

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
LLOYD PERCIVAL,	)	CASE NO. BK89-387
	)	Fil. No. 84 & 87
DEBTOR	)	CH. 12

MEMORANDUM

Hearing was held on May 8, 1992, on the Dismissal filed by FDIC. Appearing on behalf of debtor was James Dodson of Dodson & Dodson, Beaver City, Nebraska. Appearing on behalf of FDIC was Mark Rice of Adams, Howe & Zoss, P.C., Des Moines, Iowa.

This is a confirmed Chapter 12 plan. The plan proposed, among other things, to permit the FDIC, as partial satisfaction of its claim, to take possession of and liquidate all non-exempt property of the debtor. Pursuant to the terms of the plan and pursuant to its rights prior to confirmation of the plan, the FDIC employed the services of an appraiser to evaluate the machinery, equipment and irrigation pipe owned by the debtor.

The appraiser found and valued numerous pieces of equipment, including a piece of equipment called a spray cart; a pipe trailer; and six-inch and eight-inch irrigation pipe.

After confirmation of the plan, the FDIC took possession of the machinery and equipment and held an auction. The spray cart and pipe trailer were not available for the auction and the number of lengths of irrigation pipe, both six and eight inch, which were sold at the auction was a significantly different number than had been included in the appraisals.

Therefore, the FDIC brought this motion under Section 1208(c)(6) and (7) to dismiss this case for a material default by the debtor and for fraud.

At the trial, the debtor testified, the appraiser testified, and others testified concerning the reputation of the debtor for truthfulness.

With regard to the spray cart and the pipe trailer, the debtor testified that he had three trailers, including a homemade trailer, a two-wheel pipe trailer and a four-wheel pipe trailer. He also had a 1977 type 201 John Deere trailer that he calls an implement trailer. He claims that he did not own a spray cart, but that he had leased one.

In contrast, the appraiser testified that he did see a spray cart on the premises, but there was no conversation about its ownership. In addition, he believes he saw the additional "pipe trailer," but does not recall seeing anything that he would identify as an implement trailer.

This Court finds that there probably was a spray cart on the premises but it did not belong to the debtor. The FDIC had the opportunity to check with the dealer once it realized the debtor was claiming no ownership, but no evidence was presented in contrast to the statements of the debtor that the spray cart was a leased piece of equipment.

With regard to the "pipe trailer" or implement trailer, the Court is satisfied from the testimony of the debtor that whatever had been identified by the appraiser as a "pipe trailer" was not a "pipe trailer" owned by the debtor. The only testimony about it from the appraiser is that he thought he saw what he called a "pipe trailer." The debtor claims that he did not own such a trailer and described the trailers that he did own and the ages of the trailers. His testimony is more convincing than that of the appraiser.

Concerning the irrigation pipe, however, the problem is significantly different. The FDIC is involved because of the failure of the Security State Bank at Oxford, Nebraska. That bank had a security interest in virtually all of the assets of the debtor and had a specific list of equipment and irrigation pipe referred to in a financing statement executed on September 19, 1986, as Exhibit A. There is in evidence a list of equipment attached to the FDIC proof of claim. However, it is not identified as Exhibit A and the debtor disputes the theory of the FDIC that such equipment list was the list attached as Exhibit A to the financing statement.

A certified copy of the financing statement and the appropriate attachments was not offered.

Nonetheless, and notwithstanding the dispute, the list attached to the FDIC proof of claim shows 12,780 feet of eight-inch pipe and 2,640 feet of six-inch pipe for a total of 15,420 feet of pipe. When the debtor filed bankruptcy, he listed 15,420 feet of six-inch and eight-inch irrigation pipe on his schedule of assets.

At trial, the debtor testified that when he executed the initial security agreement and financing statement and provided a list of assets to the bank, he did not actually count the number of lengths of six-inch and eight-inch pipe. He and the banker estimated the number and placed that upon the list of assets. He explained his schedules in the same manner. He claims that he

provided information to his attorney based upon the records he had from the bank and his bank loans which included 15,420 foot of pipe. He did not, at that time or at any other time, count the pipe lengths.

He testified, in addition, that long prior to the bankruptcy, he sold some of the eight-inch pipe which was not necessary for his operation and paid the bank the proceeds. He estimated that he sold approximately 2,000 feet of eight-inch pipe. The FDIC did not present any testimony or bank record to rebut the claim by the debtor.

In 1990, the appraiser prepared a written report for the FDIC which listed 12,789 feet of eight-inch gated pipe and 2,640 feet of six-inch gated pipe. That written appraisal report also noted "Percival stated that the pipe totals as well as Lineal feet are concerned was acceptable."

In 1991, the appraiser provided another written report which listed 13,371 feet of eight-inch gated pipe and 2,640 feet of six-inch gated pipe. Once again, the written report stated "Percival stated that the pipe totals as far as Lineal feet are concerned was acceptable."

The result of the sale shows that 3,630 feet of eight-inch pipe were sold and 7,630 feet of six-inch pipe were sold.

The appraiser testified that he had not counted the lengths of pipe on either inspection. He had estimated the number of lengths of pipe based upon a list provided by the FDIC and based upon a conversation with Mr. Percival. He had looked at a pile of pipe and he had looked at pipe sitting on trailers and then asked Mr. Percival if he agreed with the numbers. The appraiser claims that Percival commented that the numbers were close. In contrast, Percival claims that the appraiser asked if 12,000 feet of six or eight-inch pipe was the approximate total and that Percival agreed that 12,000 feet, more or less, was correct.

The decision in this case requires the Court not only to evaluate the veracity of the witnesses and their motivation, but to consider the documentary evidence. As between the appraiser and the debtor, the appraiser has no motivation to misstate the amounts of pipe on hand at various times nor to misstate his recollection of a conversation with Mr. Percival. On the other hand, Mr. Percival, facing a liquidation of his assets at a particular point in time and now facing the potential of a dismissal, has the motivation to be somewhat hazy in his recollection of the amount of different lengths of different sizes of pipe on hand. However, after considering the testimony of both parties, this Court cannot make a determination of which witness's recollection was accurate. It appears that the

statements of both parties are reasonable based upon their point of view.

Instead of deciding this case based upon the testimony of the parties, the case will be decided based upon the documentary evidence.

The Court finds that at some point in time the debtor and the bank thought that there was a total of 15,420 feet of pipe on hand. The debtor has testified that at some later point in time he sold some of the eight-inch pipe because it was unnecessary for his operation. That testimony is consistent with the testimony of his other witnesses with regard to his operations. At least one other witness testified that most of the pipe that would be necessary to service the wells on his land would be six-inch pipe, not eight-inch pipe. Therefore, he would have less of a need for eight-inch pipe than of six-inch pipe.

The FDIC has provided no bank records with regard to pay down and sale or authorization to sell particular lengths of pipe.

The FDIC appraiser came up with two different figures for the number of lengths of eight-inch pipe in 1990 and 1991. The first time, the appraiser estimated 12,789 feet of eight-inch gated pipe. The second time, the appraiser estimated 13,371 feet of eight-inch pipe. Both times, the appraiser claimed the debtor agreed with the numbers.

Both times, the appraiser estimated 2,640 feet of six-inch gated pipe.

None of the numbers listed on the bank documents, the debtor's schedule of assets, or the appraisals are consistent with the numbers of lengths of pipe which were sold.

As mentioned above, the auction resulted in a sale of 3,680 feet of eight-inch pipe and 7,630 feet of six-inch pipe. The FDIC does not seem to be complaining about the increase in the number of lengths of six-inch pipe from the appraisal. However, it is extremely unhappy about the decrease in the number of lengths of eight-inch pipe. Its unhappiness is justified because the numbers do not jibe with any other numbers the parties had been dealing with. However, the issue here is whether or not debtor intentionally misrepresented the number of lengths of pipe or whether the debtor, post petition, sold or hid or disposed of well over a mile of eight-inch pipe.

The Court concludes that the FDIC has the burden to prove the debtor disposed of pipe post petition and that the FDIC has failed to meet its burden of proof. No party knows how many lengths of pipe the debtor owned at any point in time. Each time

the number of lengths was reduced to writing, it was different. The Court cannot determine from the evidence that the debtor intentionally, or even negligently, improperly listed the exact number of lengths or that the debtor disposed of any pipe post petition. Without a fixed and accurate specific number of lengths of eight-inch and six-inch pipe on specific dates, the Court can make no findings with regard to a disposition of pipe, if any actually occurred.

If the actual number of lengths of pipe was important to the FDIC, although it would have been difficult, the appraiser or an FDIC employee could have actually counted the number of pipe at a particular point in time. That number then could have been used as the basis for a complaint such as the one that is before the Court. However, the evidence presented by the FDIC is of particular numbers of lengths of pipe based upon guesses. Because those guesses are inaccurate, the FDIC claims the debtor cheated. The evidence is insufficient to so hold.

The motion to dismiss is denied. The Clerk shall send one copy of this order to counsel for the parties and one copy to the Chapter 12 Trustee.

Separate journal entry to be entered.

DATED: August 6, 1992.

BY THE COURT:

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

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
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LLOYD PERCIVAL,	)	CASE NO. BK89-387
	)	A
<u>DEBTOR(S)</u>	)	
	)	CH. 12
	)	Filing No. 84 & 87
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	
	)	DATE: August 6, 1992
<u>Defendant(s)</u>	)	HEARING DATE: May 8,
	)	1992

Before a United States Bankruptcy Judge for the District of Nebraska regarding Dismissal filed by FDIC

APPEARANCES

James Dodson, Attorney for debtor  
Mark Rice, Attorney for FDIC

IT IS ORDERED:

Motion for Dismissal denied. See memorandum opinion entered contemporaneously herewith.

BY THE COURT:

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