

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

IN RE:)
)
) In Proceedings
KENNETH D. COX, and) Under Chapter 7
CAROLYN SUE COX,)
) No. BK 95-40443
Debtor(s).)
)
)
AGRIBANK, FCB, a federally)
chartered corporation,)
)
Plaintiff(s),)
)
)
vs.) No. ADV 95-4049
)
)
KENNETH D. COX, and)
CAROLYN SUE COX,)
)
Defendant(s).)

OPINION

In its previous opinion and order of November 28, 1995, this Court denied the parties' cross motions for summary judgment on the plaintiff's complaint to determine dischargeability of debt under 11 U.S.C. § 523(a)(6),¹ finding that an issue of fact remained as to whether the debtors' admitted conversion of the plaintiff's collateral was "willful and malicious" for purposes of § 523(a)(6). See Agribank, FCB v. Cox, Adv. No. 95-4049, slip op. at 10 (Bankr. S.D. Ill. Nov. 28, 1995). In so ruling, the Court adopted the definition of "willful and malicious" set forth by the Seventh Circuit Court of Appeals in Matter of Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994):

¹Section 523(a)(6) excepts from a discharge any debt--

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

Under § 523(a)(6) . . . willful means deliberate or intentional . . . [and] [malicious means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm.

See Cox, slip op. at 5.

At trial, the parties presented evidence on whether the debtors' act of selling timber subject to the plaintiff's security interest during their previous Chapter 12 proceeding came within the Thirtyacre definition of "willful and malicious" so as to render the debtors' obligation to reimburse the plaintiff nondischargeable under § 523(a)(6). The Court found that the debtors acted intentionally and thus "willfully" under Thirtyacre because the debtors intended to do the physical act--selling the timber--that caused injury to the plaintiff. See 36 F.3d at 700-01. The debtors asserted, however, that their conversion of the plaintiff's collateral was not "malicious" because they relied on their attorney's advice in selling the timber and thus had "just cause or excuse" for their actions.

Reliance on the advice of counsel may constitute a defense in an action under § 523(a)(6)

[w]here a [debtor] has fully and in good faith disclosed the facts to counsel, [counsel has advised the debtor] as a matter of law, and [the debtor has acted] on this advice believing that he has been properly advised[.]

In re Murray, 116 B.R. 473, 476-77 (Bankr. E.D. Va. 1990); see also In re Topper, 229 F.2d 691, 693 (3d Cir. 1956) (advice of counsel may be excuse for an inaccurate or false oath). Whether a debtor may avail himself of such a defense depends on the circumstances of a particular case. Murray, 116 B.R. at 477 (citing In re Breitling, 133 F. 146,

148-49 (7th Cir. 1904).

In this case, debtor Kenneth Cox testified that he contacted his attorney before entering into a contract to sell the timber in question and that his attorney told him he could proceed with the sale. The debtor's testimony, however, was contradicted by his own statement in a 2004 examination conducted during his previous Chapter 12 proceeding:

Q. Did you contact an attorney or anything before you agreed to enter into this timber sale contract or was this something you did on your own?

A. I did it on my own.

Trans. of 2004 Exam. of Kenneth Cox, July 8, 1991, at 10-11, attached to Pltf.'s Mot. Summ. Judg., filed Aug. 29, 1995. The debtors did not call the attorney who represented them in their Chapter 12 proceeding as a witness to corroborate Kenneth Cox's testimony that he relied on the advice of counsel in selling the timber. Cf. Murray, 116 B.R. at 477 ("just cause or excuse" found where counsel admitted giving debtors erroneous advice). Thus, the factual question before the Court rests only on the self-serving testimony of Kenneth Cox, which is contradicted by his prior statement.

Because of this inconsistency between his position at trial and his previous statement, the Court finds Kenneth Cox's testimony that he relied on the advice of counsel in selling the timber to lack credibility. In the absence of other evidence, there is an insufficient basis on which to conclude that the debtors, sale of timber was justified by their reliance on the advice of counsel. For

this reason, the Court finds that the debtors' conversion of the plaintiff's collateral was "willful and malicious" for purposes of § 523(a)(6). Accordingly, the Court will enter judgment for the plaintiff on its complaint and declare the debtors' obligation for the amount realized from the timber sale to be nondischargeable in this bankruptcy proceeding.

SEE WRITTEN ORDER.

ENTERED: April 4, 1996

/s/ KENNETH J. MEYERS
UNITED STATES BANKRUPTCY JUDGE