

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
BRUCE MARR,)	CASE NO. BK85-752
)	
DEBTOR)	A85-163
)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff)	
)	
vs.)	
)	
BRUCE MARR,)	
)	
Defendant)	

MEMORANDUM OPINION

Hearing was held on September 30, 1986. Appearing on behalf of the plaintiff was Douglas Semisch, Assistant United States Attorney, Omaha, Nebraska. Appearing on behalf of the defendant was Marion F. Pruss of Thompson, Crounse, Pieper, Wallace & Eggers, P.C., Omaha, Nebraska.

Facts

The debtor, Bruce Marr, was the business manager for the Omaha Indian Tribe. One of his duties was to negotiate farm leases of land owned by the Tribe. In 1975, Mr. Marr leased two tracts of land from the Tribe on a crop-share basis, with two-fifths crop share going to the Tribe and three-fifths to Mr. Marr. In addition to these two tracts, Mr. Marr farmed two adjoining tracts for which no lease was ever negotiated and for which no rental payments were ever received. In 1977, after two years of unsuccessfully farming these tracts, Mr. Marr claims to have renegotiated a lease with the Omaha Tribe to farm the land on a cash basis at a rate of \$3,500 per year. The only evidence of this lease is a copy of a Tribal resolution dated July 24, 1980. This resolution was submitted to the Bureau of Indian Affairs (BIA) but was not approved. No lease was ever received or approved by the BIA. Mr. Marr admits that he knew that such approval was required. There is also no record of any cash payment for this lease having been received by the Omaha Tribe. Mr. Marr claims to have paid the lease rental in cash in 1977, 1978 and 1979, and he cannot recall if he paid the Tribe in 1980.

Although he claims to have put the 1977 and 1978 payments in envelopes for payment to dancers at the Tribal Powwow, and in 1979 he claims to have given the payment to the Tribal treasurer, this Court simply finds such testimony unbelievable. This Court finds as a fact that no payments were made for rent in 1977, 78, 79, or 80.

Mr. Marr received a number of notices to the effect that he was not complying with conservation measures required by the original lease, and he admits that he did not comply with those measures. In 1977, he arranged with Willis Leinart and Eugene Loofe to custom farm the tracts of land for him, with he and Mr. Leinart splitting any profit after deducting expenses. Mr. Marr claims that he never received any money from this arrangement. This Court finds that Mr. Marr intentionally refused to comply with his contractual requirements regarding conservation measures.

On January 30, 1980, Mr. Marr received a show cause letter from the BIA warning him that he was not in compliance with the lease. On February 26, 1980, the BIA canceled the lease and ordered Mr. Marr to quit the premises by February 28, 1980. Mr. Marr continued to occupy the land. On May 30, 1980, he was again ordered to vacate the land, but again he continued to occupy it. Mr. Marr stated that he believed he had a lease with the owners of the land, the Omaha Tribe, although he again admitted that he knew that BIA approval for such leases was required. In December of 1980, the United States brought an action against Mr. Marr for breach of contract, trespass and unjust enrichment. On November 23, 1983, a default judgment was entered against Mr. Marr for damages in the amount of \$46,652 plus costs and interest. As a result of collection attempts for the judgment, Mr. Marr filed a voluntary petition in bankruptcy under Chapter 7 on April 5, 1985. The United States seeks to have Mr. Marr's judgment debt declared nondischargeable. It should be noted that at the time of the hearing the parties stipulated that the amount of the claim is not at issue.

This Court finds that Mr. Marr intentionally trespassed on Tribal land and did receive the benefit of the crops without paying rent.

Issues

1. Does the claim of the United States arise from fraud or defalcation of the debtor while acting in a fiduciary capacity?
2. Does the claim of the United States arise from willful and malicious injury by the debtor to property?
3. Is the portion of the judgment against the defendant which arose from breach of contract dischargeable on its face?

Decision

1. Debtor was not in a fiduciary capacity.
2. Debtor did act willfully and maliciously.
3. The breach of contract judgment, as well as all other portions of the District Court Judgment, are nondischargeable.

Summary of Law

This case initially was brought under §523(a)(4), fraud by a fiduciary, and §523(a)(6), willful and malicious injury to property. No evidence was presented regarding the "fiduciary" objection, but the Court will rule on it since it was plead.

The law of the Eighth Circuit concerning the definition of a fiduciary for purposes of §523(a)(4) has recently been announced.

