

In the United States Bankruptcy Court

for the Northern District of Iowa

RODNEY L. WRIGHT
Debtor.

Bankruptcy No. L91-01588C
Chapter 7

LaSALLE NATIONAL BANK
Plaintiff

Adversary No. L91-0244C

vs.

RODNEY L. WRIGHT
Defendant.

ORDER RE: MOTION FOR SUMMARY JUDGMENT

The matter before the court is the motion for summary judgment filed June 29, 1993 by LaSalle National Bank (BANK). This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

On November 27, 1991, the Bank filed a Complaint objecting to the dischargeability of Rodney Wright's debt to Bank under 11 U.S.C. § 523(a)(2)(B) as debt for credit obtained by use of a false financial statement. Rodney Wright filed an answer on January 9, 1992 denying all the material allegations of the Complaint.

Wright's attorney filed a motion to withdraw as counsel which was granted by order issued November 25, 1992. Wright proceeded in the case *pro se*. The Bank served upon Wright discovery documents including a request to admit facts. After notice and a hearing, the court granted the Bank's motion to deem facts admitted by order issued June 10, 1993. The order found that the facts set out in requests 1 through 8 of the First Request to Admit Facts were deemed admitted.

The Bank filed its motion for summary judgment June 29, 1993. In support of its motion, the Bank filed the affidavit of Joseph Fudacz, Vice President of the Bank and loan officer principally responsible for the loans at issue. By order issued July 9, 1993, the court set a deadline of August 20, 1993, for Wright to file a written resistance to the motion. The order notified Wright that if no resistance to the motion was filed, the court would consider the motion without hearing. The court attached a copy of Fed.R.Civ.P. 56 to the order. Wright did not file any response to the motion for summary judgment.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2553 (1986). Fed.R.Civ.P. 56(e) further provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

If a party fails to respond to a summary judgment motion, the uncontested assertions in the moving party's affidavit may be taken as established fact for purposes of granting the motion. *Chicago & Northwestern Railway Co. v. Hoppers*

Packing Co., Inc., 363 F.Supp. 697, 701 (N.D. Iowa 1973); Cassidy v. Welfare & Pension Fund for Mid-Jersey Trucking Ind., 580 F.Supp. 175, 176 (E.D. Pa. 1983).

The Bank filed a statement of uncontested material facts established by the answers on file, the facts deemed admitted and the affidavit of Fudacz. The court adopts the Bank's statement of facts with slight modification as follows:

* * *

7. On or about February 26, 1987, for good and valuable consideration Hawkeye Refrigerated Services Corp. ("Hawkeye") executed and delivered to LaSalle in Chicago, Illinois, a Demand Or Time Note ("the February 26, 1987 Note") in the principal amount of \$2,000,000.00, and a Security Agreement (Ans., 7).
8. At that time, and at all relevant times referred to herein, Wright was the President and principal shareholder of Hawkeye (Ans., 8).
9. Under the terms of the February 26, 1987 Note, Hawkeye was to make monthly interest payments to LaSalle with the principal balance and remaining interest to be paid upon demand or upon default under the terms of the Security Agreement (Ans., 9).
10. In November, 1988, and on February 15, 1990, the Note was renewed (the "November, 1988 Note" and "February, 1990 Note" respectively) with the same principal amount and terms as the February 26, 1987 Note (Ans., 10).
11. At the time the February 26, 1987 Note was executed, or soon thereafter, and in order to induce LaSalle to extend credit to Hawkeye, Wright executed and delivered to LaSalle a Continuing Unconditional Guaranty (the "Guaranty") of all indebtedness, obligations and liabilities of every kind and nature of Hawkeye to LaSalle, including interest, whether then existing or created or arising thereafter (LaSalle's First Request to Admit Facts, 1,2 and Order entered on June 10, 1993 deeming facts admitted).
12. LaSalle's decision to extend credit to Hawkeye was based, in material part, on Wright's execution of the Guaranty (Affidavit of Joseph Fudacz, 5).
13. Under the terms of the Guaranty, Wright was obligated to periodically deliver to LaSalle personal financial statements. One such personal financial statement is dated April 25, 1990 ("Financial Statement") and was signed by Wright and delivered to LaSalle (Ans., 13).
14. The Financial Statement indicated a positive net worth of \$1,011,000 (Ans., 13).
15. LaSalle's decisions to extend credit to Hawkeye after April 25, 1990 were based, in material part, on representations made by Wright in his Financial Statement as to his assets, liabilities and financial net worth (Fudacz Aff., 7).
16. * * *
 - a. Wright omitted from the Financial Statement a debt to William D. Fullen, M.D. in the amount of \$1,382,919.57 (Adm., 3).
 - b. Wright omitted from the Financial Statement the fact that the National Bank of Waterloo holds a second mortgage on his condominium (Adm., 4).
 - c. Wright omitted from the Financial Statement his obligation to Toy National Bank in the sum of \$180,000 (Adm., 5).

