FILED

AUG 18 2006

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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: JEFFREY REISMAN, Debtor. _____ JEFFREY REISMAN, Appellant, v. INGREDIENTS INTERNATIONAL, LLC, Appellees. _____	BAP No. NV-05-1471-MoSMa Bk. No. 04-19378 Adv. No. 04-01361 Ref. No. 05-30 **M E M O R A N D U M**[1]

Argued and Submitted on May 18, 2006
at Las Vegas, Nevada

Filed - August 18, 2006

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding.

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Before: MONTALI, SMITH and MARLAR, Bankruptcy Judges.

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[1]This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

The bankruptcy court found that the debtor had participated in a conspiracy to defraud creditors of a corporation. Even though the debtor had not interacted directly with the particular creditor who filed a nondischargeability action against him, the court found that his participation in the conspiracy in general was sufficient to satisfy all of the elements of fraud under section 523(a)(2)(A).[2] Debtor appeals and while his conduct was wrongful, we must REVERSE.

I.
FACTS

In 2002, Debtor Jeffrey Reisman ("Debtor") was hired as president of an entity known as "AGTC Foods" ("AGTC"). In exchange for a weekly salary of $800 and free use of a cell phone and a Lexus automobile, Debtor agreed to apply for credit for AGTC using his social security number and using fictional trade references from shell corporations created for that purpose.

While serving as president of AGTC, Debtor provided false credit references to food suppliers dozens of times. He knew the references were false; he knew the reference companies were shams. He knew that supply companies would rely on the references in part when deciding whether to extend credit. He also knew that suppliers would provide valuable goods based on the false credit references. He acknowledged that the scheme was "wrong" and he just "overlooked it."

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[2]Unless otherwise indicated, all section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

The scheme for Debtor to use his social security number and to use fictional trade references on behalf of AGTC was first discussed by Debtor with two individuals known as Anthony Satriani ("Satriani") and Philip Kostoff ("Kostoff")[3] before he was hired as president of AGTC. Kostoff provided a list of false credit references[4] to Debtor which Debtor in turn provided to food suppliers when he applied for credit on behalf of AGTC. Under this scheme, the food suppliers would contact the sham companies at different telephone numbers set up for each company and someone affiliated with Kostoff or Satriani would pose as a representative of the sham company and provide a positive report of AGTC's purported payment and credit history. Debtor knew that the scheme operated in this manner. Nevertheless, neither Kostoff nor Satriani informed Debtor of any intent not to pay for goods obtained through credit; he first learned that bills were not being paid toward the end of his employment with AGTC.

While employed by AGTC, Debtor did not hire or fire anyone, did not pay bills, did not collect on accounts and did not "provide any instructions or directions to any individual employed with AGTC." The bankruptcy court found that although Debtor "was hired as the 'president' of the company, there is no evidence that [his] job required him to direct the company. . . . He had no knowledge of the company's finances and made no decisions

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[3]Debtor acknowledged that he was aware that Satriani and Kostoff used aliases.

[4]The list of fictional reference companies used by Debtor included Firenzie Company ("Firenzie"), Naturally Fresh, Inc. ("Naturally Fresh"), Frontera Latin Products ("Frontera") and Randstad North America ("Randstad").

regarding its operation." This finding is not disputed on appeal.

In 2003, AGTC contacted appellee Ingredients International, LLC ("Ingredients") to obtain a credit account. Debtor did not contact Ingredients; rather AGTC's controller did. AGTC submitted to Ingredients a credit application, a list of credit references (Firenze, Naturally Fresh, Frontera and Randstad) on its letterhead, and a bank account number. The credit application was unsigned and did not contain a Federal Tax ID number, but Jerry Coble ("Coble"), Ingredients' comptroller, did not inquire further. He did not notice that Naturally Fresh's reference was faxed from an entity named HQ Global Workplaces. He did not examine a financial statement from AGTC and did not investigate AGTC's status as a corporation in California or Nevada, although he did determine that AGTC had an active business license in Santa Fe Springs, California.

Coble faxed credit questionnaires to the four references he received from AGTC and received three positive responses by fax and one by phone. Based on the credit references, Coble authorized a trade credit line in the amount of $50,000, which he later increased. Over a two-month period, Ingredients delivered approximately 400,000 pounds of bulk sugar to AGTC. After two months, Ingredients suspended AGTC's credit line with $121,044 remaining unpaid.

Debtor testified that he does not recall any communications he had with Ingredients or any of its representatives. He testified that he would sign credit applications sent to suppliers, but the application submitted by AGTC to Ingredients

was not signed by Debtor. Moreover, the application was printed on AGTC stationery, but Debtor testified that he did not send the references on such stationery. Ingredients did not present any evidence indicating that it had communicated directly with Debtor.

Debtor filed his Chapter 7 bankruptcy petition in 2004 and listed Ingredients as a creditor. Ingredients sued Debtor for intentional fraud and misrepresentation, for civil conspiracy and violations of anti-racketeering law, and for nondischargeability under section 523(a)(2)(A), 523(a)(2)(B), 523(a)(4), and 523(a)(6). After trial, the bankruptcy entered a memorandum decision concluding that Debtor had participated in a conspiracy to deceive vendors of AGTC and that the damages arising from this conspiracy were nondischargeable under section 523(a)(2)(A). The court ruled against Ingredients on the anti-racketeering counts and on claims for nondischargeability under section 523(a)(2)(B), 523(a)(4) and 523(a)(6). Ingredients has not appealed the rulings adverse to it.

The bankruptcy court acknowledged that no evidence exists that Debtor made any representations (false or not) to Ingredients. The court nonetheless found that Debtor

> knew of the plan to obtain credit by giving manufactured references, and he knew that the plan was directed at a specific class, that is wholesale food vendors. Even if he did not send the references to Ingredients, he participated in that plan by sending the references to some vendors. Finally, he knew the method AGTC was using to obtain credit was wrong. This is enough to establish an agreement to achieve an unlawful purpose. After [Debtor] joined AGTC, the plan was put into operation. Someone at AGTC sent the false references to Ingredients with the intent that Ingredients would extend credit to AGTC in reliance on the references. Finally, Ingredients did rely and was damaged through that reliance. Thus all of the elements of conspiracy liability have been met, and the actions and intent of

> the person at AGTC who faxed the references to Ingredients are attributable to [Debtor].

The court found that all of the elements of actual fraud did exist and that Ingredients held a nondischargeable claim against Debtor pursuant to section 523(a)(2)(A).

The court entered its judgment in favor of Ingredients on November 17, 2005. Debtor filed a timely notice of appeal.

II.
ISSUE

Did the bankruptcy court err in determining that Debtor was liable for a debt owed by ATGC to Ingredients and that Debtor's liability was nondischargeable under section 523(a)(2)(A)?

III.
JURISDICTION

The bankruptcy court had jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(2)(I) and 28 U.S.C. § 1334 (a) and (b). We have jurisdiction over this appeal under 28 U.S.C. § 158(a)(1) and (b).

IV.
STANDARD OF REVIEW

The bankruptcy court's findings of fact are reviewed under a clearly erroneous standard. Advanta Nat'l Bank v. Kong (In re Kong), 239 B.R. 815, 819 (9th Cir. BAP 1999). Its conclusions of law are reviewed de novo. Id. In general, a "finding of whether a requisite element of a section 523(a)(2)(A) claim is present is a factual determination reviewed for clear error." Anastas v. Am. Sav. Bank (In re Anastas), 94 F.3d 1280, 1283 (9th Cir. 1996). Nevertheless, a determination of whether the correct

legal standard was applied is a legal question reviewed de novo. Id.

To the extent that questions of fact cannot be separated from questions of law, we review these questions as mixed questions of law and fact, applying a de novo standard. Ratanasen v. California Dep't of Health Servs., 11 F.3d 1467, 1469 (9th Cir. 1993). A mixed question of law and fact occurs when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

V.
DISCUSSION

Section 523(a)(2)(A) provides that a debt for money, property, services, or an extension, renewal, or refinancing of credit is nondischargeable 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." The bankruptcy court held that Debtor's participation in the scheme to provide fraudulent credit references on behalf of AGTC constituted grounds for the entry of a nondischargeability judgment under this section.

In so holding, the bankruptcy court employed the Ninth Circuit's five-part test for determining when a debt is nondischargeable under section 523(a)(2)(A):

> A creditor must show that (1) the debtor made the representations; (2) that at the time he knew they were false; (3) that he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representations; (5) that the creditor sustained the alleged loss and damage as the proximate result of the representations having been made.

Cowan v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 n.2 (9th Cir. 1997); Eugene Parks Law Corp. Defined Benefit Pension Plan v. Kirsh (In re Kirsh), 973 F.2d 1454, 1457 (9th Cir. 1992).

In this case, the bankruptcy court acknowledged that there was no evidence indicating that Debtor had made representations to Ingredients. Nonetheless, because Debtor participated in a scheme in which he knew false representations were being made to food suppliers generally in order to obtain goods and services on credit, the court found that he was liable for fraudulent misrepresentations which were made by others to Ingredients. This panel, however, has held that a debt may be excepted from discharge under section 523(a)(2) when "(1) the debtor personally commits actual, positive fraud, or (2) the actual fraud of another is imputed to the debtor under partnership/agency principles." Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa), 287 B.R. 515, 525 (9th Cir. 2002). Absent evidence that Debtor made any representations to Ingredients or caused any representations to be made to Ingredients, we cannot affirm any finding that Debtor "personally" committed fraud against Ingredients. Moreover, as acknowledged by the bankruptcy court,[5] liability cannot be imposed

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[5]Much of Debtor's argument focuses on how Debtor was not an alter ego or principal of AGTC, and thus the bankruptcy court therefore erred in imposing vicarious liability on him for the actions of AGTC. The bankruptcy court, however, did not impose vicarious liability on Debtor because of his position or relationship with AGTC. In fact, the bankruptcy court acknowledged on page 18 of its decision that the evidence did not show that Reisman was the alter ego or principal of AGTC. Rather, the bankruptcy court imposed liability on Debtor for misrepresentations made to Ingredients because Debtor was a conspirator in a general scheme to defraud:

> Ingredients alleges that [Debtor] conspired with Kostoff, Satriani and others to induce vendors to extend credit in reliance on fraudulent credit references. It

(continued...)

against Debtor under partnership/agency principles. Although (as discussed later) persuasive authority exists outside the Ninth Circuit for imputing statements of co-conspirators under section 523(a)(2), we are bound by our precedent (Ball v. Payco Gen. Am. Credits, Inc. v. Ball (In re Ball), 185 B.R. 595, 597 (9th Cir. BAP 1995)) and the plain language of the statute. We must therefore reverse, no matter how much we sympathize with the bankruptcy court, which properly found Debtor's conduct wrongful.

Because Ingredients was a member of a class of suppliers to whom Debtor knew that misrepresentations were being made (by him directly, in some cases), and because Debtor participated in a scheme or conspiracy to defraud similar suppliers,[6] the bankruptcy

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[5](...continued)

> has not alleged, and the evidence does not show, that [Debtor] was in a partnership with Kostoff and Satriani. Neither has Ingredients shown that [Debtor] is AGTC's alter ego, or that the employees of AGTC were [Debtor's] agents; therefore, although the general implications of attributing liability to the debtor in nondischargeability actions are relevant the main issue is whether [Debtor] is liable to Ingredients as a conspirator.

Memorandum Decision at page 18. Because the bankruptcy court did not "pierce the corporate veil" or impose corporate liability on Debtor solely because of his relationship to AGTC, and because it did not impose vicarious liability on Debtor simply because of his status with the company, we need not consider these arguments by Debtor.

[6]Debtor argues that the bankruptcy court erred in holding that he was a participant in a conspiracy to defraud. In particular, Debtor argues that California law imposes conspiracy liability "only if he was under a legal duty originating in some source other than the conspiracy itself" and that he owed no duty to Ingredients as an officer or director of AGTC. Debtor ignores that there is a "general duty to refrain from intentional tortious conduct." City & County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1141 (N.D. Cal. 1997).

Here, the record shows that Debtor knowingly provided fraudulent credit references to at least a dozen suppliers other

(continued...)

court imputed misrepresentations made by his co-conspirators to him for the purposes of section 523(a)(2). While there is a certain logic in this approach, we can find no Ninth Circuit authority imposing nondischargeable liability for representations not made (or even known) by a debtor or by agents or partners acting on his behalf. More importantly, we can find no authority for imposing co-conspirator liability under section 523(a)(2) when the debtor is unaware of representations being made to a particular creditor. In other words, if a debtor participates in a scheme to defraud a particular creditor, perhaps that debtor should be subject to section 523(a)(2) nondischargeability for misrepresentations made by others to that particular creditor in the context of that scheme. Such is not the case here. The record demonstrates that Debtor was unaware of misrepresentations being made to Ingredients and thus those misrepresentations cannot be imputed to him.

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[6](...continued)
than Ingredients; he knew about and participated in a scheme to obtain credit based on these false references; he knew that the scheme was "wrong." He engaged in an intentional tort of fraud: he made false representations to suppliers knowing they were false, and he made them with the intent to deceive the suppliers into believing that AGTC was credit-worthy. Other suppliers in addition to Ingredients likely relied on these false representations and sustained losses as a result. Thus, Debtor did violate a legal duty to refrain from participating in intentional torts, and thus could be liable for civil conspiracy. "While 'civil conspiracy is not a cause of action,' it is 'a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." Accuimage Diagnostics Corp. Terarecon, Inc., 260 F. Supp. 2d 941, 947 (N.D. Cal. 2003) (citations omitted). Debtor not only shared the common plan or design to defraud suppliers, he was an actual tortfeasor in that he knowingly gave the false references to suppliers. The bankruptcy court therefore did not err in concluding that Debtor participated in a conspiracy to defraud. As noted in the text, he escapes Ingredients' claim here not because he is not liable, but because section 523(a)(2) does not cast a wide-enough net to snare him.

As noted previously, courts have held that "section 523(a)(2)(A) may include debts which arise from the wrongful acts of conspirators and their co-conspirators." Aetna Cas. & Sur. Co. v. Markarian (In re Markarian), 228 B.R. 34, 39 (1st Cir. BAP 1998) (citing other cases excepting debts from discharge under section 523(a)(2) because of misrepresentations made by co-conspirators); MacDonald v. Buck (In re Buck), 75 B.R. 417, 420-22 (Bankr. N.D. Cal. 1987) ("a debtor who has made no false representation may nevertheless be bound by the fraud of another if a debtor is a knowing and active participant in the scheme to defraud"). Neither the Ninth Circuit nor this panel has adopted this approach in a published decision, however. In fact, this approach is inconsistent with Tsurukawa, 287 B.R. at 525, because Debtor did not "personally" make the misrepresentation and neither did his agents or partners. Moreover, Ingredients presented no evidence that Debtor was a knowing and active participant in a scheme to defraud Ingredients in particular. Therefore, as compelling as Marakarian and Buck are, we will not follow them.

Because we do not believe that Debtor can be charged with misrepresentations made by his co-conspirators to Ingredients, we find that an essential element of section 523(a)(2)(A) is missing: that the debtor make a misrepresentation. Accordingly, we must reverse the bankruptcy court's conclusion that section 523(a)(2)(A) excepts Ingredients' debt from discharge.

VI.
CONCLUSION

For the foregoing reasons, we REVERSE.