

In the United States Bankruptcy Court

for the Northern District of Iowa

WILLIAM E. WELLS JR.

Debtor(s).

Bankruptcy No. L-90-02393C

Chapter 7

REBECCA A. HOTH Administrator

Plaintiff(s)

Adversary No. L-92-0076C

vs.

WILLIAM E. WELLS JR.

Defendant(s)

RULING

Trial was held on January 10, 1994 pursuant to assignment. Rebecca Hoth as Administrator of the Estate of Bobbie Hoth (Plaintiff) appeared by Attorney James O'Brien. Defendant William Wells (Wells) appeared in person with Attorney John Heckel. Evidence was presented after which the Court took the matter under advisement. All briefs are now filed and the Court enters the following ruling.

STATEMENT OF THE CASE

William Wells, Defendant in this adversary proceeding, filed a Chapter 7 bankruptcy petition in 1990. The present proceeding is brought pursuant to 11 U.S.C. § 523(a)(2). Plaintiff seeks denial of discharge for an obligation which Plaintiff alleges is owed by Wells. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

FINDINGS OF FACT

This complaint involves three business organizations. To understand the nature of the complaint, it is helpful to describe these organizations.

WIX Transport was operated as an informal partnership. John Hoth (Hoth) and his son, Bobbie J. Hoth, were equal partners. Bobbie Hoth was killed in an automobile accident, unrelated to any facts in this case, in 1992. His widow, Rebecca A. Hoth, is the administrator of his estate and is the Plaintiff in this adversary proceeding. WIX Transport is presently operated as a sole proprietorship by John Hoth. WIX Transport rents or leases tractors, trailers and other trucking equipment. On occasion, it will also sell tractors and trailers and other trucking related equipment.

DSMI was an Iowa Corporation organized effective January 1, 1989. The corporation's purpose was to provide delivery services to companies requiring secure and expedited deliveries. It intended to provide rapid delivery of prescription drugs, food items, floral stock, bank deposits and hospital and medical supplies. The corporation owned few hard assets. Though some delivery vehicles were

owned by the corporation, most were leased. William E. Wells, Jr. was the initial incorporator. He testified, however, that he had little financial involvement and viewed himself as a consultant. During the summer of 1989, a substantial investment in DSMI was made by Jeffery and Lavern Busse. Jeffery Busse became the Secretary of DSMI Financial Corporation and a member of the Board of Directors. Wells was listed as President of the company and appears to have conducted most of the day-to-day business operations. Wells testified that Lavern Busse made the major business decisions as he was the major investor. The corporation conducted business for calendar year 1989. It was not a successful endeavor. Eventually, Wells concluded that the corporation was undercapitalized and it was dissolved. Wells' personal Chapter 7 bankruptcy petition was filed soon after dissolution of the corporation.

LTB Enterprises, Inc. is an Iowa Corporation. Lavern Busse and his son, Jeffery Busse, are the primary investors and officers in this corporation. All the business purposes of LTB Enterprises, Inc. are not clear from this record. However, it provided investment capital and other services for businesses. It had an ownership interest in various businesses including trucking companies.

The relationship between these companies began in 1989. LTB Enterprises invested equity interest in DSMI and financing for equipment. In August of 1989, DSMI contacted WIX Transport to purchase a tractor and trailer. This purchase was discussed with Lavern Busse. The tractor and trailer were purchased from WIX Transport in the name of LTB Enterprises. They were then leased back to DSMI. The purpose of the tractor-trailer purchase and subsequent lease to DSMI was to service a delivery route between Iowa and Kansas City for McKesson Pharmaceutical. DSMI was hired to deliver heavily regulated narcotics between the two locations.

On September 27, 1989, this tractor-trailer was enroute from Iowa to Kansas City. Between 2:00 and 3:00 a.m., it was involved in an accident near Des Moines. Wells was notified at approximately 2:45 a.m. from a hospital in Des Moines. He was told of the accident and that there was a fatality. He called law enforcement and informed them that there were narcotics on the truck and to post a guard. He then notified McKesson and Lavern Busse.

Because of the fatality and the nature of the cargo, there was confusion and urgency in obtaining a backup tractor-trailer to transfer the cargo and deliver it to Kansas City. Wells called Hoth. He informed Hoth that because of the accident he needed a tractor-trailer.

The recollections of Wells and Hoth differ. Wells recalls that they did not discuss whether the acquisition would be a sale, lease or some other business arrangement. Hoth simply stated that he had the equipment available and that it would be ready when Wells acquired a driver. The parties did not discuss financial terms.

Hoth's recollection of the conversation is more specific. He testified that he told Wells that he had the right equipment and it would be ready. He stated that he told Wells that Wells could "pick it up and see if it works for you." If so, he could purchase it. He believes that he offered the tractor for sale for \$11,000 and the trailer for \$7,000. Hoth agrees that no money changed hands on that date.

DSMI took possession of the truck and made the deliveries. DSMI kept possession; however, no payment was made. Eventually, Hoth called and left a message for Wells stating that he needed to know if Wells wished to purchase the truck. He felt that "trying the truck out" involved one or two trips but did not include an informal arrangement spanning several months. Hoth had difficulty contacting Wells and eventually left a message that he was going to pick up the tractor-trailer if he did

not get the matter resolved. Around October 20, 1989, Wells called Hoth and said he would get a check. At this point, the evidence is again in dispute.

Hoth testified that he told Wells that he needed \$22,900. Wells contacted Jeff Busse and told him that a check had not been made to WIX Transport for the tractor-trailer. A check was drawn in the name of LTB and delivered to Hoth on October 24, 1989 in the amount of \$22,900.

In addition, Hoth testified that Wells stated to Hoth that the \$22,900 check could be applied toward DSMI's previous obligations. More specifically, Hoth states that DSMI had rented other vehicles prior to the transaction in question and that DSMI owed WIX for these rentals. Hoth stated that Wells specifically informed him that the \$22,900 check could be applied to all past rental obligations. Wells denies that he informed Hoth that this check could be applied toward past rentals. He testified that, based upon Exhibit 5A, it appears that some rent was owed as of the time of delivery of the check. However, he testified that he was not aware of any additional rentals which may be owing and did not inform Hoth that this check could be applied toward rentals which were not included in Exhibit 5A.

The factual dispute relates to the time an itemization was provided to Wells concerning the application of the \$22,900. Wells testified that Hoth had stated that he needed a check for \$22,900. He felt Jeff Busse would check with Hoth to verify the amount and the manner in which it was to be allocated.

Hoth testified that he had made up a list (Exhibit 5A) which constitutes a breakdown of the \$22,900. Of that total amount, the tractor price was \$11,000 and the trailer price was \$7,000. The remaining amount was to be applied to load locks, tires, a mattress reflector as well as past vehicle rental and fuel.

The mattress reflector, the load locks, and the tires were all items associated with the tractor-trailer destroyed in the September 27, 1989 accident near Des Moines. This destroyed vehicle was owned by LTB and the obligations were attributable to LTB. They were indisputably payable from the \$22,900 check. These items totaled \$657.

The remaining item on Hoth's list appears to state "miles, rental, tractor and fuel". This item totals \$4,248.80. This amount was allegedly generated exclusively by DSMI for rentals of trucking equipment between DSMI and WIX on previous occasions. If so, LTB would have no obligation to pay this debt. Without the consent of LTB, this obligation would not be payable from the check. Wells testified that the first time he recalls being made aware of this itemization was when Hoth showed it to him at the time of delivery of the check.

Hoth testified that in addition to the \$4,248.80, DSMI owed additional amounts for other past tractor-trailer rentals. He claims these amounts remained unpaid even after the payment of the \$22,900 check. This unpaid amount, according to Hoth, is between \$7,200 and \$7,400. It is this allegedly unpaid rent which apparently precipitated Hoth's subsequent actions. Wells testified that he was never made aware of these additional alleged rentals until litigation began in State Court.

No title documents were exchanged when the check was delivered to Hoth. Wells claims that he thought Hoth would deliver title to LTB. It was Hoth's testimony that no one ever asked for the title. This is significant because LTB apparently assumed Wells had completed the title transfer and that LTB had title to this vehicle with a separate lease arrangement back to DSMI. DSMI continued to utilize the truck until the dissolution of the corporation at the end of 1989. While the record is

incomplete, the tractor was apparently put in the shop for repairs near the end of 1989. The repairs totaled in excess of \$2,600.

As stated, Hoth felt DSMI owed WIX Transport for past rentals. He testified that he retained ownership of the tractor-trailer because no title had been transferred. He stated that he would not have transferred title until the remaining amounts owed were paid or until such time as a lien in the amount of the outstanding rental balance was noted on the transferred title.

At some point, Hoth determined that he was not going to be paid the alleged outstanding balance. To secure this obligation, he decided to reclaim the tractor-trailer. He located it at the repair shop. To gain possession of the tractor-trailer, he paid the \$2,600 repair bill. He took possession of the tractor-trailer and subsequently sold the tractor to a third party for \$5,000. He retained possession of the trailer.

LTB learned of this transaction. It felt it had paid for the tractor-trailer and a lawsuit was commenced in Iowa District Court against Hoth and the estate of his son. The matter was tried before Judge August F. Honsell in May of 1993. A judgment was entered on August 23, 1993 in favor of LTB Enterprises and against John Hoth and Rebecca A. Hoth as Administrator of the Estate of Bobbie Hoth, d/b/a WIX Trucking. Judgment was in the amount of \$16,697 for the tractor. The Defendants were ordered to turn over delivery of the trailer and title to the Plaintiffs or, in lieu thereof, a judgment would enter on the trailer in favor of Plaintiff LTB Enterprises and against Defendants Hoth's in the amount of \$4,500.

Wells filed his Chapter 7 bankruptcy petition on August 9, 1990. In the original schedules, Wells did not list John Hoth, Bobbie Hoth, the Estate of Bobbie Hoth, or WIX Transport as a creditor. The bankruptcy was noticed as a no asset case and no claims were filed. However, on August 22, 1991, a notice was sent out by the Clerk of Bankruptcy Court that it then appeared there may be assets in excess of the cost of administration.

The bankruptcy files reflect that a minimal amount of assets were eventually collected and reduced to cash. A minimal amount of administrative expenses were paid from these funds but there were insufficient funds to make any distribution to creditors. As such, for all practical purposes, this case remained a no asset bankruptcy case. Wells was granted a discharge on January 10, 1991.

The petition in State Court was filed June 7, 1990. In this action, LTB sued the Hoth's and WIX Transport. Rebecca Hoth, the Administrator of the Estate of Bobbie Hoth, filed a cross-petition against William Wells, Jr. on December 30, 1991. Because this cross-petition created potential monetary claims against Wells, he filed an amendment to his creditor schedules on February 20, 1992 listing Rebecca A. Hoth, the Administrator of the Estate of Bobbie Hoth, and John Hoth as creditors. The amendment stated that the obligations were incurred in 1989 and that the amount of the claims was uncertain. Remarks in the amendments stated that these two creditors were listed as a result of a cross-claim derivative lawsuit arising out of DSMI Financial Corporation. The added creditors (Rebecca Hoth as Administrator of the Estate of Bobbie Hoth and John Hoth) were provided notice. The file does not reflect that either of the added creditors claim that they did not receive timely notice of this amendment. Neither creditor has filed a claim in the bankruptcy proceedings. This adversary proceeding was filed March 27, 1992. The final account of the Trustee was approved and the Trustee was discharged on October 12, 1993.

As an affirmative defense in this proceeding, Wells alleges that these creditors had actual notice of the pendency of the bankruptcy since December 13, 1991 when a conference was held among attorneys in

the State Court action. It is alleged that, at that conference, Wells' bankruptcy was discussed. This evidence is relevant because Wells contends the Plaintiff's adversary filing is not timely and should be dismissed.

This adversary proceeding is brought pursuant to 11 U.S.C. § 523(a)(2)(A). Plaintiff alleges Wells secured the use of this tractor-trailer beyond October 24, 1989 by tendering the \$22,900 check to Hoth. He states that use of the tractor-trailer by Wells after October 24 constitutes a use of property or an extension of credit.

Plaintiff asserts that Wells obtained use of the tractor-trailer by making two separate misrepresentations to Plaintiff. Plaintiff asserts that, while the misrepresentations were made to Hoth as a partner in WIX Trucking, the representation is applicable to Plaintiff through the partnership. Plaintiff asserts that the first misrepresentation made to Hoth was the statement that Hoth could apply the proceeds of the \$22,900 check to rental charges and other obligations which were due from DSMI to Plaintiff through the WIX partnership. Plaintiff asserts that the second misrepresentation is the concealment of a material fact which constitutes the equivalent of an affirmative misrepresentation under 11 U.S.C. § 523(a)(2). Plaintiff asserts that Wells concealed the fact that he did not have authority from LTB Enterprises to allow application of the \$22,900 check toward past accumulated rentals owed by DSMI to WIX Trucking. Plaintiff asserts that Wells does not deny that he lacked authority to approve application of these funds toward past obligations.

Plaintiff claims that Wells intended to obtain the use of the vehicle through payment of the check. Plaintiff states that the partnership relied on the apparent authority which Wells presented. Plaintiff states that the facts established in the Iowa District Court found that Wells did not, in fact, have authority to direct Hoth to apply a portion of these funds to rentals and fuel which were the obligation of DSMI, and not LTB.

Plaintiff states that LTB proved, to the satisfaction of the Iowa District Court, that it purchased the vehicle in question with the \$22,900 check. Plaintiff also asserts that the WIX partnership would not have delivered clear title when the check was tendered without noting a lien in favor of WIX for other obligations still owing by DSMI to WIX trucking. Plaintiff states that it was the finding of the Iowa District Court that because Wells did not have authority to bind LTB to the payment of the debt, LTB was not bound by that allocation of funds.

Plaintiff claims that the damage alleged in this adversary is the judgment which was entered in Iowa District Court in favor of LTB and against the Plaintiff individually. Plaintiff concludes that as Wells did not have the authority from LTB to allow these funds to be applied to outstanding obligations of DSMI, and failed to disclose that lack of authority, Plaintiff has been subjected to the judgment entered by Judge Honsell in Iowa District Court in August of 1993.

TIMELINESS OF ADVERSARY PROCEEDING

Wells asserts that Plaintiff's adversary proceeding is untimely. In raising this defense, Wells relies partly upon the factual assertion that Hoth had actual knowledge of Wells' bankruptcy through a December 13, 1991 meeting of attorneys relating to the State Court proceeding. The record establishes that a meeting in Attorney Kevin Collins' office occurred on or about that date. This meeting involved depositions and other matters which were pending in the State proceeding. The various individuals present have different recollections of what was discussed.

Wells filed his Chapter 7 bankruptcy in August of 1990. By the time the meeting occurred in December of 1991, Wells had already been granted a discharge, a notice had originally been sent that this was a no asset bankruptcy case, and the subsequent notice had been sent that there may be assets to administer in the case. It is not unrealistic to assume that Wells' bankruptcy would be an issue subject to discussion when peripheral litigation was occurring in State Court. However, at the same time, the evidentiary record is not at all clear that this matter was discussed at that meeting.

The burden is upon Wells to establish this affirmative defense. Actual knowledge may constitute a bar to these adversary proceedings. On this record, the Court cannot conclude, by a preponderance of evidence, that Plaintiff had actual knowledge of the bankruptcy case. The Plaintiff in this litigation is Rebecca Hoth as administrator for the Estate of decedent Bobbie Hoth. Notice to Bobbie Hoth is the critical test on this issue. It is the conclusion of this Court that the evidentiary record does not support a finding by a preponderance of evidence that Bobbie Hoth had actual knowledge of the bankruptcy sufficient to bar consideration of this adversary proceeding.

Having made a determination that the evidence does not support a finding of actual knowledge of the bankruptcy proceeding, the Court must weigh the impact of subsequent proceedings to determine timeliness. Wells filed his Chapter 7 Petition on August 9, 1990. He did not list John Hoth, Bobbie Hoth, or WIX Transport as creditors. It was not until Wells was brought into the State litigation, by way of a cross-claim in December of 1991, that he felt that a claim by any or all of these individuals may exist. Therefore, on February 20, 1992, Wells amended his creditor schedules to reflect these potential claims. On March 27, 1992, Rebecca Hoth, as administrator for Bobbie Hoth, filed the present adversary proceeding against Wells. The Court must determine the legal significance of the timing of these filings.

