In the United States Bankruptcy Court

for the Northern District of Iowa

LOWELL BERNARD SCHLEISMAN and JOAN THERESA SCHLEISMAN	Bankruptcy No. 87-01663W
Debtors.	Chapter 7
LOWELL FORD LIMITED and LOWELL BARTEL	Adversary No. X87-0316W
Plaintiffs	
vs.	
LOWELL BERNARD SCHLEISMAN	
Defendant.	

ORDER RE: MOTIONS TO AMEND FINDINGS OF FACT AND ALTER JUDGMENT

The matters before the court are cross-motions asking the court to amend its findings of fact and alter judgment in this adversary proceeding. Trial on plaintiffs' dischargeability complaint was held April 27, 1988. On July 27, 1988, this court issued its memorandum of decision and order that the indebtedness of Lowell Bernard Schleisman to Lowell Ford Limited in the amount of $5,412.28 was a non-dischargeable debt under 11 U.S.C. §523(a)(4). Judgment was also entered by the bankruptcy court clerk on July 27, 1988.

On August 8, 1988, plaintiff Lowell Ford Limited filed its "Motion to Amend Findings and Alter Judgment."

Plaintiff Lowell Ford Limited contends that the substantial and undisputed evidence at trial shows that total salary withdrawn by Schleisman from the corporation was $11,132.28. Plaintiff contends that since this court found that withdrawal of salary from corporation by Schleisman was to be nondischargeable under 11 U.S.C. §523(a)(4), that this figure should have been used in determining the nondischargeable debt, rather than the court's figure of $5,412.28.

Plaintiff points that while the court's figure of $5,412.28 was obtained from cancelled checks introduced into evidence, the court should have also granted judgment for an additional $5,720.00 based on salary taken during the first half of 1987 as shown by the quarterly recapitulation sheet of earnings of corporate employees. This quarterly recapitulation sheet was introduced into evidence as part of Exhibit 9.

Defendant does not dispute that the evidence showed this amount of salary was withdrawn.

Defendant, however, argues that the motion of the plaintiff to amend findings and alter judgment was untimely.

Alternatively, defendant argues that if the motion was timely, it should be denied, and defendant further argues that the court should amend its findings of fact and conclusions to show the following which defendant sets out in subparagraphs a through h of paragraph 3 of his resistance.

a. The Directors' understanding concerning receipt of compensation by either Bartel or Schleisman was made at a time when Bartel had assumed the full time, day to day management responsibilities of the dealership;

b. The substantial contribution of services by each director was an essential element to the Directors' agreement to not receive salary for their services;

c. Bartel's sudden departure from his managerial role and virtual inattention to dealership affairs thereafter constituted a substantial breach of the Directors' agreement;

d. Bartel's sudden departure from his managerial role and virtual inattention to dealership affairs thereafter constituted a significant change of circumstances justifying a recision (sic) by Schleisman of the Directors' prior agreement not to receive salaries for services;

e. Schleisman rescinded any agreement between himself and Bartel based upon Bartel's breach;

f. Schleisman had authority to hire additional employees to perform services for which Schleisman was compensated following Bartel's departure;

g. The amounts paid Schleisman reflect a fair and reasonable payment for services rendered in a nonfiduciary capacity;

h. The payment of a fair and reasonable wage to Schleisman for services rendered in a non-fiduciary capacity does not constitute defalcation.

DISCUSSION

I.

Motions to alter or amend judgment are governed by Bankr. R. 7059(e) which rule requires the motion to alter and amend to be served not later than ten days after the entry of the judgment. In this case, the judgment was entered on July 27, 1987, and the motion to amend was filed by plaintiff on August 8, 1988 and was served on August 5, 1988.

Since the plaintiff had ten days in which to serve the motion to amend, time computation is governed by Bankr. R. 9006(a) and 7059(e), the court finds that the motion to amend filed by the plaintiff was timely.

