

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI FILED OCT 24 1986 MOLLIE C. JONES, CLERK BY <i>L. Spears</i>
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IN RE:

JULIUS AUGUSTINE JACKSON
HOLLEY MARIE JACKSON

CASE NO. 8501172JC

FIRST BANK OF SOUTHWEST MISSISSIPPI

vs.

JULIUS AUGUSTINE JACKSON

ADVERSARY PROCEEDING NO. 850147JC

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Jackson

Edward Ellington, Bankruptcy Judge

ORDER ON "AMENDED OBJECTION TO DISCHARGEABILITY"
FILED BY FIRST BANK OF SOUTHWEST MISSISSIPPI

THIS MATTER came on for hearing on First Bank of Southwest Mississippi's Amended Objection to Dischargeability. After examining the facts and considering the same, the Court finds that the Objection is not well taken and should be overruled.

Thus, the debt owed to First Bank of Southwest Mississippi by Julius Augustine Jackson is discharged.

On August 2, 1985, Julius Augustine Jackson, the Defendant, and Holley Marie Jackson filed a joint petition under Chapter 7 of the Bankruptcy Code.

Subsequent to the filing of the Chapter 7 petition, First Bank of Southwest Mississippi (First Bank) timely filed an Objection to Dischargeability, which was subsequently amended. The Defendant/Debtor's answer was filed and after a pre-trial conference the objection was set for trial. Prior to the trial date, the parties contacted the Court with a request that a stipulation of fact be submitted. The Court granted the request and no testimony was taken and a written "Stipulation of Fact" was submitted by the parties. A copy of the stipulation is attached to this Order as Exhibit "A" and incorporated herein by reference.

First Bank's amended objection claims a perfected security interest in a 1982 Cadillac and a balance owed of \$9,690.90 as of August 26, 1985. The objection provides that because this is a perfected security interest, First Bank is entitled to its security or to the value thereof and such debt cannot be discharged in bankruptcy under section 523(a)(2) and (a)(4).

11 U.S.C. §523(a)(2) provides:

A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt--

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;

(B) use of a statement in writing--
(i) that is materially false;
(ii) respecting the debtor's or an insider'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; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than \$500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than \$1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable: "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.)

Subsection (A) provides that false representation or actual fraud can result in determining a debt as being nondischargeable. Case law indicates that certain elements are necessary to be proved to show that a debt was obtained by fraud. Although courts number the elements differently, basically the elements are that debtor made materially false representations, that debtor knew representations were false when he made them, that debtor made them with the intention and purpose of deceiving creditor, that creditor reasonably relied thereupon and that creditor sustained loss and damages. See In re Hunt, 30 B.R. 425 (D.C., M.D.Tenn. 1983); Tepsco Tennessee Pipe & Supply Corp. v. Selby, Bk. No. 78-20066 (Bkrtcy. M.D.Tenn. 1982); First National Exchange Bank v. Spangler, 14 B.R. 598, 600 (Bkrtcy. W.D. Va. 1981); Hot Springs V.A. Federal Credit Union v. Foreman, 7 B.R. 776, 778 (Bkrtcy. D.S.D. 1980).

The United States Supreme Court has stated in Ames v. Moir, 138 U.S. 306, 11 S.Ct. 311, 34 L.Ed. 951 (1891):

It is the settled doctrine of this court that "fraud" in the Act of Congress defining the debts from which a bankrupt is not relieved by a discharge in bankruptcy means "positive fraud, or fraud in fact involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud

or fraud in law, which may exist without the imputation of bad faith or immorality."

See also, Neal v. Clark, 95 U.S. 704, 24 L.Ed 586 (1878); United American Bank v. Parker, 5 B.C.D. 1035 (Bkrctcy. E.D. Tenn. 1979).

This Court finds that no evidence has been presented before it which indicates the debtor has committed any fraud in fact or intentional wrong to the creditor, First Bank. Without this showing of false representation and intent, the requirements and necessary elements to be proved by the creditor under Section 523(a)(2)(A) cannot be met. Thus, Subsection (A) cannot be relied upon to determine this debt nondischargeable. See In re Lowther, 32 B.R. 638 (Bkrctcy. W.D. Okla. 1983); In re Cook, 38 B.R. 743 (Bkrctcy. App. 9th Cir. 1984); In re Kisich, 28 B.R. 401 (Bkrctcy. App. 9th Cir. 1983).

Subsection (B) provides that the creditor must prove that false representations were made in written statements concerning the debtor's financial condition. Nothing before the Court indicates the debtor gave a false financial statement which First Bank relied on and therefore this subsection cannot be relied upon to determine the debt as nondischargeable.

Subsection (C) provides that certain types of debts are nondischargeable if made on or within twenty

(20) days or made on or within forty (40) days before the order of relief. The note attached to First Bank's objection evidences that the debt was incurred on "the 20th day of December, 1983, well before the debtor's order of relief was granted in August, 1985. Thus, Subsection (C) will not determine the debt as being nondischargeable.

11 U.S.C. §523(a)(4) provides:

A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debt from any debt--
for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

Nothing in the Creditor's objection, the Debtor's Answer or "Stipulation of Fact" indicates that embezzlement or larceny was committed. Therefore, the Court will address only the issue of "fraud or defalcation while acting in a fiduciary capacity."

First Bank alleges that the debt should be excepted from discharge since the debtor committed defalcation while acting in a fiduciary capacity. For there to be a fiduciary relationship exception to discharge under 523(a)(4), there must be an express or technical trust and not one simply arising out of contract. Davis v. Aetna Acceptance Co., 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed. 393 (1934); In re Romero, 535 F.2d 618 (10th Cir. 1976); In re Paley, 8 B.R. 466

(Bkrcty. E.D. N.Y. 1981); In re Pedrazzini, 644 F.2d 756 (9th Cir. 1981); In re Cook, 38 B.R. 743 (Bkrcty. App., 9th Cir. 1984); In re Niven, 32 B.R. 354 (Bkrcty. W.D. Okla. 1983); Matter of Dloogoff, 600 F.2d 166 (8th Cir. 1979); Matter of Storms, 28 B.R. 761 (Bkrcty. E.D. N.C. 1983); In re Baker, 40 B.R. 356 (Bkrcty. D.Minn. 1984).

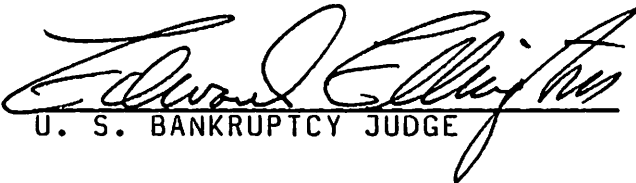
The issue then is whether the circumstances give rise to a true fiduciary relationship between First Bank and Julius Augustine Jackson, or whether it is nothing more than one of a creditor and debtor. This relationship before the Court is not an express or technical trust as required for a "fiduciary" relationship under section 523(a)(4). Thus, the Court must conclude that First Bank and Julius Augustine Jackson have nothing more than a debtor/creditor relationship and cannot be excepted from discharge pursuant to 523(a)(4).

Since First Bank has failed to prove that the defendant's debt should be excepted from discharge pursuant to 523(a)(2) or (a)(4), the Court, having maturely considered the Objection filed and stipulation of fact, finds that the Objection is not well taken and should be overruled.

THEREFORE, IT IS ORDERED that the debt owed by Julius Augustine Jackson to First Bank of Southwest

Mississippi is discharged.

SO ORDERED this the 23 day of October,
1986.


U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

10 23 AM '06

IN RE: JULIUS AUGUSTUS JACKSON
HOLLEY MARIE JACKSON

IN BANKRUPTCY
NO. 8501172 JC

FIRST BANK OF SOUTHWEST MISSISSIPPI

PLAINTIFF

VS.

ADVERSARY PROCEEDING
NO. 850147

JULIUS AUGUSTUS JACKSON

DEFENDANT

STIPULATION OF FACT

COME NOW the Plaintiff and the Defendant, by and through counsel, and stipulate to the following facts, to-wit:

1. That the only issues in dispute are set forth in Paragraph 5 of the Plaintiff's Complaint and in Paragraphs 1, 2 and 3 of the Affirmative Matter set forth in the Defendant's Answer.

2. That the Defendant is in the automobile business and in the course of his business attempted to sell the subject 1982 Cadillac through an auction in Jackson, Mississippi. The automobile was seized from the auction by investigators with the Mississippi Highway Safety Patrol but returned to the Defendant after five (5) days. An investigator indicated to Defendant that "something was wrong" with this vehicle and that he "did not want to see it on the streets again" but he returned the vehicle to Defendant because he could

not prove the vehicle was stolen. Defendant, as a result, believed the vehicle to be stolen but likewise cannot in this action prove it was stolen. Defendant then returned the vehicle to his seller, a John Buchanan of B & D Auto Parts of Birmingham, Alabama, in exchange for the seller's promise to pay the balance of the note to Plaintiff. Buchanan did not do so. The whereabouts of Buchanan and the automobile are unknown, and Defendant has cooperated with the Federal Bureau of Investigation in an attempt to locate both him and the vehicle.

3. That a short time after Defendant pledged the subject 1982 Cadillac to Plaintiff he borrowed an additional \$4,510.80 plus interest from Plaintiff and gave as security therefore a 1966 partially restored Chevrolet Corvette. The Plaintiff failed to perfect a lien on said Corvette and same was subsequently seized from Defendant by a judgment creditor by the name of Max Chizk d/b/a Harbor Auto Sales. The Corvette was sold by the Rankin County Sheriff's Department at public auction, with a number of bidders present, and was bought by Chizk for the sum of \$8,200.00 plus expenses. From the sales price the sum of \$2,500.00 was paid to the Internal Revenue Service to satisfy a Federal Tax Lien on the automobile. Defendant admits that the satisfaction of the tax lien inured to his benefit, as these taxes would have been non-dischargeable in his bankruptcy proceeding.


From the Complaint, Answer and foregoing Stipulation of Fact, the Court is respectfully requested to resolve the following two questions:

1. Has the Plaintiff stated a cause of action for non-dischargeability under 11 U.S.C. §523 entitled "Exceptions to Discharge."

2. If Question No. 1 is answered in the affirmative, is the Defendant entitled to a set-off or credit because of the Plaintiff's failure to perfect its lien on the 1966 Corvette?

Respectfully submitted, this the 5th day of May, 1986.


CHRISTOPHER A. TABB
ATTORNEY FOR PLAINTIFF


JOHN M. STEVENS
ATTORNEY FOR DEFENDANT