In the United States Bankruptcy Court

for the Northern District of Iowa

MICHAEL ELLIOT LIVELY
SHARON KAY LIVELY etc.
Debtor(s).

Bankruptcy No. 95-21907KD

Chapter 7

ALVIN P. KLOFT
Plaintiff(s)

vs.

MICHAEL ELLIOT LIVELY
Defendant(s)

Adversary No. 96-2009KD

ORDER

On May 29, 1996, the above-captioned matter came on for trial in Dubuque, Iowa pursuant to assignment. Plaintiff Alvin P. Kloft appeared with Attorney Todd Locher. Defendant Michael Elliot Lively appeared in person with Attorney David Baumgartner. Evidence was presented after which the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

STATEMENT OF THE CASE

Defendant/Debtor Michael Lively rented a farmhouse, belonging to Plaintiff Alvin Kloft located in Dubuque County, Iowa, as a residence. Debtor surrendered the premises back to Plaintiff around June 9, 1995.

Plaintiff filed this adversary complaint on January 17, 1996 and filed an amended complaint on January 25, 1996. The amended complaint is presented in two counts. Count I asserts that a debt owing to Plaintiff should be excepted from discharge under § 523(A)(2). Count II requests exception from discharge under § 523(A)(6).

In Count I, Plaintiff states that Debtor received money under false pretenses. In that regard, Plaintiff asserts that Debtor obtained $210 from Plaintiff by representing that he had paid that amount to Thermogas of Dubuque for L.P. gas and then telling Plaintiff that the gas was unused and remained in the L.P. tank when he surrendered possession of the premises.

The evidence reflects that Debtor apparently never orally told Plaintiff directly that there was gas in the tank. Plaintiff's Exhibit 2 is a written statement made by Debtor concerning property on the premises. This Exhibit offered into evidence contains the information that there was approximately 55% of a full tank left on the premises at $.79/gallon for 275 gallons, for a total of $210.

Plaintiff admits that he did not check the fuel tank on the day Debtor vacated the premises. It was not until approximately two months later when Plaintiff determined that the tank was empty. Debtor moved out on June 9 and it was not until August that Plaintiff first checked the L.P. tank. Plaintiff testified that only the two heaters in the house run on propane and that the water heater and stove are electric. He stated he had the tank previously checked and the tank had no leaks and no reason to be empty.

Debtor testified that he had filled the L.P. tank in March to a level of approximately 75-80% full. According to Debtor,

when he turned over possession of the premises on June 9, the tank gauge registered 55% full. Both parties testified there was no animosity between them and they had always had a good landlord/tenant relationship.

Count II asserts a violation of § 523(a)(6) in that Plaintiff states Debtor committed willful injury by leaving the septic system plugged up and installing a TV antenna without permission, damaging siding on the house. Plaintiff testified that the day after Debtor moved out of the house, the new tenants discovered the drains were plugged. Plaintiff's Exhibit 5 shows he was charged $210.00 to remedy the problem. According to Plaintiff, the repairperson did not say for sure what had plugged the septic system. Debtor testified that he did not intentionally harm the septic system.

Plaintiff's Exhibit 6 shows the cost to repair damage to siding from installation of the TV antenna was $128.00. Plaintiff testified he felt it was not a wise idea to install the antenna on the side of the house as Debtor wished because the wind could blow it down. Debtor testified he had installed the antenna on the side of the house after first installing it on the deck in back. He moved it because the TV reception was poor. He testified the wind did not blow the antenna down, but he removed it before he moved and took it with him. Debtor testified there was a little damage from screw holes where the bracket was attached to the siding.

Plaintiff asserts a total debt of $774.44 should be excepted from discharge. This includes $210.00 for repairing the septic system, $210.00 for L.P. gas not in the tank, and $128.00 for repair to siding from the TV antenna, plus associated travel expenses and cleanup time. Plaintiff also lists expenses from removal of water softener, making a key and postage. The Court will not consider the dischargeability of these expenses because Plaintiff failed to plead them with sufficient specificity in his Complaint.

CONCLUSIONS OF LAW

Plaintiff has the burden to prove the elements of its claims under 11 U.S.C. § 523 by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291, 111 S. Ct. 654, 661 (1991). Exceptions to discharge must be "narrowly construed against the creditor and liberally construed against the debtor. These considerations, however, 'are applicable only to honest debtors.'" In re Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987).

FALSE FINANCIAL STATEMENT

Section 523(a)(2)(A) excepts a debt from discharge if it is obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." A five part test 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 justifiably relied on the representations, Field v. Mans, 116 S. Ct. 437, 446 (1995); and (5) the creditor sustained the alleged injury as a proximate result of the representations having been made. In re Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987). An alleged misrepresentation of value may support a fraud claim if the valuation is completely without foundation and is more than mere puffing. In re Nemovitz, 142 B.R. 472, 476 (Bankr. M.D. Fla. 1992).

In resolving a complaint under § 523(a)(2)(A), the debtor's intent is the most critical element of the analysis. Because direct proof of intent is difficult to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred. Van Horne, 823 F.2d at 1287. The Court uses a totality of the circumstances approach in assessing intent. In re Davis, No. X91-01771F, slip op. at 7 (Bankr. N.D. Iowa Aug. 21, 1991); In re Stewart, 91 B.R. 489, 495 (Bankr. S.D. Iowa 1989).

The Court concludes that Plaintiff has failed to prove that Debtor intentionally misrepresented the amount of L.P. remaining in the tank on June 9, 1995. Plaintiff has not offered evidence that the tank was not 55% full on that date. His only evidence of the amount of gas in the tank arose in August, more than two months later. Even if the tank was not 55% full on the day Debtor surrendered possession, Plaintiff has failed to prove that Debtor had knowledge of that fact or intended to deceive Plaintiff by stating the tank gauge registered 55%. Considering an 80% level in the tank in March, it is not completely unbelievable that 55% would remain in early June. Plaintiff's evidence fails to disprove Debtor's representation that the tank was 55% full on June 9. The Court finds Plaintiff has failed to meet his burden of

proving the elements of § 523(a)(2)(A) by a preponderance of evidence.

WILLFUL INJURY

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). The Eighth Circuit defined the terms "willful and malicious" in In re Long, 774 F.2d 875 (8th Cir. 1985). The court found that § 523(a)(6) applies only to conduct more culpable than that which is in reckless disregard of a creditor's interest. 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 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 "malicious" element of § 523(a)(6), enunciated in Long has been described as a stringent standard. See In re Berry, 84 B.R. 717, 720 (Bankr. W.D. Wash. 1987).

As to the plugged septic system, Plaintiff has failed to offer any proof that Debtor committed a "headstrong and knowing" act which caused the problem. The record does not establish any specific cause for the plugging up of the system. Likewise, Plaintiff has failed to show that Debtor acted in any way regarding the septic system which was targeted at causing Plaintiff financial harm. The Court concludes that Plaintiff has failed to prove Debtor committed any willful act regarding the plugging of the septic system.

Debtor did knowingly install the TV antenna on the side of the farmhouse, meeting the "willful" element of § 523(a)(6). Plaintiff has failed to prove, however, that Debtor did this with malicious intent. Debtor installed the antenna in order to improve TV reception. Nothing in the record establishes that he acted with the intent to cause Plaintiff financial harm. The Court concludes that the record fails to support a finding that Debtor acted maliciously in installing the TV antenna on the side of the house.

ATTORNEY FEES AND COSTS

In his answer to Plaintiff's complaint, Debtor asserts that he is entitled to attorney fees and costs under § 523(d). That section provides that if a creditor requests a determination of dischargeability and the debt is discharged,

> the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. § 523(d). In order to be "substantially justified", the complaint must have a reasonable basis in law and fact in light of the factors relevant to the claim of nondischargeability. FCC Nat'l Bank v. Dobbins, 151 B.R. 509, 512 (W.D. Mo. 1992). A creditor is not substantially justified when it proceeds to trial knowing that it lacks sufficient evidence to sustain its burden of proof and then fails to establish a single necessary element of its claim. Manufacturers Hanover Trust Co. v. Hudgins, 72 B.R. 214, 220 (N.D. Ill. 1987). The stated purpose for § 523(d) is to discourage creditors from commencing actions in an effort to obtain a settlement from an honest debtor who may not be able to pay for an attorney to handle an adversary proceeding. Stewart, 91 B.R. at 497.

A finding of substantial justification under § 523(a)(2) is made upon the facts peculiar to each case. In this case, Plaintiff incurred expenses to fix the septic system and repair screw holes in siding from the TV antenna brackets

immediately after Debtor ended his tenancy of the farmhouse. He discovered the L.P. tank was empty within a few months of Debtor representing it as half full. As indicated above, the record does not support a finding of an intent by Debtor to financially harm Plaintiff. However, the circumstances and timing of events are such that the Court cannot find that Plaintiff lacked substantial justification to bring his complaint such that he would be liable to Debtor for fees and expenses under § 523(d).

WHEREFORE, Plaintiff's request under Count I to except a debt from discharge under § 523(a)(2)(A) is DENIED.

FURTHER, Plaintiff's request under Count II to except a debt from discharge under § 523(a)(6) is DENIED.

FURTHER, the debt outlined in the Complaint as owing to Plaintiff from Debtor is dischargeable.

FURTHER, Debtor is not entitled to fees and expenses under § 523(d).

SO ORDERED this 7th day of June, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge