

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In Re:

**IRA BRISTOL INDUSTRIES, INC.,
a/k/a WELCHER INDUSTRIES, INC.,**

BK. NO. 92-21616

Debtor.

In Re:

**IRA LARRY BRISTOL and
JEAN BRISTOL,**

BK. NO. 92-22593

Debtors.

**WELCHER INDUSTRIES, INC. and
DONALD SALAMONE,**

Plaintiffs,

-vs-

**LCA LEASING CORP. and NYMAT MACHINE
TOOL CORP.,**

**Consolidated
A.P. NO. 93-2074**

Defendants.

LCA LEASING CORP.,

Third Party Plaintiff,

-vs-

DECISION & ORDER

IRA LARRY BRISTOL,

Third Party Defendant.

BACKGROUND

On June 10, 1992, the Debtor, Ira Bristol Industries, Inc., which operated a machine tool business, filed a petition initiating a Chapter 11 case and post-petition changed its name to Welcher Industries, Inc. ("Welcher"). On September 28, 1992, Ira L. Bristol ("Ira Bristol") and Jean Bristol

(collectively the "Bristols"), husband and wife and each an officer of Welcher, filed a petition initiating a Chapter 7 case.

On January 8, 1993, after Donald L. Salamone, Esq. ("Salamone") had become its sole shareholder, Welcher commenced an adversary proceeding against the Bristols to have certain obligations and liabilities alleged to be due from the Bristols determined to be non-dischargeable (Adversary Proceeding #93-2006); Dorothy Lodico ("Lodico"), a physician and the spouse of Salamone, commenced an adversary proceeding against the Bristols to have a \$60,000.00 obligation due from the Bristols determined to be non-dischargeable (Adversary Proceeding #93-2007); and LCA Leasing Corp. ("LCA") commenced an adversary proceeding against the Bristols to have any indebtedness, obligations or liabilities which might be due from the Bristols determined to be non-dischargeable (Adversary Proceeding #93-2008).

On March 2, 1993, an action commenced by Salamone against LCA and Nymat Machine Tool Corp. ("Nymat") in New York State Supreme Court, seeking damages on several causes of action including an alleged failure to honor a commitment to lend, was removed to the Bankruptcy Court and assigned Adversary Proceeding #93-2046. Also on March 2, 1993, an action commenced by LCA against Nymat in New York State Supreme Court was removed to the Bankruptcy Court and assigned Adversary Proceeding #93-2047.

On April 8, 1993, Welcher commenced this adversary proceeding against LCA and Nymat seeking damages on several causes of action including the alleged failure of LCA and Nymat to honor a commitment to lend (Adversary Proceeding #93-2074). Thereafter, Adversary Proceedings #93-2008 (LCA vs. the Bristols), #93-2046 (Salamone vs. LCA and Nymat) and #93-2047 (LCA vs. Nymat) were consolidated with this adversary proceeding.

On January 19, 1994, after the Bristols had plead guilty to a number of criminal charges in

New York State Supreme Court, a Stipulation and Order was entered settling Adversary Proceedings #93-2006 and #93-2007, the Welcher and Lodico actions against the Bristols, which included the entry of money judgments against the Bristols for obtaining money by fraud (\$255,000 in favor of Welcher and \$60,000 in favor of Lodico), and a determination that the indebtedness evidenced by each judgment was non-dischargeable.

On June 30, 1994, a Settlement Agreement and Order was entered settling the adversary proceeding commenced by LCA against Nymat (Adversary Proceeding #93-2047).

On April 21, 1994, LCA and Nymat each filed a Motion for Summary Judgment in the adversary proceedings commenced by Salamone and Welcher against LCA and Nymat (Adversary Proceedings #93-2046 and #93-2074). Prior to the filing of this Decision & Order, the attorneys for Salamone, Welcher & Nymat advised the Court that these actions had been settled as to Nymat, subject to the Court approval of a motion to be filed on notice to all creditors of the proposed settlement. Thereafter, on September 13, 1994, an Order approving the settlement of the Salamone and Welcher actions against Nymat was entered.

The Welcher action against LCA (Adversary Proceeding #93-2074) alleged two causes of action: (1) that LCA breached an agreement to make a loan to Welcher and as a result the company was left with insufficient and inadequate working funds, was forced to file Chapter 11 and suffered consequential damages in the amount of \$1,500,000.00; and (2) that a Cincinnati Milacron Model T-10 Lathe (the "T-10 Lathe") used by Welcher, sold and installed by Nymat, and financed or leased by LCA was to have been a "new" machine, but in fact was a used machine, resulting in damages to Welcher in the amount of \$1,000,000.00.

The Salamone action against LCA (Adversary Proceeding #93-2046) alleged three causes of action: (1) that LCA breached an agreement to make a loan to Welcher that Salamone had

specifically relied upon when he lent the company approximately \$230,000.00 (the "Interim Loan"), including a \$50,000 downpayment on the T-10 Lathe, which Interim Loan he alleged was to be repaid from the proceeds of the LCA loan; (2) by reason of the fact that the T-10 Lathe was a used rather than a "new" machine, Salamone incurred damages in the amount of \$50,000.00, representing the downpayment made by Welcher from the proceeds of the Interim Loan; and (3) for fraud by various parties, including LCA, in inducing Salamone to make the Interim Loan to Welcher. In addition, Salamone requested that the Court award him punitive damages of \$1,000,000.00 in connection with each of the causes of action.

DISCUSSION

I. Cause of Action in Connection with T-10 Lathe

The motion for summary judgment by LCA as the financier or lessor of the T-10 Lathe dismissing the causes of action for damages alleged by Welcher and Salamone because the T-10 Lathe was not a new machine is granted.

Ira Bristol, who was the President, Chief Operating Officer and sole shareholder of Welcher at the time the T-10 Lathe was ordered, installed and financed or leased, indicated at various depositions in connection with the then pending adversary proceedings that in ordering the T-10 Lathe he at all times knew that it was not a "new" machine, but that it was a used machine, or as he described it a "demonstration model", or, as Nymat described it, a factory reconditioned machine. Ira Bristol further testified that he was aware that a new lathe would have cost significantly more than the lathe purchased (\$450,000.00 versus \$300,000.00). Ira Bristol also indicated in his depositions that in his opinion the T-10 Lathe purchased was fit for the purpose for which it was ordered (to produce certain parts in connection with a contract which Welcher was hoping to obtain

from Dresser Rand) and in fact produced a test run of parts which were delivered, accepted and paid for by Dresser Rand. Furthermore, an expert engaged by Nymat to test the T-10 Lathe before it was resold with Court approval filed a report indicating that the Lathe was capable of producing the parts for Dresser Rand.

In addition, nothing in the pleadings and proceedings in these adversary proceedings indicated that when LCA financed or leased the T-10 Lathe any representative of LCA knew or had reason to know that the Lathe was not "new" but was a factory reconditioned machine.

Furthermore, there does not appear to have been any damages sustained by Welcher or Salamone by reason of the fact that the T-10 Lathe was not "new" as described in the contracts, but was a factory reconditioned or a demonstration model, since there is no evidence that Welcher: (1) received a machine different from what it bargained for, or (2) paid a price that did not reflect the true value of the machine ordered and received. Further, there was insufficient evidence presented by Salamone and Welcher to conclude that the machine was not capable of performing the specific function for which it was ordered.

II. Remaining Causes of Action

The Motion by LCA for Summary Judgment dismissing the causes of action for damages alleged by Welcher and Salamone because of an alleged breach by LCA of an agreement to lend and also for fraud in connection with the alleged inducement of Salamone by LCA and others to make the Interim Loan is in all respects denied.

Salamone and Welcher contend that a representative of LCA, Thomas Varholak ("Varholak"), represented to Salamone, Ira Bristol and others in at least one telephone conference in January, 1992, that a loan to Welcher of at least \$500,000.00 had been approved. Salamone and

Welcher further contend that in reliance on this alleged representation and commitment, made after Salamone had specifically indicated that he would not make the Interim Loan in the absence of an assurance that the new loan would be made and that the Interim Loan would be repaid from its proceeds, Salamone made the Interim Loan to Welcher and Welcher became further indebted to Salamone for the Interim Loan. In the papers filed by LCA in support of its Motion for Summary Judgment, there is an Affidavit by Thomas Varholak which fails to deny these allegations or discuss the details of the alleged telephone conversation.

Until the Court, by deposition testimony or at trial, is fully apprised of what, if any, specific representations were made by Varholak or other representatives of LCA in response to exactly what questions and requests for assurances, the Court believes that the granting of the Motion by LCA for Summary Judgment would be inappropriate and not in the interests of justice since the Court believes there are genuine and undetermined issues of material fact. When the parties have addressed such factual issues at trial, the Court can properly rule on the legal issues presented regarding the Statute of Frauds, promissory estoppel, fraud, reasonable reliance and punitive damages.

IT IS SO ORDERED.

/s/

HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: September 14, 1994