

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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RANDY L. McLEAN

*Debtor(s)*

Bankruptcy No. 96-12592KC

Chapter 7

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WICK BUILDING SYSTEMS INC.

*Plaintiff(s)*

Adversary No. 97-9002C

vs.

RANDY L. McLEAN

*Defendant(s)*

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### ORDER RE: MOTION FOR SUMMARY JUDGMENT

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On July 3, 1997, this matter came before the Court on Plaintiff's Motion for Summary Judgment. Wick Building Systems, Inc. appeared by its attorney Christopher Bruns. Debtor Randy McLean appeared by his attorney John Titler. After the presentation of evidence and argument, the Court took the matter under advisement. The deadline for filing additional exhibits and briefs has now passed and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

The complaint by Plaintiff Wick Building Systems, Inc. states that it has a claim based on a guarantee executed by Debtor. Both Wick and Debtor had guaranteed a loan made by Perpetual Savings and Loan in April 1996 to EZ Homes, Inc., Debtor's business. After EZ Homes was forced out of business, Perpetual required Wick to pay off the loan. At that time, Wick asserts, Perpetual assigned to Wick its rights against Debtor under his guarantee.

Wick's complaint seeks to have its claim against Debtor, which arises from the April 1996 guarantee Debtor gave to Perpetual on its loan to EZ Homes, declared nondischargeable for fraud, § 523(a)(2), and conversion, § 523(a)(6). Its Motion for Summary Judgment asserts that no issues of fact exist and Debtor's conduct constitutes fraud and conversion as a matter of law.

The record shows EZ Homes was forced out of business because it had sold homes "out of trust". Debtor admits he had sold 12 or 13 homes "out of trust" in late 1995. That is, Debtor sold Wick's manufactured homes but did not turn over the proceeds to Green Tree Financial, the floor plan financier. Debtor gave both Green Tree and Wick a fictitious list of names and addresses of buyers of the homes and misrepresented that the sales were "in process".

Debtor was having problems with Green Tree by the end of 1995 and was afraid Green Tree would shut his business down. At this point, Wick entered into a guaranty with Green Tree, dated December 28, 1995. Debtor looked for other sources of financing. He ended up getting the loan from Perpetual which Wick guaranteed and he guaranteed individually.

Debtor acknowledges that he has admitted many of the facts underlying Wick's complaint. He disputes, however, whether Wick's reliance on his misrepresentations was justifiable. Debtor asserts Wick was aware of the misrepresentations in March 1996, prior to entering into the guarantee with Perpetual. He argues this raises issues of fact on the elements of reliance and causation under § 523(a)(2) precluding summary judgment.

In response, Wick states that it had relied on Debtor's representations in December 1995 when it agreed to guaranty Green Tree Financial's floor plan financing of EZ Homes, prior to the time it became aware that Green Tree had concerns about the absence of certain homes from Debtor's lot. Debtor responds that Wick's complaint is limited to the April 1996 guarantee to Perpetual. He asserts that Wick's supplements to its Motion for Summary Judgment go outside the scope of the pleadings. Debtor also argues that issues of fact exist concerning Wick's rights under Debtor's guarantee with Perpetual. He also states issues exist concerning the level of Wick's knowledge of the dependability of Debtor's representations as that relates to justifiable reliance and causation.

Hesitancy in granting summary judgment is no longer appropriate in light of recent Supreme Court 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 "the 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)).

A party moving for summary judgment must show an absence of any genuine issue of material fact in order to succeed in its motion. In re Earhart, 68 B.R. 14, 15 (Bankr. N.D. Iowa 1986). In considering a motion for summary judgment, the Court must view the facts in the light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences to be drawn from the facts. United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172, 1176 (8th Cir. 1992). Where mental state or intent is at issue, summary judgment must be granted with caution, as usually such issues raise questions for determination by a factfinder. Id.

This case is unusual in that Debtor's fraudulent intent is not in issue. The Court is concerned, however, that Wick's arguments appear to go beyond the scope of its complaint. The complaint focuses on Wick's guarantee of the April 1996 financing provided by Perpetual. Debtor's misrepresentations admittedly go back to late 1995 and communication between Green Tree and Wick prior to April 1996 indicates some knowledge on Wick's part of Debtor's misrepresentations regarding the 12 or 13 homes sold out of trust.

Viewing the record in the light most favorable to Debtor, the Court concludes that issues may exist concerning reliance and causation as they relate to Wick's April 1996 guarantee to Perpetual. Also, concerns are raised regarding matters now asserted which are absent from Wick's complaint. Wick is now arguing that it relied on Debtor's representations in entering into the guarantee with Green Tree in December 1995 which caused its damages. Based on these concerns, the Court concludes that summary judgment is not appropriate at this time.

WHEREFORE, Plaintiff's Motion for Summary Judgment is DENIED.

SO ORDERED this 15th day of July, 1997.

Paul J. Kilburg  
U.S. Bankruptcy Judge