- d. Wright omitted from the Financial Statement his contingent obligation to MorAmerica Capital Corporation in the amount of \$250,000 (Adm., 6).

* * *

18. 18. On May 22, 1991, LaSalle filed a lawsuit in the United States District Court for the Northern District of Illinois against Hawkeye for breach of contract and against Wright for breach of guaranty (Ans., 17).
19. 19. On August 13, 1991, judgment was entered in favor of LaSalle and against Hawkeye and Wright in the sum of \$174,749.93 (Ans., 18).
20. 20. On August 26, 1991, Wright filed his voluntary petition for relief under Chapter 7, Title 11, United States Code (Ans., 19).

The court also finds the following facts:

The Financial Statement did not state that Wright was liable for the debts of Hawkeye (Adm. 8).

Bank extended the aggregate amount of \$12,730,400.00 in credit to Hawkeye subsequent to April 25, 1990 (Aff. 7).

If the Bank had been aware of the liabilities omitted from Wright's April 25, 1990 financial statement, it would not have extended credit to Hawkeye after that date (Aff. 8).

In extending credit to Hawkeye, the Bank followed its standard and customary banking practices governing such extensions of credit (Aff. 9).

In January, 1991, a default existed on Hawkeye's obligations to the Bank, and the Bank stopped extending credit (Aff. 10).

There is approximately \$127,176.00 plus interest, costs and attorneys' fees still due and owing to the Bank from Hawkeye and Wright (Aff. 11).

The Bank must show the debt owed under the guaranty is nondischargeable by a preponderance of the evidence. Grogan v. Garner, 111 S.Ct. 654, 661 (1991). Bankruptcy Code § 523 provides that a chapter 7 discharge does not discharge a 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 debtor 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.

11 U.S.C. § 523(a)(2)(B).

The answers on file and the admitted facts establish that Wright omitted liabilities of approximately \$1.8 million from

his written financial statement. A financial statement with major omissions may be a materially false representation. Kansas Nat. Bank & Trust Co. v. Kroh (In re Kroh), 88 B.R. 972, 984 (Bankr. W.D. Mo. 1988). Financial statements that fail to list substantial contingent liabilities are materially false. Id. The substantial omissions from Wright's financial statement created a false representation of his overall financial condition. The aggregate of the debts omitted exceeded his entire net worth. Moreover, the omissions were material to the Bank's decision to continue to extend credit to Hawkeye. Landmark Leasing, Inc. v. Martz (In re Martz), 88 B.R. 663, 671 (Bankr. E.D. Pa. 1988). But for the false financial statement, the Bank would not have continued to extend credit to Hawkeye. (Affidavit of Fudacz, 8).

A Bank may be found to have reasonably relied on a financial statement when it follows its standard practices and industry standards in evaluating a loan under the particular circumstances of the case. Kroh, 88 B.R. at 984. In extending credit to Hawkeye, the Bank followed its standard and customary banking practices governing such extensions of credit. (Affidavit of Fudacz, 9). There is no indication that the Bank has acted in bad faith. See Martin v. Bank of Germantown (In re Martin), 761 F.2d 1163, 1166 (6th Cir. 1985) (reasonableness requirement is directed at creditors acting in bad faith). The court finds that the Bank reasonably relied on Wright's financial statement.

Intent to deceive by use of a false financial statement may be established by showing a gross recklessness regarding the truth or falsity of the financial statement. Bank One, Lexington v. Woolum (In re Woolum), 979 F.2d 71, 73 (6th Cir. 1992), cert. denied 113 S.Ct. 1645 (1993); Martin, 761 F.2d at 1167; Central Nat. Bank & Trust Co. v. Liming (In re Liming), 797 F.2d 895, 897 (10th Cir. 1986). Wright had an obligation under the terms of the guaranty to provide financial statements to the Bank. He knew that the Bank was relying on the accuracy of the financial statements to continue to extend credit to Hawkeye. The number and size of the debts omitted from the financial statement created a dramatic disparity between Wright's net worth as reported and his actual financial condition. This difference supports an inference of Wright's reckless disregard for the truth or falsity of the financial statement. Liming, 797 F.2d at 897; Martin, 761 F.2d at 1167.

The court finds that the Bank has shown there is no genuine issue as to any material fact and that the Bank is entitled to a judgment that Wright's obligation to the Bank is nondischargeable under 11 U.S.C. § 523(a)(2)(B). Interest accruing on the judgment in the Northern District of Illinois is part of the nondischargeable debt, as are any attorney fees and costs awarded there. Costs of this dischargeability proceeding are taxed to Wright. Each party shall bear its own attorney fees.

ORDER

IT IS ORDERED that the motion for summary judgment of LaSalle National Bank is granted. Rodney L. Wright's debt to the Bank is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(B). Costs are taxed to Wright. Judgment shall enter accordingly.

SO ORDERED ON THIS 8th DAY OF SEPTEMBER, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U. S. mail to: U. S. Trustee, Allan Harms, Kenneth Skolnick and Rodney Wright.