

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

LOUISE PATTERSON,

DEBTOR

LOUISE PATTERSON,

Plaintiff

vs.

AERO MAYFLOWER TRANSIT
COMPANY, WALD BAYTOWN
SERVICES, INC.,

Defendants

CASE NO. BK81-91

A81-565

MEMORANDUM

This matter comes before the Court upon defendant's motion to dismiss for failure to state a claim upon which the relief may be granted pursuant to Federal Rule of Civil Procedure 12(b). At the heart of the matter is the plaintiff's complaint alleging both actual and punitive damages due to "great emotional distress and suffering".

The facts presented in the complaint are as follows: On January 19, 1981, the time of filing of the Chapter 13 petition, the plaintiff/debtor Louise Patterson's personal property was in the possession of the defendant in a warehouse in Baytown, Texas. Defendants' continued possession was based upon the debtor's inability to pay the cost of storage and transportation of the goods from Texas to her home in Hartington, Nebraska. Upon receiving from her father the necessary funds to reacquire possession, \$2,390.23, the debtor mailed that same day to Wald Baytown Services a money order for that amount. After receipt of this money order, defendants refused to deliver plaintiff's household goods and continued to charge storage to her because included in those detained goods were goods purchased from Gambles in which Gambles claimed a bona fide purchase money security interest, this according to plaintiff's complaint. The debtor's attorney then entered into a agreement with the attorney for Gambles and the attorney for the defendants whereby the goods could be delivered to a Gambles' location in Hartington, Nebraska. The goods were delivered to Gambles, but defendants required Gambles to pay an additional sum of \$323. In her prayer, the plaintiff contends that the actions of the defendants in refusing to deliver her goods subsequent to her payment of the amount

demanding by them on April 21, 1981, were ". . . illegal, unjustified, cold hearted and mean and have resulted in Plaintiff being unable to obtain her worldly goods from Gambles and have caused her great emotional distress and suffering." The plaintiff prays for actual damages in the amount of \$10,000 and punitive damages in the amount of \$20,000. It is the contention of defendants, based upon the presentation in court and brief, that the complaint is deficient under Nebraska law and accordingly, fails to state a claim upon which relief can be granted.

A threshold issue raised by the debtor's counsel at the hearing on the motion to dismiss is the proper choice of law. Both counsel agree that state law is applicable under Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938), but the plaintiff argues that Texas law, not Nebraska law as the defendants contend, is controlling. Restatement, Second, Conflict of Laws, §6. provides the following guidance:

- "(1) A court, subject to constitutional restrictions will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.

Further, section 145. Restatement, Second, Conflict of Laws says of issues in tort,

- "(1) The rights and liabilities of the parties. . . are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.
- (2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:
 - (a) the place where the injury occurred,
 - (b) the place where the conduct causing the injury occurred,
 - (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and,
 - (d) the place where the relationship, if any, between the parties is centered.

"These contacts are to be evaluated according to their relative importance with respect to the particular issue."

The Restatement, §6 provides that where, as in this state, no statutory directives exist, subsection (2) is controlling. In analyzing the factors relevant to the choice of applicable law, I find that the law of the State of Nebraska should apply in this case. Policy in Nebraska, at least with regard to physical-injury torts, is to follow the law of the place where the accident occurred. [See Crossley v. Pacific Employees' Insurance Co., 198 Neb. 26, 251 N.W. 2d 383 (1977)]. That forum's law is to govern not only the amount of recovery but the right to recover. Crossley cites section 146 of the Restatement which states in part, "In an action for a personal injury, the local laws of the state where the injury occurred determine the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship. . . ." Crossley, supra, at Neb. 30. It seems clear in Nebraska, that the policy is to provide avenues for compensation according to the law of the forum most likely called upon to furnish immediate services and support to injured parties. Policies of the other interested states, in this instance Texas, are insufficient under this fact situation to override use of Nebraska law. While the household goods were indeed detained in the state of Texas, the injury itself, that is, the mental distress, was produced in the plaintiff while within the state of Nebraska. From all allegations in the complaint, including references to Ms. Patterson's home in Hartington, she was at the time of the alleged injury a resident of this state. The expectation that she would be subject to Nebraska state law rather than Texas law when bringing this tort action is reasonable. There seems as well no hazard of the use of Nebraska's law's destroying uniformity, certainty or predictability of the result of such litigation. An interstate carrier, as Aero Mayflower would appear to be, might reasonably expect the law of the state where injury to an individual or his goods occurred to be controlling in any suit regarding the same. Therefore, I find as fact that by use of the guidelines of the Restatement, Second, Conflict of Laws both choice of law principles and general principles in tort, the state which has the most significant relationship to the occurrence and the parties in this particular suit is the state of Nebraska. The conduct causing the purported injury would have occurred within the state of Texas; however, the injury itself was inflicted upon a party within the state of Nebraska whose residence, if not domicile, was this state. Accordingly, the law of the state of Nebraska shall be applied in resolving this conflict.

Cited to this Court is §46 Restatement 2nd of Torts, which provides,


"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

The Nebraska Supreme Court case Paasch vs. Brown, 193 Neb. 368, 227 N.W. 2d 402 (1975), points to that section of the Restatement Torts as representative of the law in this state. The Court there held that liability in emotional distress cases can lie only where the conduct in question has been ". . .so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Nowhere in the complaint has the plaintiff alleged that the defendants' actions were of this nature. As in Paasch, supra, a case of failure to promptly comply with provisions of a court decree, a mere insistence in a permissible manner upon what the defendant sees as its right to payment is not actionable under this tort even though the defendant may be well aware that such insistence will cause emotional distress.

There is allegation of neither intentional infliction of emotional distress, outrageous actions, nor assertion of negligent infliction of mental distress in the pleadings forwarded by the plaintiff.^{1/} Accordingly, the complaint must be dismissed for failure to state a cause of action upon which relief can be granted. A separate order is entered in accordance with the foregoing.

DATED: September 10, 1982.

BY THE COURT:


U.S. Bankruptcy Judge

^{1/} It must be noted that the negligent infliction of emotional distress, according to the Nebraska case Fournell vs. Usher Pest Control, 208 Neb. 694 (1981), requires some showing of bodily harm or other compensable damage before liability may accrue. No such allegations are made in the pleadings.

Copies mailed to:

Robert F. Craig, Attorney, 1900 One First Nat'l. Center, Omaha, Ne. 68102
Daniel K. Powers, Attorney, 1015 Park Ave., Omaha, Ne. 68105