

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
JOHN KNOBLAUCH,)	CASE NO. BK91-80986
)	
DEBTOR)	A91-8152
)	
FORKER SOLAR, INC.,)	
)	CH. 7
Plaintiff)	
vs.)	
)	
JOHN KNOBLAUCH,)	Filing No. 16 & 18
)	
Defendant)	

MEMORANDUM

This memorandum contains finding of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A). Appearing on behalf of the debtor/defendant was Wm. Hadley of Hadley Law Office, Omaha, Nebraska. Appearing on behalf of the plaintiff was Frank Schepers of Kennedy, Holland, DeLacy & Svoboda, Omaha, Nebraska.

This is an adversary proceeding brought pursuant to 11 U.S.C. § 523(a)(2)(A). That section of the Code prohibits an individual debtor from obtaining a discharge from any debt "for money, property, services, or extension, renewal, or refinancing of credit, to the extent obtained by. . .false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition...."

This debtor was sued by the plaintiff in state court and a jury returned a verdict in favor of the plaintiff and against the defendant for false representations. Judgment was entered on the verdict and the judgment was appealed to the Nebraska Supreme Court. That court affirmed in Foraker Solar, Inc. v. Knoblauch, 224 Neb. 143, 396 N.W.2d 273 (1986).

The debtor then filed a Chapter 7 case and this adversary proceeding was filed. A preliminary pretrial statement was filed by the parties and at the pretrial hearing the debtor/defendant

made an oral motion for summary judgment. The plaintiff has filed a motion for summary judgment also and the parties have agreed to the submission of the transcript of testimony and various motions and rulings in the state trial court.

The motion for summary judgment filed by the debtor is based upon his position that in order for a debt to be nondischargeable under Section 523(a)(2)(A) the debtor himself must have received a benefit, monetary or otherwise, as a result of the false representation. It is his position that a review of the transcript and an affidavit of the debtor submitted at the hearing on the motion for summary judgment make it clear that there is no evidence the debtor individually received any benefit, monetary or otherwise, from the false representations. In addition, it is the debtor's position that a review of the transcript and the affidavit will show that the debtor did not make any false representations.

This Court has read the complete transcript and all of the materials provided by the parties. If this Court were a finder of fact on the issue of whether or not false representations were made by the debtor, it may well have found that the evidence was insufficient to find against the debtor. However, this Court is not the trier of fact. A jury had the opportunity to consider all of the evidence, including the testimony of the debtor and found the debtor liable for making false representations. On appeal, the Nebraska Supreme Court affirmed and discussed in detail the evidence which supports the verdict by the jury.

In the state court case, the plaintiff, in an action for damages for false representations, was required to prove by a preponderance of the evidence the following elements:

- (1) that a representation was made;
- (2) that the representation was false;
- (3) that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion;
- (4) that it was made with the intention that the plaintiff should rely on it;
- (5) that the plaintiff reasonably did so rely; and
- (6) that the plaintiff suffered damages as a result.

Foraker Solar, Inc. v. Knoblauch, 224 Neb. at 152, 396 N.W.2d 273 at _____ (1986), citing Nielsen v. Adams, 223 Neb. 262, 388 N.W.2d 840 (1986).

The standard of proof in the Nebraska state court for a finding of false representations is preponderance of the evidence. The same standard applies in the Bankruptcy Court. Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654 (1991). Therefore, since the elements of the allegations of false representation have been proven to the satisfaction of a jury and to the satisfaction of the Nebraska Supreme Court under the preponderance of evidence standard, the debtor and this Court are collaterally estopped from revisiting that issue.

With regard to the question of whether the debtor, individually, must have received a benefit from the false representation, some factual background may be helpful. The debtor was an officer of a corporation, Solar Marketing Company. In his capacity as an officer of the corporation, he dealt with the plaintiff concerning the sale of a franchise or distributorship opportunity in the solar energy or solar heating business. The plaintiff paid to Solar Marketing Company approximately \$58,000.00 for a license to be a distributor and for certain inventory. Solar Marketing Company was unable to deliver on its contractual obligations to the plaintiff and Solar Marketing Company eventually went out of business. The plaintiff received no inventory and, because of the failure of Solar Marketing Company, had no ability to sell the product for which it had paid a license and inventory fee. The state court lawsuit concerned a claim by the plaintiff against Solar Marketing Company, this debtor and another officer of the corporation that false representations were made which induced the plaintiff to part with \$58,000.00 to its detriment.

