UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

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In re

ROBERT R. BUSCH and
MARY L. BUSH

Case No. 00-14207 K

Debtors

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ROLAND M. CERCONE

Plaintiff

-vs-

AP No. 01-1277 K

MARY L. BUSCH

Defendant

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The facts are uncontradicted because the Defendant did not testify. Thus, her denials contained in the Answer and other documents were not subject to cross examination and are not "evidence." As stated at 57 N.Y.Jur.2d, *Evidence and Witnesses*, § 126,

> The failure of a party to a civil action to testify as to matters upon which he or she is or should be informed permits every inference warranted by the evidence introduced to be indulged against him or her or permits the court to draw the inference most favorable to his or her adversary. Stated somewhat differently, the strongest inferences that the opposing evidence will permit may be drawn against a party who fails to testify. [Authorities omitted] (2000).

The matter of "inferences" here is particularly important because dischargeability in this case depends upon the Defendant's subjective state of mind - whether the promises she made at the time the Plaintiff considered lending money to her son[1] were "knowingly false" at the time they were made.[2] Of course, it is impossible to establish that by direct proof. It may only be established indirectly by inference from the provable facts, if at all.

The "strongest inferences that the . . . evidence will permit may be drawn against a party who fails to testify," as stated above. Here, consequently, the Court will infer that on April 20, 2000, when Mary Busch promised in writing that she would "sign over as collateral all her properties," [Plaintiff's Exhibit 3] this was a false promise, a promise that she did not intend to keep when she made it. Moreover, the Court accepts the testimony of the Plaintiff that the properties in question were those reflected on Plaintiff's Exhibit 4, which the Plaintiff testified

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[1] In a sworn declaration contained in the file, she denies having made any promises to the plaintiff at that time. Trial Exhibit Plaintiff's #3 is decidedly to the contrary.

[2] As to the matter of "promissory fraud" see R. Alston Hamilton, *Tennessee's Long-Awaited Adoption of Promissory Fraud: Steel Realty v. Oveisi*, 59 Tenn. L. Rev. 325 (1992).

were notes he took during their discussion of that date. Mary Busch had represented that she owned a car lot with offices on Route 31 in Middleport worth approximately $70,000, an apartment house at 12 Maple Avenue (town unknown) worth $75,000, a storefront on Main Street in Middleport worth $50,000, property at 18 Maple Avenue in Middleport worth $79,000, an undeveloped lot on Mountain Road worth $15,000, a lot on Route 104 in Medina worth $15,000 and stock worth $100,000, all of which she claimed had no liens against them. The Plaintiff later learned that they all were subject to liens, though no evidence informed the Court as to when they became encumbered.

Assuming her representations to have been false does not end the inquiry. The United States Supreme Court has required that in order to sustain a dischargeability complaint under 11 U.S.C. § 523(a)(2)(A) the plaintiff must establish by a fair preponderance of the evidence that the plaintiff's reliance on false representations was "justifiable." *Field v. Mans*, 516 U.S. 59 (1995).

By no stretch of the imagination was the Plaintiff's alleged reliance on the Debtor's false promises "justifiable." Rather, by his own testimony, he had met the Debtor and her son only twice; they did not solicit him, it was he who solicited them; she "reminded him" of his own mother; they were willing to pay 20% interest while his money was earning perhaps 18% interest in a brokerage account; he conducted no investigation whatsoever of the creditworthiness of the Debtor or the value of her assets other than to discuss them with her; any supposition he might have made regarding the Debtor's *bona fides* in light of her acquaintance with his landlord and her having been able to obtain a loan from another individual, would be his own surmise,

speculation, and conjecture not based on any representations of the Debtor.

To be sure, the *Field v. Mans* case makes clear that the Plaintiff need not establish that he acted as a "reasonable person" in lending the Debtor and her son over $200,000 on such a brief and cursory acquaintance with them. But something more than "mere actual reliance" is necessary. Here, the Court does not doubt that the Plaintiff did "actually rely" on the Debtor's representation that she owned these various properties free and clear: clearly if she had said that everything that she owned was fully encumbered he would not have extended the loan to her son. But for a sophisticated, intelligent, experienced attorney (though not experienced in commercial loans or debtor/creditor matters) to fail even to obtain a written financial statement, a credit check, mortgages or titles, etc. before handing over more than $200,000 to people he barely knew, was not "justifiable reliance" upon her puffed-up statements as to her assets. To hold otherwise would turn every falsehood in connection with borrowing into "fraud." A falsehood that would never have resulted in loss to the lender but for the lender's gross inattention to the most basic and fundamental self-protective resources (a credit check at the least) is simply that - a falsehood. Even assuming fraudulent intent on the part of the Debtor does not suffice to establish fraud in law. Justifiable reliance is an essential element.

No evidence has been offered to suggest that the Debtor and her son were involved in any sort of fraudulent scheme as of the time that Plaintiff made the loan. No evidence was introduced as to where the more than $200,000 went in fact, though it seems that it may have been used for its intended purpose, which was to pay off a higher-interest-rate business-related loan. The evidence belies any suggestion that the Debtor and her son set out to

prey on the Plaintiff. It also belies any notion that they utilized the fact that they had been able to borrow from another lender to attempt to persuade the Plaintiff that their promises were true. And there is no evidence that the Debtor's bankruptcy was being contemplated at the time of the loan.

Rather, the evidence bespeaks an attorney who took a liking to some clients of another attorney after having met them in the vestibule of the building, saw a mutually advantageous relationship, offered it to them, took at face value their representations about their assets, and sent them off with over $200,000 of his money and with his blessings.

Again, the possibility that this Plaintiff presumed that the Debtor was creditworthy because others may have found her so to be, may not assist him in claiming that he was defrauded, for purposes of 11 U.S.C. § 523(a)(2)(A) and *Field v. Mans*. He should have performed some investigation. Surmise, conjecture, speculation and guesswork on the part of the lender are not, in this Court's view, part of the "experience," "knowledge," "intelligence" and "sophistication" that the Supreme Court focused upon in *Field v. Mans*.

Finally, it was argued that the Debtor's failure to fulfill her promises to the Plaintiff was a "wilful and malicious injury" under 11 U.S.C. § 523(a)(6). Perhaps it was. But the Code does not exempt from discharge every wilful and malicious breach of promise. Rather, it exempts only "any <u>debt</u> for wilful and malicious injury by the debtor . . . ." The "debt" that the Plaintiff might complain of under this provision cannot be the $221,599.95 that he loaned, because that event preceded any possible "wilful and malicious" failure of the Debtor to deed her properties, etc. to the Plaintiff. The "debt" so created could only be the actual value of the

properties. No evidence was introduced as to their actual value, encumbered as they apparently were. He cannot claim that her "wilful and malicious" refusal to convey resulted in damages that should be measured as if she never lied about the net value of the properties in the first place. She never promised anything more than to convey her properties. She did not promise to go out and get valuable property to pledge to him. Her representation as to their value came before her failure to convey them, and cannot be part of any "wilful and malicious" breach of the promise to convey. The damages flowing from the failure to convey cannot exceed the value of the properties at the time they were to be conveyed, and no evidence of that value was offered.[3]

Finally,[4] if the "wilful and malicious" act claimed is that earlier representation of the value of the properties, then no evidence has been introduced to show that at the time that representation was made, it was false. Moreover, 11 U.S.C. § 523(a)(6) requires a finding of "intent to harm"(*Kawaauhau v. Geiger, (In re Geiger)*, 523 U.S.57 (1998)), and to adopt an inference of such intent from the Debtor's failure to testify when § 523(a)(6) was never actually pled, is simply further than this Court is willing to reach. (We must not forget that this was not a

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[3] A failure to convey ownership may be likened to conversion of the property of another. And because there is no evidence here of when the properties became encumbered or in what amounts, the Debtor's failure to convey here might best be likened to conversion of property of fluctuating value. It has been said that "[I]n the case of the conversion of 'property of fluctuating value, the damages are limited to the difference between the proceeds of the conversion, or that portion thereof duly paid or credited to the owner, and such higher value as the property may have reached within a reasonable time after the owner had notice of the conversion.'" *In re Booher*, 284 B.R. 191, 216 (Bankr. W.D. Pa. 2002), (quoting from 37 *P.L.E. Trespass* § 111 at 474). Restated for purposes of this case, and pretending that it is possible to convert land, we may think of this as a case in which the subject lands and personal property were "owned" by the Plaintiff and were converted by the Debtor. We have no evidence of what the value of the property was at the time of conversion nor of the highest value reached by the property (in other words, the point of lowest encumbrances) during the time that the Plaintiff was struggling with the Debtor and her son to get them to perform their promises.

[4] The Debtor also argues that the loan was usurious, the limit being 16% in New York. The cases are unclear as to the point at which the defense of usury might be waived, and as to who may raise the defense (the debt here was her son's, not hers, when the loan proceeds were handed over), among other things.

sales transaction; per the evidence, it was a loan to the Debtor's son, for a business purpose. For the Court to infer that she intended to harm this Plaintiff in overstating her assets would require that the Court also infer that she somehow knew that the loan could or would not be repaid. There is no evidence to suggest that she knew anything about her son's creditworthiness, or her son's business' creditworthiness, one way or the other. All we know is that the loan, in fact, was not repaid.)

The Complaint is dismissed on the merits, without costs to either side.

SO ORDERED.

Dated: Buffalo, New York
October 31, 2003

/s/ Michael J. Kaplan

U.S.B.J.