UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP No. 01-092

Bankruptcy Case No. 00-13240-WCH

IN RE: MARY L. RAPOZA,
Debtor.

MARY L. RAPOZA,
Appellant,

v.

LULU TSAI,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. William C. Hillman)

LAMOUTTE, CARLO, and DEASY, U.S. Bankruptcy Appellate Panel Judges.

Stephen A. Lechter on brief for the appellant.

William G. Billingham of Billingham & Marzelli on brief for the appellee.

June 28, 2002

Per Curiam. The debtor, Mary L. Rapoza ("Rapoza") challenges an order of the United States Bankruptcy Court granting the motion of the appellee, LuLu Tsai ("Tsai"), for a judgment pursuant to Federal Rule of Civil Procedure 52(c)[1] and granting judgment to Tsai on all counts of a complaint filed by Rapoza. The court found for Tsai on a claim for violation of Massachusetts General Laws, Chapter 93A; found that a consensual lien cannot be avoided under 11 U.S.C. § 522(f); and found that Rapoza was liable on a mortgage note to Tsai. Finding no error, we affirm.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a) and (b). The findings of fact reached by the bankruptcy court, whether based on oral or documentary evidence, are subject to review under a clearly erroneous standard. See Fed. R. Bankr. P. 8013; Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719-20 n.8 (1st Cir. 1994). Conclusions of law are reviewed *de novo*. T I Federal Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995).

BACKGROUND

In the spring of 1999, Rapoza was married to Jason Rapoza ("Jason"). Jason asked Rapoza to grant a second mortgage on their marital home, which was Rapoza's individual property, to guarantee loans being made by Tsai to a new general partnership being formed between Jason and Tsai. The partnership was called the "Tsai/Rapoza General Partnership" (hereinafter the "Partnership"). Tsai's attorney prepared a general partnership agreement (hereinafter "Agreement") and a promissory note and mortgage. On April 22, 1999, Jason and Rapoza went to Tsai's attorney's

[1]Federal Rule of Civil Procedure 52(c) is made applicable to the Bankruptcy Code by Federal Rule of Bankruptcy Procedure 7052.

office. Jason signed the Agreement, that indicated that the capital of the Partnership would consist of contributions made by Tsai totaling $400,000. The Agreement required Jason to execute a promissory note agreeing to repay the money, with interest, over four years to Tsai. Tsai was entitled to draw $12,000 per month from the funds of the Partnership to repay the capital contribution. The Agreement also required Rapoza to grant a second mortgage on her real property. At the meeting of April 22, 1999, Jason and Rapoza both signed the promissory note in the amount of $400,000, payable to Tsai. The promissory note contained the same payment terms as those contained within the Agreement and the note was secured by a second mortgage deed of the same date, pledging the real property owned by Rapoza. No money changed hands between any of the parties at that time.

At the time of the signing of the Agreement and the promissory note, Jason owned and operated a business named Raynham Marketplace Antiques, Inc., referred to by the parties as "RMA." Tsai claimed that the $400,000 was lent to Jason, and their Partnership, to finance the acquisition of antiques and estate property. The undisputed evidence introduced at trial was that Tsai issued checks, which were subsequently cashed by Jason, in the amount of $400,000. Some of the checks were issued prior to the signing of the Agreement and promissory note. One check was dated February 3, 1999, in the amount of $75,000, payable to RMA. Three were dated April 12, 1999, each in the amount of $50,000 and payable to RMA. One check, dated April 21, 1999, was in the amount of $125,000 and was payable to RMA. A final check in the amount of $50,000, payable to cash, was signed by Tsai's husband and dated April 22, 1999. Tsai testified that Jason never paid back any of the $400,000.

On May 8, 2000, Rapoza filed a voluntary petition under Chapter 7. The holder of the first mortgage on Rapoza's real property subsequently obtained relief from stay to foreclose on its

mortgage. After satisfaction of the first mortgage, there were $77,000 of proceeds remaining. The $77,000 was placed in escrow where it remains pending a final resolution of the matter that is currently before the Panel. Rapoza filed this suit seeking to avoid Tsai's lien on the real property, which subsequently attached to the funds in escrow. Rapoza argued that she received no consideration for the mortgage; that Tsai's conduct violated Massachusetts General Laws, Chapter 93A; and, that it impaired her homestead exemption.

The bankruptcy court held an evidentiary hearing on December 12, 2001, and entered a directed verdict for Tsai. The court found that $400,000 went from Tsai to Jason through checks issued to RMA, and that a significant portion of this sum was provided on the date of the closing or the day prior to the closing. The court found that there was consideration for the transaction. Moreover, the court concluded that Rapoza is liable on the note as an accommodation maker, even if she did not personally receive any money. Ultimately, the court concluded that the mortgage is valid and unassailable in the manner attempted by Rapoza. This appeal ensued.

In her brief, Rapoza states that she is presenting the following five issues on appeal:

> A. Whether a party seeking to enforce a negotiable instrument against a guarantor and not the primary maker of said promissory note must also prove there was consideration for the guarantee itself?
>
> B. Whether a mere naked promise in writing to pay the existing debt of another, without any consideration, is void?
>
> C. Whether under Massachusetts General Laws, Chapter 106, Section 3-03, "consideration means any consideration sufficient to support a simple contract . . . the maker or drawer of an instrument has a defense if the instrument is issued without consideration[?]"
>
> D. Whether the Court may cancel and discharge a mortgage on real estate where upon all the evidence there was no consideration for the execution of said mortgage?

E. Whether "if any reasonable doubt exists concerning the parties intentions, the contract (promissory note and mortgage) should be construed against the party (defendant) who drafted it [?]"

Appellant's Brief ("AB") at 1.[2] In addition to the above five issues Rapoza also makes allegations in her brief that the parties "deceived and/or defrauded" her. Id. at 5.

DISCUSSION

The Panel will begin its discussion by addressing the factual findings made by the court. The bankruptcy court found as a fact that Jason received $400,000 from Tsai. This finding was not clearly erroneous. The documentary evidence presented, as well as the testimony of Tsai and Russell Ewell, Tsai's property manager, showed that Tsai transferred the sum of $400,000 to Jason through RMA. See Appendix to AB at 63-66, 77, 79-80, 103-04. We find it of no significance to Rapoza's argument that the checks were issued to RMA rather than to Jason or the Partnership, since Jason was the ultimate beneficiary for the reasons set forth below in the discussion of Rapoza's liability as an accommodation party.

The bankruptcy court also concluded that the funds received by Jason after the signing of the promissory note and mortgage were sufficient consideration to support Tsai's claim against the funds remaining in escrow. As the bankruptcy court correctly pointed out, Rapoza's personal liability on the mortgage will be discharged as part of the Chapter 7 bankruptcy case. See 11 U.S.C. § 727(b); Cadle Co. v. Schlichtmann, 267 F.3d 14, 19 (1st Cir. 2001), *cert. denied*,122 S.Ct. 1607(Apr 22, 2002)(No. 01-1217). Thus, Tsai's secured claim becomes an *in rem* claim against the funds in

[2]The Panel notes that although the debtor has fashioned the aforementioned issues A through E as separate issues on appeal, in reality the issues presented in B, C, and D are simply sub categories of A. Accordingly, the Panel will not separately address the issues contained in paragraphs B, C, and D.

escrow. See Johnson v. Home State Bank, 501 U.S. 78, 80 (1991)(notwithstanding a Chapter 7 discharge of personal liability, a mortgage holder has the right to proceed against the property *in rem*.) While some of the funds were received by Jason prior to the signing of the promissory note, two checks were negotiated April 21st and April 22nd and these checks totaled $175,000. See Appendix to AB at 63, 77, 79, 103, and 104. The funds in escrow only amount to $77,000. Clearly, the $175,000 transferred to Jason through RMA after the closing was sufficient consideration to support Tsai's claim against the remaining $77,000 in escrow.

The real issue is whether Rapoza can be held liable as a guarantor without personally receiving consideration. The Panel finds that the bankruptcy court properly concluded that Rapoza could be held liable irrespective of whether she personally received anything. The Massachusetts Uniform Commercial Code provides that:

> A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous endorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument.

Mass. Gen. Laws ch. 106, § 3-419(c). The UCC further provides that "[t]he obligation of the accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives any consideration for the accommodation." Mass. Gen. Laws ch. 106, § 3-419(b).

In the present case, Rapoza was an accommodation party. She signed the promissory note to guarantee Jason's obligations to Tsai as stated in the note. As an accommodation party, there was no requirement that Rapoza receive consideration for the accommodation.

Likewise, under Massachusetts common law, Rapoza is liable irrespective of whether she

received consideration. In the case of Perry v. Miller, 112 N.E.2d 805 (Mass. 1953), the Supreme Judicial Court of Massachusetts held that "[a] married woman may...become surety for her husband...and may give a valid mortgage of her separate estate to secure the payment by him of his indebtedness to a mortgagee although she had no interest in the debt." Id. at 807 (citations omitted). The court concluded that "a mortgage given by a wife for such a purpose requires no consideration." Id. (citations omitted). A decision of the United States District Court for the District of Massachusetts, also states that "Massachusetts law recognizes that a mortgage may secure the obligation of a third party." Cadle Co. v. Boston Investors Group, L.P., 1997 WL 106904 (D.Mass. 1997).

Rapoza was married to Jason when the promissory note was signed. She guaranteed his debt and gave a mortgage of her separate real property to secure the payment of his indebtedness to Tsai. Under Massachusetts law, the mortgage granted to Tsai by Rapoza required no consideration.

The Panel next wishes to address the various allegations of deception and fraud made by Rapoza. She states that there was deception in the creation of the mortgage. AB at 5. She alleges that "the parties deceived and/or defrauded the plaintiff-debtor-appellant by obtaining her signature on documents related to old loans and then making no payments whatsoever to the Tsai/Rapoza entity." Id. She argues that the mortgage can be canceled because it was obtained by fraud. Id. at 6. She concludes with a statement that Tsai "deceived and/or defrauded and/or misled" her. Id. We concluded that there were sufficient new monies lent to Jason and the Partnership to support the lien that Tsai still holds against the escrow funds.

As for the other innuendos of fraud made by Rapoza, the Panel finds that they were not raised before the bankruptcy court. "The general rule is that absent extraordinary circumstances, legal

theories not raised in district court cannot be raised for the first time on appeal as a matter of right." Amcel Corp. v. Int'l Executive Sales, Inc., 170 F.3d 32, 35 (1st Cir. 1999)(citations omitted). The First Circuit Court of Appeals has indicated that an issue not raised in the trial court will be considered on appeal in a civil case only if it is "so compelling as virtually to insure appellant's success, and a gross miscarriage of justice would result from [the] failure to address it." Credit Francais Int'l, SA v. Bio-Vita, Ltd., 78 F.3d 698, 709 (1st Cir. 1996)(citations and internal quotation marks omitted). "The rule has various reasons, applying with different force in different circumstances. Perhaps most important, often the other side would try its case differently if it knew of the issue; and the trial judge would . . . make specific findings on it at a bench trial." Amcel Corp., 170 F.3d at 35 (citations omitted). This Panel concludes that Rapoza has not presented any extraordinary circumstances to justify considering her allegations of fraud for the first time on appeal.

Further, a gross miscarriage of justice will not result from failure to consider it. To the contrary, we note that nothing Rapoza introduced at trial suggested any fraud on the part of Tsai. Rapoza's own testimony was that Jason asked her to sign some documents to use the house as collateral for a loan that Tsai was making to their Partnership. Appendix to AB at 81-82 and 85. Rapoza testified that Tsai never made representations to her and, in fact, Rapoza had never spoken to Tsai. Id. at 85. It was clear to Rapoza that the attorney who did the closing was representing Tsai. Id. at 86. Rapoza testified that the attorney asked her if it was her "free act and deed" and she responded "yes." Id. at 87. The attorney's testimony corroborated this. He testified that he presented the mortgage documents to Rapoza; took her acknowledgment; and asked whether it was her free act and deed. Id. at 47. He testified that Rapoza expressed no reluctance in his presence.

Id. Rapoza testified that she had no knowledge of Jason receiving any of the funds. Id. at 88. She testified that she asked him whether he received them and he did not respond. Id. None of this testimony suggests that Tsai attempted to defraud Rapoza. Thus, Rapoza's claims of deception and fraud must fail.

CONCLUSION

The bankruptcy court properly concluded that there was consideration for the mortgage, which Rapoza granted to Tsai. The bankruptcy court also properly concluded that Rapoza was an accommodation maker, and that consideration was not necessary for the transaction. The bankruptcy court correctly determined that the mortgage is valid and unassailable on the grounds alleged by Rapoza. Accordingly, the judgment of the bankruptcy court is AFFIRMED.