

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

EUGENE V. WENZEL and
DANITA A. WENZEL

Bankruptcy No. X89-01302S

Debtor(s).

Chapter 7

KINGSLEY STATE BANK

Adversary No. X89-0225S

Plaintiff(s)

vs.

EUGENE V. WENZEL and
DANITA A. WENZEL

Defendant(s)

MEMORANDUM OF DECISION AND ORDER RE: OBJECTION TO DISCHARGE

The matter before the court is a complaint filed by Kingsley State Bank (BANK) objecting to the general discharge of debts sought by Eugene and Danita Wenzel under Chapter 7 of the Bankruptcy Code. The Bank based its objection solely on 11 U.S.C. § 727(a) (2) (A). A trial concerning this matter was held on July 26, 1990.

Upon reviewing the testimony and briefs of the parties, the court now makes the following findings of fact and conclusions of law pursuant to Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b) (2) (J).

FINDINGS OF FACT

I.

Eugene and Danita Wenzel are a married couple who were engaged in the trucking business. On May 4, 1988, the Wenzels entered into a business-related refinancing agreement with the Bank. As a result of this agreement, the Wenzels received a \$115,000.00 loan from the Bank.

In exchange for this loan, the Wenzels executed to the Bank a promissory note payable over four years. To secure the note, the Wenzels granted the Bank a security interest in the following items: (1) a 1980 Fruehauf 42' trailer; (2) a 1984 Polar American trailer; and (3) a 1987 Kenworth truck tractor ("truck"). Shortly after entering into the refinancing agreement, the Wenzels failed to meet their

monthly payment obligations. Between November, 1988 and August 31, 1989, the Wenzels made only four payments to the Bank.

Due to the Wenzels' default, the Bank, on August 1, 1989, obtained a state court writ of attachment against the truck and two trailers. Shortly thereafter, the Bank located the truck and Polar American trailer at a LeMars truck stop. The Bank took possession of the truck and trailer pursuant to the writ. On August 30, 1989, the Bank filed a petition in the Iowa District Court for Woodbury County seeking to replevy the truck and two trailers. On August 31, 1989, the Wenzels filed their chapter 7 petition with this court.

On September 20, 1989, the Bank filed a motion with this court seeking relief from the automatic stay so as to enable the state court to proceed with the replevin action. The Wenzels subsequently consented to the Bank's motion, and this court entered an order modifying the stay on October 6, 1989. On October 23, 1989, the state court entered a judgment authorizing the Bank to replevy the truck and the Polar American trailer.

On December 14, 1989, the Bank initiated this adversary proceeding by filing an objection to the Wenzels' discharge under § 727(a)(2)(A). Since the gravamen of the Bank's objection concerns the Wenzels' pre-bankruptcy treatment of the truck and two trailers, the court will issue separate findings of fact relevant to each vehicle.

A.

Fruehauf Trailer

Neither party produced any testimony or evidence concerning the date the Wenzels purchased the 1980 Fruehauf 42' trailer. However, the unrefuted testimony of Eugene Wenzel described the condition of the trailer as obsolescent, old and of minimal monetary value.

In March, 1988, the Wenzels' Fruehauf trailer was left in Utah by an employee of the Wenzels, after the truck pulling the trailer broke down in Salt Lake City on return from a West Coast haul. The truck was towed back to Iowa; the trailer was left with Gary Pitmiller, a resident of Utah.

Approximately eight months after the truck's breakdown, Eugene Wenzel learned that Pitmiller had been murdered. Upon this discovery, Wenzel made a personal visit to Utah in an attempt to recover the trailer. When Wenzel arrived at the Pitmiller residence, the trailer was no longer there. Neither Eugene nor Danita Wenzel knows the whereabouts of the trailer.

B.

Kenworth Truck and Polar American Trailer

The Wenzels purchased the 1987 Kenworth truck from Sioux City Kenworth in the spring of 1987. No testimony or evidence was introduced as to when the Wenzels purchased the 1984 Polar American trailer.

In April, 1987, Eugene Wenzel replaced the truck's original "one-stick Fuller" transmission with a "two-stick Spicer" transmission. After the two-stick transmission broke down in September, 1988, Wenzel reinstalled the original one-stick transmission. In September, 1988, a compressor in the Polar American trailer also malfunctioned, necessitating the replacement of the trailer's refrigeration unit.

Since Eugene Wenzel was hospitalized during this period, Danita Wenzel borrowed \$2,000.00 from the Bank to cover the cost of purchase and installation of the trailer's new refrigeration unit.

Between December, 1988 and January, 1989, Eugene Wenzel replaced the truck's original "Eaton" rear end with a rebuilt "Rockwell" rear end. Wenzel's replacement was motivated by his belief that the Rockwell rear end would produce more efficient fuel economy. In addition, the Rockwell rear end had only 100,000 miles of prior usage while the Eaton model had 250,000 miles of prior usage.

Despite being in default on their promissory note to the Bank, the Wenzels continued to operate their trucking business until June, 1989. After the disappearance of the Freuhauf trailer, the Wenzels' business consisted solely of operating the Kenworth truck and Polar American trailer. Eugene Wenzel was the most actively involved participant in the business. He both operated and repaired the truck and trailer. Prior to her separation from Eugene in May, 1989, Danita Wenzel performed tasks ranging from dispatching to paying bills.

On June 10, 1989, the insurance coverage on the truck and Polar American trailer expired. As a result, Eugene Wenzel discontinued the trucking operation. The Wenzels then entered into discussions with the Bank regarding the prospect of selling the truck and trailer.

The lapse in insurance coverage also led to Eugene Wenzel's storing the two vehicles on property owned by James Flewelling in Kingsley, Iowa.⁽¹⁾ Eugene Wenzel's decision to park the truck and trailer on the Flewelling property was based on a prior course of dealing between Wenzel and James Flewelling's deceased father. In previous years, Wenzel had agreed to pay the senior Flewelling rent in exchange for parking his trucks and trailers on the Flewelling property. It was not established whether the Wenzels knew that James Flewelling had become the true and legal owner of the property.

Shortly after Eugene Wenzel had parked the vehicles on the Flewelling property, Danita Wenzel received a telephone call from a woman believed by Mrs. Wenzel to be James Flewelling's mother. Without the knowledge or consent of James Flewelling, Mrs. Flewelling contacted Danita Wenzel regarding the prospect of collecting rent in exchange for Eugene Wenzel's continued parking privileges. No price or deadlines were mentioned by Mrs. Flewelling. Danita Wenzel relayed her conversation with Mrs. Flewelling shortly thereafter to Eugene. At no time did James Flewelling discuss the issue of rent with the Wenzels.

Upon learning of the Mrs. Flewelling-Danita Wenzel conversation, Eugene Wenzel moved the vehicles to a friend's farm in Cleghorn, Iowa in July, 1989. Wenzel was not required to pay a fee in order to park his vehicles on the Cleghorn farm.

After the truck and trailer were moved from the Flewelling property in Kingsley, the Bank began to inquire as to their whereabouts. The Bank alerted the Cherokee County sheriff's office and Iowa State Patrol as to the Bank's interest in locating the two vehicles. An employee of the Cherokee County sheriff's office told the Bank it would lend assistance in locating the vehicles, but would not take action upon their discovery since the Bank had not yet sought nor procured any formal judicial intervention.

The Bank also contacted Danita Wenzel concerning the location of the vehicles. Since Danita and Eugene Wenzel were separated at the time, Danita Wenzel told the Bank she would relay its message to Eugene. No testimony or evidence was ever produced showing the Bank had contacted Eugene Wenzel directly.

The Bank subsequently located the truck and trailer on the Cleghorn farm. Again, no testimony or evidence was produced showing that the Bank had communicated this discovery to Eugene Wenzel. The Bank did not attempt to reclaim the vehicles by self-help repossession.

When informed by Danita Wenzel that the sheriff was looking for the truck and trailer, Eugene Wenzel moved the vehicles in late July, 1988 to a public truck stop in LeMars, Iowa. It was Wenzel's intent that such a move would effectuate the Bank's effort to repossess the vehicles. On August 1, 1989, the Bank obtained a writ of attachment covering the truck and trailer. There is no evidence that either Eugene or Danita Wenzel were aware of the Bank's writ at the time Eugene moved the vehicles to LeMars. Shortly after obtaining the writ, the Bank seized the truck and trailer at the LeMars truck stop. Both vehicles were subsequently placed in storage by the Bank at Condon Motors in Sioux City.

II.

SUMMARY OF THE ISSUES

The Bank's objection rests solely on 11 U.S.C. § 727(a)(2) (A). Section 727(a)(2)(A) provides that an individual may not be granted a general discharge if "the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred, removed, destroyed, mutilated or concealed . . . property of the debtor, within one year before the date of the filing of the [bankruptcy] petition."

As presented to the court by both the pleadings and in-court testimony, the issues to be resolved include: (1) whether the leaving of the Fruehauf trailer in Utah constituted an act of "concealment" conducted both within one year of the Wenzels' bankruptcy and with intent to hinder, delay, or defraud the Bank; (2) whether the moving of the Kenworth truck and Polar American trailer from Kingsley to Cleghorn and from Cleghorn to LeMars constituted acts of "removal" or "concealment" conducted with an intent to hinder, delay or defraud the Bank; and (3) whether the replacement of parts on both the Kenworth truck and 1984 Polar American trailer constituted acts of "removal" or "mutilation" accomplished with an intent to hinder, delay or defraud the Bank.

III.

DISCUSSION

Any discussion concerning the denial of a debtor's discharge must be prefaced by a brief reminder as to the policy objectives underlying the concept of "discharge." The discharge in bankruptcy is considered the foremost remedy to effectuate the "fresh start" that is the goal of every debtor seeking bankruptcy relief. H.R.Rep. No. 595, 95th Cong. 1st Sess. 384 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5787. Consequently, the provisions for objections to discharge under 11 U.S.C. § 727 must be strictly construed not only in favor of the debtor, but also against the objecting creditor. In re Ellingson, 63 B.R. 271, 276 (Bankr. N.D. Iowa 1986); see also In re Johnson, 80 B.R. 953, 957 (Bankr. D. Minn. 1987) aff'd, 101 B.R. 997 (D. Minn. 1988). Further, when analyzing any objection to discharge, the court must determine whether the plaintiff has satisfied their burden of proving each and every element of their claim by clear and convincing evidence. Matter of Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987); see also Bankr. R. 4005.

In addition to the aforementioned hurdles, the Bank, in order to prevail on its § 727(a)(2)(A) objection, must prove the following elements: (1) a transfer, removal, destruction, mutilation or concealment of property has occurred, made by the debtor or at his direction; (2) the transfer, removal, destruction, mutilation, or concealment involved property of the debtor; (3) the transfer,

removal, destruction, mutilation or concealment was made within one year of the commencement of the bankruptcy case and/or after the date of filing of the petition; and (4) the debtor had, contemporaneously with the transfer, removal, destruction, mutilation, or concealment, actual intent to hinder, delay or defraud a creditor. In re Bernat, 57 B.R. 1009, 1012 (E.D. Pa. 1986). The failure of the Bank to prove each of the aforementioned elements by clear and convincing evidence must result in the denial of their objection. In re Graham, 111 B.R. 801, 806 (Bankr. E.D. Ark. 1990).

Against the backdrop of the strict legal and evidentiary standards confronting a § 727 objector, the court, after careful consideration, finds, for the following reasons, that the Bank has failed to prove by clear and convincing evidence each element of a § 727(a)(2) (A) claim against Eugene and Danita Wenzel.

A.

Fruehauf Trailer

As framed by the Bank, the issue before the court as it relate to the Fruehauf trailer is whether Eugene Wenzel's transport of the trailer to Utah and his subsequent failed attempt to retrieve the same, equates to an act of "concealment" conducted with an actual intent to hinder, delay or defraud the Bank. However, the court is able to resolve this particular matter without having to fully address the issues of concealment or intent.

As previously set forth, one of the elements to be resolved in a § 727(a)(2)(A) claim is whether the alleged act of concealment was made within one year of the commencement of the bankruptcy case. Bernat, 57 B.R. at 1012. As a general rule, acts of "concealment" occurring outside of the year preceding bankruptcy, even though conducted with intent to hinder, delay or defraud creditors are beyond the scope of S 727(a) (2) (A). This one-year requirement can best be described as threshold inquiry that must be resolved before addressing the issue of intent. The one exception to this rule arises when the "concealment" continues into the time when bankruptcy is contemplated. In re Wollmer, 57 B.R. 128, 131 (Bankr. N.D. Ill. 1986).

As asserted by the Bank in their complaint, the Wenzels removed the Fruehauf trailer to Utah in "approximately September, 1988." In contrast, testimony provided at trial by Eugene Wenzel states that the trailer was left in Utah in March, 1988. Since the Wenzels filed bankruptcy in August, 1989, the trailer was either removed to Utah eleven months prior to bankruptcy as argued by the Bank, or eighteen months prior as argued by the Wenzels.

Based on the evidence presented, the court finds that the Bank has failed to prove by clear and convincing evidence that the removal of the trailer to Utah occurred within one year of the Wenzels' filing of bankruptcy. The Bank provided no evidence supporting their assertion that the transport of the trailer occurred in "approximately September, 1988." The Bank also failed to even challenge, let alone refute, Eugene Wenzel's testimony that the trailer was transported to Utah in March, 1988.

Finally, the facts surrounding the Wenzels' treatment of the Fruehauf trailer do not support the application of the "continuing concealment" exception to the one-year time limit of § 727(a)(2)(A). Assuming the transport of the Fruehauf trailer occurred in March, 1988 as claimed by Eugene Wenzel, the Bank would have to establish that Wenzels' transport of the trailer to Utah constituted an act of concealment and that the concealment continued through the Wenzels' contemplation of bankruptcy.

A "concealment", for purposes of § 727(a) (2) (A), involves secreting of assets in the context of the bankruptcy proceeding. Miles Employee Federal Credit Union v. Griffin, 222 B.R. 821, 826 (Bankr. S.D. Ohio 1982). An example would include the hiding of assets from creditors for the purpose of exempting a portion of the estate which would be payable to creditors through the bankruptcy proceeding. Id. The Bank has provided no evidence which would lead this court to believe that the breakdown in Salt Lake City of the truck transporting the Fruehauf trailer was a contrived attempt by the Wenzels to "secret" or hide the trailer from creditors. Nor has the Bank established that Eugene Wenzel's failed attempt at retrieving the trailer constituted a "continuing act of concealment." Stated alternatively, the Bank has failed to convince the court that the trailer's presence in Utah was due to reasons other than those provided by Eugene Wenzel.

B.

The Moving of the Kenworth Truck and Polar American Trailer

The Bank claims that Eugene Wenzel's moving of the Kenworth truck and Polar American trailer from Kingsley to Cleghorn and from Cleghorn to the LeMars truck stop in July, 1989 were acts of "removal" and "concealment" conducted with actual intent to hinder, delay, or defraud the Bank. To succeed on their claim, the Bank must prove: (1) an act of "removal" or "concealment" occurred; and (2) such acts were motivated by an actual intent to hinder, delay, or defraud. In re Irving, 27 B.R. 943, 945-46 (Bankr. E.D.N.Y. 1983).

Courts have defined concealment broadly to include preventing the discovery of, or withholding knowledge of bankruptcy estate property. Bernat, 57 B.R. at 1012; Comprehensive Accounting Corp. v. Morgan, 43 B.R. 264, 271 (Bankr. E.D. Tenn. 1984). As previously mentioned, concealment usually involves a debtor hiding assets that would otherwise be payable to creditors through the bankruptcy proceeding. Wollmer, 57 B.R. at 132. In contrast, "removal" has been defined as an actual or physical change in the position or locality of property of the debtor resulting in a depletion of the debtor's estate. 4 Collier on Bankruptcy, 727-25 (L. King 15th Ed. 1990).

However, a determination that a particular act constitutes "removal" or "concealment" is meaningless for purposes of § 727(a)(2)(A) unless such act is accompanied by an actual intent to hinder, delay or defraud. Irving, 27 B.R. at 945-46. A well reasoned analysis used to determine the presence of "actual intent" as required by § 727(a) (2)(A) is set forth in Graham. According to Graham, ascertaining intent involves a two-part inquiry. 111 B.R. at 805. First, the Wenzels' actual intent must be found as a matter of fact from the evidence presented. Id. The second part requires a determination, as a matter of law, whether the Wenzels' demonstrated intent constitutes the type of intent which Congress considered so abusive as to merit denial of discharge. Id.

Applying to aforementioned parameters to Eugene Wenzel's movement of the Kenworth truck and Polar American trailer from Kingsley to Cleghorn and from Cleghorn to the LeMars truck stop, the court finds that the Bank has not shown by clear and convincing evidence that the Wenzels possessed the requisite intent to hinder, delay, or defraud the Bank. Consequently, the court need not address the separate issues as to whether Eugene Wenzel's actions constituted "removals" or "concealments" as treated under § 727(a) (2) (a).

As to Eugene Wenzel's initial act of moving the vehicles from Kingsley to Cleghorn, the Bank has failed to persuade that Wenzel's motives were anything more than what he explained them to be. Specifically, the Bank has not put forth sufficient evidence to refute Wenzel's statement that he moved

the vehicles to Cleghorn primarily to avoid what he believed would be a requirement of payment for future rent for parking on the Flewelling property.

Even though no such requirement was forthcoming, the court finds Wenzel's belief to be reasonable in light of the following circumstances. First, it was undisputed that a prior lessor-lessee relationship regarding the parking of trucks and trailers existed between Eugene Wenzel and James Flewelling's father. Secondly, James Flewelling's mother initiated a telephone call to Danita Wenzel regarding the prospect of Eugene paying rent. Finally, it was not established that either Eugene or Danita Wenzel knew that James Flewelling had become legal owner of the Kingsley property by inheritance after his father's death. As a result, the Bank failed to show that Eugene Wenzel knew or should have known that Mrs. Flewelling lacked any authority to rent the property.

As explained by Eugene Wenzel, the act of moving the truck and Polar American trailer from Cleghorn to the LeMars truck stop was intended to effectuate the Bank's repossession efforts. The court concedes that this rationale appears at first blush to be dubious. The credulity of this rationale would be further damaged had Wenzel either evinced an intent to retain control over the truck and trailer or secreted them to a location where they would unlikely be found. However, neither of the aforementioned facts were shown to have existed in the present case.

It is unlikely that the movement and subsequent abandonment of a truck and trailer to a public truck stop located along a heavily traveled state highway constitutes the type of activity sought to be proscribed by § 727(a)(2)(A). Aside from the act itself, the Bank has failed to show any tangible or intangible harm resulting from the move. At worst, Eugene Wenzel may have exhibited poor judgment or shallowness in moving the vehicles to LeMars. However, given the stringent standards applied to § 727 objections, poor judgment standing alone is not enough to deny the Wenzels their general discharge.

C.

Replacement of Parts on Kenworth Truck and Polar American Trailer

The Bank argues that Eugene Wenzel's removal of original parts from the Kenworth truck and Polar American trailer and subsequent replacement with non-original parts were acts of "mutilation" conducted with an intent to hinder, delay, or defraud the Bank. The gist of the Bank's objection concerns Wenzel's replacement of the transmission and rear end on the Kenworth truck and the refrigeration unit on the Polar American trailer. Again, the court finds the Bank has failed to sustain its burden of proving that the Wenzels acted with intent to hinder, delay, or defraud.

The Wenzels admitted to replacing the truck's original "onestick" transmission with a "two-stick" transmission in April, 1987. After the two-stick broke down in September, 1988, Eugene Wenzel reinstalled the original one-stick. Both Wenzels claim this was the last time the transmission was changed. The Bank has failed to produce clear and convincing evidence to refute the Wenzels' claim. The Bank has also failed to prove that the one-stick found in the truck at the time of attachment in LeMars was not the original one-stick found in the truck at the time of purchase. Most importantly, the Bank has failed to prove that the Wenzels' replacement of the truck's transmission was motivated by an intent to hinder, delay, or defraud the Bank.

The Wenzels also admitted to replacing the truck's original rear end with a rebuilt rear end between December, 1988 and January, 1989. This replacement was motivated with the hope of attaining better fuel economy. In addition, the rebuilt, replacement rear end had substantially fewer miles of prior

usage than the original rear end. Given these undisputed facts, the Bank has failed to show the court how the installation of a part intended to improve the truck's performance gives rise to an act of "mutilation" intended to hinder, delay, or defraud.

Finally, the Wenzels admit to having replaced the refrigeration unit on the Polar American trailer in September, 1988. This replacement was necessitated by the malfunction of the original unit's compressor. Both Wenzels claim this was the last time the trailer's refrigeration unit was changed. The Bank contends the unit was replaced between July and August of 1989. The testimony by the Bank's lone witness, Gerald Schweitzberger, did not convince the court that the trailer's refrigeration unit was again replaced between July and August of 1989. The testimony of Schweitzberger, standing alone, without any supporting documentation or corroborating testimony does not provide the requisite clear and convincing proof needed to sustain the Bank's contention.

CONCLUSIONS OF LAW

Kingsley State Bank did not meet its burden of proving that Eugene and Danita Wenzel should be denied their general discharge pursuant to § 727(a)(2).

ORDER

IT IS, THEREFORE, ORDERED that the complaint of Kingsley State Bank objecting to debtors' discharge should be dismissed. Judgment shall enter accordingly.

SO ORDERED ON THIS 28th DAY OF SEPTEMBER, 1990.

William L. Edmonds
Bankruptcy Judge

1. The court concludes that the property was owned by James Flewelling based on Mr. Flewelling's unrefuted testimony that he had inherited the land from his father in approximately January, 1985.