UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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| IN THE MATTER OF | ) | |
| | ) | |
| DAVID CARL OLSON, | ) | CASE NO. BK78-L-103 |
| | ) | |
| BANKRUPT | ) | |
| | ) | |
| CITIZENS STATE BANK, | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| DAVID CARL OLSON, | ) | |
| | ) | |
| Defendant | ) | |

MEMORANDUM OPINION

In this adversary proceeding Citizens State Bank, plaintiff, seeks a determination that an indebtedness due it from David Carl Olson, defendant, is nondischargeable in this bankruptcy proceeding. Plaintiff's complaint contains language which indicates that the allegation of nondischargeability is based on the transfer and removal of property with intent to hinder, delay and defraud plaintiff, a creditor. That basis is not a basis pursuant to §17a[11 U.S.C. §35a] for finding a debt nondischargeable. However, the allegations of plaintiff's complaint are sufficient for a consideration of whether the indebtedness is rendered nondischargeable pursuant to the willful and malicious conversion of property of another exception contained in §17a(2).

Prior to bankruptcy, the defendant as an unincorporated entity operated a business engaged in the sale of emergency medical equipment. Plaintiff held a security interest in the inventory of medical equipment and accounts receivable owned by the defendant. A term contained in the fine print of the security agreement prohibited the sale of the collateral without the prior written consent of the plaintiff.

The allegations of plaintiff's complaint allege the sale by the defendant of six "Lifepak 4" units. I take it the plaintiff' argument is that the sale of these units violated the terms of the security agreement and constitute a willful and malicious conversion of property claimed by the plaintiff. However, the evidence before me is that the defendant did not at any time own the units which are the subject of plaintiff's complaint. The only apparent relationship of the defendant to the transaction was that of a straw man. Apparently, a business in Omaha unrelated to the defendant's business placed an order with a Minnesota busines using the defendant's trade name as buyer. Although the transactior initially called for the units to be shipped to the defendant and billed to him, in fact the transaction was that the Omaha business was to receive possession of the units and to pay for them. Olson never received possession of the units nor did he at any time pay for the units. The units were paid for by the Omaha business.

Accordingly, the conclusion which results is that defendant did not convert any property alleged in the complaint since he never owned it or possessed it.

At the trial, plaintiff orally moved to amend its complaint to include other transactions which are shown in evidence before me where the defendant did sell merchandise which apparently was subject to security interest of the plaintiff. Here the evidence is that merchandise and equipment were sold by the defendant to third parties and the money not entirely applied on the indebtedness due the plaintiff. However, the undisputed evidence before me is that the plaintiff knew at all times that the defendant was selling merchandise to third parties and knew that all of the money was not being paid to the plaintiff. In fact, the plaintiff apparently knew of the financial difficulties of the defendant and was trying to work with him in an effort to keep his business operation intact. I am convinced that the plaintiff knew at all times what was happening and acquiesed in the sale of the inventory and in the failure to apply all proceeds to the indebtedness due the plaintiff.

Not every liability for conversion of property is nondischargeable. See Davis v. Aetna Acceptance Co., 293 U.S. 328 (1934). There, in a case quite similar to the present case, the Supreme Court said:

> ". . .there may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice. . .there may be an honest but mistaken belief. . .that powers had been enlarged or incapacities removed."

The foregoing rule has been recognized by the Eighth Circuit. See Robertson v. Interstate Securities Company, 435 F.2d 784 (8th Cir. 1971). Although Davis was decided prior to the time §17 of the Act was amended to include the specific provision regarding willful and malicious conversions, its principles are still applicable. For example, in his article, The New Dischargeability Law, 45 American Bankruptcy Law Journal 1, at p. 14, (1971) Professor Vern C. Countryman summarizes the law as follows:

> ". . .it might fairly be concluded that a conversion is not excepted from the discharge as a willful and malicious injury to property if it is (1) unintentional or (2) intentional, but committed under an honest but mistaken belief that it was not wrong. So the reported cases for the most part seem to hold."

See also In Re Elias, BK74-0-1059 (D. Neb. 1975); 1A Collier on Bankruptcy, Section 17.09.

In the present case, there is absolutely no evidence to support the allegation that any conversion was willful and malicious. This was a business selling its inventory and that was known to the bank. The bank may not rely on written language in its security agreement when its conduct violated that language on a daily basis.

I should add that there is no evidence before me to support the conclusion that the defendant transferred any property with the requisite guilty intent to hinder, delay or defraud his creditors.

My finding is in favor of the defendant and against the plaintiff. The separate order which will be entered will also permit the amendment made orally at the trial and will deny and dismiss the orally amended complaint as well as the original complaint.

DATED: January 4, 1979.

BY THE COURT:

Bankruptcy Judge

Copies mailed to each of the following:

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