

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

FILED
DEC 14 1984
CLERK
U.S. BANKRUPTCY COURT

In re:

Case Number:

RANDALL J. COYNE
DIANNE M. COYNE,

LM7-82-01013

Debtors.

RANDALL J. COYNE and
DIANNE M. COYNE,

Plaintiffs,

Adversary Number:

v.

82-0158

INTERNAL REVENUE SERVICE,

Impleaded Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDER DENYING MOTION FOR SUMMARY JUDGMENT

The United States of America Internal Revenue Service, by United States Attorney John R. Byrnes, having filed a Motion for Summary Judgment; and a hearing having been held; and the Movant appearing by Attorney Beth A. Sabbath; and Debtors Dianne M. and Randall J. Coyne appearing by Attorney Galen W. Pittman; and briefs having been filed; the Court, being fully advised in the premises, FINDS THAT:

1. On April 12, 1982, the United States of America Internal Revenue Service (IRS) sent Debtor Randall J. Coyne a letter

informing him that a corporate tax liability would be assessed against him personally if he did not appeal within 30 days.

2. Mr. Coyne did not appeal.

3. On May 23, 1982, Debtor Dianne Coyne caused certain items of personal property to be sold at auction.

4. Prior to May 25, 1982, the Debtors' attorney conferred with the IRS regarding Mr. Coyne's tax liability and the proceeds of the May 23 auction.

5. Affidavits of the Debtors assert that an agent for the IRS represented to the Debtors' attorney that the IRS had the right and intention to garnish the entire proceeds of the May 23 auction. The affidavit of the IRS agent explicitly contradicts the Debtors' assertions.

6. On May 25, 1982, Ms. Coyne assigned her interest to the proceeds of the May 23 auction to the IRS.

7. On May 28, 1982, the Debtors first consulted Attorney Galen W. Pittman and, shortly thereafter, Ms. Coyne attempted to withdraw the May 25 assignment.

8. On June 9, 1982, the Debtors filed for relief under Chapter 7 of the Bankruptcy Code. Ms. Coyne claimed auction proceeds as exempt property.

9. On June 21, 1982, the Debtors commenced this adversary proceeding to compel the auctioneer to turn over auction proceeds. The proceeds have been subsequently turned over, other defendants have been released and the only question remaining is the

interest of the IRS in the auction proceeds, i.e., the validity of Ms. Coyne's assignment.

10. Under Fed.R.Bankr.P. 7056, which is conterminous with Fed.R.Civ.P. 56, this Court must render summary judgment for the IRS if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

11. Assuming that the Debtors' affidavits raise a genuine issue of fact, is the issue material?

12. The IRS argues that it is not because the alleged misrepresentation by its agent was a legal--not a factual misrepresentation.

13. This Court believes that the rule against the enforcement of contracts based upon misrepresentation is not so narrowly drawn. See 17 Am.Jur.2d Contracts sec. 151 (1964) (" . . . the law . . . will not suffer [people] to be entrapped by the fraudulent contrivances or cunning or deceitful management of those who purposely mislead them. Fraud is material to a contract where the contract would not have been made if the fraud had not been perpetrated." (footnotes omitted)). Cf. id at sec. 153 (contracts based upon duress, coercion, intimidation, or threats).

14. Nor is the IRS shielded by the fact that the alleged representations were made to the Debtors' representative who, in turn, conveyed those statements to the Debtors. 37 Am.Jur.2d Fraud and Deceit sec. 244 ("it is immaterial whether [the statement] is made to [the representee] directly or indirectly

. . . provided it is made with the intent that it shall reach him" (footnotes omitted)).

15. "'The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Barwick v. Celotex Corp., 736 F.2d 946, 959 (4th Cir. 1984) (quoting Advisory Committee notes to Fed.R.Civ.P. 56(e)). "Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." Associated Press v. United States, 326 U.S. 1, 6, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) (citation omitted). See Sartor v. Ark. Nat. Gas Corp., 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.Ed. 967, reh'g denied, 322 U.S. 767 (1944) ("the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try").

16. Accordingly, "any or all statements [in an affidavit] that would be admissible in evidence . . . are admissible as evidence on the issue of whether or not to grant summary judgment." 2 J. Moore, A. Vestal & P. Kurland, Moore's Manual sec. 17.09 (1984).

17. The Debtors' understanding regarding statements made by the IRS agent to their attorney would be admissible into evidence, Fed. R.Evid. 801(d)(2)(D) (statement of an agent of a party is not hearsay when offered against the party), and are "specific facts showing that there is a genuine issue for trial", Fed.R.Civ.P. 56(e). Cf. DePinto v. Provident Security Life Ins.

Co., 374 F.2d 50, 55 (9th Cir. 1967) (hearsay that would not be admissible at trial may not properly be set forth in a Rule 56 affidavit).

CONCLUSION OF LAW

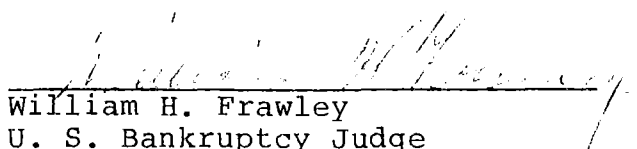
There is a genuine issue of material fact in the above captioned adversary proceeding.

ORDER

IT IS ORDERED THAT the United States of America Internal Revenue Service Motion for Summary Judgment be, and the same hereby is, DENIED, without costs.

Dated: December 14, 1984.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge