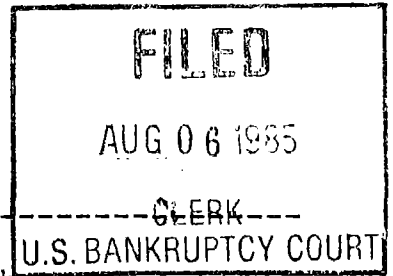


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re:

Case Number:

RONALD C. COLBETH
ELIZABETH L. COLBETH
d/b/a Top Crop Service,

EF7-82-02144

Debtors.

OTTAWA, STRONG & STRONG, INC.,

Plaintiff,

Adversary Number:

v.

83-0093

RONALD C. COLBETH and
ELIZABETH L. COLBETH,
d/b/a Top Crop Service,

Defendants.

OPINION AND ORDER DENYING OBJECTION TO DISCHARGE

Plaintiff Ottawa, Strong & Strong, Inc. (Strong) has filed a complaint seeking a denial of discharge for a debt owed to it by defendants Ronald C. and Elizabeth L. Colbeth, d/b/a Top Crop Service. Defendants bought and resold chemicals and fertilizers to farmers. In this capacity, they incurred a debt with Strong for the purchase of chemicals which Strong alleges was \$106,498.16 as of October 26, 1982. Strong maintains that this debt should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(B) based on debtors' providing a false financial statement. It further contends that debtors should be denied a

discharge under 11 U.S.C. § 727(a)(4)(A) because they made a false oath or account.

A hearing in this adversary proceeding was duly held with plaintiff appearing by Attorney Robert W. Mudge and defendants by Attorney Joseph D. Boles. Both parties have subsequently filed briefs on this matter with the court.

Prior to the 1982 season the defendants had a credit balance of \$1000 with Strong. However, by the end of May, 1982, they owed approximately \$70,000. During May of that year the defendants issued a payment check to plaintiff for \$20,518 which was returned "NSF". After redeposit, the check again bounced. Concerned over this series of transactions plaintiff's Credit Manager, Lester Borden, met with Ronald Colbeth on June 2, 1982. At this meeting Mr. Borden was provided with defendant's financial statement.

Mr. Borden testified that based on defendant's financial statement and income projections Strong decided to continue chemical shipments and not initiate legal action. During June, 1982, the plaintiff shipped an additional \$27,938.28 worth of chemicals to defendant.

Sec. 523(a)(2)(B) provides:

- (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-- . . .
 - (B) use of a statement in writing--
 - (i) that is materially false;
 - (ii) respecting the debtor's or an insider's financial condition;

- (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
- (iv) that the debtor caused to be made or published with intent to deceive;

Each of the elements contained in sec. 523(a)(2)(B) must be proved for a debt to be excepted from discharge.

Plaintiff argues that the financial statement which defendant Ronald Colbeth prepared was a false statement which it relied on in deciding to continue shipments rather than commence legal action. This financial statement was a combined business and personal statement. The business financial statement contained \$59,199.55 more liabilities than assets. However, Ronald Colbeth's personal net worth provided a combined positive balance of \$21,025.45. Plaintiff contends that when Ronald Colbeth compiled the financial statement on May 31, 1982, he was aware of \$81,607.05 more business liabilities than he listed in his financial statement.

At trial Ronald Colbeth testified that his statement of net worth for Top Crop was accurate and made in good faith. He provided various explanations for plaintiff's claimed discrepancies. Because of the court's determination that there was no intent to deceive or reasonable reliance, which will be discussed shortly, it is not necessary to determine the exact amount of any discrepancy that may have been present.

There has been no direct evidence of an intent to deceive in this case. Nevertheless, intent to deceive may be inferred where a person knowingly or recklessly makes a false representation

which that person knows, or should know, will induce another to make a loan. Carini v. Matera, 592 F.2d 378, at 380 (7th Cir. 1979). Ronald Colbeth was not an accountant or experienced financial manager. He completed slightly less than a year of college and had little experience preparing financial statements. The financial statement that he actually prepared depicted Top Crop with \$59,000 more liabilities than assets and nearly \$200,000 more current liabilities than current assets. Given defendant's lack of financial experience, the May 31, 1982 financial statement itself and his trial testimony concerning the claimed discrepancies the court concludes that he did not knowingly or recklessly make a false financial statement. No intent to deceive may be inferred.

The court also concludes that plaintiff did not reasonably rely on defendant's financial statement. In discussing reasonable reliance under sec. 523(a)(2)(B) and its predecessor under the Bankruptcy Act, sec. 17(a)(2), the 7th Circuit Court of Appeals has stated:

Congress clearly indicated that section 523(a)(2)(B)(iii) is merely a codification of the cases construing section 17(a)(2). "[T]he creditor must not only have relied on a false statement in writing, the reliance must have been reasonable. This codifies case law construing [section 17(a)(2)]." H.R.Rep.No. 595, 95th Cong., 1st Sess. 364 (1977); S.Rep.No. 989, 95th Cong. 2d Sess. 77-79 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5864, 6320.

In re Kreps, 700 F.2d 372, at 376 (7th Cir. 1983).

In an earlier case involving sec. 17(a)(2) the court pointed out that dischargeability shall not be denied if a creditor's claimed

reliance on a financial statement is so unreasonable as not to be actual reliance at all. In re Garman, 643 F.2d 1252, at 1256 (7th Cir. 1980).

The evidence in this case demonstrates that plaintiff was fully aware of defendant's precarious financial position. As noted earlier, Ronald Colbeth's May 31, 1982 business financial statement showed over \$59,000 more liabilities than assets and nearly \$200,000 more in current liabilities than current assets. The fact that debtor had personal assets which offset this deficit does not make the business viable or even salvageable. By the end of May, 1982, defendant's bill was already \$70,000. No payments on the bill had been made. A check issued as partial payment was twice returned "NSF". Under these circumstances any claimed reliance by plaintiff on debtor's financial statement is so unreasonable as to not be actual reliance at all. Since each of the elements of sec. 523(a)(2)(B) have not been proven defendants' debt to plaintiff is not excepted from discharge.

Plaintiff also claims that defendants should be denied a discharge since they allegedly made a false oath or account. In order for a debtor to be denied a discharge a false oath or account must occur in or in connection with the bankruptcy case. 11 U.S.C. § 727(a)(4)(A). The obvious purpose of this provision is to protect the integrity of the bankruptcy process by ensuring that a debtor will be honest in matters relating to the case. In the present case the claimed false account had nothing to do with the bankruptcy proceeding and was made months before a bankruptcy

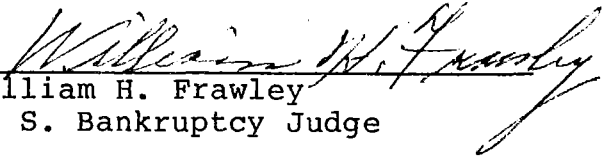
petition was filed. Plaintiff does not challenge the accuracy of any of defendants' bankruptcy filings. In fact, it cites the bankruptcy schedules as proof that the May 31, 1982 financial statement was false. Since the alleged false account was not made in the bankruptcy proceeding or in connection with it, sec. 727(a)(4)(A) is not applicable.

ORDER

IT IS ORDERED THAT plaintiff's objection to discharge is denied.

Dated: August 6, 1985.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge

cc: Attorney Robert W. Mudge
Attorney Joseph D. Boles