

In the United States Bankruptcy Court

for the Northern District of Iowa

WESLEY E. WOOD
Debtor

Bankruptcy No. 93-60230LW
Chapter 7

WAVERLY SALES CO.
Plaintiff

Adversary No. 93-6080KW

vs.

WESLEY E. WOOD
Defendant.

GLENN W. WOOD, JR.
Debtor

Bankruptcy No. 93-60364LW
Chapter 7

WAVERLY SALES CO.
Plaintiff

Adversary No. 93-6081KW

vs.

GLENN W. WOOD, JR.
Defendant.

ORDER RE MOTION TO ALTER OR AMEND JUDGMENT

On December 16, 1994, the above-captioned cases came on for hearing pursuant to assignment. Attorney David Engelbrecht appeared for Plaintiff Waverly Sales Co. Attorney John Tremaine represented Debtors/Defendants Wesley E. Wood and Glenn W. Wood, Jr. The matter before the Court is Plaintiff's Motion to Alter or Amend the Judgment. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I, O).

STATEMENT OF THE CASE

In these adversary proceedings, Plaintiff asserts that both Debtors are liable for damages arising from Debtors' sale of cattle which belonged to third parties. Debtors sold cattle, which were placed at a feedlot where they were employed, to Plaintiff by representing that they were the owners of the cattle. As noted in the Court's Ruling filed October 5, 1994 and pursuant to the Joint Stipulation of the parties, the evidence indicates that Wesley Wood made fraudulent sales to Plaintiff totalling \$46,452.24 and Glenn Wood made sales totalling \$45,653.63. The third party owners of the cattle filed a state court action against Debtors, Debtors' employer and Plaintiff to recover for the conversions. Plaintiff settled its liability in that lawsuit by paying \$52,000. It also incurred \$52,695.25 in attorney fees defending the suit. Consequently, Plaintiff asserts that it incurred total damages of \$104,695.25 for which it is entitled to indemnification from Debtors.

Plaintiff sought a ruling that such liability constitutes a nondischargeable debt under § 523(a)(2)(A) and § 523(a)(6). The Court's Ruling filed October 5, 1994 held that "the debts on which Plaintiff's claims are based are excepted from discharge" under both of those sections. Plaintiff now requests that the Court amend the judgment to determine the total

amount of the debt and to determine that Debtors are jointly and severally liable. The parties' Joint Stipulation states that an auctioneer, such as Plaintiff, may look to the sellers who have no title, such as Debtors, for contribution and indemnity for the auctioneer's liability to the true owners for conversion.

Pursuant to the evidence at trial and the parties' Joint Stipulation, both Debtors admit that they sold Plaintiff cattle which belonged to third parties. Both Debtors assert that they made the fraudulent sales at the direction of Roger Bark, the feedlot owner and Debtors' employer. Wesley Wood as supervisor essentially oversaw the care and feeding of cattle at the feedlot; Glenn Wood was a worker who provided the care and feeding. Wesley Wood's sales to Plaintiff occurred between November 1990 and November 1991. Glenn Wood's sales occurred in August and September 1991. Both Debtors deposited proceeds from the sales to Plaintiff into their personal bank accounts and then remitted the proceeds to Roger Bark.

CONCLUSIONS OF LAW

Plaintiff asserts that Debtors are liable for attorney fees expended in connection with the litigation arising from Debtors' fraudulent sales. It also asserts that Debtors have joint and several liability for the entire amount of damages because they were acting in concert. Debtors argue that neither of them should be held liable for more than the amounts of the sales which they individually transacted, i.e. \$46,452.24 for Wesley Wood and \$45,653.63 for Glenn Wood.

1. Amount of Damages

A right to indemnity exists where one party is exposed to liability by the wrongful act of another in which the first party does not join. Howell v. River Prods. Co., 379 N.W.2d 919, 921 (Iowa 1986). The measure of damages is the amount the party secondarily liable is compelled to pay as a consequence of the other's negligence or other wrong. Id. If a settlement is reached between the indemnitee and the injured party, the indemnitee may only recover what was actually paid. Id.

