

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
STEPHEN EARL McBRIDE and) Bankruptcy Case No. 93-40864
PAMELA ELAINE McBRIDE, d/b/a)
C & M Video, d/b/a Graham's)
Flowers & Gifts,)
)
Debtors.)
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)
C & M VIDEO, INC.,)
an Illinois Corporation,)
)
Plaintiff,)
)
vs.) Adversary Case No. 94-4040
)
STEPHEN EARL McBRIDE and)
PAMELA ELAINE McBRIDE, d/b/a)
C & M Video, d/b/a Graham's)
Flowers & Gifts,)
)
Defendants.)

OPINION

This matter having come before the Court on a Complaint Objecting to Dischargeability and to Discharge filed by Plaintiff, C & M Video, Inc.; the Court, having heard sworn testimony and arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

On or about September 25, 1990, the Defendants entered into a business Note with Terry Monroe, President of C & M Video, Inc., in the principal sum of \$10,000 plus interest at the rate of 11% per annum. Terry Monroe subsequently negotiated said Note to C & M

Video, Inc., the Plaintiff herein, which is the current holder of said Note. On or about January 2, 1991, the Defendants entered into a second Promissory Note with the Plaintiff wherein the Defendants agreed to pay the sum of \$49,351.74, together with interest at the rate of 12% per annum in installments. In conjunction with this second Note, the Defendants entered into a Security Agreement with C & M Video, Inc. in which the Defendants pledged a blanket security interest to C & M Video, Inc. in all of the video tape inventory, fixtures, including shelves, an Acer Computer System, signage and office supplies located at the Defendants' video store in Anna, Illinois.

As of November 6, 1993, it was apparent that the Defendants had defaulted in payment on the Notes held by the Plaintiff. As such, on November 6, 1993, the Plaintiff entered the Defendants' video store in Anna, Illinois, and repossessed the central processing unit of their computer which held a complete list of the Defendants' inventory at the store. Subsequently, on November 12, 1993, the Plaintiff appeared at the Defendants' video store with an Order of Replevin, in Case No. 93-L-58, in the Circuit Court of Effingham County, Illinois, dated November 10, 1993, and proceeded to repossess all movies, counters, and shelving from the Defendants' business pursuant to the parties' Security Agreement. Following the Plaintiff's repossession efforts of November 12, 1993, the Plaintiff determined that numerous items of inventory were missing, including in excess of 1,400 movies and video games, 2 Nintendo decks, 4 VCRs, 1 security system, 1 printer, and 1 computer terminal. The

Defendants filed for relief under Chapter 7 of the Bankruptcy Code on November 16, 1993, and the instant adversary proceeding was filed on June 6, 1994, asserting as a basis for its objection to dischargeability and to discharge the missing inventory from the Defendants' video store.

The Plaintiff's most serious cause of action is brought under 11 U.S.C. § 727(a)(2)(A), which states that:

(a) The court shall grant the debtor a discharge, unless . . .

(2) 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 -

(A) property of the debtor, within one year before the date of the filing of the petition;

The burden of proof is upon the Plaintiff to establish the elements of 11 U.S.C. § 727(a)(2)(A) by a preponderance of the evidence. Grogan v. Garner, 111 S. Ct. 654 (1991). The Court must find that the Defendants acted with actual intent requiring a showing of extrinsic evidence suggesting that fraud exists. In re Smiley, 864 F.2d 562 (C.A. 7 1989). In reviewing the facts in the present matter, the Court finds that the evidence clearly establishes that the Defendants/Debtors concealed property from the Plaintiff within days of their bankruptcy filing with the intent to hinder, delay, or defraud the Plaintiff. The evidence indicates that the Defendants removed at least 500 video tapes from their store in Anna, Illinois, between November 6 and November 12, 1993. The Defendants assert that

this removal was based upon their belief that the tapes were theirs in that they had been purchased subsequent to the Defendants' granting of a security interest in tapes to the Plaintiff. The evidence presented by the Defendants on this point was simply not credible and was belied by the fact that the Defendants did not take all tapes which they had purchased subsequent to the security agreement with the Plaintiff. Rather, the Defendants apparently took those tapes which they considered to be the most valuable leaving many others that would fall into the category of tapes purchased subsequent to Plaintiff's security agreement. The Defendants 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 Defendants 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 Defendants 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 that were more properly characterized as newer tapes which would have had a value in excess of the average of \$10 as disclosed on the Debtors' bankruptcy schedules.

In addition to finding that the Defendants intentionally concealed video tapes covered by the Plaintiff's Security Agreement, the Court also finds that the Defendants concealed certain items of equipment from the Plaintiff even though that equipment was eventually returned to the Plaintiff prior to trial in this matter. The evidence is clear that the Defendants removed several pieces of

equipment, including 4 VCRs, 1 security system, and 2 Nintendo decks from their video store between November 6, 1993, and November 12, 1993. The Defendants assert that this was done on the advice of their attorney in that the Defendants consulted with their attorney upon their assertion that there was a dispute as to ownership of this property. The Defendants assert that their attorney advised them to store this property for safe keeping until a determination could be made as to proper ownership. The evidence indicates that some conversations may have been held between the Debtors and their attorney as to the equipment in question. 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.

After considering the evidence as a whole, the Court finds that there is no doubt that the Defendants acted with the necessary intent to hinder, delay, or defraud the Plaintiff herein by concealing property which was the subject of the valid Security Agreement between the Plaintiff and the Defendants. The Defendants testified as they had to, to show a lack of intent. However, their testimony about their perceptions of their behavior was not supported by the remaining facts and circumstances established at trial. Having found that the Plaintiff has met its burden of proof in showing the elements necessary to deny a discharge under 11 U.S.C. § 727(a)(2)(A), the Court need not further address the Plaintiff's allegations under 11 U.S.C. § 727(a)(5) and 11 U.S.C. §§ 523(a)(4) and (6).

In addition to the Plaintiff's request for the Court to determine questions of discharge and non-dischargeability of the debt between the Plaintiff and Defendants, the Plaintiff also requested that the Court enter judgment against the Defendants in such amount as the evidence may show. In its Complaint, the Plaintiff asserted that the following items were missing from the Defendants' inventory:

1402 movies and video games	\$21,030
2 Nintendo decks	100
4 VCRs	600
1 security system	1,500
1 printer	350
1 computer terminal	<u>350</u>
Total	\$23,930

The evidence at trial indicates that all of the missing items in the Plaintiff's Complaint have been accounted for except for a number of movies and video games which remain unaccounted for.

As for the missing tapes, the evidence indicates that, after a credit for the 500 tapes returned to the Plaintiff which were found to have been concealed in the home of the Defendants, approximately 462 video tapes remain missing from the Defendants' inventory. The Defendants argue that this figure cannot be accurate and, as a main basis for this argument, assert that their son, as manager of the video store, failed to delete tapes which were sold out of the tape rental inventory once they had concluded their useful rental life. In making this argument, the Defendants were unable to come up with any estimate of the number of tapes that might be included in this category, and the evidence also indicated that their son had not actively managed the video store for several months prior to November

1993. The Defendants also assert that the number of missing tapes should be adjusted to reflect tapes that were out to customers on November 12, 1993, when the Plaintiff repossessed Defendants' inventory. Although this assertion by the Defendants is certainly valid, there is not sufficient evidence to suggest that a substantial reduction in the number of tapes claimed to be missing by the Plaintiff should be made in light of the conduct of the Defendants in dealing with the Plaintiff as a whole. As such, the Court finds that the Plaintiff has shown that 462 tapes remain unaccounted for from Defendants' inventory, and those tapes, based upon the evidence, had an average value of \$15 apiece at the time they disappeared, amounting to total damage to Plaintiff in the sum of \$6,930.

ENTERED: December 7, 1994.

/s/ GERALD D. FINES
United States Bankruptcy Judge