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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION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.)	MEMORANDUM¹	
)		
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.

1 Appellant Bianca Baye appeals pro se² the bankruptcy
2 court's judgment for debtor, finding that she failed to prove
3 the elements of fraud which bar discharge of debtor's debt to
4 her under § 523(a)(2)(A).³

5 WE AFFIRM.

6 **I. FACTS**

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

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

14 Debtor's wife passed away in January 2004 due to an
15 illness. Afterwards, debtor and appellant continued to have
16 some contact. On August 24, 2004, approximately seven months
17 after debtor's wife passed away, appellant transferred \$10,000
18

19 ² Although appellant was represented at trial, she filed
20 this appeal pro se. We liberally construe her pleadings due to
21 her pro se status. Kashani v. Fulton (In re Kashani), 190 B.R.
22 875, 883 (9th Cir. BAP 1995).

23 ³ Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
25 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
26 enacted and promulgated prior to the effective date of The
27 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
28 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.

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

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

6 Debtor filed his voluntary chapter 7 petition on October
7 14, 2005. Appellant commenced an adversary proceeding against
8 debtor, alleging that the debt was nondischargeable under
9 § 523(a)(2)(A), on February 6, 2006.

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

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

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

5 After hearing the parties' testimony at the October 24,
6 2007 trial, the bankruptcy court found their testimony equally
7 credible.⁵ Thus, the bankruptcy court's consideration of the
8 appellant's burden weighed heavily in its determination.

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

15 Appellant timely appealed.

16 **II. JURISDICTION**

17 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
18 §§ 1334 over this core proceeding under § 157(b)(2)(I). We have
19 jurisdiction under 28 U.S.C. § 158.
20
21

22 ⁵ Although the court did not enumerate specific findings of
23 fact or separate conclusions of law as contemplated by Rule
24 7052(a)(1), its oral ruling clearly articulates what appellant
25 failed to prove, viz., that there was a misrepresentation about
26 the insurance policy, and that there was a loan transaction. We
27 interpret the court's words as a finding that there was no
28 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.

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

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

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

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

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

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

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

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

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

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

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

(continued...)

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

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

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18 ⁶(...continued)

19 in the pretrial order or the admitted exhibits. Therefore, they
20 were not part of the trial record and appellant's reference to
21 them is misplaced. Moreover, the first two sets were answered
22 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.

23 ⁷ Appellant attempted to demonstrate debtor's lack of
24 credibility by showing that he transferred assets and received
25 income that he did not disclose on his schedules. However, as
26 the bankruptcy court noted "[d]ischargeability litigation is not
27 a forum for imposing a penalty for mistakes or misstatements in
28 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.

1 refuse to upset the bankruptcy court's credibility
2 determination.

3 We conclude the bankruptcy court did not err in finding
4 that appellant failed to meet her burden of proof⁸ under
5 § 523(a)(2)(A) in order for her debt, if it did exist, to be
6 excepted from discharge.

7 Last, we mention that in appellant's opening brief filed
8 March 19, 2008, she presented as an issue on appeal whether it
9 was error for the court to refuse to consider the confidential
10 and fiduciary relationship between the parties as requested at
11 trial pursuant to Fed. R. Civ. P. 54(c) incorporated by Fed. R.
12 Bankr. P. 7054.⁹ This assignment of error was not addressed in
13 her Notice of Errata and Corrected Appellant's Opening Brief
14

15 ⁸ "The burden of showing something by a 'preponderance of
16 the evidence,' ... 'simply requires the trier of fact to believe
17 that the existence of a fact is more probable than its
18 nonexistence before [he] may find in favor of the party who has
19 the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension
20 Trust for So. Cal., 508 U.S. 602, 622 (1993). The preponderance
21 of the evidence standard "'allows both parties to share the risk
22 of error in roughly equal fashion.'" Herman & MacLean v.
23 Huddleston, 459 U.S. 375, 390 (1983). In circumstances where the
24 evidence is evenly balanced, however, the party with the burden
25 of persuasion must lose. See Dir., Office of Workers' Comp.
Programs v. Greenwich 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).

26 ⁹ Fed. R. Civ. P. 54(c) provides in relevant part that
27 except as to a party against whom a judgment is entered by
28 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."

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

3 **VI. CONCLUSION**

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

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