IN THE UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

RAYMOND N. KENKEL and
EVELYN KENKEL,

Debtors

Case No. 86-832-W
Chapter 7

Adv. No. 86—0147

INNK LAND AND CATTLE COMPANY,

Plaintiff,

V.

RAYMOND N. KENKEL and
EVELYN KENKEL,

Defendants.

FINDINGS AND CONCLUSIONS--DISCHARGEABILITY OF DEBT AND OBJECTION TO EXEMPTION

On November 14, 1988, a trial was commenced on the complaint for dischargeability of debt and objection to exemption. The following attorneys appeared on behalf of their respective clients: Thomas C. McGowan appeared on behalf of Plaintiff, Innk Land and Cattle Company (hereinafter “INNK”); Michael P. Mallaney and Thomas T. Tarbox appeared on behalf of Defendants, Raymond N. Kenkel and Evelyn Kenkel. At the conclusion of the trial on November 22, 1988,the Court took the matter under advisement upon a briefing deadline. Briefs were timely filed and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b) (2) (I) and §157(b)(2)(B). The Court, upon review of the pleadings, evidence presented, arguments of counsel and briefs, now enters its findings and conclusions pursuant to F.R.Bankr.P. 7052.

FINDINGS

1. The Debtors, Evelyn and Raymond Kenkel, filed a petition under Chapter 7 of the Bankruptcy Code on April 9, 1986.

2. On June 25, 1986, INNK filed a complaint to determine dischargeability of debt. INNK asserts that the debt in question is nondischargeable because the Kenkels committed defalcation while acting in a fiduciary capacity, embezzlement and willfully and maliciously caused injury to INNK.

3. On their Schedule B-4, property claimed as exempt, Kenkels claimed their homestead exempt under Iowa Code §561.16.

4. On May 23, 1986, INNK filed an objection to Debtors' claim of exemption asserting that all equity currently existing in Kenkels' homestead exemption was created as a result of Kenkels' wrongful use of INNK funds.

5. On June 27, 1986, the Honorable Richard Stageman, U.S. Bankruptcy Judge, retired, Southern District of Iowa, continued the hearing on INNK's objection to Kenkels' claim of exemption until the trial on INNK's complaint for nondischargeability of debt.

6. On October 18, 1988, during a pretrial conference, the parties agreed to have the complaint for dischargeability of debt and objection to exemption heard at the same time.

7. INNK is a Colorado corporation, with its principle place of business located in Omaha, Nebraska. INNK is the successor corporation of Apishapa Land and Cattle Co. (hereinafter "Apishapa").

8. The Kenkels reside at 150 Ashland Court, Council Bluffs, Iowa. Raymond (hereinafter "R. Kenkel") and Evelyn Kenkel (hereinafter "E. Kenkel"), 66 and 63 years of age respectively, were married in 1948.

9. On June 23, 1976, the Kenkels purchased a ranch in southeastern Colorado. Title was held in the name of Raymond and Evelyn Kenkel. (Exhibit 2). This ranch was known as the Hart Ranch. They purchased this ranch from Johnny King (hereinafter "King") for a purchase price of approximately $900,000.00 with approximately $207,000.00 down. (Exhibit 5). Federal Land Bank, Pueblo, Colorado, provided financing for this purchase and took the Hart Ranch as partial security for the loan. Kenkel's Haskell County, Kansas, farm was used as additional security. (Exhibit 89). The Haskell County Farm was to remain as collateral for the Hart Ranch until such time as the loan was paid down to $600,000.00. (Exhibit 87).

10. On November 11, 1976, Earl M. Meairs entered into a written contract with R. Kenkel to purchase a one—half interest in the Hart Ranch and paid $50,000.00 to R. Kenkel as a down payment.

11. In 1976, R. Kenkel, Earl Meairs (hereinafter "Meairs"), and King entered into a pre—incorporation agreement to form a company known as Apishapa Land and Cattle Co. (hereinafter "Apishapa"). Apishapa was to operate a cattle grazing business on three ranches known as the Hart, Jacobs and Allred. The ranches had the following deeded acres: Hart - 20,000; Jacobs - 10,000; and Allred — 5,000. Grazing leases accompanied the deeded acres.

12. On or about March 18, 1977, R. Kenkel, Meairs, and King incorporated Apishapa Land and Cattle Co. R. Kenkel was elected President and chairman of the board.

13. Apishapa established a checking account in February of 1977. It listed the company address as 407 West Graham, Council Bluffs, Iowa, Kenkels' then residence. E. Kenkel signed company checks as "Sec." R. Kenkel also signed many of these checks.

14. R. Kenkel subscribed for 102,768 shares of Apishapa stock at $2.00 per share for a total of $205,536.00. R. Kenkel contributed the Hart Ranch, cash, and equipment as consideration for the 102,768 shares. This was done with the knowledge and consent of E. Kenkel.

15. Meairs contributed his $50,000.00 share of the Hart Ranch, his interest in the Jacobs Ranch, equipment, and stock, for 102,768 shares of Apishapa.

16. King contributed his share in the Jacobs Ranch, his installment land contract for the Allred Ranch, equipment and livestock in exchange for 44,464 shares of Apishapa stock.

17. Apishapa then had 250,000 outstanding shares of stock at $2.00 per share, or $500,000.00 in stock.

18. The First Meeting of Incorporators of Apishapa was held on March 19, 1977. R. Kenkel and Meairs were directors at the time.

19. R. and E. Kenkel and Meairs induced three additional people to become stockholders in order to raise additional capital and provide capital for the purchase of the Harriman Ranch and

Gonzales Farm. The three additional contributors were Julian Rundle (hereinafter 'Rundle"), Robert W. Bachman (hereinafter "Bachman"), and Anthonie C. van Ekris (hereinafter "van Ekris"). During these transactions, E. Kenkel represented to the prospective contributors that R. Kenkel had contributed the Hart Ranch to Apishapa. She represented that the Hart Ranch was the significant asset being contributed by R. Kenkel. Bachman and Rundle would not have contributed their shares if they would have known that the Hart Ranch was not an asset of Apishapa.

20. The first meeting of stockholders of Apishapa was held April 28, 1977. The minutes of the meeting (Exhibit 549) reflect the following:

The meeting was called to order by the temporary chairman, R. Kenkel.

