

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

Case No. 01-11356
Chapter 7

Robert C. Rabuck,

Debtor.

HSBC Bank, U.S.A.,

Adv. Proc. No. 01-90200

Plaintiff,

vs.

Robert C. Rabuck,

Defendant.

Appearances:

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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum Decision & Order

Before the court is an adversary proceeding filed by HSBC Bank, USA (“HSBC” or “Plaintiff”) seeking a determination that a debt owed to it by Robert Rabuck (“Debtor”) is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(4).

Facts

Based upon the submitted pleadings and the evidence presented at trial, the court finds the following:

The Debtor was a vice-president, commercial loan officer and a regional sales manager in the banking industry; he was in banking for sixteen years, working his way up from his initial position as a management trainee. At trial he testified he was a self employed commercial mortgage broker.

Prior to August 6, 1998, the Debtor and Mr. John Caputo entered into a business relationship for the purpose of acquiring and operating a gas station/restaurant off Exit 11 of the Northway. They formed a corporation, Exit 11 Enterprises, Inc., with the Debtor owning 49% and Mr. Caputo owning 51% of the company. In order to acquire the property, Exit 11 Enterprises borrowed \$75,000 from Michael Assaf (“Assaf Loan”). Both Mr. Caputo and the Debtor guaranteed repayment of the Assaf Loan.

After acquiring the Exit 11 operations, the Debtor and Mr. Caputo decided to form another corporation, Plank Road Realty, Inc. (“Plank Road”), for the purpose of acquiring another gas station located off Exit 9 of the Northway. The Debtor owned 49% and Mr. Caputo owned 51% of Plank Road. In order to acquire and improve the Exit 9 property, HSBC¹ entered into a loan agreement with Plank Road where HSBC agreed to lend money to finance the acquisition and renovation of the convenience store/gas station (“Plank Road Loan”). Mr. Caputo and the Debtor guaranteed the Plank

¹The original lender was Marine Midland Bank (“MMB”). Subsequently, HSBC acquired MMB.

Road Loan.

On August 6, 1998, the Plank Road Loan closed and \$332,000 was disbursed as set forth in the United States Small Business Administration Settlement Sheet (“Settlement Sheet”). The Debtor signed the Settlement Sheet as president of Plank Road; Mr. Caputo did not sign it. According to the Settlement Sheet, the funds were supposed to be disbursed as follows: \$217,000 to King Services, Inc. for the purchase price of the property and the franchise rights; \$40,000 to Plank Road for renovations; and \$75,000 to Plank Road for removal and replacement of underground tanks. The \$75,000 check was made payable to Plank Road and Capital Framing Corporation (“Capital Framing”) and was distributed pursuant to a Capital Framing invoice dated June 15, 1998.

At trial, HSBC could not establish whether the Debtor or Mr. Caputo submitted the Capital Framing invoice for payment. However, Mr. Joseph Clark, the owner of Capital Framing, credibly testified that neither he nor anyone from his company prepared the invoice and that he did not have any knowledge of the transaction. The Debtor freely admitted to signing Mr. Clark’s name on the check, without authorization, and using the \$75,000 to pay off the Assaf Loan. (Tr. 80-82.)

The parties have stipulated that on September 30, 1999, HSBC executed a release of the Debtor’s personal guaranty of the Plank Road Loan (“Release”). (Stip. ¶ 10.) The Release plainly states,

Upon the execution of this Agreement by all parties and compliance with the applicable provisions hereof, HSBC will release the personal guaranty of Robert Rabuck on all indebtedness of Plank to HSBC. Release will be effected by return of his original guaranty. (Ex. 15).

Arguments

In its first cause of action, HSBC contends the Debtor fraudulently represented that Capital Framing had performed work on the Exit 9 property, that he knew this representation was false, and that he made the misrepresentation was made to induce it into advancing funds. HSBC claims it reasonably relied on the Debtor's representation. In its second cause of action, HSBC alleges the Debtor committed embezzlement and larceny.

The Debtor contends HSBC has failed to offer any evidence supporting its allegation that he submitted the false invoice. He further argues HSBC has failed to establish he committed larceny or embezzlement. Finally, he reasserts the affirmative defense of release that he raised in his answer.

In its reply memorandum, HSBC repeats its argument regarding its section 523(a)(2)(A) and section 523(a)(4) causes of action. Regarding the Debtor's affirmative defense of release, it contends the Release only covered the Debtor's original guaranty, not the Plaintiff's causes of action for fraud and/or larceny.

Discussion

I. 11 U.S.C. § 523(a)(2)(A)

This court has, on numerous occasions, discussed the requirements of 11 U.S.C. § 523(a)(2), but unfortunately, neither party has utilized any of these decisions. *See Eastern Funding v. Domenici*, Adv. Proc. No. 99-10829 (Bankr. N.D.N.Y. September 18, 2001); *Such v. Keplinger*, Adv. Proc. No. 00-90176 (Bankr. N.D.N.Y. May 1, 2002); *Amex v. Orul*, Adv. Proc. No. 01-12543 (Bankr. N.D.N.Y. July 2, 2002); *Ayerst FCU v. Gregoire*, Adv. Proc. No. 00-11564 (Bankr. N.D.N.Y. August 1, 2002); *Renner v. Marcucio*, Adv. Proc. No. 01-10321 (Bankr. N.D.N.Y.

August 21, 2002). In a recent analysis of 11 U.S.C. § 523(a)(2)(A), the court articulated its requirements, stating, “[c]ourts interpreting this subdivision have concluded that a successful plaintiff needs to demonstrate, by a preponderance of the evidence, that: (1) the debtor made a representation; (2) he knew the representation was false; (3) he intended to deceive the creditor; (4) the creditor relied on the representation; and (5) his reliance was the proximate cause of his damage.” *Gregoire*, p. 5 (citing *Grogan v. Garner*, 498 U.S. 279, 286-288 (1991)).

Based upon the facts presented and despite the Debtor’s argument to the contrary, the court finds the Plaintiff has satisfied its burden of proving the Debtor submitted the manufactured invoice. The Debtor signed the fictitious invoice accompanying the Settlement Sheet as president of Plank Road. Mr. Caputo did not sign the Settlement Sheet. Furthermore, the Debtor had been in banking for over a decade and was obviously familiar with the paperwork accompanying commercial loans. Most significantly, the Debtor forged Mr. Clark’s name on the back of the \$75,000 check made payable to Plank Road and Capital Framing and then used that money to pay off the Assaf Loan, another loan he had guaranteed. Based on these facts, the court finds the Debtor’s claim that he did not know about the manufactured invoice implausible and further finds he was aware of and utilized the manufactured invoice. Therefore, the Debtor made a representation he knew was false.

The facts establishing the Debtor submitted the manufactured invoice also leads the court to conclude he intended to deceive the creditor. Because courts are aware that a debtor will not admit to harboring an intent to deceive, the objecting party may prove it by circumstantial evidence and it may be inferred from the totality of circumstances, including an individual’s reckless disregard for the consequence of his or her actions. *In re Bonnanzio*, 91 F.3d 296, 300 (2d Cir. 1996). Once again,

the most telling factor is the Debtor immediately negotiated the \$75,000 check without authorization and used the funds to pay off the Assaf Loan, a loan not connected to the Plank Road Loan or the Plank Road project.

Finally, it is not disputed that HSBC relied on the manufactured invoice in releasing the \$75,000. This reliance was the proximate cause of its damage. Therefore, the Plaintiff has satisfied its burden of establishing all elements of 11 U.S.C. §523(a)(2)(A) regarding a \$75,000² debt.

II. 11 U.S.C. § 523(a)(4)

The court also concludes the Plaintiff has established the elements of 11 U.S.C. § 523(a)(4) regarding the same \$75,000 debt. The court has already determined above that the Debtor obtained the \$75,000 check by fraudulently submitting the false Capital Framing invoice, cashed the check by committing forgery and used the funds to pay off a loan unrelated to Plank Road. Therefore, because the Plaintiff proved, by a preponderance of the evidence, that the Debtor committed larceny under state law by wrongfully obtaining HSBC's money and using it for his own benefit, the debt is also nondischargeable pursuant to section 523(a)(4). N.Y. Penal L. § 155.05(1) (McKinney 1999); *See In re Sokol*, 170 B.R. 556 (Bankr. S.D.N.Y. 1994), *aff'd*, 181 B.R. 27 (S.D.N.Y. 1995).

III. The Release

The Plaintiff has stipulated to, and does not deny the existence of, the Release. The Debtor has raised "release" as an affirmative defense. While not conceding any legal conclusion the court can draw

²The complaint alleges \$524,700 in damages. However, HSBC has not presented any evidence to support a finding beyond \$75,000.

from the facts, the Debtor contends the Release bars any recovery under section 523. The court does not agree.

The Second Circuit has instructed that when the words of a release are clear and entered into in a commercial context with parties of equal position, the release must be construed “most strongly against the releasor” and the burden is on the releasor to establish that it should be limited. *Middle East Banking Co. v. State Street Bank International*, 821 F.2d 897, 907 (2d Cir. 1987).

Moreover, the Second Circuit has stated, “[t]he traditional bases for setting aside written agreements, namely, duress, illegality, fraud or mutual mistake, must be established or else the release stands.” *Id.*

The \$75,000 check the Debtor fraudulently obtained and/or stole from HSBC was part of the \$332,000 Plank Road Loan. His personal liability for that loan stemmed from the guaranty he executed. However, although the Release specifically discharges the Debtor’s personal guaranty, it does not contain the clear and all-inclusive language of a general release. *See Mar Co. Export, Inc. v. Banco De Santander-Puerto Rico*, 99 A.D.2d 403 (2d Dep’t 1984). As found above, the Release provides solely for the release of the Debtor’s personal guaranty of Plank’s indebtedness to HSBC. The liability at issue, however, stems from the Debtor’s fraud in obtaining and/or larceny of the \$75,000, not for the corporation’s use or benefit but for his own. Since the Release does not release “any and all claims” HSBC has against the Debtor personally, or even “any and all claims” arising from the Plank Road transaction, it does not bar the Plaintiff from pursuing him using another theory of recovery like fraud or larceny. *See In re Fischer*, 116 F.3d 388 (9th Cir. 1997).³

³While the Plaintiff has successfully argued that the Debtor obtained a portion of the Plank Road Loan by fraud and/or larceny, it does not contend that either of his actions constitutes grounds to

Accordingly, it is

ORDERED that the \$75,000 the Debtor owes HSBC is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(4); and it is further

ORDERED that HSBC shall prepare and submit a judgment consistent with this decision.

Dated:

Albany, NY

Honorable Robert E. Littlefield, Jr.
United States Bankruptcy Judge

set aside the Release. *Middle East Banking Co.*, 821 F.2d at 907. It also does not contend duress, illegality or mutual mistake occurred. *Id.* Its sole argument regarding the Release is that it merely released the Debtor's guaranty, not the Debtor's fraud or larceny. As indicated above, the court agrees with HSBC's position.