RJM

WDNY
93-cv-6366
Larimer, J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of October, one thousand nine hundred and ninety-four.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. ROGER J. MINER,
HON. JOSEPH M. McLAUGHLIN,
Circuit Judges.

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In Re: JEANETTE A. FENTI

Debtor

DEBORAH C. MESSMER,

Plaintiff-Appellant,

v.

ORDER
94-5025

JEANETTE A. FENTI,

Defendant-Appellee.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Western District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Plaintiff-appellant Deborah C. Messmer appeals from a February 24, 1994 judgment of the United States District Court for the Western District of New York (Larimer, J.), affirming an order of the Bankruptcy Court (Ninfo, Bankr. J.), which ordered that a judgment debt owed to Messmer was discharged in defendant-appellee Jeanette A. Fenti's Chapter 7 bankruptcy proceeding, the bankruptcy court having found that the loan underlying the judgment debt had not been obtained by fraud under 11 U.S.C. § 523(a)(2)(A).

For some time prior to the disputed loan transaction, Fenti and Messmer had lived together as lovers. In April of 1985, Fenti was fired from her bookkeeping job for embezzling funds to subsidize her corporate retail business, Birenti, Inc. Fenti signed a confession of judgment in favor of her former employer for $61,503.81. She also was arrested and subsequently convicted on charges of grand larceny. Messmer was generally aware of Fenti's troubles at the time, although Messmer claims that Fenti told her that the judgment was for only $30,000.

In October of 1985, Messmer borrowed $15,000 from Fenti's brother and loaned this money to Fenti to use to purchase inventory for Birenti. Fenti filed a $15,000 security interest in Birenti's assets in favor of Messmer. In late October, Fenti filed bankruptcy petitions with the United States Bankruptcy Court for the Western District of New York for both herself and Birenti. Messmer was listed as a creditor of Birenti, but was not listed on Fenti's personal Chapter 7 filing.

On January 15, 1986, both $15,000 loans became due. Because Fenti could not repay her loan, Messmer obtained a home equity loan to repay Fenti's brother. Fenti, however, made the monthly payments on the home equity loan for approximately a year. In late 1991, Messmer commenced an action on the debt against Fenti in Rochester City Court. The court held the debt to be a personal obligation, and judgment was entered against Fenti. In September of 1992, Fenti filed her second Chapter 7 petition with the bankruptcy court, and Messmer was listed as a creditor in the amount of the judgment. Messmer responded by filing a complaint under section 523(a)(2)(A) to have the debt declared exempt from discharge. The bankruptcy court ruled against Messmer, finding that Fenti made no factual misrepresentations to Messmer and, to the extent that Fenti did misrepresent her situation, Messmer's reliance was unreasonable. The district court affirmed the findings of the bankruptcy court.

Section 523(a)(2)(A) exempts from discharge a debt obtained by false representations or fraud. To establish non-dischargability, the creditor must prove by a preponderance of the evidence that: (1) the debtor made a false representation; (2) the debtor knew the representation was false at the time it was made; (3) the misrepresentation had been made with intent to deceive; (4) the misrepresentation was relied on by the creditor; and (5) the misrepresentation harmed the creditor. See In re Battinelli, Nos. 891-81298-20, 893-8017-20, ___ B.R. ___, 1994 WL 383237, at *3 (Bankr. E.D.N.Y. July 19, 1994). Whether the creditor's reliance must be reasonable is still an open question in this Circuit.

Messmer contends that Fenti misrepresented the condition of her business as well as the nature and extent of her troubles with her former employer. Fenti denied this, claiming to have been completely candid with Messmer. After hearing the conflicting testimony of both parties, the bankruptcy court found that there had been no misrepresentations. A district court may reverse a bankruptcy court's factual findings only if they are clearly erroneous. Fed. R. Bankr. P. 8013. Because our review of the district court's decision is plenary, In re PCH Assocs., 949 F.2d 585, 597 (2d Cir. 1991), we must independently examine the bankruptcy court's determinations. However, we review the bankruptcy court's factual findings under a deferential standard and will reverse only for clear error. Id. Messmer concedes that the bankruptcy court's determination rested upon its assessment of the credibility of the witnesses, a determination committed to the

trier of fact. In re Brody, 3 F.3d 35, 39 (2d Cir. 1993). The Bankruptcy Judge chose to credit Fenti's testimony and we cannot say that his findings, based upon her testimony and other evidence, were clearly erroneous.

According to Messmer, Fenti's promise to repay the loan was also a misrepresentation. As the bankruptcy court correctly noted, however, a promise to be performed in the future is not sufficient to make a debt nondischargeable, even though there is no excuse for the subsequent breach. In re Austin, 132 B.R. 1, 3-4 (Bankr. E.D.N.Y. 1991). Further, the payments that Fenti made for one year after the maturity date of the loan support the court's finding that Fenti intended to repay the loan. Messmer also challenges the bankruptcy court's finding that Fenti did not intend to file bankruptcy until after the loan was obtained. The court's finding on this issue is adequately supported by the record, particularly the facts that Fenti's business operated for a year after the loan transaction and Fenti continued to make payments on the loan during this time period. In light of our affirmance of the bankruptcy court's conclusion that there were no misrepresentations, it is unnecessary to reach the issue of reasonable reliance.

Messmer also contends that the Bankruptcy Judge erred in "avoiding" admitting a copy of a prior state court decision that was the basis for the judgment debt owed to Messmer. When the evidence was proffered, Messmer's attorney stated that it would establish that the loan to Fenti was a personal obligation that was not discharged by Birenti's bankruptcy. Fenti's attorneys stipulated to these facts, and Messmer's attorney accepted the stipulation. Having accepted the stipulation, Messmer cannot assert error on appeal. Cf. Fed. R. Evid. 103(a)(1).

Finally, Messmer claims that the Bankruptcy Judge erred in applying the liberal fresh start policy of the Bankruptcy Act to Fenti, who had filed Chapter 7 petitions twice in a seven year period. Under 11 U.S.C. § 727(a)(8), a discharge in a Chapter 7 proceeding is available except where the debtor had been granted a discharge in a previous proceeding filed in the last six years. Id. The seven year period between Fenti's two filings does not fall within the statutory period.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

HON. ELLSWORTH A. VAN GRAAFEILAND,

HON. ROGER J. MINER,

HON. JOSEPH M. McLAUGHLIN,
Circuit Judges.