UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
STEVEN WEHMER,	)	CASE NO. BK87-84
DEBTOR.	)	A87-133
FEDERAL DEPOSIT INSURANCE CORP.,	)	CH. 12
Plaintiff,	)	
vs.	)	
STEVEN WEHMER,	)	
Defendant.	)	

MEMORANDUM

An evidentiary hearing on the complaint of the Federal Deposit Insurance Corporation, (FDIC), to determine dischargeability of a particular debt was heard May 12, 1988. Raymond Aranza of North & Black, Omaha, Nebraska, appeared for the FDIC; Vince Powers, Lincoln, Nebraska, appeared for Steven Wehmer, debtor. At the hearing additional legal arguments were ordered, which the Court has received and reviewed. This Memorandum constitutes the Court's findings of fact and conclusions of law pursuant to Bankr. R. 7052.

Statement of Facts

The FDIC holds three promissory notes executed by debtor, dated January 28, 1986. These promissory notes are secured by debtor's livestock, crops, equipment, machinery and any additions or proceeds therefrom. In early May 1986, the FDIC sent a letter to debtor instructing him not to sell or otherwise dispose of any of the FDIC's collateral without written approval from the FDIC. Two months later, Mike Malone, FDIC account officer, told debtor that all proceeds checks must include the FDIC as co-payee. He also notified the local livestock commissions that the FDIC claimed a lien on debtor's livestock and that proceed checks should be payable jointly to the FDIC and debtor.

Tickets from Bowles Livestock Commission Company indicate that debtor sold $20,208.49 worth of livestock between January 9, 1986 and the date of the letter from the FDIC, May 5, 1986. After

29

receipt of the letter and before the conversation with Mike Malone, Bowles Livestock Commission Company tickets indicate sales of $12,316.69 in debtor's name. For the period July 16, 1986, through January 8, 1987, debtor sold livestock at Bowles Livestock Commission in Reed Frahm's name. These sales totaled $42,979.35. None of the proceeds from any of the various sales was paid to the FDIC.

On January 13, 1987, debtor petitioned for Chapter 12 relief.

At the hearing, debtor testified that he had had a telephone conversation with FDIC officer Mike Malone in early summer 1986 in which Mike Malone gave him permission to sell the livestock and use the proceeds. Mike Malone denied that this conversation occurred. Debtor also testified that he used some of the proceeds to maintain FDIC's collateral, the livestock, and some to pay creditors having priority over the FDIC. Further, according to debtor, he wasn't harming the FDIC because the head count of the livestock remained constant. In other words, the birth rate equaled, approximately, the number sold. Debtor stated that the FDIC wanted him to refinance with another funding source. By paying other creditors who had claims on the livestock, he was improving his potential to refinance. Debtor testified that he knew the consequences of signing the security agreement and knew that the FDIC had an interest in the livestock.

FDIC contends that debtor's actions were willful and malicious. Debtor intentionally converted the livestock by using a straw party to avoid the FDIC's requirement that it be listed as co-payee, and debtor knew that these actions would harm the FDIC. The FDIC claims damages in the amount of the converted property, $75,504.53.

Conclusion

Based on the foregoing statement of facts and the application of law discussed below, the Court finds that debtor's actions, following the receipt of the May 5, 1986, letter from the FDIC, were willful and malicious. The testimony of FDIC officer Mike Malone is more credible than that of debtor's. Thus, sales after the May 6 letter violated the FDIC's rights and such sales resulted in economic harm to the FDIC.

Analysis

The FDIC relies on Section 523(a)(6) in support of its complaint:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt--

. . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

11 U.S.C. § 523(a)(6).

It is well settled that conversion of collateral can qualify as a "willful and malicious" injury to a secured creditor. In re Long, 774 F.2d 875, 879 (8th Cir. 1985). The test for determining what acts are willful and malicious is also contained in this Eighth Circuit decision, and is the test which this Court is bound to apply.

In Long, the court pointed out that the elements of willfulness and malice must be analyzed separately and that the generally agreed standard for willfulness is whether the conduct was intentional or deliberate. Id. at 880.

In the instant case, the evidence and testimony regarding debtor's sale of the livestock collateral clearly indicate that his actions were intentional and deliberate. Debtor knew the purpose of the security agreement and knew from the time he received the FDIC letter that he was not to sell the livestock without the FDIC's permission. The Court finds that debtor's actions were willful.

Turning to the issue of malice, the Long court determined that "a heightened level of culpability must be found, going beyond recklessness and beyond intentional violation of a security interest." Id. at 881. Relying on the Restatement (Second) of Torts' definition of intentional harm to characterize malice, the Eighth Circuit defined the conduct as that which is "'certain or substantially certain'" to cause financial harm to the creditor. Id. (quoting In re Fercho, 39 Bankr. 764, 766 (Bankr. D.N.D. 1984)). Moreover, according to the Eighth Circuit, intent to cause harm can be ascertained by objective information such as the presence of "aggravated circumstances." Id. (quoting Davis v. Aetna Acceptance Co., 293 U.S. 328 (1934)).

With regard to the livestock sales by debtor prior to May 5, 1986, totaling $20,208.49, the Court finds insufficient evidence to support a claim of malicious conversion. Debtor had not received the FDIC letter telling him that he could not sell livestock without its approval. Although the FDIC may have been financially harmed, no "aggravated circumstances" to support a finding of malice, before May 1986, are present.

However, following the May 5, 1986, letter from the FDIC, debtor continued to sell livestock of which $12,316.69 worth of sales was in his name and $42,979.35 in someone else's name. Further, none of the proceeds from these sales were remitted to the FDIC. Continuing to sell in defiance of the FDIC's request and utilizing a straw party to sell the livestock certainly provide the "aggravated circumstances" discussed in In re Long. Financial harm to the FDIC occurred because the FDIC neither received any payments on its outstanding debt nor received any benefit from the growth of the livestock herd. Debtor's use of a straw party to conceal his sale of collateral demonstrates his deliberate intent to mislead and deceive the FDIC.

Debtor's explanation for selling the livestock--that he was attempting to benefit the FDIC by paying creditors with priority over the FDIC--does not justify nor excuse the sales. If debtor's intent were legitimate, debtor should have been able to convince the FDIC of the merit of such a plan and received its permission to use the proceeds.

The damage caused to FDIC as a result of debtor's malicious conversion is the value of the converted property. In re Gantt, 56 Bankr. 852, 858 (Bankr. E.D. Va. 1985). The parties have stipulated that the value of the collateral is represented by its selling price. Therefore, the Court finds that the $55,296.04[1] worth of livestock sales occurring after debtor received the FDIC letter is nondischargeable. These sales caused financial harm to the FDIC which harm was intentionally and knowingly caused by debtor. Debtor knew that financial harm to the FDIC was "substantially certain" to occur and proceeded in the face of this knowledge.

Separate journal entry will be entered this date.

DATED: September 22, 1988.

BY THE COURT:

Timothy J. Mahoney
Chief Judge

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[1] $12,316.69 in debtor's name and $42,979.35 in Reed Frahm's name.