UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re

MAX WELDON WORKMAN, Chapter 7 Case No. 89-9001

Debtor.

ROBERT HARRELL,

Plaintiff,

VS. Adv. Pro. No. 89-0188

MAX WELDON WORKMAN,

Defendant.

MEMORANDUM OPINION AND ORDER RE COMPLAINT PURSUANT TO 11 U.S.C. §727(a) AND 11 U.S.C. §523(a)(2)(A)(B)

Plaintiff, Robert C. Harrell, a creditor (hereinafter "plaintiff") in the above-referenced adversary proceeding seeks to deny the general discharge of the defendant, Max Weldon Workman (hereinafter "debtor"), pursuant to 11 U.S.C. §727(a)(4)(A) or alternatively to except his particular debt from the general discharge pursuant to 11 U.S.C. §523(a)(2)(A) and (B).

Although venue of this proceeding was initially in the United States Bankruptcy Court for the Middle District of Tennessee, the March 16, 1989 consent order provided for the transfer of any prospective adversary proceeding involving the plaintiff and the debtor to the United States Bankruptcy Court for the Western District of Tennessee "as that Court would be proper venue for the hearing on the adversary action".

The following shall constitute findings of fact and conclusions of law pursuant to Bankr. Rule

7052. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I) and (J).

BACKGROUND FACTS

Plaintiff seeks to, inter alia, except from discharge the sum of $6,101.43, which represents payment on two bank loans on which the plaintiff co-signed for the debtor and one direct loan from the plaintiff to the debtor for $500.00 via a personal check.

At the trial conducted on January 11, 1990, it was uncontroverted that on or about May 11, 1988, the debtor purchased a home from the plaintiff. First Citizens National Bank of Dyersburg (hereinafter "FCNB") financed the home. Plaintiff/seller guaranteed the mortgage debt.

To finance subsequent improvements on the home, the debtor obtained two loans from FCNB which the plaintiff also agreed to serve as guarantor. The first such note was executed on July 19, 1988, for $2,000.00; and the second note was executed on August 29, 1988, for $2,000.00. Plaintiff also loaned the debtor $500.00 by personal check executed by the plaintiff's wife on August 25, 1988. Plaintiff testified in relevant part here that he subsequently paid the amount of $5,601.43 to FCNB to satisfy the two notes.

Both parties have submitted post-trial briefs.

At the trial, it was stipulated that the debtor has a prior felony conviction for bank robbery and is presently on supervised parole, and that the debtor had previously reported a Chevrolet Corvette as "stolen" to his insurance company which was in fact not true. The insurer had paid the debtor; however, upon recovery of the subject vehicle, the debtor's family members refunded the funds to the insurer. In March or August of 1987, the debtor purchased a Mazda RX-7 automobile which was titled and insured in the debtor's name only with financing being arranged with Sovran Bank. Neither the debt with Sovran Bank nor the subject vehicle was listed in the debtor's Schedule A-2 and B-2.

DISCUSSION

Certain dishonest or uncooperative acts may give rise to grounds for the denial of a general discharge.

§727(a)(4)(A) of the Bankruptcy Code is one ground for the denial of a discharge and provides as follows:

> "(a) The court shall grant the debtor a discharge unless -
>
> "(4) the debtor knowingly and fraudulently, in or in connection with the case -
>
> "(A) made a false oath or account;"

Plaintiff avers that the debtor's conduct involving the Mazda RX-7 falls within the §727(a)(4)(A)[1] objection to discharge. Notwithstanding the stipulation of facts (previously mentioned) covering the Mazda RX-7, the debtor testified that in fact his son, Brad Workman, had been driving the car as well as making payments on the subject vehicle. This testimony was unrebutted.

The essential elements of §727(a)(4)(A) are as follows: knowing and fraudulent false oath of a material matter made with the intent to deceive. See 4 Collier On Bankruptcy, §727.04 (15th ed.)

Bankr. Rule 4005 provides as follows:

> "At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection."

Debtor has the burden of proving that a misrepresentation in the statement of affairs or schedules was the result of a mistake. That is, once it reasonably appears that the oath is false, the burden falls upon the debtor to come forward with evidence to prove that it was not an intentional misrepresentation. See, e.g., In re Mascolo, 505 F.2d 274, 276 (1st Cir. 1974). Objections to the operation of a bankruptcy discharge are strictly construed against the objector and liberally in favor of the debtor. Gleason v. Thaw, 236 U.S. 558 (1985).

Without more than the previously mentioned pre-trial oral stipulations, this court cannot

[1]Should an exception to discharge be granted under this section, all prepetition debts will be excepted from discharge.

conclude from this sparse record under §727(a) that the plaintiff has carried his burden of proof on the "intent to deceive" element. Debtor has sufficiently carried his burden of proving that the failure to schedule the Sovran Bank debt and the car subject to the lien was the result of a mistake. Accordingly, the plaintiff's complaint fails under 11 U.S.C. §727(a)(4).

Plaintiff alternatively seeks to except his particular debt from discharge pursuant to 11 U.S.C. §523(a)(2)(A) or (B)[2].

§523(a)(2)(A) and (B) provide as follows:

> "(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 representations, 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 reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive;"

The elements necessary to except a debt from discharge under §523(a)(2)(A) are as follows:

> "[T]he creditor must prove that the debtor obtained money through a material misrepresentation that at the time the debtor knew was false or made with gross recklessness as to its truth. The creditor must also prove the debtor's intent

[2]Subsections (A) and (B), are mutually exclusive.

> to deceive. Moreover, the creditor must prove that it reasonably relied on the false representation and that its reliance was the proximate cause of loss." In re Ward, 857 F.2d 1082, 1083 (6th Cir. 1988), citing In re Phillips, 804 F.2d 930, 932 (6th Cir. 1986).

The creditor seeking an exception from discharge under §523(a)(2)(A) and (B) must prove nondischargeability by clear and convincing evidence. In re Phillips, supra, at p.932, In re Ward, supra, at p. 1083. In re Martin, 761 F.2d 1163 (6th Cir. 1985).

Although a somewhat heavy burden of proof, the In re Phillips court provided the following relevant language regarding the element of reasonable reliance.

> "We believe that the critical factor in evaluating cases involving the issue of reasonable reliance under §523(a)(2)(A) is to accord `a construction of the [Bankruptcy Act that] is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the *honest* citizen may be relieved from the burden of hopeless insolvency' (emphasis added). *Neal*, 95 U.S. at 709....As such, it cannot be said to be a rigorous requirement, but rather is directed at creditors acting in bad faith. 761 F.2d at 1166. *See Parkey*, 790 F.2d at 492-93. The determination of reasonableness must be made by evaluating all the facts and circumstances of the case. *Martin*, 761 F.2d at 1166.

Plaintiff contends that the debtor fraudulently represented that he had $15,000.00 worth of tools available for the granting of a security interest. Debtor testified that he told the plaintiff he would give him (plaintiff) a security interest in the tools. Further, the debtor testified as follows: "I may have said (to plaintiff) that I own $15,000.00 worth of tools". On the question of value, the plaintiff testified the tools may be worth $10,000.00. Debtor's Schedule B-2 shows a liquidation value of $1,500.00. Cf. §506(a) of the Bankruptcy Code.

Further, plaintiff was to have taken as additional collateral, a security interest in a 1967 Ford Van. Said lien status was never effectuated. Barry Ladd of FCNB testified that on at least one occasion, the debtor indicated that a list of tools would be provided for the purpose of effectuating a security interest. Mr. Ladd further testified that the debtor failed to follow through with this list.

This court notes with particularity, the facts that gave rise to the second $2,000.00 loan to the debtor. The proof at trial was that the debtor had written some bad checks and approached the plaintiff about a loan to "cover" those bad checks. There was testimony that the debtor expressed fear of his parole being violated as a result of the bad checks, all of which might lead to his return to the federal prison. Debtor moved out of the house only a few months after it was purchased from the plaintiff.

Plaintiff's wife testified that at the time she executed the $500.00 check payable to the debtor, and at the time of the second $2,000.00 loan, the debtor indicated to her that $15,000.00 worth of tools were available for collateral purposes. It is noted that different valuations exist for different purposes (e.g. replacement vs. liquidation).

After evaluating all the facts and circumstances of this particular proceeding, the court finds that the plaintiff has not by clear and convincing evidence carried the burden with respect to §523(a)(2)(A) or (B). Broken promises generally do not give rise to nondischargeable debts. As noted, exceptions to the discharge are strictly construed against the objector and liberally in favor of the debtor. Gleason v. Thaw, 236 U.S. 558 (1915).

Based on the foregoing and the entire case record as a whole, the plaintiff's complaint is denied.

IT IS SO ORDERED:

_____

DAVID S. KENNEDY
UNITED STATES BANKRUPTCY JUDGE

DATE: March 12, 1990

cc: Ted A. Burkhalter, Esq.
Attorney for Debtor-Defendant
110 29th Avenue, North #202
Nashville, TN 37203

Mark L. Agee, Esq.
Attorney for Plaintiff
Court Square
Trenton, TN 38382

Jackson Divisional Office