In the United States Bankruptcy Court

for the Northern District of Iowa

ROBERT M RAUSCH MARY A. RAUSCH *Debtors.*	Bankruptcy No. 94-60633KW Chapter 7
UNITED STATES OF AMERICA *Plaintiff* vs. ROBERT M. RAUSCH MARY RAUSCH *Defendants*	Adversary No. 94-6098KW

ORDER

On April 10, 1995, the above-captioned matter came on for trial pursuant to assignment. Defendants Robert and Mary Rausch appeared pro se. Ana Maria Martel represented the United States on behalf of the Farmers Home Administration ("FmHA"). Evidence was presented and the Court took the matter under advisement. The time for filing briefs has passed and the matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

STATEMENT OF THE CASE

FmHA filed this action to determine dischargeability of debt. Pursuant to the confirmed plan in the Rausch Brothers Partnership Chapter 11 proceeding, Debtors assumed a partnership debt to FmHA of approximately $65,000 in March 1992. The debt was secured by Debtors' interest in property they were purchasing on contract from Robert Wahl, the "Wahl property." FmHA claims that this debt is nondischargeable under § 523(a)(6).

The Court has previously considered the underlying facts of this case in a related proceeding, United States v. Rausch Brothers Partnership, et al, Adv. No. 93-6031LW. Pursuant to agreement, the record in that proceeding is considered part of this record. The following facts were stated in the Court's June 17, 1994 ruling in that case which are germane to these proceedings:

> [T]here were two occurrences which culminated in the present litigation. First, Robert and Mary Rausch began having problems with their contract seller, Mr. Wahl. Though apparently authorized in the original contract, Robert and Mary Rausch claim they did not know that Mr. Wahl had preserved the authority to borrow against the contract. Controversy arose because this land was now encumbered by the additional $65,000 obligation to FmHA. FmHA was concerned that Mr. Wahl could possibly borrow excessively against the value of this property and theoretically undermine FmHA's

security. It is unclear why this created as many problems as it did. However, it created animosity between the Rausch's and Wahl which did not improve over time. Robert and Mary Rausch refused to make a payment which was due to Wahl in January of 1992 in the amount of $25,800. This resulted in a forfeiture proceeding by Wahl which was not successful only because he failed to get a mediation release before filing. The payment was then made before Wahl was able to begin another forfeiture proceeding.

The second incident began when Robert Rausch entered into a business transaction with Holis Devoe. Their agreement involved storing used tires on the Wahl property. According to Robert Rausch, he understood that the tires would be stored on his property for a period of 60 days. He would receive a storage fee. The tires would then be removed. However, if they were not removed, Devoe would pay an additional penalty. Tires began to be delivered to the Wahl property in September of 1991.

Joseph Sanfilippo works for the Iowa Department of Natural Resources in the Chickasaw County area and became aware of these tires. He inspected the property in January of 1992 and observed approximately 50,000 waste tires on the site. As many as 16,000 were not in buildings which is in violation of the solid waste regulations of the State of Iowa. Tires continued to be placed on the property and Sanfilippo issued a second notice of violation in April of 1992. When he visited the property in June, 1992, tires were actually being unloaded. He referred the matter to the Attorney General's Office and a lawsuit was filed. Tires continued to be delivered until there were more than 150,000 salvage tires on the property by Rausch's estimate. The Department of Natural Resources estimates in excess of 209,000 tires were brought to the property. Mr. Wahl also became involved and initially was granted a temporary and ultimately a permanent injunction against the Rausch's bringing tires onto the property.

Based on the failure to make a payment and placement of salvage tires on the property, Wahl again filed a forfeiture proceeding and this time it was completed. The Rausch's were ultimately evicted from this property in January of 1994 after much contentious litigation.

The property has reverted to Mr. Wahl. However, FmHA had a $60,000 interest in the property at the time of forfeiture. It had notice of the forfeiture and did not redeem the property. Therefore, its interest in the property was also forfeited. The DNR estimates that the cost of removal of the tires is between $1 and $2 per tire. Total cost of removal is between $200,000 and $400,000. The value of the property is approximately $250,000. The outstanding contract balance plus the cost of removal of the tires establish that the property has no value. FmHA decided against redeeming the property because of the impaired value of the property and because of potential liability arising from environmental danger posed by the tires and attendant cleanup costs.

The evidence presented herein reiterates the foregoing conclusions. In January 1992, Debtors were first notified by the DNR that storing tires on their property violated Iowa laws and regulations. The DNR gave Debtors two additional notices of violations in April and June 1992. As noted above, also in January 1992, Debtors refused to make their contract payment to Wahl. Debtors testified that at that time, the property was worth approximately $260,000, the contract balance was approximately $180,000, and the balance due to FmHA was approximately $65,000. Thus, Debtors had some equity in the property and the debt to FmHA was fully secured.

Tires continued to be placed on Debtors' property after the DNR's first notice of violation in January 1992. From January through June, 1992, at least 110,000 additional tires were allowed on the property. After June 30, 1992, Debtors stopped allowing tires to be dumped on their property, primarily because of Wahl's temporary injunction. Subsequently, Debtors continued to attempt to set aside the injunction in order to continue receiving the tires.

During the same time period, one of Debtors' neighbors, Michael Murray, also had an agreement with Hollis DeVoe to store tires. When the DNR informed him that tire storage was illegal and DeVoe refused to remove the tires as agreed, Murray filed an injunction against DeVoe and received a judgment in state court. According to the Murray/DeVoe agreement, Debtor Mary Rausch was to keep the accounting records of tire delivery to Murray's property and related payments.

Debtors assert that they wished to start a business to recycle the tires and considered the tires "inventory." They were looking for financing in the Fall of 1992 but were unsuccessful. They assert that their failure to find financing was caused by the litigation by Wahl and by FmHA. Debtors testified that they made no effort to determine whether tire storage was legal after receiving warnings from the DNR. They stated that they never made a demand on DeVoe to remove the tires because they could not afford a lawyer.

The record includes evidence that Debtors filed UCC Liens and/or "common law liens" against Roger Wahl, FmHA, and Ana Maria Martel, attorney for FmHA,. They made other attempts to avoid the effect of FmHA's and Wahl's proceedings against the property by refusing service, resisting efforts to schedule depositions, requesting a charge of contempt, and filing a "Complaint of Writ of Mandamus" against FmHA, Ms. Martel, the Iowa Attorney General and other individuals.

FmHA asserts that Debtors committed willful and malicious injury by allowing their farm property, which was pledged as collateral to FmHA, to diminish in value through the storage of thousands of waste tires. It also asserts that Debtors injured the collateral by failing to make contract payments to Wahl which lead to forfeiture of the contract. FmHA argues that this renders the debt nondischargeable under § 523(a)(6).

According to FmHA, Debtors were obligated to maintain the property in good condition. Debtors violated this obligation by failing to make contract payments when due and by allowing tires to accumulate on the property. FmHA argues that this constitutes willfulness under § 523(a)(6). Furthermore, it argues that Debtors harassed FmHA, its employees and counsel with meritless liens and lawsuits, pursuing a "vendetta" against them which is evidence of Debtors' actual malice.

Debtors state that FmHA lost its interest in the real estate when it failed to redeem it from forfeiture by Robert Wahl, the contract seller. They also dispute the validity of the forfeiture. Debtors assert that they clearly have showed an interest in the farm and a desire to pass the farm on to their children. This, they argue, proves that they did not intend to cause damage to the farm. Debtors maintain that they were victims of Hollis DeVoe who tricked them into storing the tires on the property with promises that it was legal and that the storage would be temporary. They state that extensive litigation involving FmHA and Wahl prevented them from pursuing a legitimate tire disposal business.

CONCLUSIONS OF LAW

Debts for willful and malicious injury by a debtor to another entity or to the property of another entity are excepted from discharge under § 523(a)(6). FmHA filed this adversary proceeding seeking a determination that its claim is nondischargeable under § 523(a)(6). The burden of proving the

elements of that section is on FmHA. In re Decker, 153 B.R. 997, 1000 (Bankr. D.N.D. 1993). It must meet this burden by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 285 (1991).

The Eighth Circuit defined the terms "willful and malicious" in In re Long, 774 F.2d 875 (8th Cir. 1985), where the debtor had transferred property in breach of a security agreement. The court found that § 523(a)(6) applies only to conduct more culpable than that which is in reckless disregard of creditors' interests. Id. at 881; In re Miera, 926 F.2d 741, 744 (8th Cir. 1991). It observed that malice and willfulness are "two different characteristics." Long, 744 F.2d at 880-81. The court held that under § 523(a)(6),

> 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. . . . While intentional harm may be very difficult to establish, the likelihood of harm in an objective sense may be considered in evaluating intent.

Id. at 881.

The Eighth Circuit in Long accepted the Restatement (Second) of Torts definition of "intent" to aid in determining whether a debt is nondischargeable under § 523(a)(6). Miera, 926 F.2d at 744. That definition states that a person acts intentionally if "he knows that the consequences are certain, or substantially certain, to result from his act." Id., quoting Restatement (Second) of Torts § 8A cmt. b (1965).

The record presented establishes that Debtors' conduct in storing tires on their property and refusing to pay the Wahl contract payment was "willful". It was intentional and deliberate, as well as headstrong and knowing under the Long standard. As in most cases, the requirement that Debtors' conduct be "malicious" is primarily in issue in this case.

The "malicious" element of § 523(a)(6), enunciated in Long has been described as a stringent standard compared to conclusions reached in other Circuits. See In re Berry, 84 B.R. 717, 720 (Bankr. W.D. Wash. 1987). Under the more relaxed standard adopted by the Sixth Circuit, for example, § 523(a)(6) is interpreted to require an intentional act that results in injury rather than, as under the Eighth Circuit standard, an act with intent to injure. Perkins v. Scharffe, 817 F.2d 392, 393 (6th Cir.), cert. denied, 484 U.S. 853 (1987).

Two cases decided under the lesser standard consider whether conduct violating environmental regulations gives rise to a nondischargeable debt. The court in In re Daniels, 130 B.R. 239, 242 (E.D. Ky. 1991), followed Perkins which stated that "a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury". In Daniels, the debtor had engaged in surface mining in knowing violation of statutes requiring a permit. Id. at 240. The court held that this gave rise to a nondischargeable debt under § 523(a)(6). Id. at 242. It further noted that any act which violates the provisions of a statute has been found to be malicious for dischargeability purposes. Id.

The court in Berry followed a similar standard to find that a debtor committed willful and malicious injury by abandonment and inadequate storage of hazardous chemical waste. 84 B.R. at 720. The court held that the debtor knew the chemicals presented environmental and personal safety risks if stored inadequately. Id. It further found that the debtor knew the creditor landlord would be liable for the cleanup of the hazardous waste and took no steps to clean up or secure the chemicals. Id. at 721.

The Long approach was adopted by the court in In re Tinkham, 59 B.R. 209, 215 (Bankr. D.N.H. 1986), considering whether dumping chemical waste constituted willful and malicious injury. The court stated that the ultimate issue was whether the debtor was aware that the dumping would result in injury to property. Id. at 217. In that case, the debtor was aware that something about the dumping was not quite right. However, the court found it believable that the debtor would not know it would cause the magnitude of damage it did, in light of the state of common knowledge in 1979 regarding the toxic effect of industrial wastes. Id. The court held that the evidence did not support a finding that the debtor knew damage of $11 million was certain or substantially certain to occur. Id.

Other courts have also focused on the amount of knowledge a debtor possesses regarding the likelihood of harm arising from certain conduct. In In re Lombre, 102 B.R. 182, 183 (Bankr. W.D. Mo. 1989), the court found that the malice requirement was not satisfied where the debtor's boyfriend had wrecked her car. It noted that it might have been satisfied if there was evidence that the debtor had told the boyfriend to wreck the car or agreed that he enter the car in a demolition derby. Id. Another court found that debtors who stripped fixtures from their residence on the eve of foreclosure acted maliciously. In re Noland, 100 B.R. 68, 70 (Bankr. D. Kan. 1989). It noted that the debtors knew the fixtures were covered by the mortgage, they were sophisticated business people and they attempted to conceal their actions. Id. at 71. In In re Chambers, 23 B.R. 206, 210 (Bankr. W.D. Wis. 1982), the court focused on the fact that the debtor was an experienced car dealer and knew cars would decline in value over time and with continued use. It held that the debtor, by delaying sale and making use of the car, reduced the car's value and the creditor's security interest which constitutes malicious injury to the property of another. Id.

FmHA cites In re Hartley, 100 B.R. 477, 480 (W.D. Mo. 1988), wherein the bankruptcy court and district court held that the debtor's conduct of throwing a lighted firecracker into an unventilated basement room with gasoline fumes present constituted willful and malicious injury. However, a panel of Eighth Circuit judges reversed that holding and the Eight Circuit en banc vacated the panel decision, affirming the district court by an equally divided court. In re Hartley, 874 F.2d 1254 (8th Cir.), vacating 869 F.2d 394 (8th Cir. 1989), rev'g 100 B.R. 477 (W.D. Mo.), aff'g 75 B.R. 165 (Bankr. W.D. Mo. 1987). Therefore, the Court feels the Hartley case is of little precedential value except for the fact that all the opinions in that case continue to rely on Long for the standard of determining dischargeability under § 523(a)(6).

Under the foregoing standard, the Court must evaluate whether Debtors were aware that allowing tires to be stored on their property would result in injury to the property. Their conduct was malicious if they knew such tire storage would be certain or almost certain to result in a reduction of the value of FmHA's collateral.

The DNR warned Debtors in January of 1992 that storing tires without a permit violated state regulations. From that time until June 30, 1992, Debtors allowed at least 110,000 additional tires to be stored on their property. They knew FmHA had a security interest in the property. They knew the high cost of removing the tires would exceed any equity they held in the property and thus reduce the extent of FmHA's security interest. They knew the tires presented environmental safety risks if stored inadequately, as evidenced by some efforts to create rows between the tires to reduce the risk of fires.

Debtors' assertions that they were merely victims of DeVoe who convinced them that the DNR warnings could be ignored are not credible. Debtors completely disregarded the mandates of state law and warnings of state officials without just cause. It was unreasonable for them to rely on DeVoe's assertions that their conduct was legal in light of the unequivocal and repeated warnings from state

officials that the tire storage was illegal. The Court concludes that they should not benefit from a discharge of the debt arising from an open disregard of the law.

Debtors assert, by way of affirmative defense, that they had a legitimate belief that they would establish a recycling business and that the tires would be used as inventory for that business. Utilization of the tires in the recycling business would avoid the cost of removal. These arguments are untenable for several reasons. First, even assuming the relevance of this argument, the nature and type of the business which Debtors were contemplating was largely still in the experimental stage at that time. At the time the tires were delivered, no such business existed in the State of Iowa and reports discussing this type of enterprise presented extremely high startup costs. The record amply establishes that Debtors had little hope of obtaining financing for such a speculative business.

Even assuming that Debtors were acting in good faith and had a legitimate belief that they could establish such a business, this argument nevertheless is not a defense to the claims made or to environmental violations. Debtors continually utilize the term "inventory" for the tires located on their premises. However, the word inventory is merely a semantical term. Any item located on property which creates an environmental hazard, whether it is salvage or inventory, retains its hazardous character despite the manner in which it is categorized. Nor does an item properly classified as inventory lose its environmentally dangerous character simply because it may ultimately turn a profit. It is fair to assume that most individuals or businesses who violate environmental laws do so in order to turn an increased profit.

It is the conclusion of this Court that during the period of time that Debtors were involved with the Department of Natural Resources, if not before, they became abundantly aware that the location of these tires on Debtors' property constituted an extremely dangerous condition which involved significant cleanup costs and reduced the value of the property. It is the conclusion of this Court that Debtors' violation of the Department of Natural Resources regulations, whether in anticipation of a legitimate business or not, remains maliciously injurious to FmHA's security interest.

Complaint is also made by FmHA that Debtors' conduct in failing to make a contract payment to Mr. Wahl, which ultimately lead to forfeiture of the underlying contract, constitutes malicious conduct by Debtors. The refusal to make such a contract payment when the same was admittedly within Debtors' power to do so, in and of itself, would not support a finding of maliciousness. However, when taken in conjunction with all of the other facts and circumstances involved in this case, this conduct reinforces the finding of maliciousness. Debtors are sufficiently experienced in real estate matters to realize that a default in payment would result in harm to junior security interests such as FmHA's. Although FmHA's interest in the property was extinguished by the contract forfeiture proceedings, the debt continues to exist and Debtors remain personally liable. Debtors' attempts to set aside the injunction preventing their receipt of additional tires after June 30, 1992 in the face of the DNR's repeated warnings also evidences malice.

The Court concludes that Debtors' conduct of accumulating waste tires on their property and failing to make their contract payment to Wahl constitutes willful and malicious injury under § 523(a)(6). In light of their knowledge of the certainty of injury arising from this conduct, the Court finds that Debtors' conduct is malicious. The debt to FmHA is nondischargeable.

WHEREFORE, the debt owed by Debtors Robert and Mary Rausch to FmHA is nondischargeable under § 523(a)(6).

FURTHER, judgment shall enter for United States on behalf of the Farmers Home Administration.

SO ORDERED this 31st day of May, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge