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FILED

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

SEP 5 1986

CLERK, U.S.
BANKRUPTCY COURT

CASE NO. _____

In re:

Case Number:

GARY JAMES HIRN, d/b/a
Hirn Business Machines, and
TONY LYNN HIRN,

EF7-86-00843

Debtors.

CHARTER BANK EAU CLAIRE,
a Wisconsin Banking Corporation,

Plaintiff,

Adversary Number:

v.

86-0172-7

GARY J. HIRN,

Defendant.

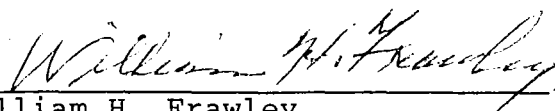
ORDER

The court having this day entered its memorandum opinion,
findings of fact, and conclusions of law;

NOW, THEREFORE, IT IS ORDERED that the motion of the debtor
pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure
and Bankruptcy Rule 7012(b) to dismiss the complaint for failure
to state a claim upon which relief can be granted is hereby
denied.

Dated: September 5, 1986.

BY THE COURT:



William H. Frawley
U.S. Bankruptcy Judge

cc: Attorney Peter Herrell
Attorney Katherine Schulz
ca
9-5-86

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Defendant.

MEMORANDUM OPINION,
FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The plaintiff, Charter Bank Eau Claire, appears by Peter Herrell and has initiated this adversary proceeding pursuant to 11 U.S.C. § 523(a)(6) and Bankruptcy Rule 4007 seeking to except a debt from discharge. The debtor, by Katherine Schulz, contests the complaint and has motioned the court to dismiss the complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. This rule is made applicable to the Bankruptcy Code by Bankruptcy Rule 7012(b).

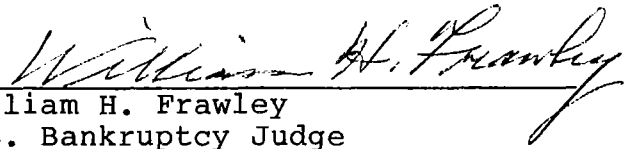
The sole and narrow issue that is before the court for determination is whether the complaint states a claim upon which relief can be granted. The burden of demonstrating that no claim has been stated is on the debtor. Johnsrud v. Carter, 620 F.2d 29 (3rd Cir. 1980). In determining this matter, all of the factual allegations of the complaint and all reasonable inferences therefrom must be presumed to be true. Miree v. Dekalb County, Georgia, 433 U.S. 25 (1977). The court should deny the motion for failure to state a claim upon which relief can be granted unless the debtor proves beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. Cowley v. Gibson, 355 U.S. 41, 45-46 (1957).

In the matter sub judice, it is alleged that the obligation owed to the plaintiff by the debtor is from a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The debtor has apparently sold property in which the plaintiff held a security interest. It is also alleged that the debtor converted the proceeds from such sales. The propriety both of the sale of encumbered property and the use of the proceeds therefrom is a question of fact that must be resolved by the bankruptcy court. Because there is a genuine issue of material fact, the motion of debtor must be denied. It is the conclusion of the court that the debtor's motion to dismiss the complaint for failure to state a claim upon which relief can be granted should be denied.

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

Dated: September 5, 1986.

BY THE COURT:



William H. Frawley
U.S. Bankruptcy Judge