UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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In re:

James Dwight Tobiasen, BKY No. 93-3-3792
ASF/Big "O" Ltd., d/b/a
Take Time Out Liquor,

Debtor.

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Russell R. Priewert and ADV. No. 93-3-235
Sharon M. Priewert,

Plaintiffs,
v.

James Dwight Tobiasen, ORDER FOR JUDGMENT
ASF/Big "O" Ltd., d/b/a
Take Time Out Liquor.

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This adversary proceeding came on for trial before the Court on April 3, 1995. Both parties appeared pro se. The Court, having received and considered all proper evidence, arguments, materials submitted by the parties, and otherwise being fully advised in the matter, now makes this ORDER, pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I. Russell and Sharon Priewert (the Priewerts) purchased the "Take Time Out Liquor Store" (the Store), located in Owatonna, Minnesota, from James Dwight Tobiasen (Tobiasen) and Julia Drake, on a contract for deed for $132,262, in November, 1992. The Priewerts allege that they purchased the Store in reliance upon fraudulent tax and financial records furnished them by Tobiasen. They claim to have suffered $41,030 in damages, as a result; and, now seek to have these damages excepted from Tobiasen's general discharge, pursuant to 11 U.S.C. Section 523 (a)(2)(A) and (B).(FN1)

Tobiasen was a 50% shareholder, president, and CEO of Big "O", Ltd., the parent corporation of the Store. Julia Drake was the other 50% shareholder in the corporation, and was treasurer, secretary, and manager. Tobiasen and Drake purchased the Store, through Big "O" Ltd., in July, 1990, on a contract for deed. Drake managed the store, but both had significant involvement and responsibility in the daily operation of the business; and, both Tobiasen and Drake regularly drew a salary.(FN2)

In the fall of 1992, Tobiasen and Drake decided to sell the Store. Tobiasen was offered a position in Florida, and Drake considered a move to England. They listed the Store with Calhoun Realty, and its agents, Nicholas Strandberg and Ben Fugate.

Russell Priewert had worked at 3M for 20 years in product development. He retired in 1992, and wished to purchase a small business for him and his wife to own and operate. Neither Russell nor Sharon Priewert had any sales, marketing, accounting or other financial experience; and, neither had owned and operated a small business before.

In September, 1992, the Priewerts contacted Strandberg and Fugate upon seeing a listing of the "Take Time Out Liquor Store". The Priewerts visited the Store, observed its customer traffic, and were interested. They requested, through the realtors, financial information concerning the business from Tobiasen and Drake, including: tax returns, inventory lists,

utility bills, and financial reports. The information received from Tobiasen was submitted by the Priewerts to an accountant, who, upon review of the Store's apparent past financial performance reflected in the documents, advised them that the business was sound and the sales price reasonable.

The Priewerts agreed to purchase the Store and its inventory for $132,262, on a contract for deed. They placed $5,000 earnest money down, and paid an additional $23,262, at the closing on November 19, 1992, as downpayment on the contract. The Priewerts also paid six months of rent arrears due the landlord of the premises where the business was operated. This was all done in reliance on information furnished by Tobiasen and Drake that was grossly inaccurate, and that seriously misrepresented the condition of the business.

One of the financial documents forwarded to the Priewerts was what appeared to be the Store's 1991 federal tax return, prepared by Steven Rohlik, a CPA, in Owatonna, Minnesota. The Rohlik return had not been signed or filed. This return listed the Store's gross sales at $541,377 for 1991. Priewert subsequently obtained the Store's filed 1991 federal tax return from the IRS. The filed return, prepared by another accountant, listed gross sales of $282,068.33 for the same period.

Testimony regarding circumstances of the Rohlik return's preparation was unclear; and, neither Tobiasen nor Drake could explain the source of the inflated sales figures. Drake testified that she located the Rohlik return among the Store's records, and forwarded it with all the other financial information presented to the Priewerts.

Other information presented to the Priewerts were monthly Minnesota Department of Revenue Sales and Use Tax Return Forms for July, 1990, through September, 1992 (State Sales Tax Forms, or Forms). The Forms contained statements of the Store's monthly gross sales amounts for the individual months represented. But they were not copies of the actual State Sales Tax Forms filed with the State of Minnnesota. Tobiasen testified that he reconstructed the Forms that he furnished from daily cash register receipts, because he did not have copies of the filed Forms readily available.

According to Tobiasen, the Priewerts had insisted on a Friday that he make the Forms available to them for a scheduled meeting the next day. Tobiasen testified that he was unable to collect the actual Forms from his accountant's office, prior to its closing for the weekend. So, he returned to the store, collected the daily cash receipts for this 27 month period, and calculated the figures himself. They were his best estimates, according to his testimony, and he claims that he told the realtors as much when he delivered the information.

Tobiasen's calculations substantially overstated gross sales for the periods represented. None of the 27 monthly State Sales Tax Forms that Tobiasen prepared was even close to the Store's actual gross sales for the month shown. Typically, Tobiasen overstated the Store's gross sales by 200%.

For example, the following table demonstrates the disparity between Tobiasen's calculations of the Store's gross monthly sales, and the figures shown in the actual filed State Sales Tax Forms obtained later by the Priewerts from the Minnesota Department of Revenue:

| Months | Tobiasen's Calc | Actual Returns |
|---|---|---|
| Jan. 1992 | $27,126 | $12,191 |
| Feb. 1992 | $31,002 | $13,897 |
| Mar. 1992 | $38,75 | $11,562 |
| Apr. 1992 | $43,336 | $13,151 |
| May 1992 | $47,979 | $9,031 |
| June 1992 | $63,456 | $11,421 |
| July 1992 | $61,789 | $ 7,691 |

| | | |
|---|---|---|
| Aug. 1992 | $59,529 | $ 6,803 |
| Sep. 1992 | $29,387 | $ 6,102 |

After closing the sale, the Priewerts soon discovered that the Store's daily cash flow was consistently below the figures represented in the financial information presented by Tobiasen and Drake. Within a few weeks, they sought to rescind the contract. In December, 1992, after only six weeks as the Store's owners, the Priewerts liquidated the Store's inventory for $9,500 and closed the business. They now seek judgment for damages in the amount of $41,030 for fraud, and nondischargeability of the debt under 11 U.S.C. Section 523(a)(2)(A).

II.

11 U.S.C. Section 523 (a)(2)(A) provides, in pertinent part:

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

(2) for money, property, services, or an extension, renewal, 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;

To succeed with a nondischargeability claim against a debtor under 11 U.S.C. Section 523(a)(2)(A), the creditor must show:

(1) that the debtor made a false representation;

(2) that at the time made, the debtor knew it to be false;

(3) that the representation was made with the intention and purpose of deceiving the creditor;

(4) that the creditor relied on the representation; and,

(5) that the creditor sustained the alleged injury as a proximate result of the representation having been made.

Caspers v. Van Horne, 823 F.2d. 1285, 1287 (8th Cir. 1987). The burden is on the creditor to show these things by a preponderance of the evidence. Grogan v. Garner, 498
U.S. 279, 290; 11 S.Ct. 654, 66 (1991).

The Priewerts relied on all of the financial information furnished to them by Tobiasen in making their decision to purchase the Store. They claim to have suffered $41,030 in damages as a result. The issues are whether Tobiasen knowingly made false statements in the financial material presented to the Priewerts; and, whether he intentionally deceived the Priewerts with this information, to induce them to purchase the Store.

1. Tobiasen's Knowingly False Representations.

The Priewerts claim that Tobiasen was aware that the documents he provided them did not accurately reflect the Store's performance, but that they contained materially false information. They point to Tobiasen's reconstructed State Sales Tax Forms. They also offered the Store's 1991 Federal Tax Return prepared by Steven Rohlik, as evidence of Tobiasen's effort to inflate the Store's gross sales.

Tobiasen explained that the State Sales Tax Forms he furnished

contained figures that were as accurate as he could calculate, under the circumstances. He testified that he was forced to reconstruct the returns in a hurry from a disorganized collection of daily cash receipts. He acknowledged that the information was inaccurate, but denied any knowledge of material falsity at the time he prepared and delivered it. Regarding the Rohlik tax return, Tobiasen points out that: he did not sign it; he was not involved in its preparation; and, he was not responsible for its presentation to the Priewerts.

The Priewerts failed to establish that Tobiasen was responsible for the preparation of the Rohlik return. The record is unclear whether Tobiasen even knew of the return when Drake forwarded it to the Priewerts.

Tobiasen acknowledges that he presented the Priewerts the State Sales Tax Forms as evidence of the Store's monthly gross sales, and that knew that the gross sales figures were not correct. Neither his explanation attempting to account for the discrepancies; nor his stated belief that the figures were reasonably accurate at the time, is credible.

The Store's gross sales figures were critical to the transaction. Tobiasen inflated the figures by more than 200%. He had been involved in the day-to-day operation of the business to the extent that he must have known that the business did not generate the cash flow suggested by his calculations.

2. Intent to Deceive:

Tobiasen denies that he knowingly presented the false financial information with an intent to deceive. The denial is not credible. Tobiasen's own testimony, and his daily involvement with the store, supports a strong inference that he inflated the gross sales figures in hopes of selling the Store.

"The essence of the action is deception, the misrepresentation, therefore, need not be expressed in words." In re Pommerer, 10 B.R. 935, 939(1981). Direct proof of intent is often impossible to obtain, so the creditor must present evidence from which intent can be inferred. Caspers, at 1287. Once the evidence has been presented, the debtor "cannot overcome [that] inference with an unsupported assertion of honest intent." Caspers, at 1288 (citing In re Simpson, 29 B.R. 202, 211-212(Bkrtcy. N.D. Ia. 1983)).

III.

Based upon the foregoing, it is hereby ORDERED:

That James Dwight Tobiasen is liable to Russell R. Priewert and Sharon M. Priewert, in the amount of $41,030. Said debt is nondischargeable, pursuant to 11 U.S.C 523 (a)(2)(A); and, it is not discharged by the 11 U.S.C 727 general
discharge entered in favor of James Dwight Tobiasen in
Bankruptcy Case No. 93-3-3792.

LET JUDGMENT BE ENTERED ACCORDINGLY.
Dated: June 20, 1995. By The Court:

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

FN1) The Court finds that the Priewerts are entitled to judgment against Tobiason under 11 U.S.C Section 523(a)(2)(A), and does not reach the issues raised under the 11 U.S.C Section 523(a)(2)(B) claim.

FN2) When the Store was purchased, Tobiasen was involved in manufacturing on a full-time basis, but was interested in commencing this venture with

his friend Drake. Tobiasen testified that he initially intended to be a silent
partner in the business, and Drake was to manage the Store. Eventually, he became more involved in the Store's daily operation. The Store's quarterly financial reports revealed that Drake and Tobiasen split $15,000 each quarter.