

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

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

Debtor

Case No. 01-14445

MARJAM SUPPLY COMPANY, INC.

Plaintiff

-against-

Adversary No. 01-90296

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

Defendant

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The matter currently before the court is the complaint of Marjam Supply Company, Inc. (“Plaintiff” or “Creditor”) alleging that a certain debt incurred by Gary F. Tucker, II (“Debtor” or “Defendant”), d/b/a Advanced Installations Technicians, is nondischaregable under 11 U.S.C.

§ 523(a)(2)(A).¹ The court has jurisdiction pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(I) and 1334(b).

FACTS

At the close of Plaintiff's case, the Debtor's attorney moved for a directed verdict. The court issued a decision on March 17, 2003 denying the motion and holding that a purported guarantee signed by the Debtor is not relevant regarding the underlying § 523 complaint.

Although the facts pertaining to that narrow decision were undisputed, the heart of the § 523 complaint is mostly a classic "he said, she said" situation.²

The gist of the complaint is that the Debtor obtained credit from the Plaintiff by falsely representing that he was going to construct a home for himself and his family. In reality, the Debtor's mother owned the underlying real property and ultimately took title to the completed home. The Debtor testified that after completion of the house, he and his family began a landlord/tenant relationship with his mother and resided in the subject premises. A secondary issue at trial was what entity bore responsibility for the indebtedness: the Debtor and his d/b/a, or the Debtor's corporation.

The Plaintiff's principal witness at trial was Ms. Barbara Hrbek, the Plaintiff's Albany

¹ 11 U.S.C. § 523 is entitled "Exceptions to discharge" and states in part:

(a) A discharge under section 727...of this title does not discharge an individual debtor from any debt-

(1) ...

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by-

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition....

² Neither side provided a transcript of the trial; the court has listened to the actual trial tapes for guidance with this decision.

manager. Ms. Hrbek stated that her business relationship with the Debtor had been longstanding. It began while the Debtor had worked for another construction company, prior to starting his own business. During the trial, she testified, on more than one occasion, that the Debtor was a very good customer of Marjam. She further testified that the Debtor was on a COD basis with Marjam with the exception that on certain occasions the Debtor and Plaintiff had a “joint check agreement.” That arrangement allowed the Debtor to receive building materials without paying for them on delivery if the general contractor on a job agreed to make any checks payable to the Debtor and Plaintiff as co-payees.

The Debtor had one account number with Marjam. It was assigned to him when he submitted a credit application on December 4, 1997.³ At that time, the Debtor operated as a d/b/a. Ms. Hrbek testified that the account number did not change after the Debtor incorporated his business. She further testified that she did not understand the nuances of corporate existence, the significance of a change from d/b/a status to corporate status, and issues such as personal guarantees and lien law violations. She was responsible for sales and other Marjam departments dealt with those other issues.

Additionally, Ms. Hrbek testified that because the Debtor was such a good customer, she arranged a meeting with high Marjam officials, including the owner, to negotiate a credit relationship for the residential housing project at issue. Ultimately, credit for the Debtor was approved. Ms. Hrbek testified that Marjam relied upon the Debtor’s representation that he was constructing the home for his personal use when it agreed to extend him credit. Ms. Hrbek,

³ Even though it is delineated “Credit Application,” Ms. Hrbek testified that it was not really a credit application. The document was more an information gathering device to facilitate a business relationship, and, according to Ms. Hrbek, no credit was extended to the Debtor as a result of the application.

however, had no first hand knowledge of the credit negotiations.

The only other witness called by the Plaintiff was the Debtor. He testified that he informed the Plaintiff of his corporate status in late December of 1998 and did not pay close attention as to whom the Plaintiff directed invoices to after that date.

Regarding the house partially built with Marjam Supplies, the parties had divergent testimony as to whether or not the Debtor affirmatively represented to Plaintiff that the house would belong to the Debtor. Other than cross examining the Plaintiff's witnesses, the Debtor offered no affirmative testimony at trial.

ARGUMENTS

It is Plaintiff's position that its debt is nondischargeable due to the misrepresentation of the Debtor that the home to be built was to be his home. Plaintiff states that the Debtor knew this was false because the Debtor's mother owned the land involved. Marjam further states that it relied on the Debtor's statement in supplying materials to the Debtor on credit. The Plaintiff argues that Marjam's reliance on the Debtor's statements was the proximate cause of its damages, because if the Plaintiff had known the proposed house was not to be the Debtor's, they would not have extended credit. The Plaintiff also asserts that notwithstanding the fact that the underlying debt is a corporate one, the court should pierce the corporate veil to reach the Debtor personally.

The Debtor responds by stating that he never hid the fact that the house to be built was for his mother. He further argues that there was no intent to deceive. The Debtor posits that in any event there was no proximate cause because his business relationship with Marjam was so important to Plaintiff that they would have extended credit to him whether he was building a home for himself or his mother.

DISCUSSION

The court need not decide whether a piercing of the corporate veil is appropriate, for any debt involved is dischargeable.

Courts interpreting § 523(a)(2)(A) 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) the creditor's reliance was the proximate cause of its loss. *Bank of America v. Jurczyk*, 268 B.R. 17, 21 (W.D.N.Y. 2001) (collecting cases).

While the court discounts the credibility of the Debtor,⁴ this decision turns not on that factor, but on the failure of the Plaintiff to carry its burden. Because the court has found Ms. Hrbek to be the more credible witness, the court finds that the Debtor did represent that the prospective home was to belong to him. Additionally, because the underlying land had belonged to his mother, he knew his representation was false and had the requisite intent to deceive the Plaintiff. However, no competent testimony was received regarding either the reliance by Marjam on the statement of the Debtor or the proximate cause of damages.

Although Ms. Hrbek testified that Plaintiff relied upon the Debtor's misrepresentation that he was constructing the subject home for his personal use when it agreed to extend him credit on this project, and the Plaintiff would not have extended credit to the Debtor on this project but for his representation that he was constructing this house for himself and his wife,

⁴ The Debtor admitted under questioning by the court that he never had an ownership interest in property even though on the December 4, 1997 credit application he stated he did own real property. Additionally, Ms. Hrbek testified she had a conversation with the Debtor about the sale of a corvette the Debtor claimed he owned. The Debtor did not recall that conversation. To the extent there are discrepancies between the testimony of Ms. Hrbek and the Debtor, the court finds Ms. Hrbek the more credible source.

Ms. Hrbek had no part in the credit making decision. She testified that she provided no paperwork to her superiors regarding the proposed credit agreement and, other than making a telephone call on the Debtor's behalf, did not have any role in the credit granting process. She testified that she did not know if any paperwork was even involved because the Debtor made all the arrangements.

Ms. Hrbek cannot testify competently to a process she had no part of. Based on the evidence before the court, we do not know what representations were made by the Debtor, what negotiations, if any, ensued and ultimately, what prompted Marjam's executives to grant the Debtor's credit request. Obviously, not knowing what representations were put forth, this court cannot make any findings as to what the Plaintiff relied upon.

Additionally, because of a lack of competent evidence, the court can make no findings as to what was the proximate cause of the Plaintiff's damages. The heart of the Plaintiff's case is that it would not have extended credit if it had known that the home to be built was to belong to the Debtor's mother. However, there is no competent testimony on that subject, one way or the other.

Based upon the failure of the Plaintiff to carry its burden, the court finds the debt dischargeable and dismisses the instant adversary proceeding.

It is so ORDERED.

Dated:

Hon. Robert E. Littlefield, Jr.

U.S. Bankruptcy Judge