

§ 523(a)(2)(B)
Dischargeability

Fodac, Inc. v. Saxbury
(In re David Lamonte Saxbury)

Adv. Proc. #94-6338-fra
Main Case #694-60982-fra7

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Unpublished

The debtor obtained a line of credit from Fodac, Inc. to finance his rent-to-own business. A home furnishings distributor, United Wholesale, provided the debtor with a credit application and form of financial statement to be used to obtain the line of credit and acted as Fodac's agent for purposes of this transaction. The debtor completed the application and delivered it to United Wholesale, which forwarded it to Fodac, and Fodac approved the application. Thereafter, the debtor obtained furniture from United Wholesale through credit obtained from Fodac. When the debtor filed for bankruptcy, Fodac claimed that its debt is nondischargeable under § 523(a)(2)(B) because it was obtained through the use of a fraudulent financial statement.

The court determined that the debtor had a reasonable basis for the values he used in the financial statement, even if they were somewhat inaccurate, given the fact that the creditor neither inquired about how the numbers were obtained nor required any particular methodology be used. Given the facts, the court did not feel that the debtor acted with fraudulent intent, one of the requirements to find nondischargeability under § 523(a)(2)(B).

The court also felt that Fodac's reliance on the financial statement was not reasonable under the circumstances of the case, thereby providing additional grounds for denying Fodac's claim of nondischargeability.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

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| IN RE |) | |
| |) | |
| DAVID LAMONTE SAXBURY, |) | Case No. 694-60982-fra7 |
| |) | |
| <u>Debtor.</u> |) | |
| |) | |
| FODAC, INC., |) | |
| |) | |
| Plaintiff, |) | |
| vs. |) | Adversary No. 94-6338-fra |
| |) | |
| DAVID LAMONTE SAXBURY, |) | |
| |) | |
| <u>Defendant.</u> |) | MEMORANDUM OPINION |

I. INTRODUCTION

This is an action by Fodac, Inc., a creditor, seeking to deny debtor/defendant's discharge in bankruptcy, pursuant to 11 U.S.C. § 523(a)(2)(B). I find that plaintiff has not met its burden of proof in this case, and therefore will not deny discharge of the debt in question.

Fodac is in the business of providing financing to "rent-to-own" furniture dealers. Once a credit line has been established, the dealer may order furniture from a supplier, which then ships

1 the goods to the dealer, and sends duplicate invoices to Fodac and
2 the dealer. Fodac pays the supplier, and is then repaid, with
3 interest, under the terms of the credit agreement.

4 In the case at bar Defendant operated a furniture business,
5 and desired to develop a rent-to-own component to his business. He
6 consulted with the owner of United Wholesale, a distributor of home
7 furnishings, who presented a credit application and a form of
8 financial statement to be used to obtain credit from Fodac. It
9 appears to be undisputed that, for the purposes of this
10 transaction, United, or its owner, acted as Fodac's agent. Fodac
11 approved the application; thereafter Defendant obtained furniture
12 from United, which sent its invoice to, and was paid by, Fodac.

13 Subsequently, Defendant filed a petition for relief under
14 Chapter 7 of the Code. Fodac now claims that its extension of
15 credit was obtained by use of a fraudulent financial statement, and
16 that the debt owed to it should not be discharged.

17 II. DISCUSSION

18 A. *Legal Standard*

19 11 U.S.C. § 523 sets out several grounds for denying the
20 dischargeability of particular debts. The provision at issue here
21 provides that:
22

23 (a) A discharge under section 727, 1141, 1228(a),
24 1228(b), or 1328(b) of this title does not discharge an
25 individual debtor from any debt--

26 * * *

1 (2) for money, property, services, or an extension,
2 renewal, or refinancing of credit, to the extent obtained
3 by

4 * * *

5 (B) use of a statement in writing

6 (i) that is materially false;

7 (ii) respecting the debtor's or
8 an insider's financial condition;

9 (iii) on which the creditor to
10 whom the debtor is liable for such
11 money, property, services, or credit
12 reasonably relied; and

13 (iv) that the debtor caused to
14 be made or published with intent to
15 deceive.

16 In order to preclude discharge, plaintiff must prove, by a
17 preponderance of the evidence, that:

18 (1) Debtor made the representations;

19 (2) that at the time he made the representations he knew them
20 to be false;

21 (3) that he made them with the intention and purpose of
22 deceiving the creditor;

23 (4) that the creditor justifiably relied on the
24 representations; and

25 (5) that the creditor sustained the alleged loss and damage
26 as the proximate cause of the representations having been made.

In re Kirsh, 973 F.2d 1454, 1457 (9th Cir. 1992).

1 The falsity must be material, that is, it must "paint a
2 substantially untruthful picture" of Defendant's financial
3 condition. Matter of Jordan, 927 F.2d 221 (5th Cir. 1991).

4 It is uncontroverted that Defendant supplied a financial
5 statement, that it contained inaccuracies, and that plaintiff
6 relied upon the statement. What must be determined are:

- 7 a. whether the statement was materially false;
8 b. whether Defendant knew of the falsity; and
9 c. whether Defendant intended to deceive plaintiff.¹

10 An essential element is that the debtor intended to deceive
11 the creditor. The fraud involved must be of the sort that involves
12 moral turpitude or intentional wrong. In re Beaver, 6 B.R. 523,
13 526 (Bankr. Or. 1980).

14
15 *B. Analysis of financial statement*

16 The financial statement itself was simple -- not to say
17 cursory -- and is set out in the appendix. Plaintiff's principal
18 complaints are that Defendant overstated the value of assets and
19 failed to reveal a \$156,000 judgment awarded against him a decree
20 of dissolution of marriage entered shortly before the time the
21 statement was signed. There appears to be no claim that the
22 liabilities are not accurately stated.

23 Respecting the value of the assets, the statement does not
24 prescribe any method of valuation. Defendant testified that he
25

26 ¹ Given my findings on these issues, it is not necessary to
decide whether, under these circumstances, plaintiff's reliance on
the financial statements was justifiable.

1 valued the inventory at retail, and the real property at what he
2 thought he could sell it for. While the approach in each case may
3 not have been ideal, there is no evidence that any inquiry was made
4 or requirement imposed by the creditor respecting methodology.

5 Where a the debtor had a reasonable basis for the values he
6 employed in a financial statement, the fact that the values proved
7 to be inaccurate does not justify denial of discharge. In re
8 Levine, 6 B.R. 54, aff'd Deel Rent-a-Car. Levine 16 B.R. 873, aff'd
9 721 F.2d 750 (1980). Defendant's approach was not unreasonable.

10
11 The same rule applies to the matter of the Defendant's cash on
12 hand. He made a rough estimate, based on advice from his mother
13 (who did the banking) that about \$8,000 had been deposited that
14 week. He thus assumed that he had at least that much on deposit.
15 This was not, of course, the best way to proceed, but I cannot find
16 that it was inherently unreasonable. Nor do I believe that the
17 discrepancy of less than \$4,000 was material under the
18 circumstances.

19 The decree of dissolution appears to present the greatest
20 departure. However, when viewed closely, it presents less of a
21 problem that appears at first blush. The decree was prepared by
22 defendant's (now) ex-wife on a form published by "Self-Counsel
23 Press, Inc." with the assistance of a non-lawyer. It awarded to
24 the wife possession and "all equity in" the parties' residence in
25 Central Point, and "50% of the net proceeds of the sale of" a
26

1 rental property in Central Point, Oregon. In a separate section
2 the decree provides that:

3 10. The co-petitioner husband is ordered to pay the
4 following debts and hold the co-petitioner free from
5 liability:

6 The husband shall pay the debts listed below. The wife
7 is awarded a judgment against the husband in the sum of
8 \$159,781.24. The husband can satisfy this judgment by
9 paying the following:

10 First Interstate Bank (Buick Loan) \$568.87
11 Advance Line \$6,000
12 Dept. of Veterans Affairs (mortgage) \$20,000.00
13 First Interstate Bank (cash loan) \$4,382.00
14 US Bank (mortgage) \$60,171.96
15 US Bank-Visa \$2,500.00
16 US Bank (business loan) \$58,907.41
17 Bank of America (heat pump loan) \$6,801.00

18 The reader will note that the judgment is in an amount equal
19 to the sum of the debts listed below it. Clearly, the intent of
20 the parties was only to secure enforcement of Defendant's
21 obligation to hold his wife harmless from the enumerated debts.
22 The judgment did not, as Plaintiff argues, have the effect of
23 doubling Defendant's liabilities.

24 The Decree was the result of an agreement of the parties,
25 coupled with some inept draftsmanship from a "paralegal" service.
26 It does not reflect their additional agreement that the residence
would be sold, and the net proceeds applied to the mortgage and the
"business loan" from U. S. Bank, which in fact was done. It is
clear that, whatever the legal effect of the decree, the Defendant
continued to believe that he had an interest in the real property,
and that it would be available to pay his liabilities. It follows

1 that failure to disclose the decree on the statement is not, in and
2 of itself, grounds for denial of discharge.

3 *C. Intent to deceive*

4 As noted, Plaintiff must prove that Defendant intended to
5 deceive it. I do not believe that it has sustained its burden of
6 proof on this issue. While not textbook examples of business
7 practice, Defendant's approach was somehow consistent. The
8 question of how assets were valued is discussed above. Liabilities
9 were accurately stated. As for the divorce decree, the parties
10 deeds after the decree better reflect Defendant's understanding of
11 his financial position than did the language of the decree. While,
12 as Plaintiff pointed out, the legal fact of ownership was not as
13 Defendant stated, it is his subjective belief which matters, so
14 long as that belief has some reasonable basis.

15
16 In light of all the evidence, I do not believe that Plaintiff
17 has established that Defendant acted with fraudulent intent.

18 III. CONCLUSION

19 Plaintiff has not established that the misstatements in
20 Defendant's financial statement were material, or made with intent
21 to deceive. A judgment shall be entered in favor of Defendant
22 dismissing the claim that the debt should not be discharged.²

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² It is not necessary to determine the amount of Plaintiff's
claim. At trial Defendant did not take issue with the amount
claimed, and the amount will be allowed as a claim in the absence
of any objection from any other party. 11 U.S.C. § 502(a).

1 This memorandum opinion contains the Court's findings of fact
2 and conclusions of law, which will not be restated. BR 9014.
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6 FRANK R. ALLEY, III
7 Bankruptcy Judge
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