As mentioned above, it is the debtor's position that this judgment debt cannot be held as nondischargeable because he did not receive any of the money or any other type of benefit as a result of the false representations. In support of his position, the debtor has provided the Court with several old and several relatively recent cases. In Gleason v. Thaw, 236 U.S. 558, 35 S. Ct. 287 (1915), the United States Supreme Court set forth the rule under the previous Bankruptcy Statute that exceptions to discharge must be narrowly construed against the creditor and in favor of the debtor. See also Lines v. Frederick, 400 U.S. 18, 91 S. Ct. 113 (1970) (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 54 S. Ct. 695 (1933)). As the debtor submits, several courts have interpreted Section 523(a)(2)(A) to apply only to debts where the debtor has received an actual benefit for himself through means proscribed by the statute. In re Ward, 115 Bankr.

532 (W.D. Mich. 1990); In re Gilpin, 99 Bankr. 93 (Bankr. M.D. Fla. 1989); In re Rubenstein, 101 Bankr. 769 (Bankr. M.D. Fla. 1989). The facts in the Ward case are similar to this case. Plaintiffs were investors who had obtained a judgment for a claim of securities fraud against an individual who ultimately sought Chapter 7 relief. The plaintiffs sought a determination that the judgment debt was nondischargeable. The Court held that the plaintiff must prove a direct benefit was received by the debtor. Since that debtor had received nothing from the corporation which received the securities investment, other than salary paid pursuant to an employment contract plus valueless shares of stock in the company, he had received no benefit and the judgment debt could not be determined nondischargeable.

What the debtor is requesting is a totally strict construction of the statute. He wants the rule to be that if a corporate officer makes false representations and thereby induces investment in or for the benefit of the corporation, any judgment rendered against him for those false representations shall be dischargeable, because he did not act for himself, but acted solely for the benefit of the employer corporation.

The law in the Eighth Circuit is contrary to the position of the debtor. In a case construing Section 523(a)(2) and the liability of an individual corporate officer/shareholder, the Eighth Circuit described a fact situation similar to the one before this Court: "Dallam's closely-held corporation benefitted from the predicament in which it had placed Lawyers Title, since the amounts Lawyers Title paid extinguished Dallam Construction Company's liability for the same debts (which Dallam scheduled in her bankruptcy petition)." In re Dallam, 850 F.2d 446, 449 (8th Cir. 1988).

The court then stated in footnote number 2 on page 449: "The fact that Dallam's fraud obtained the benefit for her closely-held corporation rather than herself directly does not alter her liability under 11 U.S.C. § 523(a)(2). In re Sobel, 37 B.R. 780, 786 (Bankr. E.D.N.Y. 1984); see also Matter of Richmond, 29 B.R. 555, 559 (Bankr. M.D. Fla. 1983)." See also In re Long, 774 F.2d 875 at 876-877, n. 1 (8th Cir. 1985).

Recently, the Bankruptcy Court for the District of Minnesota once again restated the rule in the Eighth Circuit. In the case of In re Gibson, 1993 WL 11230 (Bankr. D. Minn. Jan. 20, 1993), at *15 n. 14, Judge Kishel stated: "Even though Defendant's fraud technically resulted in a receipt and renewal of credit for his business corporation rather than himself, it will still support a determination of nondischargeability for his guarantor's liability to Plaintiff." (citations deleted)

A summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) as incorporated into the bankruptcy rules by Fed. Bankr. R. 7056. In this case, there is a final judgment that false representations were made and the debtor is liable for a monetary amount. The judgment is binding upon this Court and, therefore, there is no factual dispute. The law in the Eighth Circuit is that an individual debtor's obligation is nondischargeable under 11 U.S.C. § 523(a)(2)(A) even if the debtor did not receive specific benefits, but the benefits of the false representations accrued to a corporation for which the debtor was an employee, officer or shareholder. Therefore, the plaintiff is entitled to a judgment as a matter of law.

The motion for summary judgment filed by the defendant/debtor is denied. The motion for summary judgment filed by the plaintiff is granted. The obligation of the debtor to the plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

Separate journal entry shall be entered.

DATED: March 1, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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<u>DEBTOR(S)</u>)	
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FORKER SOLAR, INC.,)	CH. 7
Plaintiff(s))	Filing No.
vs.)	<u>JOURNAL ENTRY</u>
)	
JOHN KNOBLAUCH,)	
)	DATE: March 1, 1993
<u>Defendant(s)</u>)	HEARING DATE:

Before a United States Bankruptcy Judge for the District of Nebraska regarding adversary proceeding.

APPEARANCES

Wm. Hadley, Attorney
Frank Schepers, Attorney

IT IS ORDERED:

The motion for summary judgment filed by the defendant/debtor is denied. The motion for summary judgment filed by the plaintiff is granted. The obligation of the debtor to the plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). See memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge