UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

WILLIAM REYNOLDS Case No. 92-10856 K

Debtor

GREGORY ROWE

Plaintiff

-vs- AP 92-1168 K

WILLIAM REYNOLDS

Defendant

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Attorney for Plaintiff

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A trial was conducted on this Complaint under 11 U.S.C. § 523(a)(2) and (a)(4) on November 2, 1992 and continued on December 4, 1992. The Plaintiff alleges that this Chapter 7 Debtor wrongfully took electronic equipment of significant value belonging to the Plaintiff; that the Debtor should be liable for its value and that that liability should survive the Debtor's bankruptcy discharge.

The Court heard the testimony of the two parties and of four other witnesses. Some facts are clearly established among the six witnesses.

The following facts appear to be undisputed, and the Court finds that:

1. In the fall of 1982 or 1983, Plaintiff Rowe, Defendant Reynolds, and witnesses Morales, Harris and Klippel were "male dancers," -- men who performed striptease shows in nightclubs and the like, using sound and light equipment.

2. Plaintiff and Klippel, at least, were previously similarly engaged with a group of other men who called themselves the "Body Workers."

3. Plaintiff and Klippel joined with Defendant Reynolds and with Morales in 1982 or 1983 to form a different group called "The Men."

4. Harris joined the group later, as a dancer, and witness David Rowe (brother of Plaintiff Gregory Rowe) joined later as a "D.J." and "Sound and Light Man."

5. At the time "The Men" was formed and thereafter, the group used sound and light equipment which the Plaintiff owned when he was engaged in "Body Workers."

6. There was no agreement or contract among the members of "The Men."

7. Plaintiff managed "The Men," doing most of the booking, handling almost all of the money, arranging for repair,

moving, maintenance of equipment, scheduling the other members, etc.

8. Plaintiff bought, repaired, replaced or maintained some sound and light equipment, including "his" equipment, from the gross proceeds from performances.

9. Plaintiff also paid other expenses of the group (phone, truck rental, etc.) from gross proceeds from performances.

10. From gross proceeds from performances, Plaintiff paid the "D.J." a fixed amount for each performance based on the contract amount.

11. All dancers shared the remaining proceeds from each performance pro rata, except that Plaintiff received $50 - $75 (per performance) more than each of the other dancers, but all "souvenir" proceeds were reserved for souvenir purchases and, promotions.

12. At some point prior to November 7, 1985, the members of "The Men" were engaged in internal disputes and conflicts. Whatever other conflicts might have existed among them, the Defendants Reynolds, Morales, Harris and Klippel were all angry at Plaintiff Rowe, demanding to know "where the money went," referring to the various ongoing applications of proceeds by Plaintiff Rowe.

13. On or about November 7, 1985, Plaintiff Rowe was arrested for offenses unrelated to the matter at Bar, and

thereafter served a period of 15 months of incarceration.[1] When Rowe was arrested, the rented trailer containing the sound and light equipment used by "The Men" was seized by the authorities; the trailer was rented in the Plaintiff's name.

14. On November 8, 1985, Defendant Reynolds and witness Alan Klippel claimed the trailer from authorities, obtained the equipment, returned to U-Haul the trailer rented in the Plaintiff's name and placed the equipment in a different trailer (also apparently rented), leaving the rental fees for the previously seized trailer unpaid.

15. While Plaintiff Rowe was incarcerated, "The Men" continued without him (until 1988).

16. Through his brother David Rowe (the "D.J"), Plaintiff made demand for return of what he asserted to be "his" equipment, or for its value.

17. He was never paid anything.

But for the Plaintiff's incarceration, any dispute before this Court in these regards would likely be of less exotic nature. The group might have disbanded. Plaintiff (who had exclusive possession of the property at the time of his arrest) might have exercised dominion to the exclusion of others. Garden-variety state-court lawsuits might have totally resolved any issues.

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[1]There is unclear testimony regarding any efforts by Plaintiff to continue with the group during pre-trial release.

Instead, what happened is this. In 1986, Rowe sued the others in State Court; that action is still pending. Witness Klippel sued Defendant Reynolds regarding other dealings occurring in more recent years. Finally, in March, 1992, when Klippel was about to take judgment against Reynolds, Reynolds filed this Chapter 7.

(Klippel testified under subpoena from Plaintiff Rowe, but it is unclear (and irrelevant), whether he dislikes Rowe or Reynolds more.)

In any event, the possibility of discharge forces Rowe now to press the claim left fallow in the State Court, and it falls to this Court to sort out the relationships existing seven and more years ago.

It is in doing so that the Court discovers that there is little agreement over the nature of those relationships.[2]

The Plaintiff attests that he bought at least $5200 worth of sound equipment with his own money, all of which he let the group use, and which was taken by Reynolds and Morales from him after his arrest. Through his brother, witness David Rowe, the Plaintiff demanded the equipment back but never got it. (Apparently, he was under Criminal Court order not to communicate directly with other members of the group.) His claim, basically,

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[2]Witnesses were excluded from the courtroom while others were testifying.

is that this equipment was stolen from him.

The debtor/defendant, on the other hand, asserts that "the Men" was a partnership; that the equipment was partnership property; that the plaintiff had at most a claim to a fractional share of the value of the equipment, and; that such claim is a mere contract-type claim, not a non-dischargeable claim for fraud, embezzlement or anything of the like. Morales testified to similar effect.

Harris too believed that the equipment "belonged to everyone" and "everybody paid for it," though he also said that he felt that he "just worked" for the group.

David Rowe's testimony was consistent with that of his brother, the Plaintiff Gregory Rowe. According to David Rowe, "Greg ran the group"; the group was "Greg's business"; the equipment was "Greg's equipment" and everybody else was just a "worker." Nonetheless he admitted on cross-examination that he really doesn't know where the money came from for purchases or repairs; really didn't know about the financial affairs of the group; and though "a worker," he was never given any tax statements, any statement of earnings, or other documentation that an "employee" should receive.

Alan Klippel's testimony was consistent with that of the Defendant, of Morales and of Harris except in certain regards: he did not think that he had any ownership interest in the equipment; he thought it to be individually owned; and he agreed with

Plaintiff and Plaintiff's brother that the equipment described in Plaintiff's exhibits #1-8 was "owned" by the Plaintiff. Klippel painted a picture of Reynolds and Morales taking advantage of Rowe's arrest to "take over" the group and to keep Rowe from re-entering it.

Although these parties and witnesses each define the organizational entity "The Men" somewhat differently, the law speaks clearly to this kind of dispute under facts such as those found above.

~~Because~~ Rowe, Reynolds, Klippel, Morales and Harris were associated "to carry on as co-owners of a business for profit." [Partnership law § 10.]

Because Rowe contributed more to the joint effort then the others, both in capital (equipment) and effort (renting the van, doing the booking and scheduling, making the phone calls, arranging repairs, etc.), he received from the proceeds of each performance: (1) reimbursement or advance of all expenses, and (2) $50-75 more than his fractional share of the net receipts after payment of such expenses and payment of the D.J.

Given the absence of tax records, it is not surprising that none of these parties or witnesses can offer even a remote guess as to the group's or members' revenues during the period in question. Morales testified, however, that the group's "G-String Raffle" money, totally separate from booking contract receipts, may have totalled $30,000 over the course of two years. (This money

was kept in a separate fund for promotional and other purposes.) Further, there are exhibits demonstrating that a typical night's contract receipts would be $600 or $650, and evidence that the group might often work several appearances per week.

Thus it is reasonable to conclude that significant monies were handled; significant expenses were reimbursed to Rowe; and significant $50-$75/performance differentials were paid to Rowe for his larger efforts and contribution to the group.

This all stands for the proposition that profits were shared appropriately. There were no losses, apparently, to be shared. However, there is no suggestion whatsoever that Rowe would have paid the others out of his own pocket if "The Men" got stiffed by a club owner, as he would have been obliged to do if "The Men" were "his" business and everyone else was just an employee. Rather, it appears clear that such losses would have been shared by all.

The Court finds these five, who placed their money, effects, labor or skill in (presumably) lawful commerce or business, also agreed to and did divide the profits and bear the losses in certain proportions. [See 15 N.Y. Jur.2d, Business Relationship § 1280, n.53.]

By operation of law "The Men" was a partnership. The equipment in question was partnership property, having been contributed by Rowe to the partnership stock. By all accounts, several major items of equipment reflected in Plaintiff's Exhibits

1-8 were purchased after "The Men" was formed, during a time when moneys were being taken by Rowe from partnership receipts for "replacement" of equipment. Clearly some property, then, was purchased with partnership funds. Nearly all of Exhibits 1-8 demonstrate "trade ins." The Plaintiff has failed to demonstrate that equipment purchased or improved with partnership funds was not traded-in for equipment he now claims to be his alone.

By all accounts, the Plaintiff handled nearly all finances of the group yet continuously failed to provide the accounting that every other member had demanded. He, who had it within his exclusive power to maintain and share with the others clear and separate records of group assets and his individual assets, and who did not do so, now seeks the benefit of all inferences in those regards in his effort to carry his burden of "proof by a fair preponderance of the evidence."

Rowe's claim that the property was "his" and that the Debtor had no right to its possession and use, is rejected.

However, this does not end the inquiry. The New York Partnership Law, which invested the Debtor and the others with rights in the common property, also imposes a duty on each partner when an event results in a dissolution of that partnership. [This Court treats the State Court's Orders in the criminal proceedings against the Plaintiff, and the subsequent events, as a dissolution under Partnership Law §§ 62 or 63.]

Under Partnership Law § 69(c)(II), Rowe had a right "to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him ...."

New York Courts generally speak of the "partner in possession" having a fiduciary duty that continues after dissolution.[3] Thus it might be said that the failure of the Debtor to set aside the Plaintiff's one-fifth share of the value of the equipment, less the damages (if any) caused by Plaintiff's "withdrawal" from the partnership, was a defalcation while acting in a fiduciary capacity, under 11 U.S.C. § 523(a)(4).

The difficulty here is that the failure of the ~~Plaintiff~~ to keep adequate books and records while he managed the group's finances makes it impossible for the Court to determine what that share would have been, seven years ago. The partnership property would have been not only that claimed by Rowe to be "his," but all property contributed to the group or bought with partnership funds. There is no convincing evidence of the total inventory of equipment or of the value of this fund, and no competent evidence even of the value of the specific equipment he has claimed as "his."

Although Plaintiff Rowe has succeeded in establishing that the failure of Reynolds to set aside Rowe's share of

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[3] *Kirsch v. Leventhal*, 586 N.Y.S.2d 330 (App.Div. 3rd Dept.), but see *Duvay v. Ladenburg, Thelman & Co., Inc.*, 565 N.Y.S. 2d 819 (App. Div. 1st Dept.).

partnership property is a 11 U.S.C. § 523(a)(4) defalcation while Reynolds was acting in a fiduciary capacity,[4] Rowe cannot now be heard to benefit from the fact that he did not maintain clear books of account and records from which the Court could determine even what equipment existed on November 7, 1985,[5] let alone its value as of that date.

Plaintiff testified that "his equipment" was worth $5200 on November 5, 1985; but as to specific items even his brother had a much lower estimate. For example, Plaintiff valued a Crown D 150 amplifier at $900, but his brother said $300.

No other testimony fully supported the Plaintiff's assertion that all of the equipment reflected in his Exhibits #1-8 still existed on November 7, 1985. The most that there appears to be agreement on is that two "Heresy" speakers and a Crown Amp were there, and possibly a tape deck that had cost $296 when new in 1981. The Court finds that Rowe has proven only $1500 in "partnership property." One-fifth of $1500 will be awarded.

Each side shall bear its own costs. The Clerk will enter

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[4]To such effect see *In re Stone*, 94 B.R. 298 (S.D.N.Y. 1988).

[5]Although the Debtor and his partners should have inventoried the partnership property when they took custody of it, Rowe failed, over the course of seven years, to compel an accounting. He must be held to have failed to prove the extent of his damages, for he cannot now derive the benefit of two forms of inaction: (1) failure to keep books of account from the inception of the group to November 7, 1985, and (2) failure to prosecute his claims diligently in the seven years since.

Judgment against the Debtor and in favor of Gregory Rowe in the amount of $300, which debt is non-dischargeable in this bankruptcy case.

SO ORDERED.

Dated: Buffalo, New York
December 28, 1992

U.S.B.J.