(Cite as: 1992 WL 381040 (Bankr.D.Vt.))

In re HAWKINS BROTHERS, INC., Debtor.

In re PETER a/k/a Paul Hawkins, Debtor.

HAWKINS BROTHERS, INC., Plaintiff,

v.

HESSTON CREDIT CORP. and Hesston Corp., Defendants.

Nos. 91-00301, 91-10121.

Adv. Nos. 92-1021, 92-1028 and 92-1048.

United States Bankruptcy Court. D. Vermont.

Dec. 11, 1992.

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J.C. Palmisano of Joseph C. Palmisano Associates, Inc., Barre, Vt., for Hawkins Brothers, Inc., (Brothers), and Paul W. Hawkins (Hawkins).

MEMORANDUM OF DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT.

FRANCIS G. CONRAD, Bankruptcy Judge.

***1** Two creditors of two related debtors have moved for summary judgment [FN1] in three adversary proceedings that have been consolidated for trial. We begin by setting out the players.

Hawkins, a Chapter 7 debtor, is the sole shareholder of Brothers, which is the debtor in a pending Chapter 11 case. Brothers was a Ferrisburgh, Vermont, farm equipment dealer. Hesston is a manufacturer of farm machinery and equipment. Brothers sold and serviced, inter alia, the Hesston product line from 1971 until Brothers filed for bankruptcy in 1991. HCC

was incorporated as a wholly owned subsidiary of Hesston in 1975, but engaged in no business until it was sold in 1989 to Fiat U.S.A. Holdings, Inc. After the sale, Hesston and HCC contracted for HCC to provide floor plan financing to Hesston's dealers. Thereafter, HCC provided floor plan financing to Brothers. We consolidated the three adversary proceedings by order entered July 16, 1992 because they involved common questions of law and fact.

We sketch out in broad strokes the claims and counterclaims made in the three original adversary proceedings, in chronological order, so that it is clear who is shooting at whom. AP # 92-1021 was commenced by Brothers by the filing of a Complaint against Hesston and HCC on March 16, 1992. Brothers alleged that, beginning in 1985, Hesston, by and through its field representatives and with the actual or constructive knowledge of their New England area supervisors, began a pattern of fraudulent conduct which left Brothers heavily indebted and unable to make independent financial decisions. Brothers also complained that Hesston exercised wrongful control and domination of Brothers' business. HCC is vicariously liable for Hesston's conduct, Brothers alleges, because HCC was either the parent, affiliate, or subsidiary of Hesston. Brothers claims that the fraudulent conduct resulted in unfair advantage to Hesston and to HCC, at the expense of Brothers and its other creditors, in the amount of $2 million. Brothers asks for judgment in that amount against both Hesston and HCC, and for an order subordinating the claim of HCC to the claims of all other creditors. A substantially identical complaint, dated March 17, 1992, was filed by Brothers against HCC and Hesston in the Vermont Addison Superior Court. That action was designated as AP # 92-1028 upon removal to this Court by HCC on April 15, 1992.

In the third of the three consolidated proceedings, AP # 92-1047, HCC challenges the dischargeability of almost $600,000 HCC claims Hawkins owes, based on a personal guarantee of Brothers' debt Hawkins gave to Hesston in 1983. HCC's complaint alleges that Hawkins engaged in a pattern of fraud which makes the debt nondischargeable under 11 USC §§ 523(a)(2)(A) and (B), (a)(4), and (a)(6). Hawkins counterclaimed against HCC, reiterating its contention that HCC is vicariously liable for a widespread pattern of fraudulent activity engaged in by Hesston, because HCC was a parent, affiliate, or subsidiary of Hesston.

***2** Hesston moves for summary judgment on several grounds. First, Hesston argues that the plain language of a general release given by Brothers to Deutz- Allis releases Hesston. Secondly, it argues that Brothers can make no claim for equitable subordination against Hesston because Hesston has filed no claim in Brothers' bankruptcy to subordinate. Third, Hesston argues that it is entitled to summary judgment as to Brothers' claim that it dominated and controlled Brothers because the deposition testimony of Hawkins establishes that it did not. Fourth, Hesston argues that none of the conduct complained of could have been fraudulent because Hawkins and Brothers were parties to the fraud. Fifth, Hesston argues that Brothers' claim for damages is barred by the doctrine of in pari delicto, which bars the recovery of damages by one wrongdoer against another for injuries arising out of wrongful conduct for which both are equally culpable.

HCC moves for summary judgment on Brothers' vicarious liability claims in both AP # 92-1021 and AP # 92-1028, and on Hawkins vicarious liability counterclaims in AP # 92-1047, arguing (1) that Brothers has failed to allege any facts to warrant disregarding the separate corporate identities of HCC and Hesston, [FN2] and (2) that the General Release to Deutz-Allis extinguishes Brothers' claim against HCC. HCC also moves for summary judgment on two of the four statutory grounds it pursues for holding Hawkins' debt nondischargeable--§§ 523 (a)(2)(A) and (B).

We will address the parties' requests for summary judgment in the order set out above, after first discussing the law governing summary judgments.

I. SUMMARY JUDGMENT

To prevail on a motion for summary judgment, the movant must satisfy the criteria set forth in F.R.Civ.P. 56 as made applicable by F.R.Bkrtcy.P. 7056. F.R.Civ.P. 56(c) provides in part:

[T]he judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

See, Celotex Corp. v. Catrett, 477 US 317, 322, 91 L.Ed.2d 265 (1986), 106 S.Ct 2548, 2552; Eastman Machine Company, Inc. v. United States, 841 F.2d 469 (2d Cir.1988); Hossman v. Spradlin, 812 F.2d 1019, 1020 (7th Cir.1987); Clark v. Union Mutual Life Ins. Co., 692 F.2d 1370, 1372 (11th Cir.1982); United States Steel Corp. v. Darby, 516 F.2d 961, 963 (5th Cir.1975). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials where no genuine issue of material fact is in dispute. Farries v. Stanadyne/ Chicago Div., 832 F.2d 374, 378 (7th Cir.1987).

When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

***3** F.R.Civ.P. 56(e). Celotex Corp. v. Catrett, supra, 477 US at 324, 91 L.Ed.2d at 274, 91S. Ct. at 2553.

II. HESSTON's MOTION FOR SUMMARY JUDGMENT

A. THE DEUTZ-ALLIS RELEASE

In addition to its Hesston line, Brothers also sold equipment manufactured by Deutz-Allis Corporation. After filing of its petition, Brothers and Deutz- Allis engaged in a dispute fought out on several fronts involving the same basic claims of fraud and corporate domination at issue here. Unlike the parties here, however, Brothers and Deutz-Allis settled their differences. The settlement, which called for the exchange of mutual releases, was approved by this Court at a hearing on November 15, 1991. The release from Brothers and Hawkins to Deutz-Allis provided, in pertinent part, as follows:

HAWKINS BROS., INC.... and PETER HAWKINS, a/k/a PAUL HAWKINS, individually, hereby release and forever discharge, and for their successors and assigns, release and forever discharge DEUTZ-ALLIS CORPORATION ... and its successors and assigns, subsidiaries, affiliates, officers, directors, shareholders, employees, and agents, of and from any and all manner of actions, causes of action, suits, damages, judgments, executions, claims for personal injuries, property damage and demands whatsoever, in law or in equity, which they ever had, now have or which their heirs, executors, administrators, successors and assigns hereafter can, shall, or may have against the said Deutz-Allis, its successors and assigns, subsidiaries, affiliates, officers, directors, shareholders, employees, and agents, for, upon, or by reason of any matter, cause or thing whatsoever, at any time up to the date of execution of this Release and particularly, but without in any manner limiting the foregoing, any civil action or claims based upon all the doctrines of conduct and transactions under or relating to a certain Dealer Agreement between Hawkins Bros. and Deutz-Allis dated April 30, 1987; lender liability or equitable subordination, or violation of the Vermont Licensed Lender laws....

(Bold in original; underline added.)

The terms of the release must be construed under Vermont law, because it was made here, negotiated in the context of a bankruptcy proceeding pending here, and arose out of events that took place here. In re Mayo, 112 BR 607, 644- 45 (Bkrtcy.D.Vt.1990). "A release is a contract." Economou v. Economou, 136 Vt. 611, 619 (1979).

The scope of a release is determined by the intentions of the parties as expressed in the terms of a particular instrument considered in the light of all facts and circumstances.

Id. (emphasis added). Determination of the scope of a release is treated like "any other question of contractual construction: where the language is clear, the parties are 'bound by the common meaning of the words which they chose to express the content of their understanding.' " Douglass v. Skiing Standards, Inc., et al, 142 Vt. 634, 636 (1983), quoting Duke v. Duke, 140 Vt. 543, 546 (1982). Parol evidence is inadmissible in such cases. Muir v. Hartford Accident and Indemnity Co., et al, 147 Vt. 590, 592 (1987); Economou v. Vermont Electric Cooperative, Inc., 131 Vt 636, 638 (1973). "(C)onstruction of the unambiguous provisions of a contract is done by the court as a matter of law...." First Wisconsin Mortgage Trust v. Wyman's, Inc., et al, 139 Vt. 350, 354 (1981). Finally, Vermont adheres to the

"canon construing doubtful language of a written instrument against the draftsman." Anderson v. State of Vermont, et al, 147 Vt. 394, 398 (1985).

***4** The unrebutted affidavit of Michael F. Swick, Esq., which accompanies Hesston's Motion, establishes that at the time the releases were exchanged both Hesston and Deutz-Allis were wholly owned subsidiaries of a third corporation, AGCO. In addition, the Swick Affidavit establishes that counsel for Deutz- Allis prepared releases running to Deutz-Allis for execution by Hawkins and Brothers, while counsel for Hawkins and Brothers prepared the release from Deutz-Allis to Hawkins and Brothers. The releases from each side used the same language in referencing Deutz-Allis "and its successors and assigns, subsidiaries, affiliates, officers, directors, shareholders, employees, and agents." Given these circumstances, the canon construing ambiguous language against the drafter is inapplicable.

In any event, we do not believe that the language is ambiguous. Hawkins' deposition testimony establishes that he was aware, prior to filing of the Brothers bankruptcy, that Hesston and Deutz-Allis were related. Transcript of the July 27, 1992 deposition of Paul Hawkins, 53-54 (hereinafter "Transcript"). We believe that the status of Deutz-Allis and Hesston as siblings under common ownership makes them "affiliates" as that word is commonly understood by both laymen and lawyers, and that the Vermont Supreme Court would so hold.

Vermont has had little opportunity to mull over the meaning of "affiliate" in this context, so we can draw scant guidance from its caselaw. In Gramatan National Bank v. Beecher, 122 VT 366, 370 (1961), however, the Court noted in passing that two companies were affiliates, though "separate legal entities, [because] some of the same persons served as officers or on the board of directors of each company." We believe that the case for affiliate status is even stronger here, where both Hesston and Deutz-Allis were solely owned by a common parent.

Black's Law Dictionary (5th ed.1979) defines affiliate as "a condition of being united; being in close connection, allied, associated, or attached as a member or branch." Similarly, the Bankruptcy Code defines "affiliate" as a

corporation 20 percent or more of whose outstanding securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor....

11 USC § 101(1)(B) (emphasis added). Although this definition is limited to affiliates of a debtor, it confirms the understanding of "affiliate" which emerges from the other authorities cited. Taking them as a whole, we hold that two companies both wholly owned by a third company are affiliates.

Brothers, however, argues that the release was not intended to release Hesston, and invites us to look into the underlying factual situation. This inquiry, Brothers argues, is required by the Vermont Supreme Court's holding in Smith v. Gainer, 153 Vt. 442, 448-49 (1990) that it was "most concerned with 'what was in the contemplation of the parties when the release was executed.' " Quoting Economou v. Economou, supra, 136 Vt. at 619. That inquiry, Brothers contends, shows that the parties did not intend the release to extend to Hesston. Smith, however, does not permit such an inquiry under the circumstances here. Smith was an action for negligence arising out of a motor vehicle accident. Plaintiff paid Defendant $8,000 to settle the claims of Defendant against Plaintiff, and received from Defendant a general release. Plaintiff's claims against Defendant were not released by the express language of the release. After receiving the release and settling Defendant's claims, Plaintiff sued Defendant, who interposed the release as an accord and satisfaction. The Vermont Supreme Court reviewed several decisions from around the country which hold that "a party who obtains a release from another party in return for paying money to settle any claims that the second party may have arising out of an accident is barred from bringing an action against that second party for damages absent a reservation of rights," even where "the release is not signed by the party now suing and ... it never mentions the recipient's right to sue." Smith, supra, 153 Vt. at 448. This situation, the Court noted, presents questions of estoppel and public policy, where " '(w)e are not dealing with the interpretation of the language nor the intention of the parties as expressed therein.' " Id., at 448, quoting Harrison v. Lucero, 525 P.2d 941, 944 (N.M.Ct.App.1974). In the case sub judice, however, we are dealing with the construction of a contract, not with questions of public policy or estoppel. The language of the release is clear and its meaning is plain. Accordingly, Brothers and Hawkins are bound by it, and Hesston, an affiliate of Deutz-Allis, is released from liability.

B. EQUITABLE SUBORDINATION

***5** Hesston argues that it is entitled to summary judgment on Brothers' request for equitable subordination, because it has made no claim against the estate to subordinate. Brothers vigorously disputes the point. Why the parties would clash on this point is a complete mystery to us. Not only has Hesston not filed a claim to subordinate, Brothers never asked for equitable subordination against Hesston in either of its complaints. Paragraph 9 of Brothers' complaint in Adv.Proc. # 92-1028 alleges:

As a direct and proximate result of Hesston's inequitable conduct, it has received an economic advantage to its benefit and to the detriment of Plaintiff in an amount to be determined by jury at trial.

Paragraph 8 of Brothers' complaint in Adv.Proc. # 92-1021 alleges:

As a direct and proximate result of Hesston's inequitable conduct, it has received an unfair advantage to its benefit and to the detriment of other creditors in the amount of

approximately ... $2,000,000.00 ... Dollars.

Brothers' only request for equitable subordination was as to HCC, which has filed a claim. The pleadings are clear. Brothers has not made a claim for equitable subordination against Hesston and Hesston has made no claim to subordinate. Accordingly, there is no issue to be disposed of on summary judgment.

C. DOMINATION OF DEBTOR'S BUSINESS

Brothers claims that Hesston dominated and controlled its operations by "misrepresenting and falsifying sales reports, invoices and other related documents of Brothers for [Hesston's] own benefit," and by using "Brothers' financial problems, its leverage as a major creditor, and financial threats to force Brothers to allow its control of the company." Brothers' "Memorandum in Response to Defendants' Motions for Summary Judgment," (unpaginated).

This argument is fraught with difficulties. First, Brothers argues that "its allegations of Defendants' control of its operations, established through economic pressures as a major creditor, are sufficient to support an equitable subordination claim." Id. As earlier noted, with respect to Hesston, there is no claim to subordinate, and Brothers did not request such relief. Second, Brothers has provided us with no authority for the proposition that such conduct will support a claim for damages, which is what it asked for. Third, the Deposition testimony of Hawkins, Brothers' president and sole shareholder, makes it plain that he entered into the misrepresentation and falsification voluntarily, for the money. Transcript, 116. Finally, we have reviewed those portions of the Deposition transcript of Hawkins cited by Brothers in support of its theory that Hesston exercised domination and control, and simply find nothing there to support Brothers' contention. Brothers as the party opposing the motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial." F.R.Civ.P. 56(e), made applicable to this proceeding by F.R.Bkrtcy.P. 7056. Celotex v. Catrett, supra, 477 US at 324, 91 L.Ed.2d 274, 106 S.Ct. at 2553. Brothers has failed to provide either law or facts to support its claim against Hesston HCC.

