

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

**Don Graves
Barbara Graves,**

Debtor.

Case No. 98-12696

Chapter 7

First South Bank,

Plaintiff,

v.

Adv. Pro. No. 98-5340

**Don Graves
Barbara Graves,**

Defendant.

**MEMORANDUM OPINION AND ORDER RE
COMPLAINT OBJECTING TO DISCHARGEABILITY**

The Court conducted a trial in this matter on June 11, 1999. FED. R. BANKR. P. 7001.

Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law.

FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

On June 11, 1998, the business entity known as Graves Properties, L.L.C., (“Graves Properties”), obtained financing in the amount of \$34,850.00, from the plaintiff in this adversary proceeding, First South Bank, (“First South”). The debtors in this case, Don and Barbara Graves,

(“Graves”), were guarantors on this note. In acting as guarantors for the loan, the debtors submitted a personal financial statement dated September 1, 1997. This statement reflected the debtors’ net worth as \$389,130.00. First South and the Graves had engaged in several business transactions before entering into this loan.

Prior to obtaining this loan, Graves Properties purchased the Airways Apartments in Jackson. According to the debtors’ testimony at trial, the sellers of the apartments misrepresented the amount of income the apartments generated and the condition of the apartments. As a result of this misrepresentation, the debtors had to undertake numerous repairs to the apartments between purchasing the apartments in April 1998 until late June 1998.

At the end of June, the City of Jackson stopped the Graves from making any further repairs to the apartments. Graves Properties had been in the process of repairing the roof of the apartments at the time; however, the City demanded before any more repairs were made that Graves Properties conduct complete tear-offs of the old roofs. Because some of these roofs were seven layers thick, Graves Properties was unable to continue with the repairs.

At the same time of the City’s involvement in the Airways Apartments, the Graves’ insurance company sent a letter to the Graves demanding that certain repairs be made to the apartments. According to the terms of the letter, the insurance would be canceled if such repairs were not made within a certain number of days. Because the City had stopped Graves Properties from continuing with the roof repairs, Graves Properties was unable to make the repairs the insurance company had

requested. The insurance on the apartments was subsequently canceled.

Despite the financial difficulties the Graves began experiencing as a result of the problems with the apartments, the Graves never updated the financial statement they had given to First South. On July 20, 1998, both the Graves, as individuals, and Graves Properties, L.L.C., filed bankruptcy petitions with this Court.

II. CONCLUSIONS OF LAW

11 U.S.C. § 523(a)(2)(B)

Section 523(a)(2)(B) excepts from discharge any debt

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by -

...

(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 reasonably relied; and

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

11 U.S.C. § 523(a)(2)(B). A creditor seeking to have a debt declared nondischargeable under § 523(a)(2)(B) needs to prove that (1) they actually relied upon the statement in extending the credit, (3) their reliance on the financial statement was reasonable and (2) the debtor intended to deceive the creditor with the financial statement or the debtor acted with gross recklessness in submitting said statement. Boston Mortgage Corp. v. Ledford (In re Ledford), 970 F.2d 1556 (6th Cir. 1992). The standard of proof under § 523(a)(2)(B) is the preponderance of the evidence one. Grogan v. Garner,

498 U.S. 279 (1991).

In the case at bar, no proof was presented to the Court that at the time of submitting the financial statement, there was any false or misleading information on said statement. In fact, the testimony at trial firmly established that the Graves’ financial condition did not deteriorate to the point where the financial statement was inaccurate until the end of June/beginning of July. As a result, First South is unable to prove that Graves either intentionally or with gross recklessness submitted a false financial statement on June 11, 1998.

As for failing to update the Bank on their worsening financial condition, the Court finds that the Graves were beset by completely unforeseen circumstances which had the effect of making them insolvent within a matter of two to three weeks. Considering the rapid rate at which their condition deteriorated, the Court finds that the Graves were not reckless in failing to notify the Bank. By that time, the money had been lent and the note had been signed. First South could not have undone that fact whether the Graves gave them a new financial statement or not.

III. ORDER

It is therefore **ORDERED** that the Complaint Objecting to Dischargeability is **DENIED**. The debt owing to the plaintiff by the defendants is hereby discharged.

IT IS SO ORDERED.

By the Court,

**G. Harvey Boswell
United States Bankruptcy Judge**

Date: July 26, 1999