

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

CHAPTER 7

Franklin P. Bronk,
Debtors.

Bky. 3-92-3097

Town and Country State Bank of Winona, ADV. 3-92-253
Plaintiff,

vs.

ORDER

Franklin P. Bronk,
Defendant.

This matter is before the Court on action by Town and Country State Bank objecting to dischargeability of Debtor Franklin Bronk's debts to the Bank under 11 U.S.C. Section 523, or, in the alternative, to bar his discharge under 11 U.S.C. Section 727. Appearances are as noted in the record. Trial was held on June 28, 1993, and the Court, having heard and received evidence and arguments of the parties, and being fully advised in the matter, now makes this order pursuant to the federal and local Rules of Bankruptcy Procedure.

I.

This dispute involves two debts owed by the Debtor to Town and Country State Bank. One was incurred in connection with a veal operation, and the other with a calf starter note. The Bank seeks judgment of nondischargeability for both debts, based on wrongful conversion of its collateral regarding the veal obligation and fraudulent misrepresentation regarding the beef starter calves. Alternatively, the Bank seeks denial of the general discharge for failure to keep adequate records and satisfactorily explain loss of assets.

Defendant Franklin Bronk established a financial relationship with Town and Country Bank in 1987 in connection with his purchase and operation of a farm known as the Cedar Valley operation.(FN1)

The

Bank financed the raising of veal calves on the farm. A checking account was established at the Bank through which loans were dispersed and expended. Between Mr. Bronk's purchase of the farm

in 1987, and December 1989, six batches of veal were raised by him at Cedar Valley and financed through the Bank. The last batch resulted in a shortfall to the Bank in the amount of \$23,448, which Town and Country claims was caused by fraudulent conversion of proceeds of its collateral, the veal calves. The Bank seeks judgment of nondischargeability pursuant to 11 U.S.C. Section 523(a)(6).(FN2)

In addition to the veal operation, Mr. Bronk utilized the Bank to obtain financing for what he represented was to be a limited beef starter calf operation at Cedar Valley in April of 1989. The Bank lent Mr. Bronk \$10,020 on April 10, 1989, to purchase 50 starter calves that he was to raise for beef. The Bank claims that Mr. Bronk misrepresented the purpose of the loan, did not purchase the starter calves, but used the funds for other general purposes. The note was subsequently renewed in April 1990, but was never paid and remains outstanding. The Bank seeks judgment of nondischargeability pursuant to 11 U.S.C. Section 523(a)(2)(A)(FN3)

Mr. Bronk denies any wrongdoing regarding either the veal or starter calf obligations. He claims that the shortfall in the last veal batch was the result of catastrophic losses due to death of animals through illness. Regarding the beef starter calves, Mr. Bronk claims that the 50 calves were purchased but that they, too, were lost in the veal operation, when used to replace dying veal calves in an attempt to salvage that operation.

The Bank's 11 U.S.C. Section 727 claim is made pursuant to 11 U.S.C. Section 727(a)(3)(FN4) for failure of Mr. Bronk to maintain adequate records; and, 11 U.S.C. Section 727(a)(5)(FN5) for his

failure

to satisfactorily explain the loss of his assets. Mr. Bronk has produced little documentation regarding either operation, and none from which accurate reconciliations can be objectively made, according to the Bank.

II.

A. THE VEAL OPERATION.

1. Prima Facie Conversion of Bank's Collateral.

Raising veal involves the purchase of young calves and housing them indoors for approximately 15 weeks, after which they are sold for slaughter. During the housing period the calves are fed a liquid diet and kept in crates to minimize their movement and assure tenderness. Mr. Bronk used a barn on the Cedar Valley farm to house the animals and raised capacity batches, or 265 calves per batch. Town and Country State Bank financed six batches of veal calves raised by him, beginning in 1987 and ending with the last batch in late spring 1989. A checking account was set up at the Bank for deposit of loan disbursements and expenditures in connection with operations at the Cedar Valley farm.(FN6) Financing for the batches at Cedar Valley involved up to \$100,000 per batch.

The first four batches were financed, raised and paid for in

the ordinary course. Typically, the Bank would advance funds for the purchase and care of the animals, including feed and medicine. The batches would be raised and sold in two sets, and, upon each sale Mr. Bronk would turn over the check received to the Bank toward payment of the indebtedness.

Unusual occurrences began with the fifth batch. A number of viruses infected the batch, resulting in the death of approximately 50 calves and a financial loss from that operation of between \$5,000 and \$16,000.(FN7) The fifth batch was raised and sold between November 1988 and April 1989. On May 26, 1989, the Bank committed to finance a sixth batch, which would include total advances of \$95,000.

The sixth batch was raised and sold from the end of May through November of 1989. The first advance for the batch was made by the Bank on May 26 in the amount of \$35,020, which was to be used to purchase of veal calves and feed. However, Mr. Bronk used \$16,382 of the advance to cover his check on the Town and Country account issued to the Bank on the same day in payment of the balance owing on the fifth batch. Subsequent advances were made on the following dates for the purposes stated:

June 6, \$25,000 to purchase calves;
June 28, \$15,000 to purchase feed;
August 1, \$10,000 to purchase feed and
veterinary supplies;
September 11, \$10,000 to purchase feed.

The first sale was made on October 30, netting Mr. Bronk \$58,867.15 for 120 calves. The proceeds were paid to the Bank on November 1, at which time Mr. Bronk informed the Bank that the remaining calves would be sold approximately three weeks thereafter. Balance owing the Bank after application of the first payment was \$39,364.81.(FN8)

By December 14, the Bank had contacted Mr. Bronk several times regarding final payment for the sixth batch. On that day, Mr. Bronk informed the Bank for the first time that he had experienced catastrophic death loss in the batch and that he was unable to pay any of the principal amount owing. On December 28, \$17,898.47 was paid to the Bank from proceeds derived from sale of the Cedar Valley farm, reducing the obligation to \$23,448.96. No payments have been made since that time.

2. Inadequate Rebuttal and Nondischargeability of the Debt.

Mr. Bronk's claim of catastrophic death loss in the sixth batch is not sustainable for three reasons. First, his course of dealing with the Bank during the relevant period is inconsistent with the claim. Mr. Bronk was in contact with the Bank regularly during the sixth batch period and never mentioned any loss until after the final payment was past due.

Second, Mr. Bronk issued a financial statement to another lender on November 17, 1989, two weeks after the October 30 sale of 120 calves, stating that he still had 102 veal calves valued at \$49,365, pledged to Town and Country. The statement was given to Eastwood Bank in connection with the financing of operations at the Stockton Farm.

Third, Mr. Bronk produced no records that would tend to substantiate the loss claimed, while the records relied upon by him create negative inferences. Mr. Bronk claims to have lost 200 to 247 calves to fatal illness in raising the sixth batch.(FN9) He produced no veterinary records, no rendering records, and no persuasive credible testimony of any disinterested persons that would tend to support his claim.(FN10)

The bank account records that Mr. Bronk produced create negative inferences regarding his claim. The advances for the sixth batch were all disbursed through the Town and Country account. Mr. Bronk was able to produce cancelled checks from that account showing the purchase of only 181 of the 265 calves needed to fill out the sixth batch.(FN11) He testified that he lost or misplaced other cancelled checks from the account that would show the purchase of additional calves, but offered no explanation why he did not obtain copies of the missing checks from the records regularly maintained at the Bank concerning the account.

Furthermore, Town and Country bank statements produced for the period reveal two unusually large expenditures, totalling \$36,000, that were not explained or accounted for.(FN12) The amounts of these checks do not fit the pattern of accounted-for purchases of calves, feed or medicine, but exceed individual accounted-for purchases by three to four times. When added to the \$16,382 of advances used to pay off the balance owing for the fifth batch, \$52,382 appears to have been used for purposes unrelated to the sixth batch veal operation. A fair inference from the bank statements offered by Mr. Bronk is that a substantial number of veal calves needed to fill the sixth batch were never purchased, and the funds advanced by the bank for that purpose were diverted to unauthorized uses.(FN13)

The evidence submitted by Mr. Bronk is insufficient to rebut the Bank's prima facie case that he wrongfully converted the Bank's collateral by selling secured veal calves and failing to pay the proceeds to the Bank. Unauthorized disposition of a secured party's collateral can constitute willful and malicious injury under 11 U.S.C. Section 523(a)(6). See: In Re Long, 774 F.2d 875 (8th Cir. 1985).

The conversion was willful and malicious in this case. Mr. Bronk's actions were intentional; he understood the nature and significance of secured lending; and, he understood that his actions wrongfully deprived the Bank of an interest in property and seriously impaired its ability to realize on its debt. Therefore, the debt is nondischargeable.

B. THE STARTER CALF OPERATION.

On April 10, 1989, the Bank lent Mr. Bronk \$10,020 to purchase fifty starter calves to be raised as beef cattle at the Cedar Valley farm. The loan proceeds were deposited into Mr. Bronk's Town and Country account. From those funds, \$5,000 was immediately transferred to the Eastwood Bank. Mr. Bronk testified that he subsequently purchased the fifty calves, but that they ultimately died after he integrated them into the veal operation at Cedar Valley to replace his losses incurred with the sixth batch.

Mr. Bronk produced no evidence, other than his own testimony,

that he purchased the animals. Bank statements and cancelled checks of Town and Country and Eastwood Banks suggest that he did not purchase the starter calves.(FN14) No disinterested person testified to ever seeing the animals at the Cedar Valley Farm. One witness testified that he did not see starter calves at the farm during the relevant period.(FN15)

Furthermore, Mr. Bronk's explanation of the fate suffered by these calves is inconsistent with representations he made to the Bank during the course of the loan and its extensions. The loan was renewed after maturity on April 17, 1990, long after the raising of the sixth batch of veal calves had been concluded. Upon renewal of the starter calf note, Mr. Bronk stated to the Bank that the calves had not been sold. He did not mention that they had been integrated into the previous veal operation and that they had died. Only in mid-1991 did Mr. Bronk reveal that he did not have the cattle.

Mr. Bronk's explanation of the starter calf operation is not credible. Rather, it appears from the evidence, that he did not purchase the animals, or that they were sold without accounting to the Bank for the proceeds. In either case, the debt is nondischargeable, under 11 U.S.C. Section 523(a)(2)(A) or 11 U.S.C. Section 523 (a)(6).

III.

Since both debts to the Bank are nondischargeable under 11 U.S.C. Section 523, the Bank's remedy is complete. No purpose would be served by further consideration of this dispute in the context of 11 U.S.C. Section 727(a)(3) and 11 U.S.C. Section 727(a)(5). Mr. Bronk should receive his general 11 U.S.C. Section 727 discharge, excepting therefrom the Bank's debts pursuant to 11 U.S.C. Section 523(a)(2)(A) and 11 U.S.C. Section 523(a)(6).

IV.

Accordingly, it is hereby ORDERED:

1. Franklin Bronk is entitled to his 11 U.S.C. Section 727 general discharge in Bankruptcy Case No. 3-92-3097, which discharge shall be entered forthwith.

2. Franklin P. Bronk's debts to Town and Country State Bank of Winona in the total amount of \$32,965.36, plus interest, are nondischargeable pursuant to 11 U.S.C. Section 523 (a)(2)(A) and 11 U.S.C. Section 523(a)(6) and are not discharged by the general 11 U.S.C. Section 727 discharge to be entered in Franklin Bronk's Bankruptcy Case No. 3-92-3097.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 13, 1993.

By The Court:

DENNIS. D. O'BRIEN

U.S. BANKRUPTCY JUDGE

(FN1) Debtor, 58-years old, has been a farmer all his life. The

Cedar Valley farm is only one of several operations that he has been involved in over the years.
END FN

(FN2) The statute reads:

Section 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

END FN

(FN3) The statute reads:

Section 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --

2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by --

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

END FN

(FN4) The statute reads:

Section 727. Discharge

(a) The court shall grant the debtor a discharge, unless --

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

END FN

(FN5) The statute reads:

Section 727. Discharge

(a) The court shall grant the debtor a discharge, unless
(5) the debtor has failed to explain satisfactorily, before determination of denial of

discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;
END FN

(FN6) Mr. Bronk had another farming operation that he conducted at what is referred to as the Stockton farm, which also involved the raising of veal. Those operations were financed by the Eastwood Bank, and a separate account was established for similar purposes at that bank in connection with the Stockton operation.
END FN

(FN7) The Bank was advised of the problem and the loss as it occurred, and required that Mr. Bronk furnish an operating statement regarding the fifth batch before it committed to a sixth batch. In the statement, Mr. Bronk represented the loss at \$5,000. Final payment due the Bank at the time that the statement was given was \$16,382. Mr. Bronk used \$16,382 from the first advance by the Bank on the sixth batch to pay the balance owing for the fifth one.
END FN

(FN8) The payment was applied, \$3,267.15 to interest and \$55,600 to principal.
End FN

(FN9) The numbers are based on the following calculation:

| | |
|---|---|
| | 265 veal calves, full batch |
| - | 120 calves sold October 30, 1989 |
| | 145 calves unsold |
| + | 50 beef starter calves claimed added and lost |
| | 195 minimum number calves claimed lost |
| + | 52 calves claimed purchased to replenish the batch* |
| | 247 maximum number calves claimed lost |

* Mr. Bronk testified that he purchased 52 additional calves at the end of the batch period to replenish the batch, and that those, too, were lost. The Court understands the reference to the 52 calves as additional to the 50 beef starter calves that Mr. Bronk claims were integrated into the veal operation.
END FN

(FN10) Mr. Bronk lost 50 calves during the fifth batch. Not only do veterinary records verify the loss, but the scope of the disaster distressed the treating veterinarian to the extent that she sought counsel and support from her partners. The claimed loss from the sixth batch is four to five times more than the loss from the fifth, yet no veterinary records exist, and no veterinarian testified, regarding the claim. The only testimony offered by Mr. Bronk from any disinterested person in support of his claim was from Eugene Affeldt, who was a driver at the time for a rendering company that serviced the Cedar Valley farm. Mr. Affeldt's testimony was marginally credible as he had little independent recollection of specific visits to the Cedar Valley farm during the summer and fall of 1989 to pick up dead animals. The most that can be gleaned from his testimony is that there was apparently some loss during the period.

END FN

(FN11) The checks, Exhibit B, show a total of 183 calves purchased. However, two were purchased in March and April 1989 and, presumably, were not part of the sixth batch.

END FN

(FN12) One check was issued on May 30, 1989, for \$16,000, and the other on June 16, 1989, for \$20,000. No cancelled checks were produced and no testimony was offered regarding these transactions.

END FN

(FN13) Although it was contemplated by the parties that Mr. Bronk was to use the Town and Country Bank account for the Cedar Valley farm operation, Mr. Bronk testified that he purchased some calves for both the veal operation and the starter calf operation through an account set up at the Eastwood Bank. That account was to be used for operations at the Stockton Farm. The veal operation at the Stockton farm required 135 calves, which Mr. Bronk testified he purchased during the period. Total calves necessary for the Stockton and Cedar Valley operations, including veal and starter calves, during the sixth batch period was 450. Cancelled checks submitted from both banks evidencing purchases made during the period, show that only 360 calves were purchased during the relevant period, leaving a shortfall of 90 calves. Excluded from the calculation are cancelled checks offered by Mr. Bronk evidencing purchases made in February, March and April of 1989, totalling 23 calves. Presumably, those purchases did not relate to the sixth batch, the funding for which was committed in June of that year.

END FN

(FN14) See fn 13.

(FN15) Mr. Robert Dorbert, who was a feed representative for the feed company that Mr. Bronk purchased feed from for the veal calves, testified that he was on the premises regularly during the sixth batch period, and that he did not observe a significant number of calves outside the barn at the Cedar Valley farm. Beef starter calves, unlike veal calves, would have been kept outside the barn during the summer months.

END FN