

IN THE UNITED STATES DISTRICT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
STEPHEN EARL MCBRIDE and)
PAMELA ELAINE MCBRIDE,)
)
Debtors.)
)
C & M VIDEO, INC.,)
)
Plaintiff-Appellee-)
Cross-Appellant,)
)
vs.) CIVIL NO. 95-4020-JLF
)
STEPHEN EARL MCBRIDE and) (BK 93-40864/ADV. NO. 94-4040)
PAMELA ELAINE MCBRIDE,)
)
Defendants-Appellants-)
Cross-Appellees.)

OPINION

FOREMAN, District Judge:

This matter is before the Court on cross-appeals from the bankruptcy court's December 7, 1994, order, which denied the debtors a discharge pursuant to 11 U.S.C. § 727(a)(2)(A) and entered judgment in the amount of \$6,930 on creditor C&M Video, Inc.'s claim against the debtors. The order was entered in a case or proceeding referred to the bankruptcy judge under 28 U.S.C.

§ 157 (1988) and the parties have filed timely appeals. Thus, this Court has jurisdiction to hear the appeal under 28 U.S.C. § 158 (1988).

The parties have requested oral argument. However, the Court finds that the facts and legal arguments are well-presented in the parties' briefs. Therefore, the Court finds oral argument

unnecessary pursuant to Bankruptcy Rule 8012.¹

I. BACKGROUND

The events leading to this appeal commenced in September 1990, when the debtors, Stephen and Pamela McBride, purchased certain inventory and equipment to operate a video store in Anna, Illinois. As part of this transaction, they signed two promissory notes. The first, executed on September 25, 1990, was payable to the order of Terry Monroe, the president and chief executive officer of C&M Video, Inc., in the amount of \$10,000 plus interest. Pl.'s Ex. 1. The second note, executed on January 2, 1991, promised to pay C&M Video the amount of \$49,351.74 plus interest. Pl.'s Ex. 2.

In conjunction with the second note, the McBrides signed a Security Agreement giving C&M Video a security interest in "all of the video tape inventory, fixtures, including shelves, an Acer Computer System, signage and office supplies, all located at McBride's store in Anna, Illinois. " Pl.'s Ex. 3. When the debtors defaulted on their

¹Rule 8012 provides that oral argument shall be allowed in all cases

unless the district judge or the judges of the bankruptcy appellate panel unanimously determine after examination of the briefs and record, or appendix to the brief, that oral argument is not needed. . . .

Oral argument will not be allowed if (1) the appeal is frivolous; (2) the dispositive issues or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Bankruptcy Rule 8012.

payments, C&M Video sent an agent to the McBrides' store on November 6, 1993, to repossess the central processing unit of the store's computer. Tr. at 207-08, 244. The computer files were used to create a list of the store's inventory, id. at 244, after which C&M Video obtained an order of replevin from the Circuit Court of Effingham County. Id. at 246.

Before C&M Video arrived to carry out the replevin order, the McBrides received an anonymous phone call on November 11, 1993, alerting them to the issuance of the order. Id. at 89-90. The McBrides then removed 500 videotapes from their store, along with some miscellaneous video and Nintendo equipment and the store's theft-prevention system. Id. at 51, 92-93.

The McBrides testified that they removed these items based upon their attorney's advice. They testified that they called the attorney soon after receiving the anonymous tip and that he advised them to remove items that the McBrides believed were theirs -- i.e., not covered by C&M Video's security agreement. Id. at 49-51, 90-91, 209-10. When pressed for an explanation as to how they had selected the specific tapes to take home, however, the McBrides' answers were inconsistent and vague. Pamela McBride initially testified that she attempted to take new movies that she believed were not covered by C&M Video's security agreement. Id. at 50-51. She later changed her testimony to say that she had taken both new movies and "older" movies but, in the next breath, reverted back to testimony that all 500 tapes had been purchased within the last three months. Id. at 64. She ultimately conceded that she "just randomly took things. I had no

rhyme or reason for it." Id. at 131.

Steve McBride testified that they removed both new releases as well as older tapes that were hard to replace through wholesalers. Id. at 189-90. He testified "there was no reasoning behind" their decision to take some new releases but not others. Id. at 191.

Their attorney's recollection of the events was "extremely hazy." Id. at 163-64. He remembered telling the McBrides that they could keep property at their home for purposes of safekeeping. Id. at 145-46, 165. On direct examination, he testified that he believed this conversation occurred after C&M Video had repossessed the remainder of the store's contents and that the advice was with respect to items such as videotapes that were returned after the business ceased to exist. Id. at 146-47. However, upon cross-examination, he stated that he could not say "for a hundred percent sure" whether the conversation occurred before or after C&M Video's repossession of the entire store. Id. at 163. When pressed further, he stated that he could not refute the McBrides' testimony; he stated that it was possible that they had sought his advice before C&M Video arrived for the repossession and that he had informed them that they could secure the property at their home until it was decided who would be entitled to it. Id. at 164-65. Monroe and other C&M Video agents arrived on November 12, 1993, to repossess the video store inventory pursuant to the replevin order. Id. at 246. Based upon the computer's records of November 6, 1993, they determined that numerous items were missing, including 1,402 video and Nintendo tapes. Id. at 258. Monroe subsequently contacted the Union County state's attorney to pursue possible criminal action

regarding the missing inventory. Id. at 259-60. While in Anna to meet with the state's attorney, he visited the video store, which had been reopened on or around November 24, 1993, under the ownership of the McBrides' son, Justin. Id. at 261, 467.

After questioning the McBrides, the state's attorney sent Monroe a letter dated December 15, 1993, which stated that "Steve and Pam absolutely deny that they still have any of your inventory or secured property. They stated that the security system which is in place [in the reopened store] was obtained elsewhere and that the tape inventory was purchased from a video store which recently closed in upstate Illinois." Pl.'s Ex. 11. The McBrides introduced evidence in the bankruptcy proceeding to show that Justin McBride had in fact purchased the inventory on November 24, 1993. Def.'s Exs. Q, R.

C&M Video obtained a second replevin order, this one from the Circuit Court of Union County, and served it at the Anna video store on February 15, 1994. Tr. at 268. Monroe testified that they obtained 439 additional videotapes² on this occasion. Id. at 270. Pamela McBride testified that she also turned over the theft-prevention system and the various VCRs and Nintendo and computer equipment that she had previously stored at their home. Id. at 100-04. There is conflicting testimony as to whether the McBrides also offered to return the 500 tapes they still had at home. Id. at 105-06, 269-70. In any event, the tapes were not returned at that time. The debtors' attorney sent

²The parties dispute whether these tapes were covered by the security agreement on Stephen and Pamela McBride's inventory or whether the tapes were part of Justin McBride's newly purchased inventory.

a letter in July 1994, stating that the tapes could be picked up from the McBrides at a time to be arranged by the parties. Pl.'s Ex. 9. The tapes were ultimately turned over in October 1994. Id. at 73.

On November 16, 1993, which was within a week after the first replevin order was served, the McBrides filed for relief under Chapter 7 of the Bankruptcy Code. Tr. at 161. C&M Video filed a complaint that objected both to the dischargeability of the debt owed to C&M Video in particular and to the debtors' discharge in general. R. Doc. 1. Following a two-day hearing, the bankruptcy court entered an order that granted the latter relief pursuant to 11 U.S.C. § 727(a)(2)(A) and further ordered that judgment be entered in favor of C&M Video in the amount of \$6,930. Id. Doc. 33.

In an accompanying opinion, the bankruptcy court explained that the discharge was denied because the debtors had concealed property from C&M Video with the intent to hinder, delay, or defraud the creditor. Id. Doc. 32, at 3, 5. The court noted that there was undisputed evidence that the debtors had removed 500 tapes and other equipment from their store shortly before the first replevin order was served on November 12, 1993. The opinion rejected the debtors' claim that they had removed the property based upon a belief that it was not subject to the security agreement.

