

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

Erik Michael Hollerud
dba Hollerud Oil Company,

BKY 03-38294

Debtor(s).

Bradley Newman,

Plaintiff(s)

ADV 04-3086

vs.

Erik Michael Hollerud
dba Hollerud Oil Company,

**NOTICE OF HEARING AND MOTION
FOR SUMMARY JUDGMENT AND
REQUEST FOR AWARD OF ATTORNEY'S FEES**

Defendant(s).

TO: The debtor(s) and the United States Trustee.

1. Erik M. Hollerud moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 11:30 a.m. on Monday, September 27, 2004, before the Honorable Dennis D. O'Brien in Courtroom No. 228A, 316 North Robert Street, St. Paul, MN.

3. Any response to this motion must be filed and delivered not later than 11:30 a.m. on Monday, September 20, 2004, which is seven days before the time set for the hearing (including intermediate Saturdays, Sundays, and holidays) or filed and served by mail not later than 11:30 a.m. on Friday, September 17, 2004, which is 10 days before the date set for hearing (including intermediate Saturdays, Sundays, and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this Chapter 7 case was filed on December 10, 2003. This adversary proceeding was filed on March 18, 2004, and the case is now pending in this court.

5. This motion arises under 11 U.S.C. §§523 and 727 and Fed. R. Bankr. P. 7056. This motion is filed under Fed. R. Bankr. P. 9014 and Local Rule 9013. Movant requests the Court to issue summary judgment pursuant to Fed. R. Bankr. P. 7056, Fed. R. Civ. P. 56 and Fed. R. Bankr. P. 9014, and ask the Court to dismiss plaintiff's case in that there is an absence of evidence to support the case.

6. Movant requests an award of attorney's fees against plaintiff for the reasonable costs incurred in defending this cause of action, which was filed without a reasonable basis and in reckless disregard of the legal principles underlying the complaint.

7. This motion is based upon the attached Memorandum of Law and accompanying Affidavit and all the files and records herein.

SUMMARY JUDGMENT

WHEREFORE, defendant moves the Court for an order dismissing plaintiff's pretended cause of action and granting reasonable costs and attorney's fees incurred in defending the same.

Dated: August 17, 2004

/e/ Mark C. Halverson
Mark C. Halverson
Halverson Law Office
600 S. 2nd St.
P.O. Box 3544
Mankato, MN 56002
Telephone: 507-345-1535
Attorney I.D. #124217
Attorney for Defendant

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

Erik Michael Hollerud
dba Hollerud Oil Company,

BKY 03-38294

Debtor(s).

Bradley Newman,

Plaintiff(s)

ADV 04-3086

vs.

Erik Michael Hollerud
dba Hollerud Oil Company,

**MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT
AND AWARD OF FEES**

Defendant(s).

This matter is before the Court upon a Motion for Summary Judgment and request for an award of costs and fees brought by defendant Erik M. Hollerud. The plaintiff has filed a dischargeability complaint apparently seeking to have his claimed debt excepted from discharge as well as having Mr. Hollerud's general bankruptcy discharge withheld. The basis for both actions is confined to a lease transaction wherein the defendant leased a filling station/convenience store from the plaintiff on a short-term basis.

FACTS

The underlying dispute revolves around the defendant's lease of a gas station in Rose Creek, Minnesota, known as Route 56 (hereinafter "the station"), owned by plaintiff. Defendant, through Hollerud Oil Company, was in the business of delivering fuel. The lease discussions began because of a previous business relationship between the defendant and plaintiff. Defendant had been delivering fuel to the plaintiff's station. Plaintiff had accrued an overdue fuel bill of somewhat over \$20,000. Because defendant discontinued fuel service because of this debt, and because the plaintiff apparently was unable to obtain service from another vendor, plaintiff was intending to shut the station down. Because defendant believed the station to be of some value as an outlet for Hollerud

Oil Company, he agreed to lease the property on a short-term basis. The plaintiff had moved out of the station by the time of the lease, March 30, 2001.

A “lease agreement” dated March 30, 2001 (attached hereto as Exhibit 1), reflects the parties’ agreement that defendant would lease the station on a short-term basis while evaluating the viability of the business and attempting to obtain financing sufficient to retire or assume a debt of approximately \$93,500.00 secured by the station. No additional documents, such as a purchase agreement or option agreement, were executed. Defendant was essentially given two months to obtain financing to purchase the station, should he desire. The lease agreement is in the name of Erik Hollerud, individually.

Following the commencement of the lease, defendant did make two inquiries as to the availability of financing. First, the Rose Creek State Bank, which already held a note upon the property, was asked to finance a purchase by defendant. This bank was not interested in financing the purchase.

Next, defendant approached the Wells Fargo Bank of Austin, where he was already doing business, attempting to purchase the station. During the course of the discussions with Wells Fargo, the bank became aware that the defendant had a silent partner in Hollerud Oil Company. The bank determined it would be prudent for defendant to eliminate this interest before proceeding with the acquisition of the station. This decision was prompted in part by the desire of defendant’s silent partner, Wally Bustad, to sell his interest in Hollerud Oil Company to defendant. The terms of the agreement between defendant and Wallace Bustad (included in plaintiff’s pleadings) provided that neither party would make “any major expenditures” without the consent of the other. Thus, the acquisition of the station by Hollerud Oil Company as an entity may have required the approval of Mr. Bustad. Mr. Bustad preferred to withdraw from Hollerud Oil Company rather than expand its operation.

Wallace Bustad was the silent partner in Hollerud Oil Company. He had not been active in participating in the management of the business, as is the norm for a silent partner. However, his involvement in Hollerud Oil Company was sufficient to lead the Wells Fargo Bank to decide not to finance the acquisition of the station either through Hollerud Oil Company or defendant, individually.

An agreement to retire Mr. Bustad’s interest in Hollerud Oil Company was reached in May of 2001, but not put into writing until August of 2001. Defendant’s lease agreement expired on May 31, 2001, without him obtaining financing for the purchase of the station. Defendant attempted to extend the lease, but found the terms proposed by plaintiff to be oppressive. On June 6th, the plaintiff told defendant to leave the premises, even though defendant remained interested in acquiring the station. Defendant obliged, and vacated the property. Plaintiff retook possession of the property and resumed operating the station, presumably conducting business as usual.

During the course of the lease, defendant maintained the station. Significant cleaning was done, some painting undertaken and minimal remodeling. At the end of the lease, the station was in as good as, or better shape, than at the commencement of the lease.

Plaintiff ultimately pursued a claim against defendant in state court and was granted a default judgment. Default judgment was apparently based upon defendant's failure to comply with discovery. (See findings of fact, etc. attached to plaintiff's complaint.) Notably, the findings of fact, prepared on plaintiff's behalf, make no reference to fraud. Plaintiff's fraud theory apparently did not develop until such time as defendant filed bankruptcy. Plaintiff then commenced this adversary proceeding claiming defendant had a fraudulent intent *ab initio*, defendant supposedly deliberately concealing Mr. Bustad's involvement in Hollerud Oil Company, presumably because not to have done so would have, for some reason, persuaded plaintiff not to enter into the lease agreement.

At no time during the proceedings was defendant asked about the make up of Hollerud Oil Company. At no time did defendant make representations concealing the involvement of Wallace Bustad in Hollerud Oil Company.

At no time during the relationship involving the lease or during the course of conduct has defendant made any misrepresentations, concealed any property, or conducted his affairs in bad faith.

DISCUSSION

Plaintiff's dischargeability action, whether under 11 U.S.C. §523 or 727, is apparently based upon general allegations of fraud. A general analysis of the elements of fraud is not necessary in this instance, as no collarable fraud exists.

The business relationship between plaintiff and defendant is governed by the lease agreement dated March 30, 2001. Initially, this agreement obligates defendant only to lease the station for a two-month period. There is an acknowledgment that the purpose of the agreement is to allow plaintiff to seek financing to purchase the station. However, no purchase agreement is incorporated into the lease agreement. There is not even a requirement that defendant seek financing. Nonetheless, defendant did attempt to obtain financing through two different sources before plaintiff terminated the lease. Defendant's obligation is no more than leasing the premise for two months. Plaintiff has projected this simple 60-day lease into a \$100,000 "lost opportunity" claim based upon the presumption the lease agreement is the equivalent of a purchase agreement. However, that is clearly not the case.

Plaintiff also overlooks the fact the lease agreement was entered into by defendant, individually, rather than Hollerud Oil Company as an entity. This fact makes the involvement of the defendant's silent partner in the transaction largely irrelevant.

There are no allegations that defendant misrepresented the ownership of Hollerud Oil Company. There are no allegations that plaintiff asked anything or did any other due diligence regarding the status of Hollerud Oil Company or Erik Hollerud, individually. There are no allegations that Erik Hollerud owed any duty, absent inquiry, to disclose the organizational structure of Hollerud Oil Company or the fact he had a silent partner. By definition, “silent” partners remain largely anonymous.

There is simply no basis to support a judgment in favor of plaintiff. Plaintiff cannot prevail at trial.

There are no allegations that defendant engaged in any other fraudulent conduct, failed to disclose specific assets in the course of his bankruptcy, or engaged in any other conduct that would support an action to withhold his bankruptcy discharge pursuant to 11 U.S.C. §727.

Given the infirm nature of plaintiff’s pretended cause of action, defendant believes an award of costs and attorney’s fees is warranted and requests the same. Because plaintiff’s action has been undertaken largely in disregard of the facts and the statutory requirements of the bankruptcy code, an award of attorney’s fees is warranted.

The plaintiff, even if *pro se*, should be held to a reasonable standard if he undertakes to represent himself. His actions have necessitated a response by defendant at significant cost.

However, in this instance an award of fees should be considered irrespective of the fact plaintiff claims to be appearing *pro se*, as it is evident he has employed legal counsel to assist him in this matter. Thus, he should be held to the same standard as any litigant who is represented by legal counsel.

The same attorney who represented plaintiff in the state court litigation appears to have continued surreptitiously participating in this matter once it became a bankruptcy issue. The attorney submitting the findings of fact and related documents in the state court proceedings is the attorney who notarized the plaintiff’s complaint. The captions and file notations on the findings of fact filed in state court and the bankruptcy complaint are similar, all appearances indicating they were produced by the same entity(ies). Pleadings in this cause of action were mailed by the law firm (see Exhibit 2 attached hereto).

Defendant’s attorney will submit an affidavit outlining the request for fees prior to the hearing upon this motion, at such time as a fairly accurate summary of costs and fees incurred by defendant is known.

CONCLUSION

Plaintiff's cause of action, based upon defendant's allegedly fraudulent conduct, even on a theoretical basis is infirm. Defendant is entitled to summary judgment. Given the speculative and unfounded nature of plaintiff's claim, an award of costs and attorney's fees is warranted.

Dated: August 17, 2004

/e/ Mark C. Halverson
Mark C. Halverson
Halverson Law Office
600 S. 2nd St.
P.O. Box 3544
Mankato, MN 56002
Telephone: 507-345-1535
Attorney I.D. #124217

VERIFICATION

I, Mark C. Halverson, verify those limited facts apparent from the examination of the record or my file not encompassed by the accompanying affidavit of Erik Hollerud.

Dated: August 17, 2004

/e/ Mark C. Halverson
Mark C. Halverson
Halverson Law Office

3-30-01

Lease Agreement

I Brad Newman of Rose Creek hereby agree to lease to Erik M. Hollend the property known as Route 56 for a period of 60 days beginning Saturday March 31, 2001 until May 31st 2001.

Erik Hollend agrees to pay on April 30th 2001 \$412.00 to Sterling Bank and \$588.00 to Rose Creek State Bank on Brad's loans. And \$588.00 May 31st 2001 and \$412.00 to respective banks.

Erik Hollend is responsible for all utilities and operating expense from April 1, 2001 to May 31st 2001.

This lease is given Erik Hollend time to secure financing of \$33,197.24 and \$60,399.00 to pay off Brad's present debts and purchase said property.

Brad agrees to maintain liability insurance and whatever insurance he presently has for 60 days.

Brad Newman
Erik Hollend

EXHIBIT

1

FIRST CLASS MAIL

Atom

GRUNDHOEFFER, NEVILLE & LUDESCHER P.A.

ATTORNEYS AT LAW

515 WATER ST S PO BOX 7
NORTHFIELD, MN 55057-0007

7a

Hollerud Oil Company
Attn Erik Hollerud
707 Sixth Street NW
Austin MN 55912



POSTER
3431908



EXHIBIT

2

5. Because I discontinued fuel service because of this debt and the plaintiff apparently was unable to obtain service from another vendor, Mr. Newman was intending to shut the station down.

6. Because this outlet was of some value to Hollerud Oil Company, I agreed to lease the property on a short-term basis in order to provide an outlet for the fuel I was selling. The plaintiff had moved out of the station by March 30, 2001.

7. A general agreement was reached, but never put into writing, to the effect that I might purchase the station by servicing the debt of approximately \$93,500.00 secured by the station and also by writing off the debt of over \$20,000.00 owed Hollerud Oil Company by the plaintiff.

8. I did not sign a purchase agreement, but merely leased the station on a short-term basis in order to determine if purchasing the business under the contemplated terms was viable.

9. The fact this initial transaction is nothing more than a short-term lease is clearly reflected by the "lease agreement" dated March 30, 2001, attached hereto as Exhibit 1. The agreement does reflect the fact I was given an option to purchase the property. However, the option was contingent upon my securing financing and, in any case, was non-binding.

10. Another fact reflected by the lease agreement is that the lease and option were to me, an individual, rather than undertaken in the name of Hollerud Oil Company. Hollerud Oil Company was a business in which I had a silent partner. While at some point Hollerud Oil Company may have assumed the lease agreement and/or purchased the station, that was not necessarily going to be the case.

11. During the negotiations leading to the lease agreement, Mr. Newman made no inquiry as to the status of Hollerud Oil Company or whether I was authorized to bind the company. I made no representations to that effect. I believe it was generally known around Rose Creek that one Wally Bustad was involved in Hollerud Oil Company as a silent partner. However, since the lease agreement was not in the name of Hollerud Oil Company anyway, and since Mr. Bustad had not previously been involved in any business of Hollerud Oil Company, I did not think Mr. Bustad's involvement in Hollerud Oil Company was material. To the extent Hollerud Oil Company was involved in this transaction, I was the managing partner, in any case.

12. I did attempt to secure financing to purchase the station. The plaintiff and I cooperatively approached the Rose Creek State Bank, which already held a note upon the property, hoping they would finance my acquisition of the property by issuing a loan consolidating the existing debt upon the service station and releasing the plaintiff from liability upon that debt. The Rose Creek bank indicated they were not interested in continuing to finance the station.

13. I next went to the Wells Fargo Bank of Austin, where I was already doing business, and attempted to obtain financing to purchase the station.

14. In discussing the possibility of buying the station with my banker at Wells Fargo, it was determined that I should buy out Wally Bustad's interest in Hollerud Oil Company before proceeding with other endeavors. Wall had expressed an interest in liquidating his interest in Hollerud Oil Company. I believe the bank felt that would make my financial situation more stable. Wells Fargo did not outright decline to finance my purchase of the station, but seemingly made retiring Wally Bustad's interest in Hollerud Oil Company a prerequisite to underwriting other financial ventures, either via Hollerud Oil Company, as an entity, or myself, as an individual.

15. An agreement to retire Mr. Bustad's interest in Hollerud Oil Company was reached in May 2001. The final draft was not put into writing until August 2001. The agreement provided for a \$25,000.00 down payment followed by \$700.00 monthly payments until August 1, 2006, when the balance of the total purchase price of \$183,000.00 was due.

16. Meanwhile, my initial lease agreement through May 31, 2001, had expired. In that it was still my intention to attempt to eventually consummate the purchase of the station or otherwise continue to operate it, I attempted to renew the lease. The plaintiff, however, in addition to monthly payments, insisted on a payment of \$10,000.00 as a condition of renewing the lease. I did not find this proposal acceptable and did not agree to it.

17. On June 6th, the plaintiff told me to leave the premises. I obliged. This effectively terminated our lease and any possibility I would proceed to purchase the station, the plaintiff effectively canceling the transaction. Notably, this action is consistent with the original lease agreement, which leased the premise only until May 31, 2001.

18. While this may not be particularly relevant to the underlying dischargeability issue, the plaintiff's assertions that I gutted and damaged the facility are totally erroneous. I did clean and paint the premise, leaving it in better condition than when I moved in. Alterations were limited to removing part of a counter to provide a more pleasing retail environment. The station was totally functional, and the plaintiff resumed operating the business immediately upon my departure.

19. Likewise, the plaintiff's assertion of great economic loss is dubious. Prior to the lease, the plaintiff moved his car repair facilities and accompanying tools to his residence where he continued to operate a repair business. Following my departure from the station, to my knowledge, the plaintiff continued to operate the business in the same fashion it had always been operated.

20. All of my actions in this transaction were undertaken in good faith. While I deny that a firm purchase agreement was entered into, and that even whether or not I had an enforceable purchase agreement is doubtful, I did at all times, until evicted on June 6, 2001, maintain a desire to acquire the station.

21. At no point in time did I make any false statements to the plaintiff, do anything to deceive the plaintiff, or otherwise engage in any fraudulent or dishonest conduct. I had no intent to defraud the plaintiff and did not do so.

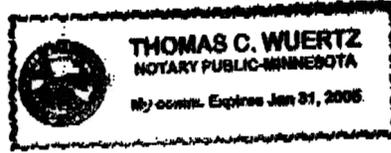
Further than this affiant sayeth not.

Erik M. Hollerud

Erik M. Hollerud

Subscribed to and sworn before me this 16 day of Aug., 2004.

Thomas C. Wertz
Signature of Notary



3-30-01

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Brad agrees to maintain liability insurance and whatever insurance he presently has for 60 days.

Brad Newman
Erik M. Hollend

EXHIBIT

1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

Erik Michael Hollerud
dba Hollerud Oil Company,

BKY 03-38294

Debtor(s).

Bradley Newman,

Plaintiff(s)

ADV 04-3086

vs.

Erik Michael Hollerud
dba Hollerud Oil Company,

ORDER

Defendant(s).

The above-entitled matter came before the Court on September 27, 2004, upon the Motion for Summary Judgment and Request for Award of Attorney's Fees submitted by Erik M. Hollerud. Mark C. Halverson appeared on behalf of the defendant. Other appearances are noted in the record.

Based upon the motion, arguments of counsel, evidence presented, and all the files and records herein:

IT IS HEREBY ORDERED:

1. That the plaintiff's case is dismissed.
2. That the defendant is granted an award of reasonable attorney's fees in the amount of

_____.

Dated: _____, 2004

Dennis D. O'Brien
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

Erik Michael Hollerud
dba Hollerud Oil Company,

BKY 03-38294

Debtor(s).

Bradley Newman,

Plaintiff(s)

ADV 04-3086

vs.

Erik Michael Hollerud
dba Hollerud Oil Company,

**UNSWORN DECLARATION
OF SERVICE BY MAIL**

Defendant(s).

I, **Jean S. Carlson**, an employee of Halverson Law Office, 600 South Second Street, Mankato, MN, deposes and says that on August 17, 2004, she served the attached **Notice of Hearing and Motion for Summary Judgment and Request for Award of Attorney's Fees, Memorandum in Support of Summary Judgment Motion and Award of Fees, Proposed Order, and Affidavit** on the attached list by depositing true and correct copies thereof in the United States Mail at Mankato, Minnesota, with postage prepaid in an envelope addressed to said individuals.

U.S. Trustee
1015 U.S. Courthouse
300 S. 4th St.
Minneapolis, MN 55415

Bradley Newman
60496 160th St.
Rose Creek, MN 55970

Dated: August 17, 2004

By /e/Jean S. Carlson
Jean S. Carlson
Halverson Law Office
600 S. 2nd St.
Mankato, MN 56001