

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:)
)
ALAN H. BESTMANN, et al.,)
)
Debtors.)
)
LARRY BAYER,)
)
Plaintiff,)
)
vs.)
)
GENE CHAMBERLAIN, et al.,)
)
Defendants.)

BK 82-262

CV 83-~~85~~ 512

FILED	
DISTRICT OF NEBRASKA	
AUG 21 1984	M
ORDER	
William L. Olson, Clerk	
By _____	Deputy

This matter is before the Court on appeal from an order of the Bankruptcy Court for the District of Nebraska after trial in a reclamation action brought by appellant Larry Bayer ("Bayer"). At issue is the right to the proceeds of 429 hogs as between appellee, the First National Bank of Bellevue ("the Bank") and appellant Bayer.

The debtors, Alan Bestmann ("Bestmann") and his corporation, Agri-Marketing, Inc., were, prior to the commencement of their bankruptcy proceeding, primarily engaged in a custom swine feeding operation. As such, the debtors provided management and swine fattening services to the owners of feeder pigs, earning profits from a margin on the feed and sometimes additional management fees.

Bestmann also, however, occasionally raised pigs for his own account. The central issue in this Bankruptcy appeal is whether between October 28, 1981, and November 12, 1981, Bestmann owned the 429 pigs in question. Bayer purchased the

pigs on November 12, 1981. Bayer urges that prior to his purchase, the pigs were owned by one Clayton Burke Walter ("Walter") and were merely being fed by Bestmann in anticipation of their ultimate sale to an investor or buyer who would compensate Bestmann for his custom feeding services and Walter for their price. At all pertinent times, the pigs were housed at the Paul Runge farm pursuant to a lease arrangement between Bestmann and Runge.

If the pigs were owned by Bestmann before their sale to Bayer on November 12, 1981, they would have become subject to a security interest in after-acquired livestock granted by Bestmann to the Bank. In that event, the sale of the pigs to Bayer on November 12, 1981, would have been subject to the Bank's security interest in Bestmann's after-acquired livestock and other farm products. See Neb. Rev. Stat. § 9-307(1) (1980).

After Bestmann and his corporation initiated their bankruptcy proceeding, Bayer filed a reclamation action, claiming that the hogs were owned by Walter until their sale to Bayer, that they therefore were not subject to the Bank's security interest in Bestmann's after-acquired livestock, and that they were sold by Walter to Bayer through the services of Bestmann as an agent or mere intermediary. The Court finds that the Bankruptcy Court's finding in favor of the Bank regarding ownership of the pigs between October 28, 1981, and November 12, 1981, must be reversed as clearly erroneous.

The record indicates that on October 27 and 28, 1981, Walter purchased 534 feeder pigs which he delivered to the Paul Runge farm. He bought the pigs after a call from Bestmann.

In Walter's words

I purchased these pigs after Mr. Bestmann had called me and told me that he had the possibility of an investor that might be interested in feeding some pigs out, so I went ahead and bought these pigs.

Mr. Bestmann . . . said, "If you want to buy some pigs and put them out there we will sell them for you." So that's what I did.

After delivering the pigs to the Runge farm at the direction of Bestmann, Walter felt free, without consulting Bestmann, to dispose of 105 head to one of Walter's own customers. Bestmann in no way objected to this exercise of dominion and control by Walter over a portion of the pigs. In addition, Walter paid rent and veterinarian bills totalling \$4,165.00 in connection with the pigs, and he conceded that it would not have been his customary practice to pay bills for services rendered in connection with hogs that he did not own. After the anticipated original investor backed out, the remaining 429 pigs stayed at the Runge farm where they also were kept after their sale on November 12, 1981, to Bayer.

The testimony of both Bestmann and Walter clearly indicates that both considered Walter the owner of the pigs to the extent that they thought in terms of ownership. Both were essentially content to wait for Bestmann to find an investor, i.e. buyer, from whom both would recoup their various costs and expenses. In fact, Bestmann testified that he never purchased the pigs from Walter and that had Bayer or another buyer not materialized, Bestmann would have charged his yardage and feed costs to Walter. Their testimony carried additional weight in light of the fact that neither Walter nor Bestmann stood to gain or lose by the outcome of this adversary proceeding between Bayer and the Bank.

Bestmann expressly stated that he never claimed ownership of the hogs and that he was concerned only with being compensated for his expenses. When Bayer indicated his interest in buying the pigs, Bestmann contacted Walter, and Walter established the minimum price for which the pigs could be sold. This price was tied to Walter's costs, and Walter authorized Bestmann to keep any difference Bestmann could make over and above that price.

Upon a review of the entire record, the Court finds the Bankruptcy Court's factual conclusion that Bestmann owned the pigs between October 28, 1981, and November 12, 1981, clearly erroneous. In addition to the testimony to the contrary, the record is devoid of any documentary or other evidence suggesting a transfer of ownership of the 429 pigs from Walter to Bestmann. Bestmann not only did not reimburse Walter for the purchase of the pigs prior to November 12, 1981, but even after the sale to Bayer, Bestmann apparently converted to his own use all of the sale proceeds obtained from Bayer for the pigs. Walter has apparently never been reimbursed for their purchase.

The Court finds that Walter purchased the pigs on October 27 and 28, 1981, becoming their owner at that time, and that Bayer purchased the pigs on November 12, 1981, from Walter with Bestmann acting solely as an intermediary or agent to facilitate the sale. As was his practice, Bestmann obtained his profit by charging Bayer for management and feeding services.

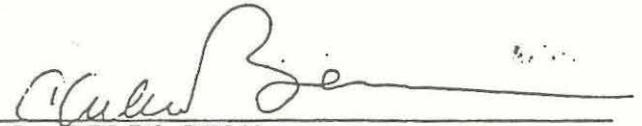
As Bestmann never acquired "rights in the collateral" other than perhaps the right to be reimbursed for feeding the pigs, any security interest in after-acquired livestock granted by Bestmann

to the Bank never attached to the 429 pigs. See Neb. Rev. Stat. § 9-203(1) (1980). To the extent that Bestmann had possession of the pigs because they were housed at the Paul Runge farm for feeding pursuant to the lease agreement between Runge and Bestmann, such possession was in Bestmann's capacity as agent for Walter and, after November 12, 1981, as agent or bailee for Bayer. A debtor does not have the kind of "rights" contemplated by section 9-203(1)(c) in property which he holds merely as bailee or agent for another. See generally Cattle Owners Corp. v. Arkin, 252 F. Supp. 34, 47 (S.D. Ia. 1966).

IT IS THEREFORE ORDERED that the judgment of the Bankruptcy Court is reversed, and this action is remanded for proceedings in accordance with this Order.

DATED this 21st day of August, 1984.

BY THE COURT:



C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE