NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 07-009

Bankruptcy No. 05-13737-RS
Adversary Proceeding No. 05-01542-RS

John W. Winer, Jr.,
Debtor.

Anthony Termine,
Plaintiffs - Appellant,

v.

John W. Winer, Jr.,
Defendant - Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Robert Somma, U.S. Bankruptcy Judge)

Before
Votolato, de Jesús and Vaughn, United States Bankruptcy Appellate Panel Judges.

Michael B. Feinman, Esq., and Stephen P. Shannon, Esq., on brief for Plaintiff-Appellant.

Gregory C. Joy, Esq., and John Rogers, Esq., on brief for Defendant-Appellee.

September 19, 2007

Per Curiam.

Anthony Termine (the "Appellant") appeals the bankruptcy court's December 14, 2006, judgment in favor of John W. Winer, Jr. (the "Appellee"), on two counts brought by the Appellant pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(6).[1] The court ruled for the Appellee despite his admitted misrepresentation that he signed a promissory note without the intention of making any payments on the note. The court concluded that because no money, property, services, or credit were advanced on account of a promissory note, nothing was "obtained" by the Appellee on account of the note for purposes of §523(a)(2)(A), and that there was no injury to satisfy §523(a)(6). For the reasons set forth below, the court's judgment for the Appellee is affirmed.

BACKGROUND

The Appellant's daughter and the Appellee were business partners who created a corporation in 1998 to operate a jewelry wholesale business. Each partner contributed $35,000 in capital and owned equal shares of the corporation. The business also obtained working capital credit lines from a bank lender that were secured by the business's assets and personal guarantees from the business partners. The Appellee's personal guarantee was secured by a mortgage on his residence, while the Appellant's daughter's guarantee was not secured by any collateral.

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[1] The bankruptcy court also denied the Appellant's third count seeking denial of the Appellee's discharge under §727(a)(4)(D) and (a)(6)(A), but the Appellant has not appealed the denial of that count.

All references to the "Bankruptcy Code" or to specific sections are to the Bankruptcy Reform Act of 1978, as amended prior to April 20, 2005, 11 U.S.C. §§ 101 to 1330.

On at least four occasions, the Appellant provided financial assistance to the cash-strapped business. First, he provided funds for computer-system upgrades. Second, he loaned $75,000 to the business in 1999, which the business repaid. Third, he loaned $85,000 to the business in early 2001. Finally, in mid-2001, the Appellant helped the business obtain a bank credit line by personally guaranteeing the credit line and offering certificates of deposit as collateral for his guarantee.[2] At no time did the Appellant request or obtain from either his daughter or the Appellee a written guarantee or other agreement in which the business partners agreed to be personally liable for loans and credit guarantee given by the Appellant. Although the Appellant and his daughter testified that they and the Appellee had an understanding that the partners were personally liable for the business debt if the business failed to pay, the Appellee testified that no such agreement or understanding existed. Sometime after the credit line was obtained, the business failed, leaving the Appellant as an unsecured creditor with a claim in the amount of $184,500 as a result of the $85,000 loan not being repaid and the bank liquidating the certificates of deposit to satisfy the credit line.

The Appellant's daughter and the Appellee commenced a non-bankruptcy liquidation of the business assets in order to pay off their obligations to the secured bank lender, which obligation both business partners had personally guaranteed, and, in the case of the Appellee, had secured with a mortgage on his residence. Toward the end of the liquidation process, the Appellant requested that his daughter and the Appellee each personally sign a promissory note for his or her respective share of the business's debt to the Appellant. Although the Appellee

[2] The $85,000 loan and the Appellant's guarantee of the credit line are hereinafter referred to collectively as the "loan and credit guarantee."

freely admits that he did not intend to make any payments on the note, he signed it in order to ensure the Appellant's daughter's cooperation in liquidating the secured bank line collateralized by the Appellee's home.

On May 1, 2002, the Appellee gave the Appellant a note for $89,620.35, and the Appellant's daughter gave the Appellant a note for $93,120. The Appellee made no payments on the note, so the Appellant sued him in state court and obtained a default judgment in the amount of $100,213.39. The Appellee subsequently filed a Chapter 7 petition on April 25, 2005.

The Appellant commenced this adversary proceeding by filing a three-count complaint in which he sought to except the default judgment of $100,213.39 from discharge pursuant to §523(a)(2)(A) and (a)(6). The complaint also sought denial of the Appellee's discharge under §727(a)(4)(D) and (a)(6)(A) for failure to produce documents. On December 11, 2006, the bankruptcy court held an evidentiary hearing at which the Appellee, the Appellant, the Appellant's daughter, and the attorney who assisted in the liquidation testified. On December 14, 2006, the court announced its findings and rulings in open court. The court denied the §727 count, and this ruling was not appealed. The court also entered judgment for the Appellee under §523(a)(2)(A) and (a)(6), concluding that the debt to the Appellant was not excepted from discharge. On appeal, the Appellant argues that the bankruptcy court erred by not finding that the promissory note was "an extension, renewal, or refinancing of credit" obtained by a false representation, and thus excepted from discharge under §523(a)(2)(A), and that the debt is for a willful and malicious injury under §523(a)(6).

JURISDICTION

A bankruptcy appellate panel "may hear appeals from final judgments, orders, and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998) (quotations omitted). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). A bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. See In re George E. Bumpus, Jr. Constr. Co., 226 B.R. 724 (B.A.P. 1st Cir. 1998). The bankruptcy court's order brought an end to the Appellant's efforts to deny the Appellee's discharge under §727 and to except the debt from discharge under §523 and is, therefore, a final, appealable order. See In re Cambio, 353 B.R. 30, 31 n.1 (B.A.P. 1st Cir. 2004).

STANDARD OF REVIEW

The Panel applies the clearly erroneous standard to the bankruptcy court's findings of fact, but subjects the court's conclusions of law to *de novo* review. See T.I. Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms. Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719–20 n.8 (1st Cir. 1994).

DISCUSSION

There are two transactions that the bankruptcy court considered under §523(a)(2)(A) and (a)(6). First, there is the Appellant's loan and credit guarantee, and, second, the promissory note

given by the Appellee. The court's transcript reveals that the Appellant focused on the promissory note rather than the loan and credit guarantee:

> At trial, indeed in all phases of this adversary proceeding [the Appellant] has focused on the note transaction and has not focused primarily or presented substantial evidence with respect to the loan and credit transaction between [the Appellant] and the business, other than to testify that it occurred.

Appellant's App. at 628.

I. Extension of Credit

Section 523(a)(2)(A) excepts from discharge a debt

> (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[.]

11 U.S.C. § 523(a)(2)(A). It is undisputed that no money, property, or services were extended to the Appellee in connection with the promissory note. The outstanding issue on appeal is whether the note represents an extension, renewal, or refinancing of credit for purposes of § 523(a)(2)(A). The thrust of the Appellant's case is that the bankruptcy court misstated and then misapplied § 523(a)(2)(A) by overlooking the "extension, renewal, or refinancing of credit" language and erroneously using as the standard only whether the Appellant advanced any money to the Appellee on account of the promissory note.

The First Circuit has adopted a broad definition of "extension." While an "extension" of credit occurs when credit is initially made available, "an extension may [also] be an 'increase in length of time' or 'an agreement on or concession of additional time (as for meeting an overdue debt or fulfilling a legal formality).' Webster's Third New International Dictionary 804–805

(1971). Granting additional time to pay [a] note would, for example, have met this definition." Field v. Mans, 157 F.3d 35, 43 (1st Cir. 1998); see also In re Biondo, 180 F.3d 126, 131, 133 (4th Cir. 1999) (stating that extensions, renewals, and refinancings are secondary debt transactions, and that "[t]he terms collectively used in § 523(a)(2) are . . . broad enough to account for virtually every type of secondary debt transaction").

In order for the promissory note to constitute an extension of credit to the Appellee, the Appellant must have initially given credit *to the Appellee* in connection with the loan and credit guarantee. See Field v. Mans, 157 F.3d at 43 ("Section 523(a)(2)(A) is said to 'encompass[ ] virtually every form of new agreement with respect to *existing* credit[.]'") (first alteration in original) (emphasis added) (quoting 4 Lawrence P. King, Collier on Bankruptcy Practice Guide ¶ 76.05[1], at 76-17 (15th Ed. 1997)).

With respect to the loan and credit guarantee, the bankruptcy court found that the Appellant gave credit only to the business, not to the Appellee:

> [The Appellant] has not proved that [the Appellee] obtained money from him based upon a false representation on which he relied. Indeed, [the Appellant] has not proved that [the Appellee] made any representation to him, other than the disclosure about the financial condition of the business and the need for working capital. [The Appellant] did not present any written undertaking or oral statement by [the Appellee] that [the Appellee] would personally repay [the Appellant] on the loan and credit guarantee if the business did not do so. And even if [the Appellee] did make a representation of personal liability at the time of the advances and credit guarantee, [the Appellant] does not allege and in any case has not proved that this representation was false when made.

Appellant's App. at 628–29. Having found no evidence of the Appellee's personal liability with regard to the loan and credit guarantee, the court continued as follows:

> As to the giving of the note, while [the Appellant] has proved and [the Appellee] has admitted that [the Appellee] misrepresented his intention to repay

> the note, [the Appellant] has not proved that he advanced any money to [the Appellee] or to the business based upon the note from [the Appellee]. To the contrary, [the Appellant] testified that he advanced nothing to [the Appellee] or to the business after the note had been given. Thus, in each transaction [the Appellant] failed to meet his burden of proof.

Id. at 629. Thus, the court concluded:

> In the loan and credit guarantee transaction, there is the obtaining of money by the business, but no false representation by [the Appellee]; and in the note transaction there is a false representation by [the Appellee], but no showing that [the Appellee] obtained anything—money, services, credit—from [the Appellant] in reliance on that false representation.

Id.

While it is clear that the Appellant did advance credit to the business in connection with the loan and credit guarantee, the bankruptcy court found that no misrepresentation was made at that time, and that the Appellant never requested or obtained a personal guarantee from the Appellee for this business debt. These findings are clearly supported by the record, and the evidence is uncontroverted that the Appellee made no promise to pay or guarantee the Appellant's loan to the business in the event of a default. See Appellant's App. at 624, 628–29. The Appellant, who has had the burden of proof on the personal liability issue, offered no evidence at trial to establish that point. Without a personal guarantee, the Appellant had no right to look to the Appellee personally when the business defaulted on its obligation. The debtor in the loan and credit guarantee transaction was the business, and the debtor of the promissory note was the Appellee. Thus, the promissory note was not an extension of credit, as it was not a "new agreement with respect to existing credit." Field v. Mans, 157 F.3d at 43 (quotations omitted). The note could not extend the terms of non-existent credit. As such, the Panel agrees with the bankruptcy court that the Appellant failed to satisfy the requirements of § 523(a)(2)(A).

II. Willful and Malicious Injury

The Appellant argues that the Appellee's admitted misrepresentation with respect to the promissory note constitutes a willful and malicious injury under § 523(a)(6), which excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). To come within § 523(a)(6), the debtor must have intended the injury suffered. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998); Rutanen v. Baylis (In re Baylis), 313 F.3d 9, 23 (1st Cir. 2002). In order to have prevailed on his claim, the Appellant needed to prove (1) that he was injured, and (2) that the Appellee willfully and intentionally caused that injury. The bankruptcy court determined that the Appellant had not proven a willful and malicious injury, stating:

> Here, [the Appellant] must prove that [the Appellee] acted deliberately and intentionally in a manner that he knew would harm [the Appellant] and his actions did so harm him. The only such act, getting [the Appellant] to lend money and provide a credit guarantee to the business on a false promise to repay [the Appellant] if the business did not, has not been demonstrated to have occurred as noted above, and thus [the Appellee] cannot be found to have shown that [the Appellant] would be harmed thereby.

Appellant's App. at 630.

In the loan and credit guarantee transaction, there is no evidence of misrepresentation on the Appellee's part. Indeed, the Appellant's brief and reply brief do not allege a misrepresentation at that time. There being no misrepresentation, there is certainly no willful and malicious injury.

The Appellant argues that the bankruptcy court erred by not finding that the Appellee's misrepresentation in connection with the promissory note was not willful and malicious. While the Appellee's actions may have constituted a willful and malicious *act*, the Appellant must

prove a willful and malicious *injury*. Kawaauhau v. Geiger, 523 U.S. at 61. There was no injury caused by the Appellee because the Appellant did not give anything to the Appellee on account of the promissory note, as discussed above.

Though the Panel does not condone the Appellee's misrepresentation, the Appellant has not proved that either the loan and credit guarantee transaction or the promissory note transaction satisfy all of the requirements of § 523(a)(6).

CONCLUSION

The bankruptcy court's order denying the Appellant's claims under § 523 is **AFFIRMED.**