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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE SCOTT R. BAKAY, also known as Scott Ronald Bakay, Debtor.	BAP No. CO-11-003
GEORGE DIAMOND and GEORGIA DIAMOND, Plaintiffs – Appellants, v. SCOTT R. BAKAY, Defendant – Appellee, and DAVID E. LEWIS, Trustee, Appellee.	Bankr. No. 09-33358 Adv. No. 10-01155 Chapter 7 OPINION*

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

Before MICHAEL, NUGENT, and THURMAN, Bankruptcy Judges.

THURMAN, Bankruptcy Judge.

Plaintiffs George and Georgia Diamond ("Diamonds") appeal a bankruptcy court order denying their request for prejudgment interest on their non-dischargeable claim against debtor, Scott Bakay ("Debtor"). The Diamonds,

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

through counsel, appeared at oral argument before this Court on May 17, 2011. No other parties appeared at that hearing. For the reasons set forth herein, we affirm.

I. BACKGROUND

In 2004, the Diamonds and the Debtor were neighbors. In October 2004, the Debtor persuaded the Diamonds to loan $100,000 to his company, Imperial World Developers, Inc. The Debtor prepared an agreement, which all parties signed. The Debtor agreed to repay the Diamonds' $100,000 loan within six months, plus interest on the loan in the amount of $100,000. Thus, the Debtor promised to repay the Diamonds $200,000 within six months in exchange for their loan of $100,000.[1]

The Debtor never repaid the Diamonds' loan, and likewise did not pay them any interest. He filed a Chapter 7 bankruptcy petition on October 31, 2009, and the Diamonds filed a non-dischargeability complaint against him on February 5, 2010. In the complaint, the Diamonds alleged that the Debtor had fraudulently induced their loan and that their claim against him was non-dischargeable pursuant to 11 U.S.C. § 523(a)(2).[2] After discovery, the Diamonds filed a motion for summary judgment on their claim, to which the Debtor did not respond. On

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[1] This equates to an annual interest rate of 200%.

[2] Unless otherwise noted, all further statutory references in this decision will be to the Bankruptcy Code, which is Title 11 of the United States Code. Section 523(a)(2) provides, in pertinent part, that a Chapter 7 discharge

> does not discharge an individual debtor from any debt —
> . . .
>
> (2) for money, property, [or] services . . . to the extent obtained by —
> (A) false pretenses, a false representation, or actual fraud . . . ; [or]
> (B) use of a statement in writing —
> (i) that is materially false;
> (ii) respecting the debtor's . . . financial condition;
> (iii) on which the creditor . . . reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive[.]

October 13, 2010, the bankruptcy court granted the summary judgment motion and entered a non-dischargeable judgment for the Diamonds in the amount of $100,000, plus post-judgment interest at the federal rate.

On October 25, 2010, the Diamonds filed a motion to amend the judgment, seeking prejudgment interest on their claim at the Colorado statutory rate of 8%. The bankruptcy court denied the Diamonds' motion on October 29, 2010, finding that the Diamonds had not sued for breach of the loan agreement with the Debtor but, instead, had sued and received judgment on a claim of non-dischargeable fraud. As such, the court found the Colorado legal interest rate inapplicable. The Diamonds did not appeal that order. Instead, on November 5, 2010, the Diamonds filed a second motion to amend, seeking prejudgment interest at the federal rate from the time the loan was made in October 2004. On December 21, 2010, the bankruptcy court denied the Diamonds' second post-judgment motion, stating that "[e]quity precludes an award of prejudgment interest," because the Diamonds had waited more than four years before commencing litigation against the Debtor,[3] despite the Debtor's failure to make any payment to them whatsoever. The court also concluded the Diamonds could not recover prejudgment interest on a contract containing a "criminally usurious interest rate" well in excess of the maximum interest rate allowed by Colorado law. The Diamonds filed a notice of appeal on January 4, 2011, specifically appealing only the December 21, 2010, Order denying their second motion to amend.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final

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[3] *Order Denying Plaintiffs' Second Motion to Amend Judgment Order ("Order")*, *in* Appendix ("App.") at 100. The bankruptcy court stated that the Diamonds had "waited four years before commencing state court litigation." Beyond this statement, and a similar statement in the Diamonds' appellate brief, there is nothing in the appellate record that reflects any such litigation. However, we conclude that the fact of filing state court litigation is not necessary to our determination of the issue before us.

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.[4] In this case, the Diamonds timely filed a notice of appeal from the bankruptcy court's order denying their second post-judgment motion, which is a final order for purposes of appeal. No party has elected to have the district court hear this appeal, and this Court therefore has appellate jurisdiction.

III. ISSUE AND STANDARD OF REVIEW

The issue on appeal is whether the bankruptcy court erred by denying the Diamonds' second post-judgment motion for prejudgment interest on their non-dischargeable claim. "The decision whether or not to allow prejudgment interest rests within the sound discretion of the trial court. Accordingly, the standard of review on appeal is whether the trial court abused its discretion in awarding-or in declining to award-prejudgment interest."[5]

IV. DISCUSSION

The Diamonds requested prejudgment interest at the applicable federal rate from October 18, 2004, the date they loaned their money to the Debtor. The purpose of prejudgment interest is "to compensate the wronged party for being deprived of the monetary value of his loss from the time of the loss to the payment of judgment."[6] Under federal law, prejudgment interest is ordinarily awarded, absent some justification for withholding it.[7] Prejudgment interest,

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[4] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[5] *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1255 n.43 (10th Cir. 1988), *implied overruling on other grounds recognized by Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996).

[6] *Id.* at 1256.

[7] *Id.*

however, is not recoverable as a matter of right.[8] In addition to the compensatory principle, awards of prejudgment interest are governed by fundamental considerations of fairness.[9] Thus,

> an award of prejudgment interest under federal law is governed by a two-step analysis. First, the trial court must determine whether an award of prejudgment interest would serve to compensate the injured party. Second, when an award would serve a compensatory function, the court must still determine whether the equities would preclude the award of prejudgment interest.[10]

In balancing the equities, courts consider a number of factors, including the degree of personal wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental fairness considerations.[11] An award of prejudgment interest is considered to be "particularly appropriate in cases of investment fraud," or where a defendant's behavior otherwise involves dishonesty or fraud.[12]

Ultimately, a "decision whether or not to allow prejudgment interest rests within the sound discretion of the trial court."[13] In order for there to have been an abuse of discretion, the appellate court must conclude that "the [trial] court base[d] its ruling on an erroneous conclusion of law or relie[d] on clearly erroneous fact findings,"[14] or that the lower court's decision is "arbitrary,

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8 *Id.*

9 *Id.*

10 *Id.* at 1257.

11 *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989).

12 *U.S. Indus., Inc.*, 854 F.2d at 1257.

13 *Id.* at 1255, n.43.

14 *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1165 (10th Cir. 1998).

capricious, or whimsical."[15] "[A] trial court's decision will not be disturbed [under the abuse of discretion standard] unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances."[16]

In this case, the bankruptcy court denied prejudgment interest based upon an undue delay of prosecution.[17] The Diamonds argue that this decision constitutes an abuse of discretion, asserting that any delay in instituting an action should be attributed to the Debtor because his continued promises to pay lulled them into believing there was no need to initiate legal proceedings. In support, the Diamonds refer to exhibits submitted to the bankruptcy court in support of their motion for summary judgment,[18] stating:

> Even three and a half years after the appellants made their investment and three years after the investment was to be returned to them in April, 2005, Mr. Bakay was representing to appellants that they would soon, albeit belatedly, receive their funds. He concocted a notice on his website in March 2008, a notice in the form of a press release stating that one of his condominium projects was being sold to Fox Sports. Mot. S.J. at Ex. P, Doc. 32. When George Diamond asked, "What is the status of the sale", the debtor indicated that the attorneys were working on the details and that the money would be wired within 48 hours. *Id.* at Ex. P. Shortly thereafter the debtor disappeared and the appellants filed a state court action for fraud

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[15] *Cox v. Sandia Corp.*, 941 F.2d 1124, 1125 (10th Cir. 1991).

[16] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (internal quotation marks omitted).

[17] The bankruptcy court did not specifically find that the Diamonds would be compensated by an award of prejudgment interest, but such a finding is implicit in the decision to consider whether "peculiar or exceptional circumstances" existed that justified withholding it. *See Order*, *in* App. at 99-100. In any event, this Court is convinced that prejudgment interest would serve to compensate the Diamonds for being deprived of their money by the Debtor and, therefore, the compensatory function of prejudgment interest is present.

[18] Only a few of the exhibits to the Diamonds' motion for summary judgment were included in the appellate record. Exhibit P, to which the Diamonds refer, does not appear to be one of them.

against him.[19]

This Court does not conclude, as the Diamonds would have us do, that the bankruptcy court abused its discretion by denying them prejudgment interest on their claim.

The bankruptcy court was concerned with the Diamonds' failure to pursue legal action for a period of years beyond the due date of the loan. The Diamonds' only counter to that concern is that the Debtor's repeated promises to pay during that time kept them from pursuing him legally. Their statements to that effect do not adequately rebut the bankruptcy court's concern, and do not establish that the bankruptcy court's decision was "arbitrary, capricious, or whimsical." The Debtor was contractually required to fully repay the Diamonds' investment, including interest and profits, in April 2005. He did not do so. In fact, the Debtor never made any payment to the Diamonds. The fact that he made a number of misrepresentations regarding his intent and ability to pay that debt some three years later does not necessarily justify the Diamonds' extensive delay in pursuing their legal rights. That delay led, in part, to the bankruptcy court's decision to deny prejudgment interest. The Diamonds have not shown that the court's decision "exceed the bounds of permissible choice in the circumstances."[20]

The second basis for the bankruptcy court's denial of prejudgment interest was that the parties' contract contained a "criminally usurious" interest rate. The Diamonds respond, again, that responsibility for the contract terms lies entirely with the Debtor. The Diamonds contend that the bankruptcy court unfairly and incorrectly cast them as unscrupulous or predatory lenders. We agree that use of the term "criminally" may have been technically incorrect, given that bankruptcy proceedings are not criminal in nature, nor is there anything in the record to show

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[19] Appellants' Amended Opening Brief at 2.

[20] *Moothart*, 21 F.3d at 1504.

what crime was committed. Nonetheless, the bankruptcy court's concern about the interest rate does reflect the reality that doubling the Diamonds' money in a period of six months would have been a return nearly 4.5 times the highest allowable rate of interest in Colorado. Had the bankruptcy court used the term "unreasonable," or even "outrageous" with respect to the interest rate, its assessment would have been more technically accurate. Indeed, this Court believes that the agreed rate of return on the Diamonds' money, whether or not it was proposed by Debtor, was outrageous.

Although the blame for everything about the parties' transaction probably does not lie solely with the Debtor, the Diamonds have been compensated for the Debtor's bad behavior. They were granted a non-dischargeable judgment against him pursuant to § 523(a)(2), which is narrowly construed, with any doubt to be resolved in the debtor's favor.[21] The Diamonds' own "gullibility," as they describe it, does not absolve them from the bankruptcy court's consideration of their conduct in its determination of the equities of an award of prejudgment interest.

V. CONCLUSION

Appellants have failed to either identify a factual basis or present a sufficient argument from which this Court could conclude that the bankruptcy court abused its discretion by refusing their request for federal prejudgment interest on their non-dischargeable judgment. We therefore AFFIRM the order denying their second post-judgment motion.

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[21] *Bellco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997) (discharge exceptions are narrowly construed, and doubts are resolved in the debtor's favor).