

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

In re:

Case Number:

RICHARD LEE NASH, SR.,
KATHLEEN NASH,
d/b/a Community Farms,

EF7-83-00092

FILED

Debtors.

FEB 21 1985

NORTHERN INVESTMENT COMPANY,
a Wisconsin corporation,

CLERK
U.S. BANKRUPTCY COURT

Plaintiff,

Adversary Number:

v.

83-115

RICHARD LEE NASH, SR., and
KATHLEEN NASH,
d/b/a Community Farms,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDER DECLARING DEBT NON-DISCHARGEABLE¹

Northern Investment Company (NIC), by Wiley, Rasmus, Colbert, Frasch, Norseng & Cray, S.C., having filed Complaints to have debts declared non-dischargeable; and Debtors Kathleen and Richard Lee Nash and Mary A. and Raymond O. Haynes, by Brunner, Sykes & Muschinske, having filed Answers; and a trial having been held; and NIC appearing by Attorney Steven R. Cray; and the

¹ An identical Decision and Order is entered this day in In re Haynes, Adv. No. 83-114 (Bankr.W.D.Wis.)

Debtors appearing by Attorney Keith D. Muschinske; the Court, being fully advised in the premises, FINDS THAT:

1. Beginning in September of 1980, the Debtors, collectively doing business as Community Farms, purchased a total of 41 head of cattle and entered into a series of notes and security agreements with NIC.

2. These transactions culminated on February 16, 1982, with a consolidated note and security agreement. In the final security agreement, the Debtors pledged 36 Holstein cows, 5 Guernsey cows, a 1956 truck and a 1212 David Brown diesel tractor as collateral. Only part of the Debtors' herd was collateralized, there were no ear tags nor any other objective method used to distinguish the secured cattle.

3. The Debtors' January 21, 1983, bankruptcy petitions show NIC as a secured creditor. The Debtors described NIC's collateral as 4 cows, a 1956 Ford truck and a David Brown tractor. Mr. and Ms. Haynes did not schedule any livestock; Mr. and Ms. Nash scheduled 28 head of cattle.

4. All of the security agreements between the Debtors and NIC required that secured property be kept at the Debtors' place of business and not be sold or disposed of without the written consent of NIC. Said agreement also prohibited waste or deterioration. The Debtors testified that they did not have actual knowledge of these provisions.

5. Exhibit 16 was offered by the Debtors as an accounting of the collateralized cattle, to-wit: Prior to February 16, 1982, 33 head were sold at market on account of injury or disease, 2 head died (disposition unstated) and 1 head was injured (disposition unstated); after February 16, 1982, and before January 21, 1983, 7 head were sold at market; after January 21, 1983, 3 head died (disposition unstated) and 2 head were sold to a rendering service.²

6. The proceeds of the sale of the secured cattle were applied toward Community Farm business obligations--including NIC note payments.

Discussion

7. A debt is non-dischargeable to the extent that it is for willful and malicious injury by the debtor. 11 U.S.C. sec. 523 (a)(6).

8. Common law conversion is an "injury" under section 523(a)(6); a sale of secured property which is contrary to the security agreement constitutes a conversion. In re Ries, 22 B.R. 343, 346 (Bankr.W.D.Wis. 1982).

² The observant reader will notice that the Debtors have accounted for 48 of the 41 cattle pledged to NIC. When this discrepancy was brought out at trial, the Debtors explained that Exhibit 16 was reconstructed from memory and that some of the cattle accounted for were not collateralized to NIC. Even if only 41 of the accounted for cattle can be attributed to the NIC portion of the herd, the Debtors' version of the facts rests upon the inherently incredible assertion that the NIC portion of their herd was entirely wiped out while, at the same time, only 7 head of unpledged cattle were removed from service.

9. A sale of secured property is "willful and malicious" when it is made with the knowledge that the secured creditor will be harmed. Id. at 347.

10. A debtor who enters into a security agreement is presumed to know that a sale of secured property would harm the secured creditor. Id. at 348.

11. The evidence presented by the Debtors in this adversary proceeding was not sufficient to rebut the presumption of knowledge of harm to NIC.

CONCLUSION OF LAW

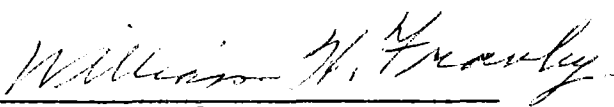
The debt owed to NIC is for willful and malicious injury by the Debtors.

ORDER

IT IS ORDERED that the debt owed to Northern Investment Company by the above captioned Debtors be, and the same hereby is, declared NON-DISCHARGEABLE.

Dated: February 21, 1985.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge

cc: Attorney Steven R. Cray (Wiley, Rasmus, Colbert, Frasc, Norseng & Cray, S.C.)
cc: Attorney Keith D. Muschinske (Brunner, Sykes & Muschinske)