NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. EC-07-1419-JuMoD
LELAND VAN MCEACHERN,	Bk. No. 05-39082
Debtor.	Adv. No. 06-02099
BIANCA BAYE,	
Appellant,	
v.	**M E M O R A N D U M**[1]
LELAND VAN MCEACHERN,	
Appellee.	

Argued and Submitted on July 25, 2008
at Pasadena, California

Filed - August 7, 2008

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding

Before: JURY, MONTALI and DUNN, Bankruptcy Judges.

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Appellant Bianca Baye appeals pro se[2] the bankruptcy court's judgment for debtor, finding that she failed to prove the elements of fraud which bar discharge of debtor's debt to her under § 523(a)(2)(A).[3]

WE AFFIRM.

I. FACTS

The facts, which are mostly disputed, are taken from the trial transcript, appellant's briefs and other pleadings included in the record on appeal filed by appellant.[4]

In 2002 appellant moved into the Pacific Sands apartment complex located in San Pedro, California. Debtor's wife was the manager of the complex. Debtor and appellant became acquainted when debtor performed maintenance jobs in her apartment.

Debtor's wife passed away in January 2004 due to an illness. Afterwards, debtor and appellant continued to have some contact. On August 24, 2004, approximately seven months after debtor's wife passed away, appellant transferred $10,000

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[2] Although appellant was represented at trial, she filed this appeal pro se. We liberally construe her pleadings due to her pro se status. Kashani v. Fulton (In re Kashani), 190 B.R. 875, 883 (9th Cir. BAP 1995).

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, because the case from which this appeal arises was filed before its effective date (generally October 17, 2005).

[4] Debtor's brief was one page and not particularly helpful to the issues raised on appeal.

from her bank account to debtor's account. Debtor purchased a Harley Davidson motorcycle with the funds.

Appellant, expecting to be repaid, commenced an action for breach of contract against debtor in the Los Angeles Superior Court on June 27, 2005.

Debtor filed his voluntary chapter 7 petition on October 14, 2005. Appellant commenced an adversary proceeding against debtor, alleging that the debt was nondischargeable under § 523(a)(2)(A), on February 6, 2006.

At the trial in this matter, debtor and appellant each had his or her own version of the facts surrounding the transaction. Debtor's version was that appellant gave him the money as a gift. He maintained that appellant wanted him to have a motorcycle because she knew he previously owned one at Pacific Sands, and he was suicidal due to his wife's death. Appellant's version was that debtor simply did not have the money to buy himself a motorcycle and, therefore, she loaned it to him based upon his representation that he would repay her by using life insurance proceeds he expected to receive as a result of his wife's death. Appellant contends that this representation was false because debtor knew the insurance policy covered only an accidental death and not one due to an illness.

Debtor testified that he learned about the life insurance policy sometime after his wife passed away and he believed he would receive up to $100,000. At some point debtor told appellant about the possibility of receiving the insurance proceeds, although the parties' testimony conflicted as to when that occurred. According to appellant, debtor told her in

August 2004, prior to her transferring the money to debtor. Debtor contradicted her testimony, contending that he did not learn about the policy until October 2004, months after the transfer.

After hearing the parties' testimony at the October 24, 2007 trial, the bankruptcy court found their testimony equally credible.[5] Thus, the bankruptcy court's consideration of the appellant's burden weighed heavily in its determination.

The court found that appellant failed to establish that the transaction was a loan. The court further found that appellant failed to prove by a preponderance of the evidence that debtor made a misrepresentation regarding the insurance proceeds at the time of the transfer. The court ruled orally in debtor's favor and entered a judgment on the same date.

Appellant timely appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 over this core proceeding under § 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

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[5] Although the court did not enumerate specific findings of fact or separate conclusions of law as contemplated by Rule 7052(a)(1), its oral ruling clearly articulates what appellant failed to prove, viz., that there was a misrepresentation about the insurance policy, and that there was a loan transaction. We interpret the court's words as a finding that there was no misrepresentation and there was no loan. The conclusion that naturally followed, therefore, is that debtor was entitled to a judgment in his favor on the complaint to determine dischargeability.

III. ISSUE

Whether the bankruptcy court erred in finding the debt, if it did exist, was not excepted from discharge under § 523(a)(2)(A).

IV. STANDARDS OF REVIEW

A finding of intent to defraud a creditor is a finding of fact. Rubin v. West (In re Rubin), 875 F.2d 755, 758 (9th Cir. 1989). We review findings of fact for clear error. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai), 369 B.R. 506, 509 (9th Cir. BAP 2007). A factual determination is clearly erroneous if the appellate court, after reviewing the record, has a definite and firm conviction that a mistake has been committed. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985).

The issue of dischargeability of a debt is a mixed question of fact and law that we review de novo. Miller v. U.S., 363 F.3d 999, 1004 (9th Cir. 2004); Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002).

V. DISCUSSION

Section 523(a)(2)(A) excepts from discharge a debt for money obtained by false pretenses, a false representation, or actual fraud. See § 523(a)(2)(A). We construe the Code's limited exceptions to the general policy of discharge narrowly. Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992).

Dischargeability proceedings under § 523(a)(2)(A) involve two inquiries. Banks v. Gill Distrib. Ctrs., Inc. (In re Banks), 263 F.3d 862, 868 (9th Cir. 2001). The first is whether appellant had an enforceable right to payment from debtor. Id.

The second is whether appellant proved, by a preponderance of the evidence, the following elements of fraud: (1) a misrepresentation by the debtor; (2) the debtor's knowledge of the falsity or deceptiveness of his statement; (3) the statement was made with the intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement. Ghomeshi v. Sabban (In re Sabban), 384 B.R. 1, 5 (9th Cir. BAP 2008).

The threshold issue is whether debtor owed any debt at all to appellant. Appellant contends the bankruptcy court erred in finding the transaction between the parties was not a loan. We need not address this issue, however, because the record shows that even if a debt did exist, appellant failed to introduce the kind of evidence necessary to meet her burden of establishing the elements under § 523(a)(2)(A).

The bankruptcy court expressly found that appellant failed to carry her burden of proof with respect to debtor's alleged misrepresentation. At oral argument, appellant argued that debtor made at least four misrepresentations that induced her to transfer the money to him. In essence, however, the four alleged misrepresentations were variations of but one — debtor's statement that he would repay appellant when he received the life insurance proceeds as a result of his wife's death.

The testimony regarding debtor's alleged misrepresentation was contested. The parties disputed whether debtor had made the statement at the time of the transaction, as appellant contends, or afterwards, as debtor contends.

The parties further disputed whether debtor knew the statement regarding the insurance proceeds was false at the time he made it because the policy covered only an accidental death. Debtor testified that he first learned he was not entitled to the insurance proceeds when his claim was rejected, which occurred after appellant transferred the money. See Sabban, 384 B.R. at 5 (no fraud exists unless debtor knew the statement was false at the time he made it). Yet, appellant maintained that debtor must have known about both the existence and nature of the policy prior to his wife's death.

The court's finding regarding appellant's failure to prove by a preponderance of the evidence that debtor made a misrepresentation was primarily based upon the testimony of the parties, which it found to be equally credible. The Supreme Court has warned that an attack on a trial court's credibility determinations rarely succeeds, for "when a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." Anderson, 470 U.S. at 575. Moreover, findings based on determinations regarding the credibility of witnesses "demand[] even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." Id.; see also Fed. R. Civ. P. 52(a) incorporated by Fed. R. Bankr. P. 7052 (requiring the reviewing court to give due

regard "to the trial court's opportunity to judge the witnesses' credibility."); Rule 8013 (same).

While we give great deference to credibility determinations, they are still subject to our review. We may find clear error if the debtor's story is so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Anderson, 470 U.S. at 575.

Appellant contends clear error exists here because of what she perceives to be inconsistencies and contradictions in debtor's testimony. She maintains that debtor provided no documentary proof to substantiate his testimony, especially with regard to the insurance policy and proceeds. It is appellant, however, who has the burden of proof. The record shows that she did not provide documentary proof that conclusively substantiated her contrary testimony.

Appellant contends that debtor denied ever being a manager of the Pacific Sands apartment complex, yet he admitted later that he carried out duties which showed, at a minimum, he was its agent. Even assuming debtor was the agent of Pacific Sands, the record shows that appellant failed to provide any evidence that linked debtor's agency position to her justifiable reliance on his statement that he would repay her with the insurance proceeds.[6] See Sabban, 384 B.R. at 5 (appellant must have

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[6] In this regard, appellant argued at the hearing that debtor's failure to respond to her requests for admission regarding whether he was a manager at Pacific Sands apartment complex conclusively established that he was a manager. The requests for admission, however, were not deemed undisputed facts (continued...)

justifiably relied on the representation for fraud to exist); see also Field v. Mans, 516 U.S. 59, 71 (1995)(justification is a matter of the qualities and characteristics of the particular plaintiff and the circumstances of the particular case).

Appellant further argues that debtor contradicted himself numerous times throughout the trial. The bankruptcy court, however, found debtor's testimony equally credible with that of appellant despite her attempted attacks on his credibility.[7] Moreover, the trial judge observed debtor's demeanor on the witness stand and heard his tone of voice which bears "heavily on the [court's] understanding of and belief in [what he] said." Anderson, 470 U.S. at 575. Our review of the record shows that neither party provided documents nor other objective evidence that conclusively contradicted the other's story. Given the absence of such evidence, we cannot say the trial court's interpretation of the facts is implausible on its face. We thus

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[6](...continued)
in the pretrial order or the admitted exhibits. Therefore, they were not part of the trial record and appellant's reference to them is misplaced. Moreover, the first two sets were answered and debtor did not admit either a loan or fraud. The third set was apparently not answered, but they are not about a loan or fraud nor is there anything to show that appellant took the procedural steps to have them deemed admitted.

[7] Appellant attempted to demonstrate debtor's lack of credibility by showing that he transferred assets and received income that he did not disclose on his schedules. However, as the bankruptcy court noted "[d]ischargeability litigation is not a forum for imposing a penalty for mistakes or misstatements in bankruptcy filings." We agree, as § 727(a)(4) specifically provides that a debtor who knowingly and fraudulently makes a false oath or account in connection with the case shall be denied a discharge. Appellant did not plead any claim for relief under § 727 in her complaint.

refuse to upset the bankruptcy court's credibility determination.

We conclude the bankruptcy court did not err in finding that appellant failed to meet her burden of proof[8] under § 523(a)(2)(A) in order for her debt, if it did exist, to be excepted from discharge.

Last, we mention that in appellant's opening brief filed March 19, 2008, she presented as an issue on appeal whether it was error for the court to refuse to consider the confidential and fiduciary relationship between the parties as requested at trial pursuant to Fed. R. Civ. P. 54(c) incorporated by Fed. R. Bankr. P. 7054.[9] This assignment of error was not addressed in her Notice of Errata and Corrected Appellant's Opening Brief

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[8] "The burden of showing something by a 'preponderance of the evidence,' ... 'simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal., 508 U.S. 602, 622 (1993). The preponderance of the evidence standard "'allows both parties to share the risk of error in roughly equal fashion.'" Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983). In circumstances where the evidence is evenly balanced, however, the party with the burden of persuasion must lose. See Dir., Office of Workers' Comp. Programs v. Greenwhich Collieries, 512 U.S. 267, 281 (1994); Cooper v. GGGR Invs., LLC, 334 B.R. 179, 191 n.11 (E.D. Va. 2005)(bankruptcy court noted at trial that when the evidence is in equipoise and plaintiff has burden of proof, plaintiff cannot prevail).

[9] Fed. R. Civ. P. 54(c) provides in relevant part that except as to a party against whom a judgment is entered by default, "[e]very other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."

filed on April 22, 2008. We therefore assume that appellant decided to abandon this issue in her appeal.

VI. CONCLUSION

For the reasons stated above, we AFFIRM the bankruptcy court's judgment.