UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP Nos. MW 02-056 and MW 02-057

Bankruptcy Case No. 01-45192-JBR
Adversary Proceeding No. 01-4391-JBR

JACQUELINE DELISLE,
Debtor.

JACQUELINE DELISLE,
Defendant-Appellant/Cross-Appellee,

v.

ALEXANDER STANIUNAS,
Plaintiff-Appellee/Cross-Appellant.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joel B. Rosenthal)

Before
LAMOUTTE, VAUGHN, and CARLO,
U.S. Bankruptcy Appellate Panel Judges.

Michael C. Najjar, Esq., of Marcotte Law Firm
on brief for the Appellant/Cross-Appellee.

Jay P. Sheehan, Esq., of the Law Offices of Jay P. Sheehan
on brief for the Appellee/Cross-Appellant.

June 9, 2003

Per Curiam.

The debtor, Jacqueline Delisle ("Delisle") appeals an order of the United States Bankruptcy Court for the District of Massachusetts concluding that $45,000 withdrawn by Delisle from a joint account which she held with Alexander Staniunas ("Staniunas"), was obtained by actual fraud and therefore is a non-dischargeable debt pursuant to 11 U.S.C. § 523(a)(2)(A). Staniunas filed a cross appeal, challenging the bankruptcy court's determination that a separate withdrawal from the account, in the amount of $35,000, was dischargeable under the same section. Staniunas also appeals the bankruptcy court's denial of his objection to Delisle's discharge pursuant to 11 U.S.C. § 727(a)(2). For the reasons set forth below, we deny the challenges raised by Staniunas in his appeal and affirm the bankruptcy court's determinations. We remand as to whether Delisle's unauthorized withdrawal of the $45,000 from the joint account constituted actual fraud.

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 made 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). "[D]ue regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Fed. R. Bankr. P. 8013. Conclusions of law are reviewed *de novo*. T I Federal Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995).

BACKGROUND

In June of 1998, Staniunas, who was then eighty years old, responded to a newspaper advertisement placed by Delisle, a twenty-four year old single mother, indicating that she was looking for a house to rent. Staniunas and Delisle met and discussed the possibility of Delisle and her minor son moving into a house, located on Indian Road in Tyngsboro, Massachusetts, which Staniunas owned. The parties anticipated that the move could not occur immediately because there were tenants living in the house. A friendship developed between Staniunas and Delisle. Staniunas visited Delisle two to three times per week at her apartment in Lowell, Massachusetts and the two frequently dined out together.

Without Delisle's knowledge, on July 17, 1998, Staniunas opened a joint passbook savings account at the Andover Bank in Methuen, Massachusetts and deposited $85,000 into the account. Staniunas thereafter told Delisle about the account and had her sign a signature card, which he returned to the bank. Staniunas claimed that the account was opened with the understanding that the funds were to be used by Delisle for his care, if his health deteriorated, and for her to serve as his homemaker. Delisle contended that the funds were for her to use as she wished and for her to access on Staniunas' behalf, if needed.

In late July, Delisle was having problems with her vehicle. On July 31, 1998, both parties went to the Andover Bank to arrange for bank checks totaling $35,000. The money was used to purchase a truck, accessories and insurance for Delisle. Staniunas claimed that he loaned the funds to Delisle and that she agreed to make payments of $100 per month. Delisle claimed that the truck was a gift.

For a couple of weeks during their relationship, Delisle worked on refurbishing the house at Indian Road. Delisle did general cleaning, stripping of wall paper, hole patching and painting. Staniunas provided the funds for these projects. On one occasion when Delisle and Staniunas were at the house on Indian Road, Staniunas asked Delisle if she would give him "some loving," which she refused.

On August 13, 1998, Staniunas was hospitalized for what was mistakenly believed to be a minor heart attack. At Staniunas' request, Delisle retrieved a bag from his car which contained bank passbooks and other items, which she delivered to him the day after his discharge from the hospital. The following day, he discovered that the Andover Bank passbook was missing. He argued that the passbook remained in his possession until that time. He alleges that when he inquired about it, Delisle indicated that it had fallen out of the bag and that she had kept it in her possession. Delisle testified that she had possession of the passbook from the time that Staniunas informed her of the account.

On August 20, 1998, Delisle withdrew $45,000 from the joint account and deposited it into her personal account at Fleet Bank in Dracut, Massachusetts. Delisle claimed that this was done at Staniunas' direction while he claimed that Delisle took the funds without his permission. Shortly thereafter, the parties discussed the potential purchase by Delisle of the house at Indian Road. Delisle asked Staniunas to finance the purchase, which he agreed to do. A home inspection occurred on September 8, 1998. Thereafter, Delisle discontinued all contact with Staniunas. Delisle claimed that she changed her mind when Staniunas insisted on having a room in the house and told her that she could not invite boyfriends there. Staniunas denied the

restriction on boyfriends, but admitted that he expected to live in the house. Delisle did not return the $45,000 that she withdrew from the joint account.

On May 2, 2000, Staniunas filed a complaint against Delisle in the Middlesex Superior Court claiming breach of contract for her failure to make payments on the loan for the truck and fraudulent conversion of the $45,000 in the joint account. On December 14, 2000, Staniunas obtained judgment by default against Delisle in the amount of $85,893.60. Delisle has sought to overturn the judgment. At the oral argument of this appeal before the Bankruptcy Appellate Panel, the state court action remained pending before the Massachusetts Appeals Court.

Delisle filed a voluntary petition under Chapter 7 of the Bankruptcy Code on August 16, 2001. Staniunas thereafter learned that on November 24, 2000, Delisle traded the truck for a mini-van and $9,000 in cash. Staniunas filed an adversary proceeding on November 15, 2001, seeking: to except the $35,000 debt resulting from the truck purchase from discharge pursuant to 11 U.S.C. § 523(a)(2)(A); to except the $45,0000 withdrawn from the joint account from discharge pursuant to 11 U.S.C. § 523(a)(4); and to deny discharge pursuant to 11 U.S.C. § 727(a)(2)(A). After trial, the bankruptcy court overruled the objection to dischargeability as to the funds used for the purchase of the truck; overruled the objection to discharge pursuant to 11 U.S.C. § 727(a)(2)(A); and granted the objection to dischargeability under 11 U.S.C. § 523(a)(2)(A) as to the $45,000 withdrawn by Delisle.

Both Delisle and Staniunas appealed. Delisle claims that Staniunas failed to establish the elements for actual fraud to bar discharge of the $45,000 debt related to her withdrawal of the funds from the Andover Bank account. Staniunas also appealed claiming that the bankruptcy court erred in overruling the objection to the dischargeability of the $35,000 related to the truck

purchase. Staniunas also claims that the bankruptcy court erred in failing to deny Delisle's discharge based on her failure to list the transfer of the truck, although it occurred within one year of the bankruptcy filing.

DISCUSSION

A. $35,000 related to the truck purchase

Section 523(a)(2)(A) excepts from discharge a debt for "money . . . to the extent obtained by . . . actual fraud . . ." 11 U.S.C. § 523(a)(2)(A). On appeal, Staniunas argues that the trial judge erred when he failed to review whether actual fraud existed in the transaction related to the purchase of the truck under a "totality of the circumstances" approach taking into account the subsequent actions of Delisle. Essentially, Staniunas argues that since the bankruptcy court concluded that Delisle actually defrauded Staniunas with respect to the withdrawal of the $45,000 from the joint account, the bankruptcy court should have considered this and Delisle's subsequent failure to list the transfer of the truck, and concluded that Delisle's actions reflected a pattern of fraud and excepted the $35,000 received by Delisle for the purchase of the truck from discharge.

We agree that direct proof of fraudulent intent may be nearly impossible to obtain and that a creditor may present evidence of the surrounding circumstances from which intent may be inferred. "As direct evidence is seldom available, fraudulent intent normally is determined from the totality of the circumstances." Williamson v. Busconi, 87 F.3d 602, 603 (1st Cir. 1996)(citing Charlie Kelton's Pontiac, Cadillac, Oldsmobile & Isuzu Truck, Inc. v. Roberts (In re Roberts), 82 B.R. 179, 184 (Bankr. D. Mass. 1987)). "[P]roper application of the 'totality' test in

the instant context often warrants consideration of post-transaction conduct and consequences, as well as pre-transaction conduct and contemporaneous events." Id. (citations omitted).

We conclude that the bankruptcy court did consider the totality of the circumstances in determining that the $35,000 used for the purchase of the truck was not obtained by fraud. The primary difference, found by the bankruptcy court, between the funds used for the truck purchase and the funds subsequently withdrawn by Delisle from the joint account was that the truck was purchased with Staniunas' consent. Staniunas himself continues to refer to the $35,000 used for the purchase of the truck as a loan. We conclude that the bankruptcy court's determination that the $35,000 provided by Staniunas to Delisle for the purchase of the truck was a gift was not clearly erroneous.

