

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
ANTHONY FRANCIS PAONESSA, ) CASE NO. BK78-0-847  
BANKRUPT )  
JOHN RUMBAUGH, )  
Plaintiff )  
vs. )  
ANTHONY FRANCIS PAONESSA, )  
Defendant )

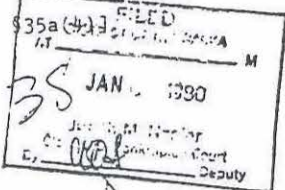
Appearances: Jeffrey H. Jacobsen, Attorney  
P. O. Box 1220  
Kearney, Ne. 68847  
for the plaintiff

Kent Schroeder, Attorney  
Box 1885  
Kearney, Ne. 68847  
for the defendant

MEMORANDUM OPINION

Crawford, United States Bankruptcy Judge.

In this adversary proceeding, plaintiff seeks a determination that an indebtedness due him from the defendant is nondischargeable in this bankruptcy proceeding either as an indebtedness created by false pretenses or false representations pursuant to §17a(2) [11 U.S.C. §35a(2)] or an indebtedness created by the defendant's "fraud, embezzlement, misappropriation or defalcation while acting. . . in any fiduciary capacity" pursuant to §17a(4) [11 U.S.C.



Pursuant to the order on pretrial conference, the parties have agreed that the following may be accepted as established facts for the purposes of this case only:

"Plaintiff is a resident of Kearney, Buffalo County, Nebraska; defendant/bankrupt was, at the time of the filing of his Petition in Bankruptcy, a resident of Kearney, Buffalo County, Nebraska, and is now believed to be residing in Arizona.

"In March, 1978, defendant doing business as T & T Builders entered into a Purchase Agreement with the plaintiff for the construction of a new home on real estate owned by the plaintiff. That said Purchase Agreement is Exhibit No. 1.

"That the construction contract provided for the construction of a house at a cost of Forty-two Thousand Dollars (\$42,000.00). That said figure included an allowance to the plaintiff of Two Thousand Five Hundred Dollars (\$2,500.00) to carpet the house and buy fixtures. That following the execution of the construction contract, an oral agreement was entered into by and between the plaintiff and the defendant to increase the amount of the contract to Forty-two Thousand Five Hundred Dollars (\$42,500.00) to include additional concrete which neither party had figured at the time of execution of the contract. That thereafter the defendant began construction pursuant to the contract and that as provided for in the contract the plaintiff made payment unto the defendant of Three Thousand Two Hundred Dollars (\$3,200.00) on the 1st day of May, 1978, representing eight percent (8%) of the total payment; a payment of Twenty-one Thousand Two Hundred Dollars (\$21,200.00) on the 5th day of May, 1978, representing an additional fifty-three percent (53%) of the total payment. That the defendant did not complete the house as provided by the construction contract and that the plaintiff paid sixty-one percent (61%) of the contract amount to the defendant.

"That on the 14th day of July, 1978, defendant petitioned this Court in voluntary bankruptcy in Proceeding No. BK78-0-847. That the plaintiff was one of the creditors listed by the defendant. That on or about the 16th day of October, 1978, the plaintiff filed a Complaint to Determine Dischargeability of Debt.

"It is further agreed between the parties that on the date of execution of the contract for construction by and between the parties, the plaintiff was the owner of Lot Nineteen (19), Block Two (2), West Villa, a Subdivision of the City of Kearney, Buffalo County, Nebraska; that the plaintiff continued to be the owner of said property and was the owner of said property on the 14th day of July, 1978."

Defendant failed to pay all his materialmen and subcontractors and there resulted therefrom mechanics' liens filed against the plaintiff's property and unpaid bills.

Plaintiff takes the position that §52-123 Neb. Rev. Stat. places the defendant in a fiduciary capacity when he receives money for construction work and fails to apply it upon unpaid subcontractors' and materialmen's bills. However, the Eighth Circuit Court of Appeals has held that this specific statute does not make construction proceeds into trust funds and, accordingly, violation of the statute does not render an indebtedness nondischargeable. See In Re Dloogoff \_\_\_ F.2d \_\_\_, No. 79-1036 (8th Cir. June 14, 1979).

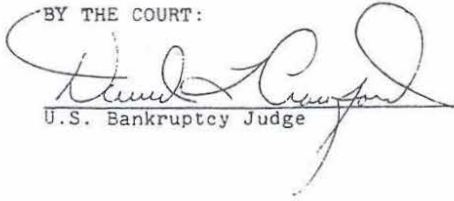
Similarly, §76-239.01 and .02 Neb. Rev. Stat. merely creates an agency relationship and explicitly negates any implication of a trust by permitting the contractor to commingle funds. See In Re Sexson, No. BK78-0-1046 (D. Neb. Dec. 26, 1979) (Crawford, Bankruptcy Judge).

To the extent that plaintiff premises nondischargeability on the allegation that the defendant obtained money by the use of false pretenses or false representations pursuant to §17a(2), the evidence is lacking. At best, the evidence discloses that the defendant said that he needed payment in order to "pay bills". There is no evidence before me to disclose that the defendant promised to pay the specific bills on the plaintiff's project. There is nothing in the written agreement in evidence before me between the plaintiff and the defendant which obligated the defendant to use advances in this manner. All that was required of the defendant was that lien waivers would be furnished before final payment. Defendant received only payments for 61% of completion. In fact, defendant received payment in accordance with the written agreement which provided for periodic payments based upon the amount of completion. He received payment based on nothing more.

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

DATED: January 4, 1980.

BY THE COURT:

  
U.S. Bankruptcy Judge

Copies mailed to attorneys who entered appearances.