UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

LEONARD A. MANCUSO, JR. Case No. 92-14022 K

Debtor

ANGELA LoPINTO

Plaintiff

-vs- AP 93-1105 K

LEONARD A. MANCUSO, JR.

Defendant

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MEMORANDUM AND ORDER

The U.S.C. § 707(a) Request.

Angela LoPinto's request that this Chapter 7 case be dismissed under 11 U.S.C. § 707(a) "for cause" consisting of a "lack of good faith" on the part of the Debtor, Leonard Mancuso, is

denied.[1] Although the case of *In re Zick*, 931 F.2d 1124 (6th Cir. 1991) and similar cases may have reached appropriate results, they did so for reasons with which this Court does not agree, and those cases do not persuade this Court that 11 U.S.C. § 707(a) imposes a threshold "good faith" test on Chapter 7 Debtors. To the contrary, this Court finds that Congress rejected such a broad scale test when it enacted a different provision, § 707(b) in 1984; Chapter 7 debtors are not subject to the burdens of responding to threshold inquiries of the sort raised here.

The *Zick* line of cases theorizes a threshold requirement that appropriate statutory construction does not erect. There is no reason to conclude that a "lack of good faith" is among the types of "cause" Congress intended. This Court regularly dismisses Chapter 7 cases "for cause" under § 707(a). Among the statutorily-unenumerated "causes" recognized by this Court are: the Debtor reaches an agreement with his or her creditors, who thus do not require the efforts of a Trustee on their behalf; the Debtor wins or inherits sufficient funds to pay all creditors and all consent to dismissal; and the Debtor is ineligible for discharge, has no assets, and should not have filed bankruptcy. Thus, the authority to dismiss "for cause" is not superfluous when a "lack of good

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[1]Although not a "legally operative fact," Lo Pinto and Mancuso are sister and brother. It does serve to explain the unusual facts.

faith" is not recognized as an appropriate basis for dismissal.[2]

11 U.S.C. §§ 305, 523 and 727 amply protect creditors against a Debtor's pre-petition and post-petition wrongdoing. LoPinto's Section 707(a) motion seeks to circumvent the fact that creditors are expressly prohibited from making a motion under 11 U.S.C. § 707(b), and the fact that that provision imposes a threshold test only as to debtors having primarily "consumer"-type debts.

Consequently, the Creditor's Motion to Dismiss the case is denied. The Debtor's motion to dismiss the concomitant cause of

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[2]It is regrettable that there is no readily-available published record of the lending industry's efforts to impose a threshold test between 1979 and 1984, resulting in the 1984 enactment of Section 707(b). Even so, it is difficult to reconcile the *Zick* result with the record that does exist. For example, at 130 Cong. Rec. S7624, S7625 (June 19, 1984) one Senator is quoted as saying "I am extremely pleased that this bill prohibits creditors from filing motions attempting to deny bankruptcy relief to individuals because of substantial abuse. If a creditor asks a court to dismiss a case claiming that there has been substantial abuse of the bankruptcy laws by the debtor, the court would not be allowed to do so. ... This will preclude creditors from making bankruptcy too expensive for the debtor by filing harassing motions alleging substantial abuse."

In the view of the Court, LoPinto's Section 707(a) claim is nothing more than an impermissible "substantial abuse" claim.

LoPinto argues that this Court's earlier decision to invoke the Adversary Proceeding rules in this matter in order to provide the Debtor with procedural safeguards attendant to Adversary Proceedings, sufficiently shelters a Chapter 7 Debtor from frivolous or vexatious 11 U.S.C. § 707(a) motions. The Court disagrees. Upon reflection it appears that by not ruling upon the Motion in a Rule 9014 setting, the Court needlessly increased the burdens upon the parties with regard to paperwork and appearances.

the Creditor's Complaint is granted.

The U.S.C. § 523 Claims

1. Preclusion, Estoppel, Waiver

The Debtor's Motion to Dismiss the Creditor's 11 U.S.C. § 523(a)(4) claim on grounds of waiver, estoppel, preclusion or the like is denied without prejudice to renewal if the Debtor can prove that the stipulation by which LoPinto withdrew her "fiduciary fraud" claims from consideration by the arbitrators was a "release" of the fraud claims or a voluntary dismissal "with prejudice" against renewal of the fraud claims.

Mancuso argues that LoPinto sued both on the "standard commercial guarantee" of corporate debts and on "breach of fiduciary duty" causes of action, but prevailed only the guarantee because the "breach of duty" claim was withdrawn. He would place the burden upon Lo Pinto to prove that she is free now to assert the "breach of fiduciary duty" cause of action that he claims she "waived" before the arbitrators.

But neither party could provide to the Court any evidence of the nature or content of the agreement by which such claims were withdrawn, and it seems clear that it is estoppel or waiver that is at issue here, rather than res judicata or merger. Consequently, the Debtor must carry the burden of proving the elements giving

rise to the waiver or estoppel. The mere fact that LoPinto sued both in contract and tort but chose (with the Debtor's consent) to submit only the contract claim to the arbitrators does not of itself establish waiver or estoppel to assert tort.

The question is not dissimilar from a classic question in bankruptcy law: Does a fraud claim survive a settlement agreement if the settlement agreement mentions nothing about fraud?[3]

On the one hand it seems reasonably clear that if the Debtor expressly stipulates to a finding of fraud of the type that is non-dischargeable in bankruptcy, he or she might be held to that stipulation if bankruptcy ensues and the creditor seeks a judgment of non-dischargeability based upon fraud.

Conversely, if a creditor stipulates to accept a promise of payment and to release any fraud claims in exchange for that promise (or for any other bargained-for consideration), then the creditor might be held to that release when bankruptcy ensues.

What is far less dispositive is a stipulation that is silent on the issue of fraud. If, as the Debtor claims, LoPinto sought to withdraw her "fiduciary fraud" claims because she believed she could not prove them, then perhaps he should have put her to her proof or bargained for a release of the tort claim, and

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[3]For a thorough examination of this complex issue, see Ferriell, "The Preclusive Effect of State Court Decisions in Bankruptcy -- Second Installment,", 59 Am. Bankr. L.J. 55 (Winter, 1985).

not simply have consented to withdrawal of that claim from the arbitrators.[4]

In bankruptcy cases it must be recognized that a creditor like LoPinto is not asserting a fraud claim merely in an effort to supplement (in a piecemeal fashion) the contract award she received. Rather, Mancuso has sought a bankruptcy discharge, and LoPinto's claim is going to be discharged if LoPinto does not take affirmative steps to establish its non-dischargeability. Under these circumstances, LoPinto may attempt to establish fraud or fiduciary defalcation until the Debtor proves that that right was lost, extinguished, waived or estopped. Perhaps it was, but Mancuso has not so proven.

2. The Merits of the "Fiduciary Duty" Claim

The Debtor's Motion to Dismiss LoPinto's § 523(a)(4) claim is denied, without prejudice.

Treating the Motion as a Rule 12(b)(6) motion (F.R.Civ.P.), the Court is not convinced that a defalcation in a fiduciary capacity would not be established in LoPinto's favor if

[4]Even obtaining a judgment on the merits dismissing the tort claims possibly might not have protected Mancuso, since the case of *Grogan v. Garner*, 111 S.Ct. 654 (1991) lessened the standard of proof in fraud claims under Section 523. Fraud claims under the laws of this State must be proven by "clear and convincing evidence," but under Section 523 need be proven only by a "fair preponderance.

all of her allegations are taken as true.

Treating it as a Rule 56 motion (F.R.Civ.P.), a genuine dispute exists as to issues of material fact regarding whether the parties' conduct, together with the various agreements, gave rise to a technical trust and, if so, whether there was a defalcation.

The argument that no fiduciary relation could ever be found under such agreements for purposes of § 523(a)(4) and of *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934) is rejected. Together with appropriate conduct, the requirement of co-signatures and the limitations placed on the permissible uses of the loan advances could give rise to (1) fiduciary duties between the parties that are not ex maleficio duties,[5] or (2) the type of "embezzlement" asserted by LoPinto in her brief. Cases cited by Mancuso supposedly to the contrary are not truly to the contrary; they are determinations after trial and deal with the sufficiency of the proof.[6]

Admonition

Finally, the Court directs a further amendment to the pleadings. The Complaint is a potpourri of conclusory allegations,

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[5]For a non-bankruptcy example, see *Sher v. Sandler*, 90 N.E.2d 536 (Mass. 1950).

[6]E.G., *Matter of Richey*, 103 B.R. 25 (Bankr. D. Conn. 1989).

some sounding in various provisions of 11 U.S.C. § 727, some sounding in 11 U.S.C. § 523, and some roaming freely through bankruptcy and non-bankruptcy jurisprudences. LoPinto is directed to focus on her theories and frame her causes accordingly. The Court refuses to submit to efforts to foist correspondence regarding hundreds of transactions upon the Court, for the Court to sort out and evaluate. (Nothing has been placed or stipulated in evidence by either party, other than the arbitrators award and state court judgment. All other "exhibits" are mere proffer, at this juncture.)[7]

The parties are cautioned that this Court will not relitigate facts that were litigated before the arbitrators and decided, and any effort to mislead the Court in those or other regards will be sanctioned under Rule 11, Fed. R. Civ. P. and Bankruptcy Rule 9011.

Furthermore, the parties are reminded that Complaints under 11 U.S.C. § 727 may not be settled upon any terms that would violate 18 U.S.C. § 152 or that would prefer the plaintiff over other creditors. Consequently, § 727 complaints typically require trial, with its consequent expenses.

The Complaint shall be amended in accordance with the above within 30 days from the date below.

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[7]See Rule 56(e) for the manner of asserting "facts" thereunder.

A further scheduling conference will be conducted on September 7, 1993, at 9:00 a.m.

SO ORDERED.

Dated: Buffalo, New York
August 6, 1993

U.S.B.J.