

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

FILED

JUL 30 1984

CLERK
U.S. BANKRUPTCY COURT

In re:

Case Number:

EDWARD FRANK HABLE
LINDA MARIE HABLE

WF7-84-00405

Debtors

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDER GRANTING IN PART AND DENYING IN PART
A MOTION FOR REPAYMENT OF MILK CHECKS AND RETURN OF COWS

Debtors Linda M. and Edward F. Hable, by Attorney Terrence J. Byrne, having filed a Motion for Repayment of Milk Checks and Return of Cows; and Creditor Van Der Geest Leasing, Inc., by Attorney Brian J. Arndorfer of Schmitt, Hartley & Arndorfer, S.C., having objected to said Motion; and a trial having been held; and the Movants appearing in person and by counsel; and the Objector appearing by its President, Gary Van Der Geest, and by counsel; the Court, having heard the testimony of witnesses and the argument of counsel, having reviewed the exhibits and the complete record and file herein, FINDS THAT:

1. "Toward the end of"² August, 1983, Van Der Geest Leasing, Inc. (VDG), delivered five dairy cows to the Debtors, Linda M. and Edward F. Hable.

2. On or about September 1, 1983, the Debtors and VDG entered into a "Cow Rental Contract". Said contract provided, inter alia, for a term of seven years; however, pre-printed language assessing a "penalty" against the lessee in the event of termination within the first three years of the contract was crossed out (with a marginal notation of "Not Apply"). In addition, the contract provided for the Debtors to pay the cost of trucking the cows to another location in the event the Debtors failed to comply with lease terms.

3. At or about the same date the Debtors executed a "Farmer's Milk Assignment" in favor of VDG. Said milk assignment called for deductions of \$225 a month from the proceeds of the Debtors' dairy product sales beginning August 1, 1983.³

4. In January, 1984, with their account at VDG current, the Debtors decided to reduce their dairy herd and told VDG to take back the leased cows.

5. On January 18, 1984, Gary Van Der Geest, an officer of VDG, and one of his neighbors went to the Debtors' farm. The

²Uncontested testimony of Edward F. Hable.

³The Debtors' dairy issued milk checks based upon sales during calendar months. Thus, a deduction beginning August 1, 1983, would result in a payment on or about September 18, 1983, from the proceeds of the Debtors' August sales.

evidence presented regarding what took place on the Debtors' farm that day was emotional and contradictory.

6. Edward Hable and his son testified that seven cows were loaded onto the VDG truck. Gary Van Der Geest and his neighbor testified that only five cows were loaded.

7. Edward Hable testified that he permitted Gary Van Der Geest to remove two extra cows and that he signed a receipt showing only five cows were removed because Mr. Van Der Geest claimed two cows as damages for the premature termination of the rental agreement, refused to leave without the two extra cows and threatened court action if he was not given said cows. Mr. Van Der Geest testified that there was no discussion regarding two extra cows or damages for premature contract termination; and that, although he had felt that the rental cows had lost value while in the hands of the Debtors, he didn't press the matter.

8. Gary Van Der Geest testified that the trucking cost from the Hable farm to VDG would have been approximately \$80.

9. On January 18, 1984, the Hable's dairy issued a \$225 check to VDL from the Debtors' December sales. On February 18, 1984, the Hable's dairy issued a \$112.50 check to VDG from the Debtors' January sales.

10. On March 7, 1984, the Debtors filed for relief under Chapter 7 of the Bankruptcy Code.

11. Because of the balance of testimony, this Court permitted the Debtors to present evidence of a a transaction between VDG and John W. Pingle. See 28 U.S.C. Appendix-Rules of

Evidence, Rule 406 (Notes of Advisory Committee: "These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation." (citation omitted)).

12. However, as the only relevant similarity between the Pingle affair and the matter before the Court turned out to be evidence of a threat of court action, evidence of the Pingle/VDG lease termination was given little weight in this Court's deliberations.

Discussion

13. The Debtors have moved pursuant to 11 U.S.C. sec. 522 (h)⁴ for the return of "two cows taken and \$225.00 from milk checks received by Van Der Geest Leasing, Inc., subsequent to January 18, 1984."

14. As the moving party, the Debtors had the burden of proving the facts essential to their causes of action. 29 Am.Jur.2d Evidence sec. 127 (1967).

15. Two Cows. Did VDG remove seven cows from the Hable farm on January 18, 1984? The Debtors' evidence that it did is not

⁴Section 522(h) permits a debtor to step into the shoes of the trustee to avoid transfers under seven different Code sections. The Debtors have not specified the section which they believe applies to this Motion, see generally paragraphs 17-19 infra; at least five of the seven potentially applicable sections must be prosecuted in adversary proceedings, Fed.R.Bankr.P. 7001. VDG is deemed to have waived any procedural defects in this proceeding. See generally In re Coleman, 37 B.R. 120, 122 (Bankr.W.D.Wis. 1984) (adversary proceeding procedure waivable).

more convincing than VDG's evidence that it did not. Accordingly, the Court must find for VDG on this issue.

16. Milk Checks. VDG received \$225 a month from the Debtors' dairy for a period of 5 1/2 months. Under the Cow Rental Contract the Debtors' obligation to pay \$225 a month commenced on September 1, 1983, and terminated on January 18, 1984--a period of 4 1/2 months. Thus, after subtracting trucking costs, see paragraphs 2 and 8 supra, it appears that the Debtors overpaid VDG some \$145.

17. That the over-payment is not avoidable under secs. 544 (Trustee as lien creditor), 545 (Statutory liens), 549 (Post-petition transactions), 553 (Setoff) or 724(a) (Treatment of certain liens) needs no discussion.

18. Because the over-payment was not for or on account of an antecedent debt, sec. 547 (Preferences) does not apply. See 11 U.S.C. 547(b)(2).

19. Because the Debtors presented no evidence regarding insolvency, sec. 548 (Fraudulent transfers) can not be invoked.

20. However, as VDG has not contested the Debtors' power to exempt any recovery from this action, the \$145 represents property which VDG is obligated to repay under sec. 542 (Turnover of property of the estate).

21. The Debtor is the proper party to receive payment of the \$145.

CONCLUSIONS OF LAW

1. The Debtors have not shown, with a preponderance of the evidence, that VDG removed more than five cows from their farm on January 18, 1984.

2. The Debtors have shown that VDG is holding \$145 which must be turned over under 11 U.S.C. sec. 542(a).

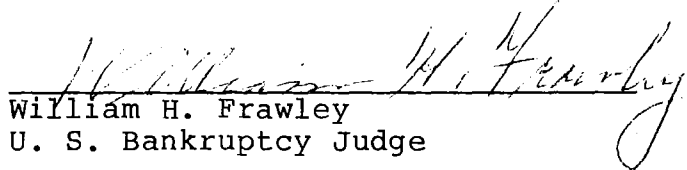
ORDERS

IT IS ORDERED THAT the Motion for Repayment of Milk Checks and Return of Cows filed in the above captioned proceeding by the Debtors is GRANTED, without costs, insofar as it requests the turnover of \$145.

IT IS FURTHER ORDERED THAT said Motion is DENIED, without costs, in all other respects.

Dated: July 30, 1984.

BY THE COURT:


William H. Frawley
U. S. Bankruptcy Judge