

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK02-43392
	)	
DENNIS RAY DAMROW,	)	A03-4021
	)	
Debtor(s).	)	CH. 7
	)	
MARLIN E. MURDOCH, DUANE MURDOCH,	)	
CLYDE LUEKING, JERRY LUEKING,	)	
ROBERT LUEKING, & DR. THOMAS SMITH	)	
as Shareholders of Carter Feeders, Inc., and	)	
CFF, Inc.; CARTER FEEDERS, INC., a	)	
Nebraska corporation; and CFF, INC., a	)	
Nebraska corporation,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
DENNIS R. DAMROW,	)	
	)	
Defendant.	)	

MEMORANDUM

Trial was held in North Platte, Nebraska, on March 10 and 11, 2004, on the complaint to determine dischargeability of a debt and whether discharge should be denied. Jeanelle Lust appeared for the individual plaintiffs, Bruce Hart appeared for Carter Feeders, Inc., and CFF, Inc., and Dennis Damrow appeared pro se. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I) and (J).

This adversary proceeding was brought by the plaintiffs against debtor/defendant Dennis Damrow ("Damrow") to obtain a determination that an arbitration award of more than \$8 million is non-dischargeable under 11 U.S.C. § 523(a)(2)(A), 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 523(a)(6). In addition, the complaint asserts that Mr. Damrow should be denied a discharge under 11 U.S.C. § 727(a)(2).

FINDINGS OF FACT & DISCUSSION

Plaintiff Carter Feeders, Inc. ("Carter Feeders") operated a custom cattle feedyard from 1990 to 1999. Carter Feeders would house cattle owned by others and provide feed and care for them on a commercial basis. All costs incurred in the feeding and care of the cattle were to be borne by the owners of the cattle. Carter Feeders was not intended to own cattle for its own account.

CFF, Inc. ("CFF") was the financing arm of Carter Feeders. A Carter Feeders customer

would provide Carter Feeders with a portion of the funds necessary to purchase cattle for the customer. The customer would sign a promissory note in favor of Carter Feeders for the balance of the purchase price. Carter Feeders, through CFF, would borrow funds from First National Bank of Holdrege to finance the cattle purchase. The customer's note and the cattle purchased were security for the financing arrangement. In concept, Carter Feeders would purchase and feed the cattle to market weight and then sell the cattle. The proceeds would be used to pay Carter Feeders for its services and pay the customer the net proceeds after paying off the customer note. The money received by Carter Feeders to pay off the customer note should have been sufficient to pay off the CFF bank note related to the customer note. CFF was supposed to make money through an interest differential over and above the interest being charged by the First National Bank of Holdrege.

The individual plaintiffs in this lawsuit are shareholders of these two corporations. Dennis Damrow, the defendant, is also a shareholder. The plaintiff shareholders, acting on behalf of the corporations and pursuant to a dispute resolution procedure in the shareholder agreement, obtained an arbitration award against Mr. Damrow for \$8.6 million. Pursuant to that agreement, the proceeds of that award belong to Carter Feeders.

Prior to trial, plaintiffs moved for summary judgment on the issue of damages. Summary judgment was entered in favor of the plaintiffs on the motion. Therefore, for purposes of determining dischargeability of debt in this lawsuit, the court assumes that the arbitration award is correct and final. However, this court does not have the authority to enter judgment on an arbitration award. That authority resides with the state courts. There was pending, prior to the bankruptcy filing, an action in the state courts brought by the plaintiffs requesting the entry of a judgment on the arbitration award. On the motion for summary judgment filed by the plaintiffs in that case, the state court refused to enter such a judgment because of certain factual and procedural issues raised by Mr. Damrow. Therefore, the matter of the finality and enforceability of the arbitration award remains with the state court. Upon a determination favorable to the plaintiffs in this litigation, either under 11 U.S.C. § 523 or under 11 U.S.C. § 727, the plaintiffs may move for relief from the automatic stay to continue with the proceeding in state court.

Carter Feeders and CFF were generally operated as one business. Both Carter Feeders and CFF were run by shareholder and debtor Dennis Damrow. Mr. Damrow was general manager of both corporations. He maintained and supervised the keeping of both companies' books and records, and was, in fact, the only person to have access to bank statements at Carter Feeders. In addition, Mr. Damrow was the treasurer of both Carter Feeders and CFF. The other shareholders and directors had very limited involvement in the operation of Carter Feeders and CFF. Mr. Damrow was also the owner and manager of another feedlot and financing company by the names of Damrow Cattle Company ("Damrow Cattle") and Damrow Feeder Finance, Inc. ("DFF").

At the trial of this matter, the plaintiffs presented oral testimony, deposition testimony and documentary summaries of the books and records of Carter Feeders, CFF, Damrow Cattle, and DFF in an effort to explain how the \$8.6 million in damages was determined, and to show the actions of Mr. Damrow which plaintiffs believe should result in a denial of discharge under Section 727 or a determination of non-dischargeability of the arbitration award under Section 523.

The plaintiffs presented the testimony of Carolyn and Sharon Lueking. They explained that their husbands are shareholders in Carter Feeders and CFF, and that at the request of counsel for

the plaintiffs and an accountant and investigator, they went through all of the books and records of Carter Feeders, CFF, Damrow Cattle, and DFF. They reconciled all of the checks and deposits in each of the accounts at each of the corporations. They presented detailed exhibits showing the source of funds into each of the accounts and out of each of the accounts. They showed that many of the packers' proceeds checks (checks from meat packing companies for fat cattle) which were for cattle fed at Carter Feeders would often be deposited in Damrow Cattle's checking account. Frequently, according to those records, corresponding checks were not transferred back to Carter Feeders from Damrow Cattle. In many cases, the deposit of these proceeds into Damrow Cattle were designated specifically in the Damrow Cattle records as belonging to Carter Feeders.

Although there is some question as to whether Sharon and Carolyn Lueking had adequate education, training and background to perform the analysis they presented, and especially to testify concerning their conclusions from the analysis, the methodology that they used — that is, comparing and tracking checks, deposits and loan proceeds — appears to be sound. Although Mr. Damrow, on cross-examination of the witnesses, obtained admissions that neither of the witnesses were accountants or trained in forensic accounting, I find that the procedure they used to track checks, deposits and loan proceeds is sufficiently detailed and logical to enable me to accept the validity of the tracking exhibits they submitted. I am not required to determine the validity of their conclusion with regard to the total amount of damages allegedly caused by Mr. Damrow's actions, but only to determine whether those actions did cause damage to the plaintiffs and whether those actions brought Mr. Damrow within the discharge and dischargeability exclusions of Section 727 and Section 523.

Mr. Damrow questioned the experience of the witnesses, and asserted that the amount of the loss could not possibly be as extensive as the witnesses believe, because, from his point of view, the feedlot, even if operated in a perfect financial environment and with good management, could not have ever produced the profits that the plaintiffs complain were lost as a result of his actions. Nonetheless, he did admit that packer proceeds checks were deposited at Damrow Cattle and not returned to Carter Feeders.

Mr. Damrow admitted in deposition testimony in a lawsuit brought by First National Bank of Omaha against First National Bank of Holdrege, which testimony was admitted without objection, that proceeds from the sale of cattle belonging to Carter Feeders /CFF customers were not always used to pay off CFF's note or to retire the customer notes. Mr. Damrow testified that he had no control over the proceeds once they were delivered to the First National Bank of Holdrege and that the bank officers as a matter of practice paid off customer notes in any order that the bank officer determined was appropriate. In other words, Mr. Damrow says that if a Carter Feeders customer's cattle were sold, a certain amount of the proceeds should have been paid to Carter Feeders and deposited in the Carter Feeders bank account. Another portion of the proceeds should have been used to pay the customer's note, which proceeds would then have been used to pay the CFF notes to the bank related to that customer. However, Mr. Damrow claims that frequently the bank would pay off another CFF note, not related to that particular customer.

