UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

GARY F. TUCKER, II d/b/a/ ADVANCED INSTALLATIONS TECHNICIANS, Case No. 01-14445
Chapter 7

Debtor.

MARJAM SUPPLY COMPANY, INC.,

Plaintiff

-against- Adv. Proc. No. 01-90296

GARY F. TUCKER, II a/b/a ADVANCED INSTALLATIONS TECHNICIANS,

Defendant.

Appearances:

Deily, Mooney & Glastetter, LLP Matthew J. Sgambettera, Esq.
Attorney for the Plaintiff
8 Thurlow Terrace
Albany, NY 12203

Law Offices of Edwin M. Adeson
Attorney for the Debtor/Defendant
498 Glen Street
Glens Falls, NY 12801

Honorable Robert E. Littlefield, Jr.

Memorandum Decision

The underlying matter is the Plaintiff's objection to the discharge of a particular debt pursuant to

11 U.S.C. § 523(a)(2).[1] The instant matter is the Debtor's motion for a directed verdict.[2] The court has jurisdiction over the matters pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(I) and 1334(b).

Facts

The facts are undisputed. On December 4, 1997, the Debtor completed a credit application with the Plaintiff in the name of his d/b/a, Advanced Installation Technicians. Near the bottom of the application, are provisions labeled "CREDIT CONDITIONS (INCLUDING PERSONAL GUARANTY)." (Ex. D.) The words, however, are very difficult to discern due to the quality of the photocopying of that exhibit. The single sentence the court can discern is the last one. It reads, "SIGNING THIS DOCUMENT BELOW CONSTITUTES A CONTINUING PERSONAL GUARANTEE." (Ex. D.)

The court can discern the words "successor" and "authorized assignee" in the first sentence of the Credit Conditions and the word "GUARANTEES" in what appears to be the second sentence. It cannot, however, make out the rest of those sentences. It also cannot tell if those words or the word "guaranty" are used in other sentences. The document does not define the terms "undersigned" or "applicant."

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[1]In the initial complaint, the Plaintiff sought a denial of discharge pursuant to 11 U.S.C. § 727(a)(2) and an objection to the discharge of a particular debt pursuant to 11 U.S.C. § 523(a)(2). Its causes of action in its amended complaint were pursuant to 11 U.S.C. §§ 523(a)(2) and 523(a)(4). The court granted the Debtor's motion to dismiss the section 523(a)(4) cause of action, leaving the section 523(a)(2) as the remaining cause of action.

[2]The court will treat the Debtor's motion for a directed verdict, now called a "motion for judgment as a matter of law" and applicable in jury trials under Fed. R. Civ. P. 50(a), as a motion to dismiss the adversary complaint pursuant to Fed. R. Bankr. P. 7041.

The Plaintiff assigned an account number to Advanced Installation Technicians but it was not a credit account according to the testimony of Barbara Hrbek,[3] the Plaintiff's store manager. Ms. Hrbek called the Debtor's account a "joint check account." She testified that the way such an account worked is the Plaintiff would send the Debtor an invoice and expect a check from him the following month.

Using the account, the Debtor obtained supplies from the Plaintiff for 21 commercial projects he worked on from November 1997 to June 2001. (Ex. X-1 through X-9, X-11 through X-22.) In December 1998, the Debtor formed a corporation called "Advanced Installation Technicians, Inc." Ms. Hrbek did recall the Debtor informed her about his corporation, but did not remember when the conversation occurred. She testified she did not change the name on the account because the Plaintiff's credit department handled those changes.

The Plaintiff billed its invoices for the job called "Tucker" to the Debtor's corporation, using the same account the Plaintiff had opened for his d/b/a. (Ex. I through T; Ex. X-10.) According to the amended complaint, $24,500 is the unpaid balance on the account for materials and supplies the Plaintiff provided for the Tucker job. (Amended Complaint ¶ 13.) Neither the exhibits nor the testimony support a different claim amount.

Unlike the prior commercial jobs, the Tucker project was a personal residence. Ms. Hrbek testified that the Debtor told her the house he was building was his; he testified that the subject never

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[3]A transcript of the trial testimony has not been filed as of the date of this decision. If the Plaintiff files one and it contains testimony different from the findings made in this decision, the court will amend its findings to reflect the true and accurate testimony.

came up. His mother's name is on the deed for the real property, the mortgage, an assignment of mortgage and the satisfaction of mortgage. (Ex. E, F, G and H.)

