

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS**

IN RE:

**JULIE K. BELSCHNER,
f/k/a JULIE K. McKOON,
Debtor.**

No. 03-33968

**KENT PORTER,
Plaintiff,**

vs.

Adv. No. 03-3568

**JULIE K. BELSCHNER,
f/k/a JULIE K. McKOON,
Defendant.**

OPINION

This adversary proceeding was brought by the Plaintiff, Kent Porter, seeking to have the debt owed to him by the Defendant, Julie K. Belschner, declared nondischargeable pursuant to § 523 (a)(2)(A) and (B) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A) and (B). The facts giving rise to this litigation are as follows.

The Plaintiff owned a single piece of real estate with two buildings on it in St. Joseph, Missouri, which the Defendant wanted to purchase. The Plaintiff prepared an offer to purchase the property for \$58,000.00, which they both signed (Pl. Ex. 1). Approximately thirteen months later, after the property was subdivided, they entered into two real estate contracts, one for each building and the real estate upon which the building was located. One contract was in the amount of \$40,000.00 and the other for \$35,000.00 (Pl. Ex. 2 & 3).

The Defendant experienced difficulty in getting financing. One of the reasons was that she owed the Grand Marais State Bank in Grand Marais, Minnesota, over \$16,000.00, secured by a Certificate of Deposit in the name of her mother and son. The Plaintiff wire transferred \$16,646.87 to the bank.¹ The sales failed to close and the Defendant filed a Chapter 7 case in Bankruptcy. The Plaintiff then filed this adversary

¹ Subsequently, the Bank refunded \$500.00 to the Plaintiff, as an overpayment.

proceeding seeking to have the debt to him arising from his paying the bank declared nondischargeable.

Section 523(a)(2) of the Bankruptcy Code provides that a discharge in bankruptcy does not discharge a debtor from any 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 debtors or an insider's financial condition;

(B) use of a statement in writing--

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive.

The Court will first address whether the discharge should be denied under § 523(a)(2)(A). This section involves two concepts, fraud by false pretenses or false representations and actual fraud. In order for the Plaintiff to prevail under the first concept he must prove (1) that the Defendant made a false representation or engaged in a fraudulent pretense; (2) the fraudulent representation or misrepresentation was knowingly and fraudulently made; and (3) that the Plaintiff relied on it. To prevail under the latter concept, the Plaintiff must prove (1) the Defendant made a representation; (2) which at the time the Defendant knew to be false; (3) with the intent and purpose of deceiving the Plaintiff, (4) upon which the Plaintiff reasonably relied; and (5) the loss or damage was the proximate consequence of the representation having been made. 4 COLLIER ON BANKRUPTCY ¶ 523.08 [1] [d] and [e] (15th ed. rev.).

There is one central factual termination that cuts across the elements required to be proven under both concepts. Did the Defendant cause the Plaintiff to pay her debt to the bank with no intention of going forward with the sales, or did the Plaintiff voluntarily pay the bank so the sales could be closed? This Court believes it was the latter.

The Plaintiff testified that the Defendant asked him to pay the bank so that the financing would be

available. The Defendant testified that the Plaintiff volunteered to pay the bank so that the financing would be available and the sales could go forward. Both were credible witnesses. There was no testimony from third parties and there was very little documentary evidence which would support one party or the other. What little there was favors the Defendant. The original offer was prepared by the Plaintiff at \$58,000.00. The subsequent two contracts were also prepared by the Plaintiff at a total of \$75,000.00. The Plaintiff arranged the appraisals at \$90,000.00. The Plaintiff sent the money to repay the Defendant's debt direct to the bank.

The Plaintiff was a willing participant in efforts to obtain the financing so that the sales could be completed. The sales were not completed because of anything the Defendant did, but because the lender decided not to make the loan. There is a \$17,000.00 difference between the offer and the contracts. The Defendant's debt to the bank was just under that amount. It would appear that the Plaintiff and the Defendant were attempting to get the Defendant's credit cleaned up as part of the sales and that attempt failed.

Applying this analysis to the elements of § 523, the elements were not proven. Even if the Plaintiff's version of what occurred is correct, that the Defendant asked him to repay the debt to the bank, there was no false representation or false pretense involved. She merely asked him to do something and he did it. There was no evidence that the Defendant did not intend to go forward with the sales or that she scuttled the financing. The lending institution refused to finance the sales. As there was no false representation or pretense, there was nothing the Defendant did which the Plaintiff relied on. He relied on his desire to complete the sales by getting the Defendant into a creditworthy position. Finally, as to the latter concept, it was the lender, in denying financing, that caused the sales to not go forward. So, nothing the Defendant did could be construed as the proximate cause of the Plaintiff's loss.

Turning to the Plaintiff's other theory under § 523(a)(2)(B), the debt cannot be declared non-dischargeable as there was no written statement pertaining to the Defendant's financial condition involved in the transaction.

This Opinion constitutes this Court's findings of fact and conclusions of law in accordance

with Federal Rule of Bankruptcy Procedure 7052. A separate Order will be entered.

Dated: 5/17/2004

/s/ WILLIAM V. ALTENBERGER
UNITED STATES BANKRUPTCY JUDGE

Copies to:

John M. Delaney, Jr., 346 West St. Louis Avenue, P.O. Box 268, **East Alton, IL 62024-0268**

Fredrick M. Steiger, 101 West Vandalia Street, Suite 150, Edwardsville, IL 62025

Laura K. Grandy, Trustee, 720 West Main Street, Suite 100, Belleville, IL 62220

U.S. Trustee, 401 Main Street, Suite 1100, Peoria, Illinois 61602