"It has long been established that the Bankruptcy Act reference to 'fiduciaries' applies only to trustees of express trusts...the Code does not reach constructive trustees, designated as such by misconduct."
In re Long, 774 F.2d 875 at 878 (8th Cir., 1985).

Mr. Marr was employed as the business manager of the Omaha Tribe. One of his responsibilities was to negotiate leases. However, he was not responsible for collecting lease payments and had no supervisory authority or control over the tribal funds. The relationship between the Omaha Tribe and Bruce Marr was obviously that of employer/employee, and, in view of In re Long, that relationship cannot be considered fiduciary in nature. Section 523(a)(4) does not apply to bar dischargeability.

With regard to the Government's willful and malicious injury count, the law of the 8th Circuit has recently been summarized:

"Congress tells us in §523(a)(6) that malice and willfulness are two different characteristics. They should not be lumped together to create an amorphous standard to prevent discharge for any conduct that may be judicially considered to be deplorable. We are convinced that if malice, as it is used in §523(a)(6) is to have any meaning independent of willful it must apply only to conduct more culpable than that which is in reckless disregard of creditors' economic interest and expectancies, as distinguished from mere legal rights. Moreover, knowledge that legal rights are being violated is insufficient to

establish malice, absent some additional 'aggravated circumstances'. . . ."In re Long, 774 F.2d 875 at 880 and 881 (8th Cir., 1985).

"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." In re Long, supra, at 881.

"Debtors who willfully break security agreements are testing the outer bounds of their right to a fresh start, but unless they act with malice by intending or fully expecting to harm the economic interests of the creditor, such a breach of contract does not, in and of itself, preclude a discharge." In re Long, supra, at 882.

Although in Long the Court dealt with security agreements, this Court believes the analysis can also apply to any contractual obligation, including land rental agreements.

It would appear that there is no question that Mr. Marr's actions were indeed willful. Because of his position as business manager for the Tribe and the fact that he himself negotiated leases for the Tribe, he was fully aware of the requirement that the BIA had to approve any leases or modifications of leases. Despite this knowledge, he made a new lease agreement with the Tribal Council without bothering to determine whether it had been approved by the BIA or even submitted to the BIA for approval. Further, even after Mr. Marr was made aware that he was farming land for which he had no lease, after he received notice that his lease was canceled, and after he was ordered to vacate the land, he continued to occupy it. Thus, it is obvious that Mr. Marr wilfully occupied the land, farmed it, and severed crops from it when he knew that he had no legal right to do so.

The more difficult question is whether Mr. Marr acted maliciously in so occupying the land. By applying the In re Long standard of conduct that is certain or almost certain to cause financial harm, Mr. Marr did act maliciously. He was fully aware that he had no legal right to be on the land, and yet he continued to farm it and take crops from it, knowing that he was taking crops to which the United States through the Omaha Tribe was entitled. He cannot prove that any benefit inured to the Omaha Tribe because he can produce no evidence showing that he paid the cash rent that he and the Tribal Council purportedly agreed to. He had to have known that he was financially harming the United

States, as trustee for the Tribe, because he, not the Tribe, was getting whatever benefit there was to be gained from the crops. He must have expected that the Tribe would be harmed financially because his actions prevented the Tribe from getting any financial benefit from the land. Therefore, his actions can be construed as malicious as well as willful, thus satisfying the requirements of §523(a)(6), and the judgment debt arising from his trespass and conversion should not be discharged.

The final question concerns whether or not the judgment for breach of contract is nondischargeable.

Count 1 of the United States complaint against Bruce Marr in the District Court alleged breach of contract for failure to pay rent, failure to rotate crops and failure to maintain terraces. Damages were assessed in the amount of \$5,480 plus interest.

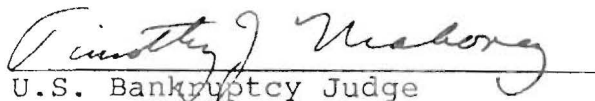
Count 2 included a claim for damages for failure to maintain terraces. Damages were assessed in the amount of \$2,040.

The evidence is that Mr. Marr disagreed with the contractual conservation requirements and that he had no funds to comply with those requirements, even if he agreed with them. This Court finds that his failure to pay rent, failure to rotate crops and failure to maintain terraces as contractually required were all intentional, knowing and willful acts or failure to act and that he knew such breaches would cause financial harm to the Tribe. The Court concludes that such breaches of contract were malicious. Therefore, the judgment for damages for breach of contract is nondischargeable.

Separate Journal Entry to be entered.

DATED: October 22, 1986.

BY THE COURT:


U.S. Bankruptcy Judge

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