IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50530

Summary Calendar

IN THE MATTER OF OMER F. THEROUX, F/D/B/A
U.S. QUALITY HOME SALES: ETC, ET AL.,

Debtor.

OMER F. THEROUX,

Appellant,

v.

HSA MORTGAGE COMPANY,

Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CA-796)

(February 27, 1995)

Before KING, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:*

Omer Theroux appeals the bankruptcy court's determination that certain debts owed by his company, U.S. Quality Home Sales ("USQHS"), were nondischargeable in his personal Chapter 7

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

bankruptcy proceeding because he acted willfully and maliciously to injure HSA Mortgage Company by selling "out of trust" certain mobile homes in which HSA held a security interest. See 11 U.S.C. § 523(a)(6). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

HSA loaned money to USQHS, a retailer of mobile homes, and retained a security interest in the mobile homes and the proceeds of the sales of such mobile homes. Paragraph Six of the financing agreement between HSA and USQHS, commonly known as a "floor plan" agreement, stated that "[o]n the same day Dealer [USQHS] sells a unit of Inventory financed under this Agreement, Dealer will pay creditor [HSA] the unpaid principal balance applicable to that item." Paragraph Eight of the floor plan agreement further stated that

> [i]f Creditor has a security interest in the proceeds resulting from the sale by Dealer of a unit of Inventory financed under this Agreement: (i) Dealer will hold the proceeds in trust for Creditor separate and apart from any other property, will account to Creditor for the proceeds and will not dispose of them without Creditor's prior written consent . . . .

A separate document, dated October 4, 1989 and signed by both parties, sets forth the terms by which USQHS agreed to abide, including, in Paragraph Three, a warranty that "[w]e/I shall promptly remit payment to Creditor [HSA], and . . . Creditor may hold and apply any money, profit or Contracts of ours/mine, which come into its possession for any amount owing by us to Creditor. . . ."

On December 28, 1990, Theroux filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code. On June 7, 1991, HSA filed a complaint objecting to the dischargeability of certain debts owed to it by USQHS, on grounds that USQHS, through Theroux, had willfully and maliciously injured HSA. See 11 U.S.C. § 523(a)(6). Specifically, HSA claimed that USQHS, at the direction of Theroux, had injured HSA by selling HSA's collateral without remitting the proceeds from such sales as required under their financing agreement. Theroux denied the allegations and counterclaimed against HSA, asserting: (1) that HSA owed USQHS money to which Theroux was entitled to offset against any amounts Theroux or USQHS owed HSA; (2) that the financing agreement between HSA and USQHS had been modified by course of dealing; and (3) that HSA had filed its complaint objecting to dischargeability in a bad faith attempt to hinder the bankruptcy trustee's efforts to collect from HSA the money owed to the bankruptcy estate.

The parties introduced as evidence several letters sent between USQHS and HSA which indicate that they were in disagreement as to the amounts owed to each other. During trial, Brenda Feeler, a loan officer for Amwest Savings Association (the parent corporation of HSA), testified that HSA halted the flow of money to USQHS after it learned that certain mobile homes had been sold out of trust. Thus, when money was received from third party lenders or other sources, HSA would use the money to reduce the principal balance on units designated as sold out of trust.

In this manner, HSA acted to protect its financial interests in accordance with its contractual rights. The result, however, was confusion. USQHS expected to receive certain money from USQHS in the form, inter alia, of commissions and manufacturer's rebates, but HSA never sent the money because USQHS owed HSA money for the out of trust sales.

Theroux testified that he knew USQHS was "responsible for the proceeds" of any sales floored by HSA. He also admitted that he failed to pay the proceeds from sales of certain mobile homes floored by HSA because USQHS was having cash flow problems, and that he used such sales proceeds to pay USQHS's general creditors. Theroux acknowledged that the floor plan agreement between HSA and USQHS did not provide USQHS with authority to pay general creditors in lieu of remitting the proceeds directly to HSA. Theroux's theory at trial seemed to be that he believed he was justified in withholding funds on the out of trust sales because he believed HSA owed USQHS money.

On April 27, 1992, the bankruptcy court conducted a bench trial on HSA's complaint and Theroux's counterclaim. On June 5, 1992, the bankruptcy court entered judgment favoring HSA's claim and denying Theroux's counterclaim. The bankruptcy court specifically found that: (1) Theroux had acted willfully and maliciously to injure the property of HSA by selling HSA's collateral without remitting to HSA the proceeds from such sales; and (2) Theroux, as president and majority stockholder of USQHS, should be held personally liable to HSA for the debts unpaid by

USQHS. The bankruptcy court awarded $83,953.33 in damages to HSA, plus pre-judgment interest at 4.4 percent per annum until the judgment is satisfied by Theroux.

On July 8, 1994, the district court affirmed the bankruptcy court's decision. In his timely appeal to this court, Theroux contends that there was insufficient evidence to support the bankruptcy court's finding that he acted maliciously within the meaning of 11 U.S.C. § 523(a)(6) and that the bankruptcy court erred in holding him personally responsible for the debts of USQHS. He also contends that the bankruptcy court erred in dismissing his counterclaim against HSA. We affirm.

II. STANDARD OF REVIEW

This court reviews a bankruptcy court's findings of fact under the clearly erroneous standard and decides issues of law de novo. Henderson v. Belknap (In re Henderson), 18 F.3d 1305, 1307 (5th Cir.), cert. denied, 115 S. Ct. 573 (1994); Haber Oil Co. v. Swinehart (In re Haber Oil Co.), 12 F.3d 426, 434 (5th Cir. 1994); see also Bankr. Rule 8013, 11 U.S.C.A. (West Supp. 1994) ("[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."). Although the court of appeals benefits from the district court's consideration of the matter, the amount of persuasive force to be assigned to the district court's conclusion is entirely a matter of

discretion with the court of appeals. Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters. (In re Briscoe Enters.), 994 F.2d 1160, 1163 (5th Cir.), cert. denied, 114 S. Ct. 550 (1993).

A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a firm and definite conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it "even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently." Anderson v. City of Bessemer, 470 U.S. 564, 573-74 (1985).

III. ANALYSIS

Title 11, Section 523 of the United States Code states that a discharge in bankruptcy will not be granted "for willful and malicious injury by the debtor to another entity or to the property of another entity . . . ." 11 U.S.C. § 523(a)(6). The term "willful" means deliberate or intentional. S. Rep. No. 95-989, 95th Cong., 2d Sess. 79 (1978) (reprinted in 1978 U.S.C.C.A.N. 5787, 5865); H. Rep. No. 95-595, 95th Cong., 2d Sess. 365 (reprinted in 1978 U.S.C.C.A.N. 575963, 6320-21); accord Seven Elves, Inc. v. Eskenazi, 704 F.2d 241, 245 (5th Cir. 1983). Although not defined by Congress, this court has

interpreted the word "malicious," as used in Section 523, to mean "without just cause or excuse." Seven Elves, 704 F.2d at 245. Furthermore, in determining whether a debtor acted without just cause or excuse, the court must apply an objective standard. American Honda Fin. Corp. v. Grier (In re Grier), 124 B.R. 229, 232 (Bankr. W.D. Tex. 1991). The burden of proving the elements of willfulness or malice lies with the creditor, who must establish they exist by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 287 (1991).

The parties in this case do not dispute that USQHS sold certain mobile homes "out of trust." They also do not dispute that USQHS acted "willfully" (i.e., intentionally) in selling the mobile homes out of trust. The key issue in this case, therefore, is whether USQHS acted with the requisite "malice." Specifically, we must determine whether the bankruptcy court clearly erred in determining that USQHS's act of selling certain mobile homes out of trust was "without just cause or excuse."

The bankruptcy court specifically found that Theroux, doing business as USQHS, "willfully and maliciously injured HSA," by selling mobile homes out of trust. In light of the record as a whole, this factual finding is not clearly erroneous. Theroux admitted that he knew that HSA had a security interest in the mobile homes. He also admitted that he knew the financing agreement did not permit him to withhold funds upon the sale of a unit financed by HSA. As an experienced businessman, it is therefore reasonable to infer that Theroux knew that selling

mobile homes out of trust jeopardized HSA's security interest. Acting in a manner which one knows will place a lender at risk, such as converting property in which the lender holds a security interest, is sufficient to permit a trier of fact to infer malice under Section 523(a)(6). See Chrysler Credit Corp. v. Perry Chrysler Plymouth, Inc., 783 F.2d 480 (5th Cir. 1986); accord Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257 (11th Cir. 1988); Central Fidelity Bank v. Higginbotham (In re Higginbotham), 117 B.R. 211, 216 (Bankr. E.D. Va. 1990); Champion Home Builders Co. v. Tarrant (In re Tarrant), 84 B.R. 831 (Bankr. M.D. Fla. 1988).

Theroux places heavy reliance on In re Grier, 124 B.R. 229 (Bankr. W.D. Tex. 1991), in which the bankruptcy court found that an automobile dealer who had sold inventory "out of trust" did not act maliciously because the lender had acquiesced to the dealer's conduct through course of dealing. Id. at 234. Unlike In re Grier, however, there is no evidence in this case that HSA ever waived its rights to collect immediate payment. HSA's inspectors visited USQHS's lot regularly and immediately informed USQHS that it was out of trust. Ms. Feeler testified that HSA sent numerous letters and made numerous calls to USQHS in an effort to collect the proceeds from the out of trust sales. The evidence clearly indicates that HSA expected and made diligent efforts to obtain immediate payment.

Theroux's primary argument is that USQHS did not act maliciously because he believed that there was a genuine dispute as to the amount of money, if any, owed by USQHS to HSA. Theroux

contends that because he believed that HSA owed money to USQHS, he had "just cause or excuse" to withhold the proceeds he received from the sale of mobile homes in which HSA had a security interest. We disagree.

While Theroux may have subjectively believed that USQHS did not owe money to HSA, there is no evidence in the record that this belief was objectively reasonable. Theroux was unable to provide any evidence at trial which objectively established that HSA owed money to USQHS. Indeed, Theroux's proof merely indicates that Theroux subjectively believed HSA owed certain funds to USQHS, and in an act of self-help, Theroux decided to withhold funds from HSA. We need not here address whether a self-help offset may preclude a finding of malice where the debtor has an objectively reasonable belief that the lender owes him money; such is not the case before us. By all reasonable accounting methods, it is clear that USQHS owed HSA a significant amount of money. Even assuming, arguendo, that HSA may have owed some funds to USQHS, the amount of such funds pales in comparison to the amounts owed by USQHS to HSA. Thus, Theroux's act of self-help in withholding funds was objectively unreasonable and cannot be considered a justifiable action which will permit discharge.

Theroux next argues that the bankruptcy court erred in determining that he should be held personally liable for the debt owed by USQHS to HSA. Theroux's brief, however, cites no authority in support of his argument. A corporate officer may be

held personally liable for a non-dischargeable debt when the officer's conduct is determined to be willful and malicious within the meaning of Section 523(a)(6). See Perry Chrysler Plymouth, 783 F.2d 480, 485-86 (5th Cir. 1986) (applying Louisiana law); see also Ford Motor Credit Co. v. Owens (In re Owens), 807 F.2d 1556, 1559 (11th Cir. 1987) (applying federal bankruptcy principles); Bancfirst v. Padgett (In re Padgett), 105 B.R. 665, 667 (Bankr. E.D. Okla. 1989) (applying Oklahoma law). Theroux was the president and majority stockholder of USQHS. He directed the out of trust sales which have been determined to be willful, malicious, and injurious to HSA. Thus, it was not error for the bankruptcy court to conclude that Theroux should be held personally liable for the nondischargeable debt resulting from the out of trust sales. In addition, because Theroux's acts were correctly determined to be willful and malicious, the bankruptcy court did not err in dismissing Theroux's counterclaim.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.