

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

In the matter of:)
)
WILLIAM H. HELMLY, III)
d/b/a SUNCOAST ELECTRIC SERVICE)
(Chapter 7 Case 97-40692)

Adversary Proceeding

Number 97-4231

Debtor

GEORGIA ELECTRIC SUPPLY, INC.,)

Plaintiff

v.)

WILLIAM H. HELMLY, III, d/b/a)
SUNCOAST ELECTRIC SERVICE)

Defendant

FILED

at 9 O'clock & 30 min. AM

Date 9/29/98

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia



MEMORANDUM AND ORDER

Before the Court is Plaintiff Georgia Electric Supply's complaint to determine dischargeability pursuant to 11 U.S.C. §§ 523(a)(2), (a)(6). The matter was tried on June 25, 1998. The Court has jurisdiction in this adversary proceeding by virtue of 28 U.S.C. § 1334(b). This adversary is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Based upon the evidence presented at trial and the applicable authorities, I make the following Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Federal

Rules of Bankruptcy Procedure.

FINDINGS OF FACT

William H. Helmly, III ("Debtor"), filed a Chapter 13 petition on March 11, 1997. The case was converted to Chapter 7 on August 18, 1997. At the time, Debtor was self-employed under the business name of Suncoast Electric Service. For several years, Debtor and Plaintiff had an ongoing business relationship in which Plaintiff supplied electric materials to Debtor for use in his various jobs. Approximately three months prior to bankruptcy, Debtor ordered supplies from Plaintiff in the amount of \$23,257.65.¹ Debtor testified that his petition in bankruptcy was precipitated by a temporary order of the Superior Court of Liberty County in connection with his pending divorce. Debtor's income tax returns for 1996 and 1997 indicate that he was losing money for both years, but Debtor testified that he had five different jobs for his electric servicing business and expected to use the money from those completed jobs to pay his bills to Plaintiff.

Wendell Fetzer testified on behalf of Georgia Electric Supply that he did not receive notice of the bankruptcy filing until March 30, although the petition was filed on March 11. Several days before Fetzer received notice, the parties had a conversation in which Debtor offered a payment of twenty thousand dollars (\$20,000.00) so that he could

¹ Finance charges added to this sum are reflected in the proof of claim submitted by Georgia Electric Supply for a total claim of \$24, 257.78.

continue to receive materials needed on a job he was completing for Motel 6. Mr. Fetzer told Debtor that he needed to talk to his attorney about accepting such a payment. In the meantime, several items ordered by Debtor pre-petition were shipped post-petition. Mr. Fetzer testified that Debtor indicated that he would pay the balance due when he got paid on the Motel 6 job. Evidence revealed that the parties' business relationship had lasted ten to twelve years, and that Debtor customarily ran sixty to ninety days past due in paying his bills to Georgia Electric Supply.

Debtor never made any lump sum reduction in his balance due and seeks to discharge the debt. Georgia Electric seeks to except the balance from discharge based upon allegations that fraud occurred when Helmly extended his offer of future payment. Mr. Helmly's monthly operating reports, filed with the Chapter 13 Trustee, indicate that his business grossed \$6,609.12 in April 1997; \$16,599.31 in May 1997; and \$10,496.44 in June 1997, of which \$2,675.35 may have been received in May.

Plaintiff also moved that the Court take judicial notice of a transcript of proceedings in the Superior Court of Liberty County. This motion was overruled, with the exception that Plaintiff read into the record a statement by the Honorable Robert L. Russell, III, that the Debtor and his estranged wife "might want to consider a joint bankruptcy when you talk to bankruptcy people." This was offered to prove that at the time Debtor spoke with Fetzer he was already contemplating filing bankruptcy.

CONCLUSIONS OF LAW

Plaintiff asserts that the debt owed to it by Debtor is nondischargeable by virtue of 11 U.S.C. § 523(a)(2) and (a)(6). Upon review of the applicable authorities and the evidence presented at trial, I find that neither section commands such a result. The debt of William Helmly to Georgia Electric Supply, Inc., is discharged.

Fraud and Misrepresentation

The bulk of Plaintiff's evidence supported its claim that § 523(a)(2) prevents the discharge of this debt. I find that the evidence presented failed to carry Plaintiff's case. In an action to determine the nondischargeability of debt, the plaintiff bears the burden of proving 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). Moreover, courts are to construe exceptions to discharge narrowly. Schweig v. Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986).

11 U.S.C. § 523(a)(2) provides:

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;

(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 reasonable relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than \$1,000 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief.

11 U.S.C. § 523(a)(2). Plaintiff asserts that the debt is nondischargeable, relying on both subsections (A) and (B).² These two subsections are in fact mutually exclusive — either the debtor falsely represented his financial picture *in a writing* or he did not. 124 Cong. Rec. H11, 095-6 (daily ed. Sept. 28, 1978). Plaintiff produced no writing on which it relied in extending credit to Mr. Helmly. The question of a fraudulent debt is therefore controlled by Section 523(a)(2)(A).

In order for a debt to be nondischargeable under § 523(a)(2)(A), the

² While Plaintiff may earnestly wish to be afforded a determination of nondischargeability, its pleading that the debt is nondischargeable pursuant to subsection (C) will nonetheless not yield that result. Quite obviously, the supplies on which this debt is owed are not, in fact, consumer goods and therefore subsection (C) is of no use. To paraphrase, Plaintiff can't get there from here.

plaintiff must show (1) that the debtor actually obtained money or property from the creditor and (2) that the debtor did so by fraudulent means. Both parties concede that Mr. Helmly obtained supplies from Georgia Electric Supply for which he did not pay. The question remains as to whether he did so in a fraudulent manner.

To give rise to a nondischargeable debt, the false representations must have been knowingly and fraudulently made with the intent to deceive the creditor and must have been relied upon by the creditor. In re Bilzerian, 100 F.3d 886, 892 (11th Cir. 1996). Simple failure to perform a promise is insufficient to render a debt nondischargeable. Moreover, a statement of future intention is not necessarily a misrepresentation. See Matter of Scarlata, 979 F.2d 1521 (7th Cir. 1992). Reckless disregard for the truth or falsity of a statement, however, constitutes a "false representation" under Section 523(a)(2)(A) of the Bankruptcy Code. Birmingham Trust National Bank v. Case, 755 F.2d 1474, 1476 (11th Cir. 1985). This Court may look to the totality of circumstances, including recklessness of debtor's behavior, to determine whether the debtor made a fraudulent statement with intent to deceive, for nondischargeability purposes. In re Miller, 39 F.3d 301 (11th Cir. 1994).³ The burden of proving that lack of intent, however, falls squarely upon the creditor. A debtor may have the honest belief that he will, in the future, be able to repay his debt, even if he has no present

³ Although the Eleventh Circuit in Miller was addressing false financial statements under Section 523(a)(2)(B), the totality of the circumstances test should be viable also under Section 523(a)(2)(A), because under both subsections the Court requires that the debtor have acted with an "intent to deceive." In re Vann, 67 F.3d 277, 281 n.5 (1995). There is no reason to think that the phrase "intent to deceive" should mean one thing for subsection (A) than it does for subsection (B).

ability to do so. See In re Carpenter, 53 B.R. 724 (N.D.Ga. 1985).

I have ruled previously that a lack of intent to repay the debt cannot be inferred only from the debtor's insolvency or inability to make payments. See In re Fabie, Ch. 7 No. 97-20171, Adv. Pro. 97-2044, slip op. at 11 (Bankr. S.D.Ga. Dec. 19, 1997) (Davis, J.). In this case, at the moment Debtor represented that he would be receiving a large payment on one of his jobs, the representation was apparently true, as evidenced by the May 1997 receipts. I therefore hold that he made no false representation of that fact, and, as stated above, his failure to perform the promise to apply the money to this debt does not rise to the level of fraud. Moreover, on cross-examination Fetzer conceded that no additional credit was extended after the \$20,000.00 offer was made. Thus even if the representation was false, the creditor did not prove reliance in extending credit.

Willful and Malicious Injury to the Property of Another

Georgia Electric Supply also asserts in its complaint that the debt is nondischargeable by virtue of Section 523(a)(6), which provides:

A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt —

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

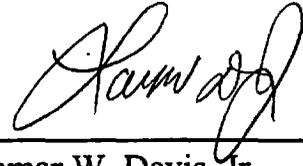
11 U.S.C. § 523(a)(6). Section 523(a)(6) encompasses the tort of conversion within its scope as injury to the property of another. See McIntyre v. Kavanaugh, 242 U.S. 138, 141, 37 S.Ct. 38, 61 L.Ed. 205 (1916). Plaintiff again must bear the burden of proof with respect to issues of nondischargeability due to willful injury. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). The injury must have been deliberate and intentional, as opposed to an intentional act which had as its consequence an injury. Kawaauhau v. Geiger, ___ U.S. ___, 118 S.Ct. 974, 977 (1998).

I find that Mr. Helmly did not convert property with regard to the supplies he ordered from Georgia Electric Supply. Plaintiff offered no proof, other than Debtor's insolvency, that Debtor did not intend to pay for the supplies at the time that he ordered them. To allow insolvency to support a finding of conversion, but not of fraud, would be insupportable. Moreover he did not convert the funds received from the Motel 6 job when he failed to remit them to Georgia Electric. The funds in question were not Georgia Electric's even in light of Debtor's promise to remit them. Cf. Golden Isles Drywall, Inc. v. Stone, No. 96-8988, slip op. at 3-4 (11th Cir. 1997) (unpublished opinion) (verbal assurances are not sufficient to create constructive trust).

ORDER

In consideration of the foregoing IT IS HEREBY ORDERED that the obligations of Debtor, William H. Helmly, III, to Plaintiff, Georgia Electric Supply, Inc., are

discharged.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 28th of September, 1998.