United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Edward C. Tesar II and Leona M. Tesar, Plaintiffs, v.
Sears, Roebuck & Company, Defendant
(In re Edward C. Tesar II and Leona M. Tesar, Debtors)
Bankruptcy Case No. 90-03443-7, Adv. Case. No. A91-0063-7

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

November 7, 1991

Melvyn L. Hoffman, for the plaintiff-debtors.
Jerome E. Lynch, for the defendant.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

This matter comes before the Court on an objection by Sears, Roebuck & Company (Sears) to the debtors' claim of exemption in a "Weedwacker," garden tiller and lawn tractor. The basis for Sears' objection is its claim of a security interest in the three items which the debtors are seeking to exempt. Defendant Sears is represented by Jerome E. Lynch. The plaintiff-debtors, Edward C. and Leona M. Tesar, are represented by Melvyn L. Hoffman. The parties submitted written memoranda to the Court and a hearing was held in La Crosse, Wisconsin, on August 27, 1991.

The relevant facts can be briefly stated. Plaintiff Leona Tesar purchased from the defendant Sears a "Weedwacker," garden tiller and lawn tractor on May 3, 1990. The merchandise was purchased for a total price, including maintenance agreements and sales tax, of $3,117.04. The purchase was a credit transaction under the defendant's "SearsCharge Plus" program. Plaintiff Leona Tesar testified at the hearing that she was told about the Sears "Rapid Charge" program while in the defendant's store. She understood the "SearsCharge Plus" program to involve a one-time purchase of merchandise on credit; she did not intend nor desire to apply for a Sears charge card. To be eligible for this one-time credit purchase, she had to have a major credit card, which she did. After speaking by telephone with a Sears credit representative and answering questions about her address, employment and major credit card, she was allowed to purchase the subject merchandise on credit.

Defendant Sears produced at the hearing a document titled "Sears, Roebuck & Co. - SearsCharge Plus Security Agreement" signed by plaintiff Leona Tesar on May 3, 1990 -- the date she purchased the merchandise. The plaintiff testified she did not

remember signing this form but acknowledged that it was indeed her signature. Paragraph 7 of this document states in part:

> SECURITY INTEREST IN GOODS. Sears has a security interest under the Uniform Commercial Code in all merchandise charged to the account. If I do not make payments as agreed, the security interest allows Sears to repossess only the merchandise which has not been paid in full. . . .

See Defendant's Exhibit 6 at 2. Sears also produced a credit account application partially completed by the plaintiff as well as the relevant sales slips signed by the plaintiff. The sales slips contained the following language directly above the plaintiff's signature:

> This credit purchase is subject to the terms of my SearsCharge Agreement which is incorporated herein by reference and identified by the above account number. I grant Sears a security interest or lien in this merchandise, unless prohibited by law, until paid in full.

See Defendant's Exhibits 1 and 2.

The plaintiffs made payments totalling $130.00 against their account with the defendant before filing their Chapter 7 bankruptcy petition on December 10, 1990. The plaintiffs sought to claim an exemption pursuant to 11 U.S.C. § 522(d) for the merchandise. That section contains the exemptions allowed pursuant to federal law. Since Wisconsin has not "opted out" of the federal exemption scheme, the debtors are entitled to claim exemptions pursuant to that scheme. As noted, Sears objected to the debtors' claim of exemption, alleging that it has a valid security interest in the subject property.

The first issue before the Court, then, is whether Sears has a valid security interest in the merchandise at issue. Under Wisconsin law,

> [a] security interest is not enforceable against the debtor or 3rd parties with respect to the collateral and does not attach unless:
>
> (a) The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; * * *
>
> (b) Value has been given; and
>
> (c) The debtor has rights in the collateral.
>
> (2) . . .
>
> (3) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in sub. (1) have taken place unless explicit agreement postpones the time of attaching.

WIS. STAT. ANN. § 409.203 (West Supp. 1991).

There is no dispute that value was given and that the debtor had rights in the collateral. The only question at issue here is whether the debtor "[s]igned a security agreement which contains a description of the collateral." "Security agreement" is

defined under Wisconsin law as "[a]n agreement which creates or provides for a security interest." WIS. STAT. ANN. § 409.105(m). (West Supp. 1991).

The plaintiff had originally asserted that she had signed no security agreement with Sears. Shortly before the hearing Sears produced the aforementioned security agreement with the plaintiff's signature on it. The Court admitted this document over the plaintiff's objection, finding that the defendant's delay in locating and producing the document was not deliberate.

The proper result in this case became much clearer after Sears ultimately produced a security agreement signed by the debtor. The debtors argue that the documents signed by Leona Tesar are insufficient to constitute a security agreement under Wisconsin law. Mrs. Tesar further asserts that she had no intention of granting the defendant a security interest in the merchandise purchased. The debtor's arguments and assertions notwithstanding, the Court finds that the two documents taken together -- the SearsCharge Plus Security Agreement and the sales slips -- do constitute a security agreement under Wisconsin law. The relevant language in each document cited earlier clearly "creates or provides for a security interest" pursuant to WIS. STAT. ANN. § 409.105(m). The cited sales slip language incorporates by reference the SearsCharge Agreement, which contains the aforementioned paragraph 7 providing that Sears has a security interest in any items purchased on credit. As noted, the sales slips also contain a clear grant of a security interest by the purchaser to Sears. The relevant language is conspicuously located directly above where the plaintiff Leona Tesar signed.

