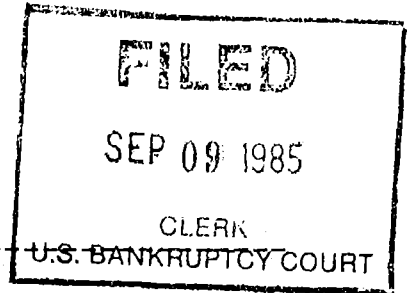


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re:

MARK J. FANDREY

Debtor.

Case Number:

WF7-84-01703

WALTER PERZENTKA,

Plaintiff,

v.

MARK FANDREY,

Defendant.

Adversary Number:

84-237-7

OPINION AND ORDER DETERMINING DEBT TO BE NONDISCHARGEABLE

Plaintiff Walter Perzentka has initiated this adversary proceeding objecting to the discharge of defendant Mark Fandrey from a debt for the purchase of cattle. The parties agree that plaintiff sold defendant seven holstein heifers on March 5, 1982. It is further agreed that the check issued as payment bounced. Plaintiff contends that the debt ensuing from this cattle sale is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

Section 523(a)(2)(A) of the Bankruptcy Code provides that a debt for property obtained by false pretenses, a false representation or actual fraud is nondischargeable. A debtor's issuance of a bad check does not automatically result in a nondischargeable debt. In re Anderson, 10 B.R. 296, 297 (Bankr.W.D.Wis.

1981). The focus of the court in bad check cases is on: (1) whether there was fraud or an intentional wrong by the debtor; and (2) whether the creditor reasonably relied on the validity of the check. Id. at 297-98.

As noted by the court in Anderson the degree of fraud or intentional wrong which must be demonstrated to bar discharge of a debt has varied. Collier on Bankruptcy has pointed out that sec. 523(a)(2)(A) was intended to codify case law which interpreted fraud to mean actual or positive fraud rather than fraud implied by law. 3 Collier on Bankruptcy (15th ed.) ¶ 523.08(5), page 523-53.

Plaintiff in this case has satisfied the requisite burden of establishing actual fraud. At trial plaintiff testified that when defendant gave him the check in payment for the cattle he stated that there were sufficient funds to cover the check. Defendant denied making such statement. As trier of fact it is the court's duty to weigh the testimony, consider conflicting evidence and assess the credibility of witnesses. Based on demeanor and other relevant factors, such as self-interest or corroboration, one witness' testimony may be given greater weight than other testimony. The court finds plaintiff's testimony to be more credible and reliable than defendant's testimony both because of the demeanor of the witnesses and the existence of evidence which tends to corroborate plaintiff's testimony.

Plaintiff's demonstration of fraud is not limited to his testimony concerning defendant's representations. At trial defendant admitted that at the time he issued the check he knew that there were insufficient funds in his account to make the

check good. However, defendant stated that he intended to be able to cover the check with proceeds of a business venture which ultimately failed. This explanation loses any credence it might have in light of defendant's admission that at times previous to the incident in this case he had purchased cattle with insufficient funds checks, sold the cattle and retained the money.

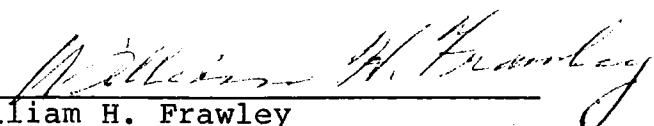
Plaintiff has demonstrated with clear and convincing evidence that defendant issued a check which he had no intention of covering for the purpose of fraudulently obtaining plaintiff's cattle and that plaintiff reasonably relied on the validity of that check. Therefore, defendant's debt for the cattle is nondischargeable pursuant to sec. 523(a)(2)(A). The exact amount of the nondischargeable debt to plaintiff is \$3525. This amount was stipulated to by the parties as a result of a small claims collection action initiated by plaintiff in state court.

ORDER

IT IS ORDERED THAT defendant's debt to plaintiff in the amount of \$3525 is nondischargeable pursuant to 11 U.S.C. § 523 (a)(2)(A).

Dated: September 9, 1985.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge

cc: Attorney Van Buren Wake Jr.
Attorney Daniel E. Ensley