adversary complaint. Appearances: James McVay for the plaintiffs and David Crawford and Daniel Winkel for the defendants. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Background

In 1981, the plaintiffs, James and Virginia Williams, hired the debtor/defendant, Steven Conley, to design an earth shelter home. Conley designed the home, but the plaintiffs did not have it built at that time.

The plaintiffs contacted Conley again in June or July 1991, showed him the old plans and discussed modifications they wanted. Rather than building an earth shelter home, the plaintiffs wanted a burmed home. Conley revised the plans, and those plans became the basis of the home that was built.

The parties also discussed additional services that Conley could provide. James Williams wanted to hire him to oversee the building of the house. Conley told him that it

would be \$45 per hour and that he could only do it on the weekends.

Subsequently, Conley called Williams and said that he would like to build the house himself. He submitted a proposal for phase one of the project, which consisted of closing the house up and performing work on the exterior of the house. On August 23, 1991, the plaintiffs entered into a contract with ConArch, Inc. for the building of the house. ConArch was a corporation formed by Steven Conley and his then wife Deborah for the purpose of building the house, though it was actually formed on August 30, 1991, after the contract had been signed.

The contract was a fixed price contract, and the original cost of phase one before subsequent change orders was \$106,171. There were three subsequent change orders, and these changes raised the total price of phase one to \$115,435. Although there was no completion date set in the contract, Conley initially told the plaintiffs that phase one would be completed by January 1, 1992.

For a variety of reasons including a blizzard at the end of October 1991 and a 38% increase in the price of lumber during the period of December 1991 to March 1992, the project was both delayed and over budget. In December 1991, James Williams realized that phase one would not be completed by January 1, 1992, and asked Conley if he was in financial trouble because he was so far behind. Conley did not say that he had any financial trouble.

In March 1992, phase one of the project was still not completed. However, the parties began discussing a proposal for phase two of the project. Phase two related to the interior of the home. The parties eventually entered into an agreement on or about July 6, 1992 for phase two. That contract was also a fixed price contract for a total of \$93,556.00. When the parties entered into the agreement for phase two, phase one still had not been completed.

On April 15, 1992, Conley presented the plaintiffs with a statement of account for phase one. This document provided a comparison of various categories of proposed expenses in the contract with the amount actually spent in those categories to date. Conley represented that the project was within the bid price and did not indicate that he would raise the price or propose a change in price. However, five of the categories

showed that the amount actually spent exceeded the contract proposal for those categories indicating that they were over budget.

A second statement of account was presented to the plaintiffs in September 1992. In the document, Conley represented that the amounts in eight of the categories showed that the amount actually spent exceeded the contract proposals for phase one and two for those categories indicating that they were over budget.

In the first week of October 1992, James Williams received a phone call from one of Conley's workers indicating that they had been paid for work, but the checks had bounced. In addition, he received a telephone call from one of the suppliers regarding payments that were due for goods provided to Conley. At that time, Williams terminated Conley.

At the time Williams terminated Conley, the plaintiffs had paid Conley \$159,500 under both contracts and had paid \$16,372.42 to three subcontractors directly for a total disbursement of \$175,878.00. The total contract obligation of the plaintiffs under both contracts was \$211,914.00. Conley had expended \$217,420.06 on the project (overhead and general business expenditures) at the time of termination. Conley testified that he knew he had incurred more cost than he would be able to collect from the plaintiffs, but stated that he thought he could obtain a loan for any amounts he would be required to further expend and would have completed the project.

On June 25, 1993, Steven and Deborah Conley filed a petition for relief under Chapter 7. The plaintiffs filed a complaint to determine the dischargeability of a debt on September 27, 1993 against both debtors. The plaintiffs alleged that they were damaged in the amount of \$80,000, and that the debt should be deemed nondischargeable. They alleged that the debt is nondischargeable under 11 U.S.C. § 523(a)(2), (4), and (6).

A trial on the plaintiffs' complaint as to dischargeability, not the amount of any damages, was held on December 10 and 11, 1996. At trial, this court sustained a motion to dismiss Deborah Conley as a party. Following the trial, in their post-trial brief, the plaintiffs have conceded that 11 U.S.C. § 523(a)(6) is inapplicable.

Decision

Any debt owing from Steven Conley to the plaintiffs as a result of the phase one and phase two contracts and the attempt by Conley to construct a house for the plaintiffs is dischargeable.

Discussion

I. Section 523(a)(2)

The plaintiffs first allege that the debt owed to them from Conley is nondischargeable pursuant to § 523(a)(2). That section provides:

(a) A discharge under section 727 . . . 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 --

(A) false pretenses, a false representation, or actual fraud . . .

(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. .

.

11 U.S.C. § 523(a)(2). James Williams admitted on cross-examination that Conley never gave them a document in writing

regarding his financial condition, and therefore § 523(a)(2)(B) is inapplicable.

To succeed in a § 523(a)(2)(A) claim, the creditor must prove the following elements: (1) that the debtor made false representation; (2) that at the time made, the debtor knew them to be false; (3) that the representations were made with the intention and purpose of deceiving the creditor; (4) that the creditor justifiably relied on the representations; and (5) that the creditor sustained the alleged injury as a proximate result of the representations having been made. See, Field v. Mans, ___ U.S. ___, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995); Caspers v. Van Horne (In re Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987). The creditor bears the burden of proof on the issue, and must prove each element of the claim by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991). "[A]ny evidence presented must be viewed consistent with the congressional intent that exceptions to discharge be narrowly construed against the creditor and liberally against the debtor, thus effectuating the fresh start policy of the Code." Caspers, 823 F.2d at 1287.

After a review of the evidence, it is apparent that the plaintiffs have failed to meet their burden of proof as to each of the five necessary elements under § 523(a)(2). It is unclear what representations were made which form the basis of the plaintiffs' cause of action. There do not appear to have been any false representations made by Conley to the plaintiffs to induce them into signing the contracts for either phase one or phase two. The accountings presented to the plaintiffs showed that Conley was over budget, but that, in and of itself, is not fraudulent conduct. None of the requests for periodic payments made by Conley are in any way fraudulent. The fact that phase one was months behind schedule is not a fraudulent misrepresent-ation.

In fact, it appears that all of the funds that were advanced to Conley by the plaintiffs were put into the project in some manner. Although the plaintiffs may not have liked some of the things on which he utilized project funds, i.e. dinner meetings with subcontractors, they had entered into a fixed price contract, and Conley was certainly entitled to spend the money advanced to him in the manner in which he thought would be best for the project. While Conley was not a

competent contractor, and while his business and accounting practices may have been shoddy, there is no evidence of fraud or an intent to deceive. Conley certainly may have been in breach of the phase one and phase two contracts for the many delays, but a breach of contract is not, standing alone, fraud.

As there is no evidence of a false representation, no evidence of an intent to deceive, no evidence of reliance on the part of the plaintiffs, 11 U.S.C. § 523(a)(2) does not bar the discharge of the debt alleged to be owed to the plaintiffs from Conley.

II. Section 523(a)(4)

The plaintiffs next allege that the debt owed to them by Conley is nondischargeable pursuant to 11 U.S.C. § 523(a)(4). That section provides in part:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt --
. . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny . .
.

A. Fiduciary Duty

The Eighth Circuit has held that the term "fiduciary" applies only to trustees of express trusts, unless a statute or other rule of state law creates a fiduciary status. Barclays American/Business Credit v. Long (In re Long), 774 F.2d 875, 878 (8th Cir. 1985). In Nebraska, the relationship between a contractor and an owner of property does not create a trust. See, Devaney v. Dloogoff (In re Dloogoff), 600 F.2d 166 (8th Cir. 1979). Accordingly, Conley was not acting in a fiduciary capacity vis-a-vis the plaintiffs.

B. Embezzlement

Embezzlement is the fraudulent appropriation of property of another by a person to whom such property has been entrusted or into whose hands it has lawfully come. Rech v. Burgess (In re Burgess), 106 B.R. 612, 621 (Bankr. D. Neb.

1989). "Three elements must be present to support a finding of embezzlement: (1) property of another was entrusted to the debtor; (2) the debtor appropriated the property for a use other than that for which it was entrusted; and (3) the circumstances indicate fraud." Id.

In this case, no property of the plaintiffs was entrusted to Conley. Conley was, rather, paid according to a contract. Once the money was paid to Conley, it was no longer the plaintiffs' property, and thus was not entrusted to Conley. Accordingly, Conley did not embezzle any property from the plaintiffs.

C. Larceny

The plaintiffs have admitted in their post trial brief that Conley did not commit larceny.

III. Conclusion

Neither 11 U.S.C. § 523(a)(2) nor § 523(a)(4) are applicable to the facts of this case. Accordingly, any debt owed by Conley to the plaintiffs as a result of the construction of their house and the phase one and phase two contracts is dischargeable.

Separate journal entry to be filed.

DATED: May 6, 1997

BY THE COURT:

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

Copies faxed by the Court to:

MCVAY, JAMES B. 697-1794

Copies mailed by the Court to:

David Crawford, 1106 Ironwood Ct., Bellevue, NE
68005
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.

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JAMES B. WILLIAMS, JR., and)	
VIRGINIA M. WILLIAMS,)	Filing No.
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
STEVEN & DEBORAH CONLEY,)	
)	DATE: May 6, 1997
<u>Defendant(s)</u>)	HEARING DATE: December
)	10 & 11, 1996

Before a United States Bankruptcy Judge for the District of Nebraska regarding Adversary Complaint.

APPEARANCES

David Crawford and Daniel Winkel, Attorneys for defendants
James McVay, Attorney for plaintiffs

IT IS ORDERED:

The debt owed by debtor to plaintiffs is dischargeable.
See memorandum entered this date.

BY THE COURT:

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

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