

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

DONALD D. RUBEK, JR.,

BANKRUPT

ROBERT L. PATTERSON and  
MARGARET A. PATTERSON,

Plaintiffs

vs.

DONALD D. RUBEK, JR.,

Defendant

CASE NO. BK79-0-909

MEMORANDUM OPINION

In this adversary proceeding, plaintiffs seek a determination that an indebtedness due them is nondischargeable pursuant to the false pretenses or false representations portion of §17a(2) [11 U.S.C. §35a(2)].

The bulk of the facts are uncontroverted and appear as follows in the Order on Pretrial Conference:

- (1) That Plaintiffs and Defendant entered into a contract by which Defendant was to furnish material and perform labor to improve Plaintiffs' house in exchange for the sum of \$8,078.34, to be paid by Plaintiffs to Defendant.
- (2) That Plaintiffs paid to Defendant, pursuant to the contract, the sum of \$8,078.34.
- (3) That the Defendant failed to complete the contract.
- (4) That Defendant, without notification to Plaintiffs, kept the sums paid by Plaintiffs, and removed himself from the State of Nebraska to the State of Oregon.
- (5) That Defendant failed to pay suppliers of materials used in the partial completion of the contract, resulting in the filing of mechanic's liens in the sum of \$1,134.00 against the plaintiffs' real property by the suppliers.
- (6) That criminal proceedings were commenced against the Defendant in the County Court of

the suppliers, in violation of the laws of Nebraska; that the Defendant entered a plea of guilty to said charge; was adjudged guilty, and sentenced to make restitution to the Plaintiffs for the sum of \$1,285.55.

(7) That Plaintiffs commenced suit against Defendant for breach of contract, in the Circuit Court of the State of Oregon for Lane County.

(8) That the Defendant entered a Confession of Judgment in said action in the amount of \$4,385.05.

(9) That Judgment was rendered by the Court in favor of Plaintiffs, and against the Defendant, in the sum of \$4,385.05.

(10) That in exchange for the Plaintiffs' foregoing of efforts and actions to collect said Judgment, the Defendant agreed to pay to the Plaintiffs the full amount of the Judgment, together with interest computed at 8% per annum, at the rate of \$100.00 per month.

(11) That pursuant to the Defendant's promise, the Plaintiffs did forego all legal actions to collect the sums due them under the Judgment.

(12) That the Defendant tendered one payment of \$50.00 to the Plaintiffs' attorney, which was refused as not in compliance with their agreement.

(13) That the Defendant then, without notice to the Plaintiff or his attorney, removed himself from the State of Oregon to the State of Nebraska.

(14) That the Defendant has failed to make any payments in satisfaction of the Judgment as previously promised and agreed.

(15) That on the 26th day of July, 1979, the Plaintiffs filed an action in the District Court of Sarpy County, Nebraska, to register the Oregon Judgment against the Defendant.

(16) That the Defendant filed a voluntary petition in bankruptcy on the 3rd day of August, 1979, naming the Plaintiffs as creditors therein.

(17) That the Defendant filed a "Suggestion in Bankruptcy" in the action to register the foreign judgment against him, thus interrupting further action in that suit.

Other facts appearing from the testimony at trial disclose that defendant, who was just beginning his own construction business, entered into his first major construction contract with the plaintiffs and promptly underbid it. Not knowing at the

beginning that he had underbid the project, defendant began construction of his portion of the construction contract. He obtained three periodic payments from the plaintiffs. At a later date, a garage floor which had been installed by defendant had to be redone which added to his cost override. The fact that he at the beginning had to pay cash for materials purchased by him apparently did not help his financial situation. Ultimately, defendant breached his contract with the plaintiffs by failing to complete the work.

Plaintiffs' main argument is that the defendant obtained the money from plaintiffs because he had no intention of completing the work when he received the money. However, having observed the defendant's testimony, the Court concludes that there is insufficient evidence before me to reach that conclusion. Conversely, I find that the defendant had every intention at the time he received the payments of completing the job. At best, the evidence discloses an inexperienced contractor who underbid a project and was forced to do extra work besides who ultimately discovers his error of judgment and breaches his contract.

Plaintiffs also allege that when they obtained their judgment against the defendant in Oregon, that defendant agreed to make \$100.00 per month payments on the judgment and failed to do so. Here again, plaintiffs allege that defendant obtained money or property by false pretenses or false representations. However, the phrase "money or property" in the Statute is strictly construed and defendant obtained no money or property for the promise to repay the judgment.

Lastly, defendant has been ordered to make restitution of \$1,285.55 by the County Court of Sarpy County, Nebraska, for failing to pay certain mechanics' lien holders. Defendant has been making payments on this restitution order and has agreed, both at pretrial and at trial, that this restitution order, to the extent it remains unpaid, should be determined to be non-dischargeable in this bankruptcy proceeding.

A separate order is entered in accordance with the foregoing.

DATED: June 30, 1980.

BY THE COURT:

  
U.S. Bankruptcy Judge

Copies mailed to each of the following:

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