UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
BERNARD G. WILTFANG and B. BERNADINE WILTFANG, f/d/b/a WILTFANG FARMS,	:	Case No. 86-146-C H
	:	Chapter 7
Debtors,	:	
CARROLL M. NEARMYER and CAROLYN NEARMYER,	:	
Plaintiffs,	:	
v.	:	Adv. No. 86-0114
BERNARD G. WILTFANG and B. BERNADINE WILTFANG, f/d/b/a WILTFANG FARMS,	:	
Defendants.	:	

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW--
COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT
AND COUNTERCLAIM FOR DAMAGES**

On July 9, 1990, trial was commenced on the complaint to determine dischargeability of debt. The following attorneys appeared on behalf of their respective clients: John C. Conger, Marcucci, Wiggins & Anderson, P.C., for the Plaintiffs, Carroll M. Nearmeyer and Carolyn Nearmeyer; and Wade R. Hauser, III and Edward Remsburg, Ahlers, Cooney, Dorweiler, Haynie, Smith & Albee, P.C., Attorneys at Law, for the Defendants, Bernard G. Wiltfang and B. Bernadine Wiltfang.

The trial proceeded through July 12, 1990, and at the conclusion of the trial, the Court took the matter under advisement upon a briefing deadline. Briefs were timely filed

and the Court considers the matter fully submitted.

Plaintiffs bring this action requesting judgment be entered finding that an alleged debt owed by Defendants to Plaintiffs be declared non-dischargeable. They alleged that they owned a farm and that they entered into a transaction with Defendants whereby Defendants would provide financing to Plaintiffs enabling Plaintiffs to continue farming. They allege that Defendants perpetrated a fraud upon them and that Defendants' acts and omissions constituted willful and malicious injury to Plaintiffs and their property.

Defendants deny the allegations of Plaintiffs. Bernard G. Wiltfang (herein "Wiltfang") counterclaims alleging that Plaintiffs converted property, breached a contract, and perpetrated fraud upon him.

Plaintiffs deny the allegations of the counterclaim and assert affirmative defenses.

For the reasons set forth below, Plaintiffs' complaint will be dismissed and judgment awarded to defendant Bernard G. Wiltfang on the counterclaim.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1334. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I).

FINDINGS OF FACT

1. Carroll M. Nearmyer and Carolyn Nearmyer (herein "the Nearmyers") live on and have operated a 270-acre farm located near Prairie City, Jasper County, Iowa, since 1974.

2. Bernard G. Wiltfang and Bernadine Wiltfang are husband and wife at all times material herein. Bernard Wiltfang is a medical doctor who practices in Grinnell, Iowa, and in the surrounding communities.

3. The Nearmyers were engaged in grain farming and livestock production.

4. Commencing in 1977, the Nearmyers financed their farm operation at the First Newton National Bank, Newton, Iowa (herein "First Newton") (Exh. J-8).

5. On June 12, 1980, Keith Welling, Vice President, First Newton, advised Carroll Nearmyer that the operating and farm line must be paid out by January 1, 1981 (Exh. J-4). This was due to failure to properly handle the notes as they came due and because of continual overdrafts in the Nearmyer checking account.

6. On June 17, 1981, Welling advised the Nearmyers that all operating, machinery and livestock debts should be paid prior to January 15, 1982 (Exh. J-9). If this could not be done, the Nearmyers were to arrange alternate financing for a payout or arrange for a complete disbursement sale by January

15, 1982.

7. During this period of time Carroll Nearmyer threatened the life of Keith Welling.

8. On May 10, 1983, First Newton filed a petition in the Iowa District Court, Jasper County, against the Nearmyers and Ardelle Nearmyer, Carroll Nearmyer's mother, praying for judgment in the principal sum of $142,000.00, accrued interest in the sum of $26,920.75, continuing interest and costs, and foreclosure of the real estate mortgage on the Nearmyer real estate.

9. The Nearmyers were experiencing cash flow problems as early as 1978. An application for a Federal Land Bank loan was denied on December 12, 1978, because machinery purchases created a negative cash flow (Exh. J-1).

10. In 1980, Carroll Nearmyer used loan finders in an attempt to arrange financing. Carroll Nearmyer applied for a $12,210,000.00 loan and was willing to pay loan and finders fees in excess of $6,000,000.00 all of which was to be paid from the proceeds of the loan (Exhs. J-2 and J-3).

11. Carroll Nearmyer also applied for another loan of $22,385,000.00 in 1980 (Exh. J-6). Carroll Nearmyer was willing to pay a finders fee of $2,035,000.00 from the proceeds of the loan. Carroll Nearmyer realized that the fee would result in a significant overborrow.

12. In 1981, Carroll Nearmyer applied for a loan of

$500,000.00 to refinance and expand his farm operation (Exh. J-7). Carroll Nearmyer authorized a 5 percent commission to the loan finder, which payment was due and payable upon receipt of a loan commitment.

13. Prior to the foreclosure, the Nearmyers employed Mid-America Farm Management, Inc. to assist them with their financial problems. Joseph R. Mitchell of that firm analyzed the Nearmyers' financial situation, provided cash flow statements, appraisals, and entered into negotiations with First Newton during 1983 (Exhs. J-12, J-15, J-16).

14. The Nearmyers retained counsel to defend them in the First Newton foreclosure proceeding (Exh. J-13). The Nearmyers were referred to this attorney by Joseph Mitchell. This attorney tried to negotiate with First Newton in August 1983 (Exh. J-18); all without success (Exh. J-19). It was during this period of time that the Nearmyers' attorney was counseling the Nearmyers about the necessity of filing a petition with the Bankruptcy Court and receiving protection under the Bankruptcy Code.

15. On September 26, 1983, the First Newton v. Nearmyer foreclosure proceeding was set for trial on January 31, 1984 (Exh. J-20).

16. The Wiltfangs incorporated Beef Barons, Inc. (herein "Beef Barons") in the early 1970s. The Wiltfangs were the sole officers, directors and shareholders of Beef Barons at

all times relevant herein. Beef Barons owned and operated apartment buildings, farm operations, and provided financing for various businesses, including farm operations.

17. In 1983, Wiltfang retained counsel for advice on how to better protect his financial position when financing farmers. Wiltfang was advised by his then attorney, who was a member of the same firm as the attorney representing the Nearmyers, that rather than enter a sale-leaseback form of financing, that a stock purchase-option arrangement be arranged (Exh. J-14). Under this arrangement the borrower would incorporate the farm operation, convey the stock to the lender, and receive an option to repurchase the stock upon repayment of the financing.

18. After First Newton refused to renegotiate the Nearmyers' debt, the Nearmyers found out from Welling that Wiltfang was providing financing for farmers who were unable to obtain conventional financing.

19. At the request of Carroll Nearmyer, Welling contacted Wiltfang, and Welling and Wiltfang visited the Nearmyer farm on a Sunday morning in September, 1983.

20. It is at this point that a great conflict in the evidence occurs. Carroll Nearmyer testified that at the Sunday morning meeting the following statements were made. Carroll Nearmyer told Wiltfang that he needed additional operating income. Wiltfang told Carroll Nearmyer that he was a

very rich doctor, and the money would be coming from his pocket. Wiltfang said that he liked farmers and that he was farming himself. Wiltfang indicated that this was the first time he had entered such a transaction. Wiltfang further said that the Nearmyers were lucky people, as Wiltfang needed a tax dodge and he would not charge any interest if he provided the money. Carroll Nearmyer acknowledged that everything was left up in the air when Wiltfang left.

21. Keith Welling, who terminated his employment with First Newton in 1985, testified in part, as follows. He has known Carroll Nearmyer since around 1972 when Welling was employed by a Prairie City, Iowa bank. He was present at all times when Wiltfang talked to Carroll Nearmyer at the Sunday morning meeting. Carroll Nearmyer told them what his needs were, but Wiltfang did not say that he was a rich doctor or anything regarding a tax dodge. Wiltfang never said that the money was coming out of his pocket or that he had never entered into a transaction such as the one contemplated. There were no commitments made when the Sunday morning meeting was completed. During the course of this meeting Welling advised Carroll Nearmyer that he should not enter into this type of a deal but that he should sell out, recover his equity and move to town.

22. Wiltfang testified, in part, as follows. He grew up on a farm and kept his interest in farming. Money would not

be loaned to farmers unless they had an equity in their farm operation. The farmers were interested because they wanted their equity released and used Beef Barons to release their equity. However, no one, including the Nearmyers, Beef Barons, or Wiltfang, ever received the benefit of this equity because land prices fell so radically. The farmers purchased the option to repurchase real estate or stock by paying a fee.

23. In 1983, Beef Barons had a farm operation of approximately 1000 acres, and Bernard Wiltfang was not planning on expanding this operation. He did not want more farm real estate, especially that which was a distance from Grinnell, Iowa.

24. Wiltfang further testified that Welling told him about the Nearmyers, and Wiltfang wanted to look at their property. At the Sunday morning meeting, Wiltfang looked at all three tracts of land which composed the Nearmyer farm. Carroll Nearmyer told Wiltfang about the pending foreclosure proceeding and that he needed to refinance his operation and obtain operating money. Carroll Nearmyer asked Wiltfang about what was in it for him, and Wiltfang told him that there would be a 10 percent fee. Carroll Nearmyer had a list of debts on scratch paper, and Welling told them about the secured debts. It appeared that the debts, secured and unsecured, would be about $300,000.00. Wiltfang wanted an appraisal of the real estate and questioned Carroll Nearmyer about his mother's real

estate, which was one of the three tracts. Carroll Nearmyer inquired about Wiltfang's farm experience as Carroll Nearmyer understood that there would be a sale of the farm, and Carroll Nearmyer did not want to work for Wiltfang. Wiltfang testified that he never said where the money was coming from or that this was a tax dodge. He denied saying the Nearmyers were lucky or that he was a rich doctor. During the course of the meeting, Welling advised Carroll Nearmyer that he should not consider this type of financing and that he should sell out and recover his equity in that manner. A specific amount was never discussed, but it was understood that the total debt was around $300,000.00.

25. Welling, as early as the 1st of August, 1983, was counselling the Nearmyers to liquidate the real estate, keep their home, and get a job in town.

26. After the Sunday morning meeting, Welling started to compile the Nearmyers' debts to determine their debt structure. Welling asked Carroll Nearmyer to give him a list of the unsecured debts.

27. On September 7, 1983, First Newton approved a new loan to Dr. and Mrs. B. G. Wiltfang in the amount of $225,000.00 (Exh. J). First Newton would take 270 acres of Jasper County real estate, machinery and livestock as security, and Dr. and Mrs. Wiltfang were to agree personally to guarantee the loan of Mr. and Mrs. Carroll Nearmyer in the

amount of $142,000.00. The borrowers were to take title to all property, and their net worth was set at approximately $3,350,000.00. The loan approval and proposed guarantee totaled $367,000.00. The notes were to mature in January, 1985.