Iowa common law recognizes the right of an indemnitee to recover the costs of defense. Bunce v. Skyline Harvestore Sys., Inc., 348 N.W.2d 248, 250 (Iowa 1984). It is a longstanding rule in Iowa that

a person who, through the tort of another, has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation from the tortfeasor for expenditures thereby incurred.

Kimmel v. Iowa Realty Co., 339 N.W.2d 374, 380 (Iowa 1983), citing Turner v. Zip Motors, Inc., 65 N.W.2d 427, 432 (Iowa 1954). In such a situation, attorney fees arising out of the third-party litigation are a natural consequence of the tort. Kimmel, 339 N.W.2d at 380 (approving grant of attorney fees from defending action for fraud and breach of fiduciary duty as damages arising from tort of another); see also Clark-Peterson Co. v. Independent Ins. Assocs., Ltd., 514 N.W.2d 912, 917 (Iowa 1994) (following Kimmel). In other words, if A is involved in litigation with B because of the tort of C, A may recover expenses so incurred from C. Rauch v. Senecal, 112 N.W.2d 886, 888 (Iowa 1962).

Plaintiff was involved in litigation with the cattle owners because of Debtors' fraudulent sales. It is entitled to indemnity because it was exposed to liability by Debtors' wrongful conduct. Plaintiff paid \$52,000 to settle its liability to the cattle owners. It further incurred attorney fees of \$52,695.25 in defending itself against the cattle owners' claims. The total amount of damages for which Debtors are liable to Plaintiff is \$104,695.25.

2. Joint and Several Liability

Defendants who act in concert may be joint tortfeasors. Rozevink v. Faris, 342 N.W.2d 845, 846 (Iowa 1983). Joint liability exists where a wrong is done by concerted action and common intent and purpose even in the absence of proof of conspiracy. Faust v. Parker, 213 N.W. 794, 795 (Iowa 1927). "There must be concurrent action, a cooperation or concert in the accomplishment by the wrongdoers of the particular wrong in order to make them jointly liable." Dickson v. Yates, 188 N.W. 948, 951 (Iowa 1922). Coincidence in time, similarity of conduct, or results accomplished are not substitutes for proof of common purpose, concert of action, or joint liability. Id. at 952.

This ancient principle of vicarious liability for concerted action continues to be viable. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 46, at 323 (5th ed. 1984).

All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable.

Id. This principle is recognized in the Restatement of Torts for persons who act in concert or give substantial assistance to another in accomplishing a tortious result. Restatement (Second) of Torts § 876 (1979).

Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself.

Id. cmt. a.

In addition to a parallel course of conduct among defendants, there must be evidence of an agreement -- express or tacit -- a common plan. In re Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 840 (2d Cir. 1992). Where defendants are acting in concert, each is severally liable for the full amount of the damages. In re Shinew, 33 B.R. 588, 593 (Bankr. N.D. Ohio 1983). Where a debtor, one of several joint tortfeasors, is the only one before the court, the debtor must bear the entire burden and is liable for the whole loss. Id.

The Court concludes that there is sufficient evidence in the record of a common plan or purpose between Debtors Wesley Wood and Glenn Wood as well as their employer, Roger Bark. Both Debtors wrongfully sold cattle from the feedlot where they were employed. The sales were conducted during the same period of time. Both Debtors state that they eventually turned the proceeds from the sales over to Roger Bark and were acting under his direction. Under these circumstances, the Debtors were acting in concert. Under the law, they are jointly and severally liable to Plaintiff.

WHEREFORE, Plaintiff's Motion to Alter or Amend the Judgment is GRANTED.

FURTHER, judgment shall enter for Plaintiff Waverly Sales Co. and against Debtors/Defendants Wesley E. Wood and Glenn W. Wood, Jr. in the amount of \$104,695.25.

FURTHER, Debtors/Defendants Wesley E. Wood and Glenn W. Wood, Jr. are jointly and severally liable for the amount of this judgment.

SO ORDERED this 13th day of January, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge