

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

In Re:

FREDERICK D. ANDERSON,
f/d/b/a FDA Architect

Bankrupt

MARATHON COUNTY SAVINGS
AND LOAN ASSOCIATION

Plaintiff

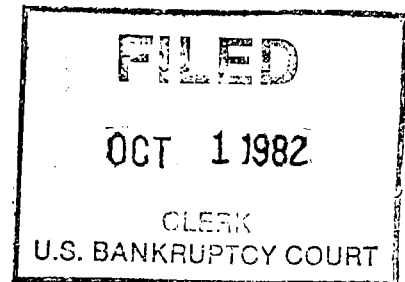
vs.

FREDERICK A. ANDERSON

Defendant.

In Bankruptcy

No. 78-01225



ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT

The Marathon County Savings and Loan Association having filed a complaint in the above matter objecting to the discharge of an alleged debt due said Savings and Loan Association from the above named bankrupt in the sum of \$12,452.00; and the defendant having filed his answer herein denying the allegations of said complaint, and having also filed a motion for summary judgment dismissing the above entitled action; and the matter having been brought before the court, and the court having heard the parties, the arguments of counsel, and having considered the briefs of the respective attorneys and affidavits on file, supporting and objecting to said motion, and upon all of the record and proceedings herein; FINDS:

1. That the plaintiff is a Wisconsin savings and loan association engaged in said business with its principal office at 500 Scott Street in the City of Wausau, Marathon County, Wisconsin.

2. That the defendant at the time of the filing of the petition in bankruptcy on November 6, 1978, was

an architect in the City of Wausau, Marathon County, Wisconsin, and also an officer and stockholder in Component Contractors Corporation, which is a bankrupt in this court, being Case No. 78-01226, and said corporation was involved in the construction business.

3. That at the same time the plaintiff commenced this action it also commenced an action against Component Contractors Corporation for the same amount, and on the same day filed a claim in the sum of \$12,452.00 in each of said cases, and stating that at the time of the filing of said petition in bankruptcy the bankrupt was indebted to Marathon County Savings and Loan Association in the sum of \$12,452.00 for money obtained under false pretenses, and which is Claim No. 26 in the Component Contractors case and Claim No. 23 in the Frederick D. Anderson case. Each claim states that it is not subject to any offset or counterclaim except as to the joint and several claim against the other.

4. That each complaint alleges that the liability of the bankrupt was created by fraud while acting in a fiduciary capacity as required of the alleged bankrupt under the provisions of Wisconsin Statutes 289.02(5) and in their behalf herein claim in each case that on or about March 21, 1978, the bankrupt corporation obtained by false representation from said plaintiff said sum of money based on a certain invoice #1150 dated March 10, 1978, which invoice is directed to Richard Harris, 3703 North 20th Avenue, Wausau, Wisconsin 54401, and a certain lien waiver dated May 5, 1978, by the corporation to Richard Harris for material and labor up to the extent of \$12,452.00.

5. That the plaintiff corporation had entered into a financing agreement with the said Richard Harris for a loan in the sum of \$104,000.00 on December 27, 1977, and a note and mortgage was executed to said plaintiff in said amount on said date.

6. That on December 17, 1977, the said Richard Harris entered into a contract with Frederick D. Anderson and Component Contractors Corporation to erect a residence for him.

7. That the said Richard Harris did not file any claim in the bankruptcy proceedings of Frederick D. Anderson, but on June 7, 1979, he did file a claim in the sum of \$20,556.87 in the bankruptcy proceedings of Component Contractors Corporation, which claim, being Claim No. 40, states that it is for a contract for construction of a home for \$108,512.00, not completed by bankrupt, therefore costing the claimant \$129,068.87, the loss to claimant being \$20,556.87.

8. That said Richard Harris had an arrangement with the plaintiff that the bankrupts were to furnish an invoice for partial payments and that he would authorize the payment thereof.

9. That the payment of \$12,452.00 on March 21, 1978, arose out of the delivery to the plaintiff of the invoice above described, and that the check therefor was picked up by an employee of the corporation from one of plaintiff's employees.

10. That the employee who usually handled the payments was on vacation and her replacement neglected to get the consent of Richard Harris before making said payment.

11. That the defendant, Frederick D. Anderson, did not at any time handle the pick up of checks for the corporation from the plaintiff, and made no representations to the plaintiff relative to said invoices. (See paragraph 7, Radant affidavit.)

12. That the procedure agreement was strictly with the plaintiff and Richard E. Harris, borrower.

13. That the plaintiff in each case is not named as a creditor in either bankruptcy for the reason that the bankrupts were not aware or did not believe that plaintiff was a creditor of the corporation or of Frederick D. Anderson.

14. That the indebtedness to plaintiff in the sum of \$12,452.00 on which the claim herein is based occurred by virtue of a payment by said Savings and Loan Association to the said Richard E. Harris sometime following a report from Meyer-Peterson Adjusting Company, Inc., a company specializing in fire, automobile and casualty insurance investigations and adjustments, and that payment was made to said Richard E. Harris because of the delivery of the check to the bankrupt corporation without first obtaining the approval of Richard E. Harris.

15. That plaintiff filed a motion to strike the affidavit of Joseph C. Kucirek, attorney for the defendant, and defendant filed a motion to strike the affidavit of Walter Gene Lew, attorney for plaintiff. Both motions are denied.

16. That the parties on the application for summary judgment have agreed that the burden of proof is on defendant to show to the court that no genuine material issues remain to be resolved, either because the facts are not controverted, or because the facts, taken in their most favorable light to the plaintiffs (opposing parties), do not as a matter of law leave issues to be tried.

17. That the affidavit of the disbursing agent for the plaintiff states that he does not specifically recall the facts surrounding the authorization of the payment of the sum of \$12,452.00 to Component Contractors Corporation on March 21, 1978, and that he does not know specifically who picked up said check on behalf of Component Contractors Corporation.

18. That the affidavit of Walter Gene Lew, attorney for the plaintiff, states that at about 12:30 p.m., on March

21, 1978, an employee of Component Contractors Corporation picked up said check. There is nothing in the record to indicate that any claim was made by said employee relative to said invoice, lien waiver or check that could in any way constitute a statement of misrepresentation or proveable fraud, and it is not claimed that any statement was made by said employee.

19. That the claim that defendant, Frederick D. Anderson, was indebted to the plaintiff on November 6, 1978, is in error in that plaintiff had not made any payment to Richard E. Harris until after that date.

20. That the contention that plaintiff is subrogated to the claim of Richard E. Harris in the bankruptcy of Frederick D. Anderson cannot be sustained for the reason that there was no claim filed by Mr. Harris in Mr. Anderson's personal bankruptcy, and there would be nothing on which to base the subrogation agreement, and no assignment was filed in either case.

21. That the contention that defendant committed fraud or defalcation while acting in a fiduciary capacity cannot be sustained, or that the theft by contractor law applies. The matter is controlled by the case of Vine v. Lotto, Adversary Case No. 81-0944, U. S. Bankruptcy Court, Eastern District of Wisconsin, in which the court holds:

"The Wisconsin Theft by Contractor statute, Wis. Stats. s. 799.02(5) imposes an express trust on contractors, within the meaning of s. 523(a)(4) of the Bankruptcy Code, but it is only the laborers, subcontractors and materialmen who are the beneficiaries of such trust, and consequently only their unpaid claims which are rendered nondischargeable by reason of the contractor's misuse of such funds."

22. That plaintiff is not a subcontractor, materialman or laborer within the provisions of said statute.

23. There has been no objection as to dischargeability filed by Richard E. Harris in either case, and only the claim

in Component Contractors Corporation was filed for breach of contract, and not claiming fraud, misrepresentation or other statutory violation.

24. That counsel in their briefs spent a great deal of time questioning whether it is based on fraud or misrepresentation.

25. That plaintiff, as stated herein in paragraph 3, claims the money was obtained under false pretenses, and the prayer for relief in plaintiff's complaint alleges fraudulent obtaining of said funds.

26. In the Matter of Kohl, 11 B.R. 470, Judge Martin very ably summarizes false representation elements, as follows:

- "1. The debtor must have obtained the property by means of representations which he knew were false or which were made with reckless disregard of their truthfulness.
2. The debtor must have an intent to deceive, which may be inferred from the knowing or reckless representation made to induce another to transfer property to the debtor.
3. The creditor must actually and reasonably rely on the misrepresentation. In Re Ratajczak, 5 B.R. 583, 586 (M.D. Fla. 1980) and Carini v. Matera, 592 F.2d 378 (7th Cir. 1979)."

He follows that the elements of fraud as stated by the Supreme Court are:

- "First. That the defendant has made a representation in regard to a material fact;
- Secondly. That such representation is false;
- Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;
- Fourthly. That it was made with intent it should be acted on;
- Fifthly. That it was acted on by complainant to his damage; and,
- Sixthly. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true. Southern Development Co. v. Silva, 125 U.S. 247, 8 S.Ct. 881, 31 L.Ed. 678 (1888).

27. The lien waiver attached to plaintiff's complaint and referred to as Exhibit A certainly cannot be treated as a misrepresentation or fraudulent act for the reason that it was not in existence at the time of the payment on March 21, 1978. The invoice referred to as Exhibit B and attached to plaintiff's complaint cannot be treated in any manner as a representation on which to base fraud or misrepresentation. It stands as a simple invoice submitted by the bankrupt corporation.

28. Since there were no oral representations on which to base either fraud or false pretense, the entire claim of the plaintiff must rest on Exhibits A and B, and it is the opinion of this court that they do not constitute any basis for creating liability on the part of the bankrupts to the said plaintiff.

29. The simple fact of the matter is that plaintiff mistakenly paid the bankrupt corporation and is now trying to claim responsibility on the part of the bankrupts, and there is no evidence to support such contention. See Matter of Kohl, 11 B.R. 470.

30. The plaintiff likewise claims that this is not a matter for summary judgment in that further facts are necessary to resolve the same. The court does not agree with plaintiff and concludes that all of the material facts necessary for determination of the matter are before the court and summary judgment is a proper procedure, and that there are no further material facts necessary to make the determination herein.

31. That on October 4, 1979, at the request of the bankrupts, the court entered a protective order prohibiting discovery while criminal charges were pending against Frederick D. Anderson in the Circuit Court of Marathon County, Wisconsin, which order remains in effect.

CONCLUSIONS OF LAW

That the court enter an order granting summary judgment and dismissing plaintiff's complaint herein on the merits and

without costs, and denying the motions to strike the affidavits of Mr. Kucirek and Mr. Lew.

O R D E R

NOW, THEREFORE, IT IS ORDERED:

1. That the motions of the plaintiff and the defendant to strike the affidavits submitted herein are denied.
2. That summary judgment is granted on defendant's motion dismissing plaintiff's complaint on the merits and without costs to either of the parties.

Dated: October 1, 1982.

BY THE COURT:


WILLIAM H. FRAWLEY
U. S. BANKRUPTCY JUDGE