

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

GENE J. ABBOUD,)
JEAN B. ABBOUD,)

CASE NO. BK79-0-593
CASE NO. BK79-0-594

BANKRUPTS)

FORT CALHOUN STATE BANK,)

Plaintiff)

vs.)

GENE J. ABBOUD and)
JEAN B. ABBOUD,)

Defendants)

Appearances:

Jan Plucknett Deroin, Attorney
10407 Devonshire Circle
Omaha, Ne. 68114

and

John C. Mitchell, Attorney
10407 Devonshire Circle
Omaha, Ne. 68114

for plaintiff, Fort Calhoun State Bank

William E. Pfeiffer, Attorney
437 Continental Bldg.
Omaha, Ne. 68102

for defendants,

Gene J. Abboud and Jean B. Abboud

MEMORANDUM OPINION

Fort Calhoun State Bank brought this adversary proceeding against the defendants for a determination that a judgment obtained by the plaintiff against the defendants is nondischargeable in this bankruptcy proceeding pursuant to the false financial statement in writing exception of §17a(2)[11 U.S.C. §35a(2)].

At the conclusion of the trial, plaintiff acknowledged there was no evidence to render Jean B. Abboud's indebtedness non-dischargeable. Accordingly, the remainder of this memorandum opinion will consider only the dischargeability of the indebtedness of Gene J. Abboud.

On December 23, 1974, Mr. Abboud obtained a \$60,000.00 loan from the plaintiff. This loan was renegotiated on July 11, 1975, and a renewal note in the amount of \$52,320.00 was signed on that date. The July 11, 1975, note was renegotiated and a replacement note in the amount of \$43,103.99 was signed by the defendant on December 15, 1976. Plaintiff alleges that on each of the three occasions, defendant gave plaintiff a false financial statement in writing which renders the balance due on the third note non-dischargeable.

The loan officer who extended the initial loan on December 23, 1974, testified that he relied on a financial statement of March, 1974 (Exhibit #3). Plaintiff's complaint, at Paragraph 5(e)1 alleges that this financial statement was false because it listed an asset of Bell Janitorial Service of \$56,000.00. While it is true that the evidence before me might allow me to speculate that this figure is inflated, there is no evidence before me from which I can actually find that the figure is not accurate. In addition, plaintiff points to footnote no. 1 which would indicate that the value of the equipment of Bell Janitorial Service is \$65,000.00. However, I accept the defendant's explanation that this footnote is inaccurate and that the \$65,000.00 figure should actually be the value of the business. In any event, plaintiff had previously received Exhibits 13 and 14 to show depreciation on equipment of a nominal amount which should have led it to investigate the footnote further. Plaintiff has failed to meet its burden of proof with regard to the financial statement of March, 1974.

With regard to the loan renewal of July 11, 1975, the most recent financial statement which plaintiff would have had before it would be the one of December, 1974 (Exhibit #4). Again, in

Paragraph 5(e)2 of plaintiff's complaint, plaintiff alleges that this financial statement was false because it listed an asset of Bell Janitorial Service of \$71,000.00. Again, while it is possible to speculate that the value was inflated, plaintiff has failed to present sufficient evidence from which I can find that the figure is inflated. Plaintiff has failed to meet its burden of proof here also.

With regard to the loan renewal of December 15, 1976, the plaintiff apparently places reliance not on the most recent financial statement which it had of September 1, 1976 (Exhibit #7) but rather on one dated at one place July 31, 1975, and at another place August 10, 1975 (Exhibit #5). Plaintiff points to an item shown as an asset which would indicate that defendant had an equity in "I-80 Restaurant" of \$10,300.00. However, Exhibit #7, the financial statement of September 1, 1976, was before the bank on December 15, 1976, and shows neither an investment in Bell Janitorial nor an investment in the "I-80 Restaurant". Plaintiff's reliance on the earlier statement is, therefore, unreasonable.

Plaintiff also suggests that the financial statement dated March 31, 1976, is false in that it lists furniture and furnishings of a value of \$25,000.00. Again, while it might be possible to speculate that the furniture and furnishings owned by the defendant were not worth \$25,000.00, plaintiff has failed to prove it.

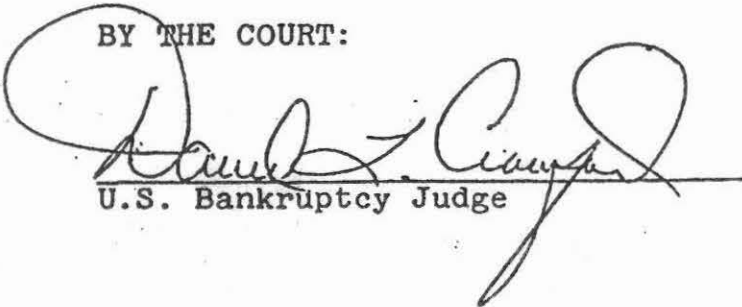
Lastly, plaintiff alleges defendant failed to disclose other loans which plaintiff had made to defendant and were owing at the times of the notes in question. Here, I hold that the plaintiff is chargeable with knowledge of loans which it has made to the defendant and must exercise a minimum of diligence to find out what it has previously done. Plaintiff may not shut its eyes to

Plaintiff also suggests that the March 31, 1976, financial statement listed liabilities of \$64,700.00 when the total liabilities were in excess of that amount. However, the evidence does not support that assertion.

My finding is in favor of the defendants and against the plaintiff. A separate order is entered in accordance with the foregoing.

DATED: December 28, 1979.

BY THE COURT:



U.S. Bankruptcy Judge

Copies mailed to attorneys who entered appearances.