

In the United States Bankruptcy Court

for the Northern District of Iowa

DAVID R. GOOD
Debtor.

Bankruptcy No. L89-01577W
Chapter 11

LARRY S. EIDE, Chapter 11 Trustee
Plaintiff

Adversary No. L90-0187W

vs.

TOM TROLARD
d/b/a COMMEMORATIVE GUNS
Defendants.

RULING ON MOTION FOR PARTIAL SUMMARY JUDGMENT

On August 26, 1994, the above-captioned matter came on for hearing on Plaintiff's Motion for Partial Summary Judgment. Hearing was held by telephone conference call. Plaintiff Larry S. Eide appeared with Attorney Randy Nielsen. Defendant Tom Trolard appeared pro se. Oral arguments were presented after which the Court took the matter under advisement.

This is an adversary proceeding arising out of the Bankruptcy case of Debtor David Roger Good. Debtor filed a Chapter 11 Petition on October 16, 1989. This was subsequently converted to a Chapter 7 on March 5, 1991. At the time of conversion, Plaintiff was appointed as Chapter 7 Trustee. Plaintiff, in his capacity as Trustee, filed the present adversary complaint on September 27, 1990.

The record reflects that Debtor David R. Good was involved in the purchase and sale of rifles, carbines, pistols and knives of a commemorative or collectible nature. While dealing in this particular market, Debtor conducted business on a regular basis with Defendant. Defendant does business under the name of "Commemorative Guns". Defendant was involved with Debtor in the buying and selling of these commemorative guns before the filing of the bankruptcy petition. The pending motion for partial summary judgment arises out of these transactions.

The first transaction in controversy involves what is known as Texas Sesquicentennial Sets of Winchester Commemoratives. A set of these commemoratives consists of one Texas Sesquicentennial Rifle, one Texas Sesquicentennial Carbine and a Texas Sesquicentennial Knife. These all had matching serial numbers and were placed in a wooden case for showing. One hundred fifty sets of these commemoratives were manufactured by the Winchester Company. It is the allegation of Plaintiff that in May of 1988 Defendant purchased 40 of the 150 original sets of these Winchester Commemoratives for Debtor. The purchase price for the 40 sets was approximately \$80,000. Allegedly, the commemorative sets were delivered to Debtor but were eventually returned to Defendant for sale. Plaintiff alleges that records indicate that Defendant sold at least 17 of these commemorative sets to various individuals around the world for approximately \$4,500 per set. As

these commemorative sets were assets of the bankruptcy estate at the time of filing, Plaintiff seeks a return from Defendant of \$76,500.

The second transaction relates to 11 Winchester Model 70 rifles with serial numbers 923 through 933. Plaintiff asserts that on the date of commencement of the bankruptcy case, these 11 rifles were property of Debtor in the possession of Defendant. The rifles were subsequently sold for a total sale price of \$10,000. Plaintiff seeks a return of the \$10,000 as the proceeds of the sale of this property of the estate.

Defendant, in his response to the Motion for Summary Judgment, admits that he purchased 40 sets of commemorative rifles for \$2,000 per set. He says that he purchased all 40 sets for himself and in his own name. He alleges that he subsequently sold 32 of these commemorative sets to Debtor for \$2,500 per set. He says that he kept the remaining eight sets for himself.

Defendant states that subsequent to these initial transactions, he traded with Debtor for two of the 32 commemorative sets with other guns. Additionally, he seems to assert that of the remaining 30 sets, subsequent trading occurred between himself and Debtor in which Defendant reacquired some of these 30 sets. Defendant does not necessarily dispute the sales transactions alleged by Plaintiff nor does he necessarily contest the serial numbers of the sets involved in those transactions. What Defendant seems to be stating is that through a series of trade transactions between himself and Debtor, Defendant reacquired or never sold the serial numbers which were involved in the sales transactions. In other words, the short response of Defendant is that the 17 commemorative sets which were sold were the property of Defendant at the time of their sale and were not the property of Debtor or the estate.

Defendant admits that the 11 Winchester Model 70 rifles belonged to Debtor while they were in Defendant's possession. He also admits that he sold the rifles about March of 1994, assuming that he had the right to do so, for \$10,000. Defendant states that if the Court determines that he inappropriately sold these rifles, he should be entitled nevertheless to his regular commission of 20% or \$2,000.

Fed.R.Civ.Proc. 56(c), which is made applicable to adversary proceedings pursuant to Fed.R.Bankr.Proc. 7056 provides that:

Summary judgment shall be rendered forthwith 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 judgment as a matter of law.

Hesitancy in granting summary judgment is no longer appropriate in light of the Supreme Court's recent decisions. Midwest Radio Co. v. Forum Pub. Co., 942 F.2d 1294, 1296 (8th Cir. 1991). Although the Eighth Circuit views summary judgment as a drastic remedy which must be exercised with extreme care, the Court has also recognized the principle that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole which are designed to secure the just, speedy and inexpensive determination of every action." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2554-55 (1986)). The moving party must show an absence of any genuine issue of material fact in order to succeed in its motion for summary judgment. In re Earhart, 68 B.R. 14, 15 (Bankr. N.D. Iowa 1986).

On the issue of the commemorative sets, the Court has considered the pleadings and the depositions attached to the motion, as well as the other matters contained in the file and the arguments of the respective parties. It is clear from the record that Debtor and Defendant had a long-term and ongoing business relationship involving the buying, selling and trading of various firearms. Plaintiff concludes that Debtor purchased 40 commemorative sets of Texas Sesquicentennial Winchester rifles prior to the commencement of the bankruptcy proceeding. Plaintiff asserts that Defendant had at least some of these sets in his possession post-petition and sold 17 sets for \$4,500 each for a total of \$76,500. Defendant admits that there were sales involving certain serial numbers of these sesquicentennial sets. However, he says they were his sets through trading with Debtor after the initial purchase of the 40 sets by Defendant. He concludes that none of the rifle sets which he sold on the world market were property of Debtor.

The Court has considered the entire record. Summary judgment can only be granted when no material facts exist which are in dispute. Ownership of these variously serial numbered sets is the critical issue. If the sets, identified by certain serial numbers, were the property of Defendant at the time of their sale, Plaintiff's motion must fail. If, however, the sets were the property of Debtor being sold by Defendant, they would constitute property of the estate which is recoverable by the Trustee. This issue is in substantial dispute and is completely factual in nature. This Court cannot conclude, as a matter of law, that these 17 sets, with specific serial numbers, were the property of Debtor at the times in question. As this factual dispute must be resolved before resolution of the controversy can be achieved, summary judgment, as to this series of transactions, must be and is hereby denied.

The second series of transactions relates to the 11 Winchester Model 70 rifles. It is undisputed that these 11 rifles were the property of Debtor at the commencement of this bankruptcy case. They are all Winchester Model 70 rifles and are described as follows:

Caliber	Serial Number
.222	923
.223	924
.22-250	925
.243	926
.257 Roberts	927
.25-06	928
7mm	929
.30-06	930
.308	931
.300 mag.	932
.270	933

Defendant admits that subsequent to March of 1994, he sold them for a total sale price of \$10,000. Though Defendant denies any malicious intent, intent is not a required element in the Court's analysis. Under § 542(a), a person who possesses property of the estate during the case must deliver to the trustee the property or the value of the property. The trustee is entitled to recover the value of estate property from any person who has wrongfully transferred such property after the filing of a bankruptcy petition, absent a showing by the transferor that the transfer was made in good faith and without notice or actual knowledge of the bankruptcy case. In re Gailey, Inc., 119 B.R. 504, 514

(Bankr. W.D. Pa. 1990). Admittedly, Defendant had actual knowledge of Debtor's bankruptcy case when he sold the guns.

If property in the possession of another is property of the estate, it is subject to turnover under § 542. In re Dunne Trucking Co., 32 B.R. 182, 188 (Bankr. N.D. Iowa 1983). The burden is on the trustee to show that the item is property of the estate. In re Washington, 137 B.R. 748, 750 (Bankr. E.D. Ark. 1992). Plaintiff has met this burden. The critical point, which is admitted and undisputed, is that these 11 rifles were property of the estate at the time of the commencement of these proceedings and were in the physical possession of Defendant. He disposed of this property and turned it into cash. This \$10,000 now becomes property of the estate and is recoverable by the Trustee.

Defendant requests that if it is determined that he inappropriately sold these rifles, he should, nevertheless, be entitled to a sales fee of 20% or \$2,000. It must be noted that, at the time of the sale, Defendant had not been appointed by the Court to dispose of these rifles. There had been no prior approval to dispose of these rifles at any price.

Defendant does not come within the definition of custodian under § 101(11) to be entitled to compensation for expenses incurred under § 543. In re Dencklau, 158 B.R. 796, 800 (Bankr. N.D. Iowa 1993). A creditor may refuse to turn over property if he possesses a valid right of setoff under § 553. In re Pester Ref. Co., 845 F.2d 1476, 1486 (8th Cir. 1987). However, in order to defeat a debtor's cause of action, the burden is on the creditor to establish a valid right of setoff. Id. Defendant has not met this burden. As this Court has already indicated, Defendant disposed of property of the estate in derogation of the rights of the Trustee. It is the conclusion of this Court that Defendant is not entitled to a sales fee associated with the sale of these rifles and the entire \$10,000 amount is recoverable by the Trustee.

In conclusion, it is the finding of this Court that there are no material facts in controversy. The 11 rifles were property of Debtor and are therefore property of the estate. These rifles were in the physical possession of Defendant who subsequently sold them to third parties without the knowledge or consent of the Trustee or prior approval of the Bankruptcy Court. It is the ultimate conclusion of this Court that summary judgment is appropriate and judgment will be entered in favor of the Plaintiff-Trustee and against Defendant in the amount of \$10,000.

WHEREFORE, as to the 40 sets of commemorative rifles, Plaintiff's Motion for Partial Summary Judgment is DENIED.

FURTHER, for all of the reasons set forth herein, Plaintiff's Motion for Partial Summary Judgment, as it relates to 11 Winchester Model 70 rifles, is GRANTED.

FURTHER, judgment is entered in favor of Plaintiff and against Defendant Tom Trolard, d/b/a Commemorative Guns, in the amount of \$10,000.

SO ORDERED this 21st day of September, 1994.

Paul J. Kilburg
U.S. Bankruptcy Judge