

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Conrad L. Hedberg,
Debtor.

Chapter 7

Bky. 3-94-4072

Margaret R. Hedberg,
Plaintiff,

vs.

Adv. No. 3-94-264

Conrad L. Hedberg,
Defendant.

ORDER

This matter was tried on November 20, 1995, on Plaintiff Margaret Hedberg's complaint for judgement of nondischargeability of Defendant Conrad Hedberg's debts to her arising out of marital dissolution of the parties. The action is brought under 11 U.S.C. Sections 523(a) (4), (5) and (6) . Appearances were noted in the record. The Court having heard and received the evidence and arguments; having reviewed the trial briefs and relevant files; and, being fully advised in the matter; now makes this Order pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

STATEMENT OF THE CASE

Margaret and Conrad Hedberg were married on November 27, 1982. Ten years later, in November 1992, Conrad filed for divorce. This adversary proceeding is the latest episode in their acrimonious and bitter dissolution proceeding.

The Hedbergs have one child, who was six years old when the dissolution was commenced. Since the filing, the parties' home has been lost in foreclosure. Margaret was awarded a 1990 automobile, which has since been repossessed. Ms. Hedberg filed for relief under 11 U.S.C. Chapter 13, but could not make the payments required under her confirmed plan.

The marriage was finally dissolved by order and judgment of the state district court on March 14, 1994. Margaret was awarded final alimony and maintenance in the total monthly amount of \$348.47. She was also awarded possession of a twenty-four foot boat, valued at \$4,000, and one-half of Conrad's fifty-percent interest in a business known as Express Cartage, Inc. The state court valued the business at \$709,000. Margaret was to pay Conrad \$2,000 for his interest in the boat, and he was to pay Margaret \$177,305 for her share of his interest in the business.

Conrad was to surrender the boat to Margaret on or before

June 1, 1994. He did not. She went back to court for an order in July, 1994, requiring turnover of the boat. Conrad was delinquent in child support and maintenance payments in the amount of \$8,000 at the time. The court was not pleased, had a blown engine, a broken propeller, and it leaked when delivered. The boat has been in storage since; and, it might be worth \$300, which is far less than the accumulated storage charges. The parties disagree over how the boat came into disrepair and who is responsible for it.(2)

In August of 1994, Express Cartage ceased business and dissolved without any return to shareholders. Conrad's stock became worthless. He filed for relief under 11 U.S.C. Chapter 7, on September 6, 1994. Margaret brought this action seeking judgment of nondischargeability: for delinquent child support and maintenance, which totaled \$8,000 at filing; and, for \$177,305, which represents the value of her share of Conrad's interest in Express Cartage, as determined by the state court. Margaret claims that Conrad intentionally destroyed the business to deprive her of her settlement.

Conrad does not dispute that his obligations under the dissolution order and judgment for \$348.47 per month child support and maintenance, are nondischargeable debts; and, he acknowledges that whatever the balance was on the account at filing is not covered by his Chapter 7 discharge. Judgment will be ordered and entered accordingly. The evidence failed to establish that Conrad intentionally destroyed Express Cartage, or that he profited from its demise. Therefore, Judgment will be entered that the \$177,305 obligation is dischargeable, and that it was, or will be, discharged by Conrad's general discharge, entered in the bankruptcy case.

II.

THE LIFE AND DEATH OF EXPRESS CARTAGE

Conrad Hedberg has been in the transportation business since 1971. Express Cartage, Inc. was incorporated by him on October 30, 1989. The company issued 1,000 shares of stock. Five hundred shares were purchased by Conrad, and the remainder were purchased by Carol Gowlland and Beverly Braaten.(3) The board of directors consisted of Conrad Hedberg, who also served as the chief executive officer; and, Carol Gowlland, who served as the chief financial officer. Conrad ran the company. His income from the business was approximately \$59,000 per year. In addition, Conrad had use of a company car, and he had loan privileges with Express Cartage.

The company was in the business of hauling freight for other, larger carriers, in regions that were considered "off route" by the larger companies. Express Cartage did business from leased property in Owatonna, Minnesota, where it operated and maintained a warehouse and truck/trailer storage facility.

The business grew from marginal to healthy profitability during the years 1989 until it ceased business in August of 1994. However, during that time, Express Cartage became a captive hauler for Hyman Freightway. By 1994, more than ninety-nine percent of the company's revenue came from Hyman. The arrangement with Hyman was controlled by a series of cartage contracts that are standard in the industry. The contracts, drawn by the big companies, are typically presented as take it or leave it offers to the smaller contract haulers.

Major terms and conditions of the contracts are not negotiable.

In June of 1994, the parties entered into new agreements. A standard contract was signed on June 20, 1994, which gave Hyman the right to cancel the arrangement upon fourteen days notice without cause. The cancellation provision was standard and nonnegotiable. On the same day, pursuant to request from Hyman, Express Cartage assigned its lease rights in the company's operating facilities to Hyman for no additional consideration. Hyman was acquiring similar assignments of leases from its other 72 lessees during the period as well.(4) The assignments, again standard Hyman documents, provided that they would survive cartage contract cancellations. According to representatives of Hyman, who testified at the trial, no decision had been made by Hyman, at that time, to cancel the Express Cartage contract.

About July 1, 1994, Hyman expressed its concern regarding stability of Express Cartage, as related to Mr. Hedberg's divorce action. Then on July 6, 1994, the Minnesota district court found Hedberg to be in contempt of court for failure to pay support and maintenance to Margaret. Hedberg's shares of stock in Express Cartage were ordered to be deposited with the court so that he would not have the opportunity to dilute the shares or to change his interest in the company. Margaret had also asked the state court to appoint a receiver for the business. The judge declined, but indicated a willingness to do so in the future under certain circumstances.

On July 15, 1994, Express received notice of contract termination from Hyman. Peter Marten,(5) who was then vice president of Hyman, formed a new cartage company under the name of Minnesota Cartage, Inc., as a wholly owned subsidiary of Hyman. After the effective date of the cancellation of the Express Cartage contract, Minnesota Cartage continued the Hyman cartage business that had been operated by Express cartage, using the same facility, under the lease assignment.

Express Cartage was without any customers, and had no business to conduct. The business was dead. Mr. Hedberg sold the assets of the company, paying the proceeds to secured lenders.

On July 25, 1994, Mr. Hedberg responded to an advertisement in the Owatonna newspaper for the employment of Terminal Manager by Minnesota Cartage. He interviewed for the position along with several others, was offered the job, and accepted it. The position does not involve any different responsibilities from those Mr. Hedberg had when employed with Express Cartage. His salary, however, is now \$30,000 a year; he has no company car; nor does he have loan privileges with Minnesota Cartage. Mr. Hedberg has no equity position in the company.

III. ANALYSIS

Plaintiff argues that Defendant's debt for her share of the value of Express Cartage is nondischargeable under both 11 U.S.C. Sections 523(a)(4) and (a)(6).(6) Section 523(a)(4) provides, in pertinent part:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt - -

(4) for fraud or defalcation while acting in a fiduciary capacity...

Plaintiff's theory is that Defendant was a fiduciary, under Minn. Stat. Section 518.58, Subd. 1a, with respect to her interest in Cartage Express. The statute provides:

During the pendency of a marriage dissolution, separation, or annulment proceeding, or in contemplation of commencing a marriage dissolution, separation, or annulment proceeding, each party owes a fiduciary duty to the other for any profit or loss derived by the party, without the consent of the other, from a transaction or from any use by the party of the marital assets. If the court finds that a party to a marriage, without consent of the other party, has in contemplation of commencing, or during the pendency of, the current dissolution, separation, or annulment proceeding, transferred, encumbered, concealed, or disposed of marital assets except in the usual course of business or for the necessities of life, the court shall compensate the other party by placing both parties in the same position that they would have been in had the transfer, encumbrance, concealment, or disposal not occurred.

11 U.S.C. Section 523(a)(6) provides:

(a) A discharge under section 727 . . . 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...

Plaintiff's claim of nondischargeability under these statutes is premised upon her assertion that Defendant intentionally caused the demise of Express Cartage to deprive her of her settlement interest in the company. But, the record does not support the claim.

Plaintiff argues that Defendant violated his fiduciary duty by causing or allowing Express Cartage to go out of business. But, Plaintiff offered no evidence to support the claim. She offered no evidence that would tend to contradict the testimony by Hyman's president that Hyman decided to cancel the only contract owned by Express Cartage, as a matter of prudent business practice. Nor did Plaintiff offer any evidence that Defendant encouraged or influenced the decision by Hyman.

Plaintiff's willful and malicious injury claim fails for the same reason. Plaintiff offered evidence that Defendant had informed Hyman about the divorce settlement. She suggests a conspiracy was entered between Hyman and Defendant to deny Plaintiff realization of the value of her property rights in Express Cartage. Plaintiff points to Defendant's continued employment with Hyman after cancellation of the cartage

contract as corroborating evidence for the conspiracy theory. However, by itself, the subsequent employment is not persuasive of a conspiracy. Defendant's compensation was greatly reduced; he has no present or promised equity position in Minnesota Cartage; and, testimony by Hyman's representative that Defendant was the most qualified individual interviewed for the position, is unanswered by Plaintiff. The burden of proof simply has not been met.

III.
DISPOSITION

Based upon the foregoing, it is hereby ORDERED:

1) Pre-bankruptcy delinquent payments owing by Defendant Conrad Hedberg to Plaintiff Margaret Hedberg, arising from his obligation under dissolution decree to pay as and for support and maintenance in the total monthly amount of \$348.47, together with all collection fees and costs incurred by Plaintiff, are nondishargeable under 11 U.S.C. Section 523(a)(5).

2) The debt owed to Plaintiff Margaret Hedberg by the Defendant Debtor Conrad Hedberg, in the amount of \$177,305, as her share of the value of his prepetition interest in Express Cartage, is dischargeable under 11 U.S.C. Section 727, and either has been, or will be, discharged by Defendant's general discharge entered in the bankruptcy case.
LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 22, 1996

By the Court:

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

support, (FN1). Since initially ordered to pay maintenance and child
Conrad has gone to considerable lengths to avoid the obligation. Although the state court ordered the amount withheld from his salary, Conrad caused loans to be made him in lieu of salary; and, he even caused his salary to be paid through checks issued to a girlfriend, which he then cashed and spent. Conrad was president and CEO of Express Cartage, and he ran the business.

(FN2). It is not clear whether Margaret is seeking relief regarding the boat. To the extent that she is, relief is denied because the evidence failed by preponderance to show willful and malicious damage caused by Conrad.

actively (FN3). Gowlland owns 400 shares of Express stock and served
in the daily operation of the company. She was also on board of directors. Braaten owns 100 shares of Express stock, but was inactive in the operation of the company.

but, (FN4). Hyman had requested the assignment in January of 1994,
according to Mr. Hedberg, he held out while trying to negotiate an exclusive contract with Hyman. Hedberg testified that,

ultimately, the price for refusal to give the assignment would have been contract termination. Representatives of Hyman, who testified at trial, did not refute the testimony. No evidence was offered regarding value of the lease to Express Cartage, apart from the operation of its business.

(FN5). Marten, who is currently president of Hyman, testified at the trial. He said that the decision to cancel the Express Cartage contract was a business decision of Hyman Freightways, and that Mr. Hedberg played no role in the decision. Concerns about stability of cartage service and cost efficiency controlled the decision, according to Mr. Marten.

(FN6). Plaintiff also suggests that it would be appropriate for the Court to find that the settlement was in the nature of child support and maintenance; and, therefore, that it is nondischargeable under 11 U.S.C. 523(a)(5). But, it clearly is not support and maintenance. The judgment clearly the award is property settlement, and the state court specifically declined to treat it differently. No reasons, other than allegations of misconduct against the Defendant, have been offered to support a determination that the award is in the nature of support and maintenance.