

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE:

RICHARD L. GRIFFIN,
Debtor.

BK #91-12704-WHB
Chapter 7

UNION SAVINGS BANK,
Plaintiff,

v.

Adversary Proceeding
No. 92-0153

RICHARD L. GRIFFIN,
Defendant.

MEMORANDUM OPINION AND ORDER ON
COMPLAINT SEEKING EXCEPTION TO DISCHARGE

Union Savings Bank of Covington, Tennessee, filed this adversary proceeding on February 3, 1992, seeking to except its debt from the debtor's discharge pursuant to 11 U.S.C. §523. No specific subsections were pled, but the Bank at trial relied alternatively upon the debtor giving a false financial statement (11 U.S.C. §523(a)(2)(B)), or upon the debtor's failure to account for loss of collateral (which relief is actually based upon 11 U.S.C. §727(a)(5) which was not pled), or upon the debtor's wrongful disposition of the Bank's collateral (11 U.S.C. §523(a)(6)). The trial was conducted on June 17, 1992, and the Court reserved ruling until it could review the documents introduced into evidence. The following contains findings of fact and conclusions of law pursuant to F.R.B.P. 7052.

The plaintiff Bank has the burden of proving an exception from discharge and each exception is narrowly construed. Gleason v. Thaw, 236 U.S. 558 (1915); In re Phillips, 804 F. 2d 930 (6th Cir. 1986). Further, the standard of proof for each §523(a) exception is preponderance of the evidence. Grogan v. Garner, 111 S. Ct. 654 (1991). As stated, the complaint does not plead an objection to the debtor's general

discharge under 11 U.S.C. §727 and the time has run for filing such complaints. F.R.B.P. 4004(a). However, the Court has considered all of the proof in the light of both §523(a)(2)(B) and §523(a)(6).

The Court has concluded that the Bank was unable to prove an exception from discharge by a preponderance of the evidence. The two witnesses for the Bank, the debtor and the debtor's mother were all credible witnesses. The Court is left with facts which clearly show that the Bank did not receive all of its collateral but do not establish that the debtor acted so improperly as to justify an exception from discharge.¹

The written financial statement given to the Bank consisted of a security agreement with an attached handwritten list of tools, equipment and inventory. Tr. Exs. 2 & 3. These documents were dated December 8, 1988. The attached list reflected a present value at that time of \$38,100.00. However, some of the items were used up as inventory, some were leased from other parties, some were "junked," some were left in the debtor's former body shop, some were taken or possibly stolen from the debtor's shop by another party, some were broken in normal use, a few were unknown by the debtor as to what happened to them, and the balance are disputed by these parties as to whether they were returned to the Bank. See Debtor's testimony and Tr. Ex. 3. The Bank's witnesses testified that, pursuant to agreement with the debtor, they recovered from the debtor's mother's driveway, a pick up truck that contained some tool boxes and a few tools. See photos, Tr. Ex. 6. The Court believes this testimony. However, the Court also finds credible the debtor's testimony, which was supported in part by his mother's testimony, that he placed all of the Bank's tools that were in his possession in the tool boxes, locked those boxes and placed the boxes, along with some equipment, in the pick up truck. This was done the night before the Bank was told to recover the truck. No one, except the debtor's blind father, was home when the Bank repossessed the truck.

The Bank of course wants the Court to infer that the debtor either did not place all of the items in the truck or that the debtor removed most of them. It is a more plausible inference that someone else took the missing items. The proof established that another party previously had taken some of the debtor's tools from

¹ Although §727(a)(5) was not pled, the proof would not support a denial of the debtor's complete discharge.

his shop and the debtor had filed a police report of that incident. The debtor also had experienced another prior theft of tools from his truck in March of 1990. It is significant that the debtor's mother testified that she saw the debtor lock the tool boxes. Those boxes were unlocked when the Bank recovered them. The debtor testified that the Bank's photographs did not reflect all of the collateral that he placed in the truck.

The Court certainly could conclude that the debtor was negligent in leaving the tools and other collateral in the back of a pick up truck but there is insufficient proof to raise that simple negligence to the level of a willful and malicious act. See Perkins v. Scharffe, 817 F. 2d. 392 (6th Cir. 1987), cert. den. 108 S. Ct. 156 (1987) (for standard of §523(a)(6)). The Court also could conclude that the Bank's loan officer was negligent in agreeing to recover the collateral from the driveway and in not asking for an updated list of collateral when the loan was renewed July 30, 1991. Tr. Ex. 1.

As an indication of the debtor's good faith efforts, the debtor spent \$188.56 on parts to repair the truck just five days before he filed bankruptcy, and, at that time, the debtor knew that he intended to surrender the truck to the Bank. Tr. Ex. 7.

As to the allegations of a false financial statement, there is no proof to support that the debtor intentionally gave such a false statement. In fact, the proof established that when the note was renewed in July, 1991, the debtor showed his equipment to Mr. Hall, the loan officer. It can not be said that the Bank reasonably relied upon the original list of collateral when it renewed the loan in 1991.

CONCLUSION

From all of the witnesses and exhibits the Court finds that the witnesses were credible and that the Bank has failed to carry its burden of proof for an exception from discharge. A logical inference can be drawn from the proof that someone other than the debtor removed tools from the truck before the Bank repossessed the truck. The Bank is certainly free to pursue available state law remedies against any other party who may have wrongfully taken the Bank's collateral, and the Court believes that the debtor would cooperate in such an effort by the Bank.

The debtor sought attorney fees and costs pursuant to §523(d); however, by the statutory language that section is not applicable. Section 523(d) allows such a recovery when the creditor, without substantial justification, seeks a §523(a)(2) determination of dischargeability of a consumer debt. This debt was a business debt, not a consumer debt. Furthermore, the Bank had a substantial justification for filing its complaint in view of its failure to recover all of its collateral.

IT IS THEREFORE ORDERED THAT:

1. The Bank's complaint is denied and the debtor's debts to this Bank are discharged;
2. The debtor's request for §523(d) fees and costs is denied. Each party will bear its own costs and fees.

SO ORDERED this 23rd day of June, 1992.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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