

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
STERLING R. FRANCK, SR.,)	CASE NO. BK85-2493
)	
DEBTOR)	A85-339
)	
DOROTHY JEAN FRANCK,)	
)	
Plaintiff)	
)	
vs.)	
)	
STERLING R. FRANCK, SR.,)	
)	
Defendant)	

MEMORANDUM OPINION

This motion to dismiss came on for hearing on February 9, 1987. Appearing on behalf of the defendant was John A. Rickerson of Rickerson & Welch, Omaha, NE. The plaintiff appeared pro se.

FACTS

Plaintiff and debtor are divorced and have been at all times relevant to this action. On January 24, 1984, debtor and plaintiff co-signed a promissory note for \$34,850.01 with Citicorp Person-to-Person Financial Center, Inc., Omaha, Nebraska. As security for the loan, debtor and plaintiff co-signed a deed of trust placing plaintiff's home in trust with Citicorp as beneficiary.

These documents replaced earlier ones signed sometime in 1981 at which time debtor had promised plaintiff to pay the payments as they came due on the promissory note. Plaintiff claims that debtor signed a written agreement incorporating these promises but said agreement is not in evidence. Relying on debtor's promise, plaintiff co-signed the promissory note and deed of trust. Debtor's and plaintiff's affidavits differ as to the specific use of the loan, but both agreed that it was for a business purpose. Debtor has defaulted on the payments.

On October 28, 1985, debtor filed a Chapter 7 petition. On December 16, 1985, this Court granted Citicorp's November 20th request for relief from the stay and on January 3, 1986, granted

plaintiff's December 3, 1985, request for relief from the stay so that she could pursue a fraud action against debtor in Douglas County District Court. Plaintiff claimed that debtor had fraudulently induced her to mortgage her property. This Court stated that the District Court's "judgment shall be binding on debtor." [J.E. 1-3-86].

On April 14, 1986, the District Court held for debtor, finding that plaintiff failed to show fraud. Plaintiff now objects to debtor's Chapter 7 discharge under both Sections 523 and 727, again claiming debtor fraudulently induced her to mortgage her property.

QUESTIONS PRESENTED

I. Whether the District Court decision that plaintiff had not proven fraud establishes collateral estoppel for purposes of Sections 523 and 727?

II. Whether the plaintiff has proven fraud sufficient to satisfy either Section 523(a)(2)(A) or Section 727(a) if the doctrine of collateral estoppel does not apply?

III. Whether this Court may dismiss for cause as provided in Section 707?

DISCUSSION

I. In Lovell vs. Mixon, 719 F.2d 1373 (8th Cir. 1983), the court outlined four criteria which must be met before the doctrine of collateral estoppel is applicable: "(1) [T]he issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment." Id. at 1376 (citation omitted). Additionally, "the party against whom the earlier decision is being asserted had a 'full and fair opportunity' to litigate the issue in question." Id. (citation omitted).

The issue before the District Court was whether the debtor fraudulently represented that the debtor would make payments on the promissory note and would not allow plaintiff's property to be taken by Citicorp. [Plaintiff's petition ¶ 6]. The Court found that the plaintiff failed to show fraud on the part of the debtor. [Doc. 841, p. 628].

Because the District Court adjudicated the same alleged fraudulent act as contained in plaintiff's objections to debtor's discharge, the issue before the Bankruptcy Court is the same as the one that was before the District Court. Moreover, plaintiff's request for relief from the stay stated that "[t]he issues in the State Court are identical to the issues to be tried in the

Bankruptcy Court." [Plaintiff's request for relief ¶ 2]. Additionally, the Bankruptcy Court, in lifting the stay to permit plaintiff to pursue the fraud action, stated that the decision by the District Court would be binding on debtor. [J.E. 1/3/86].

The District Court's ruling satisfied the Lovell court's criteria. Therefore, the doctrine of collateral estoppel bars litigating the issue of fraud in a Section 523 or 727 setting.

II. However, in the absence of a written record, an argument can be made that the issue before the District Court was merely "legal fraud," which materially differs from the actual fraud required in Section 523(a)(2)(A). Section 523(a)(2)(A) denies discharge of a debt obtained by "false pretenses, false representations or actual fraud." Colliers on Bankruptcy categorizes false pretenses and false representations as frauds which involve "moral turpitude or intentional wrong; fraud implied in law which may exist without imputation of bad faith or immorality, is insufficient." 3 Colliers on Bankruptcy ¶ 523.08[4] at 523-38 (15th Ed.).

Most of the decisions interpreting Section 523(a)(2)(A) require the creditor to show that the "misrepresentation be intentionally made...with reckless disregard for its truth." In Re Hospelhorn, 18 Bankr. 395, 398 (Bankr. S.D. Ohio 1981). For example, the court In Re Buttendorf, 11 Bankr. 558 (Bankr. D. Vt. 1981), finding that the issuance of worthless checks absent a showing of moral turpitude or intentional wrong will not defeat a discharge, stated:

"An actionable misrepresentation must relate to a present or past state of facts. Representations of intention or promises, having reference merely to the future, constitute no ground of action. An action of deceit does not lie for failure on the part of a promisor to perform a promise by him to do something in the future, which he does not intend to do and subsequently refuses to do, although the promisee has acted in reliance on such promise to his damage. The distinction between a representation that something exists which does not, and a representation, or more properly a promise, that something shall be done thereafter is obvious."

Id. at 562 (quoting Hunt v. Lewis, 90 A.578) (citations omitted).

And, in In Re Cook, 13 Bankr. 189 (Bankr. S.D. Fla. 1981), the court said: "It is settled that [Section 523(a)(2)(A)] requires proof of an intentional wrong as distinct from an implied

fraud or an imputation of bad faith. The misrepresentation must also be shown to have been made knowingly and fraudulently... ." Id. at 191.

The written record contains no proof of either an intentional wrong or a reckless disregard for the truth. Consequently, plaintiff's debt cannot be exempted from discharge under Section 523(a)(2)(A).

Turning to Section 727, subsection (a)(7) requires that an act by debtor sufficient to deny discharge must occur "on or within one year before the date of the filing of the petition...." 11 U.S.C. §727(a)(7).

The deed of trust and promissory note were initially executed in 1981 and signed again in January, 1984, due to refinancing. Debtor filed his Chapter 7 petition October 30, 1985. Even if fraud were proven, the act complained of occurred more than one year prior to the bankruptcy filing.

In summary, plaintiff has not demonstrated that her debt falls within the statutory exemption of either Sections 523 or 727. The burden of proof is plaintiff's. Rule 4005.

III. Section 707(b) provides:

"After notice and a hearing, the court, on its own motion and not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor."

The legislative history points out that "the ability of the debtor to repay his debts in whole or in part [does not] constitute adequate cause for dismissal. To permit dismissal on that ground would be to enact a non-uniform mandatory Chapter 13, in lieu of the remedy of the bankruptcy." Accord In Re Beck Rumbaugh Associates, Inc., 49 Bankr. 920 (Bankr. E.D. Pa. 1985); In Re Green, 49 Bankr. 7 (Bankr. W.D. Ky. 1984). Thus, debtor's present regular salary cannot be a factor in the Section 707(b) dismissal. Additionally, Section 101 defines "consumer debt" as "debt incurred by an individual primarily for a personal, family, or household purpose." Because debtor utilized the borrowed funds for a business purpose, the debt cannot be classified as a consumer one.

Although Section 707(b) is inapplicable, Section 707(a) must also be examined. Section 707(a) provides that "[t]he court may dismiss a case under this chapter...only for cause... ." Cause includes, but is not limited to, unreasonable delay by debtor or debtor's nonpayment of required fees. See 11 U.S.C. §707(a)(1)-(3). Generally, "cause rests within the sound discretion of the courts. In exercising such discretion, the courts have been guided by general equitable principles, including the balancing of competing interests." In re Heatley, 51 Bankr. 518, 519 (Bankr. E.D. Pa. 1985).

According to the court in In Re Schwartz, 58 Bankr. 923 (Bankr. S.D. N.Y. 1986), the test is "whether dismissal is in the best interests of the debtor and his creditors. As to a debtor, best interest lies generally in securing an effective fresh start upon discharge... . As to creditors, the issue is one of prejudice... ." Id. at 925.

Applying the Schwartz court's test to the instant facts weighs against a Section 707(a) dismissal. First, the lifting of the stay permitted plaintiff to pursue, although unsuccessfully, the state law claim. Plaintiff was thus not prejudiced by the filing of the Chapter 7 petition and second, debtor's fresh start will not be impaired if none of his debts are exempted from discharge under either Sections 523 or 727.

In summary, neither subsection (a) nor (b) of Section 707 are applicable to the instant case.

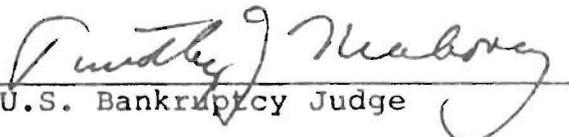
CONCLUSION

Collateral estoppel bars the relitigation of debtor's alleged fraudulent misrepresentation before the Bankruptcy Court. Moreover, plaintiff has not demonstrated that her debt falls within the statutory exemptions to discharge of either Sections 523 or 727. Nor is Section 707 applicable. No cause is sufficient to justify a dismissal of debtor's petition, and no substantial abuse of the bankruptcy laws is present.

Plaintiff's Case is dismissed. Separate Journal Entry to be entered.

DATED: March 24, 1987.

BY THE COURT:


U.S. Bankruptcy Judge

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