FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
January 17, 2008
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE CHRISTINA MARIA WINGER, Debtor.	BAP No. CO-07-090
VECTRA BANK COLORADO, N.A., Plaintiff – Appellant, v. CHRISTINA MARIA WINGER, Defendant – Appellee.	Bankr. No. 06-14534-ABC Adv. No. 06-01866-ABC Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before BOHANON, CORNISH, and THURMAN, Bankruptcy Judges.

THURMAN, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

This appeal is from the bankruptcy court's judgment finding that appellant Vectra Bank failed to prove that its claim against the Debtor, Christina Winger, is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2) and (6). We AFFIRM.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

I. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from final judgments and orders of bankruptcy courts with the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[1] An order that fully resolves an adversary proceeding is a final order for the purposes of appeal.[2] The bankruptcy court entered a judgment that fully resolved the parties' adversary proceeding on August 1, 2007, Appellant's notice of appeal was timely filed on August 10, 2007, and no district court election has been filed. Therefore, this Court has jurisdiction over this appeal.

II. BACKGROUND

In the summer of 2001, the Debtor and her husband, Richard Winger, had joint checking accounts at both Vectra Bank and First National Bank. Between July and September 2001, a number of checks were written on these two accounts, in what Vectra Bank contends was a "check-kiting" scheme. Check-kiting is the practice of writing an insufficient funds check on one account, depositing that check into another account, then "covering" the first account's insufficient funds with yet another insufficient funds check drawn on the second account, all for the purpose of avoiding an overdraft in either account. The amount of "cover" inevitably escalates as checks are written back and forth between the accounts in a deliberate effort to obtain the use of funds the account holders do not actually have.

On September 25, 2001, Richard Winger wrote a check (the "NSF Check") to himself on the First National Bank account, in the amount of $4,600.00, which he then deposited in the Vectra Bank account. The NSF Check, upon which

---

[1] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

[2] *Cascade Energy & Metals Corp. v. Banks (In re Cascade Energy & Metals Corp.)*, 956 F.2d 935, 938-39 (10th Cir. 1992).

Vectra Bank's claim is based, was ultimately returned to Vectra Bank by First National Bank, unpaid, due to insufficient funds in the First National account. Because it had already allowed other checks to be written against the expected funds from the NSF Check, Vectra Bank suffered a loss when it was dishonored.

In May 2002, Vectra Bank filed a state court civil action against the Wingers, seeking recovery of damages incurred due to the NSF Check. In June 2002, the Wingers executed a "Stipulation and Confession of Judgment" ("Stipulation") in the state court action, pursuant to which they each confessed judgment in favor of Vectra Bank in the amount of $14,796.80 plus interest, which consisted of the $4,600 NSF Check, fees, costs, and treble damages, less a $1,886.27 payment previously made by the Wingers. The Stipulation states that Richard Winger wrote and endorsed the NSF Check, that it had been dishonored, and remained unpaid. Significantly, the Stipulation does not include any allegations of, or confessions to, check-kiting or fraud. Moreover, the stipulated damages are entirely limited to those resulting directly from the fact that the NSF Check had been dishonored.

In lieu of the $9,200 in treble damages, the Stipulation required the Wingers to pay a total of $5,596.80, beginning with a $1,000 payment ten days after execution of the Stipulation, and in increments of $500 per month thereafter until fully paid. After its receipt of the entire $5,596.80, Vectra Bank would dismiss the case. However, the Wingers agreed that their failure to make any payment entitled Vectra Bank to immediately obtain judgment for the full $14,796.80, less any intervening payments. No payment was ever made pursuant to the Stipulation. Therefore, at a hearing on July 10, 2002, that was not attended by the Wingers, Vectra Bank obtained a default judgment in the state court action. For reasons not revealed in the record before us, the state court's judgment against Richard Winger is in the amount of $14,796.80, while the judgment against the Debtor is in the amount of $2,713.73, plus costs and interest. Vectra

Bank had no contact with either of the Wingers until the Debtor, individually, filed a petition for Chapter 7 bankruptcy relief on July 19, 2006, listing Vectra Bank as an unsecured creditor. Vectra Bank filed an adversary proceeding, contending that the debt owed it is non-dischargeable. After a trial, the bankruptcy court entered judgment dismissing Vectra Bank's complaint, and ordering the debt discharged. Vectra Bank appealed.

III. ISSUES AND STANDARD OF REVIEW

Vectra Bank contends that the bankruptcy court erred in finding that it failed to establish that the Debtor acted with intent to defraud. We review the bankruptcy court's factual findings in support of its decision for clear error.[3] A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'"[4] Moreover, in reviewing findings of fact, due regard must be given to the opportunity of the bankruptcy court to determine credibility of witnesses.[5]

IV. DISCUSSION

In its complaint, Vectra Bank relied on § 523(a)(2)(A) and (6) as the basis for its position that its claim against the Debtor is not dischargeable in bankruptcy. Those provisions are as follows:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title 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–

---

[3] *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990).

[4] *Id. (*quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

[5] Fed. R. Bankr. P. 8013.

> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; [or]
>
> . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

Essentially all of the evidence at the trial, which the Debtor did not personally attend, consisted of the testimony of Gary Foster, Vice President for Special Assets for Vectra Bank. Mr. Foster explained the bank's procedures, detailed the relevant activity in the Wingers' Vectra Bank account, gave a definition of "check-kiting" and his opinion that the activity in the Wingers' account established it, detailed the bank's resulting loss, and described the Stipulation and the parties' dealings both before and after its execution. Significantly, although Mr. Foster opined that the Debtor had to know that checks were being written on her account without sufficient funds, he had never personally spoken with the Debtor, and was unable to establish at trial that she had actually written, endorsed, or deposited any of the checks alleged to be part of the check-kite.[6]

The creditor asserting the claim has the burden to prove that its debt is non-dischargeable under § 523 by a preponderance of the evidence.[7] In this case, the bankruptcy court found that Vectra Bank had established a check-kite, and that a check-kite is a "fraud" within the meaning of § 523(a)(2)(A).[8] However, noting

---

[6] *See July 20, 2007, Transcript ("Tr.")* at 29, *l.* 6, *in* Appellant's Appendix at 94. The bank's inability to prove that the Debtor had actually written any of the checks on which her signature appeared resulted, in part, from its failure to list her signature card as an exhibit or to otherwise authenticate her signature on the checks. In addition, the bank did not call the Debtor as a witness and did not present the testimony of anyone else who may have been able to offer proof that the Debtor had actually written or presented any of the checks.

[7] *Grogan v. Garner*, 498 U.S. 279, 291 (1991); *In re Pasek*, 983 F.2d 1524, 1526 (10th Cir. 1993).

[8] *Bench ruling in Tr.* at 54, *in* Appellant's Appendix at 119.

the closeness of the evidence along with the placement of the burden of proof, the bankruptcy concluded that there was insufficient evidence to find that the Debtor, as opposed to her husband, acted with the requisite fraudulent intent. In so ruling, the bankruptcy court stated that it was "influenced significantly" by the state court judgment, reasoning that the disparity in amounts awarded against the Debtor and against her husband suggested that the Debtor was liable only for the overdraft, while her husband was liable for the penalties imposed for fraud.[9]

On appeal, Vectra Bank argues both that the evidence of the Debtor's intent is "clear" and that the bankruptcy court erred by not inferring fraudulent intent from the Debtor's conduct, including her failure to appear at the evidentiary hearing.[10] Without deciding whether such an inference would be appropriate, we disagree with the assertion that refusal to infer fraudulent intent can only be interpreted as a failure to understand that fraudulent intent may be inferred. In fact, the bankruptcy court simply found that Vectra Bank had not sufficiently established the Debtor's fraudulent intent with the evidence it presented.

Vectra Bank relies heavily on its assertion that the Debtor "wrote 92% of all the checks issued" as proof of her fraudulent intent.[11] On the contrary, however, the bank did not actually "prove" that the Debtor wrote *any* of the checks at issue, since it failed to verify her signature or to otherwise establish that she participated in the creation or presentation of the checks. Similarly, the bank suggests that "Mr. Foster's opinion that there is no way [the Debtor] could not have known that she had insufficient funds in her account" establishes the

---

9 *Id.* at 56-58, *in* Appellant's Appendix at 121-23.

10 Brief of Appellant at 11.

11 *Id.* at 10.

Debtor's intent.[12] However, the bankruptcy court is not bound to accept an opinion simply because it was the only one proffered. The court found that Mr. Foster's opinion was simply insufficient to satisfy the bank's burden of proof, a decision that this Court cannot say is clearly erroneous. Finally, Vectra Bank argues that the Debtor's Stipulation, along with the resulting state court judgment, should have been given collateral estoppel effect. Just how either of those documents establishes fraudulent intent is unclear, since the Stipulation makes no mention of fraud or check-kiting, reciting only that a debt is owed.[13] Moreover, the state court's judgment, as noted by the bankruptcy court, actually supports an inference that the Debtor's obligation was limited to the amount of the overdraft, while her husband's liability was based on fraud.

V. CONCLUSION

Although we agree that the question of intent was a close one, we conclude that the bankruptcy court's ultimate finding that the evidence was insufficient to prove that the Debtor acted with intent to defraud is not clearly erroneous. Therefore, the judgment discharging the bank's debt is AFFIRMED.

---

[12] Brief of Appellant at 13.

[13] Indeed, the only check referenced in the Stipulation is the NSF check, which the parties admitted was both written and endorsed by Mr. Winger. Nothing in the Stipulation suggests that Mrs. Winger was liable to the bank on any other basis than the fact that she co-owned the overdrafted account.