Wells' amendment to his schedules, after the discharge date, does not necessarily affect the dischargeability of Plaintiff's claim. It is not correct to assume that, if an omitted creditor's claim is listed by amendment after discharge, that the discharge automatically and retroactively applies. In re Crull, 101 B.R. 60, 61 (Bankr. W.D. Ark. 1989). Filing an amended schedule listing an omitted creditor after the discharge has been entered does not automatically affect a determination of the dischargeability of the underlying debt. In re Anderson, 72 B.R. 495, 497 (Bankr. D. Minn. 1987). A determination of dischargeability may be made in an adversary proceeding commenced by the filing of a complaint to determine dischargeability of the obligation under § 523(a)(3)(A). Id.

Both Crull and Anderson were Chapter 7, no asset cases, where no claim period had ever been fixed. This bankruptcy was originally treated as a no asset case but a claim period was subsequently set when it appeared that assets did exist. The files, however, reflect that while minimal assets were collected, insufficient assets existed to pay any creditor claims. From an analysis standpoint, the foregoing cases are equally applicable in this case. Thus, to determine the dischargeability of these late filed amendments to the creditor schedules, it is necessary to have their dischargeability determined in an adversary proceeding. It is, therefore, arguably as beneficial to Wells as to these claimants to have a determination made on the merits in this proceeding.

Bankruptcy Rule 4007(c) requires that an adversary proceeding be commenced not later than 60 days following the first meeting of creditors held pursuant to § 341(a). This time period has long since passed. Plaintiff asserts that dismissal of this adversary proceeding, on this ground, would constitute a denial of Plaintiff's Fifth Amendment due process rights. In re Eliscu, 85 B.R. 480 (Bankr. N.D. Ill. 1988). Courts have traditionally not determined the rights of parties on constitutional grounds when an alternative nonconstitutional resolution exists. It is the conclusion of this Court that for purposes of this case, such a nonconstitutional resolution exists in 11 U.S.C. § 523(a)(3)(B).

Application of 11 U.S.C. § 523(a)(3)(B) is not without multiple interpretations. One interpretation provides that § 523(a)(3)(B) was intended for this fact pattern where an intentional tort creditor, who did not have knowledge of the bankruptcy case in time to file an adversary proceeding, might be deprived of its rights. Section 523(a)(3)(B) provides access to the Court for this late-filed determination.

In the achievement of that purpose, subpart (B) is applicable only where a debt of the type described in subsections (2), (4) or (6) was neither listed nor scheduled in time to permit the filing of a proof of claim or the filing of a complaint to determine dischargeability, and the creditor did not know about the case within that time. So subpart (B) protects two rights: the right to file a proof of claim and the right to obtain a determination of the dischargeability of a debt in those instances where that right might otherwise be lost by reason of the passage of time.

In re Mendiola, 99 B.R. 864 (Bankr. N.D. Ill. 1989) (citations omitted).

On the issue of timeliness, therefore, it is the conclusion of this Court that the interests of the Plaintiff and Wells are best served by addressing the underlying merits of the adversary proceeding. It is the further conclusion of this Court that this methodology is authorized by the Bankruptcy Rules and Code sections discussed.

SECTION 523(a)(2)(A) CLAIM

Section 523(a)(2)(A) states:

- a. A discharge under section 727 . . . does not discharge an individual debtor from any debt -

...
 2. for money, property, services, or an extension, renewal, or 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.

Courts use a five element test which must be satisfied before a debt will be excepted from discharge under § 523(a)(2)(A). The elements are: (1) the debtor made false representations; (2) the debtor knew the representations were false at the time they were made; (3) the debtor made the representations with the intention and purpose of deceiving the creditor; (4) the creditor relied on the representations, In re Ophaug, 827 F.2d 340, 343 (8th Cir. 1987); and (5) the creditor sustained the alleged injury as a proximate result of the representations having been made. In re Coates, No. L-90-00780C, slip op. at 4 (Bankr. N.D. Iowa Apr. 1, 1991); In re Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987).

These elements must be proven by a preponderance of the evidence. Grogan v. Garner, 111 S. Ct. 654, 659 (1991).

The Court will analyze each of the elements under § 523(a)(2)(A). The first element requires that Plaintiff establish that Wells made a false representation. Plaintiff asserts that Wells made two misrepresentations. The first misrepresentation, according to Plaintiff, is Wells' assertion to Hoth that the \$22,900 check could be utilized to pay past rental obligations due to WIX Transport by DSML. Wells has denied making such an assertion.

