

**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: May 30, 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 complaint filed by Hugh Califf (the “Creditor”) against Sang Park (the “Debtor”) to determine whether the debt owed by the Debtor to the Creditor is non-dischargeable under 11 U.S.C. § 523(a)(2)(A). For the reasons set forth herein, the Court holds that the Creditor failed to establish that the debt is non-dischargeable. Moreover, the Debtor’s motion for directed findings pursuant to Federal Rule of Bankruptcy Procedure 7052 is granted.

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. FACTS AND BACKGROUND

Many of the facts are undisputed and were recited in the Court's prior Opinion in which a motion for summary judgment was denied. See Califf v. Park (In re Park), Bankr. No. 00 B 17572, Adv. No. 00 A 00881, 2002 WL 130948 at * 2-4 (Bankr. N.D. Ill. Jan. 29, 2000). Those facts are incorporated here by reference and need not be repeated. Briefly, the Creditor liquidated stock that he had purchased for the purpose of his retirement. See Debtor's Exhibit Nos. 13-19 and Creditor's Exhibit Nos. 3-14. Thereafter, he wrote a check to the Debtor on November 18, 1997 in the sum of \$15,000.00 and gave him two more checks on February 9, 1998 in the sums of \$5,000.00 and \$2,500.00. See Creditor's Exhibit No. 1 and Debtor's Exhibit No. 20. Those funds, totaling \$22,500.00, were given by the Creditor to the Debtor for the purpose of future investment in a marital arts school (the "Oak Forest School") in which the Debtor was a partial owner. Those checks were made payable to the Debtor personally. The Creditor never received any return on or refund of this investment.

The Creditor alleges in the complaint that the Debtor made false representations to him with respect to the financial condition of the Oak Forest School. Further, the Creditor contends that the Debtor told him that he could double his investment within two years, or that he would make ten times his initial investment, to induce the Creditor to invest in the Oak Forest School. The Debtor has denied that he made any such misrepresentations or perpetrated any fraud upon the Creditor. The Debtor requests payment of his attorney's fees

and costs in defense of this matter.

The Court held an evidentiary hearing. At the close of the Creditor's case in chief, the Debtor moved for directed findings pursuant to Federal Rule of Bankruptcy Procedure 7052. The Court reserved ruling on that motion until the close of all evidence and thereafter took the matter under advisement.

III. DISCUSSION

In its prior Opinion, the Court set forth the requisite elements to establish a cause of action under 11 U.S.C. §523(a)(2)(A). See Park, 2002 WL 130948 at * 4-6. Those standards are hereby incorporated by reference and will not be repeated.

A. Whether the Debtor Used False Pretenses or Made a False Representation in Obtaining the Funds from the Creditor

First, the Creditor must show that the Debtor obtained the 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. The Creditor testified that he met the Debtor in 1993 as a martial arts student at one of the Debtor's martial arts schools. He further stated that he first spoke to the Debtor in September 1997 about investing in the Oak Forest School. Thereafter, in October 1997, the Debtor telephoned the Creditor and inquired if he was still interested in investing in the Oak Forest School. The Creditor testified that the Debtor told him that he would double his money within two years, make ten times his initial investment and that they would be partners in business. The Creditor stated that he told the Debtor that he

wanted to review the financial records and books of the Oak Forest School before he invested his money and wanted the deal reduced to writing, while the Debtor was to hold the funds pending the Creditor's final decision. According to the Creditor, the Debtor took his first check in November 1997, but agreed that he would not invest the money until the Creditor had reviewed the financial books and records and had the deal in writing.

The Creditor further testified that the Debtor told him that his investment was risk-free and that the money would be returned to him at any time. In February 1998, the Debtor and the Creditor again met. At that meeting, the Creditor testified that he was shown a chart regarding the financial condition of the Oak Forest School and was told that it was in good financial condition. The Creditor stated that had he known that the Oak Forest School was in poor financial condition, he would not have invested his money in the school. He admitted being aware of the Debtor's unhappiness with the prior management of the Oak Forest School. Finally, the Creditor testified that he gave his money to the Debtor in reliance on his representations that the Oak Forest School was in good financial condition and that his investment was risk-free.

The Debtor, on the other hand, testified to the contrary. He stated that he never misrepresented the financial condition of the Oak Forest School. In fact, he stated that he told the Creditor that he was going to purchase the Oak Forest School from its owner, Joe Petrauskos, because of his mismanagement of the school. Moreover, the Debtor denied that he told the Creditor that he would double his investment within two years or that he would make

ten times his initial investment. Further, the Debtor testified that he never told the Creditor that his investment was a risk-free proposition or that he could have his money returned to him at any time. The Debtor thought that he could turn the Oak Forest School around financially. Instead, according to the Debtor, the Creditor insisted on investing in the Oak Forest School, despite its financial problems and condition of which the Creditor was advised by the Debtor.

The Court notes that the evidence regarding what the Debtor specifically represented to the Creditor is at odds and based on oral statements. The Creditor argues that the Debtor misrepresented the financial status of the Oak Forest School. The Debtor, however, claims that he informed the Creditor that the Oak Forest School was in financial straits. Hence, the only evidence presented on this issue was the testimony of the two parties. Neither party offered any corroborating evidence to support their version of the events. It is the lack of any corroborating evidence in support of the Creditor's version of the claimed misrepresentations by the Debtor that is fatal to the § 523(a)(2)(A) claim. In another dischargeability context, the Seventh Circuit Court of Appeals has noted that evidence in these matters involves "a mixed bag with factors pointing in both directions." See In re Reines, 142 F.3d 970, 973 (7th Cir. 1998), cert. denied, 525 U.S. 1068 (1999). Thus, if the objecting creditor's evidence, at most, brings its position into a "dead heat" with the debtor's evidence, the creditor "loses, because the burden of proof rests with [the creditor]." See id.

The Court is in the best position to assess the credibility of the witnesses and weigh the evidence. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575 (1985) (deference given to trial court's findings that involve credibility of witnesses because only the

trial judge can be aware of the variations in demeanor and tone of voice that bears so heavily on the listener's understanding of and belief in what is stated); Torres v. Wisconsin Dept. of Health & Social Servs., 838 F.2d 944, 946 (7th Cir. 1988) (same). In light of the fact that the Court must strictly construe exceptions to discharge against the Creditor and liberally in favor of the Debtor, see In re Scarlata, 979 F.2d 521, 524 (7th Cir. 1992) (quotation omitted), the Court finds that the Creditor failed to demonstrate by a preponderance of the credible evidence that the Debtor obtained the funds from him through representations that he either knew to be false, or made with such reckless disregard for the truth as to constitute willful misrepresentations.

B. Whether the Debtor's Actions Constituted Actual Fraud

Additionally, the Court finds that the Creditor failed to establish by a preponderance of the evidence that the Debtor's actions and conduct constituted actual fraud. For the same reasons set forth above, the evidence failed to demonstrate that 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 Creditor.

C. Whether the Debtor Intended to Defraud the Creditor

Next, the Creditor must show that the Debtor actually intended to deceive him. The record is wholly devoid of any evidence corroborating the Creditor's statement that the Debtor intended to deceive the Creditor. Rather, the Debtor testified that he did not intend to defraud the Creditor when he encouraged him to invest in the Oak Forest School. The Creditor offered

no evidence to demonstrate the requisite fraudulent scienter of the Debtor. Furthermore, the Court will not infer any intent to deceive on the part of the Debtor without some evidence of the same. Accordingly, the Creditor has failed to prove this element by a preponderance of the evidence.

D. Whether the Creditor Justifiably Relied on the Debtor's Representations

Lastly, the Creditor must show that to his detriment he justifiably relied on the Debtor's representations. It is clear from the Creditor's testimony that he actually relied on the Debtor's representations because he gave him the funds. The question is whether this reliance was justifiable. Many of the facts stipulated to by the parties and recited in the Court's prior Opinion, speak to the Creditor's prior investment experience. The Debtor contends that the Creditor was an experienced investor. The Creditor, on the other hand, testified that he traded soy beans for a short period of time and read books to prepare himself for investing in the stock market. The Court finds that the Creditor was not a sophisticated investor, but was an experienced one. Nevertheless, the Court finds it was justifiable for the Creditor to rely on the representations that the Debtor made to induce him to part with the funds in the hope that the Oak Forest School would become profitable. As a previous investor in the commodities and stock markets, the Creditor should have known that this was not a risk-free investment. Nevertheless, it was justifiable for the Creditor to rely on the Debtor's alleged representations about the financial status of the Oak Forest School.

E. The Debtor's Request for Attorney's Fees and Costs

The Debtor seeks costs and attorney's fees from the Creditor in defense of this

adversary proceeding. 11 U.S.C. § 523(d) provides for the award of attorney's fees and costs only if "a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged. . . ." 11 U.S.C. § 523(d). The Creditor sought a determination of dischargeability under § 523(a)(2)(A) and the debt will be discharged. The debt sought to be determined dischargeable here, however, is not a "consumer debt." Section 101(8) of the Bankruptcy Code defines "consumer debt" as "debt incurred by an individual primarily for a personal, family, or household purpose." See 11 U.S.C. § 101(8). The debt at bar was not incurred primarily for a personal, family or household purpose of the Debtor. Rather, it was incurred as the result of the parties' desires to take over, operate and profit from the Oak Forest School with the financial assistance and expertise of the Debtor and the Creditor's capital. See, e.g., In re Burns, 894 F.2d 361, 363 (10th Cir. 1990) (attorney's fees not awarded in non-dischargeability action when underlying debt was incurred with a profit motive).

Thus, because the remedy created by the Bankruptcy Code for determination of the dischargeability of a debt does not give the Debtor a statutory right to attorney's fees, except for consumer debt (which is not the case here), and there is no contract between the parties that provides for the same, the Court declines to tax the Creditor with the Debtor's attorney's fees. The Court will adhere to the "American Rule," which provides that in cases that are based upon or involve federal law, attorney's fees are not allowable absent a statutory basis or enforceable contract between the parties. Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 247, 257 (1975). The general rule applies to litigation in the bankruptcy courts.

See In re Reid, 854 F.2d 156, 161-62 (7th Cir.1988) (claim for attorney's fees based on wrongful appointment of interim trustee in involuntary case). This result is consistent with other courts' views on this issue. See generally Vandenberg v. Minesal (In re Minesal), 81 B.R. 477, 482 (Bankr. E.D. Wis. 1988); Palmisano v. Leslie (In re Leslie), 44 B.R. 208, 209 (Bankr. D. Vt. 1984). Accordingly, the Court declines to award the Debtor his attorney's fees for defense of this adversary proceeding. Taxable costs allowable under 28 U.S.C. § 1920 are awarded to the Debtor. He shall file his bill therefor within ten days hereafter.

IV. CONCLUSION

For the foregoing reasons, the Court finds the Creditor failed to prove that the debt owed to him by the Debtor should be non-dischargeable under § 523(a)(2)(A). Thus, the Debtor's motion for directed findings is granted.

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:)	
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.)	

ORDER

For the reasons set forth in a Memorandum Opinion dated the 30th day of May, 2002, the Court finds the debt owed by Sang Park to Hugh Califf dischargeable under 11 U.S.C. § 523(a)(2)(A). Moreover, Sang Park’s motion for directed findings pursuant to Federal Rule of Bankruptcy Procedure 7052 is granted.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge