United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions

Will this opinion be published? Yes

Bankruptcy Caption: In re Carolyn Cross

Bankruptcy No. 98 B 41966

Adversary Caption: Comcor Mortgage Corp. v. Carolyn Cross

Adversary No. 99 A 00522

Date of Issuance: January 7, 2000

Judge: Jack B. Schmetterer

Appearance of Counsel:

Attorney for Movant or Plaintiff: Gerald J. Sullivan, Sullivan & Sullivan

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
CAROLYN CROSS,	)	
	)	**Case No. 98 B 41966**
DEBTOR.	)	
_____	)	
	)	
COMCOR MORTGAGE CORP.,	)	
	)	
Plaintiff.	)	
	)	
v.	)	**Adv. No. 99 A 522**
	)	
CAROLYN CROSS,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This Adversary Complaint ("Complaint") relates to the bankruptcy case filed by Carolyn Cross ("Cross") under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 101 et seq. Comcor Mortgage Corp., ("Comcor") filed its two count Complaint against Cross seeking to bar the dischargeability of its debt. Comcor originally alleged in Count I that the debt owed by Cross to it should be declared nondischargeable because it was incurred through false non-financial misrepresentations under 11 U.S.C. § 523(a)(2)(A), but that Count was dismissed on Plaintiff's Motion May 17, 1999. In the remaining Count II,

Comcor alleges that its debt should be declared nondischargeable because it was incurred through written material financial misrepresentations under § 523(a)(2)(B).

Comcor has moved for summary judgment on Count II. For reasons stated herein, that Motion is allowed and summary judgment will enter by separate order.

Undisputed Facts

Local Bankruptcy Rule 402.M of this Judicial District requires that the party moving for summary judgment file, inter alia, a detailed statement ("402.M statement") of material facts as to which the movant contends there is no genuine issue. 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.

Comcor filed a 402.M statement that complies substantially with the requirements of this Rule. It contains numbered paragraphs setting out assertedly uncontested facts. Each paragraph in the 402.M statement also refers to exhibits furnished in support of the Motion.

The party opposing the motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement and set forth any material facts which would require denial of summary judgment. Local Bankr.R. 402.N. Cross has not

complied with Local Bankr.R. 402.N. She did not file a Rule 402.N statement. In fact, she has not filed any response to Comcor's motion for summary judgment. Ordinarily, under Rule 402.N(3)(b), the Debtor's failure to file the 402.N statement warrants the admission of all statements in the 402.M statement. Id.; see also Schulz v. Serfilco, Ltd., 965 F.2d 516, 519 (7th Cir.1992). Nonetheless, any motion for summary judgment must be considered on the merits presented, even if uncontested.

The facts of this case are drawn from the Complaint, Cross' Answer, and materials submitted in support of the Motion for Summary Judgment, including Cross' deposition.

Cross purchased residential property located at 6015 S. Elizabeth St., Chicago, IL 60636 on July 29, 1998 from "Charter Residence, Incorporated," through its agent and President Mr. Richard Osty ("Osty"). Both Cross and Osty attended the escrow closing of this transaction with Investors Title Guarantee, Inc., as escrowee, at 222 N. LaSalle St., Chicago, IL 60601. Cross obtained a mortgage loan in the amount of $53,200.00 from Comcor to complete the purchase of the above-referenced real property as evidenced by an Adjustable Rate Note. The Note was secured by a Mortgage recorded in Cook County, Illinois under Recorders Number 98677513. Cross signed a Loan Application in connection with this transaction.

Cross failed to pay her first installment and all subsequent installments on the Note. Subsequent to closing of the above-referenced transaction and subsequent to the first payment default on the Note, it was learned by Comcor that Cross had purchased

other properties with recorded mortgages prior to closing of the purchase financed by Comcor:

(A) 5937 S. Hermitage Ave., Chicago, IL
Mortgage recorded on 2/23/98 under Recorders Number 98143148

(B) 12018 S. Calumet Ave., Chicago, IL
Mortgage Recorded on 3/23/98 under Recorders Number 98224157

(C) 5519 S. Paulina St., Chicago, IL
Mortgage recorded on 5/11/98 under Recorders Number 98382962

(D) 10539 S. LaSalle St., Chicago, IL
Mortgage Recorded on 5/29/98 under Recorders Number 98446622

(E) 958 W. Marquette Rd., Chicago, IL
Mortgage Recorded on 6/23/98 under Recorders Number 98532670

(F) 11305 S. Carpenter St., Chicago, IL
Mortgage Recorded on 7/29/98 under Recorders Number 98660940

The Loan Application submitted by Cross to Comcor did not list or disclose any of the foregoing debts even though all of those six purchases occurred within a period of less than six months prior to the Comcor loan and were from the same seller, Charter.

Cross' Answer in response to paragraph 10 of the Complaint disputed that she did not disclose the foregoing information, alleging that a handwritten loan application completed by her in connection with purchase by her of the Elizabeth St. home made full disclosures of all of her outstanding properties and loans. She further asserted that at the loan closing when presented with the typed loan application she was advised by Osty that it had the same information as the aforesaid handwritten document prepared by her. She

alleges being unaware of changes and omitted information on the typed loan application signed by her.

Cross purchased all of the previously mentioned six properties not disclosed on the typed loan application from Charter Residence, Incorporated, and all of those sales were arranged by Osty. Cross' business relationship with Richard Osty was rather unusual and the details set forth in her deposition are sketchy. Their relationship began after Cross heard an advertisement on the radio station one Sunday morning. The advertisement stated that there was a way to improve the Englewood community in which Cross lived and earn extra money at the same time. Cross called the phone number mentioned and spoke to a person named John. Cross never learned John's last name.

John informed Cross that to get involved in the program she needed to bring in information on personal matters such as her employment. The two met at a McDonalds and Cross signed various documents. Cross did not receive any copies of the papers.

John claimed to represent "Honeywood Development." John told Debtor that she could earn money and help her community because there were many people who wanted to invest in the community in the Woodlawn or Roseland area. John informed Cross that "Honeywood Development" would use Cross' credit, because her credit rating was good. Cross' role was to be a passive one; her understanding was that she would be like an investor rather than owner. Due to her good credit, she was to purchase property in her name. Cross was to receive a sum of money at each closing, in the amount of $2,000.

John and eventually Richard Osty were to take care of everything. Cross did not read any of the many documents that she signed. John and Osty assured her that everything would get paid, and John and Osty would sell each property after they had rehabbed it. Each lender bank would then receive payment of its mortgage and Cross' credit would not be damaged. Indeed, John and Osty informed Cross that her credit would actually improve after John and Osty sold several properties in her name and she would then be able to buy a home of her own. Cross alleges that she never put up any money for any of the transactions nor did she ever see any of the properties purchased. Cross never had a written agreement with Osty or with John. Cross never obtained or spoke with an attorney. Cross' sister Margaret also dealt with Osty and purchased property.

Cross' first contact with Richard Osty occurred when John informed her that they wanted to switch over from "Honeydew Development" to "Charter Residence." Exactly what the term "switching over" means is not clear. John told Cross that Charter Residence was comprised of the same people as Honeydew Development, but the company was simply changing its name.

JURISDICTION

This matter is before the Court pursuant to 28 U.S.C. S 157 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. Subject matter jurisdiction lies under 28 U.S.C. S 1334(b). Venue lies properly under 28

U.S.C. § 1409. This matter constitutes a core proceeding under 28 U.S.C. S 157(b)(2)(I).

Standards for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to Adversary proceedings by Rule 7056 F.R.Bankr.P. provides that:

> 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 generally Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510- 11, 91 L.Ed.2d 202 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986).

The moving party bears the initial burden of demonstrating that no genuine issues of material fact exist and that judgment should be granted in its favor as a matter of law. Celotex, 477 U.S. at 322-23, 106 S.Ct. at 2552-53. The movant must inform the court of the basis for its motion and identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Id.

When faced with a motion for summary judgment, the party that has the burden of proof on a particular issue may not rest on its pleading, but rather must affirmatively demonstrate, by making specific allegations, that there is a genuine issue of material fact which requires a trial. Beard v. Whitley County REMC, 840 F.2d 405, 409-410 (7th Cir. 1988)(citing Anderson, 477 U.S. at 249, 106 S.Ct. at 2510). Demonstrating that there is some metaphysical doubt as to the material facts is not sufficient. Patrick v. Jasper County, 901 F.2d 561 (7th Cir. 1990)(citing Matsushita, 475 U.S. at 586, 106 S.Ct. at 1356). When the record, reviewed as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Id. 'The court should neither "look the other way" to ignore genuine issues of material fact, nor "strain to find" material fact issues where there are none...." Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987).

Summary judgment is not a disfavored procedural shortcut, but rather is "an integral part of the federal rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action."' Nat'l Ben Franklin Insurance Co. v. Calumet Testing Svcs. Inc., 191 F.3d 456 (7th Cir. 1999)(citing Celotex, 477 U.S. at 328, 106 S.Ct. at 2553). "Summary judgment is properly granted to spare the parties and the court the time, the bother, the expense, the tedium, the pain, and the uncertainties of trial". Spellman v. Commissioner of Internal Revenue, 846 F.2d 148,152 (7th Cir. 1988).

Inferences drawn from the underlying facts will be viewed in a light most favorable to the non-moving party. Anderson, 477 U.S. at 255, 106 S.Ct. at 2513-14; Matsushita, 475 U.S. at 586, 106 S.Ct. at 1355-56. However, the existence of a material factual dispute is sufficient to prevent summary judgment only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 24, 106 S.Ct. at 2381.

DISCUSSION

Section 523(a)(2)(B) of the Bankruptcy Code, Title 11 U.S.C., provides in relevant part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . .
> (2) for money, property, services, or an extension, renewal, or refinancing or credit, to the extent obtained by . . .
> (B) use of a statement in writing . . .
> (i) that is materially false;
> (ii) respecting the debtor's ... financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive.

11 U.S.C. § 523(a)(2)(B).

To prevail on a complaint under § 523(a)(2)(B), a creditor must prove: (1) that the debtor made a statement in writing; (2) that the statement was materially false; (3) that the statement concerned the debtor's financial condition; (4) that in making this misrepresentation, the debtor had an intent to deceive the creditor; and (5) that the

creditor actually and reasonably relied upon the misrepresentation. In re Bogstad, 779 F.2d 370, 372 (7th Cir.1985). The burden is on the creditor, to establish these elements by a preponderance of the evidence. Grogan v. Garner, 111 S.Ct. 654 (1991).

STATEMENT IN WRITING CONCERNING CROSS' FINANCIAL CONDITION

Cross admitted in her deposition that she signed a Uniform Residential Loan Application and Certification. That Application and Certification required her to disclose all liabilities, and further required her to declare whether she had an ownership interest in any property in the prior three years. The six undisclosed mortgage loans were obtained by Cross within the six months prior to the closing on the Elizabeth St. property, but they were not disclosed on the typed Loan Application that she signed. That Loan Application clearly indicated that Cross did not have an ownership interest in any property over the prior three years.

The Application and Certification were clearly statements in writing regarding Cross' financial condition.

MATERIAL FALSITY

The Application and Certification signed and submitted by Cross was clearly false in omitting the six properties and mortgages earlier obtained by her. In order to determine whether the falsity was "material", two tests may be used. Under the first,

known as the "substantial untruth" test, a statement is materially false if it "paints a substantially untruthful picture . . . by misrepresenting information of the type which would normally affect the decision to grant credit." Banner Oil Co., v. Bryson (In re Bryson), 187 B.R. 939, 962 (Bankr. N.D. Ill. 1995). An alternative test to determine "materiality" is the "but for" test. A Seventh Circuit panel has noted that the "but for" test is a "recurring guidepost" for determining material falsity, Selfreliance Fed. Credit Union v. Harasymiw (In re Harasymiw), 895 F.2d 1170, 1172 (7th Cir. 1990), but has not decided whether satisfaction of the "but for" test is essential under § 523(a)(2)(B). Harasymiw, 895 F.2d at 1172. Bankruptcy judges in this district have applied both tests. See Phillips v. Napier (In re Napier), 205 B.R. 900, 906 (Bankr. N.D. Ill. 1997).

Comcor submitted the sworn affidavit of Nancy Greenway, underwriter of the Cross mortgage loan for the Elizabeth St. property. Greenway stated that financial condition of the borrower was a material consideration in the underwriting process, to the extent that if she had known of the prior six mortgage loan debts of Cross she would not have approved her mortgage loan without full disclosure of the loans and further stringent requirements to be imposed on Cross.

Based on that affidavit, it must be found there is no genuine dispute as to the material falsity of the loan application.

RELIANCE ON THE STATEMENT

For a debt to be nondischargeable under § 523(a)(2)(B) Comcor must also show that it actually and reasonably relied on Cross' material false statements in her Uniform Residential Loan Application and Certification. Actual reliance on a representation may be shown by evidence that the creditor would not have extended the credit had it known the truth. Bryson, 187 B.R. at 962. Reasonable reliance is an element to be determined on a case by case bases. In re Bonnet, 895 F.2d 1155, 1157 (7th Cir. 1989).

The affidavit of Nancy Greenway stated that it was and is the practice of mortgage loan writers to rely upon representations of borrowers on their loan applications along with other credit information. Greenway stated that all underwriting guidelines of her employer were followed in processing the Cross Application, and that pursuant to those guidelines she relied upon representations of Cross when she approved the mortgage loan.

It has thus been established that Greenway relied on the inadequate and false representations of Cross and that such reliance was reasonable.

INTENT TO DECEIVE

Comcor provides the following selected portion of Cross' deposition testimony to support a determination that Cross possessed the requisite intent to deceive when she completed the loan application:

> Question: Now. Let's go back to that form [The loan application form executed on July 29, 1998] And that's I believe, [Exhibit] 3. Is that what you have? That's the smaller print that was

reduced. And on the top of the third page of this - second page, under liabilities, can you see that?

Answer: Yes,

Question: It asks you to list all of your liabilities and financial obligations, right?

Answer: Yes

Question: None of these prior properties are listed on this form, are they?

Answer: No. It's not on here.

Question: Then the information on this form omits the six properties that you listed on the Complaint, correct?

Answer: Correct.

Question: Okay. It does list that you have Union Acceptance, which is probably a credit union loan. First Bank U.S.A., which could be a credit card. It lists seller's holdback, which is that obligation that we've called No. 7 and then a new mortgage for the property on Elizabeth. Right?

Answer: Yes.

Question: Nothing else is on here about any prior mortgage obligations?

Answer: I don't understand why that's not on there.

Question: Then the information that is on here is not complete, is it?

Answer: No, it's not.

Question: As a matter of fact, it omits six prior notes and mortgages, right?

Answer: Yes.

A reckless disregard for the accuracy of a representation is enough to establish a knowing intent to deceive. Harasymiw, 895 F.2d at 1171. In Harasymiw, the debtor failed to disclose a $128,000.00 mortgage on real property offered as collateral for a loan on a written financial statement. In the instant case, the six prior mortgage loan obligations of Cross for properties all purchased from the same seller and all within a six month period preceding the closing of her purchase of the property on Elizabeth St. were omitted from her loan application. Such omission was indeed reckless, and this reckless disregard for accuracy of the written financial statement is enough to establish a knowing intent by Cross to deceive.

A party can prove an intent to deceive by creating an inference from a false representation which the debtor knows or should know will induce another to act. In re Sheridan, 57 F.3d 627, 633 (7th Cir. 1995). A debtor's intent to deceive may also be established by proving reckless indifference to, or reckless disregard for, the accuracy of the information supplied in the financial statement. Id. In addition, the debtor's intent to deceive may be proven by direct evidence or inferred from surrounding circumstances. Id.

In Cross' deposition and her Answer to the Adversary Complaint, she claims to have provided all of her omitted financial information in writing including the information on the six mortgages to Osty. Her testimony was that she handed that paper to some unidentified "person at the title company." She did not testify that she handed

the handwritten paper to an agent or representative of ComCor, but claims that she never read the typed document signed by her that was given to ComCor.

Clearly that argument does not fly, for reasons pointed out in a recent Seventh Circuit opinion in Novitsky v. American Consulting Engineers, 196 F.3d 699, 701 (7th Cir. 1999):

> Novitsky's current argument -- that she didn't pay much attention to what she was signing and shouldn't be held to its terms -- has a familiar ring. People who sign insurance applications omitting vital information often blame the insurance agent; people who sign contracts containing clauses that in retrospect prove disadvantageous often say that they didn't read the fine print; people who sign tax returns omitting income or overstating deductions often blame their accountant or tax preparer. But these arguments never go anywhere. People are free to sign legal documents without reading them, but the documents are binding whether read or not. *E.g., Chicago Pacific Corp. v. Canada Life Assurance Co., 850 F.2d 334 (7th Cir. 1988)*. Any other approach would undermine the validity of the written word and encourage people either to close their eyes (hoping that they can reap the benefits without incurring the costs and risks of the venture) or to come up with hard-to-refute tales of not reading or understanding the documents they sign. Ours is not a case in which the EEOC refused to accept a charge, or told someone that an intake questionnaire and a charge are the same thing. *Early v. Bankers Life & Casualty Co., 959 F.2d 75, 80-81 (7th Cir. 1992)*. Nor does Novitsky complain of deceit by the EEOC that would equitably toll the 300-day prior to file a proper charge, a possibility *Early* raised.

Cross alleges that when the document was subsequently typed, Richard Osty informed her that the document was exactly as she had written it except that it was now typed. Apparently relying on his assurance, she claims not to have read the typed document

when she signed it. However, in absence of fraud or duress by a transaction party, a person who signs a document cannot avoid obligations under it by showing that he or she

did not read what was signed. Comprehensive Accounting Corp. v. Rudell, 760 F.2d 138, 140 (7th Cir. 1988).

Comcor has not been tied to whatever game that Osty played with Cross, if her allegations be true. She is therefore bound by the signed paper even if she never read it.

CONCLUSION

For the reasons set forth above, there are no fact issues and Plaintiff is entitled to judgment as a matter of law. Comcor's Motion for Summary Judgment on Count II allowed and judgment will be entered in its favor.

ENTER:

_____

Jack B. Schmetterer
United States Bankruptcy Judge

Entered this 7th day of January, 2000.