SO ORDERED

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: March 27, 2015

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: MATTHEW A. LOGAN	**CASE NO. 14-50067-KMS**
DEBTOR	**CHAPTER 13**
FORT FINANCIAL CREDIT UNION	**PLAINTIFF**
V.	**ADV. NO. 14-06005-KMS**
MATTHEW A. LOGAN	**DEFENDANT**

ORDER GRANTING IN PART AND DENYING IN PART SUMMARY JUDGMENT

Before the Court is the Plaintiff's Motion for Summary Judgment (the "Motion"), (Adv. Dkt. No. 28),[1] and Plaintiff's Memorandum in Support of Its Motion for Summary Judgment, (Adv. Dkt. No. 29), filed by Fort Financial Credit Union ("Fort"); the Defendant's Response to Plaintiff's Motion for Summary Judgment, (Adv. Dkt. No. 31), filed by Matthew A. Logan ("Logan"); and the Plaintiff's Reply in Support of Its Motion for Summary Judgment, (Adv. Dkt. No. 32), filed by Fort. Having considered the pleadings, exhibits attached thereto, and the record,

[1] Unless stated otherwise, citations to the record are as follows: (1) citations to docket entries in the adversary proceeding, Adv. Proc. No. 13-05062-KMS, are cited as "(Adv. Dkt. No. ___)"; and (2) citations to docket entries in the main bankruptcy case, Case No. 13-52448-KMS, are cited as "(Dkt. No. ___)".

the Court finds that the Motion should granted in part and states the following:

I. Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this Adversary pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

II. Background

On January 17, 2014, Logan filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code.[2] (Dkt. No. 1). Fort initiated this adversary proceeding against Logan on April 18, 2014, alleging that the debt Logan owes it is non-dischargeable under § 523(a)(2), (a)(6), or both. (Adv. Dkt. No. 1). Specifically, Fort alleges that Logan entered into a loan agreement with it, whereby Logan borrowed $5,000.00 and pledged a 2003 Lucas trailer (the "trailer"). (*Id.* at 1, ¶ 3). Fort further alleges that Logan only made one payment pursuant to the agreement; never turned over title to the trailer; refused to surrender the trailer to Fort; and subsequently sold the trailer. (*Id.* at 1–2, ¶¶ 4, 5, 6, 11). Logan filed a response on May 8, 2014, where he denied each of these allegations. (Adv. Dkt. No. 8). Logan also filed a counter-claim against Fort on September 11, 2014. (Adv. Dkt. No. 22).

Fort filed the Motion on December 5, 2014, arguing that, after discovery, no genuine issue of material fact remains and it is entitled to summary judgment with respect to its claims against Logan under § 523(a)(2) and (a)(6). (Adv. Dkt. No. 28). Logan filed a response on December 29, 2014. (Adv. Dkt. No. 31). In his response, Logan admits that he never provided

[2] "Bankruptcy Code" or "Code" refers to the United States Bankruptcy Code located at Title 11 of the United States Code. All Code sections hereinafter will refer to the Bankruptcy Code unless specifically noted otherwise.

Fort with title to the trailer; that he sold the trailer; that he did not use the proceeds of that sale to repay Fort; and that he refused to surrender the trailer to Fort. (*Id.* at 2, ¶¶ 3–6). Logan also does not dispute that he signed the agreement with Fort, which lists the trailer as collateral for the loan. (*Id.* at 1, ¶ 1). Instead, Logan argues that he was not under any obligation to provide title to the trailer once the loan was made, and Fort's execution of a loan without first securing the alleged collateral is a result of its own negligence. (*Id.* at 2, ¶ 3).

III. Discussion

A. Summary Judgment

In its Motion, Fort argues that it is entitled to summary judgment in its favor regarding its claims against Logan under § 523(a)(2)(A) and (a)(6). (Adv. Dkt. No. 70). Summary judgment under Rule 56 of the Federal Rules of Civil Procedure[3] is appropriate when, viewing the evidence in the light most favorable to the non-moving party, the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is "no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is genuine if "there is sufficient evidence favoring the nonmoving party for a fact finder to find for that party." *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 273 (5th Cir. 1987). A fact is material if it would "affect the outcome of the lawsuit under the governing substantive law." *Id.* at 272.

The Court notes that it has discretion to deny motions for summary judgment and allow parties to proceed to trial so that the record might be more fully developed for the trier of fact. *G*

[3] Rule 56 is made applicable to this adversary pursuant to Federal Rule of Bankruptcy Procedure 7056.

& B Invs., Inc. v. Henderson (In re Evans), No. 10-00040-NPO, 2011 WL 671806, at *4 (Bankr. S.D. Miss. Feb. 18, 2011) (citing *Kunin v. Feofanov*, 69 F.3d 59, 61 (5th Cir.1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir.1994); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir.1989)). Applying these standards, the Court now considers whether Fort has carried its burden to show that it is entitled to summary judgment.

B. 11 U.S.C. § 523(a)(2)(A)

In its Memorandum in Support of its Motion (the "Memorandum"), Fort argues that the debt Logan owes it is non-dischargeable under § 523(a)(2)(A) and that it is entitled to judgment as a matter of law because the facts establishing the elements required to prevail on its claim are not in dispute. (Adv. Dkt. No. 29 at 4). In response, Logan argues that Fort "has not shown in any pleading or exhibit conduct that would definitively indicate any fraud or false pretenses in acquiring financing." (Adv. Dkt. No. 31 at 2).

Section 523(a)(2)(A) excepts from discharge "any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by 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) encompasses three similar grounds for non-dischargeability, all of which apply to 'debts obtained by frauds involving moral turpitude or intentional wrong.'" *Lanier v. Futch (In re Futch)*, No. 09-00144-NPO, 2011 WL 576071, at *17 (Bankr. S.D. Miss. Feb. 4, 2011) (*citing First Nat'l Bank LaGrange v. Martin (In re Martin)*, 963 F.2d 809, 813 (5th Cir. 1992)). The Fifth Circuit has recognized a distinction between the elements of proof required for false pretenses or false representation and those required for actual fraud. *AT&T Universal Card Servs v. Mercer (In re Mercer)*, 246 F.3d 391, 403 (5th Cir. 2001). This distinction

"appears to be a chronological one, resting upon whether a debtor's representation is made with reference to a future event, as opposed to a representation regarding a past or existing fact." *ETRG Investors, LLC v. Hardee (In re Hardee)*, No. 11-60242, 2013 WL 1084494, at *12 (Bankr. E.D. Tex. Mar. 14, 2013) (*citing Bank of Louisiana v. Bercier (In re Bercier),* 934 F.2d 689, 692 (5th Cir.1991) ("[A debtor's] promise . . . related to [a] future action [that does] not purport to depict current or past fact . . . therefore cannot be defined as a false representation or a false pretense")).

In its Memorandum, Fort cites a case from New York and recites the elements that are also recognized in the Fifth Circuit for showing actual fraud under § 523(a)(2)(A). (Adv. Dkt. No. 29 at 4). Fort does not acknowledge the Fifth Circuit's recognition of the temporal distinction between actual fraud and false representation or false pretense, nor does it allege that the elements of false representation or false pretense have been met in this case. (*See* Adv. Dkt. No. 29). But Fort cites two promises it allegedly relied upon: Logan's promise to repay, and his "misrepresentation within the loan documents." Logan's promise to repay constitutes a future event, and to prevail on its claim under § 523(a)(2)(A) based on this promise, Fort must establish the elements of actual fraud. The misrepresentation within the loan documents Fort alludes to, which is apparently Logan's pledge of the trailer as collateral to secure the loan, constitutes a past or existing fact, and to prevail on its claim under § 523(a)(2)(A), Fort must establish the elements of false pretense or false representation.

1. Actual Fraud

A party objecting to discharge under § 523(a)(2)(A) for actual fraud must demonstrate that: (1) the debtor made representations; (2) the debtor knew the representations were false at the time they were made; (3) the representations were made with the intention and purpose to deceive the creditor; (4) the creditor actually and justifiably relied on the representations; and (5) the creditor sustained a loss as a proximate result of its reliance. *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284,

1293 (5th Cir. 1995). In this case, it is undisputed that Logan signed the agreement with Fort, obtained a loan for $5,000.00, and only made one payment on that loan. (Adv. Dkt. Nos. 28, Exh. A; 31 at 2). But the Court finds that genuine issues of material fact remain, including but not limited to, whether Logan knew his promise to repay was false at the time he made it. Accordingly, Fort has not met its burden with respect to showing summary judgment is appropriate for its claim of actual fraud under § 523(a)(2)(A). The Court now turns to Fort's claim for false pretense or false representation under § 523(a)(2)(A).

2. False Pretense or False Representation

"Under § 523(a)(2)(A), a representation made by a debtor is a false pretense or false representation if it was: (1) a knowing and fraudulent falsehood; (2) describing past or current facts; (3) that was relied upon by the other party." *Barvié v. Broadus (In re Broadus)*, 516 B.R. 378, 389 (Bankr. S.D. Miss. 2014) (citing *In re Mercer*, 246 F.3d 391, 403 (5th Cir. 2001); *RecoverEdge*, 44 F.3d at 1292–93). "Though the Fifth Circuit recognizes a temporal distinction between actual fraud and false pretenses or false representation, the same justifiable reliance standard applies to any action arising under § 523(a)(2)(A)." *Barvié*, 516 B.R. at 389. (internal citations omitted). "Justifiable reliance is a less demanding standard than reasonable reliance." *Third Coast Bank v. Cohen (In re Cohen)*. No. 12-1004, 2013 WL 4079369, at *12 (Bankr. E.D. Tex. Aug. 13, 2013) (quoting *First American Title Ins. Co. v. Lett (In re Lett)*, 238 B.R. 167, 186 (Bankr. W. D. Mo.1999)). "The justifiable reliance standard imposes no duty to investigate unless the falsity of the representation is readily apparent or obvious or there are 'red flags' indicating such reliance is unwarranted." *Cohen*, 2013 WL 4079369, at *12 (citing *Manheim Auto. Fin. Servs, Inc. v. Hurst (In re Hurst)*, 337 B.R. 125, 133–34 (Bankr N.D. Tex. 2005)).

In this case, it is undisputed that Logan signed an agreement with Fort; that the agreement listed a 2003 Lucas trailer as collateral for a $5,000.00 loan; and that Logan never provided the title for the trailer or turned the trailer over to Fort once he ceased making loan payments under the agreement. (Adv. Dkt. Nos. 28, Exh. A; 31 at 2, ¶¶ 3, 4). It is further undisputed that Logan sold the trailer pledged as collateral and that he used the proceeds for his own benefit rather than paying them to Fort. (Adv. Dkt. No. 31 at 2, ¶¶ 5, 6). Finally, Logan affirmatively states in his discovery responses that "[a]t all relevant times when Mr. Logan made the loan with Fort Financial the trailer was never titled in Mr. Logan's name; a fact that Fort financial was aware of." (Adv. Dkt. No. 28, Exh. 3 at 1). Based on these facts, the Court finds that genuine issues of material fact remain, including but not limited to, whether Fort knew Logan did not have title to the trailer at the time of the loan. Accordingly, Fort has not met its burden with respect to showing summary judgment is appropriate for its claim of false representation or false pretense under § 523(a)(2)(A). The Court now turns to Fort's claim for willful and malicious injury under § 523(a)(6).

C. 11 U.S.C. § 523(a)(6)

Debts "for willful and malicious injury by the debtor to another entity or to the property of another entity" are excepted from discharge under § 523(a)(6). 11 U.S.C. § 523(a)(6). To prevail on a claim under § 523(a)(6), the plaintiff must show that: (1) the debtor caused an injury; (2) that injury was incurred by another or the property of another; and (3) the injury was willful and malicious. *Whitney Nat'l Bank v. Phillips (In re Phillips)*, No. 09-00033-NPO, 2010 Bankr. LEXIS 4495, 2010 WL 5093388, at *6 (Bankr. S.D. Miss. Dec. 8, 2010). "[D]ebts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Barvié*, 516 B.R. at 391 (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998)). "The Fifth Circuit has held that 'an injury is "willful and malicious" where there is either an objective

substantial certainty of harm or a subjective motive to cause harm.'" *Id.* at 391–92 (quoting *Miller v. J.D. Abrams, Inc. (In re Miller),* 156 F.3d 598, 606 (5th Cir. 1998)).

In this case, it is undisputed that the loan documents list the trailer as collateral for a $5,000.00 loan; that Logan sold the trailer pledged as collateral in the loan documents; and that Logan used the proceeds for his own benefit rather than paying them to Fort. (Adv. Dkt. Nos. 28, Exh. A; 31 at 2, ¶¶ 5, 6). It is also undisputed that Fort never had a perfected lien on the trailer. (Adv. Dkt. No. 32 at 2, ¶ 3). In a very similar case, this Court found that the sale of a gas station, which was pledged as collateral for a loan, and the subsequent misappropriation of the sale proceeds for the debtor's personal use, constituted willful and malicious injury under § 523(a)(6) to the extent of the misappropriated funds. *Barvié,* 516 B.R. at 392. In *Barvié,* like this case, the creditor never perfected his interest in the gas station. But the debtor's actions in that case—selling the gas station he knew he had pledged as collateral without notifying the creditor and then failing to turn over the proceeds of that sale to the creditor—"either necessarily caused, or were substantially certain to cause, the injury suffered by [the creditor]." *Id.* Similarly, Logan's actions in this case—selling the trailer he knew he had pledged as collateral without notifying the creditor or turning over the proceeds from the sale—constitute willful and malicious injury under § 523(a)(6) to the extent of the misappropriated funds. Logan states in his discovery answers that he sold the trailer in 2009 for $3,000.00 to a man whose name he does not recall. (Adv. Dkt. No. 28, Exh. 3 at 1). The Court therefore finds that Fort has met its burden of establishing that the amount of the misappropriated funds—$3,000.00—is non-dischargeable under § 523(a)(6) as a matter of law. Accordingly, Fort's Motion is well taken and should be granted.

IV. Conclusion

Fort has met its burden of establishing that it is entitled to summary judgment with

respect to its claim under § 523(a)(6). Thus, the debt owed to Fort is non-dischargeable to the extent of the misappropriated funds—or $3,000.00—as a matter of law. But genuine issues of material fact remain regarding Fort's claims under § 523(a)(2)(A), including but not limited to: whether Logan knew his promise to repay was false at the time he made it and whether Fort knew Logan did not have title to the trailer at the time the loan was made.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion, (Adv. Dkt. No. 28), is **GRANTED IN PART,** as to Fort's claim under § 523(a)(6) and **DENIED IN PART,** as to Fort's claims under § 523(a)(2)(A).

END OF ORDER