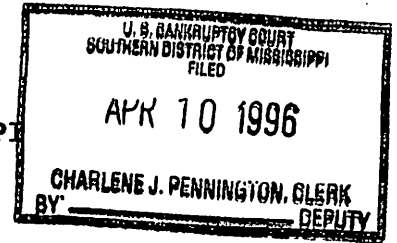


IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE: BILLY JOE SMITH

CASE NO. 9401148JEE

TRUSTMARK NATIONAL BANK,
JACKSON, MISSISSIPPI

PLAINTIFF

VS.

ADVERSARY NO. 940128JEE

BILLY JOE SMITH

DEFENDANT

J. Walter Newman, IV
539 Trustmark Building
Jackson, Mississippi 39201

Attorney for Plaintiff

Luke Dove
1142 Deposit Guaranty Plaza
Jackson, Mississippi 39201

Attorney for Defendant

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

The Court has before it for consideration in the present adversary proceeding *Trustmark National Bank's Motion for Summary Judgment* wherein Trustmark seeks summary judgment on its *Complaint to Determine Dischargeability of Debt* pursuant to Bankruptcy Code § 523(a)(2)(A)¹. After considering the motion and memorandum brief filed by Trustmark along with supporting exhibits submitted by Trustmark, and after considering that no response to said motion has been filed by the Defendant, the Court holds that there exists no genuine issue of material fact and Trustmark is entitled to a

¹ Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

judgment of nondischargeability as a matter of law. In so holding, the Court makes the following findings of fact and conclusions of law.

On April 18, 1994, the Defendant, Billy Joe Smith, filed a petition for relief under Chapter 7 of the Bankruptcy Code. On June 6, 1994, the Plaintiff, Trustmark National Bank, commenced this adversary proceeding against Mr. Smith. In its complaint, Trustmark alleges that it holds a claim against Mr. Smith arising out of certain loan transactions whereby Mr. Smith received money from Trustmark. The amount of Trustmark's claim was established by a consent judgment entered on October 14, 1993 in the Circuit Court of the First Judicial District of Hinds County, Mississippi in the amount of \$ 500,000. Trustmark alleges that its claim is nondischargeable pursuant to § 523(a)(2)(A) because Mr. Smith procured the loans through false representations regarding collateral securing the loans. Trustmark further alleges that it is entitled to attorney fees and costs pursuant to the terms of the promissory notes which were executed by Mr. Smith.

In his answer to the complaint, Mr. Smith admits that Trustmark holds a judgment against him in the amount of \$ 500,000 and that the judgment was entered as a result of his indebtedness to Trustmark on various promissory notes which he executed in favor of Trustmark. Mr. Smith, denies that Trustmark's claim against him is nondischargeable pursuant to § 523(a)(2)(A) or that Trustmark is entitled to attorneys fees and costs.

On November 30, 1995, Trustmark filed the present motion for summary judgment accompanied by a supporting affidavit and exhibits. Trustmark alleges that there exists no genuine issue of material fact, and as a matter of law Trustmark is entitled to entry of summary judgment on its complaint pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure and Rule 18 of the Uniform Local Rules of Bankruptcy Procedure for the Northern and Southern Districts of Mississippi.

After having received two extensions of time within which to respond to Trustmark's motion for summary judgment, Mr. Smith has filed no response to the motion.

Trustmark bears the burden of proving its claim of nondischargeability by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991). The issue of whether a particular debt is nondischargeable under the Bankruptcy Code is a matter of federal law. Id.; Allison v. Roberts (Matter of Allison), 960 F.2d 481, 483 (5th Cir. 1992).

Trustmark asserts that its claim against Mr. Smith is nondischargeable because Mr. Smith obtained money from Trustmark under false pretenses, made false representations, or committed fraud within the meaning of § 523(a)(2)(A) which provides in relevant part as follows:

11 USC § 523

§ 523. Exceptions to discharge.

(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 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;

In order to prove false pretenses or false representations under § 523(a)(2)(A), Trustmark must show that Mr. Smith made a misrepresentation that was a knowing and fraudulent falsehood describing past or current facts that was relied upon by Trustmark. Recoveredge v. Pentecost, 44 F.3d 1284, 1293 (5th Cir. 1995); Allison v. Roberts (Matter of Allison), 960 F.2d 481, 483 (5th Cir. 1992). Regarding the element of reliance, the United States Supreme Court has recently held that only the lesser standard of justifiable reliance need be shown. Field v. Mans, 116 S.Ct. 437, 444, 64 U.S.L.W. 4015 (1995).

In support of its motion for summary judgment, Trustmark has submitted the affidavit of the loan officer in charge of the loans in questions. In his affidavit, the loan officer states that Mr. Smith represented to him that the collateral securing the loans was in Mr. Smith's possession. The loan officer further states that, but for the representations of Mr. Smith, the loans, which were renewal loans, would not have been made.

Rule 56 of the Federal Rules of Civil Procedure as made applicable by Rule 7056(e) of the Federal Rules of Bankruptcy Procedure provides that in order for this Court to sustain a motion for summary judgment, the Court must find that "[t]he 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." See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-34, 106 S.Ct. 2548, 2552-58, 91 L.Ed.2d 265 (1986). Additionally, the Court must view the available evidence in the light most favorable to the nonmoving party. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986).

Mr. Smith has not responded to the evidence presented by Trustmark. Rule 7056(e) provides in relevant part as follows:

Rule 56. Summary Judgment.

....

(e) **Form of Affidavits; Further Testimony; Defense Required.** When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

This Court holds that based on the evidence presented to the Court, there exist no genuine issues of material fact and that Trustmark is entitled to a judgment of nondischargeability pursuant to § 523(a)(2)(A) as a matter of law. Therefore, the Court will

enter summary judgment in favor of Trustmark pursuant to § 523(a)(2)(A) of the Bankruptcy Code.

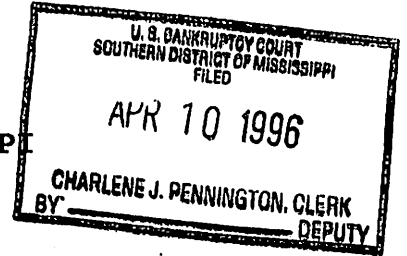
Regarding attorney fees, Mr. Smith denies that Trustmark is entitled to attorney fees under the terms of the promissory notes. While Trustmark alleges that the promissory notes provide for the payment of attorney fees associated with collection of the notes, the Court has found no such provision in the evidence provided to the Court. Therefore, the Court will deny Trustmark's request for attorney fees.

In accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure and pursuant to § 523(a)(2)(A) of the Bankruptcy Code, a separate judgment will be entered holding that the judgment which Trustmark holds against Mr. Smith in the amount of \$ 500,000 is nondischargeable pursuant to § 523(a)(2)(A).

This the 10th day of April, 1996.


UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
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TRUSTMARK NATIONAL BANK,
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VS.

ADVERSARY NO. 940128JEE

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DEFENDANT

FINAL JUDGMENT

Consistent with the Court's memorandum opinion entered contemporaneously herewith, it is hereby ordered and adjudged that the judgment Trustmark National Bank holds against Billy Joe Smith, which was entered on October 14, 1993, in the Circuit Court of the First Judicial District of Hinds County, Mississippi, cause no. 93-75-256, in the amount of \$ 500,000, is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

This is a final judgment pursuant to Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

So ordered this the 10th day of April, 1996.

UNITED STATES BANKRUPTCY JUDGE