Other courts have examined the exact language at issue here and have also found that Sears held a valid security interest on the basis of that language. See, e.g., In re Moody, 62 B.R. 282, 285 (Bankr. N.D. Miss. 1986); In re Orecchio, 54 B.R. 685, 687 (Bankr. D.N.J. 1985); Tucker v. Sears, Roebuck & Co. (In re Tucker), 36 B.R. 706-708 (Bankr. S.D. Ill. 1984). One court has gone even further and held that the cited paragraph on Sears' sales slips is alone sufficient to constitute a security agreement so as to give Sears a security interest in the merchandise at issue. See In re Hardage, 99 B.R. 738, 742 (Bankr. N.D. Tex. 1989).

This Court holds, therefore, that the SearsCharge Plus Security Agreement and the sales slips signed by Leona Tesar, taken together, constitute a security agreement pursuant to § 409.105(m) of the Wisconsin statutes.

In order for this security agreement to create an enforceable security interest in the subject merchandise, however, it must "contain a description of the collateral" pursuant to the aforementioned § 409.203(1)(a). Under Wisconsin law, a description of personal property is sufficient "[w]hether or not it is specific if it reasonably identifies what is described." See WIS. STAT. ANN. § 409.110 (West 1964). The plaintiffs' assertions to the contrary notwithstanding, this Court holds that the description of the merchandise at issue here contained on the sales slips signed by Leona Tesar "reasonably identifies" the collateral for purposes of § 409.110 of the Wisconsin statutes. The sales slips contain the following headings: "Weedwacker," "Tiller 4 HP" and "Yard Tractor." In addition, the stock numbers and sales prices are given for each item. This information is sufficiently descriptive for purposes of finding an enforceable security interest under Wisconsin law. Other courts have held likewise in cases involving descriptions contained on Sears' sales receipts and statutes similar or identical to WIS. STAT. § 409.110. See In re Moody, 62 B.R. 282, 285 (Bankr. N.D. Miss. 1986); In re Orecchio, 54 B.R. 685, 687 (Bankr. D.N.J. 1985).

Having established that the subject documents constitute a security agreement

under Wisconsin law and that the collateral is sufficiently described under that same law, a valid enforceable security interest is therefore established pursuant to WIS. STAT. § 409.203. This security interest retained by Sears, moreover, is of a purchase money character since it was taken by the seller (Sears) to secure the price of the subject merchandise. See WIS. STAT. ANN. § 409.107 (West 1964).

The plaintiffs' final argument is that, even if Sears does have a valid security interest it is unenforceable pursuant to § 425.107 of the Wisconsin Statutes. That provision pertains to unconscionability and provides, inter alia:

> (1) With respect to a consumer credit transaction, if the court as a matter of law finds that any aspect of the transaction, any conduct directed against the customer by a party to the transaction or any result of the transaction is unconscionable, the court shall, . . . either refuse to enforce the transaction against the customer, or so limit the application of any unconscionable aspect or conduct to avoid any unconscionable result.
>
> . . .
>
> (3) Without limiting the scope of sub (1), the court may consider, among other things, the following as pertinent to the issue of unconscionability:
>
> > (a) That the practice unfairly takes advantage of the lack of knowledge, ability, experience or capacity of customers; . . .
> >
> > . . .
> >
> > (d) That the practice may enable merchants to take advantage of the inability of customers reasonably to protect their interests by reason of . . . illiteracy, or inability to understand the language of the agreement; ignorance or lack of education or similar factors;
> >
> > (e) That the terms of the transaction require customers to waive legal rights; . . .
> >
> > . . .
> >
> > (g) That the natural effect of the practice would reasonably cause or aid in causing customers to misunderstand the true nature of the transaction or their rights and duties thereunder; . . .
> >
> > . . .
> >
> > (i) Definitions of unconscionability in statutes, . . . and decisions of . . . judicial bodies.

WIS. STAT. ANN. § 425.107 (West 1988).

The plaintiffs argue at length and cite numerous cases and commentators addressing commercial unconscionability in asserting that the conduct of defendant Sears here was unconscionable under Wisconsin law. See Plaintiff's Memorandum of Law and Argument at 9-19. This Court need not go into any detail in answering each of the plaintiffs' lengthy arguments. The Court does not find the conduct of defendant Sears to be unconscionable pursuant to Wisconsin law under the facts of this case. In fact, it is difficult to imagine what more Sears could have done here. To require Sears to review in detail the language of its security agreement and the language on its sales slips with every credit purchaser would be commercially impracticable and

unreasonable. The two documents signed by the plaintiff both contained a clear and unambiguous grant of a security interest to Sears in the subject merchandise. The plaintiff testified that she was familiar with security agreements and knew the consequences of signing one. This is not a case where a creditor unfairly took advantage of an ignorant or illiterate consumer who was as a result unable to reasonably protect her interests. As noted, the language granting the security interest to Sears is conspicuously printed on both documents that the plaintiff signed.

Nor is this a case, moreover, of a creditor taking an overbroad security interest in all of a consumer's personal and household goods and the subsequent threats to repossess everything if the consumer doesn't pay up. It was this type of overreaching by creditors that most concerned Congress when it drafted § 522 of the Bankruptcy Code. See, e.g., H.R. Rep. No. 595, 95th Cong., 1st Sess., at 127 (1977). As noted, this case involves a purchase money security interest taken by the creditor Sears in merchandise items purchased on credit in its retail store. Sears does not attempt to take a security interest in all of the debtors' personal or household property.

The Court thus holds that the conduct of defendant Sears in the transactions at issue here does not constitute commercial unconscionability under Wisconsin law.

Accordingly, the plaintiff-debtors' claim of exemption in the "Weedwacker," garden tiller, and yard tractor is denied.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.