

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

FILED
DEC 19 1985
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U.S. BANKRUPTCY COURT

In re: Case Number:
RICHARD CHARLES KNIPP, EF7-85-00442
Debtor.

ZUTTER ELEVATORS, INC.,
Plaintiff, Adversary Number:
v. 85-0146-7
RICHARD CHARLES KNIPP,
Defendant.

ORDER DENYING OBJECTION TO DISCHARGE

Plaintiff Zutter Elevators, Inc., has filed this adversary proceeding seeking a denial from discharge of a debt owed to it by defendant Richard Charles Knipp. Plaintiff alleges that this debt is nondischargeable under 11 U.S.C. § 523(a)(2) and (4). A trial of this matter was held December 11, 1985. Plaintiff appeared by Attorney Paul Gordon and defendant by Attorney David Steele.

This case arises out of an agreement between plaintiff and defendant by which each party was to provide certain animal feed or other ingredients to be mixed for sale. Defendant was responsible for collecting payment from the farmers who purchased the feed mixture. Plaintiff contends that it was never paid the

amount it was due under the agreement. Defendant admits that he owes the claimed amount but argues that the debt is dischargeable.

Section 523(a)(2)(A) provides, in relevant part, that a debt for money, property, services or credit is nondischargeable to the extent it is obtained by false pretenses, a false representation or actual fraud. In order to establish nondischargeability based on a false representation, a party must demonstrate:

- 1) that the debtor made materially false representations;
- 2) that the debtor knew the representations were false at the time he made them;
- 3) that the debtor made the false representations with the intention and purpose of deceiving the creditor;
- 4) that the creditor reasonably relied on the debtor's materially false representations; and
- 5) that the creditor incurred damages as a proximate result of the materially false representations by the debtor. In re Sutton, 39 B.R. 390, 396 (Bankr.M.D.Tenn. 1984).

An objecting party bears the burden of proving the necessary elements under sec. 523(a)(2) by clear and convincing evidence. In re Lamb, 28 B.R. 462, 464 (Bankr.W.D.La. 1983).

Plaintiff has failed to adequately demonstrate any of the necessary elements to establish a nondischargeable debt. Defendant's allegedly false representation was that the ingredients were to be sold to three farmers who were good customers and usually paid in three or four days. In reality, a sale to one of these farmers was further distributed to other farmers. Plain-

tiff argues that it relied on the fact that only three customers were to receive the goods.

Defendant testified that he did not recall whether he informed plaintiff that one of the sales was to be further distributed to other farmers. He explained that such further distribution occurred because the company he worked for had a certain minimum sale requirement for deliveries. If each farmer individually purchased goods, no delivery would be made. Plaintiff did not discredit defendant's explanation and introduced no evidence that the defendant actually did represent that only three farmers were to be sold the feed product. The evidence in this case does not lead to the conclusion that defendant made a materially false representation or that he intended to deceive plaintiff. Neither does the evidence lend any support to an inference that there was an intent to deceive.

In order to establish a nondischargeable debt in this case plaintiff would have to show that the issue of exactly how many farmers were to receive the feed product was an important aspect of the parties' agreement. Plaintiff has failed to establish this fact. It introduced no evidence from the Zutter party who negotiated the agreement as to the importance of the exact number of farmers. For this reason, the court cannot conclude that there was any actual reliance on a representation as to the actual number of farmers involved. Whatever representation defendant made was not significant, nor was it reasonably relied on to the plaintiff's detriment.

Plaintiff has also claimed that a constructive trust existed between the parties. In essence, its claim is that defendant's debt was one which arose through fraud while he occupied a fiduciary capacity. This would render the debt nondischargeable under sec. 523(a)(4). The term "fiduciary capacity" as contained in sec. 523(a)(4) has consistently been interpreted as being limited to situations involving express trusts, rather than trusts arising from an act of wrongdoing, or trusts imposed by law from contract. In re Chambers, 23 B.R. 206, 208 (Bankr.W.D. Wis. 1982). In Chambers, the court found that the debtor-creditor relationship which was present was not a fiduciary relationship under the Bankruptcy Code. This is an analogous situation. The parties in this case occupied a debtor-creditor relationship rather than a fiduciary relationship. Therefore, sec. 523(a)(4) does not render defendant's debt nondischargeable.

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

ORDER

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

Dated: December 19, 1985.

BY THE COURT:


William H. Frawley
U. S. Bankruptcy Judge

cc: Attorney Paul Gordon
Attorney David L. Steele