Defendant's motion to amend findings and alter judgment was included within his resistance to plaintiff's motion. It was filed August 10, 1988 and shows that a copy was served upon the attorney for the plaintiff. While there is no certificate of service, this court finds that it was served upon the attorney for the plaintiff on August 10, 1988 or before and is also timely under Bankr. R. 7059(e) and

9006(a).

II.

In defendant's motion, he argues that the change in the balance of contribution of time between Lowell Bartel and Lowell Schleisman was a sufficient change in circumstances to constitute a breach by Bartel of the agreement between the parties and therefore work a rescission of the agreement not to take a salary for contributions in time to corporate activity.

The defendant did not raise the issue of rescission or any other defense that the agreement between the parties was not valid in their answer to the plaintiffs' complaint or any other pre-trial pleading.

The argument that there was a change in circumstances that resulted in a breach of the agreement by Bartel was not raised until the defendant filed his motion to amend findings and alter judgment on August 10, 1988.

This court does not believe there was a rescission of the agreement between the parties. However, regardless of which label is placed on the defense raised by the defendant, it is certainly an avoidance or affirmative defense that should have been raised in his answer. The defendant is asking the court to amend its facts to find that there was a sufficient change in circumstances which allowed the defendant to avoid the agreement and pay himself a salary.

Rule 8(c) of the Federal Rules of Civil Procedure requires a party to set forth any matter constituting an avoidance or affirmative defense. An affirmative defense must be raised in the answer as early as possible. The failure to do so constitutes a waiver. Continental Illinois National Bank & Trust Co. of Chicago v. Tacoma Boatbuilding Co. (In re Tacoma Boatbuilding Co.1, 81 B.R. 248, 260 (Bankr. S.D. N.Y. 1987).

Since the defendant failed to raise the defense of rescission or any other affirmative defense it a timely manner, the defendant's motion to amend findings and alter judgment is denied.

Even if the defendant were allowed to raise a defense at this time, he has failed to show he was entitled to a salary based on a change in circumstances. As an officer and director of the corporation, the defendant could have requested the corporation to pay him a salary for his services. There is no indication this was ever done.

III.

As to the motion by plaintiff, the court is persuaded that it should amend its findings of fact and alter judgment to include additional salary withdrawals from the period January 1, 1987 through June 30, 1987 in the amount of $5,720.00 based on the quarterly recapitulation sheets which are part of Exhibit 9. Plaintiff argues that the undisputed evidence shows that $11,132.28 was taken in salary during the period of Schleisman's operation of the corporation. The court agrees. The court, therefore, finds and concludes that the motion to alter and amend filed by the plaintiff shall be granted.

ORDER

IT IS ORDERED that the court's Memorandum of Decision and Order dated July 27, 1988 is amended as follows:

(a) Footnote #5, page 7 is amended to add the following sentence:

> "In addition, $5,720.00 in salary during the first half of 1987 as shown by the quarterly recapitulation sheet of earnings of corporate employees as shown in Exhibit E-9.1"

(b) Page 15, second full paragraph, last sentence is amended to read as follows:

> "Those sums advanced for $11,132.28 constitute a debt which is rendered nondischargeable by §523(a)(4). See supra page 7, n.5."

(c) The "Order" portion of the Memorandum of Decision, pages 18-19, is amended to read as follows:

> "IT IS HEREBY ORDERED that Debtor-Defendant Lowell Bernard Schleisman is indebted to Plaintiff Lowell Ford Limited in the amount of $11,132.28;
>
> IT IS FURTHER ORDERED that the debt of $11,132.28 from Debtor-Defendant Lowell Bernard Schleisman to Plaintiff Lowell Ford Limited is excepted from discharge pursuant to 11 U.S.C. §523(a)(4)."

IT IS FURTHER ORDERED that an altered and substituted judgment shall enter accordingly which shall alter that judgment which was originally entered July 27, 1988 at Vol. II, page 87; that the altered and substituted judgment shall draw interest from July 27, 1988.

IT IS FURTHER ORDERED that the Motion to Alter Findings and Alter Judgment filed by the defendant is denied.

SO ORDERED ON THIS 9th DAY OF JANUARY, 1989.

William L. Edmonds
Bankruptcy Judge