FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE SUSAN STAUFFER, also known as Susan Ferre, Debtor.	BAP No. UT-07-045
AMERICAN GENERAL FINANCE OF UTAH, INC., Plaintiff – Appellee, v. SUSAN STAUFFER, Defendant – Appellant.	Bankr. No. 04-22407 Adv. No. 04-02573 Chapter 7 ORDER AND JUDGMENT*

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

Before BROWN, McNIFF, and RASURE, Bankruptcy Judges.

BROWN, Bankruptcy Judge.

Susan Stauffer ("Debtor") appeals the bankruptcy court's order denying her motion for attorney's fees and costs under 11 U.S.C. § 523(d).[1] This matter raises

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

1 This case was filed before October 15, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") became effective. Thus, this case is governed by the law in effect prior to BAPCPA and all statutory references to the Bankruptcy Code are to 11 U.S.C. § § 101-1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004), unless otherwise

(continued...)

the question of whether a complaint objecting to nondischargeability must contain a statutory reference to § 523(a)(2) before a debtor may request an award of fees. For the reasons stated, we hold that a complaint need not reference § 523(a)(2) specifically and, thus, we remand this matter to the bankruptcy court to complete its findings as to the Debtor's entitlement to an award under § 523(d).

I. Background

The Debtor filed a Chapter 7 petition on February 19, 2004. American General Finance of Utah, Inc. ("AGF") timely filed a complaint ("Complaint") objecting to the dischargeability of its debt. In due course, the Debtor received her Chapter 7 discharge, subject to this pending adversary proceeding, and the case was closed as a no-asset case on June 9, 2004.

The factual allegations of the Complaint are simple and straightforward. The Debtor entered into a revolving credit line with AGF.[2] She secured her obligation by executing a deed of trust on certain real property (the "Property").[3] In August 2001, she sold the Property and repaid the outstanding balance on the credit line.[4] "Incident to Defendants' [sic] sale of the Property, Defendant executed a Revolving Credit Loan Affidavit and Personal Undertaking wherein Defendant attested in writing that thereafter she would 'not draw down any advances nor write any drafts or checks against the [Note.]'"[5] Despite her

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[1] (...continued)
specified as well.

[2] *Complaint for Nondischarcheability (sic)* at ¶ 9, *in* Appellee's Appendix ("APPX") at 30.

[3] *Id.* at ¶ 10, *in* APPX at 30.

[4] *Id.* at ¶¶ 13-14, *in* APPX at 30.

[5] *Id.* at ¶ 16, *in* APPX at 31.

promises, she drew on the credit line in excess of $41,000.[6]

The legal grounds set out in the Complaint are not so straightforward. In the preamble, it states that the action is brought under § 523(a)(6).[7] But the heading for the only cause of action is entitled "Fraud and Misrepresentation."[8] In the first claim, AGF alleges that "Defendant . . . promised in a writing, signed by Defendant, that after the sale of the Property she would 'not draw down any advances nor write any drafts or checks against the Revolving Credit Line.'"[9] It further alleges she knew "such material statements of fact were false or made such material statements with reckless disregard for the truth or falsity thereof as evidenced by the fact that Defendant nevertheless, knowing of such promises and commitments in writing to Plaintiff, charged $41,446.94 to the RCL, after the sale of the Property, with no intention to repay the same, and without terminating the RCL in writing as agreed."[10] It then makes allegations that the Debtor made the statements with intent that AGF should rely on them, AGF did in fact "reasonably" rely on them, and suffered damages as a result.[11] Despite setting forth most of the elements of a fraudulent misrepresentation claim, the Complaint then concludes that the "acts or omissions of Defendant were a result of willful and malicious conduct," entitling AGF to punitive damages.[12]

Sometime following the pleadings, the Debtor and AGF became embroiled in a discovery dispute, which led to a series of events that effectively rendered the

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6 *Id.* at ¶ 17, *in* APPX at 31.

7 *Id.* at ¶ 3, *in* APPX at 30.

8 *Id.*, *in* APPX at 31.

9 *Id.* at ¶ 23, *in* APPX at 31.

10 *Id.* at ¶ 25, *in* APPX at 32.

11 *Id.* at ¶¶ 26-28, *in* APPX at 32.

12 *Id.* at ¶¶ 31-32, *in* APPX at 32-33.

adversary proceeding "moot" for all practical purposes. First, in the adversary proceeding, in connection with a discovery dispute, the bankruptcy court imposed sanctions against the Debtor and warned that it would strike Debtor's answer if she failed to timely produce documents.[13] Immediately prior to a hearing scheduled on Debtor's subsequent failure to produce these documents, the Debtor filed a Chapter 13 petition, listing AGF as her only creditor.[14]

In this pre-BAPCPA case, Debtor's successful completion of a Chapter 13 plan would have rendered AGF's nondischargeability claim moot. The bankruptcy court confirmed the Debtor's plan of reorganization, but AGF filed a motion to set aside plan confirmation, claiming it had not received notice of the plan and, therefore, it had been denied due process.[15] The bankruptcy court denied the request to set aside plan confirmation. The Debtor then filed a renewed motion to dismiss in the adversary proceeding.[16] Following denial of its motion to set aside confirmation of the plan, AGF did not object to the Debtor's renewed motion to dismiss the adversary. On January 17, 2007, the bankruptcy court dismissed the adversary, but took the Debtor's request for attorney's fees under advisement.[17] In a separate ruling, the bankruptcy court denied the request for fees, finding that it could not award attorney's fees under 11 U.S.C. § 523(d) because AGF's adversary proceeding was commenced under 11 U.S.C.

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[13] *See Order Granting Motion to Compel Initial Disclosures Under FRCP 26* at 2, *in* APPX at 102.

[14] *Adversary Docket* at 7 and *Chapter 13 Docket* at 11, *in* APPX at 14, 29.

[15] *See Motion to Set Aside Confirmed Chapter 13 Plan on Lack (sic) Due Process Grounds, or in the Alternative to Vacate or Amend the Order of Confirmation and for a Determination that Judgment of Nondischargeability Apply Equally to Debtor's Chapter 13 Proceeding, in* Appellant's Appendix Part 2 at 62.

[16] *See Defendant's Renewed Motion to Dismiss Adversary Proceeding With Prejudice and Motion for Fees and Costs, in* Appellant's Appendix Part 3 at 135.

[17] *Order Dismissing Adversary Proceeding with Prejudice, in* APPX at 98.

§ 523(a)(6), not § 523(a)(2).[18]

II. Jurisdiction and Standard of Review

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[19] The Debtor's notice of appeal in this case was timely. Neither party elected to have this appeal heard by the United States District Court for the District of Utah. The parties have therefore consented to appellate review by this Court.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[20] In this case, the order of the bankruptcy court denying the Debtor's request for fees left nothing remaining for the bankruptcy court's consideration. Thus, the decision of the bankruptcy court is final for purposes of review.[21]

A question involving a dismissal of a complaint for failure to state a claim is a question of law, reviewed *de novo*. *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). Because the issue in this case is whether the Complaint states a specific claim for relief, *de novo* review is also appropriate.

III. Discussion

In this appeal, the Debtor is seeking to recover attorney's fees and costs under 11 U.S.C.§ 523(d). That subsection provides:

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[18] *Order Denying Defendant's Motion for Fees and Costs Pursuant to 11 U.S.C. § 523(d), in* APPX at 93.

[19] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1(a) & (d).

[20] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

[21] *In re Geneva Steel Co.*, 260 B.R. 517, 520 (10th Cir. BAP 2001), *aff'd*, 281 F.3d 1173 (10th Cir. 2002) ("An order on an objection to a claim is a final order for purposes of 28 U.S.C. § 158(a)(1).").

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. § 523(d). Thus, a debtor must establish three elements: (1) a request for determination of dischargeability; (2) a consumer debt; and (3) the discharge of the consumer debt. *Mid. Am. Credit Union v. Glazier (In re Glazier)*, No. 90-1256, 1991 WL 177698, at *3 (D. Kan. Aug. 26, 1991). *See also Citizens Nat'l Bank v. Burns (In re Burns)*, 894 F.2d 361 (10th Cir. 1990). If the debtor establishes these elements, then the burden shifts to the creditor to show that its position was substantially justified or that special circumstances would make an award unjust.

The Debtor contends it was error for the bankruptcy court to deny attorney's fees and expenses solely because AGF's Complaint did not expressly reference a claim under § 523(a)(2). We agree. A ruling on a debtor's request for fees under § 523(d) should not rest solely on a technical pleading requirement. The bankruptcy court based its ruling on the technicality that AGF had only recited its claim fell under § 523(a)(6), and had never amended its pleading.[22] The dissent takes the position that, regardless of the statutory reference used, the *facts* outlined in the Complaint only sound in § 523(a)(6), despite some inartful, conclusory statements in the Complaint of "false pretenses, false representation, and fraud." *Dissent* at 3. We believe the facts in the Complaint could easily assert a claim under either subsection.

The facts outlined in the Complaint support a claim under § 523(a)(2)(A). A claim based on § 523(a)(2)(A) provides that:

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[22] *Order Denying Defendant's Motion for Fees and Costs Pursuant to 11 U.S.C. § 523(d)*, *in* APPX at 93.

> (a) A discharge under [11 U.S.C.] § 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). To establish that a claim is subject to this exception from discharge, a creditor must prove: (1) the debtor made a false representation; (2) with the intent to deceive the creditor; (3) the creditor relied on the false representation; (4) the creditor's reliance was justifiable; and (5) the false representation resulted in damages to the creditor. *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996). The allegations of the Complaint in this case contain all of these elements, with the exception of referring to the reliance standard as "reasonable" reliance, instead of "justifiable reliance." Thus, despite the failure to specifically include a statutory reference to § 523(a)(2)(A), these allegations could support a claim for relief for fraudulent misrepresentation, as well as a claim for willful and malicious injury under § 523(a)(6).

Admittedly, the alleged fraudulent misrepresentation in this case pertains to a promise and a statement of *future* intentions. Ordinarily, statements as to future events are not actionable as fraud, but "[a] representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention." Restatement (Second) of Torts § 530(1) (1977).[23] The relevant intention is the debtor's intention at the time he or she made the promise or statement. *Id.* cmt. d. The mere fact of nonperformance does not establish the fraudulent intent, nor does it shift the burden of proving intent to the debtor. *Id.*

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[23] In *Field v. Mans*, 516 U.S. 59, 70 n.8 (1995), the Supreme Court made clear that the term "false representation" in § 523(a)(2) is defined under the Restatement (Second) of Torts as it existed in 1978, when this phrase was incorporated into the Bankruptcy Code. *Accord Chevy Chase Bank FSB v. Kukuk (In re Kukuk)*, 225 B.R. 778, 782 (10th Cir. BAP 1998).

But the "intention may be shown by any other evidence that sufficiently indicates its existence, as, for example, the certainty that he would not be in funds to carry out his promise." *Id.* *See also Palmacci v. Umpierrez*, 121 F.3d 781, 787 (1st Cir. 1997); *In re Allison*, 960 F.2d 481, 484 (5th Cir. 1992). In this case, if the Debtor had no intention to honor her promise not to draw further on the line of credit at the time she executed her affidavit, then a finder of fact could find that she defrauded AGF at that time.

The Complaint in this action is not unlike the complaints of many other creditors who either fail to make any reference to § 523, or who refer to the wrong subsection. But Federal Rule of Civil Procedure 8(a), made applicable by Bankruptcy Rule 7008(a), provides that a complaint need only contain "a short and plain statement of the claim showing the pleader is entitled to relief[.]" Likewise, Federal Rule of Civil Procedure 8(e)(1) provides that the "pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." In fact, "[w]hen two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements." Fed. R. Civ. P. 8(e)(2). Finally, Federal Rule of Civil Procedure 8(f) requires a court to construe all pleadings so "as to do substantial justice."

Bankruptcy courts often overlook the type of pleading deficiency that exists in this case and instead they enter judgment on the basis of the facts proven at trial. As this Court has previously ruled, the court is not bound by the parties' pleadings. "[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law[.]" *Pratt v. Tower Day Surgery Ctr. (In re Pratt)*, WO-99-056, 2000 WL 159055 at *3 (10th Cir. BAP February 15, 2000).

We fear that the bankruptcy court's ruling in this matter may create a

precedent for outright rejection of a § 523(d) claim for fees whenever the complaint fails to identify § 523(a)(2) specifically. This could create an avenue for mischief. If a creditor recites facts in its complaint to substantiate either a § 523(a)(2) or (a)(6) claim, but makes no reference to any subsection of § 523 or only refers to § 523(a)(6), and its claim sounding in fraud lacks substantial justification, but nevertheless requires a debtor to expend resources responding to it, should the bankruptcy court be prevented from awarding fees in a case in which it felt a fee award was justified, simply because the complaint lacked the technical reference to § 523(a)(2)?

By our ruling, we do not suggest that the present case demonstrates that AGF's claim lacked substantial justification. The facts seem to suggest otherwise. The Debtor was on the brink of having her answer stricken in the adversary when she filed a Chapter 13 petition. It was only after AGF was unsuccessful in setting aside her Chapter 13 plan confirmation that it did not contest the Debtor's renewed efforts to have the adversary dismissed. These facts alone do not support a finding that the Complaint lacked substantial justification. Continued prosecution may not have been warranted after the court ruled that the plan's confirmation would not be set aside, but it does not appear that AGF continued to prosecute after this event.

Despite serious misgivings as to whether these facts warrant the imposition of fees under § 523(d), this Court will not substitute its judgment for that of the bankruptcy court by entering its own conclusions as to "substantial justification" or "special circumstances making an award unjust." In addition, on the basis of the record before us, we are unable to determine whether the debt at issue was a "consumer debt." Instead, the bankruptcy court must complete its findings as to each and every element necessary to consider an award under § 523(d). *See Davis v. Melcher (In re Melcher)*, 322 B.R. 1 (Bankr. D.D.C. 2005).

IV. Conclusion

For these reasons, we remand this matter to the bankruptcy court for further findings consistent with this decision.

McNIFF, Bankruptcy Judge, dissenting.

I respectfully dissent from the majority and would affirm the bankruptcy court's order denying the Debtor's motion for attorney's fees and costs.

The Debtor contends it was error for the bankruptcy court to deny attorney's fees and expenses as the Complaint inferred a cause of action under 11 U.S.C. § 523(a)(2). The Court's review of the Complaint shows that even though it contained statements of false pretenses, false representation, and fraud by using the phrases "material false and misleading statements," "promised in writing," and "reasonably relied,"[1] the Complaint clearly states that is was brought as a claim under 11 U.S.C. § 523(a)(6).[2] The facts pleaded support a claim under 11 U.S.C. § 523(a)6, not (a)(2).

A debtor may not receive a discharge "for willful and malicious injury by the debtor to another entity or to the property of another entity[.]" 11 U.S.C. § 523(a)(6). To establish that an injury is willful, the debtor must have intended to cause the injury or the debtor must have known that the injury was substantially certain to be the consequences of the debtor's acts. *Mitsubishi Motors Credit of Am., Inc. v. Longley (In re Longley)*, 235 B.R. 651, 657 (10th Cir. BAP 1999) and *Mills v. Ellerbee (In re Ellerbee)*, 177 B.R. 731, 739 (Bankr. N.D. Ga. 1995). The classic elements of a malicious injury are the commission of wrongful acts without just cause. *Mills* at 739. AGF alleged that the Debtor had a revolving account that was secured by real property that she sold to pay off the account.[3] The Debtor then executed an affidavit stating that she would not charge

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1 *Complaint* at ¶¶ 22-30, *in* APPX at 31-32.

2 *Id.* at ¶ 3, *in* APPX at 30.

3 *Complaint* at ¶¶ 9-14, *in* APPX at 30.

to the account.[4] Instead, AGF alleges, she did not cancel the account, but used it and charged $41,446.94.[5] These allegations in the Complaint support a claim under 11 U.S.C. § 523(a)(6), in that the Debtor knowingly charged to the account to incur the debt.

Generally, after a debtor files for bankruptcy relief, a court discharges the debts that were incurred prior to filing the bankruptcy. 11 U.S.C. § 727. Debts that were incurred as a result of the debtor's fraudulent actions or statements may not be discharged. Specifically, a debt obtained by false pretenses, a false representation or actual fraud is not dischargeable or if the debt is obtained by a false oral statement or a false written statement respecting the debtor's financial condition. 11 U.S.C. § 523(a)(2)(A) & (B).

The Bankruptcy Code states that a debtor does not receive a discharge:

> (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;
>
> (B) use of a statement in writing –
>
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive[.]

11 U.S.C. § 523(a)(2).

The courts defined false pretenses to mean conscious, deceptive or misleading conduct calculated to obtain or deprive another of property. *McLeod*

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[4] *Id.* at ¶ 16, *in* APPX at 31.

[5] *Id.* at ¶ 17, *in* APPX at 31.

v. Barnaby (In re Barnaby), No. 05-33096, Adversary No. 05-6051, 2007 Bankr. LEXIS 815, at *4 (Bankr. D. N.J. Mar. 6, 2007) (*quoting Gentry v. Kovler (In re Kovler)*, 249 B.R. 238, 261 (Bankr. S.D.N.Y. 2000)). To establish a claim that a debt was incurred by false pretenses, the plaintiff must establish: (1) implied misrepresentation or conduct by the defendant; (2) defendant knowingly and willingly; (3) created a contrived and misleading understanding of the transaction; and (4) induced the plaintiff to advance money, property or credit to the defendant. *McLeod* at *5. The Complaint does not allege facts that the Debtor knowingly or willingly created a misleading understanding between herself and AGF or induced AGF to give her money. The allegations contend that she just continued to use the account.

For a court to find a debt nondischargeable under false representation, the creditor must prove that the debtor made false or misleading statements with the intent to deceive in order for the creditor to give money to the debtor. *Id.* at *5. The Complaint lacks allegations that the Debtor made false or misleading statements before incurring more debt on the existing revolving account.

To establish that a debt should not be discharged because of actual fraud, the creditor must prove: (1) debtor made material false representation; (2) at the time the debtor knew it was false or the debtor showed reckless disregard for the truth; (3) the representation was made with the intent to deceive the creditor; (4) the creditor relied; and (5) sustained a loss as a result of the representation. *Id.* at *6. AGF's Complaint makes broad and general conclusory statements regarding "willful and malicious conduct," "material false and misleading statements," "promises in writing" and "reasonably relied," but does not allege facts that the Debtor's behavior was actually fraudulent.[6]

Intent is an element under each of these causes of action. "[I]ntent to

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[6] *Complaint* at ¶¶ 22-30, *in* APPX at 31-32.

deceive is measured by the debtor's subjective intention at the time the representation was made." *Johnson v. Curtis (In re Curtis)*, No. 02-74988, Adversary No. 03-7335, Adversary No. 03-7336, 2006 Bankr. LEXIS 911, at *21 (Bankr. C.D. Ill. May 24, 2006) (internal quotation marks omitted). The requisite element of intent is missing from the Debtor's facts to establish a case under 11 U.S.C. § 523(a)(2). Debtor's response to the Complaint alleges that the new monies advanced were pursuant to a new loan, paid in the form of a cashier's check prepared and drawn upon checks provided by AGF's agent.[7] The Debtor's statement negates an intent to deceive with regard to claims under 11 U.S.C. § 523(a)(2). Neither AGF's allegations concerning the actions of the Debtor nor Debtor's response to those allegations support a conclusion that AGF implied a claim under 11 U.S.C. § 523(a)(2).

It would seem grossly unfair to expect the Debtor to actively and effectively respond to elements that are generally and non-specifically plead without the benefit of being able to refer to a specific statutory provision and the case law connected thereto.

Because I do not believe that a claim for relief under 11 U.S.C. § 523(a)(2) was properly alleged by citation or fact, the application of 11 U.S.C. § 523(d) is not proper to allow attorney's fees and expenses.

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[7] *Answer* at 3, *in* APPX at 49.