NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 12-017

Bankruptcy Case No. 09-16251-WCH
Adversary Proceeding No. 09-01329-WCH

SCOT P. STEWART and
LISA F. PERRONE,
Debtors.

BELLAS PAVERS, LLC,
Plaintiff-Appellant,

v.

SCOT P. STEWART,
Defendant-Appellee.

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

Before
Lamoutte, Kornreich, and Cabán,
United States Bankruptcy Appellate Panel Judges.

Peter Cole, Esq., on brief for Plaintiff-Appellant.

Richard N. Gottlieb, Esq. and Alex R. Hess, Esq., on brief for Defendant-Appellee.

October 18, 2012

Cabán, U.S. Bankruptcy Appellate Panel Judge.

This case arises out of an adversary proceeding brought by Bellas Pavers, LLC ("Bellas") seeking to except from discharge a debt owed by Scot P. Stewart ("Stewart") for masonry services. The bankruptcy court conducted a trial, and at the close of Bellas' case, Stewart moved for a judgment on partial findings pursuant to Fed. R. Civ. P. 52(c) ("Rule 52(c)"). The bankruptcy court granted that motion and entered judgment in favor of Stewart. Thereafter, Bellas filed a motion pursuant to Fed. R. Civ. P. 59(a) ("Rule 59(a)") requesting a new trial, or in the alternative, that the bankruptcy court reopen the original trial, enter new findings of facts and conclusions of law, find in Bellas' favor on all counts, and enter a judgment of nondischargeability. The bankruptcy court denied the motion for a new trial, and Bellas appealed.

For the reasons discussed below, we **AFFIRM.**

BACKGROUND

A. Factual Background

Stewart was the sole manager of Premier Building & Window, LLC ("Premier"), a now defunct company organized under the laws of Massachusetts. In July 2007, Michael Coffin ("Coffin") hired Premier to construct a stone patio and retaining wall on his property in Stoughton, Massachusetts ("Property"). Coffin paid two initial deposits of $5,000.00 and $1,346.00 to Premier.

On July 23, 2007, Stewart sent Bellas a fax, on Premier's letterhead, asking Bellas to work as a subcontractor performing masonry services at the Property. The fax identified the job as the "paving stone project," and concluded with the following statement: "With Premier, you

will get paid one week after the job is completed and the customer signs off. What a difference!" Bellas began its work on the paving stone project on July 24, 2007, and finished on August 2, 2007.

Shortly after the paving stone project was completed, Coffin contacted Stewart complaining that the stones were discolored and threatening legal action. In an email dated August 15, Coffin stated that there was a "**VERY** serious problem" with the stones installed on his Property and that if he did not receive an immediate response, Coffin would "turn the matter over to [his] lawyers and proceed accordingly." Stewart responded by email, requesting pictures of the stones. In an email dated August 17, Stewart informed Coffin that a representative from the manufacturer, Cambridge Pavers, wanted to stop by the Property to inspect the stones. On August 18, Coffin sent another email insisting that the stones were defective and demanding a remedy. In November 2007, Coffin's attorneys sent a demand letter pursuant to Mass. Gen. Laws ch. 93A, § 9, addressed to Stewart, as manager of Premier, recounting all of Coffin's payments, the work performed by Premier and Bellas, and detailing Coffin's dissatisfaction with the work. Stewart, as manager of Premier, responded to the demand letter, denying its allegations and stating that Coffin was "absolutely thrilled with the work . . . and paid in full upon completion" and that he "repeatedly complimented the level of professionalism and quality of work as it was being performed." Coffin never filed suit against either Stewart or Premier concerning the paving stone project.

In the meantime, after completing the paving stone project, Bellas made several attempts to contact Stewart to request payment for its masonry services, and on August 8, 2007, it sent Stewart an invoice in the amount of $6,867.74. No payment was made, and Bellas' attempts to

obtain payment continued from mid-August through December 2007. Although Coffin paid Premier in full, neither Stewart nor Premier ever paid Bellas anything for the paving stone project.

B. The Bankruptcy Proceedings

In July 2009, Stewart and Lisa F. Perrone filed a joint chapter 7 petition, and Bellas brought an adversary proceeding against Stewart claiming that the outstanding debt to Bellas should not be discharged because it was based on fraud. Specifically, Bellas claimed that Stewart, when hiring Bellas as a masonry subcontractor, never intended to pay Bellas. Although Bellas did not identify any specific Bankruptcy Code sections in its complaint, its allegations of fraud suggested a claim under § 523(a)(2)(A).[1]

1. The Trial

The bankruptcy court conducted a trial on March 23, 2012.

(a) Eduardo Pereira

Bellas' first witness was Eduardo Pereira ("Pereira"), the owner and manager of Bellas. Pereira testified that he first became acquainted with Stewart when Bellas worked as a subcontractor for a company named Master, which was based in New York. Stewart was Master's manager in Massachusetts.

Pereira stated that he received a fax communication from Premier soliciting Bellas' services for a paving stone project. Pereira testified that he believed the statement contained in

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. § 101, et seq. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure.

the fax dated July 23, 2007, sent from Premier to Bellas, which indicated: "With Premier you will get paid one week after the job is completed and the customer signs off. What a difference!"

Bellas began work on the paving stone project the next day. The work involved installation of a patio around a swimming pool, "coping," i.e., creation of a border to the patio, and construction of a retaining wall between the pool and a driveway. Pereira described in detail the work of excavation, placement of layers of sand and gravel, and the placement of paving stones on the surface.

According to Pereira, a week into the job, he called Stewart to tell him he needed some additional materials. He testified that Stewart instructed Pereira to buy the necessary materials and that Bellas would be reimbursed. Bellas bought glue, grout, and rubber gloves with which to apply them, as evidenced by the copies of Bellas' receipts for the purchases.

Pereira testified that on the day Bellas finished its work, Coffin opened a bottle of champagne to celebrate because the work was "awesome." Pereira then described Bellas' attempts to obtain payment from Premier. He testified that he tried to contact Stewart numerous times, and on August 8, 2007, Bellas faxed Stewart an invoice totaling $6,867.74 for the paving stone project.

In the months that followed, Pereira made several attempts to contact Stewart regarding payment of the invoice. At one point, Stewart told him that Premier was expecting a payment from Master, and would pay Bellas after receiving it. At another point, Pereira went to the Boston address listed on Premier's letterhead; he saw a receptionist, but did not see Stewart. On December 21, 2007, Bellas sent Stewart another fax asking for payment. After sending the fax, Pereira had no more contact with Stewart.

(b) Michael Coffin

After Pereira's testimony, Bellas read into the record excerpts from a deposition of Coffin, taken on February 24, 2012. However, the bankruptcy court expressed that the excerpts read into the record about whether or not Coffin complained about the paving stones "[h]ad nothing to do with" whether Stewart entered into an agreement with Bellas intending not to pay. Bellas' counsel continued to read into the record excerpts detailing Coffin's complaints about the paving stones.

2. The Motion for Judgment on Partial Findings

Bellas rested its case on the testimony from Pereira and Coffin, and the exhibits authenticated by the witnesses. Stewart then moved for a judgment on partial findings pursuant to Rule 52(c), asserting three grounds: (1) lack of personal liability for Premier's actions (the agreement was between Bellas and Premier, not Stewart); (2) lack of evidence that Stewart had fraudulent intent when he entered into the agreement with Bellas on Premier's behalf; and (3) lack of evidence that Bellas had reasonably relied on Stewart's representations.

Bellas responded to the first point by citing case law as to personal liability for fraud committed on behalf of a business entity. As to the second point, Bellas argued that Stewart's intent to deceive Bellas could be inferred, emphasizing the short time frame between when Stewart made the promise to pay and the time he broke it. As to the third ground, Bellas pointed out that it had had problems getting paid from another company, Masters, in the past, and Stewart's statement that Premier would pay within a week was designed to tempt Bellas with the belief that it would get paid. Bellas claimed that this prompted its reasonable reliance.

In its decision, the bankruptcy court found that Bellas relied upon the statement that it would get paid, and that it was damaged by not getting paid. It rejected Stewart's first argument, stating that an agent who commits fraud on behalf of a principal may face personal liability. As to the question of fraudulent intent, the bankruptcy court stated as follows:

> But what I can't get over is a complete lack of evidence that the initial statement that you're going to get paid was false, I don't think – I know I can't do what Mr. Cole wants me to do, which is to say that since the evasion of payment started only ten days after completion of the work, that Mr. Stewart was a bad guy from the beginning. I don't think I can do that. It's perfectly consistent [with] the evidence that Mr. Stewart did, in fact, intend when he entered into the contract with Bellas on behalf of Premier to have Bella[s] paid. I have nothing in my record that indicates that that was a lie.
>
> Now, I don't know what happened. It wasn't Mr. Coffin's complaints because that came further down the road, but I don't know what happened that Premier/Stewart didn't pay Bellas Pavers. Maybe they just ran out of money. I don't know what they did with the money, but that doesn't prove that it should be a debt [sic] will be – which would be nondischargeable in bankruptcy.

Given these facts, the bankruptcy court granted Stewart's motion under Rule 52(c), and entered judgment in his favor.

3. The Motion for a New Trial

Bellas timely filed a motion requesting a new trial pursuant to Rule 59(a)(1), or in the alternative, that the bankruptcy court reopen the original trial, enter new findings and conclusions, find in Bellas' favor on all counts, and enter a judgment of nondischargeability pursuant to Rule 59(a)(2). As grounds, Bellas argued that the bankruptcy court committed reversible error by allowing Stewart's Rule 52(c) motion when Bellas had made out a prima facie claim, presented unimpeached evidence, and offered credible testimony. The bankruptcy

court, without a hearing, denied the motion for a new trial.[2] Bellas then appealed the order denying the motion for a new trial. It did not appeal the underlying judgment.

JURISDICTION

Before addressing the merits of an appeal, we must determine whether we have jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998).

A. Scope of Appeal

On appeal, Bellas essentially challenges the bankruptcy court's underlying decision to grant Stewart's Rule 52(c) motion and enter judgment in favor of Stewart on the nondischargeability of the debt. Bellas did not, however, list the judgment on its notice of appeal.

In some circumstances, we have limited the scope of the appeal where the notice of appeal only names the post-judgment order and not the underlying judgment. See, e.g., Aguiar v. Interbay Funding, LLC (In re Aguiar), 311 B.R. 129, 134-35 (B.A.P. 1st Cir. 2004); see also Zukowski v. St. Lukes Home Care Program, 326 F.3d 278, 282 (1st Cir. 2003) ("[A]ppellant's notice of appeal seeks review of only the district court's denial of her motion for reconsideration . . . and our review is accordingly limited to the court's refusal to reopen the case."); Mariani-Giron v. Acevedo-Ruiz, 945 F.2d 1, 3 (1st Cir. 1991) ("[A]n appeal from the denial of a Rule 59(e) motion is not an appeal from the underlying judgment."). Where the appellant's intent to appeal the underlying judgment is clear, appellate courts in this circuit generally treat the appeal as encompassing both orders. See, e.g., Wilson v. Wells Fargo Bank, N.A. (In re Wilson), 402

[2] The bankruptcy court's order simply said "Denied."

B.R. 66, 69 (B.A.P. 1st Cir. 2009); Devila Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval), 327 B.R. 493, 504 (B.A.P. 1st Cir. 2005); see also Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 8 (1st Cir. 2005) (explaining that the First Circuit has been "liberal" in determining subject of appeals and that determination is based on appellant's intent, record as whole and whether appellee has been misled by unclear notice of appeal); Zukowski, 326 F.3d at 283 n.4 (explaining that notice of appeal may be read to include underlying order and not simply order denying reconsideration when it "can be fairly inferred from the notice" that appellant intended to appeal underlying order).

Here, both parties addressed the underlying judgment in their briefs, and Stewart's counsel agreed at oral argument that we could and should review the merits of the nondischargeability action. Moreover, as the bankruptcy court gave no explanation for its denial of Bellas' motion for a new trial under Rule 59(a), we have no reasonable basis for reviewing that decision and can reasonably infer that the bankruptcy court was simply affirming its prior judgment. Therefore, we consider both the order denying the motion for a new trial and the underlying judgment.

B. Finality

We have jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," id. at 646 (citations omitted), whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and . . .

requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)).

An order denying a motion for a new trial under Rule 59 is a final, appealable order. See Robinson v. Watts Detective Agency, Inc., 685 F.2d 729 (1st Cir. 1982) (reviewing district court's denial of motion for new trial); Janas v. Marco Crane & Rigging Co. (In re JWJ Contr. Co., Inc.), 287 B.R. 501 (B.A.P. 9th Cir. 2002) (reviewing bankruptcy court's denial of motion for new trial). In addition, a bankruptcy court's judgment regarding the nondischargeability of a debtor's obligations under § 523(a)(2) is a final appealable order. Aoki v. Atto Corp. (In re Aoki), 323 B.R. 803, 811 (B.A.P. 1st Cir. 2005). Thus, we have jurisdiction to hear this appeal.

STANDARD OF REVIEW

Appellate courts apply the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law. Rockwood v. SKF USA Inc., 687 F.3d 1, 10 (1st Cir. 2012). An order denying a motion for a new trial pursuant to Rule 59(a) is reviewed for abuse of discretion. Cantellops v. Alvaro-Chapel, 234 F.3d 741, 744 (1st Cir. 2000); Robinson v. Watts Detective Agency, Inc., 685 F.2d 729, 740 (1st Cir. 1982). An abuse of discretion occurs when the trial court ignores a material factor deserving significant weight, relies upon an improper factor, or assesses all proper and no improper factors, but makes a serious mistake in weighing them. Torres Lopez v. Consejo de Titulares del Condominio Carolina Court Apts. (In re Torres Lopez), 405 B.R. 24, 30 (B.A.P. 1st Cir. 2009) (citation omitted).

A bankruptcy court's determination of whether a requisite element of a nondischargeability claim under § 523(a)(2) is present is a factual determination which is reviewed for clear error. Palmacci, 121 F.3d at 785; Fee v. Eccles (In re Eccles), 407 B.R. 338

(B.A.P. 8th Cir. 2009). "A finding of fact is clearly erroneous, although there is evidence to support it, when the reviewing court, after carefully examining all of the evidence, is 'left with the definite and firm conviction that a mistake has been committed.'" Palmacci, 121 F.3d at 785 (quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985)). Deference 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." Commerce Bank & Trust Co. v. Burgess (In re Burgess), 955 F.2d 134, 137 (1st Cir. 1992) (citation and internal quotations omitted), abrogated on other grounds by Field v. Mans, 516 U.S. 59 (1995).

DISCUSSION

A. The Motion for a New Trial

A motion for new trial is governed by Rule 59(a), made applicable to bankruptcy cases by Bankruptcy Rule 9023. This rule provides that a court may grant a new trial after a nonjury trial "for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." Fed. R. Civ. P. 59(a)(1). Furthermore, it provides that after a nonjury trial, a court may, on motion for a new trial, "open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." Fed. R. Civ. P. 59(a)(2). "A motion for a new trial in a nonjury case . . . should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons." C. Wright, A. Miller, and M. Cane, 11 Federal Practice and Procedure § 2804 (2d ed. rev. 2012); see also Jiminez v. Pabon Rodriguez (In re Pabon Rodriguez), 233 B.R. 212, 227 (Bankr. D.P.R. 1999) (quoting 11 Federal Practice and Procedure

§ 2804). "Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial." Sibley v. Lemaire, 184 F.3d 481, 487 (5th Cir. 1999); see also Burdick v. Dold (In re Lemasurier), No. 08-4161, 2009 Bankr. LEXIS 4181 (Bankr. D. Mass. Dec. 18, 2009) (citing Sibley v. Lemaire). A motion for a new trial should not be "a vehicle for raising issues or citing authorities a party could have or should have presented prior to the court's ruling . . . or for rehashing arguments previously made or for refuting the court's prior ruling." Foxborough Sav. Bank v. Ballarino (In re Ballarino), 180 B.R. 343, 349-50 (D. Mass. 1995) (citations and internal quotations omitted). Thus, granting a motion for a new trial under Rule 59(a)(2) is appropriate only if the moving party demonstrates: (1) a manifest error of fact; (2) a manifest error of law; or (3) newly discovered evidence. In re JWJ Contr. Co., 287 B.R. at 514 (citing Brown v. Wright, 588 F.2d 708, 710 (9th Cir. 1978)).

Here, the bankruptcy court denied Bellas' motion for a new trial without any explanation and we infer that the bankruptcy court simply affirmed its prior ruling. Thus, we must determine whether the bankruptcy court erred in granting Stewart's Rule 52(c) motion and entering judgment in his favor on Bellas' dischargeability complaint.

B. The Motion for Judgment on Partial Findings

Rule 52(c) of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings pursuant to Bankruptcy Rule 7052, provides:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A

> judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Fed. R. Civ. P. 52(c).

A court should, therefore, enter a judgment under Rule 52(c) "[w]hen a party has finished presenting evidence and that evidence is deemed by the [judge] insufficient to sustain the party's position." Morales Feliciano v. Rullan, 378 F.3d 42, 59 (1st Cir. 2004). "A motion for judgment on partial findings should be granted, 'where the plaintiff fails to make out a prima facie case, or despite a prima facie case, the court determines that the preponderance of evidence goes against the plaintiff's claim.'" Giza v. Amcap Mortg., Inc. (In re Giza), 458 B.R. 16, 24 (Bankr. D. Mass. 2011) (quoting Mosher v. Evergreen Mgmt., Inc. (In re Mosher), 432 B.R. 472, 475 (Bankr. D.N.H. 2010)); see also In re Marine Risks, Inc., 441 B.R. 181, 199 (Bankr. E.D.N.Y. 2010) (citations omitted) (holding that court may allow Rule 52(c) motion if plaintiff has failed to make out prima facie case). The court is not required to "'draw any special inferences in the nonmovant's favor, or consider the evidence in the light most favorable to the nonmoving party. Instead, the court must [weigh] the evidence, resolv[e] any conflicts, and decid[e] where the preponderance lies.'" In re Giza, 458 B.R. at 24 (quoting Mosher, 432 B.R. at 475).

C. The § 523(a)(2)(A) Exception to Discharge

Section 523(a)(2)(A) excepts from discharge a debt of an individual debtor "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, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). To establish that a debt is nondischargeable under this section, a creditor must prove actual fraud, rather than mere fraud

implied in law. Lawrence P. King, 3 Collier on Bankruptcy ¶ 523.08[1] (15th ed. rev. 2002). The First Circuit has held that the elements of actual fraud include:

> (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.

McCrory v. Spigel (In re Spigel), 260 F.3d 27, 32 (1st Cir. 2001) (citing Palmacci, 121 F.3d at 786).

The first two elements of this test describe the conduct and scienter required to show the debtor's fraudulent conduct generally. Id. The last four elements embody the requirement that the creditor's claim must arise as a direct result of the debtor's fraud. Id. The standard of proof of each element of a § 523 claim is by a preponderance of the evidence, and the burden of proof on each element lies with the party contesting the dischargeability a particular debt. Palmacci, 121 F.3d at 787.

Bellas argues that the bankruptcy court erred in granting Stewart's Rule 52(c) motion because it had met its burden of establishing all the elements for fraud.[3] Stewart contends that the bankruptcy court correctly ruled against Bellas because there was insufficient evidence with respect to the first two elements of fraud, false representation and fraudulent intent. We must

[3] Curiously, Bellas cites a case from the Ninth Circuit, Apte v. Japra (In re Apte), 96 F.3d 1319, 1322 (9th Cir. 1996), when setting forth the elements of its case under § 523(a)(2)(A), rather than established First Circuit case law. See, e.g., Spigel, 260 F.3d at 32; Palmacci, 121 F.3d at 786. Although the factors in both circuits are similar, they are not substantively identical. Compare In re Apte, 96 F.3d at 1322 (requiring that the creditor simply "relied on the representation"), with In re Spigel, 260 F.3d at 32 (requiring a showing that the creditor's reliance was "justifiable"). Bellas does cite Palmacci several times when discussing each of the specific elements.

review the bankruptcy court's findings regarding the elements of fraud for clear error, with special deference to its factual findings as to Stewart's intent. Palmacci, 121 F.3d at 785.

With respect to the first element – false representation – the First Circuit has stated that the concept of a false representation includes a misrepresentation as to one's intention, such as a promise to act. Id. at 786. As the court explained:

> A representation of the maker's own intention to do . . . a particular thing is fraudulent if he does not have that intention at the time he makes the representation . . . . [A] promise made without the intent to perform it is held to be a sufficient basis for an action of deceit. On the other hand, if, at the time he makes a promise, the maker honestly intends to keep it but later changes his mind or fails or refuses to carry his expressed intention into effect, there has been no misrepresentation. This is true even if there is no excuse for the subsequent breach. A debtor's statement of future intention is not necessarily a misrepresentation if intervening events cause the debtor's future actions to deviate from previously expressed intentions.
>
> The test may be stated as follows. If, at the time he made his promise, the debtor did not *intend to perform*, then he has made a false representation (false as to his intent) and the debt that arose as a result thereof is not dischargeable (if the other elements of § 523(a)(2)(A) are met). If he did so intend at the time he made his promise, but subsequently decided that he could not or would not so perform, then his initial representation was not false when made.

Id. at 786-87 (citations, footnotes and quotation marks omitted).

Thus, if a debtor enters into a contract with the intent not to pay, the contract may provide a basis for an exception to discharge on the grounds of fraud if the other remaining elements are established. However, a debtor's "mere failure to perform is not sufficient evidence of scienter nor is subsequent conduct contrary to the original representation necessarily indicative of fraudulent intent." Fowler v. Lane (In re Lane), 50 F.3d 1, 1995 U.S. App. LEXIS 5510, at *8-9 (1st Cir. 1995) (citation omitted).

The issue of whether a debtor knowingly made false representations is closely linked to the second element – intent to deceive.[4] Boyuka v. White (In re White), 128 Fed. Appx. 994, 998 (4th Cir. 2005). With respect to the second element, the First Circuit has stated that "[f]raudulent intent requires an actual intent to mislead, which is more than mere negligence." Palmacci, 121 F.3d at 788 (citations omitted). However, a debtor will rarely, if ever, admit to acting with an intent to deceive. Therefore, a debtor's fraudulent intent can be inferred if the totality of the circumstances presents a picture of deceptive conduct by the debtor.

> Thus, while fraud may not be implied in law, it may be inferred as a matter of fact. The finder of fact may "infer[] or imply[] bad faith and intent to defraud based on the totality of the circumstances when convinced by a preponderance of the evidence." Among the circumstances from which scienter may be inferred are: the defendant's insolvency or some other reason to know that he cannot pay, his repudiation of the promise soon after made, or his failure even to attempt any performance.

Id. at 789 (citations omitted). "The focus, however, should be on whether the surrounding circumstances or the debtor's actions 'appear so inconsistent with [his] self-serving statement of intent that the proof leads the court to disbelieve the debtor." Id. (citation omitted).

As noted above, the bankruptcy court found that Bellas had failed to provide sufficient evidence that, at the time Premier engaged Bellas' services, Stewart's representation that Bellas would get paid was false or that he intended to deceive or defraud Bellas when he made the promise to pay. Clearly, there is no direct proof of Stewart's state of mind at the time he entered into a contract with Bellas on Premier's behalf.

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[4] In many cases, such as this one, the facts that go to each of these elements are virtually identical.

Bellas argues, however, that the bankruptcy court should have inferred Stewart's fraudulent intent from the totality of the circumstances. As noted above, "[a] court may infer the existence of the debtor's intent not to pay if the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor." In re Hashemi, 104 F.3d 1122, 1125 (9th Cir. 1996).

Furthermore, Bellas argues that the evidence showed a close temporal proximity between Stewart's promise that Premier would pay, and his refusal to pay upon completion of the project ten days later. Bellas contends that this short time frame shows that from the start, Stewart never intended to pay Bellas and, therefore, his promise to pay was false. In support, Bellas cites a few cases in which fraud was inferred where a debtor made a representation which was followed by a contrary action. See, e.g., Palmacci, 121 F.3d at 789 (noting that intent to defraud can be inferred from the totality of the circumstances, and among the circumstances from which it may be inferred is a debtor's "repudiation of the promise soon after made"). As Bellas acknowledges, however, a short time frame between an allegedly fraudulent statement and a later inconsistent statement or act does not, standing alone, provide a sufficient factual basis for inferring fraudulent intent. See Yourish v. Calif. Amplifier, 191 F.3d 983, 997 (9th Cir. 1999) (stating that temporal proximity of allegedly fraudulent statement or omission and later disclosure cannot, without more, prove fraudulent intent). Bellas urges us to also consider Stewart's subsequent conduct which, it claims, shows that Stewart lacked any good faith basis for not paying Bellas and establishes a pattern of deceptive behavior. Bellas points to the fact that although Coffin paid Premier in full, Stewart refused to pass on the portion of the payment owed to Bellas, offering a string of excuses for not paying. Based on this evidence, Bellas argues,

"[a]ny reasonable person would conclude that Stewart never intended to honor the commitments he made a few days earlier on Premier's behalf."

The bankruptcy court determined that it simply could not find fraudulent intent because Stewart's evasion of payment started ten days after completion of the work, not from the beginning as required. There was nothing else in the record to indicate that Stewart's promise was false, and the short time frame between the promise to pay and the completion of the project was not enough for the bankruptcy court to infer fraudulent intent. The evidence is consistent with the bankruptcy court's finding that when Stewart entered into the contract with Bellas on behalf of Premier, he did, in fact, intend to pay Bellas. Moreover, Stewart's subsequent conduct does not establish his fraudulent intent at the time he entered the contract. Although he failed to pay after the completion of the project, there is no evidence in the record that his lack of payment was based on a prior intention from the beginning not to pay. Thus, based upon the record, we conclude that the bankruptcy court did not err by not inferring fraudulent intent from the totality of the circumstances.

Bellas also urges us to reverse the bankruptcy court because it "refused to look at the entire record when assessing fraudulent intent" – i.e., that the bankruptcy court did not consider the totality of the circumstances. To Bellas, the bankruptcy court "put on blinders and looked only at whether an unmistakable sign of fraudulent intent appeared in the first ten days." When issuing its decision, however, the bankruptcy court stated that it was based on "a complete lack of evidence that the initial statement that you're going to get paid was false." This implies that the bankruptcy court considered and weighed all the evidence and found that, as a whole, it was insufficient to establish fraudulent intent. Furthermore, Bellas argues that the bankruptcy court

erred by requiring it to "prove a negative" – to prove that no other reason existed for Stewart not to pay. Although the bankruptcy court stated that it did not know why Premier did not pay Bellas, and gave hypothetical possibilities for it, the bankruptcy court did not require Bellas to "prove a negative." The bankruptcy court's decision is not based on why Premier refused to pay Bellas; rather, it turned on Bellas' failure to present sufficient evidence of Stewart's fraudulent intent at the time the contract was made.

Thus, for the reasons set forth above, we conclude that the bankruptcy court did not make any clearly erroneous findings of facts or manifest errors of law when granting the Rule 52(c) motion and entering judgment in Stewart's favor.

D. The Motion for Damages and Costs

Stewart has filed a separate motion under Bankruptcy Rule 8020 seeking damages, including attorneys' fees and costs, incurred in defending this appeal. Bellas objects to the motion.

Bankruptcy Rule 8020 provides:

> If a . . . bankruptcy appellate panel determines that an appeal . . . is frivolous, it may, after a separately filed motion . . . and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Fed. R. Bankr. P. 8020.

Imposing sanctions under Bankruptcy Rule 8020 is a "two-step process." Lumb v. Cimenian (In re Lumb), 401 B.R. 1, 9 (B.A.P. 1st Cir. 2009) (citing Maloni v. Fairway Wholesale Corp. (In re Maloni), 282 B.R. 727, 734 (B.A.P. 1st Cir. 2002)). We must determine: (1) whether the appeal is frivolous; and (2) whether the moving party has fulfilled the procedural requirements of Bankruptcy Rule 8020. Id.

1. Procedural Requirements

Bankruptcy Rule 8020 requires that a party must request sanctions in a separately filed motion and that the person or party targeted by the motion or notice must be given notice and an opportunity to respond. Fed. R. Bankr. P. 8020. Stewart filed a separate motion, served it on Bellas, and provided it with an opportunity to respond, which it did. Thus, the procedural requirements have been met.

2. Frivolous Appeal

While there is no formula for determining whether an appeal is frivolous, courts generally consider several factors, including: the appellant's bad faith, whether the argument presented on appeal is meritless *in toto*, and whether only part of the argument is frivolous. Great Road Serv. Ctr., Inc. v. Golden (In re Great Road Serv. Ctr., Inc.), 304 B.R. 547, 552 (B.A.P. 1st Cir. 2004). A court may consider whether the appellant's argument addresses the issues on appeal, fails to cite any authority, cites inapplicable authority, makes unsubstantiated factual assertions, asserts bare legal conclusions, or misrepresents the record. Id. However, "[Bankruptcy] Rule 8020 is far from a strict liability model. More than just a losing argument is necessary to support a conclusion that an appeal is frivolous." Berliner v. Kusek (In re Kusek), 461 B.R. 691, 698 (B.A.P. 1st Cir. 2011) (citations omitted). An appeal is frivolous if the result is obvious or the arguments supporting the appeal are wholly without merit. Cronin v. Town of Amesbury, 81 F.3d 257, 261 (1st Cir. 1996) (citations omitted).

This appeal is based on Bellas' contention that the bankruptcy court failed to properly weigh the evidence before it on the issue of Stewart's intent at the time he entered into the contract with Bellas on Premier's behalf. The bankruptcy court's finding regarding Stewart's

intent was based on the record developed in this case, and Bellas had a good faith basis to seek appellate review of that factual determination. Thus, we conclude that Bellas' appeal, though unsuccessful, was not patently meritless, and that sanctions are not warranted. In addition, we find no basis for granting Bellas' request for attorneys' fees incurred in defending the motion for sanctions.

CONCLUSION

For the reasons set forth above, we conclude that the bankruptcy court did not abuse its discretion in denying the motion for a new trial, and that the bankruptcy court's findings with respect to § 523(a)(2)(A) were not clearly erroneous. Therefore, we **AFFIRM** both the order denying the motion for a new trial and the judgment in favor of Stewart. We also **DENY** Stewart's motion for sanctions.