United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Sang Park

Bankruptcy No. 00 B 17572

Adversary Caption: [Hugh Califf v. Sang Park

Adversary No. 00 A 00881

Date of Issuance: January 29, 2002

Judge: John H. Squires

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
SANG PARK,	)	Chapter 7
	)	Bankruptcy No. 00 B 17572
Debtor.	)	Judge John H. Squires
	)	
	)	
HUGH CALIFF,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 00 A 00881
	)	
SANG PARK,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of the Defendant/Debtor, Sang Park (the "Debtor") for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056 on the complaint filed by Hugh Califf (the "Plaintiff") against the Debtor to determine the dischargeability of a debt owed by the Debtor to the Plaintiff pursuant to 11 U.S.C. § 523(a)(2)(A). For the reasons set forth herein, the Court denies the motion.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

II. APPLICABLE STANDARDS FOR SUMMARY JUDGMENT

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he judgment sought shall be rendered forthwith 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 a judgment as a matter of law.

Fed. R. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

The United States Supreme Court decided a trilogy of cases which encourages the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact

is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327,

331 (7th Cir. 1990). The Seventh Circuit has noted that trial courts must remain sensitive to fact issues where they are actually demonstrated to warrant denial of summary judgment. Opp v. Wheaton, 231 F.3d 1060 (7th Cir. 2000); Szymanski v. Rite-way, 231 F.3d 360 (7th Cir. 2000).

Local Rule 402.M of the Bankruptcy Rules adopted for the Northern District of Illinois requires the party moving for summary judgment to file a detailed statement ("402.M statement") of material facts that the movant believes are uncontested. Local Bankr. R. 402.M. The 402.M statement "shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Id.

The Debtor filed a 402.M statement that substantially complied with the

requirements of Rule 402.M. It contained numbered paragraphs setting out uncontested facts with reference to the complaint.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr. R. 402.N(3)(a). Most importantly, "[a]ll material facts set forth in the [402.M] statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party." Local Bankr. R. 402.N(3)(b). The Plaintiff has complied with this Rule.

III. FACTS AND BACKGROUND

Many of the facts in this matter are undisputed. The dispute focuses on the Plaintiff's allegations that the Debtor made false representations, false pretenses and perpetrated fraud in soliciting investments in schools providing martial arts instruction. In November 1997, the Plaintiff began day trading soybean futures through the Chicago Board of Trade. The Plaintiff researched trading soybeans by reading books and listening to tapes in September and October 1997. In order to trade soybean futures, the Plaintiff opened an account with Lind Waldock for $5,000.00 and rented a quotrex

machine to obtain quotes on soybeans. The Plaintiff made up to $1,500.00 or $1,700.00 on one soybean trade, but ultimately lost between $1,500.00 and $2,000.00 trading soybeans in November and December 1997. The Plaintiff understood that there was a risk in investing.

Prior to trading soybeans, the Plaintiff invested in the stock market. He opened an account with Charles Schwab in 1996 to invest in the stock market. The Plaintiff later invested $15,000.00 in the stock market through a self-directed account with Charles Schwab. He also purchased stock in United Airlines, AOL, Microsoft, Intel, Apple, Novell, At Home, AT&T, Dell, Compaq and Rambus. In 1996 and 1997, the Plaintiff was interested in the stock market and gathered information on it either through Money Magazine, Fortune Magazine, or by watching MSNBC on television on a daily basis. He understood that he could lose money on his investments. The Plaintiff sold his shares in AOL, Microsoft, Intel, Apple, Novell and At Home at the same time in October 1997.

The Plaintiff and the Debtor met while the Plaintiff was taking martial arts lessons from the Debtor. He signed up for a three-year program to take martial arts lessons and ultimately obtained his black belt in November 1997. Sang Sporex III, Inc. (the "Oak Forest School" or "Sang Sporex III") was a corporation that owned and operated a martial arts school in Oak Forest, Illinois. In September or October 1997, Jack Ruby ("Ruby"), another martial arts student of the Debtor, approached the Plaintiff about being involved with T-USA, a company the Plaintiff believed to operate martial arts schools, and told him that if he was interested he should let Ruby know. The Plaintiff thought that Ruby would be able to facilitate an introduction to someone at T-USA. The Plaintiff did

not believe that Ruby was soliciting or trying to persuade him to invest with T-USA. The Plaintiff responded by telling Ruby that he "would take a look at it."

Ruby then introduced the Plaintiff to Steve Smith ("Smith"), the manager of a martial arts school on Archer Avenue, who told the Plaintiff that he would pay a certain amount of money for a certain percentage of two new schools that were opening in Palos, Illinois and Oak Forest, Illinois. At the time the Plaintiff had this conversation with Smith, he believed that Joe Petrauskos owned the two schools. After speaking with Smith, the Plaintiff spoke with Bill Thompson ("Thompson") in October 1997. Thompson told him that he could own a certain percentage of a school, depending on how much he invested. The Plaintiff met with Thompson and the Debtor in October 1997, and discussed how much a percentage of a martial arts school would cost, along with information regarding fees for testing merchandise, and structure of the reserve account. The Plaintiff refused to invest in the Oak Forest School unless he received something in writing.

The Plaintiff wrote one check to the Debtor in November 1997, and gave him two more checks in February 1998, one of which the Plaintiff's sister wrote. The first check the Plaintiff gave the Debtor was dated November 18, 1997 in the sum of $15,000.00. The Plaintiff gave the Debtor two checks on February 9, 1998, one from the Plaintiff for $5,000.00 and a second check from his sister in the amount of $2,500.00. The Plaintiff believed that the Debtor would not do anything with the checks because, at the time he gave them to the Debtor, the Plaintiff had not yet decided whether he would invest in the Oak Forest School because he was still awaiting written information regarding the

business. The Plaintiff did not believe that he would lose the opportunity to invest in the Oak Forest School if he did not give the Debtor the first check on November 18, 1997. Moreover, the Debtor never told the Plaintiff that he had to give him money by a date certain in order to invest in the business.

The Plaintiff sold his stock in October 1997, not because the Debtor told him to, but because he was contemplating involvement in the Debtor's business. The Plaintiff transferred funds from his Charles Schwab account to his TCF National Bank account several days before giving the Debtor the first check. The Plaintiff sold his stocks in his Charles Schwab account on October 16, 17 and 20, 1997. The Debtor told the Plaintiff in November 1997, that he could make ten times his investment.

The Debtor told the Plaintiff he could get his money back at any time, and therefore, the Plaintiff believed it was a risk-free investment. After the Plaintiff received information about how the business operated, he did not agree with the operation, as set forth in the Participation Agreement. The Plaintiff received the Participation Agreement in July 1999, and at that point, he decided he did not want to be involved in the ownership of the Oak Forest School. The stock certificates for the Oak Forest School issued in the Plaintiff's name, were issued in error. The Plaintiff never thought he was an employee at the Oak Forest School. When the Plaintiff spoke with the Debtor in October 1997, the Debtor did not make any specific representations regarding a return on an investment. The Debtor became the owner of the Oak Forest School in February 1998.

On June 13, 2000, the Debtor filed a Chapter 7 bankruptcy petition. Thereafter, on September 22, 2000, the Plaintiff filed the instant adversary proceeding against the

Debtor seeking a determination that the debt owed by the Debtor to the Plaintiff is non-dischargeable under 11 U.S.C. § 523(a)(2)(A). On June 18, 2001, the Court entered a Final Pretrial Order setting this matter for trial on November 19, 2001. Subsequently, on November 8, 2001, the Plaintiff sought and obtained a continuance of the trial to February 25, 2002. On December 26, 2001, the Debtor filed this motion for summary judgment. The Court set a briefing schedule and thereafter took the matter under advisement.

IV. DISCUSSION

The party seeking to establish an exception to the discharge of a debt bears the burden

of proof. In re Harasymiw, 895 F.2d 1170, 1172 (7th Cir. 1990); Banner Oil Co. v. Bryson (In re Bryson), 187 B.R. 939, 961 (Bankr. N.D. Ill. 1995). The United States Supreme Court has held that the burden of proof required to establish an exception to discharge is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991). See also In re McFarland, 84 F.3d 943, 946 (7th Cir.), cert. denied, 519 U.S. 931 (1996); In re Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994). To further the policy of providing a debtor a fresh start in bankruptcy, "exceptions to discharge are to be construed strictly against a creditor and liberally in favor of a debtor." In re Scarlata, 979 F.2d 521, 524 (7th Cir. 1992) (quoting In re Zarzynski, 771 F.2d 304, 306 (7th Cir. 1985)). Accord In re Reines, 142 F.3d 970, 972-73 (7th Cir. 1998), cert. denied, 525 U.S. 1068 (1999).

Section 523 of the Bankruptcy Code enumerates specific, limited exceptions to the dischargeability of debts. Section 523(a)(2)(A) provides:

> (a) A discharge under section 727 . . . 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 representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) lists three separate grounds for dischargeability: actual fraud, false pretenses and false representation. Bletnitsky v. Jairath (In re Jairath), 259 B.R. 308, 314 (Bankr. N.D. Ill. 2001). A single test was applied to all three grounds even though the elements for each vary under common law. Id. (citations omitted). The Seventh Circuit, however, made clear that misrepresentation and reliance therein is not always required to establish fraud. McClellan v. Cantrell, 217 F.3d 890, 894 (7th Cir. 2000).

In order to except false pretenses or a false representation from dischargeability, the creditor must show the following elements: (1) the debtor obtained funds through representations that the debtor either knew to be false, or made with such reckless disregard for the truth as to constitute willful misrepresentations; (2) the debtor possessed the requisite scientier, i.e., he actually intended to deceive the creditor; and (3) to his detriment, the creditor justifiably relied on the debtor's misrepresentations. Caez v. Jacob (In re Jacob), Bankr. No. 97 B 27010, Adv. No. 97 A 01664, 1998 WL 150493, at *4 (Bankr. N.D. Ill. Mar. 23, 1998) (citing In re Mayer, 51 F.3d 670, 673 (7th Cir.), cert.

denied, 516 U.S. 1008 (1995)). The creditor must establish each of the these elements to support a finding of a false pretense or misrepresentation; failure to establish any one element is determinative of the outcome. Jairath, 259 B.R. at 314 (citation omitted).

An intentional falsehood relied on under § 523(a)(2)(A) must concern a material fact. Id. (citations omitted). Misrepresentation of the type that makes a debt nondischargeable under § 523(a)(2)(A) can be shown through conduct, and does not require a spoken statement. Id. (citing Haeske v. Arlington (In re Arlington), 192 B.R. 494, 498 (Bankr. N.D. Ill. 1996) (conduct intended to create a false impression constitutes misrepresentation)).

The determination of whether the debtor had the requisite scientier is a factual question which is resolved by a review of all of the relevant circumstances of a particular case. Park Nat'l Bank & Trust of Chicago v. Paul (In re Paul), 266 B.R. 686, 694 (Bankr. N.D. Ill. 2001) (citations omitted). Proof of intent to deceive is measured by a debtor's subjective intention at the time the representation was made. Mercantile Bank v. Canovas, 237 B.R. 423, 428 (Bankr. N.D. Ill. 1998). Where a person knowingly or recklessly makes false representations which the person knows or should know will induce another to act, the finder of fact may logically infer an intent to deceive. Zirkel v. Tomlinson (In re Tomlinson), Bankr. No. 96 B 27172, Adv. No. 96 A 1539, 1999 WL 294879 at *11 (Bankr. N.D. Ill. May 10, 1999) (citing Sheridan, 57 F.3d at 633)).

Reliance on a false pretense or false representation under § 523(a)(2)(A) must be "justifiable." Justifiable reliance is an intermediate level of reliance. It is less than reasonable reliance, but more than reliance in fact. Field v. Mans, 516 U.S. 72, 74-75

(1995). The justifiable reliance standard imposes no duty to investigate unless the falsity of the representation is readily apparent. Id. at 70-72. Whether a party justifiably relies on a misrepresentation is determined by looking at the circumstances of a particular case and the characteristics of a particular plaintiff, and not by an objective standard. Id. at 71. To satisfy the reliance element of § 523(a)(2)(A), the creditor must show that the debtor made a material misrepresentation that was the cause-in-fact of the debt that the creditor wants excepted from discharge. Mayer, 51 F.3d at 676 ("reliance means the conjunction of a material misrepresentation with causation in fact").

The Seventh Circuit has recently held that "actual fraud" is not limited to misrepresentation, but may encompass "'any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another.'" McClellan, 217 F.3d at 893 (quoting 4 L. King, Collier on Bankruptcy, ¶ 523.08(1)(e) at 523-45 (15th ed. rev. 2000)). Hence, a different analysis must be utilized when a creditor alleges actual fraud. Id. The McClellan court opined that because common law fraud does not always take the form of a misrepresentation, a creditor need not allege misrepresentation and reliance thereon to state a cause of action for actual fraud under § 523(a)(2)(A). Id. Rather, the creditor must establish the following: (1) a fraud occurred; (2) the debtor was guilty of intent to defraud; and (3) the fraud created the debt that is the subject of the discharge dispute. Id.

The Court denies the Debtor's motion for summary judgment. Material issues of fact exist which preclude the entry of summary judgment. Those facts include what percentage the Debtor owned in the Oak Forest and Palos Schools in September and

October 1997; whether the Plaintiff intended to invest in the Oak Forest School when he gave the funds to the Debtor or whether that money was to be held until the Plaintiff agreed to invest; whether the $22,500.00 given to the Debtor by the Plaintiff bought him an ownership interest in the Oak Forest School, and what percentage of ownership; and whether the Plaintiff asked for his money back shortly after he received the written agreement he was awaiting.

A material issue of fact exists regarding whether the Debtor obtained the funds from the Plaintiff in November 1997 and February 1998 through representations about the Plaintiff's investment in the Oak Forest School that the Debtor either knew to be false, or made with such reckless disregard for the truth as to constitute willful misrepresentations. A genuine issue exists as to whether the Debtor knew of the financial condition of the Oak Forest School at the times he obtained the funds from the Plaintiff–November 1997 and February 1998. The Debtor testified in his deposition that he purchased the Oak Forest School on February 10, 1998 from Joe Petrauskos because the bank was about to foreclose on the mortgage and the Debtor believed that Petrauskos was "in debt up to his ears."

Moreover, a material issue of fact exists regarding whether the Debtor possessed the requisite scientier, i.e., he actually intended to deceive the Plaintiff. The poor financial condition of the Oak Forest School was not disclosed to the Plaintiff, but was allegedly known by the Debtor when he purchased the school after he received the first funds from the Plaintiff. Thus, the Court finds that a material issues of facts exists regarding whether the Debtor intended to deceive the Plaintiff when he obtained the

funds in November 1997 and February 1998. It is undisputed that the Debtor was not supposed to invest the Plaintiff's money in the Oak Forest School until the Plaintiff had received a written agreement. It is not at all clear what the Debtor did with the funds he received from the Plaintiff.

Furthermore, a genuine issue of material fact exists regarding whether the Plaintiff justifiably relied on the Debtor's alleged misrepresentations to his detriment. A factual question exists regarding whether the Plaintiff justifiably relied upon alleged misrepresentations by the Debtor regarding the financial condition of the Oak Forest School and the Plaintiff's future return on his investment which were the cause-in-fact of the debt.

Finally, a material issue of fact exists regarding whether the Debtor's actions and conduct constituted fraud. The Court cannot determine, based upon the limited record before it, whether the Debtor intentionally perpetrated any deceit, artifice, trick or design involving direct and active operation of the mind, which was used to defraud and cheat the Plaintiff. It is improper to weigh the conflicting evidence submitted at this stage of the matter. The Court is unable to make credibility determinations which are especially critical when fraud is the gravamen of the cause of action. The credibility of the parties' testimony is usually critical in such matters and virtually impossible to determine at this stage. Consequently, the Court must deny the Debtor's motion for summary judgment.

V. CONCLUSION

For the foregoing reasons, the Court denies the Debtor's motion for summary judgment.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
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HUGH CALIFF,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 00 A 00881
	)	
SANG PARK,	)	
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 29th day of January, 2002, the Court denies the motion of the Defendant/Debtor, Sang Park for summary judgment.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List