UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re

Case No. 92-27252

FRANK PIO CRIVELLO,

Debtor.

Chapter 7

CENTURY SHOPPING CENTER FUND I
LIMITED PARTNERSHIP,

Plaintiff,

v.

Adversary No. 94-2346

FRANK PIO CRIVELLO,

Defendant.

MEMORANDUM DECISION ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

This action was brought by the plaintiff, Century Shopping Center Fund I Limited Partnership (Century), alleging that the defendant, Frank Pio Crivello (Crivello), participated in intentional acts of conspiracy and antitrust violations to deprive Century of its property or to cause great damage to its property. Century asserts that Crivello's actions caused willful and malicious injury to Century, and the resulting debt is excepted from discharge under 11 U.S.C. § 523(a)(6). The adversary proceeding was held in abeyance for several years, pending resolution of various state court proceedings, and was reopened in October 1999. The plaintiff has now moved for summary judgment. The parties have fully briefed the issues and presented oral argument to the court.

This court has jurisdiction under 28 U.S.C. § 1334(b), and this is a core proceeding under

28 U.S.C. § 157(b)(2)(I). The following opinion constitutes the court's findings of facts and conclusions of law pursuant to Fed. R. Bankr. P. 7052. For the reasons stated herein, the debt of the defendant/debtor to the plaintiff is excepted from the debtor's discharge under 11 U.S.C. § 523(a)(6).

FACTS

At all times relevant to this dispute, the Howell Plaza Shopping Center, which was owned by plaintiff Century, had as its anchor tenant a Sentry Food Store owned by Godfrey & Co., n/k/a Fleming Companies, Inc. Pursuant to the lease between Godfrey and Century, the Sentry store was to be Howell Plaza's anchor tenant until September 1, 1993.

In April 1987, Frank Pio Crivello announced plans to build Oak Creek Centre across the street from Howell Plaza. The new shopping center was to include a 45,000 square foot supermarket as its anchor tenant. As part of the planning for the new center, Crivello negotiated with various potential grocery store tenants, and he also considered operating his own grocery store. Shortly after Crivello's building plans became public, Century made plans to expand and remodel Howell Plaza, and it entered into negotiations with Godfrey to amend its lease and to retain Sentry as a tenant. As Godfrey's negotiations with Century proceeded, Crivello also turned his attentions to Godfrey. His efforts to lure Godfrey away from the competing center were successful.

Crivello orchestrated an agreement with Godfrey, pursuant to which Godfrey closed its Sentry Food Store at Howell Plaza in mid-November 1998 and moved the store to Crivello's center across the street. In addition to their lease, Crivello and Godrey executed a "side agreement," discussed in detail below, which set forth their plan to ensure the success of their

respective enterprises. Godfrey was required to maintain the vacant store at Howell Plaza without lighting but to retain its occupancy and leasehold, effectively excluding grocery competition from its new store in Oak Creek Centre. Crivello compensated Godfrey for its cost in retaining the vacated space. The agreement also enhanced the attractiveness of satellite rental space in Oak Creek by virtue of Godfrey's presence as an anchor tenant. Shortly after the store went dark, Century terminated the lease and demanded that Godfrey surrender the premises, which Godfrey refused to do. After considerable litigation, Century settled for substantial damages against Godfrey.

ARGUMENTS

Century claims that Crivello conspired to engage in *per se* violations of section 133.03(1), Wis. Stats., by agreeing to restrain competition and fix prices for shopping center space, and his conduct resulted in willful and malicious injury to Century. According to Century, without the side agreement with Godfrey, Crivello would have had to compete with Howell Plaza for shopping center tenants, and he or his anchor tenant would have had to compete with Godfrey for grocery customers.

Crivello contends that the court should reject the *per se* analysis of the parties' business arrangement, in favor of a "rule of reason" analysis of antitrust violations. The arguable consequences of opening the new store were an increase in the level of customer service, the creation of additional jobs in the area, and a decrease in prices. The side agreement merely facilitated the legal objective of building a new supermarket and shopping center. Crivello maintains that the antitrust laws should not be implemented to condemn restrictions on competition when the restrictions are ancillary to an output-increasing, cooperative venture.

Since the court should analyze the competition enhancing factors, summary judgment should be denied.

Crivello also argues that he lacked the requisite malicious intent to sustain a judgment of nondischargeability under section 523(a)(6). He believed he had the right to require Godfrey to keep the Howell Plaza store dark until its lease for the property expired in 1993, primarily because the lease did not have a "continuous operations" clause. Crivello based his belief that he was acting lawfully on an incident that had occurred several years earlier. Previously, Crivello had litigated and lost a claim in which Godfrey had "gone dark" in a strip mall owned by a Crivello-related partnership. The state circuit court determined that Godfrey was allowed to "go dark" in the absence of a "continuous operations clause." (*See* 5/19/00 Affidavit of Frank P. Crivello, ¶ 11).

DISCUSSION

This case is appropriate for summary judgment. Fed. R. Bankr. P. 7056. There are no material facts in dispute, only the interpretation of those facts. *See, e.g., United States v. Navistar Int'l Trans. Corp.*, 152 F.3d 702, 707 (7th Cir. 1998). The court has interpreted the allegations in the manner most favorable to the nonmoving party, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2514 (1986), and even if the court were to assume the defendant's allegations are correct as to the elements of section 523(a)(6), Century is still entitled to a judgment of nondischargeability.

The Supreme Court in *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 977 (1998), held that for a debt to be considered "willful" within the meaning of the first standard for exception from discharge under section 523(a)(6), the actor must have intended the harmful

consequences of the act, not simply the act itself. Crivello intended to restrict the operation of the mall across the street, Howell Plaza, and even stated as much to his loan broker when he disclosed the lease agreement with Godfrey:

> In addition to the items I pointed out above, the most important factor to keep in mind is it will make the balance of my development a slam dunk. When you consider that [Godfrey] will close the store across the street and keep it dark, this will cripple the [Howell Plaza] center and make it difficult for them to compete with me in the future. They have six years left on that lease and they plan to pay it out so as to keep the space dark. This will make the lease of our satellite space extremely easy because we will be the dominant center without question. Further, since the other corners are already developed, we are not going to see competition pop up down the road in the way of another food store. It really is a very neat play for us.

(Frank P. Crivello 3/11/88 letter to Donald Schefmeyer, Action Mortgage Company).

Crivello accomplished the crippling of Howell Plaza by a "side agreement" with Godfrey that supplemented the provisions of their lease for the Oak Creek Plaza space. Godfrey's lease for Howell Plaza was set to expire on August 31, 1993. The side agreement stated that Godfrey "shall not terminate the Existing Lease [with Century] or exercise any option to extend the term." Crivello paid Godfrey for any leasehold improvements it was leaving behind at Howell Plaza, and Crivello also paid $210,730 as the present value of base rent due for the remaining term. He maintained the right to veto any subtenant Godfrey might put in their old space, and he dictated the type of business that Godfrey could carry on in its Howell Plaza space, notwithstanding what it might have been allowed to do under its lease with Century. Crivello even dictated what type of business could be a subtenant, and provided for damages, payable by Godfrey to himself if Godfrey exercised its subletting rights under its lease with Century. In essence, Crivello was contractually restricting Godfrey's rights under its lease with Century, thus preventing competition with himself.

Therefore, based on Crivello's own statements, his actions against Century were willful. He intended to harm Howell Plaza, not merely to build a competitive shopping center across the street.

That the economic losses suffered by Howell Plaza constitute an injury or damage is not seriously disputed. Crivello argues, however, that notwithstanding his intent that Godfrey take the Howell Plaza space out of the market, his actions are not legally compensable. That is, the act is not one for which the defendant is liable for damages under applicable tort law. This court is satisfied that Crivello's deliberate removal of grocery store space, and the resulting reduction of the value of satellite space, constituted price fixing and a *per se* violation of antitrust laws.

Section 133.03, Wis. Stats., is interpreted in accordance with the federal courts' interpretation of section 1 of the Sherman Act. *See Carlson & Erickson Builders, Inc., v. Lampert Yards, Inc.,* 190 Wis. 2d 650, 665, 529 N.W.2d 905, 910-11 (1995); *Independent Milk Producers Co-op v. Stoffel,* 102 Wis. 2d 1, 298 N.W.2d 102, 104 (Ct. App. 1980). An antitrust violation is a statutory tort. *Olympia Equipment Leasing v. Western Union Telegraph Co.,* 797 F.2d 370, 379 (7th Cir. 1986); *see also Carlson & Erickson Builders,* 190 Wis. 2d 650 (establishing burden of proof for private, civil antitrust actions under Chapter 133, Wis. Stats.). Thus, an antitrust violation leading to recovery of damages by Century may provide a basis for an exception to discharge under 11 U.S.C. § 523(a)(6).

Section 133.03(1), Wis. Stats., provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal. Every person who makes any contract or engages in any combination or conspiracy in restraint of trade or commerce may be fined not more than $100,000 if a corporation, or, if any other person, $50,000, or be imprisoned for not more than 5 years, or both.

Wis. Stat. § 133.03(1). Here, Crivello and Godfrey entered into a contract to restrain trade and to prevent competition by a particular entity. Crivello used Godfrey's contract and Godfrey's right to go dark for his own purposes, and the fact that he got cooperation from Godfrey does not detract from his motives. A conspiracy is defined as "a combination of two or more person by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful." *Maleki v. Fine-Lando Clinic*, 162 Wis. 2d 73, 86, 469 N.W.2d 629, 634 (1991). The unlawful purpose here was restraint of trade by removing competitive rental space from the market. This enhanced the value of Crivello's grocery and satellite space, and participation in the conspiracy is a *per se* antitrust violation.

Although the purpose, cause, and effect are not disputed, Crivello still maintains that his actions were legal or at least susceptible to analysis under the "rule of reason." Cases interpreting antitrust law have applied this rule when an act by a defendant has an arguably valid competitive purpose, but it has the ancillary effect of diminishing competition to some extent. An analysis of the reasonableness of the restraints includes an examination of the purpose of the restraint, market power, and the anticompetitive effect of the restraint. *Grams v. Boss*, 97 Wis. 2d 332, 348, 294 N.W.2d 473, 481 (1980).

The doctrine that certain conduct is a *per se* violation of the antitrust laws provides a presumption that the alleged conduct has a subversive effect on competition. *Id.* at 348-49. Certain restraints of trade are unreasonable per se and therefore illegal "because of their pernicious effect on competition and their lack of any redeeming virtue." 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 50 (1996). The critical analysis

focuses on whether the activity on its face seems to be such that it would always or almost always restrict competition and decrease output, instead of being designed to increase economic efficiency and made the market more, rather than less, competitive. *National Electrical Contractors Ass'n v. National Constructors Ass'n*, 678 F.2d 492, 500 (4th Cir. 1982) (citing *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 99 S.Ct. 1551 (1979)). Persuading Godfrey to keep its former space dark in order to prevent competition is a *per se* violation.

Crivello misses the distinction between opening a center that is better and more attractive to the public, as opposed to targeting a specific competitor to shut the competitor down. *See, e.g., Serfecz v. Jewel Food Stores,* 67 F.3d 591 (7th Cir. 1995). Here, Century was right in Crivello's bull's eye, and Godfrey had the bullet. All he had to do was to persuade Godfrey to fire that bullet, a move that was also in Godfrey's economic interest. A competitive act directed at the buying public is legal, but an anticompetitive act intended to harm another entity in the same business is against public policy and law. Crivello's conspiracy with Godfrey had the intended effect of forcing Century, his only rival, out of the Oak Creek retail shopping center market. A prospective tenant needed only to see the dark store, and the tenant would go elsewhere.

The anticompetitive effect of the side agreement is further demonstrated by what happened when Century terminated the lease on December 28, 1988, right after the store went dark. Godfrey had moved its Sentry Foods store out on November 19, 1988. Even if Godfrey had a right to go dark under the terms of the lease, Century had a right to breach the lease itself by kicking them out. This is an "efficient breach." *See Stop-N-Go of Madison, Inc. v. Uno-Ven Co.*, 184 F.3d 672, 680 (7th Cir. 1999); *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750 (7th

Cir. 1988). Century would have been required to pay damages for its breach, although Godfrey was mitigating its damages up a storm across the street with its bigger new store, and that should have been the end of the matter. But Godfrey could not relinquish the premises after the termination by its landlord, as this was not contemplated by the side agreement. Had it done so, Godfrey would probably have had to return $210,730 to Crivello, which was the remaining base rent on its Century lease. Surrendering the old store risked litigation with Godfrey's new landlord. So it decided to hold over and live up to the side agreement, all the while forcing Century to litigate the termination. Holding over after termination of a lease is prohibited under Wisconsin law, and Godfrey paid well for abiding by the side agreement. (*See* Milwaukee County Court Order, dated 10/6/98, awarding double rental damages to Century). The actions of Crivello were not compatible with the legitimate business activities of a shopping center developer.

For damages resulting from the debtor's willful act to be excepted from discharge under 11 U.S.C. § 523(a)(6), the act must also be malicious. "Malicious" means in conscious disregard of one's duties or without just cause or excuse. *In re Shala*, 251 B.R. 710, 713 (N.D. Ill. 2000) (citing *Matter of Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994)). Hatred or ill will are not necessary elements of malice. *In re Molina*, 228 B.R. 248, 251 (B.A.P. 9th Cir. 1998); *In re Behn*, 242 B.R. 229, 237 (Bankr. W.D.N.Y. 1999). No actual malice or wrongful intent is required under section 133.03(1), Wis. Stats. Thus, Crivello's acts must be evaluated under 11 U.S.C. § 523(a)(6) as well as under antitrust laws to determine whether the acts were done "without just cause or excuse."

Crivello had no legal right, just cause, or excuse to contractually require Godfrey to

holdover, thereby gaining effective control of its former space, even if he thought Godfrey had the legal right to do so. *See In re Mitchell*, 227 B.R. 45, 51 (Bankr. S.D.N.Y. 1998) (malice "can be implied when anyone of reasonable intelligence knows that the act in question is contrary to commonly accepted duties in the ordinary relationships among people, and injurious to another"). Crivello's written statement to his loan broker, quoted above, is more than mere bravado; it shows the harm he intended for his competitor, considerably more harm than he could have inflicted by fair competition. It shows clear malice.

CONCLUSION

The debtor's liability to the plaintiff is excepted from the debtor's discharge. The court will set a scheduling conference for determining the amount of damages.

Dated at Milwaukee, Wisconsin, January 11, 2001.

BY THE COURT

Honorable Margaret Dee McGarity
United States Bankruptcy Judge