

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Adversary Proceeding
BEN T. TOWERY, JR.)	
d/b/a Ben's Auto Repair)	Number <u>96-4016</u>
(Chapter 7 Case <u>95-402435</u>))	
)	
<i>Debtor</i>)	
)	
)	
THE COASTAL BANK)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
BEN T. TOWERY, JR.)	
d/b/a Ben's Auto Repair)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

This action is a complaint to determine dischargeability of a debt pursuant to Title 11 U.S.C. Section 523(a)(2)(A). Plaintiff, Coastal Bank, claims that it is owed approximately \$10,458.96 as the balance due under a note signed by Ben T. Towery, Jr.

(hereinafter "Defendant") and asserts that this obligation is nondischargeable pursuant to the applicable provisions of the Bankruptcy Code. By virtue of 28 U.S.C. Section 157(b)(2)(I), this matter is a core proceeding. Pursuant to Rule 7052 of the Federal Rules of Bankruptcy, this Court held a trial on May 29, 1996, and makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On November 13, 1995, Ben T. Towery, Jr., d/b/a Ben's Auto Repair ("Defendant") filed a no asset Chapter 7 bankruptcy petition. Defendant listed Plaintiff as a secured creditor in the Chapter 7 case. On or about December 27, 1995, Chapter 7 Trustee James L. Drake, Jr., issued an abandonment of property regarding all known assets that serve as collateral for the Plaintiff's loan. In its complaint Plaintiff alleges that the Defendant, through false pretenses, false representation, or actual fraud, induced the Plaintiff to loan Defendant money for business purposes, and that Plaintiff relied upon misrepresentations made by the Defendant in initiating loans and renewing loans. As such, Plaintiff claims that the debt incurred by Defendant should be deemed non-dischargeable pursuant to 11 U.S.C. Section 523(a)(2).

Defendant's banking relationship began with Plaintiff on October 21, 1993, when Defendant borrowed \$10,000.00 for his business, a sole proprietorship. The promissory note executed by Defendant shows that collateral for the loan included a 1978 Ford E-300 wrecker along with four pieces of equipment, including a wheel balancer and

lift.

On June 8, 1994, the original loan was renewed. The balance of the loan at that time was \$8,492.81, and Plaintiff loaned Defendant an additional \$8,000.00. This renewal promissory note was signed by Defendant and the Plaintiff took as collateral both the 1978 Ford E-300 wrecker and a newly acquired 1986 F-300 wrecker, along with the remaining equipment, including the tire balancer and lift. The additional money provided in this loan for business purposes was to be used for the purchase of the 1986 F-300 wrecker. At no time did the Defendant notify the Plaintiff that the 1978 Ford E-300 wrecker was sold or traded in on the purchase of the 1986 Ford F-300 wrecker.

On or about January 13, 1994, after execution of the initial promissory note by Defendant, Plaintiff filed a UCC Financing Statement in Liberty County covering the 1978 Ford E-300 wrecker and four pieces of equipment, including the tire balancer and lift. At the time the original promissory note was renewed, the Coastal Bank also was shown as the first lienholder on the 1986 Ford wrecker.

On or about June 7, 1994, prior to the renewal of the original loan on June 8, 1994, Defendant sold or traded the 1978 F-300 wrecker to his brother-in-law, Doyle Posey, for a credit of \$4,000.00. In turn, Mr. Posey, on June 7, 1994, sold the 1978 Ford E-300 wrecker to Bruce Meadows in Hinesville, Georgia, for \$4,000.00. At no time was Plaintiff aware of the disposition of the 1978 Ford E-300 wrecker when the original

promissory note was renewed on June 8, 1994.

On August 11, 1994, Defendant borrowed \$8,000.00 from Plaintiff. Defendant signed a promissory note again pledging both the 1978 Ford wrecker and the 1986 Ford wrecker as collateral. The Defendant also pledged four pieces of equipment, including a tire balancer and lift, as collateral for the loan.

On January 13, 1995, this second loan was renewed and an additional \$5,000.00 in new money was advanced to take care of overdrafts that Defendant had with Plaintiff. This renewed promissory note, signed by the Plaintiff, pledged the two vehicles and four pieces of equipment, including the tire balancer and lift, as collateral.

At all times when the August 11, 1994, promissory note was executed and renewed on January 13, 1995, Defendant was aware that the 1978 Ford wrecker had been sold, but failed to advise the Plaintiff that he was no longer in possession of the 1978 Ford wrecker.

On or about November 11, 1995, Defendant contacted Plaintiff's vice president, Danny Brant, advising that he had filed a Chapter 7 bankruptcy and that he was no longer in possession of the 1978 Ford wrecker.

After the bankruptcy petition was filed and an abandonment regarding all

property was signed by the Chapter 7 trustee, Plaintiff sold the 1986 Ford wrecker in a commercially reasonable manner to an interested third party for \$4,500.00. Plaintiff also sold the four pieces of equipment securing these loans for \$6,000.00. After credit of these amounts to offset the indebtedness owed the Plaintiff, there remains an outstanding balance of \$10,458.96.

Thereafter, Plaintiff learned the Mr. Tim Branch in Tifton, Georgia, was claiming an interest in two pieces of equipment (the wheel balancer and lift) which served as collateral for Plaintiff's loans. Defendant has acknowledged that he made representations to the Plaintiff that the wheel balancer and lift were unencumbered pieces of equipment. Defendant further induced Plaintiff to accept the unencumbered equipment as collateral. In fact, Defendant now admits that in January of 1993 he entered into a lease agreement with Mr. Branch regarding the wheel balancer and lift and at no time did he ever own this equipment. Plaintiff relief on these material misrepresentations in loaning money to the Defendant and agreeing to renew these loans for the Defendant.

CONCLUSIONS OF LAW

In pertinent part, 11 U.S.C. Section 523(a)(2) provides:

(a) 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;

11 U.S.C. § 523(a)(2)(A). The burden of proof in non-dischargeability actions is upon the plaintiff to show by a preponderance of the evidence that a discharge is not warranted. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991).

In order to except a particular debt from discharge because of fraud, a creditor must prove the following:

- (1) the debtor made a false representation with the purpose and intention of deceiving the creditor;
- (2) the creditor relied upon such representation;
- (3) such reliance by the creditor was justifiable;
- (4) the creditor suffered a loss as a result of that reliance.

In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986); In re Phillips, 804 F.2d 930 (6th Cir. 1986); In re Lacey, 85 B.R. 908 (Bankr. S.D.Fla. 1988). *See also* In re Vann, 67 F.3d 277 (11th Cir. 1995) (reliance must be justifiable); In re Kimzey, 761 F.2d 421, 423 (7th Cir. 1985) (plaintiff must demonstrate reliance on debtor's representations); In re Dobbs, 115

B.R. 258, 265 (Bankr. D. Idaho 1990); Matter of Carpenter, 53 B.R. 724, 729 (Bankr. N.D.Ga. 1985) (actual fraud). However, a debtor's silence regarding a material fact can constitute false representations under 11 U.S.C. Section 523(a). See In re Van Horne, 823 F.2d 1285, 1288 (8th Cir. 1987). Moreover, a creditor has no obligation to verify all of the debtor's statements in order for the court to find that the creditor has reasonably relied on the debtor's false misrepresentations. See In re Ashley, 903 F.2d 599, 604 (9th Cir. 1990). Here, the testimony of the defendant provides this Court with sufficient grounds to deem this debt non-dischargeable.

The facts in this case reveal that Defendant had actual knowledge that the 1978 Ford wrecker had been sold prior to renewal of the original promissory note on June 8, 1994. The Defendant's failure to notify the Plaintiff that collateral for the original loan had been disposed of prior to execution of the renewal promissory note constitutes a false representation or fraud on the part of the Defendant. Moreover, the testimony clearly reveals that at the time the second promissory note was executed in August of 1994 and that note was renewed in January of 1995, the Defendant failed to advise the Plaintiff that the 1978 Ford wrecker, which was listed as collateral on each promissory note, had been sold. The Defendant has acknowledged signing each promissory note, with full knowledge that the collateral listed on the promissory notes were either non-existent or encumbered. The Defendant's testimony further shows that he never owned the tire balancer and lift which he provided the Plaintiff as collateral for these loans. The use of false representations or fraud to obtain an extension of a debt originally procured non-fraudulently will render the debt

non-dischargeable. *See In re Gerlach*, 897 F.2d 1048, 11 C.B.C.2d 1101 (10th Cir. 1990). *See also In re Goodrich*, 999 F.2d 22, 29, C.B.C. 2d 554 (1st Cir. 1993) (entire loan renewal, including original amount of Chapter 7 debtor's loan as well as additional amount given during renewal was deemed non-dischargeable).

The testimony of Plaintiff's vice president, Danny Brant, is convincing. It is inconceivable that the Plaintiff would agree to renew the loans and extend additional funds without obtaining assurances from the Defendant that the Plaintiff maintained a fully secured position in case of a default. Mr. Brant's testimony regarding the procedure for execution of the promissory notes and preparation of credit memoranda referencing the collateral for each loan and renewal indicates the Plaintiff's reliance on representations by the Defendant and the Plaintiff's belief that it maintained a fully secured status. Even at the time of the Chapter 7 filing Plaintiff believed that it was fully secured.

In light of the foregoing I find that Plaintiff has carried its burden of proof and deem this debt non-dischargeable.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the debt of Ben T. Towery, Jr., d/b/a Ben's Auto Repair, to The Coastal Bank is deemed non-dischargeable.

IT IS FURTHER ORDERED that judgment be entered in favor of the Plaintiff for the balance of the debt, giving credit for collateral already sold by the Plaintiff to reduce its indebtedness, in the amount of Ten Thousand Four Hundred Fifty Eight and 96/100 (\$10,458.96) Dollars.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of July, 1996.