UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

TOM ROTH,

CASE NO. BK79-L-193

BANKRUPT

FIRST NATIONAL BANK & TRUST COMPANY OF LINCOLN, a national banking association,

Plaintiff

vs.

TOM ROTH,

Defendant

MEMORANDUM OPINION

In this adversary proceeding, plaintiff seeks a determination that an indebtedness due it from the defendant is nondischargeable pursuant to the false financial statement in writing exception of §17a(2)[11 U.S.C. §35a(2)].

In January, 1976, defendant approached a loan officer with plaintiff and stated that he intended to purchase a farm which was located near other land which he owned near Neligh, Nebraska. The defendant told plaintiff that he had arranged for a Conservative Investment Company "takeout" loan. Apparently he advised plaintiff that Conservative Investment Company had given a written letter of commitment to "takeout" interim financing up to \$55,000.00.

Apparently, in January, 1976, defendant's financial statement was such that plaintiff would not have made a loan without the assurance of the takeout financing. As testified to by a representative of plaintiff, the collateral for this loan was the letter of commitment from Conservative Investment Company.

From January 7, 1976, through March, 1976, plaintiff advanced defendant a total of \$55,000.00. The initial note taken by the plaintiff from defendant was to mature in July, 1976. The letter of commitment by Conservative Investment Company was to expire January 6, 1977.

Between March, 1976, and December 15, 1976, plaintiff asked for and received from the defendant a new financial statement. In September, 1976, plaintiff received a financial statement from defendant dated June 24, 1976, which disclosed total assets of \$678,381.87 and a net worth of \$538,928.87. The defendant admits that the financial statement dated June 24, 1976, is inaccurate in that it lists property which the defendant did not own and also lists property at full market value whereas the defendant had only a partial market interest. For example, the financial statement lists 120 acres east of Tilden with a market value of \$64,000.00 which the defendant later inherited but which was not actually owned by the defendant at the time of the giving of the financial statement. In addition, when he received the inheritance, he received only a 50% interest subject to a life estate in his mother.

The statement also lists the defendant as the owner of 440 acres north of Neligh, Nebraska, at a market value of \$174,000.00. This property was never owned by the defendant and, in fact, the defendant had made a bid on the property, which bid was rejected a month before Exhibit 3 was given to the plaintiff.

The statement also lists 160 acres north of Neligh which was the property which was to be purchased by the defendant with the \$55,000.00 loan to the defendant by the plaintiff. This transaction never took place and defendant never owned this property. This property is listed as worth \$72,000.00 with a mortgage of \$55,000.00.

In fact, on December 6, 1976, plaintiff had purchased Conservative Investment Company with the result, as testified to by a representative of plaintiff, that there was no longer in existence on December 15, 1976, a takeout loan commitment.

Representatives of plaintiff testified that as a result of the loss of the takeout loan commitment, they relied solely on the financial statement dated June 24, 1976, in making their decision to renew the note on December 15, 1976. That note remains in part unpaid and is represented by a judgment as to the unpaid balance rendered by the District Court of Lancaster County, Nebraska, at Docket 310, Page 7.

Given the testimony before me that in January, 1976, when the defendant's financial statement showed a net worth of \$120,000.00 that they would not have made an unsecured loan without the takeout loan.commitment and the fact that they renewed the loan at a time when the defendant's financial statement showed a net worth of \$538,928.87 and given the large amounts of the misrepresentations, I conclude that the misrepresentations here made are material and I conclude that the plaintiff relied on the defendant's financial statement in making the loan renewal.

The defendant's defense is that although he gave the financial statement dated June 24, 1976, to the plaintiff knowing that it was false, he believed that the plaintiff was relying on the takeout loan commitment and not upon the financial statement. However, given the fact that the defendant listed on his financial statement 440 acres at a value of \$174,000.00 which he knew that he could not own because his bid had previously been rejected and especially because he listed on his financial statement the 160 acres in Neligh which the \$55,000.00 loan by the plaintiff was supposed to purchase and which the defendant never had purchased, I reject the defense offered by the defendant. Conversely, I am convinced that the defendant intended the plaintiff to rely upon the financial data supplied in the financial statement in making the decision to renew the prior loan.

A separate judgment is entered in accordance with the foregoing.

DATED: June 26, 1980.

THE COURT: Bankruptcy

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