In the United States Bankruptcy Court

for the Northern District of Iowa

LeROY DONALD MILLER *Debtor(s).*	Bankruptcy No. 97-2874F Chapter 7
JOEL A. McNEILL *Plaintiff(s)* vs. LeROY DONALD MILLER *Defendant(s)*	Adversary No. 97-9253F

DECISION

Joel A. McNeill requests that his claim against LeRoy D. Miller be excepted from Miller's discharge. Trial was held May 27, 1999 in Emmetsburg, Iowa. Robert A. Dotson appeared for Joel A. McNeill. William H. Habhab appeared for the debtor, LeRoy D. Miller. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

Findings

LeRoy Miller filed his chapter 7 petition on September 18, 1997. Miller is in his early seventies. Prior to bankruptcy, he was a construction contractor, operating as a sole proprietor. In January 1996, he agreed to build three hog finishing units for Joel A. McNeill of Algona. McNeill planned to raise swine as a contract grower for Murphy Family Farms, Inc. (Murphy). McNeill obtained a construction loan to finance the construction of the facilities. The total cost of the project, including the land, would be more than $500,000.00. The cost of Miller's part would be $102,000.00.

McNeill and Miller signed a contract on June 1, 1996. Miller was to begin construction on June 5, 1996; he was to complete the buildings by July 30, 1996. If he did not complete the work by August 30, 1996, then "$250.00 per day [would] be deducted from the contract price." Exhibit 1, section five, ¶ A. It was stated in the contract that "times stated ... are of the essence." Id., section nine, ¶ A. Final payment under the contract was conditioned on Miller's providing lien waivers to McNeill. Id., section four, ¶ A.

McNeill became dissatisfied with Miller's performance. The contract was not being completed on time, and the project was over budget. McNeill claimed Miller was in default, but Miller disputed it. He blamed vandalism at the job site and wet weather for preventing timely completion. McNeill terminated the contract. He asserted claims against Miller for his breach. Miller disputed some of McNeill's costs for completing the project.

McNeill, Robert Malloy, who was McNeill's attorney, and others met with Miller to discuss the dispute in Humboldt in September or October 1996. They met again later that fall in Algona. At the Algona meeting, they reached a settlement.

On November 27, 1996, attorney Malloy sent a letter to Miller to memorialize the settlement agreement. Exhibit 3. It was agreed that on or before December 31, 1996, Miller would pay McNeill the sum of $9,628.00 as reimbursement for additional expenses. Id., ¶ 1(c). "In addition all lien waivers will be provided for all vendors or suppliers of material to the site." Id. Miller would also pay penalties of $21,000.00 over a three-month period beginning January 1, 1997 and ending March 31, 1997. Id. at ¶ 2(a). The settlement agreement provided for interest on the debt at prime rate plus two per cent. Id. at ¶ 2(b). The settlement letter was signed by Miller and his wife, Marion.

McNeill later came to the conclusion that Miller would not make the first payment on time. Malloy tried to set up a meeting with Miller and his attorney, Thomas M. Magee. A meeting was set for December 31, 1996 in Magee's office in Emmetsburg. It was the earliest date all parties were available. In addition to the parties and their lawyers, the meeting was attended by Steve Stanton of Murphy and Nathan Anderson. Anderson attended the meeting because he had complaints about Miller's completion of another construction contract.

Miller and Magee asked for more time for Miller to pay. McNeill would only agree if he received assurances that no mechanics' liens would be filed against his property. This was a major concern to him because he was attempting to convert from the construction loan to long-term financing. He believed that if there were any liens, he would not be able to refinance the project without paying them. Under the contract with Miller and the settlement agreement, Miller was responsible for paying materialmen.

According to witnesses, assurances were given. Robert Malloy testified that Magee told him that Miller had assured Magee that liens would not be a problem. Magee said that Miller had made contact with suppliers and that there were no outstanding or delinquent accounts that would affect the McNeill job. Miller said that he had had long-standing relationships with suppliers and vendors and that mechanics' liens were not an issue with the site. Magee told McNeill that Miller had said he had taken care of the mechanics' lien issue with Emmetsburg Ready Mix, and there would be no mechanic's lien.

Prior to the meeting, Malloy, his staff, and Steve Stanton made calls to some of the suppliers with whom Miller did business. They verified that Miller owed money to the suppliers, but none of the suppliers tied the account balances to the McNeill project. Stanton contacted someone at Emmetsburg Ready Mix Co. (Ready Mix), which was a major supplier to the project. He reported at the meeting that the amounts due were not specific to the McNeill project.

Dale Schleisman, a representative of Ready Mix, denied he had ever made a promise to Miller not to file a lien or that Miller had asked him not to file one. Earlier in December, Schleisman had gone to Miller's house to demand payment on Miller's account, and Miller told him he could not pay. On January 27, 1997, Ready Mix filed two mechanics' liens against the McNeill property. After approximately 18 months of liti- gation, the liens were released without any payment to Ready Mix.

Besides asking for assurances on mechanics' liens, McNeill demanded a balance sheet from Miller. Malloy said he would not agree to an extension for his client unless they received one. Malloy believed that if Miller did not have the resources to pay, agreeing to extensions would be futile. If

they did not receive the mechanics' liens assurances and an accurate balance sheet, Malloy was instructed by McNeill to file suit against Miller on January 2, 1997.

Thus at the meeting, with Miller's input, Magee wrote out a balance sheet for Miller. Miller signed it. Concerned about round numbers, Malloy and McNeill emphasized the need for accuracy. Miller assured them it was accurate. The balance sheet stated the following:

LeRoy Miller
Balance Sheet
12/31/96

Assets:			
Household furnishings		15,000	
Trucks, Cars & Construction Co.		45,000	
Block & Brick Inventory		4,500	
	Total		64,500
Acct. Receivable:			
Thiel		9,800	
Hersom		4,600	
Eischen		6,000	
Eggerson		3,600	
Chaffey		5,000	
Wershbann		7,000	
Small accts.		3,000	
	Total		39,000
		Total	103,500
Liabilities:			
Stockdale		18,000	
Mercantile Bank		650	
	Total		18,650
Accounts:			
Wersbann		8,000	
E'burg Ready Mix		26,000	
Rockvale Block & Tile		350	
E'burg Lumber Yard		1,600	
Pocahontas Lumber Yard		2,100	
Northern Iowa Lumber		2,100	
	Total		40,150
Total Liailities			58,800
Net Worth			44,700

/s/ LeRoy Miller
12/31/96

Exhibit 2.

Malloy asked for verbal descriptions of the accounts receivable. He also asked for phone numbers for the account debtors, but he never received them. He was not successful in finding them through telephone information. Malloy testified that he was more concerned about Miller's liabilities, as he knew Miller was working and was generating income. McNeill believed also that Miller had genuine accounts receivable.

After receiving the balance sheet and Miller's assurances on mechanics' liens, McNeill agreed to the extensions. They were granted as handwritten changes to Malloy's November 27 settlement letter (the changes to Exhibit 3). The changes were initialed by Miller. McNeill allowed Miller until January 20, 1997 to make the two payments totaling $9,628.00. He extended the deadline to April 30 for making the $21,000.00 in penalty payments.

McNeill argues that the accounts receivable were not accurate. The Thiel account receivable in the amount of $9,800.00 was disputed. According to a letter from Thiel to Dotson, Miller had agreed earlier in 1996 not to bill Theils further. Exhibit 10. Also, William Chaffee testified that he did not owe Miller $5,000.00. He said that on December 31, 1996, he had paid all bills submitted by Miller and still had a deposit with him of $9,700.00. Moreover, on January 2, 1997, Miller presented a $1,386.00 bill to Chaffee, payment of which supposedly brought the project current.

The balance sheet showed household furnishings valued at $15,000.00. Miller agrees this was inaccurate. He said the figure was $1,500.00, but that his attorney misunderstood what he had told him.

The balance sheet showed $40,150.00 in accounts payable and net worth of $44,700.00. This information was false. Miller was not nearly "in the black." When he filed his bankruptcy petition about eight months later, he showed $35,255.00 in debts to priority creditors, all of which was owed on December 31, and none of which was shown on the balance sheet. Exhibit 11, Schedule E. Miller said he knew he owed the money, but did not list it because he did not know the amounts due, and because he did not know he had to "turn it in."

On his bankruptcy schedules, he also listed 54 unsecured creditors to whom he owed $254,361.14. Most of the debts were described as being incurred from 1996-97. Testimony at trial did not completely clarify which of the debts were owed on December 31, but a substantial amount of them were. On December 31, Miller owed Cliff Tufty $41,000.00; he owed Dave Naig $43,000.00; he owed Michael Hyde $13,600.00; he owed Mitch Naeve $10,000.00. These debts alone totaled $107,600.00. He knew he owed them, but he testified that he did not list them because he thought the balance sheet was only for the business. He knew also that he owed C.I. Hersom Construction Co., Inc. for materials and that he owed money to Ronald Hersom's vehicle service station. Although he listed his claim against Hersom as an account receivable, he did not list his debt to Hersom's companies he said because he did not know the correct amounts. Ronald Hersom testified that he always tried to keep the accounts between himself and Miller fairly even and that at the end of December, they were probably "a wash."

In addition to his other explanations for inaccuracy, Miller said they were in a hurry that day and that the hurried nature of the situation contributed to the inaccuracy of the balance sheet. He testified that it was not intentionally false.

Miller made the required payments totaling $9,628.00, although they were late. The penalty payments were never made. The penalty payments were to draw interest at 12-1/4 per cent per annum from November 27, 1996.

Discussion

I. False Representation

McNeill says that his claim should be excepted from discharge on two grounds. The first is that he extended credit based on a fraudulent representation that Miller had personally arranged with suppliers to ensure there would be no liens. The second is that credit was extended based on a false financial statement.

A discharge does not discharge an individual debtor from a debt for an extension of credit obtained by false representation. 11 U.S.C. § 523(a)(2)(A). To succeed in such a claim, McNeill must prove:

(1) that Miller made false representations;
(2) that at the time he made them, Miller knew them to be false;
(3) that Miller made the representations with intent and purpose to deceive McNeill;
(4) that McNeill relied on the representations; and
(5) that he sustained an injury as a proximate result of the misrepresentations.

Caspers v. Van Horne (Matter of Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987). The reliance must be justifiable. Field v. Mans, 116 S.Ct. 437, 446 (1995). McNeill must prove these elements by a preponderance of the evidence. Grogan v. Garner, 111 S.Ct. 654, 659 (1991).

A false representation must involve current or past facts. Kuper v. Spar, 176 B.R. 321, 327 (Bankr. S.D. N.Y. 1994). "Representations as to opinion, expectation or declarations of intention do not relate to existing fact and are not actionable." Id.

McNeill has not proven by a preponderance of evidence that a statement made by Miller as to the potential of mechanics' liens was a statement of existing fact rather than opinion. McNeill would characterize the testimony as being that Miller told him that he had reached an agreement with Emmetsburg Ready Mix Co. that there would be no lien filed. The weight of the evidence does not support this. At best, it supports a finding that Miller talked to suppliers and in his own opinion there was no lien problem. The fact that Dale Schleisman, of Ready Mix, did not convey this to Miller, does not aid the plaintiff. Miller could have, much as Stanton did, contacted someone else at the company and believed that none of the account owed could be specifically identified to the McNeill site. The versions of the representation support such an alternative. McNeill has not proven his claim under 11 U.S.C. § 523(a)(2)(A).

II. False Financial Statement

A debt is not excepted from discharge if it is one for the extension or renewal of credit to the extent obtained by the use of a statement in writing

(i) that is materially false;
(ii) respecting the debtor's ... financial condition;
(iii) on which the creditor to whom the debtor is liable for such ... credit reasonably

relied; and
(iv) that the debtor caused to be made or published with intent to deceive."

