IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 98-41421**
JAMES SROUFE and BECKY SROUFE, husband and wife,	)	
	)	
Debtors.	)	
_____	)	
	)	
RICHARDS JENKINS, d/b/a JENKINS BUILDING SUPPLY,	)	**Adv. No. 99-6029**
	)	
Plaintiff,	)	
	)	**MEMORANDUM OF DECISION**
vs.	)	
	)	
JIM SROUFE and BECKY SROUFE, husband and wife,	)	
	)	
Defendants.	)	
_____	)	

Kent E. Whittington, Idaho Falls, Idaho, for Plaintiff.

Richard D. Vance, Pocatello, Idaho, for Defendants.

Background.

In this adversary proceeding, Plaintiff Jenkins Building Supply ("JBS") seeks a determination by this Court that obligations owed it are

nondischargeable under Section 523(a)(2) of the Bankruptcy Code[1] in Defendants James and Becky Sroufe's Chapter 7 bankruptcy case. A trial was held on July 1, 1999 and January 7, 2000, at which the parties presented evidence and testimony, and the matter was taken under advisement. The Court has now had an opportunity to review the record and assess the credibility of the witnesses, and after consideration of the arguments of the parties and due deliberation, the following constitutes the Court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

Facts

The evidentiary record submitted through the documentary exhibits and testimonial evidence at trial is in many instances incomplete. However, from the evidence, it appears that in August 1997, Defendant Richard Sroufe was hired by Lynn Ricks ("Ricks") to complete a remodeling and construction project on Ricks' home in Swan Valley, Idaho. The project included placing siding on the home, building a deck, and some drywall work. To finance the project, Ricks

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[1]In its complaint, Plaintiff also asserted its claim against Defendants was excepted from discharge under Sections 523(a)(4) and (a)(6) of the Bankruptcy Code. However, Plaintiff failed to submit evidence or make any argument in support of its position under these two provisions at trial. The Court therefore concludes Plaintiff did not carry its burden of establishing a right to relief under either of the two provisions.

borrowed money from Beneficial Finance ("Beneficial"). In order to receive payment, Defendant would submit a bill to Ricks, who would then in turn submit the bill to First American Title Company ("First American"), who had been designated by Beneficial to disburse the loan funds. First American would pay Defendant.

On August 7, 1997, Defendant applied for credit at JBS, a local lumber and hardware store. Defendant represented to Marcy Barber, an employee at JBS, that he needed credit to purchase materials for the Ricks' construction project. Before she would approve an account for Defendant, Barber requested verification that funds for payment would be available to Defendant from Beneficial. She was provided with a facsimile copy of a letter from the manager at Beneficial indicating funds would be available for the Ricks' project no later than August 15. After contacting the credit references provided by Defendant in the application for credit, Barber opened an account for Defendant at JBS. Defendant immediately gave JBS a deposit of $6,000 on his account and began purchasing materials on credit to be used on the Ricks' home. The deposit check was post-dated August 16, 1997.

Work on the Ricks' project proceeded. In addition to using up the $6,000 deposit money, from August 7 through October 22, 1997, Defendant

purchased on account approximately $13,433 in materials and supplies from JBS. Defendant received his first payment from First American on August 15, 1997, a check for $18,205.50, $6,000 of which was used to cover the post-dated deposit check at JBS.[2] On August 21 and September 24, 1997, Defendant received additional checks from First American for $5,725 and $9,900 respectively.

On September 10, 1997, Defendant failed to make payments due on his JBS account.[3] Barber would see Defendant several times during the week when he was at the lumber yard purchasing supplies. Barber took such opportunities to ask Defendant about payment on his account. The first of such conversations took place on September 11. In each of those conversations, Defendant represented that: he had not yet received additional payments on the Ricks job; that payment was expected within a few days or by the end of that particular week; and that when he received payment, he would promptly pay JBS.

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[2]How the $6,000 deposit was applied to Defendant's account and whether Defendant made any other payments in August on the account is unclear from the record.

[3]Defendant's account was due on the tenth of the month following charges.

Defendant continued to purchase materials and supplies at JBS on credit in September and October. When Defendant's visits to the lumber yard became less frequent, and when no further payment of Defendant's account was made, Barber began contacting Defendant by phone. Many of the phone calls were not answered. However, Barber did speak with Defendant by phone on at least two occasions, on October 22 and November 18. In those phone conversations, Defendant again represented he was awaiting payment from Ricks and he anticipated making payment to JBS within a matter of days. Defendant thereafter failed to make any payments on his account and in late October Defendant's access to credit at JBS was cut off.

Barber continued her efforts to collect from Defendant, calling his home on several occasions, only to be told by Becky Sroufe that Defendant was not home but that he would call her back later. Defendant did not return the calls. In January 1998, frustrated with Defendant's overdue account and continued failed representations that payment would soon be made, Barber and Sam Jenkins, a principal of JBS, went to speak with Ricks about Defendant's account. At this meeting, Ricks informed the two JBS employees that Defendant had in fact been paid a total of $33,830.50 by Ricks through First American. Ricks also informed them that he had fired Defendant on October 15, 1997, in

connection with a dispute over Defendant's performance. Further, in this meeting, Ricks reviewed several invoices from JBS to Defendant and identified certain supplies and materials purchased by Defendant Ricks that were not used on the project at his home. Following the meeting with Ricks, Barber called Defendant again. Defendant again represented he had not received payment from Ricks. Defendant stated that if Ricks did not pay him by January 27, Defendant he would initiate a lien foreclosure action against Ricks' home.

JBS failed to timely file a materialmens' lien against Ricks' property. However, later JBS initiated an action against Defendant in state court and on November 18, 1998, obtained a default judgment against Defendant for $12,154.35, togther with interest and attorney fees.

Defendants filed for Chapter 7 relief on November 20, 1998. Plaintiff timely filed this adversary proceeding on February 17, 1999.

Discussion

Section 523(a)(2)(A) excepts from discharge a debt obtained through "false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). To invoke the protections of this provision, a creditor must prove, by a preponderance of the evidence, *see Grogan v. Garner*, 498 U.S.

279, 291 (1991), that: (1) the defendant made representations; (2) which at the time the defendant knew were false; (3) the representations were made with the intent to deceive; (4) the plaintiff relied on such representations, and; (5) the plaintiff sustained the alleged loss as the proximate result of the representations. *American Express v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir. 1996), cert. denied, 520 U.S. 1230 (1997).

Here, Defendant at different times made the following representations to JBS: (1) that he had not yet been paid by Ricks; and (2) that as soon as he received money from the Ricks' project, that he would promptly pay JBS.[4] In fact, Defendant was paid on three separate occasions by Ricks, on August 15 and 21, and September 24, 1997. As early as September 11, and on several occasions thereafter, Defendant represented to Barber that he had not yet been paid by Ricks, but that he anticipated receiving payment soon, and that once he was paid by Ricks he would promptly pay his JBS account. Since in each case Defendant had already received additional payment on the Ricks account, and on each occasion had used the funds received for other purposes, the Court concludes Defendant's representations to Plaintiff's agent were false

[4]Plaintiff also asserted Defendant made certain false representations on his credit application that may have justified exception from discharge under 11 U.S.C. § 523(a)(2)(B). However, these claims were withdrawn by Plaintiff at trial.

and Defendant appreciated the falsity of the representations when he made them.

Intent to deceive is a question of fact which may be inferred from the surrounding circumstances of the case. *Cowen v. Kennedy (In re Kennedy)*, 108 F.3d 1015, 1018 (9th Cir. 1997). Had Defendant, on September 11, informed JBS that he had been paid on August 21, JBS may have adjusted the payment terms on Defendant's account or taken other appropriate measures to protect itself, including terminating credit altogether, or filing a lien on Ricks' house. Thus, from the surrounding circumstances, the Court concludes the representations were made by Defendant to Plaintiff in order to maintain his access to credit with JBS and to induce JBS not to take action to collect the account. In other words, the Court concludes these representations were made by Defendant with the intent to deceive JBS.

However, JBS must show it relied upon Defendant's false representations. The United States Supreme Court has construed the terms of Section 523(a)(2)(A) to require justifiable, not reasonable, reliance by the creditor. *Field v. Mans*, 516 U.S. 59, 70-71 (1995). The Court instructed "that justifiable reliance is the standard applicable to a victim's conduct in cases of alleged misrepresentation and that 'it is only where, under the circumstances,

the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own.'" *Id.* at 71 (quoting W. Prosser, Law of Torts § 108, p. 718 (4th ed. 1971)). Here, there was no warning from Defendant's conduct adequate to prompt JBS to conduct an investigation into whether Defendant had indeed received payment from Ricks. Defendant received the initial disbursement on Ricks' loan at Beneficial on August 15 as indicated in the letter given to JBS, and Defendant had promptly made good the deposit check previously tendered to JBS. Given this history, JBS continued to extend credit to Defendant based on his representations until October 11, when JBS became suspicious about Defendant's ability to pay on his account and discontinued his credit. The surrounding circumstances show JBS justifiably relied upon Defendant's representations.

Having found Defendant made knowingly false representations to JBS upon which it justifiably relied, JBS must prove the amount of its loss and whether such loss was proximately caused by Defendant's representations. In this case, Defendant had already charged approximately $12,367 in materials and supplies at JBS before making the first of the false representations to Ms.

Barber on September 11, 1997. Following September 11, according to the Court's review of the record and JBS' invoices, Defendant used his account at JBS to purchase another $1,065.80 in materials before his account was suspended on October 11. While JBS argues otherwise, it is only as to this latter amount of credit that JBS was victimized. No fraud effectively occurred before that date, and so Defendant's promises to pay for charges already made were not proximately related to his later false statements. Thus, the amount that should be excepted from discharge is $1,065.80 plus appropriate interest.

Plaintiff argues because of Defendant's fraudulent representations, Plaintiff did not file a materialmens' lien as provided by state law, and thereby lost its right to collect the entire amount due. However, under Idaho Code § 45-507, a supplier of building materials has ninety (90) days after the completion of furnishing materials to record its lien. Here, JBS continued to extend Defendant credit through October 11, 1997, when account privileges were terminated. Defendant appears to have made one purchase, on October 22, following the termination of his credit at JBS. Certainly by that point in time, JBS should have critically evaluated its position and considered filing a lien to cover the materials and supplies furnished to Defendant. From that point, JBS had ninety days to take action to perfect a its lien rights, or until sometime

around January 22, 1998. Although it had ample time to do so, JBS chose not to file a lien.

Plaintiff asserts several explanations for the failure to file a lien. First, is that Mr. Richard Jenkins, a principal of JBS, was on vacation. However, Jenkins testified that he was on vacation from January 23, 1998, until February 18, 1998. The vacation was near the end of the ninety day period. There was more than enough time for JBS to evaluate its rights prior to Jenkins' vacation. Second, Plaintiff asserts it discovered certain critical facts when Barber and Sam Jenkins met with Defendant. Once again, this is no excuse for failing to file a lien. Barber testified the meeting with Ricks was in mid-January 1998. Plaintiff had ample time to protect its rights prior to its meeting with Ricks. Under the circumstances, the Court concludes the decision by JBS not to file a lien did not result from the false representations made by Defendant.

Conclusion

For the reasons set forth above, the Court finds Defendant made representations to JBS, which he knew to be false, with the intent of deceiving JBS, which as a result JBS suffered damages of $1,065.80, plus appropriate interest as allowed by state law. This amount will be excepted from Defendant's

discharge under Section 523(a)(2)(A).[5] Counsel for Plaintiff shall submit an appropriate order and judgment for entry by the Court.

DATED This _____ day of March, 2000.

_____
JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

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[5]Plaintiff failed to show that Defendant Becky Sroufe made any false representations, or otherwise materially participated in or benefitted by the wrongful conduct of her spouse. Moreover, Plaintiff's state court judgment is against Defendant Jim Sroufe alone. Therefore, Plaintiff has failed to show any basis to except any claims it may have against Becky Sroufe from discharge. Judgment will be entered against Defendant Jim Sroufe alone.

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

Office of the U.S. Trustee
P. O. Box 110
Boise, Idaho 83701

Kent E. Whittington, Esq.
P. O. Box 2780
Idaho Falls, Idaho 83403

Richard D. Vance, Esq.
845 W. Center, Suite 400
Boise, Idaho 83706

ADV. NO.: 99-6029

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED:

By_____
Deputy Clerk