

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

CHARLES R. TURNER,)

CASE NO. BK78-0-854)

BANKRUPT)

JOHN GOODKNIGHT,)

Plaintiff)

vs.)

CHARLES R. TURNER,)

Defendant)

Appearances: Martin A. Cannon
318 South 19th Street
Omaha, Ne. 68102
Attorney for plaintiff

Thomas C. Emery
146 Univac Building
Omaha, Nebraska 68106
Attorney for defendant

MEMORANDUM OPINION

John Goodknight, plaintiff, brought this adversary proceeding for a determination that part of an indebtedness due him from Charles R. Turner, defendant, is nondischargeable in this bankruptcy proceeding. Plaintiff alleges two separate grounds of nondischargeability.

In 1977, Mr. Goodknight was the owner of a 1973 Beechcraft airplane which he was offering for sale. Mr. Turner expressed an interest in the airplane and met with Mr. Goodknight to inspect the plane. The parties came to an agreement of a \$60,000.00 purchase price for the airplane. The initial agreement was that Mr. Goodknight would receive \$10,000.00 in cash and accept a \$50,000.00, six-month note for the balance of the purchase price. Mr. Goodknight received a \$10,000.00 check at that time. The balance was to be secured by a first mortgage

on the airplane to Mr. Goodknight. Mr. Goodknight did not receive the mortgage or the note at the initial meeting. Defendant left his airplane and took Mr. Goodknight's plane with him.

At a later time, Mr. Goodknight contacted Mr. Turner and requested an additional \$34,000.00 cash down payment. Mr. Goodknight proposed that he receive an additional \$34,000.00 and he would accept a \$16,000.00 note for the purchase price secured by a second mortgage on the airplane. Mr. Turner would be allowed to obtain the \$34,000.00 from any other institution and give them a first mortgage on the airplane. Mr. Turner agreed. Thereafter, Mr. Turner gave Mr. Goodknight a check for \$34,000.00 and executed a note for \$16,000.00 and a second mortgage on the airplane.

Mr. Turner actually took title to the airplane in the name of Millard Aviation, Inc., a corporation with which he was associated. In fact, unknown to Mr. Goodknight, Mr. Turner on behalf of Millard Aviation, Inc., gave a first mortgage to the Bank of Papillion in the amount of \$45,000.00.

Defendant has failed to pay in full either the Bank of Papillion note or the Goodknight note.

Initially, defendant argues that defendant obtained the plane itself through the use of false pretenses or false representations pursuant to §17a(2)[11 U.S.C. §35a(2)]. However, Mr. Turner actually obtained the plane based on the initial agreement of a \$10,000.00 down payment with a mortgage back of \$50,000.00. Only thereafter were the arrangements modified. Accordingly, my conclusion is that the defendant did not obtain the plane through the use of false pretenses or false representations.

Plaintiff also suggests that the defendant obtained the title

representations. However, the evidence, it seems to me, does not rise to the level of an actual false pretense or false representation. The evidence before me discloses a rather loose discussion of the method of financing with Mr. Goodknight making certain assumptions and implying compliance with those assumptions from the conduct of the defendant. No doubt Mr. Goodknight expected the first mortgage which was to be given to a third party to be in the amount of \$34,000.00 but the evidence does not support an actual false pretense or actual false representation.

Plaintiff also suggests that defendant was entrusted with the Bill of Sale for the purpose of placing thereon only a \$34,000.00 first mortgage and is guilty of creating a debt by his "fraud, embezzlement, misappropriation or defalcation while acting. . .in any fiduciary capacity" pursuant to §17a(4). However, the term "fiduciary" as used in that statutory language has a narrow meaning, referring to technical or express trusts which exist apart from the particular transaction giving rise to the liabilities claimed to be nondischargeable and not referring either to trusts implied by law from contract or trusts ex maleficio. Davis v. Aetna Acceptance Co., 293 U.S. 328 (1934); 1A Collier on Bankruptcy, Section 17.24; 8 Remington on Bankruptcy, Section 3364-3367; Cowans, Bankruptcy Law and Practice, Section 478. There is no such fiduciary relationship present here.

Neither can I find that there was fraud, embezzlement, misappropriation or defalcation in the creation of a debt to the plaintiff while the defendant was "acting as an officer" pursuant to §17a(4). The debt which was created of the \$45,000.00 was

Notwithstanding the foregoing, the facts before me do support a determination, in my view, of nondischargeability pursuant to the "willful and malicious conversion of property of another" exception of §17a(2). If the transaction had occurred as Mr. Goodknight assumed it would, some third party would have had a first mortgage in the amount of \$34,000.00 and Mr. Goodknight would have had a second mortgage position for \$16,000.00. It can be assumed that the value of the plane at this point in time was \$60,000.00, that being arrived at by Mr. Goodknight and Mr. Turner in an arm's length transaction. The net result would have been that Mr. Goodknight would have had a cushion of \$10,000.00 to protect his second mortgage position. By granting a first mortgage to the Bank of Papillion for \$45,000.00 instead of \$34,000.00, Mr. Turner converted the cushion of \$10,000.00 to his own or his corporation's use, thereby depriving Mr. Goodknight of the cushion which he anticipated. That a person with a security interest has a sufficient property interest in property to have it converted, see Davis v. Aetna Acceptance Co., supra.

Davis v. Aetna Acceptance Co., supra, also defines what are and are not "willful and malicious" conversions. The court said:

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

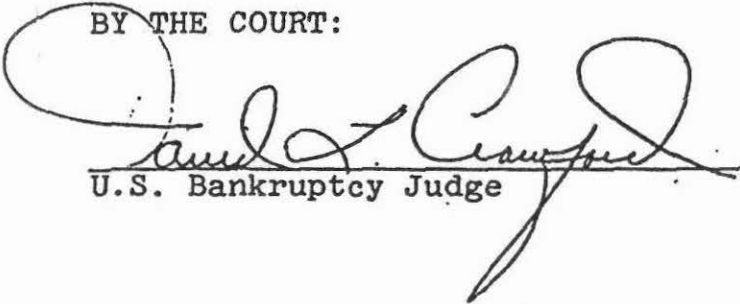
Under the facts before me, it is clear that Mr. Turner realized that Mr. Goodknight's assumption was that the first mortgage placed on the plane was to be only \$34,000.00 and no more. He wilfully disregarded that assumption. I conclude, therefore, that his conduct fits within the meaning of "willful

I should add that although there is evidence before me that the plane has increased in value since the initial transaction, I am unpersuaded by the evidence and am persuaded by the contrary evidence that the plane has declined in value. Accordingly, Mr. Goodknight has suffered actual damage. I find the amount of Mr. Goodknight's damage to be \$11,000.00, the same being the difference between the \$34,000.00 expected and the actual first mortgage of \$45,000.00.

A separate order is entered in accordance with the foregoing.

DATED: December 27, 1979.

BY THE COURT:


U.S. Bankruptcy Judge

Copies mailed to the attorneys who entered appearances.