In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

GERALD R. PETERSEN and RITA A. PETERSEN — Bankruptcy No. 93-50555XS

Debtors. — Chapter 7

JOLLIFFE & CO.
Plaintiff

vs.

GERALD R. PETERSEN
Defendant.

DECISION

Jolliffe & Co. asks that its claim against Gerald R. Petersen be excepted from Petersen's discharge as a debt for willful and malicious injury. Trial was held May 11, 1994, in Sioux City. The court now issues its decision including findings and conclusions as required by Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

Debtor Gerald R. Petersen graduated from high school in Clinton, Iowa. He took correspondence courses in accounting. He began work for an accounting firm in 1958. He became a certified public accountant in 1967. In 1968, he was hired as comptroller for a hospital in Rock Island, Illinois. Ten years later, he joined the accounting firm of Dee, Gosling & Co. as a tax partner. In 1986, Dee, Gosling merged with Clifton Gunderson Co. Because he believed the firm had become too large, Petersen began looking for other employment. In the summer of 1989, he became aware of an opening with Jolliffe & Company in Cherokee, Iowa. He was interviewed for the position by the company's vice president, Tjeran Jolliffe. When they met in October, 1989, Petersen learned that the execution of an employment agreement would be a condition of employment. He reviewed the terms and objected to two--the five-year length of the non-compete period and a provision in the indemnity portion of the contract which permitted the employer to offset from the employee's pay the cost of the employee's "mistakes." Jolliffe agreed to remove the latter provision and to reduce the non-competition period to three years.

Petersen was hired as a staff accountant. He began work in November, 1989. When he left Clifton Gunderson, he had been earning $60,000.00 per year. At Jolliffe, he earned either $46,800.00 or $48,600.00. Petersen read, signed and believed he understood his employment contract. He was somewhat familiar with agreements not to compete with the employer. He had seen attempts to enforce them when employees voluntarily left firms and tried to take clients with them. To his knowledge, most efforts to enforce were settled out of court for damages.

At Jolliffe, Petersen supervised accountancy work done by other staff persons, and he engaged in tax accounting, income tax return preparation and tax planning. He also did some estate planning. When he joined Jolliffe, Petersen retained some clients from his former practice. He also did work for Jolliffe clients, and he obtained new clients while in Jolliffe's employ. The latter included clients who came to Jolliffe for accounting work because of Petersen. While at Jolliffe, Petersen did accounting work for several hundred clients.

In January, 1991, Jolliffe gave Petersen 90 days' notice of its intent to terminate him. Such notice was required by their contract. Petersen understood that he was being let go, but thought that a new employment contract could be negotiated. As it turned out, there was no discussion of Jolliffe's employing Petersen after the 90 days. Petersen stayed somewhat longer in an effort to finish some tax returns, but eventually, on May 2, 1991, he was given written notice to vacate the office. At the time he was terminated, he was almost 53 years old. He was married and had one child living at home. When he left, Petersen took files of clients who had come with him from the Clinton area.

Petersen took an insurance exam and became licensed to sell life, health and accident insurance. As part of an agency agreement with Massachusetts Mutual, Petersen had to send an insurance solicitation letter to 200 people. He included in the list his former accounting clients, Jolliffe clients, friends, and names randomly selected from the phone book.

After he left, Petersen was contacted by clients he had done work for at Jolliffe. They asked him to continue to do their accounting work. At first, he said he was not sure of his plans, but he later agreed to do accounting work. He agreed as early as June to do some work, and he began doing accounting work for some Jolliffe clients in July. Petersen did not solicit these clients; all contacted him.

Petersen did accounting work for clients he had brought with him to Jolliffe but also he had made arrangements to do work for approximately 28 Jolliffe clients. In January, 1992, Jolliffe was successful in obtaining a temporary injunction in its state court suit to enforce the non-compete clause of the contract. Petersen did no accounting work for former Jolliffe clients after the temporary injunction issued. He did do work for clients he had brought to Jolliffe from his previous practice. Petersen wrote to Jolliffe clients and informed them he could not work further for them because of the state court injunction. He indicated he could help them find a new accountant or that they could, if they wished, return to Jolliffe. Petersen recommended Dorothy Olson, also a former Jolliffe accountant, to finish up the work. He sent her the files of approximately 16 former Jolliffe clients who had agreed to her retention. Olson charged for her work, and Petersen got no part of her fees. After the completion of her work, Olson returned the files to Petersen. He explains the return by indicating that at the time, he still felt he would win the state court suit and be able to represent these clients. He admits that his retention of the files was "in contravention of the [employment] agreement" with Jolliffe.

Petersen had been advised by the attorney representing him in the injunction suit that there was a "strong possibility" that the non-compete clause could be avoided. One justification given for this opinion was the fact that Petersen had not quit his job, but had been fired. A second was that he was 52 years old and needed to earn a living. Petersen made an unsuccessful effort to settle the case. The Iowa District Court for Cherokee County issued a final judgment and decree in January, 1993, which gave Jolliffe judgment against Petersen in the amount of $21,265.41. Of this amount, $12,785.41 was for damages as a result of Petersen's competition and $8,480.00 was for attorney's fees and expenses. The court enjoined Petersen "from providing accounting, bookkeeping and tax services or any tax or estate planning within a radius of 20 miles of [Jolliffe's] office in Cherokee, Iowa for a period of three years commencing on May 2, 1991." (Exhibit 3, pp. 10-11). Petersen was also enjoined "from

providing any services in competition with [Jolliffe] for any former client of [Jolliffe] regardless of their place of residence or business for a period of three years commencing May 2, 1991. . . ." (Exhibit 3, p. 11). The state court made no finding of malice on Petersen's part.

Petersen did no further accounting work for former Jolliffe clients. Because the state court had reduced the mileage limitation of the non-compete agreement, Petersen opened an office in Storm Lake and again began practicing. Because of financial difficulties, he lost his home in Cherokee.

Petersen understood that, in doing work for Jolliffe clients, he was violating the non-competition portion of his contract. He understood too that, by doing work for these clients or by recommending the clients to Dorothy Olson, Jolliffe would be losing income from these clients. After he left Jolliffe, Petersen collected $5,099.00 from former Jolliffe clients.

Discussion

Jolliffe asks for a determination that its claim against Petersen is nondischargeable as a willful and malicious injury within the meaning of 11 U.S.C. § 523(a)(6). Jolliffe points out that Petersen admits that he knowingly breached the competitive restrictions of the employment contract and that, therefore, the breach was willful or deliberate. Jolliffe contends that because Petersen realized that his accounting work for Jolliffe clients would deprive his former employer of income, Petersen's actions were also malicious.

Jolliffe has failed to show it is entitled to judgment in its favor. The evidence does not prove that Petersen, in violating the restrictive covenant, intended to harm Jolliffe.[(1)]

Section 523(a)(6) excludes from a chapter 7 discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." "Willful" means "intentional or deliberate." Barclays American/Business Credit, Inc. v. Long (In re Long), 774 F.2d 875, 880 (8th Cir. 1985). Maliciousness, a separate concept from willfulness, applies to conduct "more culpable than that which is in reckless disregard of creditors' economic interests and expectancies...." Id. at 881. In analyzing maliciousness, the Circuit Court has focused on the debtor's intent to cause harm, not merely the intent to do an act which causes harm. Cassidy v. Minihan, 794 F.2d 340, 343-44 (8th Cir. 1986).

The Long case involved the breach of a security agreement by conversion of collateral. The Circuit Court stated:

> When transfers in breach of security agreements are in issue, we believe nondischargeability turns on whether the conduct is (1) headstrong and knowing ("willful") and, (2) targeted at the creditor ("malicious"), at least in the sense that the conduct is certain or almost certain to cause financial harm.

Long, 774 F.2d at 881. Recognizing that intentional harm may often be difficult to establish, the Court's test for maliciousness permits the intent to do harm to be inferred from the likelihood that the debtor's act will cause the injury in question. For the latter proposition, the Circuit Court cites the Restatement (Second) of Torts § 8A, Comment b. Id.

Section 8A itself states that "[t]he word 'intent' is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Comment B states:

> All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness. . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence....

Therefore, when a debtor's conduct is almost certain to cause harm, it may be inferred that he intended the harm, insofar as § 523(a)(6) of the Code is concerned. While this inference may be helpful to the court in determining a debtor's intent to cause harm, nowhere in the Long opinion does the Court indicate that the inference is mandatory. The likelihood of harm, as it permits an inference of intent, is but one consideration. But such likelihood is not the sole consideration. For conduct to be malicious, the conduct must not only be "certain or almost certain to cause . . . harm," it must also be "targeted at the creditor." Johnson v. Miera (In re Miera), 926 F.2d 741, 744 (8th Cir. 1991). The court should consider all evidence of the debtor's intent in determining whether the debtor intended to cause harm to the injured party.

There is substantial evidence in this case to show that Petersen did not intend to harm Jolliffe. Petersen was fired by Jolliffe. He did not quit in order to set up a competing practice. His first attempt at employment after his firing was as an insurance salesman. His contacting of Jolliffe clients at that point was to sell them insurance, not to provide them with accounting services. The Jolliffe clients, whom he later did work for, contacted him to do the work, not he them. Petersen was trained as an accountant and had a family to support. At least one client, Darlene M. Roepke, went to Petersen because of her independent desire to change accountants; she was exasperated with the time and expense resulting from regularly changing accountants at Jolliffe.

Petersen contacted a lawyer about the enforceability of the covenant, and he relied on the attorney's advice that there was a strong possibility that the covenant would not be enforceable because Petersen had been fired and needed to make a living. Both factual assumptions were true. Based on Iowa law, the attorney's advice to Petersen was reasonable. See Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500, 502 (Iowa 1984) (holding that discharge by the employer is a factor which weighs against the grant of an injunction to enforce a non-compete agreement and should be considered in the court's decision).

Consideration of all these factors leads the court to the conclusion that although Petersen knowingly breached the noncompete covenant, he did not do so with any intent to harm Jolliffe. This is so despite the fact that he testified he knew that his doing work for Jolliffe clients would deprive Jolliffe of fees from the clients. Because Petersen did not intend to injure Jolliffe, the debt is not excepted from discharge under 11 U.S.C. § 523(a)(6).

CONCLUSION

Gerald R. Petersen's debt to Jolliffe & Co. is not excepted from Petersen's discharge under 11 U.S.C. § 523(a)(6).

ORDER

IT IS ORDERED that the complaint of Jolliffe & Co. against Gerald R. Petersen is dismissed. Judgment shall enter accordingly.

SO ORDERED ON THIS 18th DAY OF JULY, 1994.

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:

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1. [1] The court need not determine whether § 523(a)(6) applies only to actions sounding in tort, and if so, whether in the present action plaintiff proved the elements of a tort.