According to Ms. Hrbek, the Debtor negotiated "Net 90 day" payment terms with the Plaintiff's credit department and its owner around the time of the Tucker project. She testified that she asked the owner to help the Debtor get credit. Exhibits I through T, the invoices for the Tucker project, show "Net 60" terms. Ms. Hrbek also testified that if the decision had been hers to make, she would have allowed the Plaintiff to supply the Debtor with the materials for the Tucker project because he was one of the largest contractors and did a large amount of business with Marjam.

At the close of the Plaintiff's case in chief, the Debtor's attorney moved for a directed verdict.[4] His main contention was the Debtor did not guarantee the debts of a future corporation; he also contended a personal guaranty could not extend to a future corporation since individuals operating d/b/a's generally formed corporations to escape personal liability.

When asked if the guaranty covered the debts of the applicant or of the account, the Plaintiff's attorney responded the guaranty remained in place because of the assign, heir and successor in interest language in the agreement. After hearing the remaining oral argument on the Debtor's motion, and the Debtor's attorney having informed the court he would not call any witnesses, the court directed the parties to file an initial post trial brief addressing the personal guaranty issue.

The Plaintiff attached what it called a "clean and readable copy" of the credit application and guaranty to its post trial brief. (Plaintiff's Post-Trial Brief p. 2.) At the bottom of the new copy are

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[4]*See* n. 2.

provisions labeled "CREDIT TERMS AND CONTINUING PERSONAL GUARANTEE OF PAYMENT." The phrase "successors and or assigns" can be found in only one spot of the application – the first sentence written after the "CREDIT TERMS" caption. The first sentence reads, "For the purpose of inducing the extension of credit from MARJAM to the applicant identified above and its successors and or assign, the undersigned warrants and represents that the statements made and information provided herein are complete, correct and true with the intent that strict reliance be placed thereon in extending and continuing credit to the above applicant." (Plaintiff's Post-Trial Brief Ex. B.) Like Exhibit D, the word "applicant" is not defined in the entire application.

The second sentence under the "CREDIT TERMS" caption contains language that sounds like a guaranty. It reads, "In order to further induce you to sell merchandise on credit, the undersigned jointly and / or severally unconditionally and irrevocably guarantees the full and prompt payment of any indebtedness of the applicant to MARJAM including finance / late charges in the amount of 2% per month." (Plaintiff's Post-Trial Brief Ex. B.) In the third sentence, the undersigned guarantees payment of the Plaintiff's attorney's fees, costs and expenses for "legal action instituted to enforce payment of the amount due pursuant to such extension of credit." (Plaintiff's Post-Trial Brief Ex. B.) The remaining sentences do not contain the words "guarantee" or "guaranty" and the last sentence is separated from the body of the agreement. Above the signature lines are the words "EXECUTION OF THIS INSTRUMENT CONSTITUTES A PERSONAL GUARANTEE ON MY/OUR PARTS." (Plaintiff's Post-Trial Brief Ex. B.)

Arguments

The Debtor argues the Plaintiff may have a claim against his corporation, but it does not have a

claim against him. He admits he signed the guaranty on the credit application, but contends the application did not cover future corporations or future corporate debts. He asserts his corporation cannot be a successor in interest to his d/b/a because a primary reason an individual incorporates is to establish a separate and distinct entity. He also argues the record shows the Plaintiff's store manager knew he incorporated and points out it billed the corporation for the Tucker project supplies. He contends the Plaintiff should have obtained a guaranty from him after he incorporated.

The Plaintiff contends the Debtor, by executing a guaranty of the debts of his sole proprietorship, also guaranteed the debts of that entity's successor in interest, the corporation. It points to the language of the agreement where the Debtor guaranteed the debts of his successors and/or assigns and argues when a party retains the same rights as its predecessor, without a change in ownership, it will be deemed a successor in interest. It states the state court decisions it cites apply the successor in interest doctrine when a corporation takes over and succeeds to a previously unincorporated business, viewing the procedure as a mere change in form and not substance. To the Plaintiff, the Debtor merely changed the form of his business entity when he incorporated because the corporation was owned by him and it conducted the same business and employed the same people as his d/b/a.

Discussion

The Debtor has focused his defense on the guaranty, or rather the lack thereof, but section 523(a)(2)(A)[5] does not require a guaranty for a creditor to meet its burden of proof. A debt is

[5]Although it did not specifically plead subparagraph (A) in its amended complaint, the allegations it bases its section 523(a)(2) cause of action on read like a typical "false pretenses, false

nondischargeable under that statute if a debtor obtained money, property or services by false pretenses, a false representation or actual fraud. 11 U.S.C. § 523(a)(2)(A). Nondischargeable debts of this nature do not stem from debts a debtor "guaranteed" but from money, goods or services the debtor fraudulently obtained. To meet its burden, a creditor must prove: (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. *Bank of America v. Jarczyk*, 268 B.R. 17, 21 (W.D.N.Y. 2001)(citing *In re Mercer*, 246 F.3d 391, 403 (5th Cir.2001); *In re Rembert*, 141 F.3d 277, 280-81 (6th Cir.1998), *cert. denied*, 525 U.S. 978 (1998); *In re Grause*, 245 B.R. 95, 99 (B.A.P. 8th Cir. 2000); *In re Anastas*, 94 F.3d 1280, 1284 (9th Cir.1996)). Thus, the Plaintiff need not prove the Debtor also guaranteed the debt although it must still prove he used fraud, false pretenses or a false representation to obtain the Tucker project supplies.

In the interest of completeness, the court will consider the alleged guaranty and the Plaintiff's case law. To begin with, the Plaintiff's new copy of the credit application does not look at all like Exhibit D. Readily apparent differences include the captions for the "guarantees" of the applications and the distinct signature lines. However, even if the two copies were substantially similar, the only provision in the agreement where the "undersigned" guarantees something is in the second sentence. There, the undersigned guarantees the full and prompt payment of any indebtedness of the "applicant" to the Plaintiff.

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representation or actual fraud" dischargeability complaint.

As found above, neither copy of the agreement defines the term "applicant." When the court uses the plain meaning of that word and the other undefined terms, it concludes the Plaintiff attempted to get the individual who signed the bottom of the application and who was therefore the "undersigned," (i.e., the Debtor) to "guarantee" the full and prompt payment of credit extended to the entity who was seeking a credit account and was therefore the "applicant" (i.e., Advanced Installation Technicians, his sole proprietorship). However, a guarantor relationship arises only when one party becomes bound to satisfy an obligation owed by another. *Anti-Hydro Co., Inc. v. Castiglia*, 461 N.Y.S.2d 87, 88 (N.Y. App. Div. 1983). Thus, any agreement involving a sole proprietor, an individual personally liable for his business debts, that purports to guarantee payment of debts of the sole proprietorship is nothing more than a promise to pay debts personally incurred. *Id*. The sole proprietor, by signing such an agreement, does not promise to pay the debts of another.[6] *Id*. Thus, although described as a "guarantee," the agreement the Debtor signed was only a promise to pay his own obligation for purchases he made on his account. *See New York Plumber's Specialties Co., Inc. v. 91 East End Corp.*, 42 N.Y.2d 865, 866 (1977).

As for the "successor in interest" case law the Plaintiff relies on, it has not cited, and the court itself has not uncovered, a single case involving a sole proprietorship as the initial business entity that "guaranteed" the debts of a successor or assign. If such a case did exist, it would ostensibly undermine the very reason most individuals who operate d/b/a's incorporate: to escape personal liability. While it is true the Debtor's incorporation did not change the sum and substance of his business operation, his

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[6]The Appellate Division went on to discuss an "even if it were a valid guaranty" scenario, but the court declines to do that. *Anti-Hydro Co., Inc.*, 461 N.Y.S.2d at 742.

written promise to pay the debts of his sole proprietorship does not, by itself, support a determination that the Plaintiff relied upon that promise as guarantying payment of future corporate debts, especially when the Plaintiff's store manager admits to knowingly transacting with a corporation on the Tucker project and the bills and invoices were in the corporation's name. *Anti-Hydro Co., Inc.*, 461 N.Y.S.2d at 89. Of course, as already noted above, the Debtor's liability for the debt might exist if the Plaintiff proves he obtained the supplies using false pretenses, a false representation or actual fraud, grounds that often exist in "corporate officer liability" or a "corporate veil piercing" context.

Conclusion

Whether the Debtor "guaranteed" the account is not relevant. The Plaintiff shall file and serve a post trial brief covering the five-part test of its section 523(a)(2)(A) cause of action on or before April 25, 2003. The Debtor shall file and serve his post trial brief on or before May 9, 2003. The Plaintiff shall have until May 23, 2003 to file and serve a reply brief.

Dated:

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