NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP No. MW 03-075

Bankruptcy Case No. MW 01-25192-JBR
Adversary Proceeding No. MW 01-4391-JBR

JACQUELINE DELISLE,
Debtor.

JACQUELINE DELISLE,
Defendant-Appellant,

v.

ALEXANDER STANIUNAS,
Plaintiff-Appellee.

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

Before
CARLO, DEASY, and KORNREICH, U.S. Bankruptcy Appellate Panel Judges.

Michael C. Najjar, Esq., of Marcotte Law Firm
on brief for the Appellant.

Jay P. Sheehan, Esq., of the Law Offices of Jay P. Sheehan
on brief for the Appellee.

May 10, 2004

Per Curiam.

This is the second appeal before the United States Bankruptcy Appellate Panel ("Panel") in this adversary proceeding. In the first appeal, the debtor, Jacqueline Delisle ("Delisle"), appealed an order of the United States Bankruptcy Court for the District of Massachusetts concluding that $45,000 withdrawn by Delisle from a joint account which she held with Alexander Staniunas ("Staniunas") was obtained by actual fraud and therefore was a nondischargeable debt pursuant to § 523(a)(2)(A) of the United States Bankruptcy Code.[1] The Panel concluded that the bankruptcy court's findings were incomplete and it remanded for additional findings. On remand, the bankruptcy court made additional findings based on the testimony and other evidence presented at the original trial. The bankruptcy court again concluded that Delisle obtained the funds by actual fraud and held that the debt was nondischargeable pursuant to § 523(a)(2)(A). This appeal ensued. 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 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).

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[1] Unless otherwise indicated, all references to the "Bankruptcy Code" and all references to statutory sections are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq.

BACKGROUND

Staniunas was eighty years old in June of 1998 when he responded to a newspaper advertisement placed by Delisle, who was twenty-four years old, indicating that she was looking for a house to rent. Delisle considered renting a house owned by Staniunas and performed work refurbishing the house. Staniunas and Delisle developed a friendship. He visited her at her apartment in Lowell, Massachusetts and they frequently dined together.

In mid-July of 1998, without Delisle's knowledge, 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. Staniunas retained possession of the passbook and signature card. There was a verbal understanding between Delisle and Staniunas that the funds were to be used by Delisle for his care, if his health deteriorated. Nonetheless, after Delisle began having problems with her vehicle, on July 31, 1998, Staniunas and Delisle went to the Andover Bank together and withdrew $35,000 from the joint account for the purchase of a truck, accessories and insurance for Delisle.[2]

On August 13, 1998, Staniunas was hospitalized overnight and at his request, Delisle retrieved some items from his car, 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 from the items delivered to him. Delisle indicated that it had fallen out of the bag and that she had kept it in her possession.

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[2] Staniunas originally claimed that these funds were obtained by false pretenses, a false representation or actual fraud, but the bankruptcy court found against him and we affirmed. Staniunas has not appealed this determination.

One week later, 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 initially claimed that this was done at Staniunas' direction, but she now concedes that the transfer was made without Staniunas' permission. Delisle had considered purchasing the house from Staniunas until Staniunas indicated that he expected to have a room in the house and purportedly told her that she could not have boyfriends over. Staniunas had also made a request for "some loving" prior to the withdrawal of the funds, which Delisle refused, but which she claims had a bearing on her decision not to purchase the house. Thus, after a home inspection on September 8, 1998, Delisle discontinued all contact with Staniunas.

Beginning with a letter on September 16, 1998, Staniunas, through legal counsel, sought the return of the passbook and the funds, which Delisle refused. On May 2, 2000, Staniunas filed a complaint against Delisle in the Middlesex Superior Court claiming, among other things, fraudulent conversion of the $45,000 in the joint account. On December 14, 2000, Staniunas obtained judgment by default against Delisle. While Delisle has sought to have the judgment overturned, the matter remains pending on appeal.

Delisle filed a voluntary petition under Chapter 7 of the Bankruptcy Code on August 16, 2001. Staniunas filed an adversary proceeding on November 15, 2001, seeking, among other things to except the $45,0000 withdrawn from the joint account from discharge pursuant to § 523(a)(2)(A).[3] After trial, the bankruptcy court granted the objection to dischargeability under

[3] Staniunas also sought to except the $35,000 debt resulting from the truck purchase from discharge pursuant to § 523(a)(2)(A) and a denial of discharge pursuant to § 727(a)(2)(A). The bankruptcy court overruled the objection to dischargeability as to the funds used for the purchase of the truck and overruled the objection to discharge pursuant to § 727(a)(2)(A). We subsequently affirmed. Staniunas sought no further review of these orders.

§ 523(a)(2)(A) as to the $45,000 withdrawn by Delisle. Delisle appealed. We remanded for additional findings.

The bankruptcy court issued a Memorandum of Decision making further findings on the elements of the test for excepting a debt from discharge based on fraud and the bankruptcy court found that Delisle's actions satisfied the requirements of fraud. Delisle appeals claiming 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. Delisle also claims that the bankruptcy court essentially imposed a constructive trust remedy, which is not recognized under bankruptcy law, on the $45,000 withdrawn from the joint account.

DISCUSSION

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). In its initial decision, 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)). In the first appeal, we concluded that the bankruptcy court articulated the proper

standard for excepting a debt from discharge based on actual fraud. We remanded for application of the individual elements.

Exceptions to discharge under § 523(a) are construed narrowly and in favor of the debtor. See In re Spigel, 260 F.3d at 32. Nevertheless, sections "like § 523(a)(2)(A), are intended to make certain that bankruptcy protection is not afforded to debtors who have obtained property by means of a fraudulent misrepresentation." Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997). The claimant in a nondischargeability proceeding under § 523(a)(2)(A) must prove fraud by a preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 287-90 (1991).

On remand the bankruptcy court concluded that Staniunas proved actual fraud by a preponderance of the evidence. The court found that Delisle made a knowingly false representation or one made in reckless disregard of the truth; that she intended to induce Staniunas to rely upon the false representation; he actually relied on the statement; his reliance was justified and his reliance caused damage.

I. Misrepresentation and Scienter

The initial elements to except a debt from discharge under § 523(a)(2)(A) relate to the debtor's conduct and intent. On appeal, Delisle makes largely the same arguments regarding false representation and intent to deceive. Thus, rather than discuss the arguments in separate sections, we address these elements jointly.

Staniunas was required to show that Delisle made a knowingly false representation or one made in reckless disregard of the truth. If Delisle made a promise that she did not intend to perform, then she made a false representation pursuant to § 523(a)(2)(A). Palmacci, 121 F.3d at 787. Intent to deceive may be inferred from the totality of the circumstances, including

inferences from circumstantial facts. Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 764 (1st Cir. 1994). A false representation paired with deceptive conduct is sufficient to permit the inference of intent to deceive. Eastern Food Service, Inc. v. Leger (In re Leger), 34 B.R. 873 (Bankr. D. Mass. 1983). "'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" Palmacci, 121 F.3d 781, 190-91 (1st Cir. 1997) (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985)).

With respect to the false representation, the bankruptcy court found that there was credible evidence of an agreement between Staniunas and Delisle regarding Delisle's use of the funds in the joint account. The bankruptcy court found that Delisle's use of the funds was dependent upon Staniunas' permission and that she falsely represented her assent to this agreement. We previously held that the finding regarding the agreement as to the use of the funds was not clearly erroneous. In this appeal, Delisle indicates that while she disagrees with this finding, she is not requesting that the Panel revisit this issue. Brief of Defendant-Appellant at 9.

The bankruptcy court also found that the totality of the circumstances demonstrated that Delisle intended to deceive Staniunas. The bankruptcy court considered that Delisle's use of the funds was conditioned on Staniunas' permission and she secretly withdrew the funds and placed them in her own checking account, out of Staniunas reach. The bankruptcy court determined that Delisle's placement of the funds in her personal account was an attempt to conceal the funds. The bankruptcy court also considered the fact that Delisle obtained Staniunas' permission to withdraw the funds to purchase the truck, but subsequently withdrew the $45,000 from the joint account without his permission. Finally, the court considered that Delisle kept the passbook after

she found it among Staniunas' belongings. The court found that these circumstantial facts lead to the inference that Delisle intended to deceive Staniunas.

The findings made by the bankruptcy court were not clearly erroneous. Delisle admits that she agreed not to use the funds without Staniunas' permission and one month after the opening of the joint account she transferred $45,000, without his permission, into her individual account in another bank. She subsequently dissipated the funds. Delisle provided no justification for her behavior to refute the inference of her intent to deceive Staniunas. The bankruptcy court had ample evidence from which to infer that Delisle made the agreement as to the use of the funds without the intent to perform. Delisle falsely represented her assent to the agreement, and thus made a false representation pursuant to § 523(a)(2)(A). She intended to deceive Staniunas and intended to induce him to rely upon her representation.

Delisle argues, however, that the bankruptcy court blurred the transfer of the funds with her actual use of the funds. Delisle contends that her use of the funds had to show a fraudulent or immoral intent and that her use of the funds for actual living expenses does not manifest this intent. She relies on Burlington Indus., Inc. v. Wilson (In re Wilson), 114 B.R. 249 (Bankr. E.D. Cal. 1990), wherein the court held that the debtor's conversion of proceeds of checks and use of the funds to sustain a business was not necessarily fraudulent, deceitful or immoral. The debtor argued that he was simply trying to buy some time to collect receivables and pay his creditors and thus the court found that fraudulent intent was missing. In Wilson, the debtor made no misrepresentations until after the conversion of the funds.

In the present case, we conclude that Delisle is misconstruing the requirements of a fraudulent misrepresentation. The present case can be compared to Printy v. Dean Witter

Reynolds, Inc., 110 F.3d 853 (1st Cir. 1997), wherein a debtor willfully and maliciously injured a brokerage firm by taking advantage of the firm's error in crediting stock to the debtor's account by borrowing against and withdrawing funds from a false margin account that derived its value from stock which the debtor knew he did not own. In Printy, the bankruptcy court determined, and the First Circuit Court of Appeals agreed, that the debtor used the funds received to finance trades and for personal and family expenditures. Id. at 858. Notwithstanding, the First Circuit determined that the debt was nondischargeable.

While the action was prosecuted under 11 U.S.C. § 523(a)(6) to except a debt from discharge for a willful and malicious injury, the First Circuit held that this section and the discharge exception pertaining to fraud, 11 U.S.C. § 523(a)(2)(A), are not mutually exclusive. The action could have been maintained under either section and the fact that the debtor did not use the funds for a fraudulent, deceitful or immoral purpose would not have had a bearing on the determination of the dischargeability of the debt. Thus, we conclude that the purpose for which Delisle used the funds has no bearing on whether she made a fraudulent misrepresentation prior to her withdrawal of the funds.

Delisle also contends that Staniunas' failure to act promptly after he determined that the funds had been transferred can be seen as a ratification of the transfer. First, the record disputes that he failed to act promptly. The funds were withdrawn by Delisle on August 20, 1998 and on September 16, 1998, through counsel, Staniunas requested their return. While three weeks is not a long period of time, Staniunas provided a justification for his failure to act even sooner. He intended to finance her purchase of the house from him and he testified that if they made a deal for the house, he thought he could negotiate inclusion of the money that Delisle had withdrawn

into the purchase price. See Appellant's App., Transcript of Hearing at 31-32. Moreover, Staniunas' actions after the transfer do not address the issue of whether Delisle made a false representation. Delisle's deceit was established when she transferred the funds and placed them out of this reach.

II. Reliance

Staniunas was also required to prove justifiable reliance. Lentz v. Spadoni (In re Spadoni), 316 F.3d 56, 58 (1st Cir. 2003) (citing Field v. Mans, 516 U.S. 59, 73-74 (1995)). "The standard of review on this appeal requires that we respect, unless 'clearly erroneous,' all findings of fact by the bankruptcy court, which includes any finding of actual reliance and any raw fact findings pertinent to the issue of justifiable reliance." Id. (citing Brandt v. Repco Printers & Lithographics, Inc., 132 F.3d 104, 107-08 (1st Cir. 1997)). Friendship may reinforce reliance on false statements. Id. (citing In re Vann, 67 F.3d 277, 281, 284 (11th Cir. 1995)).

The bankruptcy court found that while Staniunas opened the account without Delisle's knowledge, he later explained the purpose of the account and Delisle assented to the terms. The court found that presumably, Staniunas left the account open because of Delisle's assent to the terms. Staniunas left Delisle's name on the account and he did not take any action to recover the passbook from Delisle after he found out that Delisle was in possession of it. The court found that these examples of the trust that Staniunas placed in Delisle with regard to the funds leads to the conclusion that he relied on her promise.

The bankruptcy court found that Staniunas was justified in relying on Delisle's representation because of their friendship and because Delisle misrepresented that she would not withdraw funds without Staniunas' permission. Again the court found that Delisle's prior

conduct was consistent with their agreement. Delisle obtained permission and did not withdraw funds unilaterally to purchase the truck. The court found that Staniunas clearly trusted Delisle, which was evidenced by his intent to have her care for him if he should become ill. Staniunas had no reason to doubt Delisle's intentions prior to her withdrawal of the $45,000.

With respect to the issue of reliance, Delisle argues that the bankruptcy court's finding is clearly erroneous because Staniunas did not clear out the remaining funds nor close the joint account until the Spring of 2002. After Delisle's transfer, Staniunas did not take steps to stop her from spending the funds. Delisle claims that these facts demonstrate that he did not rely on her promise. Further, Delisle argues that "one need not address whether reliance was justified because there is no evidence of reliance in the first place." Brief of Defendant-Appellant at 13. Delisle considers that Staniunas allowed her to retain the passbook after she had taken it while he was hospitalized. He did not ask for the money back immediately after he learned that it had been withdrawn. It was not until the negotiation for the sale of the house fell through and after the dissolution of the parties' relationship that he requested the return of the funds. Delisle also contends that Staniunas was a knowledgeable business man with an understanding of joint accounts and that he had indicated that he wanted the funds to go to her if he died.

In Spadoni, supra, the First Circuit Court of Appeals considered the effect of a delay in seeking to recover money. Lentz filed suit against Spadoni for collection of unpaid rent, related to a commercial lease, more than a year after Spadoni had vacated the premises. After Spadoni filed a Chapter 7 bankruptcy petition, Lentz filed an adversary proceeding claiming that the outstanding rent was nondischargeable under § 523(a)(2)(A) as a money debt obtained by false pretenses or false representations. Namely, Lentz claimed that Spadoni had made assurances

during the lease that he would pay and that he trusted Spadoni and gave him the benefit of the doubt.

The First Circuit concluded that Spadoni's assurances were credible and that renewed assurances made by Spadoni allowed Lentz's trust to endure. The First Circuit concluded that Lentz's forbearance was justifiable and concluded that the 1998 rent qualified as a non-dischargeable debt notwithstanding that Lentz did not bring suit until more than one year after Spadoni vacated the premises. The court stated that "[w]hat this further delay has to do with Lentz's actual trust or lack of it in Spadoni's promises is unclear." Id. at 58-59.

Likewise, we conclude in the present case that any delay by Staniunas in closing the account or in bringing suit to recover the funds does not go to the issue of whether he relied upon Delisle's misrepresentation or whether the reliance was justifiable. Moreover, while it may be true that the account remained open, the bulk of the $85,000 used to open the account had already been withdrawn. The purchase of Delisle's truck required a withdrawal of $35,000 and $45,000 was withdrawn from the account by Delisle without Staniunas' consent. The fact that Delisle left some funds in the account when she made the unauthorized withdrawal of the $45,000 does not negate her fraudulent intent. It is no less a fraud because Delisle took 90% of the funds in the account than if she had withdrawn them all. Nor does the fact that the account was not immediately closed demonstrate that Staniunas was not relying on her promise prior to her withdrawal of the funds. The $5,000 which remained in the account is not at issue. Certainly, if Delisle had withdrawn the remaining $5,000, more than two years after her initial withdrawal of the $45,000, Staniunas would have had a difficult time showing justifiable reliance

on her promise not to withdraw these funds, because she had already shown that her promise was false. But, at the time of the initial withdrawal, Staniunas had no reason to doubt her intentions.

The fact that Staniunas allowed Delisle to retain the passbook after she found it in his belongings was not inconsistent with his intention to allow her to withdraw money for his care, if he needed it. As the bankruptcy court found, a credible view of the evidence is that Staniunas allowed her to retain the passbook because of their friendship and his trust in her. Until she withdrew the money, he had no reason to doubt her intentions. While it is not disputed that Staniunas had said that he wanted the funds to go to Delisle if he died and that he had some business acumen, these two factors do not negate his justifiable reliance upon her misrepresentation.

III. Damages

In Gem Ravioli, Inc. v. Creta (In re Creta), 271 B.R. 214 (B.A.P. 1st Cir. 2002), the Bankruptcy Appellate Panel for the First Circuit adeptly summarized the law in this circuit governing proximate cause in the context of dischargeability proceedings related to misrepresentations.

> The First Circuit Court of Appeals has explained that section 523(a)(2)(A) requires a "direct link" between the alleged fraud and the creation of the debt to be excepted from discharge. Spigel, 260 F.3d at 32 n.7, 35. See also Palmacci, 121 F.3d at 787 (stating that the creditor must show that the debt "arose as a result" of the debtor's fraud). In Spigel, the First Circuit cited its earlier decision in Century 21 Balfour Real Estate v. Menna (In re Menna), 16 F.3d 7, 10 (1st Cir. 1994), where it stated that the creditor must show that the debt owed to it "arises as a direct result of the debtor's misrepresentation or malice." Spigel, 260 F.3d at 32. The United States Supreme Court has indicated that the term "debt for" in section 523(a)(2)(A) means "debt arising from" or "debt on account of." Cohen v. de la Cruz, 523 U.S. 213, 220, 118 S. Ct. 1212, 140 L. Ed.2d 341 (1998). The Supreme Court has also used phrases such as "debts resulting from 'false pretenses, a false representation, or actual fraud' "and "debts traceable to falsity or fraud or to a

> material false financial statement" in discussing the requirement. Field v. Mans, 516 U.S. 59, 61, 64, 116 S. Ct. 437, 133 L. Ed.2d 351 (1995).

Creta, 271 B.R. at 218.

The bankruptcy appellate panel continued, concluding that the concept of proximate cause encompasses both the elements of "causation in fact" and "legal causation." Id. at 219 (citing Restatement (Second) of Torts §§ 546, 548A). Causation in fact requires that reliance upon the misrepresentation be a substantial factor in incurring the loss. Id. (citing Restatement § 546.) Whereas, "'legal causation' requires that a creditor's loss 'reasonably be expected to result from the reliance.'" Id. (quoting Restatement § 548A).

The bankruptcy court concluded that Staniunas' reliance upon Delisle's misrepresentation was the proximate cause of his damages. The court concluded that because of his trust, Staniunas relied upon Delisle's agreement to obtain permission before withdrawing funds from the joint account. The court found that Delisle was able to withdraw the funds because of Staniunas' lack of safeguards. Thus, as to "causation in fact," the court concluded that Delisle's false statement that she would not withdraw the funds without permission was a substantial factor in the damages.

As to "legal causation," the bankruptcy court concluded that Staniunas left the funds in the joint account because of Delisle's false representation that she would not use the funds without his permission. The court concluded that it was reasonably expected that funds left unguarded because of a false representation may be removed from an account. Staniunas' reliance caused him to leave the account without safeguards, allowing Delisle to withdraw it and

causing Staniunas a loss of $45,000. His loss was reasonably expected from his reliance on her misrepresentation that she would not take the money without permission.

We reject Delisle's argument that Staniunas' failure to act after the transfer to stop dissipation of the funds caused the loss, rather than Staniunas' reliance on Delisle's word because of his trust in her. We conclude that the bankruptcy court committed no error in determining that Staniunas' reliance upon Delisle's misrepresentation was a substantial factor in causing Staniunas' loss and that Staniunas' loss was reasonably expected to result from his reliance. Thus, the bankruptcy court properly concluded that Staniunas' reliance upon Delisle's misrepresentation was the proximate cause of his damages.

IV. Constructive Trust

In this appeal, as in her first appeal, Delisle argues that she had legal title to the funds in the joint account and that the bankruptcy court imposed the remedy of constructive trust in order to hold her liable for withdrawing the funds. Delisle contends that constructive trusts are not recognized in bankruptcy proceedings. "Constructive and resulting trusts are traditional constructs utilized by courts . . . to avoid unjust enrichment and other forms of injustice that would result from allowing the legal owner to benefit from the property." Davis v. Cox, 356 F.3d 76, 90 (1st Cir. 2004) (citations omitted); see also Fleet Nat'l Bank v. Valente (In re Valente), 360 F.3d 256 (1st Cir. 2004). Davis v. Cox stands for the proposition that constructive trusts can be imposed in the bankruptcy context under certain circumstances. However, the circumstances under which they can be imposed are not relevant here because the bankruptcy court in this case did not use the constructive trust doctrine in its rationale. Staniunas had an adequate legal remedy and he sought it.

In the bankruptcy court's initial opinion, the court discussed the rights of the parties in the joint account. The court concluded that while "[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)), "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 court then found that Delisle and Staniunas had an agreement as to the use of the funds and that Delisle withdrew them without his authorization. The agreement between the parties was used by Staniunas to prove the misrepresentation which formed the basis of the bankruptcy court's determination that the debt was nondischargeable pursuant to § 523(a)(2)(A).

Delisle also argues that the imposition of a constructive trust would be a useless remedy to Staniunas since the funds withdrawn by Delisle were dissipated prior to the filing of the bankruptcy petition. We agree. If Delisle were in possession of the funds and if the remedy of constructive trust were available to Staniunas, and if Staniunas successfully argued for the

imposition of a constructive trust, he would have had his debt satisfied. However, this hypothetical scenario did not occur. Rather, Staniunas has proven the nondischargeability of the debt, but unlike a scenario involving the imposition of a constructive trust, Staniunas has no further assurances than he had prepetition that he will be repaid.

As Delisle concedes, in Ball v. Forbes, 49 N.E.2d 898 (Mass. 1943), also one of the cases relied upon by the bankruptcy court, the plaintiff proceeded under a contract theory rather than under an equitable remedy theory. Likewise, in the present case, prior to Delisle's petition in bankruptcy, Staniunas filed an action and obtained a judgment under a theory of fraudulent conversion. None of the pleadings suggest that Staniunas sought the imposition of a constructive trust. The bankruptcy court found that the debt specifically fit within the exception to discharge provided by § 523(a)(2)(A). Applying all of the elements discussed, we have agreed.

CONCLUSION

The bankruptcy court properly sustained the objection to dischargeability pursuant to § 523(a)(2)(A) for the $45,000 withdrawn by Delisle from the joint account. Accordingly, we **AFFIRM.**