In the United States Bankruptcy Court

for the Northern District of Iowa

Charles D. Glew Sheryl A. Glew *Debtor(s).*	Bankruptcy No. 97-01387C Chapter 7
Jomo Investments Inc. *Plaintiff(s)* vs. Charles D. Glew Sheryl A. Glew *Defendant(s)*	Adversary No. 97-9159-C

ORDER RE DEBTORS' MOTION FOR SUMMARY JUDGMENT

On January 21, 1998, the above-captioned matter came on for hearing pursuant to assignment. Plaintiff appeared by Attorney Keith Stapleton. Debtors/Defendants Charles and Sheryl Glew appeared by Attorney Richard Hansen. The matter before the Court is Debtors' Motion for Summary Judgment. After the presentation of evidence and oral argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I) and (J).

STATEMENT OF THE CASE

Debtors Charles and Sheryl Glew filed a voluntary Chapter 7 bankruptcy petition on May 7, 1997. Jomo Investments filed its adversary complaint on July 31, 1997. Plaintiff asserts that Debtors' discharge should be denied for fraud pursuant to 11 U.S.C. § 727(a)(4)(C), or, alternatively, if Debtors are granted a discharge, Plaintiff's claim should be excepted from discharge pursuant to 11 U.S.C. §523(a)(2)(A).

Debtors filed a Motion for Summary Judgment, stating that the alleged pre-petition fraud did not occur in or in connection with the bankruptcy case as required by §727(a)(4). Further, Debtors deny that Debtor Charles Glew was involved in any fraud or that Jomo Investments has suffered any damages. In response, Plaintiff Jomo Investments asserts that summary judgment is not appropriate where proof of intent to deceive is involved. Jomo Investments also argues that it has suffered damages from (1) the filing of a mechanic's lien by a materials supplier, (2) Debtors' failure to complete work under the construction contract, and (3) Plaintiff having to employ other persons to complete Debtors' required work.

FINDINGS OF FACT

Glew Construction Co., an Iowa corporation, was owned solely by Debtors Charles and Sheryl Glew, who were the officers and directors of the corporation. As of the hearing date, Glew Construction Co. was no longer doing business. Jomo Investments, an Iowa corporation, is wholly owned by its president, William J. Skogman. Jomo Investments and Glew Construction Co. entered into a contract whereby Glew Construction Co. would construct a portion of a building at 1110 Industrial Park in Hiawatha, Iowa, for the benefit of Jomo Investments. The parties dispute the exact contract price. Jomo Investments argues that the parties orally agreed that Jomo would pay Glew Construction Co. $61,339.27 to furnish building materials and labor necessary to complete certain portions of the building. Glew Construction Co., however, argues that the parties entered into a contract whereby Glew Construction Co. would construct the building for the contract price of $63,873.43.

Before completion of the work required under the contract, Glew Construction Co. delivered to Jomo Investments an invoice in the amount of $63,873.43 dated October 25, 1995. The following November 1, Jomo Investments delivered a check made payable to Chuck Glew Construction for $40,000 to Debtor Sheryl Glew. The parties dispute whether the $40,000 check was to be paid to materials suppliers or go toward the $63,873.43 contract price.

Plaintiff claims that Debtor Sheryl Glew informed Mr. Skogman that Glew Construction Co. lacked funds to pay ReVosWel, a materials supplier. ReVosWel refused to supply further building materials to complete the Jomo Investments building until it received payment for the already furnished materials. Mr. Skogman asserts that Jomo Investments issued the $40,000 check on the condition that the money be used exclusively to pay ReVosWel in full with any balance to be paid to Midwest Plumbing& Heating Co., Inc., a separate corporation. Jomo Investments alleges Debtor Sheryl Glew misrepresented that Glew Construction Co. would use the $40,000 check from Jomo Investments to pay materials suppliers and instead converted the money to some other use.

Debtors claim the $40,000 check was not issued with any such conditions, but rather the money was to be applied against the contract price. Debtors assert that at the time the check was issued, Jomo Investments was indebted to Glew Construction Co. for $63,873.43 based upon the contract.

Jomo Investments claims that it suffered damages from ReVosWel's filing of two mechanic's liens and from Glew Construction Co.'s failure to complete work required under the contract. Jomo Investments expended approximately $13,000 to employ other persons to complete Debtors' required work. ReVosWel filed its first mechanic's lien against Jomo Investments on February 16, 1996, in the sum of $29,634.68 plus interest of $1,355.89 through March 17, 1997. ReVosWel's second mechanic's lien was filed against Jomo Investments on April 25, 1996, in the sum of $28.11 plus interest.

Debtors argue that Jomo Investments has suffered no damages because the first mechanic's lien was filed by ReVosWel after the lapse of ninety days from the last date materials were supplied. An action on the enforceability of the mechanic's lien is presently pending in the Linn County District Court. Debtors argue that under Iowa Code section 572.11, a mechanic's lien is enforceable only to the extent that the owner owes money to the general contractor as of the date of the filing of the lien. Thus, Debtors argue that because Plaintiff need only pay ReVosWel what it legally owes Glew Construction Co. for services performed under the contract, Plaintiff has suffered no damages.

CONCLUSIONS OF LAW

The Eighth Circuit recognizes "that summary judgment is a drastic remedy and must be exercised with extreme care." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990); see also Geiger v. Tokheim, 191 B.R. 781, 785 (Bankr. N.D. Iowa 1996). The Eighth Circuit has also recognized that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Wabun-Inini, 900 F.2d at 1238 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)).

In considering a motion for summary judgment, the Court must determine "whether the record, viewed in a light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rabushka v. Crane Co., 122 F.3d 559, 562 (8th Cir. 1997).

> After the moving party points out the absence of evidence to support the nonmoving party's case, the nonmoving party "must advance specific facts to create a genuine issue of material fact for trial." A genuine issue of material fact exists if the evidence is sufficient to allow a reasonable [factfinder] to return a verdict for the nonmoving party. However, the mere existence of a scintilla of evidence in favor of the nonmoving party's position is insufficient to create a genuine issue of material fact.

Id. (citations omitted). The existence of some factual disputes does not preclude summary judgment unless the factual disputes are relevant and could affect the outcome of the case. See Adams v. Erwin Weller Co., 87 F.3d 269, 271 (8th Cir. 1996). Summary judgment must be granted with caution when a party's mental state or intent is at issue, as usually such issues raise questions for determination by a factfinder. United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172, 1176 (8th Cir. 1992); see also In re Bartlett, 154 B.R. 827, 829 (Bankr. D.N.H. 1993).

Under the Code, there is a distinction between bars to discharge and exceptions to dischargeability. See In re Cox, 161 B.R. 667, 668 (Bankr. W.D. Ark. 1993). Bars to discharge under 11 U.S.C. § 727 are filed on the "basis of the debtor's conduct in the bankruptcy case or conduct with regard to his assets." Id. For example, bars to discharge may be based upon such acts as a "failure of the debtor regarding his duties of record-keeping, truthfulness to the trustee and the court, or concealing assets." Id. (citations omitted). In contrast, exceptions to dischargeability under 11 U.S.C. §523(a) are filed on the basis of a debtor's actions with regard to [a] particular debt." Id. For example, exceptions to dischargeability may be based upon acts such as "procuring money by fraud, embezzlement or larceny, or wilful and malicious injury." Id. (citations omitted).

Discharge Pursuant to § 727(a)(4)(C)

Debtors assert that the alleged fraud was not in or in connection with the bankruptcy case as required by §727(a)(4)(C), which states:

> a. The court shall grant the debtor a discharge, unless--
>
> ...
>
> 4. the debtor knowingly and fraudulently, in or in connection with the case--
>
> ...

C. gave, offered, received, or attempted to obtain money, property, or advantage, of a promise of money, property, or advantage, for acting or forbearing to act.

11 U.S.C. §727(a)(4)(C) (1993). Plaintiff must be able to prove all elements of its § 727(a)(4)(C) claim in order to defeat Debtor's Motion for Summary Judgment. One element of §727(a)(4)(C) requires that the alleged fraud occur "in or in connection with the [bankruptcy] case." It is undisputed that the alleged fraud occurred on November 1, 1995, approximately eighteen months prior to the commencement of the bankruptcy case. Thus, the alleged fraud did not occur in or in connection with this Chapter 7 case. Because Plaintiff is unable to prove all the elements required under §727(a)(4)(C), Debtors are entitled to Summary Judgment as a matter of law.

Dischargeability Pursuant to § 523(a)(2)(A)

Although both parties cite 11 U.S.C. §523(a)(4) in their briefs, Plaintiff's complaint only cites 11 U.S.C. §523(a)(2)(A). The Court is uncertain whether the parties simply made an error in drafting, as the majority of the authorities cited by the parties substantively refer to §523(a)(2)(A) rather than §523(a)(4), or whether the parties are trying to raise a new claim.

"While complaints are to be liberally construed [and leave to amend a complaint is to be granted liberally], 'an attempt to amend one's pleadings in [a] brief comes too late.'" Dorothy J. v. Little Rock School Dist., 7 F.3d 729, 734 (8th Cir. 1993) (citing Hanson v. Town of Flower Mound, 679 F.2d 497, 504 (5th Cir. 1982)); see also Mut. Creamery Ins. Co., v. Iowa Nat'l Mut. Ins. Co., 427 F.2d 504, 507-08 (8th Cir. 1970) (stating that "pleadings must be construed liberally in order to prevent errors in draftsmanship"). Because this case was originally presented under §523(a)(2)(A) and neither party filed a motion to amend the complaint, the Court will analyze Debtors' Motion for Summary Judgment under §523(a)(2)(A).

Plaintiff bears the burden to prove the elements of its claim under 11 U.S.C. §523 by a preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 290 (1991). Exceptions to discharge must be "narrowly construed against the creditor and liberally against the debtor, thus effectuating the fresh start policy of the Code. These considerations, however, 'are applicable only to honest debtors.'" In re Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987) (citations omitted).

Section 523(a)(2)(A) states:

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 refinancing 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) (1993). In this Circuit, a plaintiff proceeding under §523(a)(2)(A) must prove the common law elements of fraud, which include: (1) the debtor made false representations; (2) at the time made, the debtor knew them to be false; (3) the representations were made with the

intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on the representations; and (5) the creditor sustained the alleged injury as a proximate result of the representations having been made. See Van Horne, 823 F.2d at 1287, as modified by Field v. Mans, 516 U.S. 59, 74-75 (1995) (holding that "§ 523(a)(2)(A) requires justifiable, but not reasonable, reliance") and In re Ophaug, 827 F.2d 340, 343 (8th Cir. 1987) (holding that a "creditor need not prove that his reliance was reasonable"). This Court noted in United States v. Earhart, 68 B.R. 14, 17 (Bankr. N.D. Iowa 1986), that it is "highly unlikely that a situation would ever arise under which summary judgment would be appropriate in adversary proceedings brought under section 523(a)(2)."

The parties dispute whether Debtor Sheryl Glew made false representations at the time Mr. Skogman, on behalf of Jomo Investments, issued her the $40,000 check. Plaintiff asserts that Mr. Skogman issued Sheryl Glew the $40,000 check to pay off ReVosWel with any excess going to Midwest Plumbing & Heating Co., Inc., a separate corporation. Debtors, on the other hand, claim that the $40,000 check was not issued with any conditions, but rather the money was to be applied against the contract price of $63,873.43. Were the Court simply to accept Debtor's assertion as true, the Court would be "improperly weighing the credibility of the witness[es]." In re Shelnutt, 150 B.R. 436, 438 (Bankr. E.D. Ark. 1992). Thus, a material issue of fact exists regarding whether Debtors made a false representation at the time Jomo Investments issued Sheryl Glew the $40,000 check.

Although the Code does not allow courts to impute one spouse's intent to another spouse, "fraudulent intent may be inferred from the totality of the circumstances and the conduct of the person accused." In re Nahabedian, 87 B.R. 214, 216 (Bankr. S.D. Fla. 1988). Debtors argue that Charles Glew did not make any false representations and, therefore, should be dismissed from the case. However, the test under §523(a)(2)(A) "dictates that a particular debt is nondischargeable '[i]f the debtor benefits in some way' from the money, property, services or credit obtained through deception." In re Luce, 960 F.2d 1277, 1283 (5th Cir. 1992).

Although Luce involved a partnership owned by a husband and wife, the issue was quite similar to this case--whether a wife could be discharged under §523(a)(2)(A) for money obtained by her husband's fraud. See id. at 1281-83. The Court acknowledges that partnership liability and corporate liability are very different. However, Luce's logic could hold true in a closely-held corporation owned by a husband and wife. Because Glew Construction Co. was a closely-held corporation solely owned by Charles and Sheryl Glew, the uncontested record is insufficient for the Court to determine as a matter of law that Charles Glew benefitted from the $40,000 check from Jomo Investments. As such, Charles Glew cannot be dismissed from the case.

Even though the parties dispute whether Debtors made false representations at the time Jomo Investments issued Sheryl Glew the $40,000 check, Plaintiff must be able to show that it sustained injury as a proximate result of the representations made in order to succeed under §523(a)(2)(A). See Van Horne, 823 F.2d at 1287. Jomo Investments argues that Debtor Sheryl Glew misrepresented that Glew Construction Co. would use the $40,000 check from Jomo Investments to pay ReVosWel and instead converted the money to some other use. Consequently, ReVosWel was not paid and filed two mechanic's liens against Plaintiff's property. Debtors argue, however, that Jomo Investments has suffered no damages because the first mechanic's lien was filed by ReVosWel after the lapse of ninety days from the last date materials were supplied.

Whether the mechanic's liens are enforceable or not, Jomo claims that it incurred an additional $13,000 in expenses to employ other persons to complete Debtors' required work under the contract. Although causation issues may exist concerning whether the $13,000 in expenses were incurred as a proximate result of the representations made, such issues are seldom capable of determination on a

Motion for Summary Judgment. See, e.g., Earhart, 68 B.R. at 17. Accordingly, summary judgment is not appropriate with respect to Debtors' §523(a)(2)(A) claim.

In summary, the alleged fraud did not occur in or in connection with this Chapter 7 case as required by §727(a)(4)(C). A material issue of fact exists regarding whether Debtors made a false representation. More facts are needed before the Court can rule on whether Charles Glew benefitted from the $40,000 check from Jomo Investments. A material issue of fact exists as to whether Plaintiff sustained injury as a proximate result of Debtors' alleged misrepresentations.

WHEREFORE, Debtors' Motion for Summary Judgment with respect to their § 727(a)(4) claim is GRANTED.

FURTHER, Debtors' Motion for Summary Judgment with respect to their § 523(a)(2)(A) claim is DENIED.

SO ORDERED this 20th day of February, 1998.

Paul J. Kilburg
U.S. Bankruptcy Judge