11 U.S.C. § 523(a)(2)(B). McNeill has proven all of the elements of such a claim.

Miller's statement respected his financial condition as of December 31, 1996. It was false in substantial ways. I do not need to reach the issue of whether it was false because Miller failed to show that certain accounts were disputed. The statement as it portrayed Miller's debts and net worth was materially false. He had at minimum more than $140,000.00 in undisclosed debts. His net worth was not a positive $44,700.00 as shown in the statement, but rather was a negative net worth of at least $110,000.00.

McNeill reasonably relied on the statement in agreeing to renew a credit arrangement. Reasonable reliance is measured by an objective standard--"that degree of care which would be exercised by a reasonably cautious person in the same business transaction under similar circumstances." Insurance Company of North America v. Cohn (In re Cohn), 54 F.3d 1108, 1117 (3rd Cir. 1995). McNeill exercised such a degree of care. His attorney and Stanton attempted to call known creditors with whom Miller had a reputation of dealing. They did not blindly accept all they were told. They were able to verify some of the debts which Miller disclosed. There was nothing in what Miller provided or what McNeill verified to alert McNeill or his attorney to what was undisclosed. McNeill was not a commercial lender. He was in this instance a customer. Miller has pointed to no "red flag" in the financial statement which would have undercut the reasonableness of McNeill's reliance.

Miller knew that the statement was false. He knew that his liabilities were not limited to those shown on the statement, and he must have known that he did not have a positive net worth. I do not find credible his explanation that he did not believe he had to list non-business debts because this was just a balance sheet for his business. The balance sheet bore his name. It made no reference to the trade name of his business, which according to his Statement of Financial Affairs (Exhibit 11), was "Miller Construction." Moreover, had he really believed the financial statement was limited to the business, he offers no satisfactory explanation as to why he listed household furnishings as part of his assets. He also offers as a reason for the statement's inaccuracy that if he did not know the amount owed he did not believe he needed to list the debt. He knew, therefore, that the information being given was false, yet he failed to disclose the inherent defect in the statement--that he had debts of amounts allegedly unknown to him. I infer from the circumstances that he gave McNeill the financial statement with the intent to deceive McNeill in order to obtain extensions of time for repayment.

There is some disagreement among courts as to whether damages is an element of a claim under § 523 (a)(2)(B). The issue is
whether McNeill must show damages as part of his claim, meaning that had he not extended the loan, he could have collected all or some part of his claim as of December 31, 1996. It has been held that detriment or damage is not required for nondischargeability. Shawmut Bank, N.A. v. Goodrich (In re Goodrich), 999 F.2d 22, 26 (1st Cir. 1993). Others disagree. North Shore Savings & Loan Assoc. v. Jones (In re Jones), 88 B.R. 899, 905-06 (Bankr. E.D. Wis. 1988). See also 2 Epstein, Nickles & White, Bankruptcy 361-62 (1992) (discussing cases).

The Eighth Circuit Court of Appeals has explicitly left the issue undecided. Caspers v. Van Horne (Matter of Van Horne), 823 F.2d 1285, 1289 n.1 (8th Cir. 1987). I need not decide the issue in this case. There is no evidence that all of the accounts listed on the financial statement were disputed or non-existent. In fact, Miller testified that he collected on accounts after December 31, 1996. Accounts

on the balance sheet for which there would have been no setoff or dispute appear to total $12,600.00 (Eischen (sic), Eggerson and small accounts). Other accounts arose after January 1, 1997. Although I doubt that the language of the statute requires McNeill to prove he could have collected his claim on December 31, 1996, even if it did, there is sufficient evidence to show that there were accounts which McNeill could have garnished on and after December 31 to prove damage from the reliance on the false financial statement.

McNeill has proven his claim under 11 U.S.C. § 523(a)(2)(B). He is entitled to judgment in the amount of $21,000.00 plus interest at the rate of 12-1/4 per cent from November 27, 1996. I calculate such interest to be $6,567.08 through June 16, 1999.

ORDER

IT IS ORDERED that Joel A. McNeill shall recover from LeRoy D. Miller the sum of $27,567.08. The judgment is excepted from Miller's discharge under 11 U.S.C. § 523(a)(2)(B). Judgment shall enter accordingly.

SO ORDERED THIS 16th DAY OF JUNE 1999.

William L. Edmonds
Chief Bankruptcy Judge