

AUG 18 2006

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	NV-05-1471-MoSMA
)		
JEFFREY REISMAN,)	Bk. No.	04-19378
)		
Debtor.)	Adv. No.	04-01361
)		
_____)	Ref. No.	05-30
JEFFREY REISMAN,)		
)		
Appellant,)		
)		
v.)	<u>MEMORANDUM</u> ¹	
)		
INGREDIENTS INTERNATIONAL, LLC,)		
)		
Appellees.)		
_____)		

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.

Before: MONTALI, SMITH and MARLAR, Bankruptcy Judges.

¹This 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.

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

9
10 **I.**
FACTS

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

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

25
26 _____
27 ²Unless otherwise indicated, all section and rule references
28 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal
Rules of Bankruptcy Procedure, Rules 1001-9036.

1 The scheme for Debtor to use his social security number and
2 to use fictional trade references on behalf of AGTC was first
3 discussed by Debtor with two individuals known as Anthony Satriani
4 ("Satriani") and Philip Kostoff ("Kostoff")³ before he was hired
5 as president of AGTC. Kostoff provided a list of false credit
6 references⁴ to Debtor which Debtor in turn provided to food
7 suppliers when he applied for credit on behalf of AGTC. Under
8 this scheme, the food suppliers would contact the sham companies
9 at different telephone numbers set up for each company and someone
10 affiliated with Kostoff or Satriani would pose as a representative
11 of the sham company and provide a positive report of AGTC's
12 purported payment and credit history. Debtor knew that the scheme
13 operated in this manner. Nevertheless, neither Kostoff nor
14 Satriani informed Debtor of any intent not to pay for goods
15 obtained through credit; he first learned that bills were not
16 being paid toward the end of his employment with AGTC.

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

24
25 ³Debtor acknowledged that he was aware that Satriani and
26 Kostoff used aliases.

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

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

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

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

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

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

5 Debtor filed his Chapter 7 bankruptcy petition in 2004 and
6 listed Ingredients as a creditor. Ingredients sued Debtor for
7 intentional fraud and misrepresentation, for civil conspiracy and
8 violations of anti-racketeering law, and for nondischargeability
9 under section 523(a)(2)(A), 523(a)(2)(B), 523(a)(4), and
10 523(a)(6). After trial, the bankruptcy entered a memorandum
11 decision concluding that Debtor had participated in a conspiracy
12 to deceive vendors of AGTC and that the damages arising from this
13 conspiracy were nondischargeable under section 523(a)(2)(A). The
14 court ruled against Ingredients on the anti-racketeering counts
15 and on claims for nondischargeability under section 523(a)(2)(B),
16 523(a)(4) and 523(a)(6). Ingredients has not appealed the rulings
17 adverse to it.

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

21 knew of the plan to obtain credit by giving manufactured
22 references, and he knew that the plan was directed at a
23 specific class, that is wholesale food vendors. Even if
24 he did not send the references to Ingredients, he
25 participated in that plan by sending the references to
26 some vendors. Finally, he knew the method AGTC was
27 using to obtain credit was wrong. This is enough to
28 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

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

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

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

8
9 **II.
ISSUE**

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

13
14 **III.
JURISDICTION**

15 The bankruptcy court had jurisdiction over this matter
16 pursuant to 28 U.S.C. § 157(b) (2) (I) and 28 U.S.C. § 1334 (a) and
17 (b). We have jurisdiction over this appeal under 28 U.S.C.
18 § 158(a) (1) and (b).

19
20 **IV.
STANDARD OF REVIEW**

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

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

3 To the extent that questions of fact cannot be separated from
4 questions of law, we review these questions as mixed questions of
5 law and fact, applying a de novo standard. Ratanasen v.
6 California Dep't of Health Servs., 11 F.3d 1467, 1469 (9th Cir.
7 1993). A mixed question of law and fact occurs when the
8 historical facts are established, the rule of law is undisputed,
9 and the issue is whether the facts satisfy the legal rule.
10 Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

11
12 **V.**
DISCUSSION

13 Section 523(a) (2) (A) provides that a debt for money,
14 property, services, or an extension, renewal, or refinancing of
15 credit is nondischargeable to the extent obtained by "false
16 pretenses, a false representation, or actual fraud, other than a
17 statement respecting the debtor's or an insider's financial
18 condition." The bankruptcy court held that Debtor's participation
19 in the scheme to provide fraudulent credit references on behalf of
20 AGTC constituted grounds for the entry of a nondischargeability
21 judgment under this section.

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

25 A creditor must show that (1) the debtor made the
26 representations; (2) that at the time he knew they were
27 false; (3) that he made them with the intention and
28 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.

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

4 In this case, the bankruptcy court acknowledged that there
5 was no evidence indicating that Debtor had made representations
6 to Ingredients. Nonetheless, because Debtor participated in a
7 scheme in which he knew false representations were being made to
8 food suppliers generally in order to obtain goods and services on
9 credit, the court found that he was liable for fraudulent
10 misrepresentations which were made by others to Ingredients.
11 This panel, however, has held that a debt may be excepted from
12 discharge under section 523(a)(2) when "(1) the debtor personally
13 commits actual, positive fraud, or (2) the actual fraud of another
14 is imputed to the debtor under partnership/agency principles."
15 Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa), 287 B.R.
16 515, 525 (9th Cir. 2002). Absent evidence that Debtor made any
17 representations to Ingredients or caused any representations to be
18 made to Ingredients, we cannot affirm any finding that Debtor
19 "personally" committed fraud against Ingredients. Moreover, as
20 acknowledged by the bankruptcy court,⁵ liability cannot be imposed

21 _____
22 ⁵Much of Debtor's argument focuses on how Debtor was not an
23 alter ego or principal of AGTC, and thus the bankruptcy court
24 therefore erred in imposing vicarious liability on him for the
25 actions of AGTC. The bankruptcy court, however, did not impose
26 vicarious liability on Debtor because of his position or
27 relationship with AGTC. In fact, the bankruptcy court
28 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...)

1 against Debtor under partnership/agency principles. Although (as
2 discussed later) persuasive authority exists outside the Ninth
3 Circuit for imputing statements of co-conspirators under section
4 523(a)(2), we are bound by our precedent (Ball v. Payco Gen. Am.
5 Credits, Inc. v. Ball (In re Ball), 185 B.R. 595, 597 (9th Cir.
6 BAP 1995)) and the plain language of the statute. We must
7 therefore reverse, no matter how much we sympathize with the
8 bankruptcy court, which properly found Debtor's conduct wrongful.

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

13
14 ⁵(...continued)

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

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

30 ⁶Debtor argues that the bankruptcy court erred in holding
31 that he was a participant in a conspiracy to defraud. In
32 particular, Debtor argues that California law imposes conspiracy
33 liability "only if he was under a legal duty originating in some
34 source other than the conspiracy itself" and that he owed no duty
35 to Ingredients as an officer or director of AGTC. Debtor ignores
36 that there is a "general duty to refrain from intentional tortious
37 conduct." City & County of San Francisco v. Philip Morris, Inc.,
38 957 F. Supp. 1130, 1141 (N.D. Cal. 1997).

39 Here, the record shows that Debtor knowingly provided
40 fraudulent credit references to at least a dozen suppliers other
41 (continued...)

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

17
18 ⁶(...continued)

19 than Ingredients; he knew about and participated in a scheme to
20 obtain credit based on these false references; he knew that the
21 scheme was "wrong." He engaged in an intentional tort of fraud:
22 he made false representations to suppliers knowing they were
23 false, and he made them with the intent to deceive the suppliers
24 into believing that AGTC was credit-worthy. Other suppliers in
25 addition to Ingredients likely relied on these false
26 representations and sustained losses as a result. Thus, Debtor
27 did violate a legal duty to refrain from participating in
28 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.

1 As noted previously, courts have held that "section
2 523(a)(2)(A) may include debts which arise from the wrongful acts
3 of conspirators and their co-conspirators." Aetna Cas. & Sur. Co.
4 v. Markarian (In re Markarian), 228 B.R. 34, 39 (1st Cir. BAP
5 1998) (citing other cases excepting debts from discharge under
6 section 523(a)(2) because of misrepresentations made by co-
7 conspirators); MacDonald v. Buck (In re Buck), 75 B.R. 417, 420-22
8 (Bankr. N.D. Cal. 1987) ("a debtor who has made no false
9 representation may nevertheless be bound by the fraud of another
10 if a debtor is a knowing and active participant in the scheme to
11 defraud"). Neither the Ninth Circuit nor this panel has adopted
12 this approach in a published decision, however. In fact, this
13 approach is inconsistent with Tsurukawa, 287 B.R. at 525, because
14 Debtor did not "personally" make the misrepresentation and neither
15 did his agents or partners. Moreover, Ingredients presented no
16 evidence that Debtor was a knowing and active participant in a
17 scheme to defraud Ingredients in particular. Therefore, as
18 compelling as Marakarian and Buck are, we will not follow them.

19 Because we do not believe that Debtor can be charged with
20 misrepresentations made by his co-conspirators to Ingredients, we
21 find that an essential element of section 523(a)(2)(A) is missing:
22 that the debtor make a misrepresentation. Accordingly, we must
23 reverse the bankruptcy court's conclusion that section
24 523(a)(2)(A) excepts Ingredients' debt from discharge.

25
26 **VI.**
CONCLUSION

27 For the foregoing reasons, we REVERSE.
28