The following stock subscriptions had been received from the following persons:

Meairs	$205,536.00
R. Kenkel	$205,536.00
King	$ 88,928.00
Rundle	$166,666.68
Bachman	$166,666.66
van Ekris	$166,666.66

All of the subscriptions were fully paid except King's and R. Kenkel's. R. Kenkel's subscription was "contingent upon certain of his assets (Haskell County Farm) being released as collateral on the Hart Ranch, which Ranch was intended to be part of Kenkel's subscription."

The above—named persons, except King, convened themselves as shareholders and elected Meairs, Rundle, R. Kenkel, Bachman, and van Ekris as directors.

The Board of Directors convened and elected the following officers:

President-	R. Kenkel
Vice President-	Meairs
Secretary-	Rundle
Treasurer—	van Ekris

The following common stock was issued:

Meairs	102,768 shares
R. Kenkel	102,768 shares
Rundle	83,334 shares
Bachman	83,333 shares
van Ekris	83,333 shares
	455,536 Total Shares

44,464 shares of common stock were conditionally issued to King and held in escrow pending resolution of a dispute about his contribution of the Jacobs Ranch, which was encumbered by a second mortgage.

The purchase of the Harriman Ranch was unanimously approved and the purchase of said ranch was closed on that day. The Harriman Ranch became an asset of Apishapa at the time of closing. All existing Apishapa real estate, including the Hart Ranch, was pledged as additional security for the purchase of the Harriman Ranch.

The Board of Directors designated the Omaha National Bank as a depository and R. Kenkel, E. Kenkel, Rundle, and Bachman were authorized to draw checks, drafts, or other orders on said account.

R. Kenkel, E. Kenkel, Rundle, and Bachman were authorized to procure credit and borrow money on behalf of Apishapa from the Omaha National Bank. They were also authorized to mortgage, pledge, assign, endorse and deliver to said bank any assets of Apishapa as security.

The minutes were signed by Rundle as Secretary and attested to by R. Kenkel as President.

21. E. Kenkel was present at the meeting on April 28, 1977, and upon the request of R. Kenkel, continued as Apishapa's chief financial officer and bookkeeper. E. Kenkel kept and maintained the corporate books and records at her home in Council Bluffs, Iowa. She also maintained control of the financial statements and records.

22. In June 1977, the additional investors in Apishapa knew that the Hart Ranch had not been deeded to the corporation. R. Kenkel's stock certificate was not issued to him. In November of 1977, stock was issued by Apishapa, and R. Kenkel received his original subscription of 102,768 shares. (Exhibit 550). The stock certificate was not conditionally issued and neither R. Kenkel nor E. Kenkel advised anyone that the Hart Ranch had not been contributed to Apishapa. E. Kenkel entered the certificate of stock on the stock register.

23. E. Kenkel advised the Board of Directors of the importance of employing a good accounting firm to set up a satisfactory bookkeeping system. E. Kenkel contacted the accounting firm, Touche Ross, Omaha, Nebraska, on behalf of

Apishapa for accounting and tax services. Said accountants set up the books upon the information E. Kenkel provided. E. Kenkel provided the information to Touche Ross that the Hart Ranch was an asset of Apishapa and Touche Ross set up the books accordingly. (Exhibit 675)

24. A local corporate office was set up at the ranch in Colorado and a bookkeeper was employed. Copies of all invoices to be paid were sent to E. Kenkel in Iowa before any check could be written and issued. (Exhibit 144).

25. The Kenkels were also using Touche Ross as their personal tax consultants. While preparing the Kenkels' 1977 personal tax return, Touche Ross determined that the Kenkels would incur approximately $200,000.00 in tax liability as a result of exchanging the Hart Ranch for stock in Apishapa.

26. R. Kenkel and E. Kenkel approached the other stockholders and it was agreed that the Hart Ranch should be backed off the corporate books. Touche Ross suggested, and all parties, including the Kenkels, agreed that all payments, past and future, made by Apishapa for all expenses on the Hart Ranch would be treated as lease fees permitting the Hart Ranch to be operated with the other ranches. This was done solely to accommodate the Kenkels by preventing the $200,000.00 tax liability. Apishapa made payments to the Kenkels as lease payments so that the Kenkels could make their Federal Land Bank payment. Title to the Hart Ranch remained in the Kenkels but stock issued in exchange for the Hart Ranch was cancelled with R. Kenkel retaining 24,000 shares. All

operations of the Hart Ranch, including expenses, were part of Apishapa.

27. In September, 1978, Alemeda, a Dutch entity, entered into a purchase and sale agreement with Apishapa whereby the Apishapa ranches were sold to Alemeda. As part of this transaction, R. Kenkel entered into a written agreement (Exhibit 554) on September 19, 1978, whereby the proceeds from the sale of the Hart Ranch were to be regarded as the proceeds of Apishapa and divided as part of the corporate proceeds. In other words, R. Kenkel was to maintain his 22.55% interest in Apishapa. E. Kenkel knew of this document and did not object.

28. The sale to Alemeda never closed. On November 13, 1978, an Agreement was entered into whereby another Dutch entity, herein referred to as “Van Buren” purchased the Apishapa ranches. R. Kenkel and E. Kenkel assigned the Alemeda contract to Van Buren on the Hart Ranch and Apishapa entered into a contract whereby Van Buren purchased the other ranches. (Exhibits 570 and 571). These contracts cross—referenced each other as to terms of purchase, collateralization, and default.

29. Touche Ross was asked by the principals of Apishapa, including the Kenkels, to develop a formula so that if the sale to Van Buren went through, the proceeds of the sale of the property, including the Hart Ranch, would be distributed to the shareholders as if all properties had been sold as one unit. Touche Ross developed a formula on working papers whereby it was ensured that every shareholder, including R. Kenkel, received from the Van buren

sale the same pro rata share as if the ranches were all sold as one unit. (Exhibit 675). Under this formula the Kenkels would have netted more from their pro rata share than they would have netted from the sale of the Hart Ranch as a separate unit.

30. On October 2, 1978, Apishapa, over the signature of R. Kenkel, paid $100.00 to the Federal Land Bank of Pueblo as release fees to release the Haskell County Farm as collateral on the Hart Ranch mortgage. (Exhibit 523). On December 18, 1978, Federal Land Bank of Pueblo mailed to R. Kenkel a release of the Haskell County Farm from the Hart mortgage without further paydown. Neither R. Kenkel nor B. Kenkel revealed this information to the other shareholders.

31. On December 19, 1978, R. Kenkel signed an amendment whereby the plan of liquidation of September 19, 1978, (Exhibit 554) was amended to substitute Van Buren for Alemeda where applicable. (Exhibit 555).

32. The sale to Van Buren was closed on January 18, 1979. As agreed, Apishapa changed its name to INNK Land and Cattle Company (“INNK”) as of that date, as the corporation’s name was transferred in the sale to Van Buren as part of the terms of the sale.

33. Van Buren was contractually required to make a payment to Federal Land Bank on April 1, 1979, in the amount of $83,566.16 on the Hart Ranch. Van Buren failed to make this payment. Van Buren defaulted on the obligations to INNK and the Kenkels under the cross—default provision.

34. On April 11, 1979, R. Kenkel sent a notice of default to Van Buren. (Exhibit 574). Said notice stated that the Kenkels had made the April 1, 1979, payment of $83,566.16 to protect their interest in the Hart Ranch and demanded repayment with interest.

35. On April 13, 1979, E. Kenkel issued a check to R. Kenkel on the Apishapa account in the amount of $83,566.16. (Exhibit 530). This check was labeled as “lease fees” for 1978, and R. Kenkel deposited this check into his personal account. This check caused an overdraft of $20,713.05 on the Apishapa (INNK) account on April 13, 1979. (Exhibit 530).

36. On July 17, 1979, foreclosure proceedings were commenced against Van Buren. The INNK and Hart Ranch foreclosure proceedings were consolidated and R. Kenkel was appointed receiver and E. Kenkel was appointed bookkeeper. R. Kenkel, as receiver, operated all ranches as one unit during the receivership.

37. During the receivership, R. Kenkel and E. Kenkel re-imbursed themselves for all of the Hart expenses from receivership funds which the parties considered as corporate funds.

38. On October 9, 1980, the foreclosure decree was entered in the District Court in and for the County of Otero and State of Colorado. (Exhibit 166A). Judgment was awarded to the Plaintiffs, R. Kenkel and E. Kenkel, for foreclosure of the deed of trust on the Hart Ranch and to INNK for foreclosure of the deeds of trust on the other ranches.

39. Jim Vessels was employed as the ranch manager from August 1977 until May 1984. He testified that at all times during his

employment, the ranches, including the Hart Ranch, were operated and considered as one unit. He understood that the Hart Ranch was a corporate asset. Mr. Vessels managed the Hart Ranch as a corporate asset during the receivership. He showed the ranches to prospective purchasers and was never advised by anyone, including R. Kenkel and E. Kenkel, to distinguish the Hart Ranch in any manner.

40. Vessels kept R. Kenkel informed as to the day-to-day operation of the ranches and cattle commencing in 1978. Vessels did not have authority to make major expenditures and R. Kenkel gave the orders concerning these matters.

41. Vessels sent bills to E. Kenkel in Council Bluffs, Iowa. He talked to E. Kenkel two to three times as week regarding the payment of bills, payroll, and records concerning weights and numbers of cattle.

42. On October 5, 1981, the Kenkels received a sheriff’s deed for the Hart Ranch (Exhibit 74A) and INNK received the other ranches during the same month. The Receivership was closed in October 1981.

43. After the closing of the Receivership, INNK entered into a plan whereby the Hart Ranch would be leased and the Gonzales Farm and Jacobs Ranch would be sold. INNK was attempting to reduce the debt and operating expenses.

44. All of the principals of INNK, including R. Kenkel, were trying to sell the ranches. The ranches were advertised for sale, including the Wall Street Journal on July 31, 1981 (Exhibit 578),

and inquiries were to be directed to R. Kenkel at his Council Bluffs, Iowa, telephone number. R. Kenkel did not object to this sale arrangement and never indicated that the Hart Ranch was not an asset of INNK.

45. On or about February 1, 1982, the Kenkels entered into a lease of the Hart Ranch with Guy and Yvonne Roricks, hereinafter "The Roricks"). The principals of INNK were aware of this lease and considered it as an implementation of the plan to increase the cash flow.

46. Pursuant to said lease, the Kenkels received a $100,000.00 advance rental. The other principals of INNK did not know of this payment until later and no portion of this payment was paid to the corporation.

47. On or about April 5, 1982, the Kenkels entered into an agreement with the Roricks and John and Billicarole Evans, (hereinafter "The Evans"), whereby the Kenkels agreed to sell the Hart Ranch to the Evans as part of a tax—free real estate exchange by the Roricks and Evans (Exhibit 669 and 580). The purchase price for the Hart Ranch was $1,861,614.30. Evans paid $150,000.00 to the Kenkels as earnest money. The closing date was set on or before Thursday, May 20, 1982.

48. The principals of INNK learned of the sale of the Hart Ranch when the ranch foreman, Jim Vessels, called Bachman and told him that he, Vessels, had heard that the Hart Ranch had been sold. Bachman was shocked and a telephone conference call was arranged whereby R. Kenkel, Rundle, van Ekris, and Bachman were on the line.

R. Kenkel was confronted with the information on the sale of the Hart Ranch. R. Kenkel stated that the Hart Ranch had been leased with an option to purchase. However, R. Kenkel did not advise the other principals that the Kenkels had received either the advance rental payment or the earnest money.

49. On March 8, 1982, the Kenkels used $70,000.00 from the lease payment of $100,000.00 as a payment on the mortgage on their personal residence located at 150 Ashland Court, Council Bluffs, Iowa. (Exhibit 691). On April 6, 1982, the Kenkels used $100,000.00 from the earnest money of $150,000.00 as a payment on the mortgage on their personal residence. (Exhibit 693). The corporation did not receive any of the proceeds from the payment of $150,000.00 as earnest money.

50. On May 14, 1982, a special meeting of the board of directors and shareholders was held. All of the directors, R. Kenkel, Rundle, Clairmont (Van Ekris sold a portion of his stock to Clairmont), Bachman, and van Ekris, were present. E. Kenkel, as chief financial officer of the company, was also present, as were representatives of Touche Ross & Company. The Kenkels admitted that the Hart Ranch had been leased with an option to purchase. The Kenkels denied any knowledge of an impending sale, knowing full well that the closing was on May 18, 1982. The representatives of Touche Ross advised all present that the Hart Ranch had always been considered a corporate asset but record ownership of the Hart Ranch had remained in the Kenkels to prevent

serious tax consequences from occurring to the Kenkels. (Exhibit 584).

51. On May 19, 1982, van Ekris wrote a letter to R. Kenkel in which van Ekris confirmed that the Hart Ranch was considered an asset of INNK. (Exhibit 583). Neither R. Kenkel nor E. Kenkel responded to this letter or attempted in any manner to correct van Ekris's understanding of what took place.

52. On May 18, 1982, the Kenkels closed the sale on the Hart Ranch. The Kenkels received $1,882,765.87 as net proceeds from this sale. The net cash profit to the Kenkels was $964,857.86. (Exhibit 668)

53. Throughout the period from the corporation's inception to the ultimate sale of the Hart Ranch in May, 1982, the Hart Ranch was operated as if it were a corporate asset with the corporation paying all debt service and expenses. The expenses amounted to $738,337.48. The corporation incurred an operating deficit on said ranch in the amount of $437,680.52.

54. On May 19, 1982, the Kenkels, using proceeds from the sale of the Hart Ranch, paid the balance of $37,093.97 which was owed on their personal residence.

55. On May 19, 1982, E. Kenkel transferred $397,715.00 to Raylin Ag, their privately held corporation, for the purchase of additional stock with the provision that the Kenkels could borrow back money from Raylin Ag to pay income taxes for 1982.

56. On May 20, 1982, E. Kenkel transferred $100,000.00 as a gift to Thomas Kenkel, their son.

57. On or about June 10, 1982, the principals of INNK held a telephone conference call and R. Kenkel was confronted with the sale of the Hart Ranch. R. Kenkel admitted that the Hart Ranch had been sold and agreed to give the sales proceeds to INNK as a corporate asset. van Ekris confirmed this commitment in writing on June 14, 1982, (Exhibit 585) and neither R. Kenkel nor E. Kenkel immediately challenged van Ekris as to the correctness of this understanding. The first time the Kenkels challenged the correctness of this letter was when litigation commenced against the Kenkels.

58. E. Kenkel was terminated as the chief financfal officer and bookkeeper on August 12, 1982. Thereafter, she refused to turn over the corporate books and records, although repeated efforts were made to acquire these records. INNK gradually acquired, piece by piece, the books and records from E. Kenkel. E. Kenkel erased, obliterated and altered entries concerning the Hart Ranch in the corporate books. This caused delays and losses to INNK in attempting to transact corporate business.

59. R. Kenkel remained as president of INNK until September 1982.

60. Sometime prior to April 1, 1983, the Kenkels removed Bachman’s name as an authorized signature on the INNK checking account. This in effect changed the corporate resolution thereby providing that they, the Kenkels, were the only local authorized persons to sign on the checking account at the Omaha National Bank. (Exhibit 592)

61. On August 2, 1983, INNK commenced an action in the United States District Court for the District of Colorado under the caption of INNK Land and Title Company, Plaintiff, v. Raymond N. Kenkel and Evelyn Kenkel, Case No. 83-F1375.

62. Within days of being served with the Summons and Complaint, R. Kenkel gifted 559 shares of stock of Raylin Ag and 294 shares of stock of Manawa Implement, another privately held corporation, to his children. On August 12, 1983, E. Kenkel gifted 600 shares of Raylin Ag stock to her children and grandchildren. (Exhibits 720, 721). On October 12, 1983, the Kenkels gifted the remainder of their stock in Raylin Ag and Manawa Implement to their children and grandchildren. (Exhibit 722). In addition, $62,000.00 of debt owed by Thomas Kenkel was forgiven. The gift tax returns on these gifts were prepared by Mary K. Pfantz, daughter of the Kenkels.

63. The Colorado trial was bifurcated by pretrial order of June 25, 1985, as amended by order of July 12, 1985 (Exhibit 689). The order bifurcating the trial provided that "(t)he Phase I trial ... will encompass the issues raised in Paragraphs 1 through 13 of Plaintiff's Complaint, to-wit, whether or not Plaintiff had an interest in the Hart Ranch and is therefore entitled to all, or a portion, of the proceeds from the sale of the Hart Ranch."

64. This order then provided that the Phase II trial "... will encompass the issues raised in Paragraphs 14 through 25 of Plaintiff's Complaint, to-wit, whether Defendants wrongfully diverted or disposed of corporate assets to pay expenses of the

Hart Ranch, whether Defendants failed to pay grazing fees, whether Defendants caused Plaintiff to lose a business opportunity, whether Defendants acted negligently or in breach of their fiduciary duty and whether Defendants failed to give Plaintiff corporate books and records."

65. The amended order provided that the issue of whether Defendants acted in breach of their fiduciary duty would be addressed in the Phase I trial with the issue of whether INNK had an interest in the Hart Ranch.

66. The first thirteen paragraphs of the Colorado complaint concerned INNK's prayer for a declaratory judgment that INNK had an interest in the Hart Ranch and the proceeds of its sale. Paragraphs 14 through 25 concerned INNK's alternative allegations that the Kenkels fraudulently diverted and disposed of corporate assets arid funds, created a lost business opportunity, wrongfully detained corporate books and records, caused a diminution in value of INNK's remaining real estate, and failed to properly manage INNK's business affairs.

67. INNK's allegations of fraud, misconduct, ma1ice, insult and a wanton and reckless disregard of TNNK's rights and entitlement to punitive damages were contained in Paragraph 24 of the Colorado complaint.

68. The Kenkels answered the Colorado Complaint. (Exhibit 688). As a Sixth Defense the Kenkels alleged alternatively and by way of setoff against INNK's claims that INNK was indebted to the Kenkels in the principal sum of $20,553.60 plus interest.

69. On November 27, 1985, a judgment was entered after the Phase I trial in favor of INNK against Raymond N. Kenkel and Evelyn Kenkel in the sum of $964,857.86, representing net profit received by the Kenkels from the sale of the Hart Ranch, plus interest and costs. (Exhibit 690). This judgment was never appealed.

70. The Court concluded as part of its Conclusion of Law as follows: "We do not conclude, however, that defendant's conduct was so egregious as to warrant an award of punitive or exemplary damages. Exemplary damages are appropriate in breach of fiduciary duty cases only when attended by wanton and reckless conduct. (citations omitted) We find that defendant's conduct did not rise to the level of being wanton and reckless."

DISCUSSION

I. Dischargeability of Debt.

A. §523(a) (4) and §523(a) (6) Dischargeability of Debt

INNK asserts various grounds under §523(a) (4) and §523(a) (6) for nondischargeability of the $964,857.86 judgment. The Court will discuss each of these grounds, infra.

1. §523(a)(4) Defalcation While Acting in a Fiduciary Capacity.

The Court must initially determine the collateral estoppel effect of the District Court's decision on breach of fiduciary duty. The doctrine of collateral estoppel is applicable to cases to determine the dischargeability of a debt in bankruptcy. In re Coover, 70 B.R. 554 (Bankr. S.D. Fla. 1987). Under the doctrine of collateral estoppel, a prior adjudication precludes relitigation of an issue if the following requirements are met:

1. The issue sought to be precluded must be the same as that involved in the prior action;

2. that issue must have been actually litigated;

3. it must have been determined by a valid and final judgment; and

4. the determination must have been essential to the prior judgment.

Matter of Ross, 602 F.2d 604, 608 3d Cir. (1979). Issue preclusion is improper if the .party seeking preclusion had a less burdensome standard of proof in the pre—bankruptcy action than he has in the subsequent dischargeability proceeding. In re Billings, 94 B.R. 803, 810 (Bankr. E.D.N.Y. 1989); Chang v. Daniels (In re Daniels), 91 B.R. 981 (M.D. Fla. 1988).

The District Court concluded that INNK had proven by a preponderance of the evidence that R. Kenkel acted in a manner which was contrary to his fiduciary duty to INNK. The appropriate measure of proof in §523 (a) (4) dischargeability proceedings is the clear and convincing standard. In re Billings, 94 B.R. 803, 810 (Bankr. E.D.N.Y. 1989). Because the District Court's conclusion was pursuant to the lessor preponderance of evidence standard of proof, rather than the clear and convincing standard applicable to this §523(a)(4) dischargeability proceeding, preclusion of the fiduciary duty issue is improper. Therefore, the Court will make its own determination of Kenkels' defalcation while acting in fiduciary capacity under §523(a) (4).

Section 523(a) provides in pertinent part:

> A discharge under §727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

§523 (a) (4)

The threshhold requirement under §523(a) (4) to hold the debt nondischargeable for fraud or defalcation is a finding that the debtor was a fiduciary of the creditor plaintiff. Clark v. Taylor (In re Taylor), 58 B.R. 849, 852 (Bankr. E.D. Va. 1986). To be a fiduciary for dischargeability purposes, the debtor must be acting as a trustee under an express or technical trust. In re Gagliano, 44 B.R. 259 (Bankr. N.D. Ill. 1984), citing Davis v. Aetna Acceptance Co., 293 U.S. 328, 33 (1934). The trust must exist prior to the act creating the debt. In re Gagliano, 44 B.R. 259, 261 (Bankr. N.D. Ill. 1984), citing In re Pedrazzini, 644 F.2d 756 9th Cir. 1981)

The fiduciary relationship required under §523 (a) (4) includes the fiduciary relationship between a corporate officer or director and the corporation. In re Decker 36 B.R. 452 (D. N.Dak. 1983). The president of a private corporation entrusted with funds for a particular purpose, has been held to be acting in a fiduciary capacity within the meaning of §523(a)(4). In re Wolfington, 48 B.R. 920, 924 (Bankr. E.D. Penn. 1985). R. Kenkel as president and director of INNK, entrusted with the Hart Ranch sale proceeds, was acting in his fiduciary capacity.

The next determination is whether R. Kenkel committed defalcation while acting in his fiduciary capacity. The United

States Bankruptcy Court, District of South Carolina, outlined the definition of defalcation:

> The case law interpreting the term "defal—cation" has given it a broad definition. Generally, defalcation is a failure to account for money or property that has been entrusted to one. American Metals Corp. v. Colley (In re Colley), 35 B.R. 526, 529 (Bankr. D. Kan. 1983). Treacher v. Duttenhofer (In re Duttenhofer), 12 B.R. 926, 7 B.C.D. 1187 (Bankr. S.D. Calif. 1981); see, Kansas State Bank & Trust Co. v. Vickers (In re Vickers), 577 F.2d 683 (10th Cir. 1978.) A mere deficit resulting from the debtor's misconduct, even if the debtor's conduct does not benefit him, may be "defalcation." In re Colley, supra, 35 B.R. at 529; Aetna Ins. Co. v. Byrd (In re Byrd), 15 B.R. 154, 8 B.C.D. 436 (Bankr. E.D. Va. 1981). "Defalcation" is the slightest misconduct, and need not be intentional misconduct; negligence or ignorance may be "defalcation". In re Colley, 35 B.R. at 529. See In re Duttenhofer, supra; Baugh v. Matheson (In re Matheson), 10 B.R. 652, 7 B.C.D. 643 (Bankr. S.D. Ala. 1981).

In re Owens, 54 B.R. 162, 165 (Bankr. D.S.C. 1984).

In the Phase I trial, the District Court established the fact that INNK had an interest in the Hart Ranch and the Kenkels are precluded from relitigating this issue under the doctrine of issue preclusion. R. Kenkel appropriated the proceeds from the sale of the Hart Ranch which rightfully belonged to INNK. This conduct clearly meets the broad definition of defalcation outlined supra. R. Kenkel therefore committed defalcation while acting in his fiduciary capacity and the $964,857.86 judgment is nondischargeable as to him under §523(a) (4).

The court finds that according to applicable case law, E. Kenkel was not acting in a fiduciary capacity under §523(a) (4) in that INNK has failed to establish that she was a fiduciary under

an express or technical twist of INNK. Therefore, although her actions clearly constitute defalcation, E. Kenkel did not commit defalcation while acting in a fiduciary capacity under §523 (a) (4).

2. section 523(a)(4) Embezzlement

Section 523(a) provides in pertinent part:

> A discharge under §727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

§523 (a) (4).

The phrase while acting in a fiduciary capacity does not modify the word embezzlement. Funventures in Travel, Inc. v. Dunn, (In re Funventures) 39 B.R. 249 (E.D. Pa. 1984). Thus, even though E. Kenkel was not acting in a fiduciary capacity, the debt would still not be dischargeable if the debt arose as a result of embezzlement.

Embezzlement is defined as “the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come.” 3 Collier on Bankruptcy, ¶523.14[3] at 523—116. The elements of embezzlement are 1) appropriation of funds by debtor for his or her benefit, and 2) appropriation with fraudulent intent or by deceit. In re Taylor, 58 B.R. 849, 855; In re Graziano, 35 B.R. 589, 593. The fraudulent intent and misappropriation elements of embezzlement may be proven by circumstantial evidence. In re Graziano, 35 B.R. at 596.

In the Phase I trial, the District Court established the fact that INNK had an interest in the Hart Ranch. By not submitting

any of the earnest money and net proceeds from the sale of the Hart Ranch to the Evans, and using a portion of these funds as a mortgage payment on their personal residence, Kenkels clearly appropriated the earnest money and net proceeds for their own benefit.

The manner in which Kenkels appropriated these funds reveals their fraudulent intent or deceit. The Kenkels did not advise the principals of INNK that Kenkels had received earnest money on the sale of the Hart Ranch to Evans, and INNK did not receive any of the $150,000.00 earnest money payment. Further, the Kenkels attempted to conceal the sale of the Hart Ranch to Evans, and did not submit the proceeds of the Hart Ranch sale to INNK. Instead, all of the funds were deposited in E. Kenkel's bank account, rather than their joint account, and the Kenkels used a portion of the earnest money and Hart Ranch sale proceeds to pay off the balance of the mortgage due on Kenkels' personal residence, transferred $397,715.00 to their privately held corporation, Raylyn Ag, and transferred $100,000.00 to their son, Thomas Kenkel. The Kenkels doubled their investment in the Hart Ranch without incurring any of the costs and leaving the operating deficit of $437,680.52 with the corporation.

The deceptive attitude of the Kenkels is reflected throughout their course of dealing with Apishipa/INNK and other stockholders. The Kenkels led the new shareholders, Bachman, Rundle and van Ekris, to believe that the Hart Ranch was an asset of Apishipa. This was a big factor in causing the new shareholders to contribute $500,000.00 in additional capital to Aphshipa.

The books and records of Apishipa were set up on information, principally supplied to Touche Ross by the Kenkels, that the Hart Ranch was an asset of Apishipa. This included the Meair's contribution of his interest in the Hart Ranch, with $50,000.00 in cash, to Apishipa. The Kenkels retained this sum for many months before it was paid over to the corporation.

The Hart Ranch was pledged as security in the Harriman Ranch mortgage. This was done with knowledge that R. Kenkel's sub scription to stock was contingent upon the Haskel County Farm being released as collateral on the Hart Ranch. At this point in time, the release of the Haskell County Farm was considered a detail which would be resolved shortly.

In November, 1977, R. Kenkel received the stock certificate which was not issued conditionally. R. Kenkel signed the stock certificate and never informed the others that he had not contributed the Hart Ranch. E. Kenkel entered the certificate upon the stock register without any notification to the officers or stockholders of Apishipa/INNK.

R. Kenkel and E. Kenkel were facing a tax liability of approximately $200,000.00, when they requested that the Hart Ranch be backed off the corporate books. This was done solely to assist the Kenkels in their financial matters without benefit to Apishipa/INNK or the other stockholders. This procedure would not have been necessary if the Hart Ranch was not a corporate asset.

The Haskell County Farm was released as collateral on the Hart Ranch on October 2, 1978, but the Kenkels did not advise the other principals of this event. R. Kenkel testified that he did not

believe this was necessary because it was such a minor event. However, the Kenkels also maintain that the failure to contribute the Hart Ranch to the corporation was caused by the fact that the Haskell County Farm secured the purchase of the Hart Ranch and was not released. However, the Kenkels thought that the release of the Haskell County Farm was such a corporate event that they caused Apishipa to pay the fees for these releases.

R. Kenkel and E. Kenkel were both titleholders of the Hart Ranch. The Kenkels remained silent about this fact until after litigation commenced. This was another reservation by the Kenkels and they are estopped from using this fact as a defense at this point of time.

The Kenkels also confirmed their agreement that the Hart Ranch should be a corporate asset when they agreed to place the proceeds in the sale of the Hart Ranch into the corporate account in December 1978. It is noteworthy that at that time the Kenkels would have netted more from the Hart Ranch as a corporate asset than if the Hart Ranch was sold as a separate unit and the Kenkels received all of the proceeds from the sale of the Hart Ranch alone.

The corporation received the income from the Hart Ranch and paid the debt service and expenses. This continued even after the receivership was closed and the Kenkels caused INNK to continue on paying Hart Ranch expenses in a priority position.

Based on the above facts, the Court finds that the Kenkels clearly appropriated INNK funds for their own benefit with a fraudulent intent. Therefore, the Court finds the $964,857.86 judgment nondischargeable as to Raymond N. Kenkel and Evelyn Kenkel

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Based on the above facts, the Court finds that the Kenkels clearly appropriated INNK funds for their own benefit with a fraudulent intent. Therefore, the Court finds the $964,857.86

judgment nondischargeable as to Raymond N. Kenkel and Evelyn Kenkel due to embezzlement under §523(a) (4).

3. section 523(a) (6) Willful and Malicious Injury by the Debtor to Another Entity or to the Property of Another Entity

It is well settled that §523 (a) (6) includes debts for willful and malicious conversion. In re Jacobs, 47 B.R. 526, 527 (Bankr. S.D. Fla. 1985). INNK must prove by clear and convincing evidence the elements of a willful and malicious conversion under §523 (a) (6). See America Honda Finance Corp. v. Loder, 77 B.R. 213, 214 (N.D. Iowa 1987).

Conversion is generally defined as a wrongfully assumed "dominion over personal property by one person to the exclusion of possession by the owner and in repudiation of the owner's rights." In re Hicks, 100 B.R. 576, 577 (Bankr. M.D. Fla. 1989) ; In re Pommerer, 10 B.R. 935 (Bankr. D. Minn. 1981). The District Court established the fact that INNK had an interest in the Hart Ranch in the Phase I trial. By not submitting any of the earnest money and net proceeds from the sale of the Hart Ranch to the Evans, and using a portion of these funds as a mortgage payment on their personal residence, Kenkels clearly assumed dominion over INNK funds to the exclusion of possession by INNK in repudiation of INNK's rights. Kenkels therefore converted these funds.

In ruling on a transfer in breach of a security agreement, the Eighth Circuit Court established the definition of willful and malicious. In re Long, 774 F.2d 875, 881 (8th Cir. 1985). According to the Eighth Circuit Court, willful means headstrong and knowing (intentional). Malicious means targeted at the

creditor, at least in the sense that the conduct is certain or almost certain to cause financial harm. In re Long, 774 F.2d at 881.

The June 25, 1985 pretrial order, as amended by order of July 12, 1985, limited the issues covered at the Phase I trial. The Phase I trial encompassed the issues of whether or not Kenkels acted in breach of their fiduciary duty, and whether or not INNK had an interest in the Hart Ranch and was therefore entitled to all, or a portion, of the proceeds from the sale of the Hart Ranch. The Phase II trial was to encompass the issues of whether the Kenkels wrongfully diverted or disposed of corporate assets to pay expenses of the Hart Ranch; whether the Kenkels failed to pay grazing fees; whether the Kenkels caused INNK to lose a business opportunity; and whether the Kenkels failed to give INNK corporate books and records. The parties therefore did not fully litigate the issue of Kenkels' willful and malicious conduct in the Phase I trial. This Court thus makes its own determination of Kenkels' willful and malicious conduct for its §523(a) (6) analysis.

This Court finds that Kenkels' actions in selling the Hart Ranch and retaining the proceeds, attempting to conceal the sale and attempting to cover their tracks by erasing the books and records, clearly evidence intentional conduct by Kenkels. In addition, the intentional retention of the sale proceeds was certain to cause financial harm to INNK, in that use of these proceeds by Kenkels would permanently deprive INNK from the use of the funds, with no potential benefit to INNK. Therefore, Kenkels appropriation of the sale proceeds constitutes a willful and

malicious conversion, and the $964,857.86 judgment is nondischargeable as to both defendants under §523(a) (6).

B. Affirmative Defenses

1. Statute of Frauds.

The Kenkels have raised the defense of the statute of frauds and contend that the oral agreement between INNK and the Kenkels fell within the statute of frauds.

Judge Finesilver addressed this defense on page 5, footnote 1, of the Colorado decision (Exhibit 690). Judge Finesilver stated: "It should be noted that Defendants have not raised the possible defense arising out of the statute of frauds. Since Defendants failed to plead this defense, we will not address its application, if any, to the matter before us." (citation omitted).

Res judicata forcloses all that which might have been litigated previously. Brown v. Felson, 442 U.S. 127, 139, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979), Footnote 10; Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 378 (1980); In re Daley, 776 F.2d 834, 838 (9th Cir. 1985), cert. den. _____ U.S. ____ 106 S.Ct. 2279, 90 L.Ed. 721.

The defense of the statute of frauds might have been litigated in the Colorado action and the Kenkels are therefore barred from reasserting this issue in this proceeding.

In addition, there is also sufficient extrinsic evidence in this record to show that the Kenkels had agreed to make the Hart Ranch an asset of INNK, and even if the Hart Ranch was not shown on the corporate books as an asset, that the proceeds from the sale of the Hart Ranch would be considered a corporate asset.

Accordingly, the defense of the statute of frauds must fail.

2. Collateral Estoppel

The Kenkels also raised the defense that there was no finding of fraud in the Colorado action. Further, the Colorado courts specifically found that R. Kenkel breached his fiduciary duty toward INNK but his conduct was not so egregious as to award punitive or exemplary damages.

The Colorado court specifically found that R. Kenkel's conduct did not rise to the level of being "wanton and reckless." In analyzing this issue, this Court must keep in mind that the issues raised by the Colorado complaint were divided for trial purposes for pretrial order. As stated, for trial convenience, the parties in Phase I were limited in their proof to the issues of whether INNK had an interest in the Hart Ranch, and, if so, the amount thereof, and whether the Kenkels acted in breach of their fiduciary duty. By pretrial order INNK was precluded from litigating those issues of fraud raised in the second portion of its complaint. Consequently, upon the record before this Court, INNK never reached those issues of fraud and these issues were actually not litigated.

In the apparent attempt for forestall further litigation on the Colorado complaint, Judge Finesilver did address the issue of exemplary or punitive damages using a standard of "wanton and reckless conduct."

However, this finding does not bar INNK from litigating those issues *sub judice.* This Court is compelled to conduct a trial and hear such additional evidence as may be material to the issue of dischargeability. This Court must consider all evidence, including

the Colorado judgment, to determine the nondischargeability of the judgment debt. In re Daley, supra, 776 F.2d at 838.

Accordingly, INNK is not barred from litigating those issues involving fraud and willful and malicious injury.

II. Counterclaim.

R. Kenkel filed a counterclaim in his Amended Answer on March 15, 1988. He alleges that certain sums paid to INNK by himself should be set off against any claim by INNK. Although R. Kenkel has not addressed his counterclaim in his proof, brief and argument, the counterclaim must be resolved.

The Kenkels used offset as an affirmative defense in the Colorado trial. The Kenkels plead $20,553.60 plus interest as a setoff in their Sixth Defense in the Colorado trial. R. Kenkel has now increased the amount, but the issue, setoff, remains the same.

In disposing of the issue of the amount of INNK's interest in the Hart Ranch in the Colorado lawsuit, it was necessary to consider the Kenkels' defense of setoff. Resolution of the defense of setoff was necessary to the decision in the Colorado case. The parties have already litigated whether INNK has an interest in the Hart Ranch, and the amount of that interest. Therefore, R. Kenkel is precluded from raising this issue, setoff *sub ludice.* Accordingly, the counterclaim must be dismissed.

It is noteworthy that on November 11, 1976, Meairs entered into a contract with R. Kenkel to purchase a one—half interest in the Hart Ranch and paid $50,000.00 as a downpayment. In 1977, Meairs contributed his share of the Hart Ranch, plus other assets,

for 25,000 shares of stock. Kenkels contributed the Hart Ranch but retained the $50,000.00 down payment. A dispute arose between the Kenkels and Meairs as to their relative interest in the Hart Ranch. On December 4, 1979, R. Kenkel and INNK entered into an agreement whereby R. Kenkel paid $50,000.00 to INNK and INNK agreed to indemnify R. Kenkel in the event it was determined Meairs had an interest in the Hart Ranch. (Exhibit 562). R. Kenkel has chosen to ignore this agreement and is accordingly not entitled to the $50,000.00.

R. Kenkel also claims $20,553.60 as a result of the promissory note executed on May 2, 1977, by INNK in favor of R. Kenkel. This is the same sum set forth in the Sixth Defense in the Kenkel answer in the Colorado action. (Exhibit 688). The Kenkels wrote off this sum as a bad debt in 1982, and then transferred this debt to Raylyn Ag which also wrote off this sum as a bad debt in 1983. The Kenkels transferred ownership of this promissory note and therefore cannot use it as a basis for a setoff.

Accordingly, the counterclaim must be dismissed.

III. Objection to Exemption.

INNK objects to Kenkels' claim of the homestead exemption for the reason that all equity currently existing in said homestead exemption was created as a result of Kenkels' use of wrongfully obtained INNK funds.

Kenkels assert that INNK's objection is improper in that it should be considered a proceeding to determine the validity or extent of a lien and thus is an adversary proceeding. The Court finds that the objection to the homestead exemption is properly

brought as an objection to exemption and properly determined under Iowa exemption law.

Interpreting the Iowa homestead exemption statutes, the Supreme Court of Iowa stated:

> We conclude the legislature never contemplated or intended that a homestead interest could be created or maintained with wrongfully appropriated property. (citations omitted) Where wrongfully obtained funds are used to purchase property, the property does not belong to the purchasers, and therefore, to the extent of the illegal funds used, they never acquire a homestead interest. (citations omitted) The same principle applies where the funds are used to retire debt against the homestead. (citations omitted).

Cox v. Waudby, 433 N.W.2d 716, 719 (Iowa 1988).

The Court finds that the Cox holding controls INNK's objection to Kenkels' exemption. Thus, to the extent of the March 8, 1982 $70,000.00 mortgage payment, April 6, 1982 $100,000.00 mortgage payment, and May 19, 1982 $37,093.97 mortgage payment made with wrongfully appropriated funds, the Kenkels' homestead is not exempt.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes: 1) Plaintiff has proven by clear and convincing evidence that the $964,857.86 judgment is nondischargeable under §523(a) (4) and §523(a) (6); 2) Plaintiff has proven by a preponderance of the evidence that the Kenkels are not entitled to exempt $207,093.97 of their homestead, representing that portion of the homestead mortgage payments made with wrongfully obtained funds; and (3) Defendant, R. Kenkel, has failed to prove his counterclaim.

IT IS ACCORDINGLY ORDERED that the Clerk of Bankruptcy Court is directed to enter judgment as follows:

(1) For the Plaintiff, INNK Land and Cattle Company, and against the Defendants, Raymond N. Kenkel and Evelyn Kenkel, that the judgmment entered on November 27, 1985, in the United States District Court for the District of Colorado, INNK Land and Cattle Company, Plaintiff, v. Raymond N. Kenkel and Evelyn Kenkel, Defendants, Civil Action No. 83—5—1375, is nondischargeable;

(2) for the Plaintiff, INNK Land and Cattle Company, and against the Defendant, Raymond N. Kenkel, dismissing the counterclaim; and

(3) the Debtors, Raymond N. Kenkel and Evelyn Kenkel, may not claim $207,093.97 as a homestead exemption.

Dated this 30th day of October, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

RAYMOND N. KENKEL and
EVELYN KENKEL,

Debtors,

Case No. 86-832-W
Chapter 7

Adv. No. 86—0147

INNK LAND AND CATTLE COMPANY,

Plaintiff,

v.

RAYMOND N. KENKEL and
EVELYN KENKEL,

Defendants.

JUDGMENT

The issues of this proceeding having been duly considered by the Honorable Russell J. Hill, United States Bankruptcy Judge, and a decision having been reached,

IT IS ORDERED AND ADJUDGED that the Clerk of Bankruptcy Court is directed to enter judgment as follows:

(1) For the Plaintiff, INNK Land and Cattle Company, and against the Defendants, Raymond N. Kenkel and Evelyn Kenkel, that the judgmment entered on November 27, 1985, in the United States District Court for the District of Colorado, INNK Land and Cattle Company, Plaintiff, v. Raymond N. Kenkel and Evelyn Kenkel, Defendants, Civil Action No. 83-5—1375, is nondischargeable;

(2) for the Plaintiff, INNK Land and Cattle Company, and against the Defendant, Raymond N. Kenkel, dismissing the counterclaim; and

(3) the Debtors, Raymond N. Kenkel and Evelyn Kenkel, may not claim $207,093.97 as a homestead exemption.

Dated this 30th day of October, 1989.

Mary M. Weibel
Clerk of U.S. Bankruptcy Court

By:_____
Deputy Clerk

SEAL OF U.S. BANKRUPTCY COURT

ENTRY OF JUDGMENT

Dated:October 30, 1989

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

IN THE MATTER OF

CIVIL NO. l-90-CV-70012

RAYMOND N. KENKEL and
EVELYN KENKEL,

Debtors.

INNK LAND AND CATTLE COMPANY,

Plaintiff,

v.

AFFIRMANCE

RAYMOND N. KENKEL and
EVELYN KENKEL,

Defendants.

Appellants, defendants Raymond N. Kenkel and Evelyn Kenkel, who are the debtors in this bankruptcy matter, appeal from the findings and conclusions——dischargeability of debt and objection to exemption and judgment entered October 30, 1989, by the bankruptcy court and the ruling and order——motion to amend the findings, motion for a new trial, and motion to alter or amend the judgment and judgment entered December 29, 1989, by the bankruptcy court.

The appeal has been submitted on well—prepared written briefs and oral arguments.

I am satisfied that Judge Hill's findings of fact are not clearly erroneous and that he made no legal error in his conclusions. Accordingly, the judgments appealed from are affirmed.

DATED this 31st day of December, 1991.

HAROLD D. VIETOR, Chief Judge
Southern District of Iowa