NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE BILLIE J. STEWART, Debtor.	BAP No. WO-02-040
BETTY RUTH REEVES, Plaintiff – Appellant, v. BILLIE JEAN STEWART, Defendant – Appellee.	Bankr. No. 01-14429-BH Adv. No. 01-1230-BH Chapter 7 ORDER AND JUDGMENT*

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

Before PUSATERI, CLARK, and CORDOVA, Bankruptcy Judges.

PUSATERI, 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.[1] The case is therefore ordered submitted without oral argument.

Plaintiff Betty Ruth Reeves appeals the bankruptcy court's order dismissing a complaint in which she had sought to except debtor Billie Jean Stewart's

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).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] Fed. R. Bankr. P. 8012.

obligation to her from discharge pursuant to 11 U.S.C. § 523(a)(2). For the reasons stated below, the bankruptcy court's order is affirmed.

Background

In March 1998, Betty Ruth Reeves ("Reeves") bought real property in Oklahoma City from debtor Billie Jean Stewart ("the Debtor") on a contract for deed. Under the contract, Reeves was to make a down payment and then 36 monthly payments. The total she would pay under the contract, including taxes and insurance, was $18,824. At the time of the sale, the property was encumbered by a mortgage. When Reeves completed all the payments, the Debtor was to convey the property to her "in fee simple, clear of all encumbrances whatsoever, by good and sufficient quit claim deed."[2]

By July 2000, Reeves had paid the Debtor $14,659, but still owed eight more payments. At that time, the Debtor was "tired of messing with" the property, and had an attorney draft a letter telling Reeves to send her future payments to the mortgage company instead of to the Debtor. Along with the letter, the Debtor sent Reeves a quitclaim deed. Reeves thereafter paid $5,140.40 to the mortgage company. An unknown balance is still owed on the mortgage; Reeves testified that she was unable to discover the balance because she did not know the obligor's Social Security number. At trial, besides explaining why she had the letter sent to Reeves, the Debtor testified (and her attorney argued) that she was not obliged to deliver clear title to Reeves because Reeves did not give all 36 payments called for under the contract directly to her. The Debtor also testified that she had assets available, at least at some time during the term of the contract, to pay off the mortgage on the property, but was never effectively asked to explain why she did not do so.

The Debtor filed a Chapter 7 bankruptcy petition in April 2001. Reeves

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[2] Contract for Deed, *in* Appellant's Appendix at 24.

filed a complaint seeking to except from discharge damages for the Debtor's failure to give her clear title to the property, claiming that the Debtor had obtained money from her "by false pretenses, false representations, and/or actual fraud in violation of the provisions of Title 11 U.S.C. § 523(a)(2)."[3] The final pretrial order repeated the legal basis of Reeves's claim in identical terms. No mention of a false statement in writing respecting the debtor's financial condition appears in either the complaint or the pretrial order.

The adversary proceeding was tried to the bankruptcy court on April 10, 2002. At the close of Reeves's evidence, the Debtor moved to dismiss, contending fraud had not been shown. The court interpreted the motion to be one for judgment on partial findings under Federal Rule of Civil Procedure 52(c), made applicable to adversary proceedings by Bankruptcy Rule 7052. The court concluded: "[T]he evidence at the most shows there's been a breach of contract, but it does not show that there was any false pretenses, or misrepresentations, or fraud which would except the debt from discharge. So judgment will be entered for the [Debtor]."[4] The court did not indicate whether it believed either or both of the Debtor's somewhat conflicting assertions about sending Reeves the letter and quit-claim deed, and thinking that Reeves had not complied with the contract.

Discussion

Section 523(a) of the Bankruptcy Code provides in pertinent part:

> A discharge under section 727 . . . 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; [or]
>
> (B) use of a statement in writing—

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[3] Complaint ¶ 2, *in* Appellant's Appendix at 7.

[4] Transcript of Hearing at 41, *in* Appellant's Appendix at 41.

> (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.[5]

Before the bankruptcy court, Reeves relied solely on subparagraph (A) of § 523(a)(2) as the basis for excepting the Debtor's obligation to her from discharge. On appeal, she has switched theories and tries to base her claim on subparagraph (B). We will address subparagraph (A) first.

The terms "false pretenses," "false representation," and "actual fraud" in § 523(a)(2)(A) are interpreted according to their definitions developed under common law.[6] The treatment of "misrepresentation" in the Restatement of Torts published shortly before Congress enacted the Bankruptcy Code guides our interpretation of this provision.[7] That Restatement provides the following treatment of "misrepresentation":

> "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation."[8]

Reeves had the burden of proving the Debtor's fraud by a preponderance of the evidence.[9]

In deciding this case, the bankruptcy court exercised its authority under Federal Rule of Civil Procedure 52(c), made applicable here by Bankruptcy Rule

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[5] 11 U.S.C. § 523(a)(2).

[6] *Field v. Mans*, 516 U.S. 59, 69-70 & n. 9 (1995).

[7] *Chevy Chase Bank v. Kukuk (In re Kukuk)*, 225 B.R. 778, 783 (10th Cir. BAP 1998).

[8] *Id.* at 783-84 (quoting Restatement (Second) of Torts §525 (1976)).

[9] *Grogan v. Garner*, 498 U.S. 279, 283-91 (1991).

7052. Rule 52(c) provides:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence.[10]

This rule authorizes the trial judge, when also acting as the trier of fact, to resolve a factual issue against a party who has presented all his or her evidence on that issue without waiting to hear the opposing party's evidence.

The bankruptcy court concluded that Reeves had shown at most that the Debtor breached the contract to provide a deed, not that she defrauded Reeves. On appeal, we may reverse this finding only if it is "clearly erroneous."[11]

> A finding is clearly erroneous only if it is without factual support in the record, or if, in light of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Cowles v. Dow Keith Oil & Gas, Inc.*, 752 F.2d 508, 511 (10th Cir.1985). Under this standard, we uphold "any district court determination that falls within a broad range of permissible conclusions." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990).[12]

Viewed in its best light, Reeves's evidence showed only that she made all the payments required by the contract and that the Debtor failed to deliver unencumbered title to the property. This might have supported an inference that the Debtor never intended to fulfill her obligation to deliver clear title and so fraudulently promised to do so, but certainly did not require that inference to be made. Furthermore, the Debtor offered evidence that rebutted this possible inference. She testified that she had assets available to pay off the mortgage on the property, but was never effectively asked to explain why she did not do so.

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[10] Fed. R. Civ. P. 52(c).

[11] *Roth v. Am. Hosp. Supply Corp.*, 965 F.2d 862, 865 (10th Cir. 1992); *see also* Advisory Committee Note to 1991 Amendment to Fed. R. Civ. P. 52.

[12] *Hockett v. Sun Co., Inc.*, 109 F.3d 1515, 1526 (10th Cir. 1997).

She said she gave Reeves a quit-claim deed and told her to pay the mortgage company directly simply because she was tired of "messing with" the property. Exactly what she meant by this statement is not clear. The Debtor also testified that she was not obliged to deliver clear title to Reeves because Reeves did not give all 36 payments called for under the contract directly to her. This, too, is at least some evidence indicating that the Debtor had no intent to defraud Reeves, but sincerely believed, rightly or wrongly, that Reeves had not complied with the contract so she was not obliged to deliver clear title to her. Given these considerations, we cannot say that the bankruptcy court's finding that Reeves failed to show fraud was clearly erroneous.

As indicated, in her appellate brief, Reeves has sought to change the legal theory she contends should make the Debtor's obligation to her nondischargeable. Before the bankruptcy court, Reeves relied solely on § 523(a)(2)(A), the exception to discharge based on false pretenses, false representation, or actual fraud, but before us, she now relies for the first time on § 523(a)(2)(B), the exception based on a false financial statement. She fails to identify the written document she alleges would be covered by this exception, nor do we see such a document in the record on appeal. In any event, with limited exceptions not applicable here, we will not consider arguments or issues that a party has raised for the first time on appeal.[13]

Conclusion

Based on the record before us, we are convinced that the bankruptcy court properly exercised its authority under Federal Rule of Civil Procedure 52(c), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7052, and that the record supports its finding of no fraud under 11

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[13] *Diviney v. Nationsbank (In re Diviney)*, 225 B.R. 762, 771 (10th Cir. BAP 1998); *Blagg v. Miller (In re Blagg)*, 223 B.R. 795, 804 (10th Cir. BAP 1998).

U.S.C. § 523(a)(2)(A). The bankruptcy court's judgment is affirmed.