The evidence presented by the [debtors] on this point was simply not credible and was belied by the fact that [they] did not take all of the tapes which they had purchased subsequent to the security agreement with the Plaintiff. Rather, the [debtors] apparently took those tapes which they considered to be the most valuable leaving behind many others that would fall into the category of tapes purchased subsequent to Plaintiff's security agreement. The [debtors] further argue that

their lack of intent to hinder, delay, or defraud the Plaintiff was evidenced by the fact that the tapes which were removed by the [debtors] from their video store were listed upon their bankruptcy schedules. While the Court notes that this fact is true, the Court finds that at trial the evidence indicated that, while the [debtors] had listed 500 old tapes on their bankruptcy schedules with a value of \$5,000, the Debtors, in fact, had removed at least 500 tapes which would have had a value in excess of the average of \$10 as disclosed on the Debtors' bankruptcy schedules.

Id. at 4.

The opinion also rejected the debtors' claim that they had relied upon their attorney's advice in removing the property from their store. The bankruptcy judge acknowledged that the debtors had some conversations with their attorney regarding the property. "However, the evidence did not support a finding that the Debtors had acted solely on advice of their counsel in removing and concealing the equipment in the manner that they did." Id. at 5. Having found that C&M Video carried its burden of proof under § 727(a)(2)(A), the bankruptcy court did not further address the allegations pursuant to §§ 727(a)(5) and 523(a).

The opinion went on to discuss C&M Video's request for judgment against the debtors. The bankruptcy judge found that C&M Video was entitled to damages in the amount of \$6,930 because approximately 462 videotapes were still missing from the inventory.³

³This figure appears to be a typographical error. The bankruptcy court's decision indicates that the number is based upon C&M Video's calculation that 1,402 videotapes were missing from the inventory as recorded in the store's computer as of November 6, 1993, with credits for the 439 tapes that were seized under the February 1994 replevin order and the other 500 tapes were returned by the debtors in October 1994. The correct figure would appear to be 463.

The debtors have appealed the order in its entirety. In addition to challenging the decision to deny their discharge and to award \$6,930 in damages, they argue that the bankruptcy court erred in striking their affirmative defense of fraudulent inducement and in denying their motion to amend their answer to include a judicial estoppel defense. C&M Video has cross-appealed from the bankruptcy court's calculation of the damages.

II. ANALYSIS

In reviewing a bankruptcy court's judgment or order on appeal, a district court is authorized to "affirm, modify or reverse . . . or remand with instructions for further proceedings." Bankruptcy Rule 8013. The bankruptcy court's findings of fact "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." Id.; see also In re Excalibur Auto. Corp., 859 F.2d 454, 458 (7th Cir. 1988); In re Evanston Motor Corp., 735 F.2d 1029, 1031 (7th Cir. 1984). However, where questions of law are concerned, the district court will review the bankruptcy court's ruling de novo. In re Sanderfoot, 899 F.2d 598, 600 (7th Cir. 1990), rev'd on other grounds, 111 S.Ct. 1825 (1991); In re Evanston Motor Corp., 735 F.2d at 1031.

A. Denial of Discharge Under § 727(a)(2)(A)

Section 727 of the Bankruptcy Code provides that a debtor shall be denied a discharge in bankruptcy if the court finds that

the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred,

removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed . . . property of the debtor, within one year before the date of the filing of the petition

11 U.S.C. § 727(a)(2)(A)(1988). "To deny discharge, a court must find proof of the debtor's actual intent to defraud, . . . but that finding may be inferred from the circumstances of the debtor's conduct." In re Smiley, 864 F.2d 562, 566 (7th Cir. 1989) (citations omitted). "A bankruptcy court's finding that a debtor acted with intent to hinder, delay, or defraud is a factual determination that may be reversed only if it is clearly erroneous." Id. (quoting In re Reed, 700 F.2d 986, 992 (5th Cir.1983)).

Upon review of the record in its entirety, the Court concludes that the bankruptcy court's finding on this issue was not clearly erroneous. There is undisputed evidence that the debtors removed certain property from their video store shortly before their creditor, C&M Video, was to serve a replevin order. Although the debtors testified that their attorney had advised them to take home any property that was not covered by C&M Video's security agreement, their actions were inconsistent with this advice. Instead of taking all of the tapes that were arguably outside the security agreement, the debtors removed only the more valuable new releases and some vintage tapes that would be difficult to replace. The bankruptcy judge, therefore, found the debtors' explanations to be not credible.

Furthermore, although the debtors listed some of this equipment on their bankruptcy schedules filed in late November 1993, the

bankruptcy court noted that the debtors substantially undervalued the 500 tapes in their possession and completely omitted any reference to the theft-prevention system. Most damning, however, is the fact that the debtors denied having any of C&M Video's property when contacted by the state's attorney in December 1993. The state's attorney's letter to C&M Video suggests that the debtors were asked specifically about the theft-prevention system and videotapes that were in Justin McBride's store. As a result, the debtors were alerted to the fact that C&M Video believed that such items were subject to its security agreement. Significantly, the debtors made no attempt to reveal the fact that they had the original theft-prevention system, as well as 500 tapes, in their home under their understanding that the items were outside the security agreement. Instead, the debtors simply denied that they had any of C&M Video's property and told the sheriff that Justin McBride had obtained the new inventory and theft-prevention system elsewhere.

Under the clearly erroneous standard, the bankruptcy judge's factual findings -- including his credibility determinations -- will be reversed only if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985). As the trier of fact, the bankruptcy judge had

the best "opportunity to observe the verbal and non-verbal behavior of the witnesses focusing on the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture and body movements," as well as confused or nervous speech patterns in contrast with merely looking at the cold

pages of an appellate record.

United States v. Nururdin, 8 F.3d 1187, 1194 (7th Cir. 1993) (citations omitted), cert. denied, 114 S.Ct. 1328 (1994). Thus, special deference must be accorded to his credibility findings. United States v. Hamm, 13 F.3d 1126, 1129 (7th Cir. 1994).

The bankruptcy judge's ability to observe the witnesses is especially critical in the case at bar because the debtors' subjective intent was at issue. The debtors' act of removing the property from the video store, taken by itself, could be viewed either as an attempt to conceal the property from the creditor or as a means of safekeeping property that was not subject to the creditor's security agreement. Thus, the case turned largely upon the debtors' explanations for their actions and their demeanor in testifying as to this explanation. While the evidence discussed above could be viewed favorably to the debtors, the record also supported a finding that the debtors had improperly concealed the creditor's collateral. "Where there are two permissible views of the evidence, the factfinder's choice cannot be clearly erroneous." Anderson, 470 U.S. at 574.

For these reasons, the Court concludes that the bankruptcy court was not clearly erroneous in finding that the debtors had concealed property from C&M Video with the intent to hinder, delay, or defraud the creditor. The Court, therefore, AFFIRMS the bankruptcy court's decision to deny the debtors a discharge pursuant to 11 U.S.C. § 727(a)(2)(A).

B. Rejection of the Debtors' Affirmative Defenses

The debtors also challenge the bankruptcy court's rejection of the debtors' affirmative defenses. One of the defenses was raised in the debtors' answer to C&M Video's adversary complaint, alleging that C&M Video had fraudulently induced the debtors into executing the promissory notes upon which C&M Video's claim was based. The debtors subsequently filed a motion to amend their answer to raise the second defense of judicial estoppel. The bankruptcy court granted C&M Video's motion to strike the fraudulent inducement defense and denied the debtors' motion to amend their answer to include the estoppel defense.⁴ The debtors challenge both rulings.

C&M Video argues that the bankruptcy court properly rejected the debtors' fraudulent inducement defense because the theory was part of a counterclaim that the debtors had filed in the Union County replevin action. C&M Video argues that upon the filing of the bankruptcy petition, this counterclaim became property of the bankruptcy estate. The debtors unsuccessfully sought to have the claim abandoned; the bankruptcy trustee instead sold the claim to the highest bidder, which was C&M Video. C&M Video, therefore, argues that the debtors cannot raise the claim as an affirmative defense.

Neither party has cited any authority in their briefs in support of their respective positions on this issue. In oral argument before the bankruptcy court, however, C&M Video relied upon In re Kressner, 159 B.R. 428, 431 (Bankr. S.D.N.Y. 1993), which stated that a debtor's

⁴The bankruptcy court gave no explanation for its ruling on the affirmative defenses. The Court, therefore, presumes that the bankruptcy judge agreed with the legal arguments presented by C&M Video in opposition to the defenses.

counterclaim was improper in a dischargeability proceeding because "the trustee in bankruptcy, and not the debtor, is the proper person to recover prepetition claims for the estate." The decision is based upon the well-established rule that "[a] debtor lacks standing to object to a claim against the estate because he has no interest in the distribution to creditors of assets of the estate." Id. at 432.

Kressner is inapplicable to the case at bar. Simply put, the debtors are not attempting to secure judgment on a counterclaim, but instead have raised affirmative defenses to challenge the validity of C&M Video's claim. The Court recognizes that a debtor ordinarily would not have standing to object to a claim. However, that rule is based upon the assumption that the debtor has no pecuniary interest in the distribution of his assets among his creditors.

[S]ince the bankrupt is normally insolvent, he is considered to have no interest in how his assets are distributed among his creditors and is held not to be a party in interest. . . . However, when it appears that, if the contested claims are disallowed, there may be a surplus of assets to be returned to the bankrupt, the bankrupt is considered to have standing to contest the claims.

Willemain v. Kivitz, 764 F.2d 1019, 1022 (4th Cir. 1985) (quoting Kapp v. Naturelle, Inc., 611 F.2d 703, 706-07 (8th Cir. 1979)). Where a creditor has sought to have a debt declared nondischargeable -- or has argued that the debtor should be denied a discharge altogether -- the debtor obviously has a pecuniary interest in objecting to a creditor's claim because the debtor himself will retain responsibility for the debt.

At least two courts have recognized that a debtor may raise a

claim of setoff or recoupment as an affirmative defense to a complaint objecting to the debtor's discharge or the dischargeability of a debt even though the debtor is precluded from raising these issues in a counterclaim. In re Nasr, 120 B.R. 855 (Bankr. S.D. Tex. 1990); In re Henderson, 24 B.R. 630 (Bankr. M.D. Ga. 1982). As the Texas bankruptcy court pointed out, section 541 of the Bankruptcy Code gives the bankruptcy trustee the exclusive right to assert a debtor's causes of action, but section 558 provides a more limited right with respect to asserting the debtor's defenses. Nasr, 120 B.R. at 858; 11 U.S.C. §§ 541, 558. "The trustee is entitled to use the defense to its fullest extent without preventing the debtor from raising the same." Id.

The court, therefore, allowed the debtor to assert an affirmative defense based on the alleged fraud in the inducement -- i.e., the same defense at issue in the case at bar. Id.

Debtor is asserting the actions of setoff and recoupment as affirmative defenses to the claim of fraud under § 523(a)(2)(A). As defenses, these actions are not exclusive to the trustee and may be asserted by the debtor. A trustee has no incentive to raise defenses in a complaint to determine dischargeability since this would provide little or no benefit to the estate, but no reason has been shown to bar debtor from raising these defenses. Furthermore, allowing debtor to raise these defenses is consistent with the policy of favoring debtor in a complaint to determine dischargeability.

Id. The Georgia bankruptcy court similarly held that while a debtor is prohibited from asserting a counterclaim against a creditor, the debtor could defend against a creditor's complaint by raising as a defense certain debts allegedly owed to him by the creditor. Henderson, 24 B.R. at 632. The court noted, however, that an affirmative defense is

purely defensive in nature. Thus, "a claim of setoff may not be used to gain an affirmative recovery but may be employed only to reduce the claim of the opposing party." Id.

Based upon this analysis, the Court finds that the bankruptcy court erred in striking the debtors' affirmative defense of fraudulent inducement. Because C&M Video has purchased the counterclaim, the debtors may not seek an affirmative recovery. However, they may rely upon the alleged fraud as an affirmative defense to attack the validity of C&M's claim in the first instance -- i.e., whether C&M's claim is voidable for fraud in the inducement.

Turning to the judicial estoppel argument, the debtors argue that C&M Video, having purchased the debtors' counterclaim, is now estopped to deny that the debtors have a valid defense for fraudulent inducement. "By purchasing the claims of [debtors] against [C&M Video] for fraud, for \$7,000, [C&M Video] is estopped to deny that it defrauded the [debtors]. If [debtors'] fraud claim against [C&M Video] was without merit, surely [C&M Video] would not have paid \$7,000 to purchase such claim against itself." Appellant's Brief, at 14.

Under the doctrine of judicial estoppel, "[a] litigant is forbidden to obtain a victory on one ground and then repudiate that ground in a different case in order to win a second victory." Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1427 (7th Cir. 1993).

The principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events. .

. . . "Judicial estoppel, however, is applied only where the party prevails in suit #1 and then tries to take a position in suit #2 inconsistent with that taken in suit #1." . . . "The offense is not taking inconsistent positions so much as it is winning, twice, on the basis of incompatible positions."

Chrysler Motors Corp. v. International Union, Allied Indus. Workers of Am., 2 F.3d 760, 764 (7th Cir. 1993). Thus, to assert judicial estoppel, the litigant must show that the party to be estopped: (1) asserted a particular position in a prior action; (2) prevailed in the prior action as a result of taking that position; and (3) is attempting to assert an inconsistent position in a subsequent proceeding.

The debtors argue that C&M Video, by purchasing the debtors' counterclaim from the bankruptcy trustee, took the position that the counterclaim was meritorious. Therefore, they contend that C&M Video cannot take the opposite position by challenging the debtors' affirmative defense of fraudulent inducement in the pending proceeding. This argument fails, however, for two reasons. First, C&M Video's decision to purchase the counterclaim does not constitute an assertion that the counterclaim has merit. To the contrary, the transaction is more in the nature of a settlement or compromise of the claim -- i.e., C&M Video paid \$7,000 to avoid litigating the claim. That does not necessarily mean that C&M Video believes the claim has merit, as it might if C&M Video has purchased a claim against another entity with the hope of ultimately recovering a judgment. Rather, the purchase is more likely to have resulted from a financial determination that it would cost less to purchase the counterclaim than it would to proceed with litigation to ultimately defeat the claim.

Secondly, even if the Court were to assume that C&M Video has asserted the validity of the counterclaim by purchasing it from the trustee, the debtors have not shown that C&M Video has "prevailed" on that assertion. C&M Video has not attempted to obtain a judicial determination as to the merits of the counterclaim. To the contrary, as stated above, the purchase of the counterclaim was the equivalent of a settlement, which, as the Seventh Circuit has recognized, "sidesteps the issue in the first case so that neither side prevails on the particular contested issue." Kale v. Obuchowski, 985 F.2d 360, 362 (7th Cir. 1993); see also Warda v. Commissioner, 15 F.3d 533, 538 (6th Cir.) ("a settlement, even in the form of an agreed order, usually does not constitute judicial acceptance of the terms the settlement contains."), cert. denied, 115 S.Ct. 55 (1994); Bates v. Long Island R.R., 997 F.2d 1028, 1038 (2d Cir.) ("A settlement neither requires nor implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel.") (citations, internal quotations omitted), cert. denied, 114 S.Ct. 550 (1993); Reynolds v. Commissioner, 861 F.2d 469, 473 (6th Cir. 1988) ("When an ordinary civil case is settled, there is no 'judicial acceptance' of anyone's position and thus there can be no judicial estoppel in a later proceeding.").

By purchasing the counterclaim, C&M Video did not obtain a victory on any ground; rather, it avoided any determination on the merits by buying out its opponent. Accordingly, the Court finds that the bankruptcy court correctly denied the debtors' motion to amend their answer to include an affirmative defense of judicial estoppel.

C. Calculation of Damages

After determining that the debtors should be denied a discharge, the bankruptcy court proceeded to award judgment to C&M Video in the amount of \$6,930, which was based upon the court's determination that 462 videotapes that were missing from the inventory pledged to C&M Video as collateral. In its cross-appeal, C&M Video argues that the bankruptcy court erred in reaching this determination because the court failed to award a reasonable attorney's fee, as provided for in the promissory note. C&M Video further argues that the bankruptcy court failed to recognize that while some of the collateral was eventually turned over to C&M Video, some of the videotapes depreciated in value and C&M Video was deprived of the use and/or rental value of the tapes and equipment between the time that the first replevin order was served and the time that the property was turned over. Thus, C&M Video argues that the judgment failed to account for this depreciation and loss of use of the collateral.

Upon review of the record, the Court is unable to determine any legal basis either for the bankruptcy court's award or the additional damages sought by C&M Video based upon depreciation and loss of use of the collateral. Under the default provisions of the security agreement, C&M Video was entitled to all of the rights and remedies of a secured party under the Illinois Commercial Code. Pl.'s Exs. 2, 3. Thus, C&M Video had the right to repossess the collateral and to either (1) dispose of the collateral, applying the proceeds toward satisfaction of the debt and the costs of the sale, including a reasonable attorney's fee; or (2) retain the collateral in satisfaction

of the debt. 810 Ill. Comp. Stat. § 5/9-503 -- 4/9-505. If a creditor chooses the first option, the creditor may seek a deficiency judgment against the debtor. Id.

§ 5/9-504(2). Under the second alternative, the creditor "keep[s] the collateral as his own, thus discharging the obligation and abandoning any claim for a deficiency." Id. § 5/9-505 cmt. 1. Neither option provides for damages for missing collateral or for depreciation or loss of use of collateral -- other than to the extent that the collateral would not be available to reduce the amount of any deficiency if the collateral is sold under § 5/9-504.

The record indicates that C&M Video repossessed the collateral but there is no indication that it had disposed of that property or had exercised its option to retain the collateral in satisfaction of the debt. Thus, there is no way to determine whether C&M Video was in fact entitled to any damages at all. Furthermore, even if C&M Video opted to dispose of the collateral under § 5/9-504, its measure of damages would be in the nature of a deficiency judgment -- i.e., for the portion of the debt that was not repaid by the sale of the collateral. The defendant's pre-trial brief states that the debtors still owed C&M Video \$25,888 at the time the bankruptcy petition was filed. No such evidence was presented during the hearing to support that claim. More significant, however, is the failure to provide any evidence that the collateral was sold, and for what amount, as required to determine whether any deficiency exists.

In short, the Court finds no justification for the bankruptcy court's award under the above-cited provisions of the Illinois

Commercial Code. The Court further notes that neither the bankruptcy court nor the appellee have discussed, or even alluded to, any other legal theory to support the bankruptcy court's award, and none is readily apparent from the record.

Based upon this analysis, the bankruptcy court's calculation of C&M Video's damages was clearly erroneous. For this reason, and because the bankruptcy court erred in striking the debtors' affirmative defense of fraudulent inducement, the case must be remanded to the bankruptcy court for further proceedings consistent with this opinion.

III. SUMMARY

For the foregoing reasons, the Court hereby **AFFIRMS** the bankruptcy court's ruling to the extent that it finds the debtors should be denied a discharge pursuant to 11 U.S.C. § 727(a)(2)(A) for concealing property with the intent to delay, hinder, or defeat a creditor. However, the Court **REVERSES** the bankruptcy court's judgment with respect to the validity and amount of the creditor's claim against the estate. Accordingly, the case is hereby **REMANDED** to the bankruptcy court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

DATED: MAY 31, 1995

/s/ JAMES L. FOREMAN
DISTRICT JUDGE