

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN

FILED  
MAY 9 1984

In re:

Case Number:

TERRY CLIVER  
BERNICE CLIVER,

WF7-84-00013

Debtors.

DAIRYLAND REALTY, INC.,

Plaintiff,

vs.

Adversary Case Number:

TERRY CLIVER and  
BERNICE CLIVER,

84-0062-7

Defendants.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND  
ORDER GRANTING MOTION TO DISMISS

Creditor Dairyland Realty, Inc., by Attorney William C. Gamoke of Nikolay, Jensen, Scott & Gamoke, having filed a Complaint demanding a judgment for \$6,900 and for an order determining debt to be nondischargeable; and Debtors Terry and Bernice Cliver, by Attorney D. Michael Hoerl of Associated Attorneys, S.C., having filed a Motion to Dismiss; and said Motion having come on for a hearing; and the parties having filed legal briefs; the Court, having reviewed the complete record and file herein, FINDS THAT:

1. Creditor Dairyland Realty, Inc., having withdrawn claims in connection with the Witte sale, the substantive portions of the Complaint provide:

5. That on or about November 1, 1982, the defendant, Terry Cliver, as owner, entered into a farm listing contract . . . with the plaintiff, Dairyland Realty, Inc., as the real estate broker. . .

6. The listing contract included provision for a broker's commission of Six percent (6%) of the sales price if an offer is accepted for the sale of the property or any part thereof up to the 1st day of May, 1983.

7. That an amendment to the listing contract was entered into on May 4, 1983, extending the original listing contract to November 1, 1983. . . .

8. That an offer for the sale of a portion of the real estate listed by the defendants with the plaintiff was made by Emery Schmidt on May 16, 1983. The plaintiff received \$100.00 earnest money payment from Emery Schmidt for said offer. . . Said offer was countered by the defendants on May 16, 1983. . . .

9. That the defendants sold a portion of their real estate listed with the plaintiff to Emery Schmidt prior to November 1, 1983 for \$85,000.00. . . .

10. That commissions on said sales amount to \$6,900.00.<sup>1</sup>

11. That the defendants failed to pay the plaintiff for commissions earned despite actual knowledge of the provisions of the listing contracts.

12. That the defendants obtained the plaintiff's services for the sale of the defendants' listed property upon representing that commissions would be paid to the plaintiff at the rate of 6% of the sales price of the defendants' listed property if sold prior to November 1, 1983. That based upon those representations the plaintiff corporation through its officers and employees marketed the defendants' listed property. That the defendants with full knowledge of the listing contract provisions sold the property listed with the plaintiffs to third parties and

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<sup>1</sup> The Schmidt sale accounted for \$5,100 of this total.

intentionally failed to pay commissions on said sales to the plaintiff. That by said actions, the defendants committed fraud on the plaintiff to the plaintiff's detriment in the amount of \$6,900.00.

. . .

2. The Debtors' Motion is based upon Fed.R.Civ.P. 12(b)(6) (failure to state a claim). See Bankruptcy Rule 7012.

3. To state a claim under 11 U.S.C. sec. 523(a)(2)(A) (obtaining services by false pretenses), the plaintiff must allege facts which show that the following elements were present at the time the services were obtained:

- (1) the debtor made representations which he knew to be false or made with reckless disregard for the truth;
- (2) the representations were made to deceive;
- (3) the creditor actually and reasonably relied on the representations.

See In re Schnore, 13 B.R. 249, 252 (Bankr.W.D.Wis. 1981) (interpreting Carini v. Matera, 592 F.2d 378, 380-1 (7th Cir. 1979)). See generally Bankr.R.7009 (Fed.R.Civ.P. 9(b): averments of fraud to be stated with particularity).

4. The Complaint alleges no representations by Debtor Bernice Cliver.

5. The Complaint alleges representations by Debtor Terry Cliver on or about November 1, 1982, and May 4, 1983, and a subsequent intentional failure to pay.

6. False representation and intent to deceive may be implied by a debtor's conduct or silence. In re Schnore, Paragraph 3 supra, 13 B.R. at 252-257.

7. However, an allegation of a failure to pay an obligation when due--standing alone--is not enough to support an implication of scienter or of intent at the time the obligation was incurred. Cf. id. (discussion of evidence which will permit inference of misrepresentation and intent to deceive).

8. Accordingly, the Complaint does not allege a set of facts which would entitle the plaintiff to relief under 11 U.S.C. sec. 523(a)(2)(A). See J. Moore, A. Vestal & P. Kurland, Moore's Manual sec. 11.06 [1] (1983) (complaint may be dismissed in the absence of facts sufficient to make a good claim).

CONCLUSION OF LAW

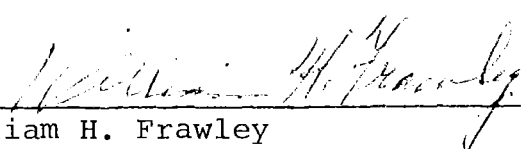
The Complaint of Dairyland Realty, Inc., fails to state a claim upon which relief can be granted.

ORDER

IT IS ORDERED THAT the Motion of Terry and Bernice Cliver to dismiss the Complaint of Dairyland Realty, Inc., is GRANTED without costs.

Dated: May 9, 1984.

BY THE COURT:

  
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William H. Frawley  
Bankruptcy Court