The Court has carefully reviewed the evidentiary record presented and it is the conclusion of this Court that Wells did not state to Hoth that some or all of the funds derived from the \$22,900 check could be applied to past rentals. It is inconsistent with the evidentiary record that Wells would have done this or would have any reason to do so. At about the time the check was obtained by Wells from LTB, Hoth had given Wells a specific amount that was needed. This was in Exhibit 5A. Hoth did not seek anything from Wells outside of this itemization nor were any other obligations discussed at that time. It is the conclusion of this Court that there would be no reason to discuss additional back rentals at that time or their application because Exhibit 5A was specific in how the funds would be applied. For that reason, as a fact, it is the determination of this Court that Wells did not make the representation alleged by Hoth.

Plaintiff claims that another misrepresentation occurred due to Wells' silence. Plaintiff alleges that Wells was aware that the check was drawn on the account of LTB Enterprises and that Wells did not have the consent of LTB Enterprises to apply all or part of this LTB check to outstanding DSMI obligations.

While Bankruptcy Courts have unanimously held that positive or overt fraud satisfied the first element of a claim under § 523(a)(2)(A), the issue has arisen as to whether a debtor's silence can satisfy this element. The 8th Circuit has considered this issue and has determined that silence can constitute a misrepresentation sufficient to satisfy this element. In re Van Horne, 823 F.2d 1285, 1288 (8th Cir. 1987). "While it is not practicable to require the debtor to 'bare his soul' before the creditor, the creditor has the right to know those facts touching upon the essence of the transaction." Id. at 1288.

This Court construes that language as incorporating the Restatement of Torts analysis relating to silence as a misrepresentation. See Restatement of Torts 2d, § 538, Comments D and F. Under the restatement definition, in order to satisfy this element, it is necessary that a person concealing information must know that a reasonable person similarly situated would consider the information as important in making a decision. Additionally, the person concealing the material fact must know, or have reason to know, that the other person would consider, or likely consider, the fact as important in that person's business affairs. Finally, the concealed fact must have some importance in influencing the other person to enter into a transaction which would not have otherwise occurred.

Plaintiff claims Wells was aware that he lacked authority to allow part or all of the \$22,900 check to be applied to his company's obligations. Hoth wanted payment or return of the tractor-trailer. The original sale price of \$18,000 was originally discussed when the tractor-trailer was received by Wells. The subsequently higher amount sought was itemized in Exhibit 5A. This represented \$18,000 for the tractor-trailer. It also contained \$4,248.80 in back DSMI rentals. This itemization was presented to Wells when the check was delivered to Hoth. Nowhere does the record reflect that Hoth notified Wells that he would not give clear title to the tractor-trailer if the \$22,900 was paid. This was not a partial payment for back rent nor a partial payment for the tractor-trailer. Hoth asked for \$22,900 and he received the amount he sought.

Succinctly stated, Hoth wanted \$22,900 from Wells. He itemized this amount and presented that itemization to Wells when the check was delivered. These items have already been fully explained in this opinion. Wells had a right to conclude that the check corresponded to the itemization in Exhibit 5A and that the funds would be applied in that manner. The record fails to establish that Hoth subsequently modified that itemization in any manner. This Court has already concluded that Wells did not make the affirmative statement that all or part of these funds could be applied to other alleged back rentals. The law is clear that a misrepresentation by silence must be on a material issue. As the

given itemization matched exactly the amount of the check, and as Hoth made no further statements concerning changing that allocation, Wells' silence as to any authority which he might have to allocate this check, even if intentional, has no materiality or causal relationship to what subsequently transpired. This Court concludes that there was no representation by silence by Wells regarding a material fact which can legally constitute a false representation.

In summary, it is the conclusion of this Court that there was neither an oral misrepresentation made by Wells nor a representation by silence. The Plaintiff has failed to establish by a preponderance of evidence the first element of its claim under § 523(a)(2).

The second element of a § 523(a)(2)(A) claim requires a showing that Wells knew the representation was false at the time it was made. For the same reasons previously discussed, this Court concludes that Wells did not consider it critical that the check be allocated in any particular manner. At the time of delivery of the check, Exhibit 5A relating to Hoth's proposed allocation of these funds was discussed with Wells. It is conceivable that Wells did not have explicit authority from LTB to allow this allocation. However, based on the prior dealings of these parties, it is clear that Wells did not consider this to be critical in the context of this transaction. Wells' intent must be analyzed in terms of the facts as they existed at that time.

The various business entities discussed in this opinion had a relatively informal business arrangement for a considerable period of time. Some of the officers of LTB were also involved in the management of DSMI. LTB had previously provided capitalization to DSMI. The burden is upon Plaintiff to establish that Wells knew that any alleged representations were false. This Court has concluded that no misrepresentations occurred. However, even if Wells' silence on the issue of authority to apply LTB funds to DSMI obligations were in dispute, the facts presented are as consistent with an ongoing informal business arrangement as they are with a knowing misrepresentation. It is inappropriate to categorize Wells' conduct as a representation he knew was false. It is the ultimate conclusion of this Court that Plaintiff has failed to establish the requisite knowledge under the second element of a § 523(a)(2)(A) claim.

Element number three requires that a representation or concealment be intentional and done for the purpose of deceiving the creditor. It is the conclusion of this Court that Wells did not conceal any material fact with the intent of deceiving Hoth. Hoth presented Wells with an itemization of the \$22,900 check. No additional conditions were expressed as necessary to complete the transaction. In the State Court action, Judge Honsell found that if a check for \$22,900 had been presented on September 27, when the truck was delivered, Hoth would have provided clear title. However, in subsequent testimony and at the time of trial herein, Hoth stated that he would have only given a conditional title with a lien noted for the additional obligations. Even if Hoth's testimony is viewed as consistent, there is nothing in this record to indicate that Wells was aware of these additional unstated conditions. Because he was not aware of those conditions, he had no reason to feel that the allocation of these funds was critical or that his authority to apply these funds was a critical fact of which he should inform Hoth. It is the conclusion of this Court that Wells did not intend to conceal any fact for the purpose of deceiving Hoth.

The fourth issue relates to reliance by a creditor. In this context, reliance means that Hoth considered the concealed fact as material to the transaction and would have changed his conduct if he had been made aware of the fact in dispute. Hoth testified that he was subjected to a judgment in State District Court as a result of the conduct of Wells. However, the record is not clear how Hoth would have handled this situation if he had been aware that Wells did not have specific authority to allow Hoth to apply some of the funds from this check to DSMI obligations. Hoth does note that he would not have

allowed the title to be transferred without noting a lien. However, the record appears to reflect that this was true whether or not Wells had authority to apply funds to DSMI obligations. It is the conclusion of this Court that the facts which Hoth views as critical did not have a significant impact on this transaction.

The final element of a 523(a)(2)(A) claim relates to damages. In many respects, this is the most problematical element in this case. Hoth maintains that the injury which he sustained is the judgment which was entered against him in State Court. However, there must be causation between the alleged act and the injury. Here, the proximate cause of Hoth's injury was not Wells' alleged concealment of a material fact. The cause was Hoth's action in reselling a tractor which the State District Court found had been sold to LTB by oral contract.

The conclusion is inescapable that Hoth was fully paid for the tractor-trailer. He knew, or should have known, that he was not only dealing with Wells but also LTB Enterprises because he had previously dealt with them under similar circumstances. He then sold the tractor, which he had already sold to LTB Enterprises, in order to satisfy an obligation which was owed, if at all, by DSMI. It was this conduct which precipitated the lawsuit and was the proximate cause of the judgment and not any alleged representations made by Wells.

In addition to causation issues, it is difficult to discern a loss sustained by Hoth. He was given a check by LTB Enterprises in the amount of \$22,900. He later resold the tractor for \$5,000. He kept the trailer. In the State District Court judgment, Hoth was given credit for rental for the tractor of \$5,500. He was given rental for the trailer of \$1,483. He was credited for fuel cost of \$550 and with repair costs which he had to pay when he reclaimed the tractor.

While the judgment against Hoth for almost \$17,000 appears substantial, in reality, he has sustained no loss. He received \$22,900 from LTB Enterprises on October 24, 1989 and had use of those funds until entry of Judge Honsell's judgment on August of 1993. Judge Honsell's Order does nothing more than to put the parties in the position they would have occupied if Hoth had not resold the tractor. This Court cannot conclude that this transaction constitutes injury or damage to Hoth.

Finally, it is not clear that the measure of damages is the judgment entered in District Court. Wells allegedly owed Hoth for preexisting rentals. He alleges that the new value was the use of the tractor-trailer after the submission of the check on October 24. However, he alleges that the injury is the judgment which was entered against him. Plaintiff has never filed a claim. There has never been a determination that this is a "claim", as the term "claim" is defined in the Bankruptcy Code (11 U.S.C. § 101(4)). There has been no independent determination that Wells owes Plaintiff \$16,967 for the tractor and \$4,500 for the trailer. Such a finding would be patently inconsistent in that Hoth has already been paid \$22,900 and has resold the tractor for \$5,000. To now say that Wells is denied discharge on a claim in favor of the Plaintiff, would constitute an absolute windfall.

The Court has already determined, based on these findings, that no misrepresentation occurred and any damages sustained by Plaintiff were not proximately caused by the conduct of Wells under § 523 (a) of the Bankruptcy Code. If it was the intention of the Plaintiff to establish in this proceeding an independent tort, none is apparent from this record. There is no pled theory involving contribution or indemnity as a result of the State Court action. As no independent theory is pled or sustained by the evidence, it is not possible by this Court to discern any compensable theory of recovery in favor of the Plaintiff and against Wells.

SUMMARY

Additional issues have presented themselves in the analysis of this case. The Court is aware that there may be a substantial issue as to whether Plaintiff, Rebecca A. Hoth as Administrator of the Estate of Bobbie Hoth, is the real party in interest. Many of the transactions which occurred in this case involved the various business entities. Allegedly, Bobbie Hoth was partner with his father in WIX Transport. It is, however, not abundantly clear from this record how Bobbie Hoth would stand as a Plaintiff as opposed to WIX Transport or his father John Hoth. Additionally, there is a substantial issue as to how Wells, as an individual, would be responsible for any alleged conduct presented in this record. There is a significant argument that in order to expose Wells to individual liability, the corporate veil would have to be pierced. There are no allegations made in that regard and no evidence presented on that issue. An issue is also apparent, from the State Court action, that many of the matters raised here may have been litigated and determined adversely to the Plaintiff. The foregoing are all worthy of substantial discussion and may well impact adversely to the Plaintiff. However, as is apparent, this opinion is of substantial length, and the Court has determined this matter adversely to the Plaintiff. No purpose is served by extending this opinion.

Plaintiff, Rebecca A. Hoth as Administrator of the Estate of Bobbie Hoth, has asserted that the Estate has suffered damages because of the conduct of Wells. It is the conclusion of this Court that the evidentiary record does not support a conclusion that Wells misrepresented himself in any manner. The entry of the judgment in State Court against the Plaintiff was not caused by any conduct attributable to Wells. The direct causal relationship of the entry of the judgment, as found by Judge Honsell in State Court and as is determined by this Court, was the second sale of the tractor by Hoth in derogation of the rights of LTB to clear title to the tractor-trailer. Wells did not make any overt representations or representations by silence which precipitated this conduct by Hoth. As such, there is no conduct by Wells which would support a claim of nondischargeability under 11 U.S.C. § 523(a) (2) of the Code. For that reason, it is the determination of this Court that any claims by Creditors Rebecca A. Hoth, as Administrator of the Estate of Bobbie Hoth, John Hoth, and WIX Transport will be determined to be dischargeable as a result of this proceeding.

CONCLUSION

The evidence in this case fails to establish the requisite elements of a claim under 11 U.S.C. § 523(a) (2). The evidence also fails to establish any damage sustained by the Plaintiff as a result of the alleged misrepresentations of Wells. The Court further finds that the obligations listed for creditors Rebecca A. Hoth, Administrator of the Estate of Bobbie Hoth, and John Hoth on the amended schedules of February 20, 1992 should be discharged.

ORDER

IT IS THEREFORE ORDERED that the dischargeability complaint filed by Rebecca A. Hoth, Administrator of the Estate of Bobbie Hoth, is **DISMISSED**.

FURTHER, the obligations listed by Wells in the amended schedules of February 20, 1992 listing Rebecca A. Hoth, as Administrator of the Estate of Bobbie Hoth, and John Hoth as creditors are discharged as a result of this adversary proceeding.

SO ORDERED this 29th day of March, 1994.

Paul J. Kilburg
U.S. Bankruptcy Judge

