

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

IN RE:

JEANETTE A. FENTI

CASE NO. 92-22400

Debtor.

DEBORAH C. MESSMER,

AP NO. 92-22400

Plaintiff,

-v-

JEANETTE A. FENTI,

Defendant.

DECISION AND ORDER

Having heard the testimony and observed the credibility of the witnesses at trial on May 13, 1993, the Court makes the following additional Findings of Fact and Conclusions of Law to supplement those placed on the record pursuant to Rule 9052 at the end of trial.

FINDINGS OF FACT

1. By their own testimony, Plaintiff, Deborah C. Messmer, ("Messmer") and Defendant, Jeanette A. Fenti, ("Fenti") were lovers who lived together from December 1978 until December 1986 or January 1987.

2. In April 1985 Fenti was fired from Perri Debes Looney & Crane ("Perri"). At that time she executed an affidavit of Confession of Judgment in favor of Perri for \$61,518.81. Fenti's acts which resulted in her being fired and executing the Confession of Judgment also resulted in her being arrested in the summer of 1985 on felony charges for embezzlement and grand larceny.

3. Fenti advised Messmer fully as to the nature and extent of the Perri matters when she was fired in April 1985, when she was arrested in the summer of 1985 and at other times as the Perri matters developed.

4. In October 1985 Fenti requested that her brother, Valentine Fenti, loan her \$15,000 to purchase inventory for the holiday season for her corporate retail business, Birenti, Inc. ("Birenti"). By his own testimony Valentine Fenti would not make the loan without what he deemed to be sufficient collateral because prior loans had not been repaid timely and he was concerned that Fenti was struggling.

5. In October 1985 Fenti advised Messmer of her brother's refusal to make the loan and the reasons for his refusal, and she requested that Messmer cosign a loan from her brother. Messmer refused. When Messmer refused to cosign the proposed loan, Fenti emphasized their personal relationship and accused Messmer of not supporting her.

6. Later in October 1985 Messmer did agree to a series of transactions where she borrowed \$15,000 from Valentine Fenti and then loaned the \$15,000 to Fenti for her to use in her business. At that time the business was Fenti's sole source of support, the only source of funds which would among other things enable her to contribute to the parties joint living expenses and attempt to resolve the Perri matters.

7. Fenti represented to Messmer that over the holiday season she could sell the purchased inventory for a gross amount of approximately \$45,000. From her experience as the General Manager of The Birenti Store for approximately three (3) years in the early 1980's and her continuing familiarity with the business, Messmer knew that this was possible.

8. When Messmer loaned the \$15,000 to Fenti she knew that: (a) The inventory purchased with the loan proceeds could be sold for three times its cost based on the store's mark-ups; (b) Fenti had felony charges pending against her and a substantial civil judgment entered against her in favor of her former employer (it was substantial regardless if the amount was \$30,000 or \$60,000); (c) Fenti had two attorneys representing her in connection with the Perri matters; (d) Fenti's own brother would not lend her \$15,000 for the business without collateral; and (e) Fenti could not obtain a loan for the business from conventional sources including her own bank.

9. Messmer's primary motive in making the October 1985 loan to Fenti was personal. She felt she needed to prove to Fenti the strength of their relationship and to show support for her lover. In addition, the success of Fenti's business was her only way to generate funds to resolve the Perri matters and to continue to contribute to the household expenses and their ongoing relationship.

10. Fenti did not intend to file bankruptcy individually and for Birenti at the time the loan was obtained from Messmer. After the loan was obtained from Messmer, Fenti's attorneys determined that the only way to protect her and her business from the Perri Civil executions, since an anticipated settlement could not be achieved, was to file individual and corporate bankruptcies. Before the cases were filed Fenti, on the further advice of her attorneys attempted to protect Messmer by making it appear that Messmer was a perfected secured creditor of Birenti and not a personal creditor, since Birenti was the only realistic short-term source for the repayment of the Messmer loan.

11. The loan from Messmer to Fenti was a personal obligation. The obligation was not discharged by the 1985 Birenti bankruptcy case nor by the 1985 Fenti bankruptcy case because Messmer was not scheduled in the bankruptcy and at this trial the evidence indicates that she did not have actual knowledge of the individual case in time to file a timely proof of claim or a complaint to find the debt nondischargeable. However, it is clear that the debtor, Fenti, never really contested this either in State Court or in this Court.

12. At the time of the loan to Fenti, Messmer never attempted to fully investigate the financial condition of Fenti or her business or the actual status of the Perri civil and criminal matters. Although an intelligent and articulate woman, overly careful in many of the insignificant details of the transactions, Messmer did not exercise any, let alone reasonable care, in these details where warning signs were so clear. Given her personal relationship with Fenti and her knowledge of the business as a former store manager, an investigation would have been easy to accomplish and meaningful. Messmer during the trial even referred to Fenti's attorneys who were handling the Perri matter as Larry and Mike. Messmer chose to act with respect to the loan transaction as a lover and personal friend rather than in any reasonable way as a lender.

13. Fenti made payments on the loan to Messmer for approximately one year after the January 1986 maturity date of the Messmer loan.

14. Fenti's actions from the time of the Messmer loan through the end of 1986 indicate her intention to repay the loan and to protect Messmer as much as possible. From her testimony it appears that Messmer almost went out of her way not to investigate these matters, even though she lived with Fenti and could clearly have obtained all the detailed information she needed.

CONCLUSIONS OF LAW

1. By the evidence produced at trial, Messmer has failed to meet her burden to show by the preponderance of the evidence that Fenti obtained the \$15,000 loan by false pretenses, false representations or actual fraud as required under 11 U.S.C. §523(a)(2)(A).

2. Fenti did intend to repay the loan to Messmer when she obtained the loan from Messmer in October 1985.

3. Fenti did not intend to file bankruptcy at the time she obtained the loan from Messmer in October 1985.

4. Fenti did not misrepresent to Messmer the condition of her business or the nature and extent of the Perri matters at the time she obtained the loan from Messmer in October 1985, to the extent Fenti may have represented that the business was sound or that the Perri matters would not affect her business or her ability to repay the loan to Messmer, it was unreasonable for Messmer to rely on any such representations Fenti may have made without investigating them further, given all of the facts and circumstances Messmer was aware of in October 1985.

5. Fenti at the time of the 1985 loan did not make any representations to Messmer which she believed were false or with an intent to deceive Messmer.

6. Messmer made the loan to Fenti primarily to strength their personal relationship, to show support for her lover at a crucial time, and to give lover her a chance to succeed in her business for the benefit of both Fenti and Messmer.

IT IS SO ORDERED.

/s/

HON. JOHN C. NINFO, II
UNITED STATES BANKRUPTCY JUDGE

Dated: May 24, 1992