United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Gonzalo Garcia

Bankruptcy No. 03 B 50412

Adversary Caption: Keybank, USA, NA., v. Gonzalo Garcia

Adversary No. 04 A 00821

Date of Issuance: December 13, 2004

Judge: John H. Squires

Appearance of Counsel:

Attorney for Creditor/Plaintiff: David L. Hazan

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Trustee: Brenda Porter Helms

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	Bankruptcy No. 03 B 50412
GONZALO GARCIA,	)	Chapter 7
	)	Judge John H. Squires
Debtor.	)	
	)	
	)	
KEYBANK USA, N.A.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. No. 04 A 00821
	)	
GONZALO GARCIA,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of KeyBank USA, N.A. ("KeyBank") for summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056 and Federal Rule of Civil Procedure 56 on its complaint against Gonzalo Garcia (the "Debtor") which seeks to except a debt owed by the Debtor to KeyBank from discharge pursuant to 11 U.S.C. § 523(a)(2)(A). For the reasons set forth herein, the Court denies the motion. A trial has been set in this matter for January 14, 2005 at 1:00 p.m., and the Final Pretrial Order previously entered on September 24, 2004 remains in effect.

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)(A), (I) and (O).

II. APPLICABLE STANDARDS

A. 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:

> The 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 Estate of Allen v. City of Rockford*, 349 F.3d 1015, 1019 (7th Cir. 2003).

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/Chi. Div.*, 832 F.2d 374, 378 (7th Cir. 1987) (*quoting Wainwright Bank & Trust Co. v. Railroadmen's Fed. Savs. & 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. Int'l Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998). On a motion for summary judgment, "the court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003) (internal quotation omitted).

In 1986, 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); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (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; *Celotex*, 477 U.S. at 322; *Matsushita*, 475 U.S. at 585-86.

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). "[S]ummary 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 Van Lines, Inc.*, 231 F.3d 1060, 1065-66 (7th Cir. 2000); *Szymanski v. Rite-Way Lawn Maint. Co., Inc.*, 231 F.3d 360, 364 (7th Cir. 2000).

The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the motion is supported by a prima facie showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion may not rest upon the mere allegations or denials in its pleadings; rather, its response must show that there is a genuine issue for trial. *Anderson*, 477 U.S. at 248; *Celotex*, 477 U.S. at 323; *Matsushita*, 475 U.S. at 587; *Patrick v. Jasper County*, 901 F.2d 561, 565 (7th Cir. 1990). The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If the burden of persuasion at trial would be on the non-moving party, the party moving for summary judgment may satisfy Rule 56's burden of production either by submitting affirmative evidence that negates an essential element of the non-moving party's claim or by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. *See Union Nat'l Bank of Marseilles v. Leigh (In re Leigh)*, 165 B.R. 203, 213 (Bankr. N.D. Ill. 1993).

Where resolution of a dispositive issue requires the Court to determine a party's state of mind, summary judgment is generally inappropriate because much depends on the credibility of the witness and the trier of fact's observance of the demeanor of the witness during direct and cross examination. *Am. Isuzu Motors, Inc. v. George's Comet Motorcars, Ltd. (In re George's Comet Motorcars, Ltd.)*, 100 B.R. 403, 405 (Bankr. N.D. Ill. 1989). Where the defendant's motive or state of mind is an essential element of a plaintiff's case, courts must be circumspect

in granting summary judgment based solely on the defendant's categorical denial that the requisite mental state existed. *Corrugated Paper Prods., Inc. v. Longview Fibre Co.*, 868 F.2d 908, 914 (7th Cir. 1989). "Summary judgment is appropriate, however, even when issues of scienter are involved, if in response to a properly supported motion for summary judgment, the non-movant offers no specific facts to show that there is a genuine issue for trial or simply relies on mere allegations or denials." *George's Comet Motorcars*, 100 B.R. at 405; *see also Corrugated Paper*, 868 F.2d at 914. "Although the movant's testimony about the existence of a particular mental state may not be dispositive, the movant is entitled to summary judgment if the burden is on the nonmovant to establish the state of mind and the nonmovant has failed to come forward with even circumstantial evidence from which a jury could reasonably infer the relevant state of mind." *Corrugated Paper*, 868 F.2d at 914; *see also Morgan v. Harris Trust & Sav. Bank*, 867 F.2d 1023, 1026 (7th Cir. 1989); *Schwartz v. Sys. Software Assocs., Inc.*, 813 F. Supp. 1364, 1367 (N.D. Ill. 1993).

Local Bankruptcy Rule 7056-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Illinois, which deals with summary judgment motions, was modeled after LR56.1 of the Local Rules of the United States District Court for the Northern District of Illinois. Hence, the case law construing LR56.1 and its predecessor Local Rule 12 applies to Local Bankruptcy Rule 7056-1.

Pursuant to Local Bankruptcy Rule 7056-1, a motion for summary judgment imposes special procedural burdens on the parties. Specifically, the Rule requires the moving party to supplement its motion and supporting memorandum with a statement of undisputed material facts (the "7056-1 statement"). The 7056-1 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." Local Bankr.R. 7056-1B. KeyBank filed a 7056-1 statement that complies with the Rule. It includes numbered paragraphs establishing undisputed facts with specific references to accompanying exhibits.

The party opposing a summary judgment motion is required by Local Rule 7056-2 to respond (the "7056-2 statement") to the movant's 7056-1 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. 7056-2. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and to make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr.R. 7056-2A(2)(a). Most importantly, "[a]ll material facts set forth in the [7056-1] statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party." Local Bankr.R. 7056-2B.

The Debtor filed a 7056-2 statement that substantially complies with the rule. He has responded to each numbered paragraph in KeyBank's 7056-1 statement and made specific references to parts of the record and other supporting materials relied upon, including an affidavit from the Debtor. In addition, the Debtor has set forth additional undisputed material facts that require the denial of summary judgment pursuant to Rule 7056-2A(2)(b).

B. 11 U.S.C. § 523(a)(2)(A)

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 with 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 Morris*, 223 F.3d 548, 552 (7th Cir. 2000); *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 a false representation. *Id.*; *Bletnitsky v. Jairath (In re Jairath)*, 259 B.R. 308, 314 (Bankr. N.D. Ill. 2001). A single test is applied to all three grounds even though the elements for each vary under common law. *Jairath*, 259 B.R. at 314.

In order to demonstrate a claim based on false pretenses or a false representation, a creditor must show that (1) the debtor made a false representation of fact; (2) the debtor (a) either knew the representation was false or made it with reckless disregard for its truth and (b) made the representation with an intent to deceive; and (3) the creditor justifiably relied on the false representation. *Baker Dev. Corp. v. Mulder (In re Mulder)*, 307 B.R. 637, 643 (Bankr. N.D. Ill. 2004); *Bednarsz v. Brzakala (In re Brzakala)*, 305 B.R. 705, 710 (Bankr. N.D. Ill. 2004). The determination of whether the debtor had the requisite intent is a factual question that must be resolved by a review of all of the relevant circumstances of a particular case. *Park Nat'l Bank & Trust of Chi. v. Paul (In re Paul)*, 266 B.R. 686, 694 (Bankr. N.D. Ill. 2001). 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 made false representations that the person knew or should have known would induce another to act, the court may logically infer an intent to deceive. *Glucona Am., Inc. v. Ardisson (In re Ardisson)*, 272 B.R. 346, 357 (Bankr. N.D. Ill. 2001).

Reliance on a false pretense or false representation under § 523(a)(2)(A) must be "justifiable." *Field v. Mans*, 516 U.S. 59, 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, not by an objective standard. *Id.* at 71; *Bombardier Capital, Inc. v. Dobek (In re Dobek)*, 278 B.R. 496, 508 (Bankr. N.D. Ill. 2002). 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 v. Spanel Int'l Ltd.*, 51 F.3d 670, 676 (7th Cir.), *cert. denied*, 516 U.S. 1008 (1995) ("Reliance means the conjunction of a material misrepresentation with causation in fact.").

The Seventh Circuit Court of Appeals has made it clear, however, that misrepresentation and reliance thereon are not always required to establish fraud. *McClellan v. Cantrell*, 217 F.3d 890, 894 (7th Cir. 2000). Indeed, the Seventh Circuit recently defined the term "fraud":

> 'Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth. No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.'

Id. at 893 (*quoting Stapleton v. Holt*, 250 P.2d 451, 453-54 (Okla. 1952)). "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.'" *Id.* (*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 intended to defraud the creditor; and (3) the fraud created the debt that is the subject of the discharge dispute. *Id.* The fraud exception under § 523(a)(2)(A) does not reach constructive frauds, only actual ones. *Id.* at 894.

III. FACTS AND BACKGROUND

Based upon KeyBank's 7056-1 statement and the 7056-2 statement of the Debtor, the Court finds that the following facts are undisputed. In July 2000, the Debtor was approached by his long-time friend, Christopher Bibbs ("Bibbs"), who requested that the company Bibbs worked for, Common Cents Financial, use the Debtor's credit rating and that the Debtor purchase real property in the Debtor's name. 7056-2 statement at ¶¶ 13, 14; 7056-1 statement at ¶ 10; Debtor Dep. at pp. 22-24. Bibbs told the Debtor that Common Cents Financial would rehabilitate the property bought and sell it within three months. 7056-1 statement at ¶ 10; Debtor Dep. at pp. 25, 26. Bibbs told the Debtor that Bibbs and Common Cents Financial would make all of the mortgage payments and that the Debtor did not have to make any of the payments. 7056-2 statement at ¶¶ 15, 17; Debtor Dep. at pp. 20-22; Debtor Aff. at ¶ 6.

On August 18, 2000, the Debtor, as borrowerer, executed and delivered to Landmark Financial, as lender, a written promissory note (the "Note") in the original principal amount of $106,200.00. 7056-1 statement at ¶ 2; KeyBank Ex. No. 2; Debtor Dep. at pp. 7, 8. The Note was secured by a mortgage (the "Mortgage") against real property known as 5230 South Ashland Avenue, Chicago, Illinois (the "Property"). 7056-1 statement at ¶ 3; KeyBank Ex. No. 3; Debtor Dep. at pp. 8, 9. The Property was subsequently demolished by the City of Chicago. 7056-1 statement at ¶ 3. The funds for the loan were provided to Landmark Financial by KeyBank, and Keybank is the current owner and holder of the Note and Mortgage pursuant to an assignment of the Mortgage. 7056-1 statement at ¶ 4; KeyBank Ex. No. 4. The Debtor signed a Uniform Residential Loan Application (the "Loan Application"), which was prepared and completed when he signed it without reviewing it or any documents prior to or at the

closing. 7056-1 statement at ¶ 5; KeyBank Ex. No. 5; Debtor Dep. at pp. 9, 10; Debtor Aff. at ¶ 3. The Loan Application stated that the Debtor owned the Property for eight years, but, in fact, the Debtor never owned any real property. 7056-1 statement at ¶ 6; Debtor Dep. at p. 6. Additionally, the Debtor signed an Occupancy Affidavit and Financial Status, which stated that the Debtor occupied the Property. 7056-1 statement at ¶ 7; KeyBank Ex. No. 6; Debtor Dep. at p. 17. The Debtor also signed a Hazard Insurance Requirements form. 7056-1 statement at ¶ 8; KeyBank Ex. No. 7; Debtor Dep. at p. 18.

The Debtor admits that at the time he signed the Note, he never intended to personally make the payments. 7056-1 statement at ¶ 9; Debtor Dep. at pp. 20-22. Rather, the Debtor avers in his affidavit that pursuant to his agreement with Bibbs, Odell Shannon, a colleague of Bibbs, and Common Cents Financial, he believed that Bibbs, Shannon and Common Cents Financial would make the payments under the Note. Debtor Aff. at ¶¶ 6, 12. The Debtor received a $4,000.00 fee for the use of his name and credit rating. 7056-1 statement at ¶ 11; Debtor Dep. at p. 26. The Debtor avers that he never intended to defraud KeyBank; rather, he was duped and defrauded by Bibbs, Shannon and Common Cents Financial. Debtor Aff. at ¶¶ 15, 16.

The Note went into default because the Debtor failed to make any payments thereunder. On August 25, 2003, a judgment was entered in favor of KeyBank and against the Debtor in the aggregate amount of $142,774.66 in the Eighteenth Judicial Circuit, DuPage County, Illinois (the "State Court Judgment"). 7056-1 statement at ¶ 12; KeyBank Ex. No. 8. The State Court Judgment contains no findings of fact regarding any fraud by the Debtor. On December 16, 2003, the Debtor filed a voluntary Chapter 7 bankruptcy petition. Thereafter, on March 3, 2004,

KeyBank filed the instant adversary proceeding seeking a determination that the State Court Judgment be found non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

IV. DISCUSSION

KeyBank alleges that the State Court Judgment should be found non-dischargeable under § 523(a)(2)(A). KeyBank contends that because the Debtor never intended to make any payments on the loan, he was simply a "front man" or "straw man" in the transaction and a participant in the fraudulent scheme orchestrated by Bibbs. The Debtor, on the other hand, states that he was duped by Bibbs, Shannon and Common Cents Financial and, like KeyBank, was a victim of their fraudulent scheme. Thus, the Court must ultimately decide whether the Debtor was a part of the con.

The Court notes that KeyBank failed to specifically identify whether the Debtor's conduct constitutes false pretenses, a false representation or actual fraud. As the Court noted above, the elements required to prove false pretenses and a false representation are different from those needed to establish actual fraud. However, regardless of which prong KeyBank seeks to pursue under § 523(a)(2)(A), the Debtor's fraudulent intent is an element that must be established by a preponderance of the evidence.

The Court finds that there are material issues of disputed fact as to several of the elements required under § 523(a)(2)(A), precluding the entry of summary judgment. Specifically, there is a factual dispute regarding whether the Debtor intended to defraud KeyBank. The Debtor avers in his affidavit that he never intended the payments on the loan to KeyBank to not be made. Debtor Aff. at ¶¶ 2, 12. Rather, he thought that Bibbs and Common

Cents Financial would make the payments. *Id.* at ¶¶ 6, 12. The Debtor further states that he did not intend to defraud KeyBank. *Id.* at ¶ 15. Rather, he avers that he was "duped and defrauded" by Bibbs and Common Cents Financial. *Id.* at ¶ 16. Based upon the Debtor's affidavit, the Court finds that a genuine issue of material fact exists regarding the Debtor's intent. In addition, the Court finds that a material issue of fact exists regarding whether KeyBank justifiably relied on the Debtor's representations. KeyBank failed to proffer any evidence to show that its reliance on the documents executed by the Debtor was justifiable. Indeed, the record is wholly devoid of any evidence with respect to this element under § 523(a)(2)(A). Accordingly, summary judgment must be denied.

The Court further notes that KeyBank's reliance on the *Mayer* case at this stage in the proceedings to support its motion for summary judgment is misplaced. While the facts in the *Mayer* case may be similar to the facts in the matter at bar, the decision to find the debt non-dischargeable under § 523(a)(2)(A) in *Mayer* was made after a trial on the merits, not on a summary judgment motion. Credibility determinations are difficult if not impossible to make at this stage on the limited record before the Court.

V. CONCLUSION

For the foregoing reasons, the Court denies the motion for summary judgment. A trial has been set in this matter for January 14, 2005 at 1:00 p.m., and the parties shall comply with the Final Pretrial Order previously entered.

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