***6** (T)he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Id., 477 US at 322, 91 L.Ed.2d at 273, 106 S.Ct. at 2552. Accordingly, we will grant summary judgment to Hesston against Brothers on the allegation of domination and control.

D. FRAUD AND MISREPRESENTATION

Brothers alleges that it was the victim of a pattern of fraudulent and deceptive acts by Hesston. Hawkins, however, admitted at his Deposition that he was a willing participant in

the conduct complained of by Brothers. In Vermont,

(a)n action for fraud and deceit will lie upon an intentional misrepresentation of existing fact, affecting the essence of the transaction, so long as the misrepresentation was false when made and known to be false by the maker, was not open to the defrauded party's knowledge, and was relied on by the defrauded party to his damage.

Silva v. Stevens, 156 Vt. 94, 102 (1991), quoting Union Bank v. Jones, 138 Vt. 115, 121 (1980). Brothers' allegation of fraud and deceit falls short at every juncture. First, the only specific allegation of a lie made by Hawkins in the passages from his Deposition transcript to which Brothers points us has to do with future events. Transcript, 87-88. Second, as will be set out in more detail hereafter, Hawkins has conceded that he was the maker of the misrepresentations, although allegedly with the assistance of Hesston's employees. Third, the false reporting was not only open to Brothers' knowledge, but was, according to Hawkins, actually known by him and other Brothers employees. Transcript, 214-217. Finally, Hawkins testified that Brothers in fact profited, at least initially from the misrepresentations. Transcript, 116. Under these circumstances, we will grant summary judgment to Hesston and against Brothers on the fraud and deceit allegations.

E. IN PARI DELICTO

Finally, Hesston requests summary judgment on the basis of the common law doctrine of in pari delicto, which bars an action for damages by a plaintiff arising out of conduct for which the plaintiff is equally culpable with the defendant. We have found no clear statement by the Vermont Supreme Court adopting the doctrine in this State; however, it exists in other jurisdictions, and although a grant of summary judgment on this issue is redundant in light of the other holdings in this memorandum, we grant summary judgment on this point.

II. HCC's MOTION FOR SUMMARY JUDGMENT

A. VICARIOUS LIABILITY

HCC moves for summary judgment on Brothers' vicarious liability claims, arguing that Brothers has failed to allege any facts to warrant disregarding the separate corporate identity of HCC and Hesston. The basis for Brothers' claim is that HCC "is the current parent, affiliated or subsidiary company of Hesston." We assume for purposes of this discussion that Brothers' statement of the standard for liability under its "alter ego" or "instrumentality" theory is correct:

***7** A parent corporation may be held liable for the acts of its subsidiary corporation whenever the parent company "totally dominates and controls its subsidiary, operating the subsidiary as its business conduit or agent."

Brothers' Memorandum, unpaginated, quoting United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir.1985).

Brothers' own argument thwarts the standard it concedes is appropriate. Brothers points to the uncontroverted Affidavit of John Patton, HCC Branch Manager, submitted by HCC in support of its motion.

Mr. Patton has described HCC as merely a 'shelf' or 'dormant' corporation which was created by Hesston Corporation in October of 1975 and until late 1989 conducted no day to day activities. Hesston Corporation clearly dominated and controlled all aspects of the so-called 'dormant' corporation, HCC during this time period.

Brothers' Memorandum, unpaginated. See, "Affidavit of John Patton," paragraphs 2, 10, 11, 12. The problem with this scenario is that it is Hesston which is the parent, not HCC. Brothers would have us hold the subsidiary responsible for the actions of the parent, while citing authority for holding the parent responsible for the actions of the subsidiary. More importantly, however, the uncontroverted Patton Affidavit establishes that:

--HCC did no business from its incorporation by Hesston in 1975 until it was sold in 1989 to Fiat U.S.A. Holdings, Inc.

--Only after the sale did HCC begin to provide floor-plan financing for Brothers.

--From and after the sale, HCC and Hesston had different parent companies, separate management, and engaged in different lines of business.

--After, but contemporaneous with the sale of HCC to Fiat, Hesston and HCC entered into a business relationship under which HCC provided floor-plan financing to Hesston dealers and Hesston assigned to HCC all of its interest in wholesale financing documents and security instruments relating to inventory held by Hesston Dealers, including Hawkins. HCC purchased the assigned interests for value, in good faith, and without knowledge of any claims by Hawkins or Brothers against Hesston.

--Thereafter, the business transactions between HCC and Hesston were arms length.

Patton Affidavit, paragraphs 2, 4, 5, 12.

When the moving party supports the motion [for summary judgment] with affidavits, "an adverse party may not rest upon the mere allegations or denials ... but, by affidavits or as otherwise provided ..., must set forth specific facts showing there is a genuine issue of material fact."

In re Edmond (Edmond v. Maryland), 934 F.2d 1304, 1307 (4th Cir.1991), quoting Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir.1985). Brothers, which bears the burden of proof on its alter ego/instrumentality cause of action, has utterly failed to show any specific facts to controvert those set forth in the Patton Affidavit, or to establish any basis for holding that HCC in any way, shape, manner or form dominated or controlled Hesston's conduct. Accordingly, HCC is entitled to summary judgment in its favor on Brothers' claims of vicarious liability.

B. THE DEUTZ-ALLIS RELEASE

***8** If we are correct in granting summary judgment to HCC on Brothers' vicarious liability claim, then Brothers has no claim which is within the scope of the release to Deutz-Allis. If, however, we are incorrect, and Brothers has established a factual issue with respect to whether HCC is vicariously liable for the acts of Hesston under Brothers' alter ego/ instrumentality theory, then we believe that granting summary judgment to HCC onthe release issue is inappropriate. Courts in other jurisdictions are divided on the question of whether a release of a primary tortfeasor also operates to release a secondarily liable tortfeasor. Annotation, Release of, or Covenant Not to Sue, One Primarily Liable for Tort, but Expressly Reserving Rights Against One Secondarily Liable, as Bar to Recovery Against Latter, 24 ALR 4th 547 (1983). The Vermont Supreme Court has not directly addressed this issue. Given our other holdings in this Memorandum of Decision, we believe that it would not serve a useful purpose to attempt to divine the position that Vermont's Supreme Court would take on this issue. Accordingly, we decline to speculate as to how Vermont would decide this issue. Summary judgment is denied.

C. COMPLAINT TO DETERMINE DISCHARGEABILITY

HCC moves for summary judgment on its complaint to determine dischargeability under §§ 523(a)(2)(A) and (B) of Hawkins' liability for the Brothers debt under a personal guarantee. HCC asserts that fraudulent reports made by Hawkins of Brothers' inventory bar discharge of Hawkins' liability for the indebtedness. HCC provided credit to Brothers which was secured by Brothers inventory. HCC monitored the status of Brothers' inventory by requiring preparation of periodic reports listing the inventory securing Brothers' indebtedness, and its value. Patton Affidavit, paragraph 7. Hawkins helped to prepare the reports, Transcript, 178-79, and signed them. Transcript, 185. The inventory reports were the primary source of information used by HCC to determine the level of floor plan financing it would provide to Brothers. Patton Affidavit, paragraph 7.

As we noted in In re O'Brien, 110 BR 27, 31 (Bkrtcy.D.Colo.1990), "Exceptions to discharge are construed narrowly, and the burden of proving that a debt falls within a statutory exception is on the party opposing discharge." We believe that HCC has met its burden on all elements of its complaints under both §§ 523(a)(2)(A) and (B), with two exceptions. First,

HCC has not established that Hawkins is liable for Brothers' debt, and second, there remains a factual issue as to whether HCC's reliance was reasonable.

Paragraph 6 of HCC's Complaint against Hawkins alleges that:

Defendant's debt to Plaintiff is based on his written guarantee of the indebtedness of Brothers to Plaintiff, dated March 3, 1983.

From our reading of the Guarantee, however, it appears that Hawkins personal liability is only for obligations of Brothers to Hesston and to those parties to whom Hesston assigns such obligations. The record before us, although it is not clear, indicates that HCC is seeking to bar Hawkins' discharge on obligations for which Brothers was directly liable to HCC without an intermediary assignment through Hesston. Accordingly, summary judgment on nondischargeability is not available because their remain factual and legal issues as to whether Hawkins is personally liable for Brothers' direct debt to HCC, if it is direct.

***9** HCC has, however, established, all other elements of its § 523(a)(2)(A) and (B) claims of nondischargeability, except reasonable reliance, and is entitled to partial summary judgment as to those issues.

(1) Section 523(a)(2)(A)

As we noted in O'Brien, supra, 110 BR at 31:

The elements necessary to prevent a discharge under § 523(a)(2)(A) are:

(1) the debtor made a false representation or a willful misrepresentation;

(2) such representation or misrepresentation was made with the intent to deceive the creditor;

(3) the creditor's reliancewas reasonable; and,

(4) the creditor sustained a loss as a result of the debtor's representation or misrepresentation.

The first and second elements are satisfied by the Deposition testimony of Hawkins, Debtor's president and sole shareholder. Hawkins testified, inter alia, to the following false representations made by Brothers that relate to the floor-plan financing provided by HCC:

--"We ... floor planned stuff that was just totally junk," overstating the value of used

equipment traded in by customers. Transcript, 127-28.

--Hawkins reported equipment owned by customers that had been brought in for repairs as equipment which had been traded in, and was thus available to collateralize Brothers' indebtedness to HCC. Transcript, 129.

--On occasion, Hawkins would retrieve a piece of equipment owned by a customer which had been listed as a trade-in on the inventory report so that it was present during inspections by Hesston. Transcript, 129-30.

--Hawkins engaged in "double floor planning," listing the same piece of equipment on the floor plan inventories for financing provided by HCC and by Deutz-Allis. Transcript, 130.

--On occasion, Hawkins would continue to list on the inventory equipment which had been sold, thus misrepresenting the value of the collateral. Transcript, 131-32.

We also believe that Hawkins' deposition establishes that the misrepresentations were made with intent to deceive. He testified that the inventories were used by the floor-plan financing companies to "keep track of the inventory," and acknowledged that he knew the inventories were used to make decisions about extending credit. T. 181-82. Hawkins also acknowledged that HCC was harmed by his misrepresentations because it didn't get the collateral it thought it was getting, and didn't get paid for several pieces of new equipment for which it supplied financing. T. 198. Moreover, Hawkins conceded that he did not know whether HCC would have continued to provide financing if his fraudulent inventory reporting practices had been known. T. 184. Accordingly, we find that Hawkins made false inventory reports intending to deceive HCC.

Although the Patton Affidavit establishes that HCC relied on the inventory reports in extending credit to Brothers, Paragraph 7, HCC has failed to establish the reasonableness of that reliance. The Financing Agreement between Hesston and HCC, entered into at the time of the sale of HCC to Fiat, required Hesston to verify the inventories submitted by Hesston dealers. Patton Affidavit, paragraph 6. We are unable to conclude that it was reasonable for HCC to rely on inventories verified in this manner. Hawkins' deposition testimony was that an agent of Hesston first suggested and then participated in the false statements,, and that the fraudulent practices he participated in were widespread, involving several Hesston representatives, the representatives of other lines of equipment, and even other dealers. Transcript, 116, 127-28, 131, 134, 139, 183, 208-210, 213. These practices began several years before Hesston took HCC off the shelf and sold it to Fiat. Transcript, 115-16. Hawkins testified that the new HCC employees were former Hesston employees. Transcript, 167-68. These sworn statements are unrebutted by HCC. Given the apparent pervasiveness of the fraud, we have to wonder who knew and how much they knew about the patterns of misreporting engaged in by Hawkins and the travelling Hesston representatives. Indeed,

Hawkins' testimony leads us to suspect that knowledge went up at least one rung on the ladder higher than the visiting Hesston representatives. HCC has not met its burden on this issue.

***10** The uncontroverted Patton Affidavit, paragraph 16, establishes that HCC's loss as a result of the fraudulent reporting totalled $427,080.13, $293,337.53 from equipment which had been sold but continued to be reported as inventory, and $133,742.60 in fraudulent reporting of used equipment. As noted above, Hawkins acknowledged that HCC was harmed by his misrepresentations because it didn't get the collateral it thought it was getting, and didn't get paid for several pieces of new equipment for which it supplied financing. Transcript, 198. In the event HCC prevails at trial, damages will be based upon the findings in this memorandum.

(2) Section 523(a)(2)(B)

Section 523(a)(2)(B) excepts from discharge

... any debt ... for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... use of a statement in writing

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive....

The fraudulent conduct by Hawkins set out in the discussion above on § 523(a)(2)(A) was in connection with the production of written statements intended for HCC. Brothers is an insider with respect to Hawkins. § 101(31)(A)(iv). The statements produced contained materially false information about Brothers' financial condition, and, for the reasons set out above, we find that they were produced by Hawkins with the intent to deceive. We are unable to find, however, as previously discussed, that HCC's reliance on them was reasonable in light of the circumstances. Finally, the unrebutted affidavit of John Patton supporting HCC's motion for summary judgment establishes the amount of the damages suffered by HCC. Accordingly, we hold that HCC is entitled to summary judgment against Hawkins on each element of the § 523 (a)(2)(B) claim except liability for Brothers' debt and reasonable reliance by HCC.

E. RECAPITULATION

Based on the foregoing discussion, we hold as follows:

--Summary judgment will be granted to Hesston and to HCC, and against Brothers in AP # 92-1021 and AP # 92-1028, and Brothers' claims against them will be dismissed.

--Summary judgment will be granted to HCC and against Hawkins on Hawkins' counterclaims in AP # 92-1047, and the counterclaims will be dismissed.

--Partial summary judgment will be granted to HCC and against Hawkins in AP # 92-1047 on HCC's §§ 523(a)(2)(A) and (B) dischargeability claims on all elements of each except as to Hawkins' personal liability and the reasonableness of HCC's reliance.

Counsel for HCC shall settle an Order consistent with the views expressed in this opinion. A final pre-trial conference is set for 25th day of January, 1993, at the United States Bankruptcy Court, Rutland, Vermont, at 11:30 A.M.

FN1. Our subject matter jurisdiction over this controversy arises under 28 USC § 1334 (b) and the General Reference to the Court under Part V of the Local District Court Rules for the District of Vermont. This is a core matter under 28 USC §§ 157(b)(2)(A) and (I). This Memorandum of Decision constitutes findings of fact and conclusions of law under F.R.Civ.P. 52, as made applicable by F.R.Bkrtcy.P. 7052.

FN2. HCC also argues at some length that it cannot be vicariously liable on the theory that a Hesston employee, acting as its agent, participated with Hawkins in the fraudulent conduct. Brothers does make the argument, in its "Memorandum in response to Defendants' Motions for Summary Judgment," that "a sales representative of Hesston Corporation, against whom Hawkins Bros., Inc., has asserted claims of fraud, acted as HCC's agent in the inventory inspection process," in support of its vicarious liability theory. It failed to complain of that, however. Brothers' complaints in both AP # 92-1021, paragraph 9, and AP # 92-1029, paragraph 8, allege merely:

Defendant HCC is vicariously liable for the actions of Hesston Corp., ... as the current parent, affiliated or subsidiary of the Hesston enterprise presently engaging in a business relation with Plaintiff.

Paragraph 8 of Hawkins' counterclaim to HCC's dischargeability complaint against him in AP # 92-1047 alleges:

As the Plaintiff is the current parent, affiliated or subsidiary company of Hesston, it is vicariously liable for the actions of Hesston....

F.R.Civ.P. 56(c) requires us to enter judgment based on "the pleadings, depositions,

answers to interrogatories, and admissions on file." Brothers' memorandum fits in none of these categories. The only category into which it could conceivably fit is "pleadings." F.R.Civ.P. 7(a), made applicable to this proceeding by F.R.Bkrtcy.P. 7, eliminates that possibility. Accordingly, we may not consider an argument made in a Memorandum as a claim set forth in a pleading.

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