28. After the Sunday morning meeting, Carroll Nearmyer, Welling and Wiltfang met at the bank in October 1983. At this time it was known to all parties that Welling had been to First Newton's loan committee and First Newton would commit $366,000.00 to the transaction. Welling and Carroll Nearmyer were concerned if Beef Barons would enter into the transaction if the Nearmyers removed the farmstead and a truck. The bills were discussed, and it was understood that they totaled approximately $300,000.00. Carroll Nearmyer felt a 10 percent fee was too high and it was negotiated down to $35,000.00. Some of the closing costs were also discussed, and Beef Barons' 10 percent fee was discussed as a closing cost.

29. On November 23, 1983, the Nearmyer real estate (three tracts) was appraised (Exhs. J-23, J-24, J-25) at the request of First Newton. The total appraised market value as of October 25, 1983, was $375,000.00.

30. On or about December 1, 1983, the Nearmyers' machinery had a value of approximately $63,300.00, and the livestock had a value of approximately $15,825,00 (Exhs. J-30 and N).

31. The attorney for the Nearmyers was advised of the appraised values of the real estate, machinery, and livestock.

32. After the meeting at First Newton, counsel for the Nearmyers and counsel for Beef Barons were in communication with each other regarding the legal aspects of the proposed transaction between the Nearmyers and Beef Barons.

33. The transaction with the Nearmyers was structured so that the Nearmyers and Carroll Nearmyer's mother would transfer three tracts of land, livestock, and machinery to a corporation called Nearmyer Acres, Inc. (herein "Nearmyer Acres"). Beef Barons then was to purchase all of Nearmyer Acres stock. Carroll Nearmyer would then resign as president of Nearmyer Acres, and Wiltfang would become the president. The Beef Barons purchase of the stock was financed by the $366,000.00 loan at First Newton. The purchase price was set at $366,000.00. Beef Barons granted the Nearmyers an option to purchase all the stock back for $366,000.00. The Nearmyer home and farm buildings, the 5-acre building site, and a truck were to be omitted from the transaction. This property was held out in case the Nearmyers were unable to exercise the option and reacquire the stock.

34. On or about December 16, 1983, Carroll Nearmyer and his attorney, and Wiltfang and his attorney, met at the Boondocks, a truckstop near Williams, Iowa.

35. Prior to this meeting, counsel for the Nearmyers and

counsel for Beef Barons began the process of putting the transaction together. Beef Barons' attorney sent a draft copy of the documents to counsel for the Nearmyers.

36. It was known at the Boondocks meeting that Beef Barons would be the purchaser of the stock and First Newton would finance the transaction. Carroll Nearmyer knew that he was to form a farm corporation and that his farm real estate, machinery and livestock were to be conveyed to that corporation in exchange for stock. The need to pay off debts and provide operating capital was also discussed although Carroll Nearmyer did not understand all that was taking place. The fact that Beef Barons was going to charge a 10 percent fee was also discussed. Either Carroll Nearmyer or his attorney brought a list of debts. Carroll Nearmyer was anxious to close the deal. Carroll Nearmyer and his attorney also examined preliminary drafts of the stock purchase agreement and the option. It was also agreed that 5 acres containing the home and farm buildings would be excluded from the transactions. Carroll Nearmyer's attorney also advised Carroll Nearmyer as to his rights as an option holder as compared to his rights as a mortgagor of property. It was also discussed that hopefully there would be approximately $20,000.00 to $25,000.00 in operating capital although the amount of unsecured debt was still being computed.

37. At or about this time both Carroll Nearmyer and his

attorney knew that Beef Barons was going to be paid a 10 percent fee (Exh. J-35).

38. During this period of time the attorney for the Nearmyers discussed the tax ramifications of the transactions with Carroll Nearmyer. Their attorney also counselled Carroll Nearmyer against entering this transaction and advised him that the only way Carroll Nearmyer could make this deal work was to refinance immediately, exercise the option, and recover the stock in Nearmyer Acres.

39. The Nearmyers attorney drafted all the documents for the incorporation of Nearmyer Acres, including the notice of incorporation and by-laws (Exh. J-37), minutes of the first meeting and articles of incorporation (Exh. J-41). Their attorney also drafted all the deeds from Ardelle Nearmyer to Carroll Nearmyer and Carolyn Nearmyer, and all the deeds from the Nearmyers to Nearmyer Acres (Exhs. J-40, 41, 43, 44, 45), the bill of sale of machinery and livestock of the Nearmyers to Nearmyer Acres (Exh. J-42), and release of a real estate mortgage (J-46).

40. The closing was held on January 11, 1984, at First Newton. Carroll Nearmyer was present with counsel as was Wiltfang with his attorney.

41. The stock purchase agreement (Exh. J-58), in which Carroll Nearmyer sold his stock to Beef Barons, was signed that date. The purchase price was $366,000.00. The stock

purchase agreement was altered on that date at the insistence of counsel for the Nearmyers to provide that Carroll Nearmyer and his son were to receive a weekly salary for their services in farming the corporate farm. This was done because there was concern that there would be insufficient operating funds.

42. Pursuant to numbered paragraph 1 of the Option Agreement (Exh. J-58), the debt of $366,000.00 could not be exceeded unless Carroll Nearmyer consented to the additional debt.

43. Carroll Nearmyer was contractually obligated to operate the Nearmyer Acres farming operation (Exh. J-58; ¶6). This was necessary if Carroll Nearmyer was to keep the option to repurchase the farming enterprise viable.

44. At the time of the closing, Carroll Nearmyer knew that attorney's fees, including his own attorney, were considered as closing costs.

45. The fee for Beef Barons was not disclosed in any of the closing documents.

46. Wiltfang had wanted this fee disclosed in the documents, but his attorney had counseled against it. Wiltfang's attorney advised him that this was not advisable, as the transaction was structured as a sale, and the inclusion of such a provision could be used to classify the transaction as something other than a sale.

47. Carroll Nearmyer collected the amount of unsecured

debt to be paid. This figure was higher at the time of closing than had been previously disclosed. Carroll Nearmyer had understated the total unsecured debt by approximately $20,000.00.

48. There was concern at the closing that there would be insufficient operating funds, and there would be insufficient funds to accomplish all that Carroll Nearmyer wanted. Carroll Nearmyer advised that he had already applied the fertilizer for the 1984 crops, and he had the necessary resources to put in the 1984 crop.

49. It was agreed by all parties that Welling would disburse the funds after the closing. This was done, and after payment of the secured debt, the closing costs, including all attorney's fees and some of the unsecured debt, it was determined that not all of the unsecured debt could be paid.

50. Upon hearing this, Wiltfang called his attorney and was advised that Beef Barons should be paid its fee as there was no provision in the closing documents for Beef Barons to get paid at a later time.

51. Beef Barons was paid the $35,000.00 fee.

52. Wiltfang met with Carroll Nearmyer and discussed the bills which had been paid and those which were unpaid (Exh. J-63). They went over the list and Carroll Nearmyer did not object to the fee paid to Beef Barons.

53. During March, April and May 1984, Carroll Nearmyer, the bookkeeper for Nearmyer Acres, and Wiltfang worked together to make the operation work (Exhs. B, C, D, E, F, and G). During this time there was no objection made to the fee paid to Beef Barons. During this time Carroll Nearmyer knew that sales made from the farm were assets of Nearmyer Acres.

54. On June 12, 1984, Wiltfang, as president of Nearmyer Acres, wrote a letter to the Nearmyers reminding them that interest on the Nearmyer Acres note was due on June 30, 1984 (Exh. J-70).

55. On June 25, 1984, Wiltfang, again as president of Nearmyer Acres, wrote another letter to the Nearmyers reminding them of the due date for the interest payment.

56. The Nearmyers did not respond to either of the letters. The bookkeeper for Nearmyer Acres did not receive any money, and the interest payment was not paid. The Nearmyers and Nearmyer Acres did not have the money to make the payment.

57. On July 3, 1984, Wiltfang as president of Beef Barons and Nearmyer Acres gave notice to Carroll Nearmyer that pursuant to paragraph 6(d) of the Stock Purchase Agreement (Exh. J-58), the buyer elected to liquidate corporate assets to pay Nearmyer Acre corporate debt (Exh. J-73).

58. First Newton was pressuring Wiltfang as an officer of Nearmyer Acres to make the interest payment (Exh. J-74). Nearmyer Acres could not incur additional corporate debt

without the consent of Carroll Nearmyer (Exh. J-58).

59. From June 1984 on, Carroll Nearmyer sold livestock and kept the proceeds. He did not turn the proceeds over to Nearmyer Acres.

60. Carroll Nearmyer threatened the life of Wiltfang and employees of Beef Barons and Nearmyer Acres, and on September 25, 1984, a temporary writ of injunction was issued enjoining and restraining Carroll Nearmyer from interfering with the activities of Nearmyer Acres, its agents or employees (Exh. J-82).

61. On November 16, 1984, Nearmyer Acres commenced an action against Carroll Nearmyer in the Iowa District Court, Jasper County. On December 3, 1984, the Iowa District Court refused to issue a preliminary writ of replevin for Nearmyer Acres and against Carroll Nearmyer on the basis that upon the evidence presented there was no evidence that a purchase price was paid for the Nearmyer Acres stock (Exh. J-88). The Iowa District Court went on to state that "This situation is unconscionable from the standpoint of the plaintiff (Nearmyer Acres)" and the case would have to be tried on its merits.

The Iowa District Court then went on to order that the Defendant, Carroll Nearmyer, should not "dispose of any personal property, other than livestock, and he shall do so then only by selling on the market, and all proceeds shall be paid to Nearmyer Acres, Inc."

62. Carroll Nearmyer continued to sell livestock after this order and the proceeds were not paid into the Nearmyer Acres account.

63. The total damages specifically shown by Nearmyer's own admissions for conversion of hogs is $12,043.09.

64. First Newton commenced a foreclosure action against Beef Barons, Nearmyer Acres, and an action on the Wiltfangs' guarantees in the fall of 1984. Beef Barons could not liquidate the property; Nearmyer Acres did not have sufficient monies as that operation was not cash flowing; and, the Wiltfangs were unable to perform on their guarantees. Consequently, all the assets of Nearmyer Acres were lost by Beef Barons.

65. Beef Barons, Nearmyer Acres, and the Wiltfangs, personally, filed separate Chapter 7 bankruptcies in this Court on January 21, 1986.

66. The Trustee in the Beef Barons case and the Nearmyer Acres case abandoned their claims against Carroll Nearmyer.

67. Nearmyer Acres, Inc. and Beef Barons, Inc. have assigned all of their causes of action against Carroll Nearmyer to B. G. Wiltfang.

68. Bernadine Wiltfang did not send the Nearmyers any letters or messages; she did not attend any of the meetings or the closing; she did not negotiate with Carroll Nearmyer or his attorney; she did nothing to secure the $366,000.00 loan

from First Newton; she had nothing to do with the formation of the transaction documents; and she did not receive anything of value from the transaction.

69. Carroll Nearmyer admitted he has never talked to Bernadine about anything important and makes no claim that he relied upon anything Bernadine did or said.

70. Bernadine was actively involved in renting and maintaining the Beef Barons apartments in Grinnell, Iowa. She was less involved in Beef Barons' farming operations.

71. B. G. Wiltfang made the decisions concerning the investment transactions. Bernadine's actions involving the investment transactions were matters of administration.

72. Farmland values rose in the late 1970s. By the 1980s those values dropped and then stabilized. The big fall in values occurred in 1983, 1984, and 1985.

73. Dominic Lickteig was called to testify as a witness for the Nearmyers. Mr. Lickteig testified that he lived in Shelby County, and by the early 1980s had purchased approximately 300 acres of farmland. He had to refinance the real estate loans, and he needed additional operating capital. He employed a money broker to find financing for him and was introduced to Wiltfang in May 1983. Lickteig had an equity interest in his farm operation and incorporated his farm operation. Lickteig was represented by counsel at all times. He transferred the stock in his farm corporation to Beef

Barons with an option to repurchase. Beef Barons received an option fee at the time of closing, and Lickteig knew about this prior to the closing. Lickteig had to use non-conventional financing because he could not obtain conventional financing. He was unable to exercise the option because the operation would not cash flow.

74. Lickteig then commenced a pro se lawsuit against Wiltfang because he wanted to "get" Wiltfang. An Iowa District Court Judge signed an order requiring Lickteig to stop filing papers because his actions constituted harassment. This action was dismissed.

75. Lickteig testified that he did not have an attorney. However, Lickteig did have an attorney, although the attorney was unable to be present on the date of closing but was available by phone. Lickteig's attorney had gone over all the documents prior to the closing date. Lickteig wanted to close on the closing date and did not want the closing date continued to permit his attorney to be personally present.

76. Harlan Iske was also called as a witness by the Nearmyers. The Iskes farmed in Jasper County and suffered financial problems in the late 1970s and early 1980s.

77. Iske had incorporated his farm operation in order to obtain more favorable loan terms. Iske was unable to obtain conventional financing and employed a money broker to obtain financing. Iske was introduced to Wiltfang by the money

broker.

78. Iske had equity in his farm but was having trouble meeting current expenses and debt service on his existing loans. In mid-1983, Iske had to consider either bankruptcy or finding non-conventional financing, as conventional financing was not available.

79. Iske entered into a stock purchase/option to repurchase stock agreement with Beef Barons in August 1983. Iske was unable to exercise the option as the farm would not cash flow.

80. Iske was represented by counsel at all times. He knew that Beef Barons was going to charge a 10 percent fee, and he knew that Beef Barons was going to finance the transaction by obtaining a loan from a bank.

81. Iske's testimony was contradicted by the testimony of his attorney. Iske denied that his attorney advised him not to enter the transaction. His attorney testified that he advised Iske not to enter the transaction and that Iske was going to lose the farm. Iske denied that he was advised by his attorney that he was only buying a short period of time. His attorney contradicted this statement and testified that he had advised Iske that Iske would have to sell in order to exercise the option and that at that time he would be further in debt.

82. Iske admitted that he sold livestock and failed to

turn proceeds over to Beef Barons.

83. Robert Kline was also called as a witness for the Nearmyers. He testified that he owned 440 acres south of Grinnell, Iowa. By 1982 and 1983, he could not arrange conventional financing to refinance his operation. He found a money broker for farmers in a farm magazine, and the broker stated that he would attempt to find financing. Kline promised to pay a 2 percent finder's fee for the services.

84. Kline incorporated his farm operation and sold the stock to Beef Barons under a stock purchase agreement with an option to repurchase.

85. Beef Barons charged a 10 percent fee, and Kline knew about this prior to signing the stock purchase agreement. Kline was represented by counsel at all times. Kline's attorney prepared documents and negotiated terms of the agreement. All of the bills were paid and additional money was received for expansion of Kline's farm operation, but the additional money was not as much as Kline had hoped for. Kline knew of all the closing costs at the time of the closing.

86. Kline's operation would not cash flow, and he lost his farm.

87. The Nearmyers also called Henry E. (Ed) Kriegel, Jr. to testify for them. Mr. Kriegel was employed at first by Wiltfang Farms as a farmhand and mechanic. In 1984, the

Wiltfangs were scaling down their operations because of financial problems, and Mr. Kriegel was one of two retained employees.

88. Mr. Kriegel was fired by Wiltfang in 1988 because he was unreliable and started to carry guns. Mr. Kriegel was enraged about the termination of his employment and displayed immediate hostility toward Wiltfang. After observing Mr. Kriegel on the stand and hearing his testimony, his testimony was not worthy of belief.

DISCUSSION

I. Corporate Veil

Initially, the Court must determine whether it should disregard the Beef Barons corporate entity. The Court looks to Iowa law in determining whether to pierce the corporate veil. See In re Botten, 54 B.R. 707, 708 (Bankr. W.D. Wisc. 1985). The U.S. Bankruptcy Court, Northern District of Iowa outlined Iowa law on piercing the corporate veil in In re Manchester Hides, Inc., 45 B.R. 794, 799 (Bankr. N.D. Iowa 1985):

> In Northwestern National Bank v. Metro Center, Inc., 303 N.W.2d 395, 398 (Iowa 1981), the Iowa Supreme Court observed that "central to corporate law is the concept that a corporation is an entity separate and distinct from its shareholders." This concept is, however, subject to the rule that "the corporate device cannot in all cases insulate the owners from personal

> liability." Briggs Transportation Co., Inc. v. Starr Sales Co., Inc., 262 N.W.2d 805, 809-10 (Iowa 1979). Interpreting this "pierce the corporate veil" doctrine in Iowa, the Eighth Circuit found the following determinative factors: [A] corporation's existence is presumed to be separate, but can be disregarded if (1) the corporation is undercapitalized, (2) without separate books, (3) its finances are not kept separate from individual finances, individual obligations are paid by the corporation, (4) the corporation is used to promote fraud or illegality, (5) corporate formalities are not followed or (6) the corporation is merely a sham.
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> Lakota Girl Scout Council, Inc. v. Harvey Fund Raising Management, Inc., 519 F.2d 634, 638 (8th Cir. 1975); accord, e.g., Darling Stores Corp. v. Young Realty, Co., 121 F.2d 112, 116 (8th Cir. 1941) (applying Iowa law); Northwestern National Bank, 303 N.W.2d at 398-99; Team Central, Inc. v. Teamco, Inc., 271 N.W.2d 914, 923 (Iowa 1978); Briggs Transportation Co., 262 N.W.2d at 810.

In the instant case, Plaintiffs have not proven the Lakota factors, and the Court refuses to pierce the Beef Barons corporate veil and disregard the corporate entity. However, assuming arguendo that the corporate entity is disregarded, the Court discusses Plaintiffs' allegations infra.

II. 11 U.S.C. §523(a)(2)(A)

Bankruptcy Code section 523 lists ten exceptions to discharge and provides in relevant part:

> (a) A discharge under section 727. . . does not discharge an individual debtor from any debt--

> . . .
>
> (2) for money, property, services, or an extension, renewal, or re-financing of credit, to the extent obtained by--
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. . .

11 U.S.C. §523(a)(2)(A).

To prevent discharge because of fraud under 11 U.S.C. §523(a) (2)(A), a plaintiff must prove actual fraud, not fraud implied in fact. In re Simpson, 29 B.R. 202, 209 (Bankr.N.D.Iowa 1983). The elements of actual fraud include: (1) the debtor made false representations; (2) at the time the representations were made the debtor knew they were false; (3) the debtor made the representations with the intent to deceive the creditor; (4) the creditor relied upon such representations; and (5) the creditor sustained the alleged loss and damages as a proximate result of the false representation. Matter of Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987); Simpson, 29 B.R. at 209.

The plaintiff has the burden of proving each of the elements of actual fraud by the preponderance of the evidence. Grogan v. Garner, ____ U.S. ____, 111 S. Ct. 654 (1991).

In order to prove the first element of a fraud claim, the creditor must show at the time money, property, or services

were obtained by the debtor from the creditor, the debtor made false representations or obtained money, property, or services by false pretenses. In re Snyder, 101 B.R. 822, 835-836 (Bankr. D. Mass. 1989); Matter of Weinstein, 31 B.R. 804, 809 (Bankr. E.D.N.Y. 1983); In re Gans, 75 B.R. 474, 483 (Bankr. S.D.N.Y. 1987). False pretenses involves implied misrepresentation or conduct intended to create or foster a false impression. Gans, 75 B.R. at 483; Weinstein, 31 B.R. at 809; In re Guy, 101 B.R. 961, 978 (Bankr. N.D. Ind. 1988). The representations must be material. In re Rubin, 875 F.2d 755, 759 (9th Cir. 1989).

The second element requires proof of what the debtor knew at the time the representations were made. The debtor must have positive knowledge that the representations were false. In re Patch, 22 B.R. 970, 972-73 (Bankr. D. Md. 1982).

The third element requires a showing by the creditor that the debtor intended to deceive the creditor at the time the representations were made. Guy, 101 B.R. at 979. A creditor may use circumstantial evidence to show a debtor's intent. However, fraud may only be inferred if the totality of the circumstances present a picture of deceptive conduct by the debtor which indicates that the debtor intended to deceive or cheat the creditor. Guy, 101 B.R. at 978; Van Horne, 823 F.2d at 1287; Simpson, 29 B.R. at 211. Statements and actions by the debtor which were neither false nor fraudulent when made

will not be made so by the happening of subsequent events unless the subsequent conduct reflects the debtor's state of mind at the time he made the promise. Guy, 101 B.R. at 979; In re Zack, 99 B.R. 717, 722 (Bankr. E.D. Va. 1989). The courts have also found that the requisite intent is lacking if the debtor does not understand a transaction or shows poor business acumen. Patch, 22 B.R. at 973; Bonosky v. Allen, 25 B.R. 566, 570 (Bankr. S.D. Ohio 1982).

The fourth element of actual fraud is creditor's reliance on a false representation. The Eighth Circuit does not require that the creditor's reliance be shown to be reasonable. In re Ophaug, 827 F.2d 340 (8th Cir. 1987). In Ophaug the Court stated that the statute was clear on its face and that 11 U.S.C. §523(a)(2)(A) does not require a creditor to prove that his reliance on the debtor's fraudulent misrepresentations was reasonable. The creditor need only prove that he relied on the debtor's fraudulent misrepresentations in extending credit to the debtor.

The fifth and final element, proximate cause, requires that the debtor's action was the act, without which the plaintiff would not have suffered the alleged loss and damages. Van Horne, 823 F.2d at 1288-89. If the creditor was negligent or contributed to the creditor's loss, then the causal nexus is destroyed and there is no recovery. In re Goldstein, 105 B.R. 1016, 1017 (Bankr. S.D. Fla. 1989).

A. Bernadine Wiltfang

Bernadine Wiltfang did not send the Nearmyers any letters or messages; she did not attend any of the meetings or the closing; she did not negotiate with Carroll Nearmyer or his attorney; she did nothing to secure the $366,000.00 loan from First Newton; she had nothing to do with the formation of the transaction documents; and she did not receive anything of value from the transaction. Further, Carroll Nearmyer admitted that he has never talked to Bernadine about anything important and makes no claim that he relied upon anything Bernadine did. Therefore, the Court concludes that Plaintiff has not proven the elements of fraud required to except the debt from Bernadine's discharge pursuant to 11 U.S.C. §523(a)(2)(A).

Plaintiffs cite In re Hall, 109 B.R. 149, 156-56 (Bankr. W.D. Pa. 1990) as support for their claims against Bernadine Wiltfang. The Court finds Hall clearly inapplicable. Unlike Ms. Hall, Bernadine Wiltfang made no misrepresentations to Plaintiffs. Further, while Bernadine was actively involved in renting and maintaining the Beef Barons apartments in Grinnell, Iowa; she was less involved in Beef Barons farming operations. Bernadine's actions involving the investment transactions were matters of administration only.

B. Wiltfang

The Court finds the Plaintiffs have not established by preponderance of the evidence that Wiltfang made a false representation, knew any representation was false at the time it was made, and made any representation with the intent to deceive Plaintiffs. Beef Barons disclosed everything about the transaction to Nearmyers and their lawyer. There was no false representation made with the intent to deceive Plaintiffs. The transaction was ultimately a financial disaster. However, the consequences were disastrous for Beef Barons and the Wiltfangs also.

Plaintiffs essentially contend that Wiltfang failed to reveal that there was a fee to be charged, and if a fee was revealed, that Wiltfang failed to reveal that it was to be paid up front, or as part of the closing costs.

Wiltfang testified that the fee was revealed and that the fee was to be paid as part of the closing costs. Wiltfang's testimony is corroborated by Welling's testimony.

This testimony is corroborated by the circumstantial evidence. First of all, it stretches the credulity of the Court to believe that Wiltfang was going to advance $366,000.00 and not charge for the use of the money and the risk involved, as Carroll Nearmyer would have us believe. Wiltfang knew that Carroll Nearmyer was a risk because Carroll Nearmyer was facing a foreclosure proceeding and could not

obtain conventional financing. Wiltfang had never met Carroll Nearmyer prior to the Sunday meeting on the Nearmyer farm. Carroll Nearmyer would have us believe that Wiltfang was going to advance this money just to help him out. After watching the witnesses and listening to their testimony, the Court cannot accept this. Carroll Nearmyer was rather sophisticated regarding the financing of farm operations at the time, and he was willing to pay substantial finder's fees on top of interest money in order to save his farm.

The stock purchase agreement was drafted in such a manner that it supports the conclusion that Beef Barons was to receive the fee up front. The purchase price was $366,000.00, and the Nearmyers' option to repurchase the Nearmyer Acres stock was set at $366,000.00. The provision that the debt of $366,000.00 could not be exceeded unless Carroll Nearmyer consented was inserted at Carroll Nearmyer's assistance.

The Court having rejected the Wiltfang's altruistic and eleemosynary motivations, the stock purchase agreement confirms the fact that Beef Barons' fee was revealed to Carroll Nearmyer as an up-front fee.

Carroll Nearmyer's acceptance of the payment of the fee from January through May, 1984, is also revealing. During this period of time, Carroll Nearmyer did not challenge or complain about the Beef Barons' fee. Carroll Nearmyer's challenge of the fee did not occur until after June 1984.

The testimony of Dominic Lickteig, Harlan Iske, and Robert Kline confirmed the fact that Carroll Nearmyer was made aware that the fee was to be paid up front as part of the closing cost. Lickteig, Iske and Kline all knew of the fee prior to their signing the financing documents.

Concerning reliance by Plaintiffs, the Court finds that Plaintiffs have not established this element by a preponderance of the evidence. Nearmyers were represented by their attorney on all aspects of the transaction and were advised by their attorney and Welling not to pursue the transaction. Despite this advise, Nearmyers chose to pursue the transaction. In short, Plaintiffs did not independently rely on anything told them by Beef Barons or Wiltfang.

Plaintiffs have also not established by a preponderance of the evidence the nexus element. In this case, the real problem was the Nearmyers' debts. Carroll Nearmyer was responsible for compiling the list of unsecured debts before the transaction closed. He either knew or should have known that there were substantially more debts than were listed. Nearmyer caused the problems he now claims were created by others' fraud.

Carroll Nearmyer had one goal in mind and that was to save the farm. In his desperation he did not listen to the advice of his attorney and was willing to ignore the order of the Iowa District Court. He was also willing to threaten the

lives of people in order to gain his objectives. His goal justified the radical means that he was willing to employ.

III. 11 U.S.C. §523(a)(6)

11 U.S.C. §523(a) provides in pertinent part:

> (a) A discharge under §727, 1141, 1228(a), 1228(b), or 1328(b) of this Title does not discharge an individual debtor from any debt--
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

It is well-settled that 11 U.S.C. §523(a)(6) includes debts for willful and malicious conversion. In re Jacobs, 47 B.R. 526, 527 (Bankr. S.D. Fla. 1985). Plaintiff must prove by clear and convincing evidence the elements of a willful and malicious conversion under 11 U.S.C. §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).

In ruling on a transfer and 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.

In the instant case, Plaintiffs have not proven by a preponderance of the evidence that there was a conversion, let alone that there was a willful and malicious conversion. Beef Barons and Wiltfangs never acquired any of the personal property or real estate involved in the transaction. Plaintiffs still had possession and use of the property after Beef Barons and the Wiltfangs filed their bankruptcies. Thus, the Court denies Plaintiffs 11 U.S.C. §523(a)(6) complaint.

IV. Wiltfang's Counterclaims

A. Conversion of Nearmyer Acres Personal Property

The burden is on Wiltfang to show that Carroll Nearmyer wrongfully asserted control or dominion over the personal property of Nearmyer Acres in denial of or in a manner inconsistent with the possessory property rights of Nearmyer Acres. Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235, 247 (Iowa 1988); Welke v. City of Davenport, 309 N.W.2d 450, 451 (Iowa 1981); Jensma v. Allen, 81 N.W.2d 476, 480 (Iowa 1957); Trowe Farms, Inc. v. Central Iowa Production Credit

Association, 528 F.Supp. 500 (S.D. Iowa 1981). Although the tort of conversion includes an intent element, it is an intent to exercise dominion or control over the property. The converter's good faith, ignorance of the owner's rights, mistake, or the owner's negligence are irrelevant. Trowe Farms, 528 F.Sup. at 506. The interference with the possessory right to the property must be so serious that the converter may justly be required to pay as damages the full value of the property converted. Kendall/Hunt, 424 N.W.2d at 247.

In the instant case, from June 1984 on, Carroll Nearmyer sold livestock and kept the proceeds. He did not turn the proceeds over to Nearmyer Acres. Carroll Nearmyer continued to sell Nearmyer Acres' livestock without paying over the proceeds despite an Iowa District Court Order which stated that Carroll Nearmyer should not "dispose of any personal property, other than livestock, and he shall do so then only by selling on the market, and all proceeds shall be paid to Nearmyer Acres, Inc." The total damages specifically shown by Nearmyer's own admissions for conversion of hogs is $12,043.09.

B. Breach of Contract

When Nearmyer executed the stock purchase agreement, Carroll Nearmyer was contractually obligated to operate the

Nearmyer Acres farming operation. He agreed to perform certain duties and generally use his best efforts to fulfill the terms of the agreement. Further, Nearmyer promised to cooperate with the liquidation of Nearmyer Acres corporate assets in the event Beef Barons elected to liquidate corporate assets to pay Nearmyer Acres corporate debt. Nearmyer failed to keep his part of the bargain and breached the contract.

A fundamental maxim of contract law is that if there is non-performance of a duty under a contract, there is a breach unless performance is excused or there is another failure in the formation of the contract. Metropolitan Transfer v. Design Structures, 328 N.W.2d 532, 537-38 (Iowa Appeals 1982); Restatement 2d of Contracts, §235 (1979). Moreover, equity will not relieve competent parties from the legal effect of a contract that is not tainted by fraud simply because one of the parties made a bad bargain. Carson v. Mikel, 216 N.W. 60, 61 (Iowa 1927); Harvey Construction Company v. Parmele, 113 N.W.2d 760, 764 (Iowa 1962). If there is an allegation of fraud in the formation of the contract, then the misrepresentation relied upon must be material. Smith v. Waterloo C.F.& N.R. Co., 182 N.W. 890, 894-95 (Iowa 1921). If both parties have equal knowledge of the truth or falsity of the facts of the transaction, equity will not void the contract. Bell v. Byerson and Barlow, 11 Iowa 233, 237 (1860).

In the instant case, Nearmyer was fully informed about the terms of the agreement and breached the contract. Therefore, he is responsible for such consequences of the breach as must have been contemplated by the parties when they entered into the agreement. See Metropolitan Transfer, 328 N.W.2d at 538. The loss to Wiltfang, Beef Barons, and Nearmyer Acres was the $366,000.00 loan.

C. Deceit

In Count III of Wiltfang's counterclaims, Wiltfang alleges deceit by Carroll Nearmyer, asserting that Nearmyer falsely represented that he would perform in good faith pursuant to the agreement but never had any intention of performing pursuant to the agreement. However, Wiltfang has failed to prove that Nearmyer intended to deceive Wiltfang at the time the agreement was entered and therefore Wiltfang has failed to prove the elements of fraud. See Sinnard v. Roach, 414 N.W.2d 100, 105 (Iowa 1987).

D. Affirmative Defenses to Counter Claims

The Court summarily rejects Plaintiffs' affirmative defenses on the counterclaims. Plaintiffs failed to present evidence concerning said affirmative defenses and failed to argue the affirmative defenses.

IT IS ACCORDINGLY ORDERED that the Defendants should have

judgment against the Plaintiffs dismissing the complaint, as amended, and for their costs, and the Defendant/Counterclaim Plaintiffs should have judgment against the Defendants to the counterclaim in the sum of $378,043.09 plus interest from the entry of the judgment, and for the costs.

LET JUDGMENT ENTER ACCORDINGLY.

Dated this 20th day of February, 1991.

_____
RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE