

FILED

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN

JUL 23 1986

CLERK  
U.S. BANKRUPTCY COURT

In re:

Case Number:

NORMAN LAVERNE ROGERS, d/b/a  
Rogers Distributors, Inc.

EF7-80-01960

Debtor.

EMIL J. BUTLER

Plaintiff,

Adversary Number:

v.

NORMAN LAVERNE ROGERS, d/b/a  
Rogers Distributors, Inc., and  
NORMAN LAVERNE ROGERS,

85-0010-7

Defendant.

ORDER

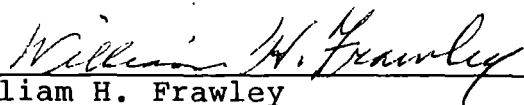
The court having this day entered its memorandum opinion,  
findings of fact, and conclusions of law;

NOW, THEREFORE, IT IS ORDERED that the debt owed by the  
debtor to Emil Butler amounts to \$16,000.

IT IS FURTHER ORDERED that the debt owed by the debtor to  
Emil Butler in the amount of \$16,000 is hereby excepted from  
discharge.

Dated: July 23, 1986.

BY THE COURT:

  
William H. Frawley  
U.S. Bankruptcy Judge

cc: Attorney Gary Stoneking  
Attorney Steven Swanson *ca 7-23-86*

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NORMAN LAVERNE ROGERS, d/b/a  
Rogers Distributors, Inc., and  
NORMAN LAVERNE ROGERS,

Defendant.

MEMORANDUM OPINION,  
FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Emil Butler (Butler), by Gary Stoneking, has initiated this proceeding pursuant to 11 U.S.C. § 523(a)(2)(A) and Bankruptcy Rule 4007 seeking to except a debt from discharge. The debtor appears by Steven Swanson and contests the complaint. A trial was held in this proceeding on June 10, 1986, and the issues have been submitted for determination by briefs.

In the latter part of the summer of 1980, Butler placed an ad in a newspaper stating an interest to purchase a herd of dairy cattle. The debtor contacted Butler and informed him that he had a herd of cattle for sale. Butler inspected the cattle and pur-

chased the herd of 33 cattle for \$33,000. At the time of the sale, the cattle were encumbered by a security interest held by Thorp Finance Corporation (TFC) by virtue of a security agreement executed by TFC and the debtor on February 25, 1980. The debtor did not disclose the fact of the existence of this security interest to Butler. The debtor used a substantial portion of the proceeds from this sale to purchase a new herd of cattle. TFC initiated an action against Butler for replevin of the cattle that Butler purchased from the debtor. Butler paid \$16,000 to TFC in settlement of the action. The debtor was not a party to the settlement agreement.

Butler has moved the court for the admission of evidence by deposition. Butler attempts to introduce the deposition testimony of Robert Brown. Robert Brown lives more than 100 miles from the place in which the trial was held. Fed. R. Civ. P. 32(a)(3)(B). It is the conclusion of the court that the deposition is admissible evidence. However, the court could decide the issues involved in this case without the need of the deposition.

The debtor does not deny that he knew of the existence of the security interest at the time of the sale. However, the debtor argues that TFC's security interest was not enforceable. The debtor alleges that the sale of the cattle was implicitly authorized by TFC and that the sale of the encumbered cattle was justified due to TFC's improper course of conduct in dealing with the debtor. The debtor also asserts that he did not have the requisite intent to deceive at the time of the sale of the cattle.

Finally, the debtor argues that the plaintiff is not able to show that he was damaged by the transaction.

Section 523(a)(2)(A) of the Bankruptcy Code provides:

§ 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt--

....

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

Butler bears the burden in this proceeding of proving that the debt should be excepted from discharge. In re Hofkens, (Bankr. E.D. Wis. 85-0109, June 30, 1986).

To except a debt from discharge because of fraud under this section the plaintiff must show that:

- 1.) The debtor obtained money ... through representations known to be false or made with reckless disregard for the truth amounting to willful misrepresentation;
- 2.) The debtor had an intent to deceive; and,
- 3.) The creditor actually and reasonably relied on the representation.

Matter of Platt, 47 B.R. 70, 71 (Bankr. W.D. Wis. 1985). The debtor's misrepresentation may be by conduct or silence as well as by overt statement. Matter of Schnore, 13 B.R. 249, 252 (Bankr. W.D. Wis. 1981).

In the proceeding sub judice, the debtor knew that the cattle were encumbered by a security interest. He knew that the existence of the security interest was a material fact which

should have been disclosed. The fact that the debtor was having a dispute with TFC about the validity of the security interest did not alter the debtor's duty of disclosing the existence of the security interest to a prospective purchaser. The actions of the debtor manifested the impression to Butler that the debtor was selling unencumbered property. By proposing the sale of the cattle, the debtor implied that he had authority and ability to sell full title. Hence, the debtor obtained \$33,000 through willful misrepresentation.

The debtor argues that he did not have the requisite intent to deceive that is necessary to cause a debt to be excepted from discharge. When searching for the intent of the debtor the court looks to all the facts of a particular case. "In determining whether the debtor intended to deceive the creditors at the time the false representation was made, courts have looked to the totality of the circumstances." Matter of Platt, 47 B.R. 70, 71 (Bankr. W.D. Wis. 1985). The debtor admits that he was aware of the security interest at the time of the sale. The only apparent reason why the debtor did not disclose the existence of the encumbrance is that a prospective buyer would probably not be willing to purchase the cattle if possessed with such information. The debtor knowingly concealed a material fact from Butler with respect to the sale of the cattle. This constitutes an intent to deceive.

Butler relied on the representations of the debtor when he purchased the cattle. The debtor's actions implied that he had

good title to the cattle and had an ability to sell same. He also relied on the debtor's failure to inform him of the encumbrance. Butler testified that he would not have purchased the cattle if he had known of the encumbrance. The reasonableness of Butler's reliance is a question of ordinary care. Matter of Brisbach, 36 B.R. 350 (Bankr. W.D. Wis. 1984). "The extent of the duty to exercise ordinary care depends upon the relative sophistication of the parties, the nature of the representations, and the ease of conducting an investigation." Id. at 353. Butler is a farmer, not an attorney. He placed an ad in the newspaper seeking to purchase a herd of dairy cattle. When he inspected the cattle he was not informed of the security interest. The debtor assumed that Butler would not investigate the cattle to see if they were encumbered by a security interest. Butler relied on the representations of the debtor and his reliance was reasonable under the circumstances of this case. Butler has carried his burden of proving by clear and convincing evidence all of the elements of 11 U.S.C. § 523(a)(2)(A).

The court also notes that the duty to disclose the existence of a security interest or encumbrance on property that is being sold is on the seller. U.S.C. § 2-312.

402.312. Warranty of title and against infringements; buyer's obligation against infringement. (1) Subject to sub. (2) there is in a contract for sale a warranty by the seller that:

(a) The title conveyed shall be good, and its transfer rightful; and

(b) The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

Wis. Stat. § 402.312. The debtor, by his silence, warranted that the cattle were "free from any security interest." The fact that the debtor was having a dispute with TFC did not relieve him from the duty of disclosing the existence of the security interest. A buyer may conduct a UCC search on the goods that are to be purchased; however, such a search is to protect the buyer from other parties. The buyer does not need to conduct a UCC search for protection against the seller.

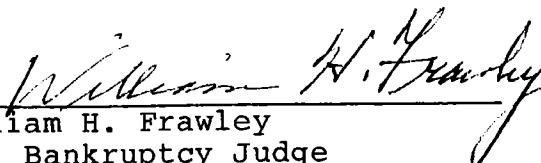
Finally, the debtor asserts that Butler has not proved that he was actually damaged by the debtor's failure to disclose the existence of the security interest. The debtor argues that the security interest possessed by TFC was worthless. The debtor argues that he was not a party to the settlement agreement and that he should not be held responsible for Butler's settlement payment. The court disagrees. Butler was damaged by the misrepresentation of the debtor. Butler settled the dispute at the best price he could. Considering the debtor's financial condition, Butler could not rely on recovering this money from the debtor. The settlement amount was not unreasonable. Butler was damaged to the extent of \$16,000.

It is the conclusion of the court that Butler has carried his burden of proving that the debt owed to him falls within the purview of 11 U.S.C. § 523(a)(2)(A).

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

Dated: July 23, 1986.

BY THE COURT:

  
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William H. Frawley  
U.S. Bankruptcy Judge