"A finding of fact is clearly erroneous, although there is evidence to support it, when the reviewing court, after carefully examining all the evidence, is 'left with the definite and firm conviction that a mistake has been committed.'" Palmacci v. Umpierrez, 121 F.3d 781, 785 (1st Cir. 1997)(citing Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985)). In Palmacci, the First Circuit Court of Appeals stated that "[d]eference to the bankruptcy court's factual findings is particularly appropriate on the intent issue '[b]ecause a determination concerning fraudulent intent depends largely upon an assessment of the credibility and demeanor of the debtor.'" Id. (citing Commerce Bank & Trust Co. v. Burgess (In re Burgess), 955 F.2d 134, 137 (1st Cir. 1992)). "Particular deference is also due to the trial court's findings that depend on the credibility of other witnesses and on the weight to be accorded to such testimony." Id. (citing Fed. R. Bankr. P. 8013 and Keller v. United States, 38 F.3d 16, 25 (1st Cir. 1994)).

In the present case, Delisle claimed that the $35,000 was a gift. There was no evidence, other than Staniunas' testimony, that the money was a loan. Staniunas had known Delisle for less than two months at the time of the transaction and yet there were no loan documents nor did Staniunas' name appear on the title. Staniunas agreed to the transaction and he went to the Andover Bank with Delisle to withdraw the funds. Moreover, Staniunas was eighty years old at the time of the transaction. He argued that Delisle was supposed to repay the money at a rate of $100 per month. At this rate, the sum would have been repaid, without interest, in 350 months, or close to thirty years. Staniunas would not have been repaid before the age of 109 years.

The bankruptcy court's finding that Staniunas made the gift because he took an interest in this young mother and wanted to help her out, as opposed to that Delisle obtained the funds through misrepresenting that she was a close friend who would take care of Staniunas, is not clearly erroneous.[1] It was obvious that Staniunas and Delisle had a close relationship, but not that Staniunas' motivation in making the gift was based on any representation that Delisle would provide care for him, even if that was the general purpose of the account. Staniunas was visiting Delisle two to three times per week. They often dined together. Staniunas opened the joint account, from which the funds were withdrawn, in both their names without Delisle's knowledge. Delisle's car began giving her problems and she asked Staniunas to assist her in

[1] The bankruptcy court did make a statement in the section dealing with the $45,000 withdrawal that appears to contradict this finding. With respect to the $45,000 withdrawal, the bankruptcy court stated that "[n]o reasonable person would believe that an eighty-year-old man, with potentially failing health, would grant a gift of tens of thousands of dollars to someone he had known for less than 30 days." Staniunas v. Delisle (In re Delisle), 281 B.R. 457, 468 (Bankr. D. Mass. 2002). Qualified by what the bankruptcy court found in the section dealing with the vehicle purchase, just because Staniunas wanted to help Delisle out by purchasing the truck for her, does not mean that he would give her $45,000 of the $50,000 remaining in the account.

purchasing a new vehicle. Staniunas went to look at the truck with Delisle and accompanied her to the Andover Bank to arrange for the bank checks to purchase the vehicle. Although there were contradictions in his testimony, he did testify that he did not care what the truck cost, because he wanted Delisle to have it. By his own admission, included in the state court complaint, Staniunas had previously given Delisle $500 to pay the July rent at her apartment in Lowell because he alleged that she told him that she was going to move to Connecticut to live with her aunt because the house belonging to Staniunas was not yet available. At one point while Delisle was working on the house, Staniunas asked her if she would give him "some loving," which he admitted in his testimony was a reference to having sex. Staniunas was planning to finance Delisle's purchase of his house and he expected to have a room in the house. All of these factors reinforce the bankruptcy court's finding that the funds used for the truck purchase were not obtained by Delisle through fraud.

B. Unauthorized Withdrawal

Staniunas argues that the $45,000 which Delisle withdrew from the joint account is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Delisle argues that she had the right to withdraw the funds since they were maintained in the joint account. Moreover, she argues that Staniunas failed to establish the elements necessary to bar discharge of a debt obtained by false pretenses, false representation or actual fraud.

Delisle argues that she had lawful dominion over the funds in the joint account. Indeed, the bankruptcy court concluded that "[a]ll parties to a joint account have the legal right to withdraw all or part of the funds." In re Delisle, 281 B.R. at 467 (citing Heffernan v. Wollaston Credit Union, 567 N.E.2d 933, 937 (Mass. App. Ct. 1991)). However, the bankruptcy court also

accurately concluded that "this legal right to withdraw pertains to the rights of the parties vis-a-vis the bank; the parties to the account may have an agreement among themselves that is separate and apart." Id. (citing Bradford v. Eastman, 118 N.E. 879 (Mass. 1918); Ball v. Forbes, 49 N.E.2d 898, 900 (Mass. 1943)). The bankruptcy court continued, stating that:

> "The determination of the interest the [parties have] in the deposits in the joint accounts is dependent primarily on what their intention was, and that is a question of fact." Buckley v. Buckley, 301 Mass. 530, 531, 17 N.E.2d 887, 888 (1938)(citations omitted); see also United States v. U.S. Currency, 189 F.3d 28, 33 (1st Cir. 1999). It is permissible to prove by oral evidence the purpose by which a joint account was established. Burns v. Paquin, 345 Mass. 329, 331, 187 N.E.2d 139, 141 (1963)(citations omitted).

In re Delisle, 281 B.R. at 467.

The bankruptcy court then found that there was credible evidence that there was an agreement between Staniunas and Delisle that Delisle's use of the funds in the account was dependent upon Staniunas' permission. This finding is not clearly erroneous. Staniunas testified that he opened the account so that Delisle could serve as his "homemaker" and to take care of him if he needed her. He testified that he told Delisle that he funded the account in case he was sick so that "she would be able to handle the money." He testified that she agreed to this. Although Delisle testified that Staniunas told her that the funds in the account were to use for whatever she wanted, she also admitted that Staniunas had told her that the money was there in case he got sick and she needed to get some money. She testified that her understanding was that "I guess if he came to me and said, 'You know, I need a couple thousand to do this,' or 'Can you go to the store for me. You can take money out and go do that.' That's the way I interpreted it." See Appellant's App., Transcript of Hearing at 89.

Staniunas agreed to assist Delisle with the purchase of the truck, but denied that he authorized any other withdrawal. According to his testimony, even after she signed the signature card, he remained in possession of the passbook and signature card until after his hospitalization. He asked her to recover the passbooks from his car and she delivered the various passbooks to him the following day when they had dinner together. He thereafter realized that the passbook for the joint account was missing. He stated that he confronted her and she said that it had fallen out of the bag that contained the other passbooks and that she had the passbook. He later went to the bank and found that she had withdrawn $45,000. Delisle explained that the funds were moved to her individual account in another town at Staniunas' direction because the bank was closer and she would have easier access to the funds. The bankruptcy court did not accept this explanation. Delisle later testified that when the relationship between Delisle and Staniunas terminated and he requested return of the funds, she refused, claiming that they were a gift. Delisle admits that she spent all of the money on herself and her son. There was abundant evidence that Delisle's withdrawal of the funds was unauthorized.

Section 523(a)(2)(A) excepts from discharge a debt for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--false pretenses, a false representation, or actual fraud . . ." 11 U.S.C. § 523(a)(2)(A). The bankruptcy court set out the elements for excepting a debt from discharge pursuant to this section:

> The Plaintiff must show that 1) the debtor made a knowingly false representation or one made in reckless disregard of the truth, 2) the debtor intended to deceive, 3) the debtor intended to induce the creditor to rely upon the false statement, 4) the creditor actually relied upon the misrepresentation, 5) the creditor's reliance was justifiable, and 6) the reliance upon the false statement caused damage.

In re Delisle, 281 B.R. at 467 (citing McCrory v. Spigel (In re Spigel), 260 F.3d 27, 32 (1st Cir. 2001)).[2]

The bankruptcy court then made various conclusions. The bankruptcy court concluded that there was no evidence of fraud in the opening of the joint account since it was opened by Staniunas without Delisle's knowledge. The bankruptcy court concluded that Delisle's withdrawal of the $45,000 was unauthorized and that the transfer of the funds to her personal account was an attempt by Delisle to conceal the funds from Staniunas. The bankruptcy court then allowed the objection to the dischargeability of the debt under 11 U.S.C. § 523(a)(2)(A), concluding that the funds were obtained through actual fraud.

The bankruptcy court did not apply the elements of the test cited to determine the dischargeability of a debt based on actual fraud. The bankruptcy court did not specifically identify the representation made by Delisle, her intent, or the justifiable reliance of Staniunas, which caused his damages. The bankruptcy court's findings that the funds were withdrawn without authorization and concealed are incomplete. Where findings are too indistinct, we may remand for more explicit findings. See Groman v. Watman (In re Watman), 301 F.3d 3, 8 (1st Cir. 2002)(citing Brandt v. Repco Printers & Lithographics, Inc. (In re Healthco), 132 F.3d 104, 108 n.5 (1st Cir. 1997)). Accordingly, we will remand this issue to the bankruptcy court for adequate findings on the elements of the test for excepting a debt from discharge based on actual fraud.

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[2] The First Circuit Court of Appeals has questioned, without deciding, whether this test should be considered the exclusive test to determine nondischargeability under 11 U.S.C. § 523(a)(2)(A), when the allegation is actual fraud. In re Spigel, 260 F.3d at 32 n.7.

C. Denial of Discharge

The Bankruptcy Code provides that:

> The court shall grant the debtor a discharge, unless--the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, mutilated, or concealed--property of the debtor, within one year before the date of the filing of the petition.

11 U.S.C. § 727(a)(2)(A).

The bankruptcy court found, and Delisle does not dispute, that she transferred her interest in the truck within one year of the bankruptcy petition, by exchanging the truck for another motor vehicle and $9,000 in cash on November 24, 2000 and filing a bankruptcy petition on August 16, 2001. She failed to disclose this transfer in her petition. At issue is whether Delisle had the intent to hinder, delay, or defraud a creditor by failing to list the transfer.

The bankruptcy court correctly concluded that Staniunas had the burden of establishing this by a preponderance of the evidence. In re Delisle, 281 B.R. at 465 (citing Annino, Draper & Moore, P.C. v. Lang (In re Lang), 246 B.R. 463, 467-68 (Bankr. D. Mass. 2000), aff'd, 256 B.R. 539 (B.A.P. 1st Cir. 2000); Rhode Island Depositors Econ. Protection Corp. v. Hayes (In re Hayes), 229 B.R. 253, n.7 (B.A.P. 1st Cir. 1999); Xerox Fin. Servs. Life Ins. Co. v. Sterman (In re Sterman), 244 B.R. 499, 504 (D. Mass. 1999)). The bankruptcy court also properly concluded that:

> . . . The Plaintiff must show the Debtor's actual, rather than constructive, intent to hinder, delay, or defraud. In re Lang, 246 B.R. at 468 (citations omitted).

> Since "no debtor will admit to an improper intent[,] [t]he Court must . . . consider the surrounding facts and circumstances and draw inferences of a debtor's actual intent from that debtor's actions." Id. at 469 (citations omitted). Courts have looked at the so-called "badges of fraud" which include: "(1) the lack of or inadequacy of consideration for the transfer; (2) the existence of a family, friendship, or special relationship between the parties; (3) an attempt by the debtor to keep the transfer secret; (4) the financial condition of the party sought to be charged both before and after the transaction; (5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and (6) the overall chronology of events and transactions." Id. at 869.

In re Delisle, 281 B.R. at 465.

> Applying these criteria, the bankruptcy court found that:
>
> First, there is nothing suspect about the timing of the filing; the Debtor filed for bankruptcy nine months after the transfer was made. Second, the transfer was made before the state default judgment was entered, therefore, no inference could be made that the transfer was made to avoid attachment of the truck. Third, there is no evidence of inadequate consideration. Fourth, the transfer was not made to a family member or friend. Fifth, there is no evidence that the failure to disclose the transfer was a result of the Debtor's attempts to keep the transfer secret. Lastly, there was testimony that the Debtor lost her job one month prior to the transfer, therefore, an inference could be made that she sold the truck because she needed money to provide for herself and her child.

Id.

We conclude that the bankruptcy court amply supported its determination that there were no "badges of fraud" and no evidence that Delisle omitted the truck transfer with the intent to hinder, delay, or defraud. Therefore, the bankruptcy court properly overruled Staniunas' objection to discharge pursuant to 11 U.S.C. § 727(a)(2)(A).

CONCLUSION

The bankruptcy court properly overruled the objection to dischargeability pursuant to 11 U.S.C. § 523(a)(2)(A) for the $35,000 related to the truck purchase. The bankruptcy court also properly denied the objection to discharge pursuant to 11 U.S.C. § 727(a)(2)(A). As to these orders, we AFFIRM. As to the order sustaining the objection to dischargeability pursuant to 11 U.S.C. § 523(a)(2)(A) for the $45,000 withdrawn by Delisle from the joint account, we REMAND for additional findings.