

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

GARY DUANE HEIMBOUCH,

DEBTOR

ST. PAUL EQUIPMENT, INC.,

Plaintiff

vs.

GARY DUANE HEIMBOUCH,

Defendant

CASE NO. BK80-1455

A80-427

MEMORANDUM AND ORDER

This matter comes before the Court on a complaint to determine dischargeability of a debt pursuant to §523(a)(2)(B) of the Bankruptcy Code which excepts from discharge any debt for obtaining property by the use of a materially false statement in writing respecting the debtor's financial condition on which the creditor reasonably relied and that the debtor caused to be made or published with intent to deceive.

As submitted in the Order on Pretrial Conference, the uncontroverted facts are these. On or about June 4, 1980, St. Paul Equipment, Inc., a Nebraska corporation, sold a John Deere 95 combine with grain table to Gary Duane Heimbouch on credit for the purchase price of \$7,000. Debtor took delivery of the combine and table and gave the plaintiff a check for \$7,000 post-dated to June 15, 1980. Plaintiff in this action, St. Paul Equipment, Inc., has not been paid for the 95 combine with grain table.

The issues to be determined at trial track the statutory language. First, does an insufficient funds check constitute a materially false statement in writing? If so, was that representation made with intent to deceive the plaintiff? Last, did the plaintiff in fact reasonably rely on that representation?

A salesman and manager for the plaintiff corporation has testified that at the debtor's request, he agreed to hold the check tendered by Mr. Heimbouch until the fifteenth of the month.

This he contends is not a normal procedure for his company, but he had agreed to take the check as made based upon the debtor's past performance in dealings with that company. There had never been, he testified, any problem with the debtor's checks. The transaction was made on the basis that the defendant, doing business as Valley Equipment Company, a company engaged in the business of buying and selling farm equipment, had obtained a prospective purchaser for the combine and grain table. The post-dated check was issued to the plaintiff based upon the understanding that resale of the combine would take place within a two-week period. Testimony would indicate, then, that plaintiff corporation accepted through its salesman/agent, a check which it knew to be written on an insufficient funds account.

The difficulty here arose from the fact that notwithstanding the debtor's statement that he fully intended to perform the representations he made to the plaintiff, he was unable to do so because of an execution issued by another judgment creditor on a judgment obtained in the District Court of Scotts Bluff County, Nebraska, which execution was levied upon the combine at issue here. It was this June 13, 1980, execution against a judgment in excess of \$10,000 which prohibited the debtor from selling the combine and grain table.

In considering first the issue of materiality, this Court has consistently held in agreement with Swanson Petroleum Corporation v. Cumberland, 184 Neb. 323, 167 N.W.2d 391 (1969), that an insufficient funds check alone does not constitute a materially false statement in writing which would bar the discharge of a debtor in bankruptcy. Exhibits and testimony before me reveal no other evidence which would indicate a false statement in writing other than the assertion which the check might make upon its face. It is unnecessary, therefore, that the Court consider either the debtor's intent or the plaintiff/creditor's reliance upon that written statement. As an insufficient funds check with nothing more is inadequate to meet the requirements of §523(a)(2)(B)(i), the plaintiff's case must fail.

IT IS ORDERED that the debt owed by Gary Duane Heimbouch to St. Paul Equipment, Inc., is dischargeable in bankruptcy and it is accordingly discharged.

DATED: May 24, 1982.

BY THE COURT:


U.S. Bankruptcy Judge

Copies mailed to:

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