UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

VICTOR STANLEY OVERAITIS, JR.,

Debtor.
_____/

Case No. ST 00-04132
Chapter 7

DARRYL T. JOHNSON, P.L.C.,

Plaintiff,

v.

VICTOR STANLEY OVERAITIS, JR.,

Defendant.
_____/

Adversary Proceeding
No. 00-88230

NOT FOR PUBLICATION



## OPINION

This matter comes before the Court upon a Default Hearing for failure to answer a Complaint to Determine Debt to be Nondischargeable filed by the Plaintiff, Darryl T. Johnson (Johnson or Plaintiff). Based on oral argument, we are treating this as a Motion for Summary Judgment based upon the collateral estoppel effect of the state court's default judgment. This Court has jurisdiction pursuant to 28 U.S.C. §1334(b); this is a core proceeding under 28 U.S.C. §157(b)(2)(I). Accordingly, we enter a final order subject to appellate review under 28 U.S.C. §158 and Fed. R. Civ.

P. 8001 et. seq.

Facts

On January 21, 1998, Victor Stanley Overaitis Jr. (Overaitis or Debtor) hired Johnson to represent him in a divorce. During the time of the representation, Overaitis paid Johnson in irregular installments.[1] Over the course of their relationship, Johnson told Overaitis through conversation and correspondence that he would prefer to cease his representation if there was a chance he was not going to be paid in full. Overaitis assured Johnson that he intended to eventually pay the fees completely and further averred that even if forced to declare bankruptcy, he would reaffirm his debt to Johnson.

Based on these assertions, Johnson continued representing Overaitis, working a total of 136 hours. Overaitis never paid the bill in full and eventually stopped making payments altogether. Johnson sued Overaitis for $16,478.26, alleging fraud in the inducement. "Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." Kefuss v. Whitley, 220 Mich. 67, 82-83, 189 N.W. 76 (1922).

The Plaintiff received a default judgment[2] in state court on January 19, 2000. Overaitis filed chapter 7 bankruptcy on May 19, 2000. Johnson filed an adversary proceeding in the Bankruptcy Court alleging that the debt is nondischargeable under 11 U.S.C. §523(a)(2)(A). He argues that the default judgment in the state court should have collateral estoppel effect.

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[1]Payments totaling $1140.00 were made in February, April, May, June, September and October of 1998 and in February and April of 1999.

[2]The default judgment was a "true" default, meaning that Overaitis never appeared in any manner in the state court proceeding.

Discussion

Collateral estoppel bars relitigation of an issue previously decided in judicial or administrative proceedings if the party against whom the prior decision is asserted had a "full and fair opportunity" to litigate that issue in an earlier case. Allen v. McCury, 449 U.S. 90, 95, 101 S.Ct. 411, 414 (1980). Collateral estoppel principles apply to dischargeability proceedings. Grogan v. Garner, 498 U.S. 79, 285 n.11, 111 S.Ct. 654, 658 n.11 (1991). This Court has previously found that in some circumstances, a default judgment can be given collateral estoppel effect. Vander Mey v. Kott (In re Kott), No. 98-88621 (Bankr. W.D. Mich., May 22, 2000)

Section 523(a)(2)(A) bars discharge of any debt to the extent obtained by false representations, false pretenses or actual fraud. The Plaintiff claims that the false representation made by the Debtor constituted fraud in the inducement because it caused the Plaintiff to continue his representation of the Debtor. In order to sustain his case under §523(a)(2), Plaintiff must establish each of the four elements: 1) the debtor obtained money or services through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; 2) the debtor intended to deceive the creditor; 3) the creditor justifiably relied on the false representation; and 4) its reliance was the proximate cause of loss. Rembert v. AT & T Universal Credit Card Services (In re Rembert), 141 F.3d 277 (6th Cir. 1998); Longo v. McLaren (In re McLaren), 3 F.3d 958, 961 (6th Cir. 1993).

The alleged false representation must encompass statements that falsely purport to depict current or past facts. Sain v. Vernon (In re Vernon), 192 B.R. 165 (Bankr. N.D. Ill. 1996). A promise to perform acts in the future is not considered a qualifying misrepresentation merely because the promise is subsequently breached. In re Bercier, 934 F.2d 689 (5th Cir. 1991); Comerica Bank-Detroit

v. Nahas (In re Nahas), 92 B.R. 726 (Bankr. E.D. Mich. 1988). Absent more, a promise to be carried out in the future is not sufficient to show fraudulent intent under §523(a)(2). Dawley v. Gould (In re Gould), 73 B.R. 225 (Bankr. N.D.N.Y. 1987).

To qualify under §523(a)(2)(A), the representation must be made with fraudulent intent; the conduct must therefore involve some intended wrong. Gabellini v. Rega, 724 F.2d 579 (7th Cir. 1984). "Neither representations of fact that will exist in the future nor mere promises, although false and intended to deceive, afford the basis of actionable fraud." Nahas, 92 B.R. at 727.

Mere negligence, poor business judgment, or even fraud implied in law is insufficient conduct to be actionable under §523(a)(2)(A). See In re Sutton, 39 B.R. 390, 397 (Bankr. M.D. Tenn. 1984) (the action must be intentional and merely reckless representations are insufficient).

Where there is room for an inference of honest intent, the question of fraudulent intent must be resolved in favor of the debtor. Buckeye Candy Co. v. Ritzer (In re Ritzer), 105 B.R. 424, 428 (Bankr. S.D. Ohio 1989); Wilson v. Mettetal (In re Mettetal), 41 B.R. 80, 89 (Bankr. E.D. Tenn. 1984); Heinold Commodities & Securities v. Hunt (In re Hunt), 30 B.R. 425, 439 (Bankr. N.D. Tenn. 1983).

Based on these authorities, we find that the elements required for fraud in the inducement are insufficient for a finding of fraud under §523(a)(2)(A) and therefore we are unable to give the state court judgment collateral estoppel effect. The representations made by Overaitis regarding his bill payment were not intentionally false under §523(a)(2)(A) because he made payments throughout 1998 and into 1999. These actions contradict the Plaintiff's allegations that Overaitis never intended to pay.

In addition, under §523(a)(2)(A), reliance by the Plaintiff must be both actual and justifiable under the circumstances and facts of the case. Field v. Mans, 516 U.S. 59, 116 S.Ct. 437 (1995). A creditor who possesses access to the truth may be denied recovery of judgment for dischargeability of debt under §523(a)(2)(A) for lack of justifiable reliance on a purported misrepresentation. Mayer v. Spanel International Ltd., 51 F.3d 670, 676 (7th Cir. 1995). Here, Johnson had somehow been warned that Overaitis was considering bankruptcy after the divorce. That clearly posed a threat to his fees, both those earned in the past and those to be earned in the future. He continued his work despite seeking some protection. Although admirable, it does not give us grounds to determine the debt to be nondischargeable. Discharge exceptions are to be narrowly construed, and improvident creditors are not to be afforded special protections in bankruptcy for the assumption of common business risks. First National Bank of Mobile v. Roddenberry, 701 F.2d 927 (11th Cir. 1983).

Dated: January 4, 2001

Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge

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**ORDER**

At a session of said Court, held in and for said District, at the United States Bankruptcy Court, Federal Building, Grand Rapids, Michigan this 04 day of January, 2001.

PRESENT: HONORABLE JO ANN C. STEVENSON
United States Bankruptcy Judge

NOW, THEREFORE, IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that this Opinion and Order shall be served by first-class United States mail, postage prepaid upon Jeffrey C. Alandt, Esq., Darryl T. Johnson, Esq., Victor Stanley Overaitis, Jr. and Craig W. Elhart, Esq.

Dated: January 4, 2001

Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge

Served as ordered: