

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Bky. No. 03-48513-NCD
Adv. No. _____

In re:

Russell L. Livingood and
Carolyn E. Livingood,

Debtors.

HomeTown Bank,

Plaintiff,

vs.

Russell L. Livingood and
Carolyn E. Livingood,

Defendants.

ADVERSARY COMPLAINT

COMES NOW, HomeTown Bank, by and through its undersigned attorneys, as and for its complaint against Russell Livingood and Carolyn Livingood, states and alleges as follows:

PARTIES

1. HomeTown Bank is a Minnesota banking organization duly authorized to transact business in the State of Minnesota.
2. Defendants Russell Livingood and Carolyn Livingood (“Defendants” or “Debtors”) are Minnesota residents residing at 84953 - 360th St., Olivia, MN 56277.

JURISDICTION AND VENUE

3. This adversary proceeding is brought pursuant to Bankruptcy Rule 7001 and arises under 11 U.S.C. § 523. This Court has exclusive jurisdiction over this action pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 7001(6) and Local Rule 7004.

4. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157.
5. Venue is appropriate in this jurisdiction pursuant to 28 U.S.C. § 1409.

GENERAL FACTUAL BACKGROUND

6. HomeTown Bank is in the business of, amongst other things, making agricultural loans.
7. Defendants executed various notes and obtained various loans, renewals and refinancing of loans from the Bank from 2001 to 2003.
8. In obtaining the loans and renewals and refinancing of the loans, Defendants submitted various financial statements to the Bank. In making the loans, advancing money and providing the extension, renewal and refinancing of credit to Defendants, the Bank relied upon the various financial statements submitted to it by Defendants.
9. To secure advances made pursuant to the various notes, Defendants executed security agreements wherein they granted the Bank a security interest in various items of personal property, including but not limited to, inventory, machinery and equipment, rights to payment, general intangibles, farm products, and proceeds thereof (the "Collateral").
10. The Bank duly perfected its security interest in the Collateral.
11. On December 9, 2003, Defendants filed a petition for relief under Chapter 7 of Title 11 of the United States Code as Bankruptcy No. 03-48513-NCD.
12. As of the date of the filing of the Bankruptcy Petition, Defendants were indebted to the Bank in the approximate amount of \$224,714.21, exclusive of accruing interest, costs, attorney's fees and expenses.

COUNT I

13. Plaintiff Bank restates the allegations of Paragraphs 1-12 above, inclusive, as though fully set forth below.
14. Defendants are not entitled to a discharge pursuant to the provisions of 11 U.S.C. § 523(a)(2)(A).
15. Defendants obtained money, extensions, renewals and refinancing of credit by false pretenses, plus representations and fraud.
16. Defendants made false representations and provided false pretenses to the Bank as it related to the Defendants' financial condition.
17. As a result of the Defendants' false pretenses and false representations, the Defendants' obligations are not dischargeable pursuant to the provisions of 11 U.S.C. § 523(a)(2)(A).

COUNT II

18. Plaintiff Bank restates the allegations of Paragraphs 1-17 above, inclusive, as though fully set forth below.
19. Defendants are not entitled to a discharge pursuant to the provisions of 11 U.S.C. § 523(a)(2)(B).
20. Defendants obtained money, extensions, renewal and/or refinancing of credit by submitting financial statements that were materially false with regard to the Defendants' financial condition and status.
21. The Bank reasonably relied upon the financial statements submitted by the Defendant in approving the loan, advancing monies, and extending the renewal and refinancing of credit.
22. Defendants made the false financial statements with the intent to mislead the Bank so the Bank would approve their loan, refinance their loan, and advance money for Defendants' farming operations.
23. As a result of the Defendants' materially false financial statements, upon which the Bank reasonably relied, the Defendants' obligations to the Bank are not dischargeable pursuant to the provisions of 11 U.S.C. § 523(a)(2)(B).

COUNT III

24. Plaintiff Bank restates the allegations of Paragraphs 1-23 above, inclusive, as though fully set forth below.
25. Defendants are not entitled to a discharge of the debt due and owing the Bank pursuant to the provisions of 11 U.S.C. § 523(a)(6).
26. Defendants failed to turn over all proceeds and/or account for the disposition of certain items of Collateral, including but not limited to the following:
 - a. \$39,000.00 of hog proceeds that were deposited by the Defendants into another bank account;
 - b. Defendants have failed to account for and/or identify the sales of approximately 260 hogs;
 - c. Defendants failed to account for and/or identify a rent check payment in the amount of \$7,200.00 due and owing to them at the time of the filing of the Bankruptcy Petition. One day after the filing of the petition, the Defendants endorsed the check and received approximately \$3,400.00 of cash.

27. Defendants' liquidation, sale, transfer and disposition of Collateral, as set forth above, were subject to the Bank's security interest.
28. Defendants failed to remit all the proceeds of said sales, transfers, rights to payment of Collateral to the Bank in violation of the security agreement.
29. Defendants engaged in a pattern of fraudulent conduct by being willful and causing malicious injury to the Bank by transferring and/or selling Collateral, out of trust and without the permission of the Bank, in which the Bank had a valid, validly perfected security interest, in failing to turn over the proceeds of said sales or transfers.
30. Defendants' actions with respect to the conversion of the various items of Collateral subject to the Bank's security interest constitutes a willful and malicious injury by Defendants to the property of the Bank.
31. As a direct result of Defendants' willful and malicious injury of Bank's Collateral, by transferring, failing to disclose and selling the Collateral and failing to submit the proceeds of said sales and/or transfers or rights to payment to the Bank, Defendants' obligations to the Bank are not dischargeable pursuant to the provisions of 11 U.S.C. § 523(a)(6).

WHEREFORE, HomeTown Bank prays for an Order of this Court:

1. Determining that Defendants' obligations and debts to the Bank are not dischargeable pursuant to the provisions of 11 U.S.C. § 523(a);
2. Entering judgment against the Defendants for the non-dischargeable debt, in an amount to be determined at trial;
3. Awarding the Bank its costs, disbursements and attorney's fees incurred in connection with this matter; and
4. For such other relief as the Court deems just and equitable.

Dated this 8th day of April, 2004.

/e/ Michael S. Dove
Michael S. Dove #214310
GISLASON & HUNTER LLP
Attorneys for Plaintiff
2700 South Broadway
P. O. Box 458
New Ulm, MN 56073-0458
Phone: 507-354-3111