IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK03-43137
	)	A03-4123
JOEL D. BAUMAN,	)	
	)	CH. 7
Debtor(s).	)	
BOB MANN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOEL D. BAUMAN,	)	
	)	
Defendant.	)	

MEMORANDUM

Trial was held in North Platte, Nebraska, on September 20, 2004, on the adversary complaint. P. Stephen Potter appeared for Bob Mann, plaintiff, and W. Eric Wood appeared for debtor/defendant Joel D. Bauman. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I) and (J).

The debtor ran a cow-calf operation. He purchased hay from the plaintiff for the cattle, and had done so for several years. When he needed hay, he would call the plaintiff, tell the plaintiff how much he needed, and the plaintiff would find hay. The debtor and the plaintiff would then discuss the price, and the plaintiff would deliver the hay after weighing it. The plaintiff would present an invoice for the purchase price, with scale tickets attached, to the debtor for payment.

The debtor financed his cattle operation through the First National Bank of Gothenburg. Each January he met with a banker to discuss his financial needs, and the bank would grant the debtor an operating line of credit. As checks written by the debtor for cows or hay or other expenses for the operation were presented to the bank, the bank advanced funds from the line of credit to pay the checks. As the debtor sold animals and received the proceeds of those sales, the debtor deposited those proceeds with the bank. Usually, the bank, immediately upon receipt of the funds, withdrew some or all of the funds from the checking account and applied them to the outstanding balance on the operating line. These transactions were reflected on the debtor's monthly bank statements.

In the ordinary course of the debtor's business, it did not matter what amount was in the checking account when the debtor wrote checks. The reason it did not matter is that the operating line of credit would be drawn upon to pay the outstanding checks.

In January 2003, the bank and the debtor entered into the annual operating line. The debtor testified that the operating line for 2003, as approved by the bank in January 2003, was $200,000 to $300,000. In April of 2003, the debtor sold cattle and deposited proceeds in an amount exceeding $100,000. At the same time, the bank applied those deposits to reduce the line of credit by more than $100,000.

The plaintiff delivered hay to the debtor on April 21, 2003, and presented the debtor with a bill for $9,004. The debtor wrote a check dated April 22, 2003, for the amount of the invoice. The plaintiff presented the check to his bank as a deposit. A few days later the check was returned to him marked by the debtor's bank "return to maker." The plaintiff re-deposited the check and it was once again rejected.

The plaintiff then contacted the debtor and informed him that the check was not honored by the bank. The debtor went to the bank and asked why the check had not been honored. The banker informed him that it was time to stop the operation and therefore they would not advance funds to pay the $9,004 check, nor another check in the approximate amount of $12,000, payable to a company that provided services to the debtor.

The bank's collateral for its line of credit and other notes included all of the cows and calves, which needed to be fed. At that time, the debtor's operation was large enough to employ the services of a helper. The bank agreed to allow the debtor to write checks for operating expenses, including the wages of the helper, natural gas, and some supplies. Each check had to be approved by the bank prior to its delivery to the recipient. The bank also agreed to permit the debtor to continue to purchase hay to feed the cattle which were its collateral. However, in that situation, the debtor would inform the bank how much hay was needed and what it would cost, and the bank would make a cashier's check payable to the debtor and to the plaintiff. They continued that practice for several months until the cattle were eventually sold.

The only checks that the debtor has ever had dishonored by the bank are the check which is the subject matter of this adversary proceeding and the other check to the provider of services. The bank simply refused to honor the checks and would not allow the debtor to use the bank's collateral to pay the amounts due.

The plaintiff has sued the debtor for fraud and has requested the court to determine that the $9,004 obligation represented by the dishonored check is non-dischargeable under 11 U.S.C. § 523 and is cause for a denial of discharge under 11 U.S.C. § 727.

The position of the plaintiff is that, on the date the check was written, the debtor did not have sufficient funds in his checking account to cover the check. The debtor knew or should have known that he did not have sufficient funds to cover the check, and yet he wrote the check and received the hay. To the plaintiff, such action is fraudulent as to him.

However, the balance in the checking account on any particular day is irrelevant. The debtor's arrangement with the bank was to honor checks written in support of the cattle operation. Since 1990, the bank had honored all of the checks. The bank gave no notice to the debtor that it had decided not to honor checks written after a certain date. The debtor had no knowledge that the course of business between the bank and the debtor had changed prior to writing the check.

There is no evidence that the debtor intended to defraud the plaintiff.

The debtor has requested this court to impose sanctions on the plaintiff for filing this action and pursuing this action to trial. It is the position of the debtor that there was no legal or factual basis for bringing such an action and therefore the filing of it and the continuation of it through trial is a violation of Federal Rule of Bankruptcy Procedure 9011. However, because there was, from the beginning, a fact question concerning the debtor's knowledge of the position of the bank and a fact

question with regard to the relevancy of the balance of his checking account on the day he wrote the check, it appears that the plaintiff had a reasonable basis for initiating and prosecuting this action through the trial level. Therefore, the request for sanctions will be denied.

A common basis upon which to allege the non-dischargeability of a dishonored check is 11 U.S.C. § 523(a)(2)(A), on the theory that tender of the check is an implied representation that sufficient funds to cover it are in the account. Section 523(a)(2)(A) excepts from discharge debts "for money, property [or] services . . . to the extent obtained by false pretenses, a false representation, or actual fraud".

