FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
November 23, 2011
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JAMES B. HOBI, also known as Jim Hobi, Debtor.	BAP No. WO-11-025
JOHN D. MEYER, Plaintiff – Appellant, v. JAMES B. HOBI, Defendant – Appellee.	Bankr. No. 10-13931 Adv. No. 10-01136 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before NUGENT, THURMAN, and SOMERS, 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. The appellant, John D. Meyer ("Plaintiff"), appeals the Bankruptcy Court's judgment in favor of the debtor, James B. Hobi ("Debtor"), on his non-dischargeability complaint under 11 U.S.C. 523(a)(2)(A). After a trial on the merits, the

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

Bankruptcy Court concluded that the Plaintiff failed to meet his burden of proving by a preponderance of the evidence that the Debtor's representation that he would purchase properties with loan proceeds provided to him by the Plaintiff was made without any intent to perform. As the Plaintiff has not shown the Bankruptcy Court's decision to be the result of clear error, we AFFIRM the judgment.

I. APPELLATE JURISDICTION

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.[1] In this case, the Plaintiff timely filed a notice of appeal on May 16, 2011, from the Bankruptcy Court's May 3, 2011, judgment in favor of the Debtor in the adversary proceeding. The judgment, which fully and finally resolved the adversary proceeding, is final for purposes of appeal.[2] Neither party has elected to have this appeal determined by the district court and, therefore, this Court has appellate jurisdiction.

II. BACKGROUND

The Debtor filed a voluntary Chapter 7 bankruptcy petition on June 28, 2010, and received a discharge on September 29, 2010. On September 21, 2010, the Plaintiff filed a non-dischargeability adversary proceeding in the Debtor's bankruptcy, alleging fraud under 11 U.S.C. § 523(a)(2).[3] After a trial on May 3, 2011, the Bankruptcy Court ruled in favor of the Debtor, and the Plaintiff appealed.

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

[2] *Adelman v. Fourth Nat'l Bank & Trust Co. (In re Durability Inc.)*, 893 F.2d 264, 265-66 (10th Cir. 1990).

[3] 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.

The Plaintiff loaned the Debtor $120,000 on October 4, 2007, pursuant to a promissory note ("Note")[4] payable by a single balloon payment on January 5, 2008. The Note, which includes 12.5% quarterly interest, provides only that "[t]his note is to purchase property."[5] On November 8, 2007, the parties executed an addendum to the Note ("Addendum I"), granting the Plaintiff a second lien position on properties already owned by the Debtor (and/or his business entities) in Oklahoma County, which liens were to be released when the Debtor purchased property and secured it with a first lien in favor of the Plaintiff.[6] Addendum I also states that the "original loan was made for the purpose of purchasing properties and getting a secured first lien position for the loan principal and interest."[7]

On November 21, 2007, the parties executed yet another addendum ("Addendum II") to acknowledge that the Debtor would pay the Plaintiff "partial

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[4] *See* Promissory Note, *in* Appendix to Appellant John D. Meyer's Brief ("Appx.") at 11 [Note: All record page references herein are to the PDF page numbers of the documents as they appear in the appellate record, rather than to page numbers specified by the parties. Thus, the reference "Appx. at 11" refers to page 11/146 of the PDF document, as opposed to page 8, as was designated by the Plaintiff.]

[5] The Debtor testified that the loan was intended to be an unsecured personal loan from the Appellant to him, to be used for general business purposes, which is what he requested in his application. He also testified that he requested a $500,000 loan, which was reduced by the Plaintiff to $140,000, then reduced again at signing to $120,000. The note itself is altered to reduce the amount from $140,000 to $120,000, which change was initialed by the Plaintiff. *See* Promissory Note, *in* Appx. at 11.

[6] The record does not reflect whether any second liens were actually documented or recorded. However, the Plaintiff testified that the second liens were of no value to him and were unacceptable due to lack of equity in the Debtor's properties. *See* May 3, 2011, Transcript ("Tr.") of Testimony of John D. Meyer at 19-20, *ll.* 24-25, 1, *in* Appx. at 72-73.

[7] The Debtor testified that he was initially unaware that the 12.5% interest on the October note was quarterly, rather than yearly, and that part of the reason for Addendum I was to reduce the interest rate. The addendum itself does not mention the note's interest rate. However, the Plaintiff's payment records indicate a "revised interest rate" on January 5, 2008, in the amount of 12.5% per *year*. *See* Loan Payments (Ex. C), *in* Appx. at 14.

monthly interest payments to cover the maker's loan at First National Bank of Midwest City." Addendum II was initiated by the Plaintiff because his bank began charging him interest on his line of credit when he advanced funds to the Debtor. The Debtor did, in fact, make a number of payments.[8] However, the parties agree that no properties were ever purchased with proceeds of the loan, nor was any first lien ever procured for the Plaintiff.

Only the Plaintiff and the Debtor (who was unrepresented by counsel) testified at trial. The Plaintiff testified that he had some loan experience prior to making the loan to the Debtor, and that he and an acquaintance previously had purchased some tax sale properties for resale. He was introduced to the Debtor by the same individual, and he reviewed the Debtor's resume, which he called "impressive." He stated that the purpose of the original loan was to purchase property on which he would receive a first lien position, and that the addenda to the Note were meant to address the fact that, after a period of time, the Debtor had not made any purchases. The Plaintiff recalled that he was told, either by his acquaintance or by the Debtor, that the Debtor only needed a short-term loan, which is why the original note was only for 90 days. He further testified that no properties were ever purchased, and that the Debtor became increasingly difficult to reach. He asked the Debtor about property purchases repeatedly, and the Debtor kept referencing a piece of property in Decatur, Illinois that he wanted to purchase and refurbish. However, the Plaintiff did not want his money used for the Illinois property because it was scheduled for demolition.

The Debtor testified that, prior to the Plaintiff's loan, he had 15 years of borrowing and repaying loans, had never had any credit problems, and ran a

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[8] The Plaintiff's loan payment record indicates that the Debtor made 28 payments, which began on October 23, 2007 (prior to execution of Addendum I), and ended on January 27, 2010, in amounts that varied between $500 and $903.68. *See id.*

successful small business, which failed due to the economic downturn in 2009-10. He stated that his loan request was for a general business loan, that the original loan was unsecured, and that the Plaintiff had told him the loan would be renewed as long as he made interest payments. The Debtor testified that it was only at a later date that the parties discussed collateral for the loan, which is when he offered the Plaintiff the second mortgages. Further, the Debtor estimated the value of equity in the second mortgage properties to be about $200,000 when the second liens were offered, but conceded that the value of those properties subsequently declined. Regarding the Illinois property, the Debtor stated that, although the proposed project on that property had "a lot of problems," he had reached the point of drawing up legal documents to purchase the property when the Plaintiff "again changed his mind" and said he wanted both a first lien on the Illinois property and the second liens in Oklahoma County. Finally, the Debtor testified that he had made 29 payments on the loan (although the Plaintiff's records, which the Debtor agreed appeared to be accurate, indicate that only 28 payments were made).

III. THE BANKRUPTCY COURT'S RULING

At the end of the trial, the Bankruptcy Court orally ruled that the Plaintiff had failed to meet his burden to prove that the Debtor had "made the contract without the intention of performing." In so ruling, the court noted that the burden of persuasion in a § 523(a) case is on the creditor, the proof required is preponderance of the evidence, exceptions to discharge are construed narrowly, and all doubts are to be resolved in a debtor's favor. The Bankruptcy Court specified that, in order to prevail on his § 523(a)(2) claim, the Plaintiff needed to prove that the Debtor made a false or willful misrepresentation, with intent to deceive, upon which the Plaintiff justifiably relied to his detriment. Focusing on the intent element, the Bankruptcy Court noted that an intent to deceive may be inferred from the circumstances, but that "a promise to take some [action] in the

future on which the defendant is unable to follow through, without more, is not a representation within the meaning of the dischargeability exception." However, proof that a promise to pay was made without any intention to perform would satisfy the Plaintiff's burden. The court then made the following significant findings:

1. Addendum I "clearly indicated that [Debtor's] obligation was to purchase properties with the loan proceeds and provide [Plaintiff] with the first lien position," and the Debtor did not purchase any properties or provide any first mortgages;

2. The Debtor's failure to purchase properties was a breach of the parties' contract;

3. The evidence of the Debtor's efforts to purchase properties on the Plaintiff's behalf was "scant," and the court shared the Plaintiff's "suspicion" that the provided offers "may not be legitimate offers"; and

4. Although the Debtor's evidence was scant, the Plaintiff had failed to satisfy his burden to prove that the Debtor "made a representation that he would purchase properties without any intent of performing."[9]

Noting that a debt that arises from a breach of contract is only non-dischargeable if the debtor made contractual promises without a present intention to perform them, and that proof only that a debtor had breached the parties' contract is insufficient to prove lack of intent to perform when the contractual promises were made, the Bankruptcy Court concluded that the Plaintiff had failed to carry his burden of proof under § 523(a)(2)(A).

IV. MOTIONS

A. The Debtor's Motion to Dismiss

On August 15, 2011, the Debtor filed a motion to dismiss the Plaintiff's appeal, to which the Plaintiff filed a response in opposition on August 25, 2011. On August 26, 2011, a panel of this Court entered an order submitting the motion to this panel for decision. The essence of the motion is that the Plaintiff's appeal

[9] Tr. at 68-76, *in* Appx. at 121-129.

is defective because there was "no evidence" of fraud presented at trial. This is essentially the Debtor's argument in response to the appeal. A motion to dismiss an appeal is ordinarily reserved for lack of appellate jurisdiction, such as lateness of the notice of appeal or mootness, or for an appellant's significant failure to comply with appellate procedure. The arguments made by the Debtor in his motion, which are directed at the merits of the appeal, are to be made in the parties' briefs. Therefore, the motion is denied.

B. The Plaintiff's Request to Strike the Debtor's Brief

In his reply brief, the Plaintiff contends that Debtor's brief should be stricken for failure to comply with Fed. R. Bankr. P. 8010, which specifies requirements for the form of appellate briefs. Although *pro se* litigants, such as the Debtor, are held to the same procedural rules applicable to everyone, their pleadings "are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers."[10] In any event, as the appellee, the Debtor's appellate burden is significantly less than that of an appellant. This Court does not believe that the Debtor's appellate brief is as deficient as the Plaintiff suggests. In any event, this Court would most likely have reached the same conclusion with or without the Debtor's brief, and it would therefore be both pointless and overly rigid to ignore or strike the Debtor's brief. This is particularly so in that the Plaintiff did not actually move to strike the brief; he simply argued that it should be stricken. We therefore deny the Plaintiff's request to strike the Debtor's brief.

V. ISSUES AND STANDARD OF REVIEW

On appeal, the Plaintiff asserts that the Bankruptcy Court erred in reaching its "conclusion" that he had failed to prove fraudulent intent, which he contends

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[10] *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

should be reviewed under a *de novo* standard. However, intent to defraud under § 523(a)(2)(A) is a question of fact, which is reviewed for clear error.[11] Moreover, the clear error standard "is significantly deferential, and requires the appellate court to give due regard to the trial court's opportunity to judge witnesses' credibility."[12] Moreover, it is clear that the Bankruptcy Court applied the proper legal standards to the Plaintiff's § 523(a)(2)(A) claim. Thus, we review the Bankruptcy Court's decision for clear error.

VI. DISCUSSION

Section 523(a)(2)(A), upon which the Plaintiff's claims against the Debtor are based, provides 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–
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

The Bankruptcy Court correctly stated the Plaintiff's burden with respect to this provision, which is:

> To sustain a claim under § 523(a)(2)(A), the creditor must prove by a preponderance of the evidence that the debtor made a false representation with the intent to deceive the creditor, that the creditor reasonably relied on the misrepresentation, and the misrepresentation caused the creditor to sustain a loss.[13]

The Bankruptcy Court also correctly applied the well-established rule that

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[11] *In re Carlson*, No. 06-8158, 2008 WL 8677441, at *2 (10th Cir. Jan. 23, 2008). *See also*, *Copper v. Lemke (In re Lemke)*, 423 B.R. 917, 919 (10th Cir. BAP 2010) (bankruptcy court's findings regarding a required element of a § 523(a)(2)(A) claim is a factual determination reviewed for clear error).

[12] *Sawagerd v. Sawaged (In re Sawaged)*, CO-10-058, 2011 WL 880464, at *2 (10th Cir. BAP Mar. 15, 2011) (internal quotation marks and footnotes omitted).

[13] *In re Lemke*, 423 B.R. at 921-22.

"exceptions to discharge are to be narrowly construed, and . . . doubt is to be resolved in the debtor's favor."[14]

Under these principles, proving a debt to be non-dischargeable at trial is an uphill battle. Moreover, case law establishes that obtaining an appellate court reversal of a bankruptcy court's decision that the debtor prevailed in that battle is even more difficult.[15] Nonetheless, the Plaintiff asserts that the Bankruptcy Court erred in finding that he failed to prove that the Debtor did not intend to perform when the parties executed the Note. In support of this proposition, the Plaintiff relies on two cases, *In re Davis*[16] and *In re Burton*.[17] However, neither of these cases leads this Court to conclude that the Bankruptcy Court erred.

In *Davis*, the Tenth Circuit Bankruptcy Appellate Panel ("BAP") affirmed a bankruptcy court judgment of non-dischargeability under § 523(a)(2)(A) as to one of two allegedly fraudulent transactions. In the first transaction, the debtor had agreed to provide funds for the purchase of cattle by giving the plaintiff a blank signed check, which subsequently bounced because his account had insufficient funds in it to make the purchase. At trial, the debtor testified that he was "playing the float" with the funds in his account. The BAP determined that the bankruptcy court had erred by denying discharge of this transaction, holding that the plaintiff had not sustained the burden of establishing the requisite intent because the debtor had not represented that the check was good, and because he

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[14] *Bellco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997).

[15] *See* footnote 11, *supra*.

[16] 246 B.R. 646 (10th Cir. BAP 2000), *vacated in part on other grounds*, 35 F. App'x 826 (10th Cir. 2002).

[17] CO-10-022, 2010 WL 3422584 (10th Cir. BAP Aug. 31, 2010).

had subsequently paid that debt.[18] In a second transaction, the bankruptcy court found that the debtor had promised to wire funds to the plaintiff with no intention of doing so, based largely on the fact that he did not have the funds in his account when he made the promise to wire them. The BAP affirmed this finding based, in part, on the debtor's subsequent misrepresentations about the funds.

Thus, in *Davis*, the plaintiff had met his burden as to the intent element of that transaction because intent to defraud can be inferred from proof that a debtor promised to do something at a time when he knew he did not have the ability to do it. Such proof is qualitatively different from the evidence offered in the present case, which is that the Debtor promised to do something that he ultimately failed to do.

In *Burton*, the BAP reversed a bankruptcy court's dismissal of a creditor's § 523(a)(2)(A) claim for failure to state a claim for relief. Agreeing that the complaint was "minimal in some respects," the BAP noted that the question was "close," but concluded that a claim had been adequately pled. The plaintiff's complaint asserted several things: 1) that he had entered into an agreement with debtor's company under which a new joint venture company would be formed; 2) that his capital contribution was to be used to purchase a building lot; 3) that debtor's company was to obtain a construction loan and supervise construction of a home on the lot; and 4) that his investment was to be secured by a trust deed lien, second only to the construction loan. The plaintiff alleged, first, that the debtor was the alter ego of the company with whom the plaintiff had contracted and, second, that the debtor's statements regarding the property and the construction loan had been fraudulent. The plaintiff also alleged that although the debtor had in fact obtained a construction loan, he had used it for his own

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[18] The bankruptcy court's decision on this transaction was not actually reversed, however, because the debtor's subsequent payment of the NSF check rendered the matter moot.

personal benefit, thereby causing the plaintiff to spend even more money to obtain removal of the lender's lien. The BAP found that, though minimal, the complaint allegations to the effect that the debtor made representations to plaintiff to induce him to invest money, then violated those representations only a short time later were sufficient to state a claim.

Accordingly, *Burton* holds only that the fraud allegations stated in the complaint in that case were minimally sufficient to satisfy the pleading requirement that "a plaintiff must include in the complaint 'enough facts to state a claim to relief that is plausible on its face.'"[19] Appellate review of a bankruptcy court's determination of the sufficiency of a complaint under Federal Rule of Civil Procedure 9(b)[20] is not analogous to its determination, after trial, that the allegations alleged in the complaint had not been proven.

Thus, neither *Davis* nor *Burton* is inconsistent with the Bankruptcy Court's decision in this case. Moreover, a much more analogous case is *In re Carlson*, *supra*, in which a buyer of business equipment claimed that some of the purchased equipment was either missing or in disrepair. The buyer filed a § 523(a)(2)(A) adversary proceeding in the seller's Chapter 7 bankruptcy case, alleging that the debtor had never intended to transfer title to all of the assets listed in the parties' contract. However, the bankruptcy court denied the fraud claim, finding that the buyer had failed to prove the seller's fraudulent intent. Both the BAP and the Tenth Circuit Court of Appeals ("Tenth Circuit") affirmed. The Tenth Circuit characterized the trial evidence as "at best" indicating a breach of contract, noting that "mere inability or failure to perform is not, in itself,

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[19] 2010 WL 3422584, at *2. *See also* Fed. R. Civ. P. 12(b)(6), made applicable to bankruptcy adversary proceedings by Fed. R. Bankr. P. 7012(b).

[20] Made applicable to adversary proceedings by Fed. R. Bankr. P. 7009.

sufficient evidence" to satisfy § 523(a)(2)(A).[21] In rejecting the buyer's appellate claims, the Tenth Circuit reiterated long-standing precedent that, although fraudulent intent may be inferred from the circumstances, discharge exceptions are to be narrowly construed and doubt is to be resolved in the debtor's favor.[22] The Tenth Circuit found no clear error in the bankruptcy court's ruling.

The BAP also recently affirmed a bankruptcy court's decision that a plaintiff had failed to prove the debtor's fraudulent intent. *See In re Lemke*, 423 B.R. 917 (10th Cir. 2010). In *Lemke*, the debtor was a contractor who obtained funds from the plaintiff to buy property and build his "dream home" in Colorado. The debtor's draws on the parties' loan ultimately exceeded the original note by more than 100% and, upon inspection, the plaintiff discovered that the house was not nearly complete and was missing appliances that the debtor claimed to have purchased. The bankruptcy court commented that plaintiff's proof that the debtor had failed to complete the home within the parties' time and cost projections "may show that he is a poor construction estimator or project manager, but it does not show that he never had the intention to complete the Home or repay [the plaintiff]."[23] Evidence in the present case that the Debtor did not purchase any properties with the Plaintiff's money, as he had agreed to do, is equally insufficient to prove that he did not intend to do so at the outset.

Under the clearly erroneous standard, an appellate court defers to the trial court's assessments of witness credibility and other disputed facts, and is "required to view the evidence in the light most favorable to the [] court's ruling . . . and must uphold any [] court finding that is permissible in light of the

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[21] *In re Carlson*, No. 06-8158, 2008 WL 8677441, at *3 (10th Cir. Jan. 23, 2008) (internal quotation marks omitted).

[22] *Id.* at *2.

[23] 423 B.R. at 923-24.

evidence."[24] Moreover, the reviewing court must "accept the ultimate factual determinations of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data."[25] From our review of the record and the briefs, we cannot conclude that the Bankruptcy Court's decision bears no rational relationship to the evidence. On the contrary, the Bankruptcy Court, applying the correct standards under the statute, rendered a reasonable decision on the evidence, which is that, although the Plaintiff had established a breach of contract, he had not proven fraudulent intent by a preponderance of the evidence.

VII. CONCLUSION

The Plaintiff has not shown the Bankruptcy Court's decision to be the result of clear error. Accordingly, the judgment in favor of the Debtor on the Plaintiff's claims against him is AFFIRMED.

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[24] *In re Ford*, 492 F.3d 1148, 1154 (10th Cir. 2007) (internal quotation marks omitted).

[25] *Id.*