Mr. Damrow did not inform the other shareholders or directors or officers of this bank practice. He also did not pull the plug on the bank by informing banking authorities. Instead, he participated in the above-described transactions, and even admitted that in some cases he used forged customer notes to obtain additional financing for CFF.

The result of this activity caused the corporations to incur interest expenses that would not otherwise have been incurred had the notes been paid off appropriately.

Mr. Damrow also admitted in the deposition that he created a CFF note in the name of one customer for cattle that were never purchased. The amount of the note was \$500,000. Carter Feeders ended up paying off this note balance by taking out a mortgage on its real property through Metropolitan Life Insurance Company.

In his capacity as general manager of Carter Feeders, Mr. Damrow used false financial statements to misrepresent the financial condition of Carter Feeders by overstating inventories. This misrepresentation to the bank caused Carter Feeders to take on more debt than it could afford. Mr. Damrow has admitted that the cattle inventory figure displayed on financial statements and submitted to the bank had no basis in reality and that there never was an intention on the part of the Carter Feeders shareholders to own inventory.

Prior to his bankruptcy filing, Mr. Damrow and his wife obtained a dissolution of their marriage. In the dissolution proceeding, he agreed to an order which provided that his wife receive substantially all of his assets as a property settlement. He also agreed to an order directing him to pay her \$4,000 a month in alimony. The plaintiffs argue that the divorce was a sham and simply an artifice to transfer his assets to his wife in derogation of the rights of his creditors. I do not think it appropriate for this court to make such a determination. The divorce was handled in a state court proceeding. Up until the date of the final hearing, both parties were represented by counsel. The state court judge made certain findings and entered a decree of dissolution of marriage and signed an order with regard to a property division and alimony obligations. A federal court does not have the power to look behind a state court final order in the context of a Section 727(a)(2) denial of discharge proceeding. This court must assume that the marital litigation in state court was in good faith and that the orders entered were based upon the facts and the law as the state court judge found them. The subject matter of some of the transfers which occurred in the dissolution proceeding will be before this court in another proceeding based upon allegations of fraudulent conveyances. It is in that proceeding that the remedy for the fraudulent transfers, if any, will be dealt with.

Similarly, Mr. Damrow has admitted that prior to bankruptcy he transferred \$75,000 into trusts for his children's benefit. The source of the funds transferred is not any of the corporations which have been discussed in this opinion. Once again, those transfers are the subject of an adversary proceeding with regard to an allegation of a fraudulent conveyance. Such transfers, in the context of this litigation, are insufficient for the court to find that Mr. Damrow's discharge should be denied. He did not admit and the plaintiffs have not presented sufficient evidence with regard to his intent to hinder, delay or defraud a creditor. He testified that he transferred the property for the benefit of his children so that they would have funds available for college, and because as a result of the business failures of Damrow Cattle, DFF, Carter Feeders and CFF, he had lost millions of dollars, his and their home had been foreclosed, and he was without any other funds to support his family. Whether such reasons will insulate the transfers from a fraudulent conveyance action is yet to be seen.

From Exhibit 76, I find that the records of Carter Feeders and Damrow Cattle show that at least \$3,550,471.19 in packer checks representing the proceeds of cattle sold by Carter Feeders, which should have been deposited to the benefit of Carter Feeders, were deposited to the benefit

of Damrow Cattle. The proceeds of such checks would have been used to pay off Carter Feeders and CFF loans from the First National Bank of Holdrege, to pay off cattle owner loans, and to permit distribution to the cattle owners from their initial deposit and their profit, if any, from the sale of the cattle. Because those funds were not applied to the Carter Feeders account, Carter Feeders was unable to pay down all of the notes related to the sold cattle and, on occasion, was required to borrow additional funds to pay off cattle owner notes.

Mr. Damrow, as an officer and general manager of Carter Feeders, owed a fiduciary duty to Carter Feeders. By allowing Carter Feeders proceeds checks to be deposited in Damrow Cattle accounts and used by Damrow Cattle, Mr. Damrow breached his fiduciary duty and the misapplication of the funds is a defalcation under Nebraska law. In addition, such misapplication of Carter Feeders proceeds checks into the Damrow Cattle accounts is embezzlement.

Mr. Damrow suggests that most of the checks that were improperly deposited into Damrow Cattle were misapplied, not by him, but by employees of the bank. Because he operated Damrow Cattle and Carter Feeders almost as if they were one entity, the bank employees apparently treated them as one entity also, or at least they were confused by the bookkeeping and marketing practices of Carter Feeders and Damrow Cattle to the extent that they could not tell into which account certain checks should be deposited. However, even if the misapplication occurred as a result of confusion by bank employees, Mr. Damrow is responsible. He is the fiduciary. He operated both businesses. He permitted both businesses to use the same bank and to commingle funds, which he admitted that he only attempted to disentangle when he had time, and frequently not until the end of each year.

During the operation of the business of Carter Feeders, in order to keep the business operating, Mr. Damrow frequently acquiesced in the actions by bank officers. For example, the packer checks representing the proceeds of the sale of customer-owned cattle were sent directly from the packer to the First National Bank of Holdrege. Frequently, the proceeds were not properly applied by the bank to the loans which were related to the sale of the cattle. In other words, the bank frequently determined on its own to which loans cattle proceeds would be applied. According to the testimony of Mr. Damrow, which is not controverted, the bank would use the proceeds checks to pay off the oldest outstanding notes, rather than the notes directly related to the proceeds checks. Such activity caused Carter to incur additional interest expenses. Although permitting the bank to take such actions appears to have harmed Carter Feeders, it also appears that Mr. Damrow acquiesced in such activity in order to keep the business afloat. In other words, he did not acquiesce in order to financially injure Carter Feeders, but to keep on the good side of the bank officers so that they would continue to loan money, when necessary, to support CFF and the Carter Feeders' financing and feeding operations.

Mr. Damrow also submitted notes which customers had pre-signed, but which did not represent the purchase of any cattle, to the bank to support ongoing financing operations. He did so at the direction of the bank to "clean up" the CFF line of credit. Such activities defrauded the bank, and may have harmed the interest of Carter Feeders with regard to the incurrence of additional financing costs. However, I find as a fact that he did not do so to financially harm Carter Feeders, but to keep the bank officers satisfied so that Carter Feeders could continue to operate.

According to the evidence represented by the reconciliation of the Carter Feeders and Damrow Cattle books, occasionally Dennis Damrow would overpay cattle-owning customers to

keep them feeding at Carter Feeders, or allow them not to pay for feed. I conclude that he did so, not to harm Carter Feeders, but to keep the customers and thereby keep the operation going.

I make such factual conclusions as indicated above after considering Mr. Damrow's status and incentive to harm Carter Feeders. He was a shareholder in Carter Feeders. When dealing with the bank and dealing with Carter Feeders' customers, Mr. Damrow had absolutely no incentive to harm the financial interest of Carter Feeders. Any such harm would also result in harm to his own interest. I therefore conclude that although many of the transactions with the customers and the bank were abnormal and were done intentionally by Mr. Damrow, they were not done maliciously as that term is used in 11 U.S.C. § 523(a)(6).

On the other hand, the misapplication of packer checks of Carter Feeders into Damrow Cattle accounts is not only a defalcation by a fiduciary, but was done intentionally and with the knowledge that if Carter Feeders funds did not go to Carter Feeders, Carter Feeders would be directly financially harmed. Such actions come within the provisions of 11 U.S.C. § 523(a)(6).

#### APPLICABLE LAW & DISCUSSION

A. 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) provides an exception to discharge for 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, other than a statement respecting the debtor's or an insider's financial condition.

To establish fraud within the context of § 523(a)(2)(A), the creditor must show, by a preponderance of the evidence, that: (1) the debtor made a representation; (2) the representation was made at a time when the debtor knew the representation was false; (3) the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such representation; and (5) the creditor sustained a loss as the proximate result of the representation having been made. Universal Bank, N.A. v. Grause (In re Grause), 245 B.R. 95, 99 (B.A.P. 8th Cir. 2000) (citing Thul v. Ophaug (In re Ophaug), 827 F.2d 340, 342 n.1 (8th Cir. 1987), as supplemented by Field v. Mans, 516 U.S. 59 (1995)).

"The intent element of § 523(a)(2)(A) does not require a finding of malevolence or personal ill-will; all it requires is a showing of an intent to induce the creditor to rely and act on the misrepresentations in question." Merchants Nat'l Bank v. Moen (In re Moen), 238 B.R. 785, 791 (B.A.P. 8th Cir. 1999) (quoting Moodie-Yannotti v. Swan (In re Swan), 156 B.R. 618, 623 n.6 (Bankr. D. Minn. 1993)). "Because direct proof of intent (i.e., the debtor's state of mind) is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred." Id. (quoting Caspers v. Van Horne (In re Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987)). The intent to deceive will be inferred when the debtor makes a false representation and knows or should know that the statement will induce another to act. Id. (quoting Federal Trade Comm'n v. Duggan (In re Duggan), 169 B.R. 318, 324 (Bankr. E.D.N.Y. 1994)).

There is no evidence that the debtor obtained money, property, or credit of or from Carter

Feeders by false pretenses, false representation or actual fraud.

B. 11 U.S.C. § 523(a)(4)

Section 523(a)(4) of the Bankruptcy Code excepts from discharge any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

“Acting in a fiduciary capacity” is limited in application to technical or express trusts, not to trusts that may be imposed because of the alleged act of wrongdoing from which the underlying indebtedness arose. See Hunter v. Philpott, 373 F.3d 873 (8th Cir. 2004) (“fiduciary” used in a strict and narrow sense in § 523(a)(4), and fiduciary status must pre-date the debt); Barclays Am./Bus. Credit, Inc. v. Long (In re Long), 774 F.2d 875, 878-79 (8th Cir. 1985) (for purposes of § 523(a)(4) fraud or defalcation exception, fiduciary capacity must arise from express trust, not constructive trust or mere contractual relationship).

However, it is clear that a corporate officer or director owes a fiduciary duty to the corporation. “An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders, and is treated by the courts as a trustee.” Evans v. Engelhardt, 246 Neb. 323, 327, 518 N.W.2d 648, 651 (1994). See also Woodward v. Andersen, 261 Neb. 980, 990, 627 N.W.2d 742, 751 (2001) (same), and Sadler v. Jorad, Inc., 268 Neb. 60, 67-68, 680 N.W.2d 165, 172 (2004) (same).

The rule is thoroughly embedded in the general jurisprudence of . . . America . . . that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders, and are treated by courts of equity as trustees. Courts hold the directors of a corporation to the strictest accountability. Conduct inconsistent with any duty is condemned. The fiduciary relation is so vital that directors are not only prohibited from making profit out of corporate contracts, and from dealing with the corporation except upon the most open and on the fairest terms, but the rule of accountability is so strict that they are not permitted to anticipate the corporation in the acquisition of property reasonably necessary for carrying out the corporate purposes or conducting the corporate business.

Anderson v. Bellino, 265 Neb. 577, 588-89, 658 N.W.2d 645, 656 (2003) (quoting Nebraska Power Co. v. Koenig, 93 Neb. 68, 75, 139 N.W. 839, 841-42 (1913)).

According to the caselaw in the Eighth Circuit, a bankruptcy court can find a “defalcation” under 11 U.S.C. § 523(a)(4) without evidence of intentional fraud or other intentional wrongdoing. The Eighth Circuit Court of Appeals in the case of Tudor Oaks Ltd. P’ship v. Cochrane (In re Cochrane), 124 F.3d 978 (8th Cir. 1997), cert. denied, 522 U.S. 1112 (1998), stated:

Defalcation is defined as the “misappropriation of trust funds or money held in any fiduciary capacity; [the] failure to properly account for such funds.” Under section 523(a)(4), defalcation “includes the innocent default of a fiduciary who fails to account fully for money received.” . . . An individual may be liable for defalcation without having the intent to defraud.

Cochrane, 124 F.3d at 984 (quoting Lewis v. Scott, 97 F.3d 1182, 1186 (9th Cir. 1996)). Allowing

Carter Feeders proceeds checks to be deposited to the benefit of Damrow Cattle, and not returning the funds to Carter Feeders, is a defalcation by a fiduciary.

"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. Belfry v. Cardozo (In re Belfry), 862 F.2d 661, 662 (8th Cir. 1988). The plaintiff must establish that the debtor was not lawfully entitled to use the funds for the purposes for which they were in fact used. Id. To show embezzlement, the creditor has to prove that it entrusted its property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud. Bankers Trust Co. v. Hoover (In re Hoover), 301 B.R. 38, 52 (Bankr. S.D. Iowa 2003).

"Larceny" is the fraudulent and wrongful taking and carrying away of the property of another with intent to convert the property to the taker's use without consent of the owner. Rech v. Burgess (In re Burgess), 106 B.R. 612, 622 (Bankr. D. Neb. 1989). "The essential difference between larceny and embezzlement is the manner in which property comes into the possession of the person charged. Embezzlement involves a lawful or authorized possession. In the case of larceny, however, the original taking and possession is unlawful." Id.

The actions by debtor in allowing Carter Feeders proceeds checks to be deposited to the benefit of Damrow Cattle, and not returned, is embezzlement by a fiduciary.

C. 11 U.S.C. § 523(a)(6)

The applicable law in this circuit has been explained as follows:

Under section 523(a)(6), a debtor is not discharged from any debt for "willful and malicious injury" to another. For purposes of this section, the term willful means deliberate or intentional. See Kawaauhau v. Geiger, 523 U.S. 57, 61, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) (§ 523(a)(6) requires deliberate or intentional injury); In re Long, 774 F.2d 875, 881 (8th Cir. 1985) (to meet willfulness component of § 523(a)(6), debtor's actions creating liability must have been "headstrong and knowing"). To qualify as "malicious," the debtor's actions must be "targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause financial harm." In re Long, 774 F.2d at 881.

Hobson Mould Works, Inc. v. Madsen (In re Madsen), 195 F.3d 988, 989 (8th Cir. 1999).

Malice requires conduct more culpable than that which is in reckless disregard of the creditor's economic interests and expectancies. Long, 774 F.2d at 881. The debtor's knowledge that he or she is violating the creditor's legal rights is insufficient to establish malice absent some additional aggravated circumstances. Conduct which is certain or almost certain to cause financial harm to the creditor is required. While intentional harm may be difficult to establish, the likelihood of harm in an objective sense may be considered in evaluating intent. Id.

Johnson v. Logue (In re Logue), 294 B.R. 59, 63 (B.A.P. 8th Cir. 2003).

In Nebraska, conversion is any unauthorized or wrongful act of dominion exerted over

another's property which deprives the owner of his property permanently or for an indefinite period of time. Farmland Serv. Co-Op., Inc. v. Southern Hills Ranch, Inc., 266 Neb. 382, 392, 665 N.W.2d 641, 648 (2003). Taking Carter Feeders' money and depositing it in Damrow Cattle's accounts is a conversion of Carter Feeders' assets. Such conversion decreased Carter Feeders' assets, and caused Carter Feeders to borrow additional funds and pay additional interest on those funds.

A debtor-agent who misappropriates proceeds belonging to his principal to pay his own debts commits conversion. Payne v. Lomantini (In re Lomantini), 252 B.R. 469, 477 (Bankr. E.D. Mo. 2000). By intentionally diverting money from Carter Feeders to his own business, Mr. Damrow acted willfully. Because he also knew of Carter Feeders' financial situation and therefore knew his conversion of funds would deepen Carter Feeders' debt, Mr. Damrow acted maliciously. See Mercantile Bank v. Speers (In re Speers), 244 B.R. 142 (Bankr. E.D. Ark. 2000). I find that Mr. Damrow intended that the Carter Feeders money be provided to and used by Damrow Cattle, thereby causing financial harm to Carter Feeders.

E. 11 U.S.C. § 727(a)(2)

Denial of discharge is "a serious matter not to be taken lightly by a court." McDonough v. Erdman (In re Erdman), 96 B.R. 978, 984 (Bankr. D.N.D. 1988). The provisions of § 727 are strictly construed in the debtor's favor, while remaining cognizant that § 727 exists to prevent a debtor's abuse of the Bankruptcy Code. Fox v. Schmit (In re Schmit), 71 B.R. 587, 589-90 (Bankr. D. Minn. 1987). The objecting party must prove each element by a preponderance of the evidence. Korte v. Internal Revenue Serv. (In re Korte), 262 B.R. 464, 471 (B.A.P. 8th Cir. 2001).

Section 727(a)(2) of the Bankruptcy Code denies a debtor a discharge if he or she, with intent to hinder, delay, or defraud a creditor, transferred, removed, destroyed, mutilated, or concealed property of the debtor or property of the estate.

To succeed on a § 727(a)(2) claim, the creditor must establish by a preponderance of the evidence that the debtor committed the act complained of, resulting in transfer, removal, destruction or concealment of property belonging to the debtor or the estate, within the statutory time period, with the intent to hinder, delay or defraud a creditor or officer of the estate. Kaler v. Craig (In re Craig), 195 B.R. 443, 449 (Bankr. D.N.D. 1996).

There is insufficient evidence in this case to find that Mr. Damrow's discharge should be denied.

### CONCLUSIONS

1. There is insufficient evidence in this record to find that Mr. Damrow should be denied a discharge under Chapter 7 of the Bankruptcy Code.

2. The evidence is sufficient to find, and I do find, that his obligation to the corporations, in an amount equal to the Carter Feeders' packer checks deposited in the Damrow Cattle accounts and not reimbursed to Carter Feeders in the amount of \$3,550,471.19, is non-dischargeable under 11 U.S.C. §§ 523(a)(4) and (a)(6) if a state court judge eventually enters judgment on the arbitration award. The balance of the arbitration award, even if judgment is entered thereon, is dischargeable.

3. I find that Mr. Damrow did not, in his individual capacity, obtain money, property, services or an extension, renewal or refinancing of credit, for himself, and therefore, although he may have obtained credit on behalf of Carter Feeders and CFF by use of false pretenses, false representations or actual fraud, his obligations to CFF and Carter Feeders cannot be found to be non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

Separate order to be filed.

DATED: August 17, 2004

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:  
Jeanelle Lust  
Bruce Hart  
Dennis Damrow  
U.S. Trustee

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

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Plaintiffs,	)	
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DENNIS R. DAMROW,	)	
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Defendant.	)	

ORDER

Trial was held in North Platte, Nebraska, on March 10 and 11, 2004, on the complaint to determine dischargeability of a debt and whether discharge should be denied. Jeanelle Lust appeared for the individual plaintiffs, Bruce Hart appeared for Carter Feeders, Inc., and CFF, Inc., and Dennis Damrow appeared pro se.

IT IS ORDERED: For the reasons stated in the Memorandum of today's date, Mr. Damrow's obligation to the plaintiff corporations in the amount of \$3,550,471.19 is non-dischargeable under 11 U.S.C. §§ 523(a)(4) and (a)(6) if a state court judge eventually enters judgment on the arbitration award. The balance of the arbitration award, even if judgment is entered thereon, is dischargeable.

DATED: August 17, 2004

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:  
Jeanelle Lust  
Bruce Hart  
Dennis Damrow  
U.S. Trustee