To establish fraud within the context of § 523(a)(2)(A), the creditor must show, by a preponderance of the evidence, that: (1) the debtor made a representation; (2) the representation was made at a time when the debtor knew the representation was false; (3) the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such representation; and (5) the creditor sustained a loss as the proximate result of the representation having been made. Universal Bank, N.A. v. Grause (In re Grause), 245 B.R. 95, 99 (B.A.P. 8th Cir. 2000) (citing Thul v. Ophaug (In re Ophaug), 827 F.2d 340, 342 n.1 (8th Cir. 1987), as supplemented by Field v. Mans, 516 U.S. 59 (1995)).

"The intent element of § 523(a)(2)(A) does not require a finding of malevolence or personal ill-will; all it requires is a showing of an intent to induce the creditor to rely and act on the misrepresentations in question." Merchants Nat'l Bank v. Moen (In re Moen), 238 B.R. 785, 791 (B.A.P. 8th Cir. 1999) (quoting Moodie-Yannotti v. Swan (In re Swan), 156 B.R. 618, 623 n.6 (Bankr. D. Minn. 1993)). The intent to deceive will be inferred when the debtor makes a false representation and knows or should know that the statement will induce another to act. Id. (quoting Federal Trade Comm'n v. Duggan (In re Duggan), 169 B.R. 318, 324 (Bankr. E.D.N.Y. 1994)).

As explained above, there has been no evidence of intent to deceive the plaintiff.

Another potential basis for excepting a debt such as this from discharge is 11 U.S.C. § 523(a)(6), which covers "willful and malicious injury" by the debtor.

> For purposes of this section, the term willful means deliberate or intentional. See Kawaauhau v. Geiger, 523 U.S. 57, 61, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) (§ 523(a)(6) requires deliberate or intentional injury); In re Long, 774 F.2d 875, 881 (8th Cir. 1985) (to meet willfulness component of § 523(a)(6), debtor's actions creating liability must have been "headstrong and knowing"). To qualify as "malicious," the debtor's actions must be "targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause financial harm." In re Long, 774 F.2d at 881.

Hobson Mould Works, Inc. v. Madsen (In re Madsen), 195 F.3d 988, 989 (8th Cir. 1999).

There has been no showing here that the debtor deliberately acted to cause the plaintiff financial harm.

It is unclear from the complaint what subsection(s) of 11 U.S.C. § 727 the plaintiff might be relying on in arguing that the debtor should be denied a discharge altogether. To the extent the plaintiff is asserting § 727(a)(4), which deals with debtors who knowingly and fraudulently make a

false oath or account in connection with the case, it does not appear applicable to the circumstances of this case. This section is often applied to debtors who sign bankruptcy schedules which omit material information or contain false information. See Jordan v. Bren (In re Bren), 303 B.R. 610 (B.A.P. 8th Cir. 2003). Again, this section requires a showing of fraudulent intent, which has not been made here.

Another subsection of § 727 that may be applicable is § 727(a)(5), which denies a debtor a discharge if he or she has failed to explain satisfactorily any loss of assets or deficiency of assets to meet his or her liabilities. Section 727(a)(5) does not contain an intent element as part of its proof. First State Bank of Newport v. Beshears (In re Beshears), 196 B.R. 468, 473 (Bankr. E.D. Ark. 1996). Under this section, when the plaintiff demonstrates a loss of assets, the burden of proof shifts to the debtor to explain the loss. United States v. Hartman (In re Hartman), 181 B.R. 410, 413 (Bankr. W.D. Mo. 1995). The debtor must "explain his losses or deficiencies in such a manner as to convince the court of good faith and businesslike conduct." Miami National Bank v. Hacker (In re Hacker), 90 B.R. 994, 996 (Bankr. W.D. Mo. 1987) (quoting 1A Collier on Bankruptcy ¶ 14.59 at 1436 (14th ed. 1976)).

To the extent that section is applicable to the present case, the debtor explained, and showed via his bank statement, that the bank swept his checking account shortly after he deposited more than $100,000 in April 2003 – funds which he thought would be available to cover checks he was writing, such as the one to Mr. Mann. The bank made a unilateral decision to cut off the advances on the debtor's operating line of credit. The debtor was not aware of that decision until it was too late. The evidence here cannot support a finding that the debtor should be denied a discharge under § 727(a)(5).

Lastly, a request for sanctions has been made. Sanctions under Rule 9011 may be awarded if counsel files a pleading that has no chance of success under existing legal precedent and fails to advance a reasonable argument for extending, modifying, or reversing the law. Halverson v. Funaro (In re Frank Funaro, Inc.), 263 B.R. 892, 900 (B.A.P. 8th Cir. 2001). Rule 9011 also imposes a continuing duty on the plaintiff to dismiss a cause of action upon learning, or having reason to learn, that he or she will not be able to offer evidence sufficient to sustain the burden of proof. Id. at 903-04.

As noted above, however, fact issues existed in this case which survived a motion for summary judgment and brought the case to trial. Therefore, the case does not violate Rule 9011 and the request for sanctions is denied.

Separate judgment will be entered in favor of the debtor. The debt at issue is discharged.

DATED this 22nd day of September, 2004.

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
P. Stephen Potter W. Eric Wood U.S. Trustee

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Plaintiff,	)	
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vs.	)	
	)	
JOEL D. BAUMAN,	)	
	)	
Defendant.	)	

JUDGMENT

Trial was held in North Platte, Nebraska, on September 20, 2004, on the adversary complaint. P. Stephen Potter appeared for Bob Mann, plaintiff, and W. Eric Wood appeared for debtor/defendant Joel D. Bauman.

IT IS ORDERED: Judgment is hereby entered in favor of the defendant and against the plaintiff, for the reasons stated in the Memorandum filed contemporaneously herewith. The debt is discharged.

DATED this 22nd day of September, 2004.

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
P. Stephen Potter
W. Eric Wood
U.S. Trustee