UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

PAUL J. BODUCH AND
MALGOSIA M. TAYLOR-BODUCH

Case No. 04-15682 K

Debtors

PHILIP SORGE

Plaintiff

-vs-

AP No. 04-1312 K

MALGOSIA TAYLOR
MALGOSIA BODUCH
MALGOSIA M. TAYLOR
MALGOSIA M. BODUCH
MALGOSIA M. TAYLOR-BODUCH
MALGOSIA BODUCH

Defendant

Philip Sorge
4089 California Road
Orchard Park, NY 14127

Plaintiff - Pro Se

Christopher J. Mikienis, Esq.
Mikienis & Mikienis, P.C.
5838 Main Street
Williamsville, NY 14221

Attorney for Defendant

DECISION AFTER TRIAL

Here we have a case in which the Debtor[1] claims that the Plaintiff loaned her $10,000 because she was in financial trouble and because they had been having a intimate relationship for approximately six months, and he simply wanted to help her. The Plaintiff denies any relationship with the Debtor other than a casual one, and has set out (without an attorney) to attempt to prove that he was bilked by the Debtor and her husband. He seeks to establish that the Debtors were clever con artists who victimized him - - merely a well-intentioned neighbor.

This Court has often stated that in addition to the five-prong common law test of "fraud,"[2] numerous other means of trickery, deceit, and sham may be non-dischargeable under the expanded language of 11 U.S.C. § 523(a)(2)(A) which excepts from discharge debts obtained by "false pretenses, a false representation or actual fraud."[3] Consequently, someone who can establish that he or she was victimized by someone with whom he or she had a close personal or business relationship (such as a familial relationship, business partnership, position of confidence, or even romantic relationship) might obtain a judgment declaring a resulting debt to be non-dischargeable as one

[1]Although both of the joint Debtors were sued here, the Debtor's husband was dismissed out of this Adversary Proceeding at the beginning of trial on his counsel's Motion. Hereinafter, "the Debtor" means only Malgosia.

[2]The five prongs are: (1) a representation, (2) known by the utterer to be false, (3) intended to deceive, (4) upon which the victim relies, and (5) as a consequence of which he is damaged.

[3]See *In re Reid*, 237 B.R. 577. Compare, however, the decision of District Court of this District in *Bank of America v. Jarczyk*, 268 B.R. 17.

resulting from "false pretenses, a false representation or actual fraud.". It is not necessary that a plaintiff have dealt exclusively on an arms-length basis with the debtor. Here the Court is convinced that whether or not the Plaintiff and the Debtor had an intimate relationship, the relationship between the Plaintiff and the Debtor was far more "substantial" than the Plaintiff admits, and so he has lied. Were he simply to have told a true and consistent story, he might conceivably have been able to set out a case of his having been defrauded by someone with whom he had a close relationship. But that is not what he chose to do. He chose instead to present a case in which he has utterly failed to convince the Court that he is telling the truth. Consequently, he has lost whatever opportunity he might have had to obtain a judgment of non-dischargeability against this Debtor. Furthermore, he has opened himself up to liability on the Debtors' counterclaims. For the reasons set forth below, this Court finds that the Plaintiff has sought to mislead the Court and that he has violated 11 U.S.C. § 362 in his efforts to collect a debt.

DISCUSSION

The story that Plaintiff tells is a simple story. He claims that in the days leading up to Christmas 2002, he had a casual, neighborly acquaintance with the Debtor and her husband; but on the morning before Christmas of 2002 the Debtor came to his house and asked him to loan her $13,000 because she had trouble with the Internal Revenue Service. He only had $10,000 to lend her; despite his casual relationship, he went with her to the bank and drew out the $10,000 and gave it to her in exchange for a promissory note and a photocopy of her deed to her property; in gratitude she invited him to come to their house for Christmas dinner the next day; when he got there on Christmas Day no

one answered the door; he quietly returned home; the local police came to his door to tell him that the Debtor and/or her husband had reported that he had disturbed the peace at their home.

Plaintiff vehemently argues that this was a false report to the police and was the opening "gambit" by the Debtor and her husband to pull-off a clever con game by which they would "use the law" to harass and intimidate him from attempting to collect the debt.

Thereafter, there were criminal charges and protective orders thrown back and forth for a year and a half, with no resulting convictions against either side. But the Plaintiff argues that the fact that he was arrested five times upon various accusations by the Debtor and/or her husband is proof that they were extremely clever con artists who had managed to intimidate and harass him and "other persons" that they had conned,[4] and that he had decided to be the one who was going to "make a stand" against these people and see that justice is done.

The trouble for the Plaintiff is that this is the third version of the story told by this Plaintiff to law enforcement or to the Courts of Law. The differences between the versions might seem to be slight on their face, but have profound implications.

The first version told by the Plaintiff was to the Orchard Park Police Department in Complaint # 02-219125 on December 27, 2002 at 5:03 p.m. This report was offered into Evidence here by the Plaintiff himself. In it he complains that he was a victim of Grand Larceny Third Degree and that the perpetrator was this Debtor.

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[4]No admissible evidence was offered of any "other" suppossedly-fraudulent activities toward anyone "else" by this Debtor or her husband.

The police report states that on that date and at that time, the Plaintiff came to the police station and said that the Debtor,

> "who he has known on a friendship basis for about a year, came to his house on 12/24/2002 and told him that she needed $13,000 to pay an IRS debt. He kept refusing to give her any money but she was sobbing and telling him that she wasn't married and she was a doctor and she would be able to pay him back by April, 2003. [He] reluctantly agreed to lend her $10,000 only if she agreed to sign an I.O.U. and supply him with a receipt from the I.R.S. She agreed and together they went to the victim's bank where he withdrew two $5,000 bank drafts and gave them to the subject. They then went back to the victim's house where they drew up and signed an I.O.U. She also supplied the victim with a photocopy of her deed for her townhouse. Before leaving his house she invited him over to her house at 1700 hours [the next day] for dinner and she would give him the I.R.S. receipt then. When the victim arrived at the subject house, he was met by the subject's husband, Paul Baduch [sic] who stated he was not welcomed there and slammed the door in his face. Since that encounter the victim has been trying to make verbal contact with the subject via telephone but the subject's husband keeps answering and hanging up on the victim."[5]

The second version of the Plaintiff's story was told many months later to then-Town Justice John Curran. In a written decision rendered on December 2, 2003, after a bench trial in which this Plaintiff was prosecuted by the People of New York for allegedly having committed the offense of "Harassment in the Second Degree" by uttering two threatening statements to the Debtor's husband, Justice Curran stated "There are a number of disputes over immaterial facts, but the following facts are conclusively established by the testimony of both [this Plaintiff] and [this Debtor]: (1) [the Debtor]

[5]It was explained by the Debtor's attorney that this police report was never acted upon by the District Attorney because of the charges against this Plaintiff already filed by the Debtor and/or her husband for disturbing the peace at their home.

borrowed $10,000 from [this Plaintiff] on December 24, 2002, and agreed to repay him in the future; and (2) after [this Debtor] informed [this Plaintiff] that he was no longer invited to Christmas dinner and did not have the receipts he demanded, [this Plaintiff] insisted on immediate repayment of the loan. . . ."

So we see that in the first version, which the Plaintiff recited to the Orchard Park Police just forty-eight hours after the incident on December 25, the Plaintiff stated that the Debtor had told him she was single, but that when he went there for Christmas dinner on December 25, her husband was there and slammed the door in his face.

And in the second version, the Judge trying criminal charges against the Plaintiff in the Fall of 2003 found that this Plaintiff had been told by this Debtor not to come to the house. (Before setting forth the facts that had been "conclusively established," the Town Justice recited some less-certain findings, including the finding that Ms. Boduch had called the Defendant to cancel dinner "because her estranged husband would be visiting for Christmas dinner.")

In the current version, the third version, the Plaintiff claims that at all times he knew that the Debtor was married, that he regularly saw the Debtor's husband on almost a daily basis at all times leading up to the events in question, and that when he went to the Debtor's home at 5:00 o'clock on Christmas Day, no one answered the door bell or his knock and he went quietly home. (He has never denied having received a phone call from the Debtor telling him not to come to the home; but then again, he was not specifically asked this question here by the Debtor's counsel or by the Court. This fact is discussed later.)

FINDINGS

The Court is satisfied that the Plaintiff has given false testimony under oath when he states that there was no confrontation at the door of the Debtor's house on December 25, 2002. The Court derives this partly from the Debtor's own statement on December 27, 2002 to the Orchard Park Police, and partly from what the Town Court called the "conclusively established" fact that the Debtor had told him not to come to the house. (The testimony of Paul Boduch before this Court details that confrontation.) But the Court's conclusion derives as well from the fact that the Plaintiff never testified that he had ever asked in connection with the loan, "What about your husband? What does he owe? Why isn't he here?" If the Plaintiff is now telling the truth, then this omission makes no sense.

The Plaintiff's current story is that he knew that the Debtor was married all along and had seen the Debtor's husband on a regular basis right up to the time of the events in question, but why does he not simply testify today (consistent with the police report that he himself offered into evidence) that the Debtor's husband was home and slammed the door in his face?

It seems likely to the Court that the possibility, in the Plaintiff's mind, that the Debtor has proof that she had called to tell the Plaintiff not to come over (proof in the form of witnesses to her phone call, perhaps, or telephone records) necessitated that the Plaintiff simply ignore that issue, and fabricate a different reason (other than dinner) that he was at their home at that time, and deny that there was any confrontation at all.

And so this Court finds it more probable than not that once criminal charges were

lodged against the Plaintiff for the events at the Debtor's home, the Plaintiff inserted language in the promissory note about his entitlement to see an I.R.S. receipt (that is forgery) and claimed that that was why he was there at their home.

And now, in the third version of the events, he claims that there was no confrontation at all and that the police report filed against him was simply a clever con game by the Debtor and her husband, to intimidate and frighten him into leaving them alone. Plaintiff thus rests assured that if the Debtor does have proof that she had called him and told him not to come to dinner, he can simply say that he was there to demand the I.R.S. receipts, and not for dinner. And by denying the existence of a confrontation, he launches his scenario of the Debtor and her husband filing false charges against him as part of a "con game."

Although any falsehoods under oath are always serious, there is a more profound truth lying beneath the surface of the Plaintiff's decision to move to a third version of the events. That more profound truth is that if it were true (as the Plaintiff states) that he at all times knew that the Debtor was married and that he had seen her husband on a nearly daily basis right up to the event in question, there would have been no reason for the Debtor to call this Plaintiff at all to disinvite him to dinner. It would make no difference whether her husband was going to be at Christmas dinner or not. In fact, the Plaintiff would have expected him to be there and would have looked forward to seeing him.

And so the decision by the Plaintiff to fabricate a reason for being at the house even if the Debtor were able to prove that she had called to warn him off, leads the Court to conclude not only that the Plaintiff has testified falsely under oath about having seen the Debtor's husband regularly right

up to the events in question, but also in denying the existence of a much more substantial relationship with the Debtor than just a well-meaning neighbor.

As for the Debtor's version, she claims that she and her husband had been estranged for a number of months. She described how it came to pass that she met the Plaintiff, that they had had some casual interactions, and that it led to an affair of six or seven months duration. She testified that she and the Plaintiff were together at the Plaintiff's house early on Christmas Eve Day, 2002, and that she was disclosing her money woes and the Plaintiff offered to help her. She testified that later on Christmas Eve her estranged husband called and said that he wanted to come home to be with his family for Christmas, whereupon she called to convey this to the Plaintiff and told him that he must not come over.

Her husband testified that he knew nothing about the affair when the Plaintiff came to their house at 5:00 o'clock on Christmas Day and the Plaintiff was (by the husband's testimony) loud and abusive and threw around presents that he (the Plaintiff) had brought. (Some other family members were inside the home.) It was later that evening, according to the husband, that the Debtor explained to him the nature and extent of the relationship with this Plaintiff. She also testified that she never said to the Plaintiff that she had I.R.S. problems, but rather that she had numerous financial problems.

In evidence is a letter from her then-attorney to this Plaintiff, dated December 26, 2002, asking him to contact the attorney to arrange repayment terms. Plaintiff denies ever having received it.

Also provided are copies of numerous money orders that the Debtor purchased on

December 24, 2002, that were written to pay bills. In fact, over $8,000 of the $10,000 the Debtor received was immediately transmitted or delivered by the Debtor that very day to satisfy outstanding liens on her home, to pay health insurance and past due medical bills, past due automobile bills, current and past due homeowner's association assessments, to satisfy collection demands on various other debts, etc.

This belies any argument that the Debtor knew before she asked the Plaintiff for the money that her husband was returning, and wanted the $10,000 so that she and her husband could skip town or have a nice vacation. (That is not to say that her husband didn't benefit from some of the uses to which she put the money. The uses did keep the roof over their heads, health insurance in place, and a car in the garage.)

But in the end, it is not necessary for the Court to believe the story told by the Debtor or her husband. The burden of proving fraud is on the Plaintiff, and this Plaintiff cannot be believed.

The relief he seeks in his Complaint is hereby denied on the merits because of what the Court finds to be his false testimony under oath, as described above.

COUNTERCLAIMS

In the Answer, the Debtor and her husband assert Counterclaims. They seek $2500 in attorney's fees for their counsel, and damages of $15,000 to each Debtor. They point out that the Plaintiff has set out upon a calculated attempt to deceive and defraud this Court; that his actions in bringing the adversary proceeding "are baseless in nature and . . . solely an attempt to harass, oppress

and abuse the Defendants"; and that his various actions have caused the Debtors to suffer actual damages, including, but not limited to physical and emotional distress and financial damages.[6]

In Court, it was proven that this Plaintiff lives on the corner of the cul-de-sac on which the Debtors reside, and that he has used that location in a prolonged campaign to embarrass and demean the Debtors in an effort to collect this debt, and that he continued to do so after he learned of their bankruptcy. He did so by posting (on a pre-petition basis) and maintaining (on a post-petition basis) large signs on his corner-lot with such slogans as "Merry Christmas 2002," "No Honor Among Thieves," "Your last scam - watch out skunks," so that Debtors and their family and friends would have to drive by this display morning, noon and night, and so that all of the neighborhood would also have a constant reminder of what the Plaintiff asserts that the Debtors have done to him. He testified that all he has done is to merely "warn" the neighborhood against "scams" against unnamed predators.

But the Plaintiff admitted from the stand on cross examination that he would take the signs down if he got $10,000 from the Debtors. The Court concludes that he violated the automatic stay of 11 U.S.C. § 362. What is "free speech" before bankruptcy might become "debt collection activity" after. *See, e.g. In re Andrus*, 189 B.R. 413 (N.D. Ill. 1995); *In re Sechuan City, Inc.*, 96 B.R. 37 (Banks E.D. Pa. 1989); *In re Stongate Sec. Servs., Ltd.*, 56 B.R. 1014 (N.D. Ill 1986).

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[6]The bankruptcy filing stayed a state court suit by this Plaintiff in which he was attempting to get title to the Debtor's home based upon the theory that he loaned the $10,000 in exchange for ownership of or a mortgage on her home. He repeats this theory in his Complaint here. This theory is too frivolous to merit exposition in this Decision. The Court also finds that the Plaintiff has chosen to deny receipt of the 12/26/02 attorney letter offering payment terms. His efforts to take away the Debtor's home reinforce the Court's finding that he is lying about being a "mere neighbor" who tried to do a "good thing at Christmastime."

The matter of the amount of damages was taken under submission at trial.

11 U.S.C. § 523(d) recites that "If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the Court shall grant judgment in favor of the Debtor for the costs of, and a reasonable attorneys fee for, that proceeding, if the Court finds that the position of the creditor was "not substantially justified, except that the Court shall not award such costs and fees if special circumstances make the award unjust."

Pursuant to that authority, and for the reasons set forth above and also set forth by the Court in open court, the Court finds that the Plaintiff has proceeded on false and unjustified premises here,[7] and awards to the Debtors their attorney's fees and costs in the amount of $2500. For violations by the Plaintiff of the automatic stay, the Court awards under 11 U.S.C. § 362(h) punitive damages in the amount of $1500 per Debtor. (This Court has regularly awarded $1500 in many cases over the years for a knowing violation of the stay against any one debtor).

Debtors' counsel may submit an Order directing the Clerk to enter money judgment against the Plaintiff in the total amount of $5500. The language of such Order and such judgment is to be consistent with counsel's understanding between himself and his clients as to the pursuit and distribution of any recoveries from the Plaintiff.

All other prayers for relief by the Plaintiff or by the Debtors have been considered and

[7] Again, truthful arguments might have prevailed here.

are rejected. However, the Plaintiff is admonished that 11 U.S.C. § 524 protects the Debtors from any efforts to collect the debt that had been owed to the Plaintiff and is now declared "discharged." This Court would consider any new public "displays" of any sort against the Debtor to be a violation of that federal statute. "Vigilante justice" is not permitted under the federal laws addressing discharge in bankruptcy.

SO ORDERED.

Dated: Buffalo, New York
March 31, 2005

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U.S.B.J.