

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
DENNIS & MARY JANE BADE,)
)
 Debtor(s).)
-----)
JOHN A. WOLF, Chapter 7 trustee,)
)
 Plaintiff,)
)
 vs.)
)
STOR BUILDINGS, INC.; DAVID MILLER;)
and BERKSHIRE INVESTMENTS, L.L.C.,)
)
 Defendants.)

CASE NO. BK03-40066
A03-4055

CH. 7

ORDER

Trial was held in Lincoln, Nebraska, on June 20, 2005, on the Amended Complaint, No. 16. Vincent Powers appeared for John A. Wolf, Trustee, and James Overcash and Joseph H. Badami appeared for Stor Buildings, Inc. and David Miller.

The following summary of uncontroverted facts is taken from the preliminary pretrial statement.

a. The plaintiff, John A. Wolf, is the Trustee in the underlying Chapter 7 case. Dennis and Mary Jane Bade, husband and wife, are the debtors and are residents of Lancaster County, Nebraska.

b. The defendant, Stor Buildings, Inc., is a Nebraska corporation organized and operating according to the laws of Nebraska.

c. The defendant, David Miller, is a resident of Lincoln, Lancaster County, Nebraska.

d. The debtors were, prior to December 31, 2002, the owners of certain real property in Lincoln, Lancaster County, Nebraska.

e. Prior to December 31, 2002, debtors entered into a series of loan transactions with a bank in Lincoln, Nebraska, whereby the loans were secured by deeds of trust in favor of the bank.

f. On or about October 1, 2002, the bank filed a notice of default against each of the properties.

g. The defendant Stor Buildings, Inc., took an assignment of the notes and deeds of trust securing the property.

f. A trustee's sale was conducted on December 31, 2002, foreclosing the deeds of trust with regard to the real estate.

i. Stor Buildings, Inc., was the successful bidder at the trustee's sale and a trustee's deed was issued to Stor Buildings, Inc., and filed with the Register of Deeds in Lancaster County, Nebraska, on each of the parcels of real estate.

The above summary is all that the parties agree on.

Mr. Bade operated a used-car business and a personal property storage facility on the property and rented apartments in one building on the property. In early December 2002, after the bank notified Mr. Bade that it was going to foreclose on the deeds of trust, Mr. Miller, a real estate investor, introduced himself to Mr. Bade and suggested that he might be able to help Mr. Bade with regard to the foreclosure action.

Mr. Bade and Mr. Miller had several conversations during the month of December 2002. They apparently discussed various options, including the possibility that Mr. Miller would purchase the property and pay off the liens; that Mr. Miller would purchase the notes and deeds of trust, take title to the property by quit claim deed from the Bades and leave the Bades with certain personal property that was cross-collateralized with the real property; and other discussions. Mr. Bade employed the services of legal counsel who advised him that, in order to save his interest in the real property, he would have to file a Chapter 11 bankruptcy case prior to the date of the trustee's sale. Mr. and Mrs. Bade, with the aid of their counsel, executed all of the documents necessary to file the Chapter 11 case.

Discussions with Mr. Miller continued up to the day before the scheduled sale. Mr. Miller told the debtors that he would take care of the bank prior to the sale, and on the morning of the sale, he purchased the bank's interest in the underlying promissory notes and deeds of trust. However, there were several additional liens against the property which were inferior in priority to those of the bank. The bank loans were cross-collateralized with each of the deeds of trust.

Through the month of December 2002, Mr. Bade was not only dealing with Mr. Miller, but was negotiating with another bank to provide him with sufficient funds to pay off the deeds of trust and promissory note so that he could continue operating his businesses. The bank he was negotiating with was aware of the possibility that he would file a Chapter 11 case, but the bank officer he dealt with was satisfied that there was sufficient equity in the property to protect the interest of the bank if it made the requested loans. The refinancing with the new bank had not been completed by the date of the trustee's sale.

On the morning of the trustee's sale, the debtor was scheduled to meet his attorney at the federal courthouse to file the Chapter 11 petition and schedules. He conversed with Mr. Miller by phone prior to entering the courthouse. The conversation which occurred between them by telephone and thereafter in person outside the courthouse is the problem in this case. What was said and why it was said and the effect of the conversation on Mr. Bade's actions either does or does not create the cause of action filed in this adversary proceeding.

Mr. Bade testified that during the telephone conversation, Mr. Miller requested him to not file the bankruptcy case because he had already taken care of the notes and the deeds of trust. Mr. Miller does not recall that he requested Mr. Bade not to file bankruptcy. He claims that he informed Mr. Bade during the telephone conversation that he had been at the office of the lawyer for the bank and had purchased the interest of the bank.

Following the telephone conversation, Mr. Miller drove to the federal building and he, Mr. Bade, and a friend of Mr. Bade's, Mr. Stutzman, had a conversation. Mr. Bade and his friend testified that the conversation included a statement by Mr. Miller that there was no need to file bankruptcy because he had taken care of the interest of the bank and the trustee's sale would be stopped. They testified that Mr. Miller said that there was no need for them to go to the state courthouse for the trustee's sale because he would talk with the trustee and cancel the sale.

Eventually, Mr. Bade's attorney arrived and participated in the conversation. She testified that Mr. Miller told the others that he would cancel the trustee's sale. Counsel, however, told Mr. Bade that nothing Mr. Miller said was binding and that the only way that Mr. Bade could be assured that the trustee's sale would not be held was to file a Chapter 11 case.

After further discussion between Mr. Bade and Mr. Miller, Mr. Miller decided not to file the Chapter 11 case and counsel left the scene.

Mr. Miller denies that he ever said he would have the trustee's sale cancelled because he was aware that without the trustee's sale, the other liens on the property would not be removed and the property would not be as saleable with such liens attached.

Mr. Miller claims that he did not care whether a Chapter 11 case was filed or not. He testified that he has had some experience with other bankruptcy cases and understood his position would be that of creditor with a claim in the full amount of the balance due on the promissory notes, even though he purchased them from the bank at a discount.

Mr. Miller, in his testimony, at first firmly denied that he had requested Mr. Bade to not file bankruptcy, but eventually his testimony changed so that he testified that he did not recall whether he had asked Mr. Bade not to file bankruptcy.

Mr. Miller attended the trustee's sale. Although he had informed Mr. Bade that he, that is, Mr. Miller, had purchased the interests of the bank, what actually had occurred was that Mr. Miller had an associate who was involved in the investment with him. The promissory notes and deeds of trust were assigned by the bank to Mr. Miller's associate, Mr. Cuda, through his corporation, Stor Buildings, Inc. At the trustee's sale, Stor Buildings, Inc., was the high bidder on all of the properties and trustee deeds were executed and delivered to Stor Buildings, Inc. Following the sale, Mr. Miller, on his behalf and that of Stor Buildings, sold some of the property to a person who had attended the sale.

The balance due on the promissory notes on December 31, 2002, was approximately \$1.35 million. Mr. Miller and Stor Buildings purchased the notes at a discount, paying \$1,000,000 to the bank. They then sold one parcel of property at the sale for \$150,000.

Following the sale, Mr. Cuda became the operating manager of the premises and let Mr. Bade remain on the premises for a period of three months with no rent being required. Mr. Bade discovered that not all of the loans at the bank had been paid off by Mr. Miller. Instead, all of his vehicle and personal property loans were still in place. He was able to borrow sufficient funds from the bank he had been negotiating with in December 2002 to pay off those personal property items, but eventually had to sell each of them to pay down the loans.

Mr. Bade eventually did file a Chapter 11 case but was unsuccessful and it was eventually

converted to Chapter 7. Prior to the conversion, Mr. and Mrs. Bade filed this adversary proceeding against Mr. Miller and Stor Buildings, Inc. After the case was converted, Mr. Wolf as Chapter 7 trustee was substituted as the plaintiff.

The amended complaint (Fil. #16), filed by the debtors while still in Chapter 11, alleges the following:

9. That in the weeks leading up to the Trustee's Sale on December 31, 2002, the Defendant acting through its agent and representative, David Miller, made a series of fraudulent representations intending to induce Plaintiffs to refrain from filing a Chapter 11 Bankruptcy proceeding.

10. That on December 31, 2002, on the steps of the Federal courthouse preceding the 10:00 a.m. Trustee's Sale, David Miller apprehended Dennis Bade in order to prevent the Plaintiff from filing a Chapter 11 Bankruptcy proceeding and also so the scheduled Trustee's Sale might proceed, to wit:

David Miller made deliberate and intentional misrepresentations to Dennis Bade to the effect that:

a) filing a Chapter 11 proceeding was not in the Plaintiff's best interests and that he, David Miller would be subsequent to December 31, 2002, enter [sic] into an agreement with the Plaintiffs to pay Bade additional sums for the property if the Plaintiffs wished to sell it, which would pay off all of Bade's debts, including Westgate Bank; or if Plaintiff wished, Miller would allow Bade to simply enter into an agreement constituting an extension of the existing loan agreements;

b) that he, David Miller, as of the morning of December 31, 2002, and prior to the Trustee's Sale, owned the said property being sold at the Trustee's Sale;

c) that he, David Miller, was canceling the Trustee's sale scheduled for 10:00 a.m. on December 31, 2002, at the Lancaster County courthouse, because the property was now owned "lock, stock, and barrel," and Plaintiff therefore would not need to file a Chapter 11 Bankruptcy, invoking the automatic stay, to stop the Trustee's Sale;

d) that Bade had no reason to even go into the Lancaster County courthouse for the scheduled sale since he, David Miller, now held the assignment from Westgate Bank regarding said property being sold at the 10:00 a.m. Trustee's sale, and that he, David Miller, was going into the courthouse to cancel the Trustee's sale.

11. That David Miller, on behalf of himself and on behalf of Stor Buildings, Inc., intentionally made such representations, said representations were false and were made with the intention that Dennis Bade would rely upon the same.

12. That Bade did reasonably rely upon said misrepresentations to his

detriment and was damaged as a result thereof by the loss of the equity in said property. Said economic and pecuniary losses are continuing in nature at this time and at this time are believed to amount to \$6,000,000.00

The petition then prays for an order finding in favor of the plaintiff and for an order directing the defendants to execute the necessary deeds to restore title of the real property to the debtors, or in the alternative, an order for the defendants to pay damages to the debtors, up to the value of the land.

The elements of fraudulent misrepresentation that plaintiff was required to prove at trial are as follows:

- (1) That a representation was made;
- (2) That the representation was false;
- (3) That when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion;
- (4) That it was made with the intention that the plaintiff should rely upon it;
- (5) That the plaintiff did so rely; and
- (6) That he or she suffered damages as a result.

Freeman v. Hoffman-LaRoche, Inc., 260 Neb. 552, 575-76, 618 N.W.2d 827, 844-45 (2000).

The plaintiff has the burden of proof and fraud must be proved by a preponderance of the evidence. Tobin v. Flynn & Larsen Implement Co., 220 Neb. 259, 262, 369 N.W.2d 96, 99 (1985).

Mr. Bade, Mr. Stutzman, and former counsel for Mr. Bade all testified that Mr. Miller asked Mr. Bade not to file bankruptcy and told Mr. Bade that he would stop the trustee's sale. Mr. Miller, although initially denying such a statement, eventually testified that he did not recall telling Mr. Bade that he did not need to file bankruptcy, but he continued to deny that he ever told anybody that he would stop the trustee's sale.

I find as a fact, based on the testimony of the parties, that Mr. Miller did request Mr. Bade not to file bankruptcy and did state that he would stop the trustee's sale. I further find that the statement made by Mr. Miller that he would stop the trustee's sale was false. I further find that when he made such a statement, he knew it was false.

I further find that the statement was made with the intention that the Bades should rely upon it. Finally, I find that the Bades did rely upon it and delayed filing the bankruptcy case until after the trustee's sale had taken place and they had lost all interest in the real property.

I do not find that the debtors were damaged by the false representations because they did not have equity in the property. Although a bank officer from the bank that Mr. Bade was negotiating with during the month of December testified that he had thought there was sufficient equity to protect the interest of his bank if loans were made, the plaintiff presented no other evidence concerning the

value of the real property versus the liens against it. On the other hand, the defendants presented expert testimony, through deposition, that the Bades had negative equity of several hundred thousand dollars when considering all of the liens of the bank and taxes and contractor liens.

The plaintiff presented no evidence that had the bankruptcy Chapter 11 case been filed prior to the trustee's sale, the debtors would have been able to produce sufficient revenues to enable them to pay off the bank loan and successfully reorganize. The plaintiff presented no evidence that a substitute lender would have agreed to loan the debtors sufficient funds to pay off the original lender.

From the testimony of the Bades and Mr. Miller, I am unable to determine what agreement, if any, had been reached between the Bades and Mr. Miller. The Bades think that Mr. Miller was going to pay off all of their debt at the bank and give them vehicles and the equivalent of another parcel of real estate. However, even Mrs. Bade questioned that possibility. She did not trust Mr. Miller and did not understand how the transaction would work or what he would get out of it. Actually, Mr. Miller did not need to do anything for the benefit of the Bades. He had sufficient funds available to him to purchase the position of the bank and clear the liens off by bidding at the trustee's sale. He was, however, in great need that the trustee's sale be completed so the liens would be cleared.

In conclusion, I find that although misrepresentations were intentionally made on the morning of December 31, 2002, such misrepresentations did not result in monetary damages to the Bades and I will enter a judgment in favor of the defendants and against the plaintiff trustee.

SO ORDERED.

DATED this 26th day of August, 2005.

BY THE COURT:

/s/ Timothy J. Mahoney

Chief Judge

Notice given by the Court to:

Vincent Powers
James Overcash
Joseph H. Badami
U.S. Trustee