UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
CLAUDE J. LIVINGSTON,	)	CASE NO. BK84-596
DEBTOR	)	A84-346
LARRY HENDERSON,	)	
Plaintiff	)	
vs.	)	
CLAUDE LIVINGSTON,	)	
Defendant	)	

MEMORANDUM OPINION

This matter came before the Court on September 25, 1985, in North Platte, Nebraska. Plaintiff, Larry S. Henderson, filed a complaint to determine the dischargeability of a specific debt pursuant to various subsections of §523 of the Bankruptcy Code and filed an objection to discharge pursuant to various subsections of §727 of the Bankruptcy Code. Leroy Anderson of North Platte, Nebraska, and Gary Krajewski of Ogallala, Nebraska, appeared on behalf of plaintiff. Claude J. Livingston appeared pro se.

Issue

Does the sale of cattle by debtor without the permission of the party who holds a security interest in the cattle amount to such a serious act that either the specific debt obligation of the secured party should not be discharged or the debtor should be denied a discharge?

Decision

Debtor shall not be denied a discharge. Debtor's obligation to plaintiff is not dischargeable.

Facts

The debtor, Claude J. Livingston, was a farmer in Hayes County, Nebraska. He also was the president, director, manager, chief employee and 80% stock owner of a Nebraska corporation known as C.J.L. Ranch Co., Inc. His wife owned the remaining 20% of the stock

Larry Henderson is a rancher from the Whitman, Nebraska, area. In November and December of 1978 Mr. Henderson advertised the sale of cows. Mr. Livingston responded to the ad by telephone and then visited the ranch and viewed the cows. Henderson and Livingston discussed an installment purchase agreement. Their oral discussion concerned the purchase price, delivery, brand, interest rate and number of cows.

On or about December 20, 1978, Livingston called Henderson and agreed to the purchase price and the interest rate and requested delivery of the cows as soon as possible. Without any written agreement, Henderson delivered to Livingston 500 head of mixed cows and provided the appropriate brand releases under the Nebraska Brand Law.

In the meantime, Henderson had his attorney draw an agreement which incorporated the oral agreement of the parties. He then sent the agreement, a security agreement and a financing statement to Livingston. The sale document, entitled "Agreement for Sale of Livestock" is dated January 3, 1979. The typed document indicated that the seller was Larry S. Henderson and the buyer was Claude J. Livingston. It listed the number of head of livestock as 500; the purchase price of $260,000 payable in annual installments of $39,375 each; specified that the payment would be made on or before November 1 of each year and further specified that Henderson would purchase from Livingston 175 heifer calves per year for the annual purchase price of $39,375. The agreement further specified that the heifer calves to be purchased and delivered should be heifer calves out of the cows being purchased by Livingston or out of cows of equivalent quality.

The agreement had a number of other terms, but the important terms for the determination of this case are that the cows were presently branded with Henderson's brand and would be rebranded by Livingston with the Livingston brand; that Henderson would be granted a security interest in the livestock with financing statements to be filed in the appropriate counties; and that each year when Henderson received 175 heifer calves he would release 50 head of cows from the security agreement.

When the documents were returned from Livingston, the sale agreement was signed by C.J.L. Ranch Co., Inc., Claude J. Livingston, President, above the name of Claude J. Livingston. On the portion of the contract that indicated the name of the buyer Mr. Livingston had placed, in handwriting, "C.J.L. Ranch Co., Inc." and had placed his initials CJL next to the change.

On the security agreement which listed Claude J. Livingston as the debtor, he signed it "C.J.L. Ranch Co., Inc., Claude J. Livingston, President."

On the financing statement, which was not filed in Hayes County, Nebraska, until December 7, 1979, the debtor was listed as "Livingston, Claude J. and C.J.L. Ranch Co., Inc." The signature was that of Claude J. Livingston, president of C.J.L. Ranch, Inc.

There is a dispute in the testimony as to what occurred next. Mr. Henderson claims that Mr. Livingston called him and explained that he had inserted the corporation as the buyer because he always did his business through the corporation,but that he, Mr. Livingston, would be responsible for the purchase price. Based upon those assurances, Mr. Henderson initialed the change in the name of the buyer on the sale document only. On the other hand, Mr. Livingston claims that he always had represented himself as an officer of the corporation in all of the negotiations with Mr. Henderson and made it clear to Mr. Henderson that the corporation should be named as the buyer and the debtor.

The testimony of Mr. Henderson is more credible than that of Mr. Livingston. First, Mr. Henderson was responsible for preparing and paying for the preparation of the written contract which embodied the agreement of the parties. There is no reason to believe he would be consistent in listing Claude Livingston as the buyer on all of the documents if there had been specific conversations with regard to the buyer and debtor being a corporation. Next, the portion of the sale contract which discusses the brand being placed upon the livestock is significant. Paragraph 5 of the sale contract states "the cows are presently branded with Henderson's brand, and will be rebranded by Livingston with Livingston's brand." It further goes on to state "calves will be branded with Livingston's brand, and the heifer calves delivered to Henderson may be rebranded by Henderson following delivery to him as herein provided."

The evidence shows that the corporation is not the owner of a registered brand in the State of Nebraska and has never been the owner of such a brand. Therefore, the reference to "Livingston's" brand must have been to a brand owned by Mr. Livingston and not the corporation. The evidence shows that he and other members of his family are the owners of a brand called the "Apple F" brand.

In summary, Henderson delivered 500 head of livestock to Livingston, believing that he was dealing with an individual. He had documents prepared which represented the sale agreement, the security agreement and the brand release based upon his understanding that he was dealing with an individual.

On November 1, 1979, and approximately November 1, 1980, the annual payments were made by the delivery of the appropriate number of heifer calves. In November of 1981, 97 calves were delivered from the ranch operated by Claude Livingston's son and 78 were delivered from the Ogallala livestock sale barn. After receipt of the heifer calves in each year, Henderson released 50 cows annually from the security agreement or a total of 150 cows.

Each year Mr. Henderson attempted to inspect the livestock that he had a security interest in. However, they were spread across several hundred acres of land and, although he did see some of them on each trip, he was not able to make an accurate count. Neither Mr. Livingston nor any other employee of C.J.L. Ranch Co., Inc., informed Mr. Henderson that some of the livestock which was his collateral had been sold prior to his inspection.

The evidence shows that cows with the Henderson brand were sold by Mr. Livingston on April 19, 1979; January 10, 1980; April 17, 1980; and on a regular basis thereafter. The records show that at least 67 of the cows subject to the security agreement were sold by April 17, 1980. The evidence further shows that more sales were made throughout 1980 and 1981.

Mr. Livingston testified that he traded some of the cows which were collateral of Mr. Henderson to his son for land lease payments or equipment lease payments. He also testified that he didn't know that he could not sell the collateral without permission of Mr. Henderson and that, in any event, Mr. Henderson knew that the cattle were being sold. This testimony is not believable.

Mr. Livingston was an experienced cattle buyer and rancher. He had entered into very similar agreements prior to purchasing the cattle from Mr. Henderson. He, individually, or on behalf of his corporation, had previously sold cattle which were subject to a security interest without first obtaining permission of the seller. He was familiar with the procedure, failed to obtain permission prior to sale, failed to adequately explain either to Mr. Henderson or to the Court the disposition of cattle that he claimed were ill, dry, or died during the term of the contract.

In October and November of 1981, Mr. Henderson became aware that the heifer calves that he was to receive in 1981 would come only partially from the cattle he had sold to Mr. Livingston. The balance would be purchased at the Ogallala livestock auction. At that time he discussed the matter with Mr. Livingston and was then made aware that most, if not all, of the cattle in which he had a security interest had been sold. He immediately took steps to round up the remaining cattle and was successful in retaking 44 of the cows with his brand upon them

Mr. Livingston eventually filed for protection under Chapter 7 of the Bankruptcy Code.

At trial, Mr. Livingston admitted that in late 1978 and early 1979 when the purchase contract was entered into with Mr. Henderson, the corporation C.J.L. Ranch Co., Inc., had no assets that were unencumbered. In addition,the corporation was the subject of a series of lawsuits and that he had individually been sued. He admitted that he did not discuss the financial structure of C.J.L. Ranch Co., Inc., with Mr. Henderson.

This Court finds that Mr. Livingston induced Mr. Henderson to deliver 500 head of cattle based upon an oral agreement which was later put into writing by Mr. Henderson. Mr. Livingston then induced Mr. Henderson to agree that he would look both to the corporation and to Mr. Livingston for the completion of the contract. Mr. Livingston, individually and as a corporate officer, caused the collateral of Mr. Henderson to be sold without permission of or knowledge by Mr. Henderson. Mr. Livingston personally benefited from the sale of the collateral in the form of wages and benefits from the corporation and continuing operation of the ranching business prior to the filing of the petition in bankruptcy.

The contract of sale was with Livingston individually and, by later amendment, included the corporation. Although Livingston did not individually sign the documents, he took possession of the cattle, branded some with his personal brand, sold some in his individual capacity and, in his capacity as officer of a corporation, caused collateral covered by a security agreement to be sold without permission of the secured party.

He owed the debt to Henderson, as did the corporation. He breached the terms of the security agreement. Finally, he committed the tort of conversion by his acts, thereby injuring Henderson in the amount of the balance due on the contract.

Conclusions of Law

This complaint was filed in two counts. The first count objecting to the discharge of Mr. Livingston and alleging facts which plaintiff believed were sufficient to obtain a denial of the discharge under §727 and its various sub-parts. After having the opportunity to observe the witnesses, review the evidence, listen to final arguments and read the briefs submitted following the trial, it is the opinion of this Court that none of the facts which were proved by the plaintiff are sufficient to deny debtor a discharge under §727. Therefore, no further discussion of §727 will be included in this opinion.

Count 2 of the complaint alleges that the sale of the cows covered by plaintiff's security interest and the use of the proceeds by the debtor was a conversion of the collateral and that such conversion was willful and malicious on the part of the debtor. Based upon those allegations, the plaintiff believes that the specific indebtedness to plaintiff is nondischargeable under the provisions of §523(a)(2); (4); and (6). The actual complaint cites §323, but it is clear from the evidence that was presented, the argument of counsel and the brief that there was simply a typographical error in the complaint and that §523, exceptions to discharge, is the appropriate section being referred to by plaintiff.

The exceptions to discharge being relied upon by plaintiff are listed at 11 U.S.C. §523. Those sections read as follows:

> §523. Exceptions to discharge.
>
> (a) A discharge under §727, 1141 or 1328(b) of this Title does not discharge an individual debtor from any debt--
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting a debtor's or an insider's financial condition;
>
> (B) the use of a statement in writing--
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive.

(Subsection (C) is not applicable to his case.)

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

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

Based upon the evidence and the findings of fact listed above, the only portions of §523 which may be applicable are §523(a)(2)(A), false pretenses, a false representation or actual fraud; §523(a)(6) for willful and malicious injury to the property of the creditor.

The conclusion that this Court reaches after review of all of the evidence and the pertinent statutes and case law is that Claude J. Livingston, individually, converted collateral of Larry Henderson for his own use and that such conversion was willful and malicious and caused injury to Larry Henderson by causing him a specific monetary loss. This conclusion is reached by the following analysis.

Larry Henderson owned a registered brand under the Nebraska Brands and Marks Statute, Chapter 54 of the Reissue Revised Statutes of Nebraska, 1943. Section 54-109 of that statute provides that documentary evidence concerning brand registration is prima facie evidence of the ownership of animals carrying the registered brand. Pursuant to the sale agreement between Henderson and Livingston, Henderson was to release his brand registration on the 500 head of cattle and Livingston was to replace his own registered brand upon the cattle. Through negotiation Mr. Livingston was able to convince Mr. Henderson that the documents should be amended to list the corporation as the buyer, but he did not and could not rebrand the cattle with a registered brand of the corporation because the corporation did not have a brand. Mr. Livingston, individually and with other members of his family, owned the Apple F brand which was placed upon some of the cattle.

The brand release or brand inspector's local inspection certificate executed by the brand inspector on or about the date the cattle were transferred from Larry Henderson to the buyer indicate that the seller is Larry Henderson and the buyer is Claude Livingston.

Claude Livingston put his brand on a number of the cattle and Claude Livingston individually or as a representative of the corporation sold the cattle throughout 1979, 1980 and 1981.

Claude Livingston initially negotiated the purchase of the cattle without any indication that a corporation was involved. Eventually the name of the corporation was placed on most of the sale documents and security instruments but Mr. Livingston was careful to sign each of the documents as an officer of the corporation.

It is the conclusion of this Court it does not matter who was the "buyer" of the cattle according to the documents. As between the seller and Claude Livingston, either in his individual capacity or in his capacity as a corporate officer, the seller maintained a security interest in the cattle which was perfected. The cattle were resold without consent of Henderson and Claude Livingston individually and in his capacity as a corporate officer and majority shareholder of the corporation caused the sale of the cattle in direct violation of the terms of the security agreement. Then, Claude Livingston, either in his individual capacity or in his capacity as a corporate officer and controlling person of the corporation, used the proceeds of the sale of the collateral for his own benefit.

There is no credible evidence that Mr. Henderson was aware of the sales of cattle or that he granted permission for the sales of cattle which were subject to the security interest.

For the plaintiff to succeed in obtaining a denial of the dischargeability of a debt owed to the plaintiff for conversion, the plaintiff must prove that a conversion occurred (thereby causing injury to the plaintiff) and that the injury was willfully and maliciously caused by the debtor. Section 523(a)(6).

In this case there has been a finding that a conversion occurred. The plaintiff didn't get paid and didn't get his collateral and, therefore, has been injured.

The term "willful" as used in §523(a)(6) means intentional or deliberate. See <u>In Re Long</u>, 774 F.2d 875, 880 (8th Cir. 1985); <u>Matter of Morgan</u>, 22 B.R. 38, 39 (Bkrtcy. D. Neb. 1982).

In discussing the definition of malice in the context of a §523(a)(6) question, the Eighth Circuit in the <u>Long</u> case cited above stated at page 881:

> "When transfers in breach of security agreements are in issue, we believe nondischargeability turns on whether the conduct is (1) headstrong and knowing ("willful") and (2) targeted at the creditor ("malicious"), at least in the sense that the conduct is certain or almost certain to cause financial harm"

The Eighth Circuit went on to say

> "While intentional harm may be very difficult to establish, the likelihood of harm in an objective sense may be considered in evaluating intent." 774 F.2d, 875 at 881.

The Long case was similar to this case in that the president of a corporation caused collateral to be sold and instead of paying the proceeds over to the creditor pursuant to the agreement, the president put the money in a separate corporate bank account. The comparison ends at that point, however, because the president of the corporation in the Long case used the proceeds in an attempt to keep the business going with a view towards improving the position of the creditor and all other creditors. Mr. Long was a guarantor of the loans and when he filed individual bankruptcy the creditor attempted to have his dischargeability on a particular debt denied.

The Court found that the conversion of collateral alone was not sufficient to deny the dischargeability of the debt. In addition, the Court found that the intent of Mr. Long was not to harm the creditor but to keep the business going long enough to enable all creditors to be paid. The Court found that while Mr. Long committed a tort, it agreed that the lower court was correct in determining that he did not act maliciously as the term is used in §526(a)(6).

In the case before this Court, however, the evidence is that Mr. Livingston, shortly after the execution of a security agreement, began systematically selling collateral and continued to do so for two or three years with full knowledge that the corporation was in great financial stress and that it was unlikely that the use of the proceeds of the collateral by the corporation would in any way benefit Mr. Henderson. This Court finds that Mr. Livingston intended the harm to Mr. Henderson by selling the collateral, keeping the proceeds, failing to inform Mr. Henderson of the use of the cattle or the proceeds and with full knowledge that the sale of the cattle and the use of the proceeds would be substantially certain to injure Mr. Henderson. As Mr. Livingston continued with his sales scheme, it had to become clear to him that the corporation had no assets with which to repay Mr. Henderson and no ability to replace the collateral in order to protect the interests of Mr. Henderson.

Mr. Livingston committed a tort, his conduct is disapproved, his actions were wilful and malicious, he intended and fully expected to harm the economic interests of Mr. Henderson and, therefore, his individual obligation to Mr. Henderson, which he asserts is an obligation of the corporation, is not dischargeable.

Separate judgment will be entered.

DATED: December 9, 1985.

BY THE COURT:

U.S. Bankruptcy Judge

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