UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: Chapter 7 Case

William Carragher, BKY Case No. 3-89-4632
ADV No. 3-90-027

Debtor.

Republic Leasing Corp., a
Minnesota Corporation,

Plaintiff,

v. MEMORANDUM ORDER

William Carragher,

Defendant.

This matter came before the Court for trial on November 5, 1990 on Plaintiff's complaint seeking to except its debt from discharge under 11 U.S.C. Section 523(a)(2)(B) or 11 U.S.C. Section 727(a)(2)(A). Plaintiff is represented by Russell Norum. Defendant is represented by John A. Hedback. This is a core proceeding under 28 U.S.C. Sections 1334 and 157(a), and Local Rule 103(b). The Court has jurisdiction to determine this matter under 28 U.S.C. Section 157(b)(2)(I). Based upon all the files and records in this case, being fully advised in the premises, the Court now makes the following Order pursuant to the Federal and Local Rules of Bankruptcy.

I.
FACTS

1. The Nondischargeability Claim. Defendant William Carragher (hereinafter "Carragher") filed his Chapter 7 petition on November 30, 1989. In l986, prior to filing, Carragher became socially acquainted with one, Michael Eakin, who operated various business enterprises, including Chicquick Corp. and P & C Investments, Inc. (hereinafter "P & C"). Carragher invested $30,000 in Chicquick, but lost those funds when the business failed. In January or February of 1988, Eakin, then President of P & C, attempted to obtain restaurant equipment for the corporation via leases with Plaintiff Republic Leasing Corp. (hereinafter "Republic"). Republic, however, refused to lease equipment to P & C without a third-party guarantee of its debt. At that point, Eakin approached Carragher to become involved in the business, ostensibly to recoup his earlier loss. Specifically, Eakin asked Carragher to guarantee either the corporation's lease or purchase of a delivery van to be used by the corporation. Carragher agreed to do so, if a guaranty proved necessary. In return, he would be paid a salary by P & C during its operation as compensation for his earlier loss.

Due to his extensive business travel schedule, Carragher gave Eakin a power of attorney which allowed him to present financial information about Carragher, a customer statement, and guaranty signed in blank. The documents were to be held pending determination of need for the guaranty and oral instructions by

Carragher regarding completion of the financial statements. Eakin, however, completed the documents and used them to enter into the equipment leases with Republic. Thereafter, P & C defaulted on its lease obligations, and on October 12, 1988, Republic brought suit against Carragher as guarantor.

Michael Eakin could not be located by either party to testify at trial regarding the circumstances surrounding provision of financial information concerning Carragher to Republic. Roger Wellner, credit manager for Republic, testified that Eakin provided a completed, signed customer statement which Republic believed Carragher submitted to demonstrate his creditworthiness as third-party guarantor for all P & C leases with Republic. Republic seeks a judgment of nondischargeability under 11 U.S.C. Section 523(a)(2)(B), claiming that the financial statement was materially false in overvaluation of certain assets. Specifically, the following assets were apparently overvalued: the homestead the Carraghers owned jointly prior to their dissolution valued on the statement at $125,000 rather than $80,000; the home Carragher inherited valued at $175,000 rather than its appraised value of $165,000; and, his salary set at $100,000 rather than $75,000.

Carragher testified that, while he signed a blank customer statement for Eakin's future use, he did not supply the completed form that Eakin eventually submitted to Republic. Carragher insisted that Eakin was neither authorized to name him as guarantor on the ten equipment leases nor authorized to provide the completed customer statement to Republic. Carragher denies he intended to deceive Republic in any way. Finally, Carragher argues, even though the net equity figure shown on the completed customer statement was inflated based upon the stated over-valued assets, it was nevertheless correct when available additional assets omitted from the statement are taken into consideration.

2. The Objection to Discharge Claim. Carragher and his wife, Karen, were divorced on July 7, 1989. As a part of the dissolution settlement, Karen received: their former homestead in Rosemount, Minnesota, valued at $80,000; a house in Massachusetts which Carragher had inherited from his mother, valued at $165,000; a house in Wisconsin, which belonged to her parents, valued at $50,000; various deposits in the total amount of $59,118.33; a Ford Van valued at $3,000; and two travel trailers, valued at $1,500. Karen receives child support for their minor children, but no spousal maintenance. Carragher received a house purchased on June 25, 1989, as his homestead, valued at $80,000; a 1984 Chrysler, valued at $7,000; a pension valued at $30,000; and one deposit in the amount of $500.

Republic argues that the Carragher's course of conduct within the year prior to filing systematically favored his ex-spouse and denied creditors access to assets which would otherwise have been nonexempt. Specifically, the conduct complained of is: making funds available to his wife; purchasing a new home for cash and subsequently mortgaging it; and mortgaging his automobile. Carragher claims that he took appropriate action in the dissolution proceeding to reach a fair, consensual division of marital assets.

ISSUES

1. Does the information on the financial statement, coupled with the circumstances surrounding its publication to Republic, entitle this creditor to except its debt from discharge under 11 U.S.C. Section 523(a)(2)(B)?

2. Should Carragher's discharge be denied under 11 U.S.C. Section 727(a)(2)(A) as hindering, delaying or defrauding Republic

through transfers of property to his former spouse which placed otherwise nonexempt property beyond Republic's reach; and, through other financial transactions which converted otherwise nonexempt property to exempt property, all within the year prior to filing?

DISCUSSION

1. Lease guarantees and Nondischargeability.

Republic argues that Carragher's liability as guarantor of P & C's leases should be ruled nondischargeable under 11 U.S.C. Section 523(a)(2)(B).(1) Each element of 11 U.S.C. Section 523(a)(2)(B) must be established by clear and convincing evidence to sustain the cause of action. Barclays Am./Business Credit v. Long (In re Long), 774 F.2d 874 (8th Cir. 1985). Those elements are:

1) That the debtor made false representations of material fact;
2) That at the time representations were made, the debtor knew they were false;
3) That the debtor intended to deceive the creditor with false representations;
4) That the creditor relied on the false representations to its detriment.

Footnote 1

11 U.S.C. 523(a)(2)(B) reads in pertinent part:

"A discharge under section 727, 1141 or 1328(b) 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--

(B) use of a statement in writing-

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debt is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive:...."

End Footnote

Regarding the first three elements, Carragher denies that he supplied the completed form to Republic because Eakin did not consult him regarding either the information it contained or in its submission. Carragher's uncontroverted testimony at trial was that Eakin's power of attorney was conditioned in two ways. First, unless absolutely necessary, Carragher was not to be involved and, if involvement could not be avoided, it was to be limited to either lease or purchase of a delivery van for P & C's use. Second, Eakin was not to submit the signed customer statement until correct financial information was supplied by Carragher via telephone conference or otherwise. Additionally, Carragher contends that the representations in the statement were substantially true. The fact that certain assets were overvalued, he argues, did not materially distort his financial status at the time the document was submitted to Republic, since he then possessed substantial additional assets which Eakin omitted from the statement.(2) Carragher denies any intent to deceive Republic. He argues that the publication was not made by him; was unauthorized; and, was unknown to him.

Footnote 2

The completed customer statement did not include over $70,000 in various accounts available to Carragher or additional vehicles he

owned, which were later detailed in the dissolution settelment.
End Footnote

Republic has not produced any evidence of collusion by Carragher with Eakin in the deception. At most, Carragher was negligent in furnishing blank, signed documents to Eakin. While negligence might be sufficient to establish the debt to Republic, negligence is insufficient to establish its nondischargeability under 11 U.S.C. Section 523(a)(2)(B). Nondischargeability under that section is based on intentional tort standards.

2. Division of Marital Assets and Objection to Discharge.

Republic also contends that Carragher's general discharge should be denied under 11 U.S.C. Section 727(a)(2)(A).(3) That portion of the statute is construed strictly in favor of the debtor, and strictly against the objecting creditor, which must prove actual intent to hinder, delay or defraud creditors. In re Elholm, 80 B.R. 964, 967 (Bankr. D.Minn. 1987).

Footnote 3
11 U.S.C. Section 727(a)(2)(A) reads in pertinent part:
"(a) The Court shall grant the debtor a discharge, unless--
(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--
(A) property of the debtor, within one year before the date of the filing of the petition;...."
End Footnote

In this case, Carragher, Malcomb MacGregor (his counsel in the dissolution proceeding), and Carragher's former spouse, Karen, testified that their settlement was fair and reasonable. Karen continues to have custody of their minor children; she has not been employed for many years; and, she has severe arthritis severe preventing her from obtaining employment. Karen testified that the interest in the Wisconsin house came from her parents, and that Carragher never had an interest in it. She also testified that rental of the Massachusetts house is intended as spousal maintenance when child support payments cease upon the children's majority. Carragher's counsel testified that he believes her circumstances would otherwise entitle her to spousal maintenance or its equivalent, and that he advised his client that the settlement agreement was fair and equitable to both parties.

Accordingly, Carragher's contention that he acted in good faith when relying upon legal advice during his dissolution proceeding regarding property transfers is at least as likely an explanation for his actions as one construing them as an attempt to shield assets from creditors. This is not a case in which Carragher seeks to give effect to an informal understanding with a former spouse reached prior to the filing of a Chapter 7 petition. See In re Vann, 113 B.R. 704, 706 (Bankr. D.Colo. 1990). The proposed division of marital assets was reviewed and approved by a family court judge pursuant to current principles of Minnesota family law. Ordinarily, the bankruptcy court does not sit as a "de novo divorce jurisdiction" by reconsidering the agreement of the parties approved by the appropriate state court for determination of family law matters. See In re Sorlucco, 68 B.R. 748, 753 (Bankr. D.N.H. 1986). And see In re Riso, 102 B.R. 280, 290, 291 (Bankr. D.N.H. 1989).

NOW, THEREFORE, IT IS ORDERED:

1. The debt owed by William Carragher to Republic Leasing Corp. is not excepted from general discharge under 11 U.S.C. Section 523(a)(2)(B).

2. The Debtor's general discharge under 11 U.S.C. Section 727(a) is granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 9, 1991.

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