

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
JAMES McCARVILLE &)
CHERYL NORD-McCARVILLE,)
)
Debtor(s).) CASE NO. BK02-41760
A02-4092
SCREEN PRINT PROMOTIONS, a)
Nebraska sole proprietorship,)
)
Plaintiff,) CH. 7
)
vs.)
)
JAMES McCARVILLE, individually)
and as guardian & conservator)
for Cheryl Nord-McCarville,)
)
Defendants.)

MEMORANDUM

This matter is before the court on the plaintiff's motion for summary judgment (Fil. #59). The plaintiff is acting pro se through its owner, Kathleen Foley. No resistance to the motion was filed. The motion was taken under advisement as submitted without oral arguments, and is now ready for decision. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

The plaintiff is in the business of designing and printing t-shirts and other items. The debtors placed an order with the company in 2001 for more than \$5,000 worth of t-shirts to be sold at a St. Patrick's Day celebration. Because this was a very large order for the company, the plaintiff insisted on payment at the time of delivery. The debtors were unable to pay the full amount at that time, but the parties reached an agreement whereby the t-shirts would be released to the debtors in exchange for \$2,500 and the debtors' assurances that they would pay the balance within a week. The debtors subsequently stopped payment on the \$2,500 check. The debtors did not make the check

good, nor did they pay the remaining balance.

Screen Print obtained a state court default judgment in December 2001 for \$5,136.15, plus \$50 court costs and interest and attorney fees. The bankruptcy filing stayed execution of that judgment. Screen Print now moves for summary judgment on the grounds that the debt is excepted from discharge under 11 U.S.C. § 523(a)(2)(A) as having been obtained by fraud, false pretenses, or a false representation.

Summary judgment is appropriate only if the record, when viewed in the light most favorable to the non-moving party, shows there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c) (made applicable to adversary proceedings in bankruptcy by Fed. R. Bankr. P. 7056); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Morgan v. Rabun, 128 F.3d 694, 696 (8th Cir. 1997), cert. denied, 523 U.S. 1124 (1998); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992); St. Paul Fire & Marine Ins. Co. v. FDIC, 968 F.2d 695, 699 (8th Cir. 1992).

To withstand a motion for summary judgment, the nonmoving party must submit "sufficient evidence supporting a material factual dispute that would require resolution by a trier of fact." Austin v. Minnesota Mining & Mfg. Co., 193 F.3d 992, 994 (8th Cir. 1999) (quoting Hase v. Missouri Div. of Employment Sec., 972 F.2d 893, 895 (8th Cir. 1992), cert. denied, 508 U.S. 906 (1993)). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

To establish fraud within the context of § 523(a)(2)(A), the creditor must show, by a preponderance of the evidence, that: (1) the debtor made a representation; (2) the representation was made at a time when the debtor knew the representation was false; (3) the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such representation; and (5) the creditor sustained a loss as the proximate result of the representation having been made. Universal Bank, N.A. v. Grause (In re Grause), 245 B.R. 95, 99

(B.A.P. 8th Cir. 2000) (citing Thul v. Ophaug (In re Ophaug), 827 F.2d 340, 342 n.1 (8th Cir. 1987), as supplemented by Field v. Mans, 516 U.S. 59 (1995)). In Field v. Mans, the Supreme Court held that § 523(a)(2)(A) requires justifiable reliance, in which "[j]ustification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases." Id. at 71 (citing the Restatement (Second) of Torts § 545A cmt. b (1976)).

"The intent element of § 523(a)(2)(A) does not require a finding of malevolence or personal ill-will; all it requires is a showing of an intent to induce the creditor to rely and act on the misrepresentations in question." Merchants Nat'l Bank v. Moen (In re Moen), 238 B.R. 785, 791 (B.A.P. 8th Cir. 1999) (quoting Moodie-Yannotti v. Swan (In re Swan), 156 B.R. 618, 623 n.6 (Bankr. D. Minn. 1993)). "Because direct proof of intent (i.e., the debtor's state of mind) is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred." Id. (quoting Caspers v. Van Horne (In re Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987)). The intent to deceive will be inferred when the debtor makes a false representation and knows or should know that the statement will induce another to act. Id. (quoting Federal Trade Comm'n v. Duggan (In re Duggan), 169 B.R. 318, 324 (Bankr. E.D.N.Y. 1994)).

In this case, Screen Print has moved for summary judgment because the debtors did not respond to its requests for admission and thereby failed to put any material facts at issue. Under Federal Rule of Civil Procedure 36(a), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7036, "each matter requested is deemed admitted unless the responding party serves a written answer or objection within 30 days." Manatt v. Union Pacific R. Co., 122 F.3d 514, 516-17 (8th Cir. 1997) (citing Gutting v. Falstaff Brewing Corp., 710 F.2d 1309, 1312 (8th Cir. 1983)). See also Ru Jan Yang Living Trust v. Qin (In re Qin), 285 B.R. 292, 296 (Bankr. N.D. Iowa 2002) (Plaintiff's failure to admit or deny a certain allegation in request for admission means the allegation stands as admitted and conclusively established.)

Here, the evidence as established by the uncontroverted admissions indicates fraud under § 523(a)(2)(A). The debtors obtained several hundred t-shirts from Screen Print without

paying for or having the ability to pay for them, while assuring the company that payment would be forthcoming. In particular, the debtors represented to the plaintiff that they could pay \$2,500 at the time of pickup, with the balance to follow within a few days. The debtors knew that they did not, and would not, have \$2,500 in their bank account when they wrote the check to Screen Print, but they made that offer with the intention and expectation that Screen Print would rely on it and release the merchandise. As a result, Screen Print suffered damages of more than \$5,000. All of the elements of § 523(a)(2)(A) have been met, and separate judgment declaring this debt non-dischargeable will be entered in favor of the plaintiff.

In addition, Screen Print requests relief from the automatic stay to pursue execution of the state court judgment. The debtors received a Chapter 7 discharge on September 13, 2004 (Fil. #178). Under 11 U.S.C. § 362(c)(2)(C), the automatic stay expired when the discharge was granted. Therefore, the creditor is free to pursue whatever remedies it may have in state court.

DATED: December 3, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Kathleen Foley
James McCarville
U.S. Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
JAMES McCARVILLE &)
CHERYL NORD-McCARVILLE,)
)
Debtor(s).) CASE NO. BK02-41760
SCREEN PRINT PROMOTIONS, a) A02-4092
Nebraska sole proprietorship,)
)
Plaintiff,) CH. 7
)
vs.)
)
JAMES McCARVILLE, individually)
and as guardian & conservator)
for Cheryl Nord-McCarville,)
)
Defendants.)

JUDGMENT

This matter is before the court on the plaintiff's motion for summary judgment (Fil. #59). The plaintiff is acting pro se through its owner, Kathleen Foley. No resistance to the motion was filed.

IT IS ORDERED: The plaintiff's motion for summary judgment (Fil. #59) is granted. The debt owed to Screen Print Promotions is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A). See Memorandum entered this date.

DATED: December 3, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Kathleen Foley
James McCarville
U.S. Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.