

APR 27 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NOT FOR PUBLICATION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

In re:)	BAP No.	NC-05-1323-BRyK
)		
GEORGE Q. CHEN,)	Bk. No.	03-32157
)		
Debtor.)	Adv. No.	03-03712
_____)		
)		
TERRA NOVA INDUSTRIES, INC.,)		
)		
Appellant,)		
)		
v.)	M E M O R A N D U M ¹	
)		
GEORGE Q. CHEN,)		
)		
Appellee.)		
_____)		

Argued and Submitted on March 24, 2006
at San Francisco, California

Filed - April 27, 2006

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

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Before: BRANDT, RYAN² and KLEIN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. John E. Ryan, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 Appellant contracted with Debtor to build a restaurant at San
2 Francisco International Airport, knowing that Debtor had a \$3 million
3 construction loan and was eligible for reimbursement from the City and
4 County of San Francisco for airport storefront improvements. Debtor used
5 some of those funds for other purposes, and ultimately was unable to pay
6 Appellant in full for the project. After Debtor filed for bankruptcy
7 protection, Appellant filed an action seeking a declaration of
8 nondischargeability under § 523(a)(2)(A)³ (services obtained by false
9 pretenses, false representation, or actual fraud) and other relief.

10 After a three-day trial, the bankruptcy court entered judgment in
11 favor of debtor, based primarily on its finding that there was
12 insufficient evidence of intent to deceive. This appeal ensued. We
13 AFFIRM.

14

15

I. FACTS

16 Terra Nova Industries, Inc. ("Terra Nova" or "Appellant") is a
17 California licensed general contractor. In May 2000 it entered into a
18 contract with GQC Holdings, an entity controlled by debtor George Q.
19 Chen, for construction of a restaurant known as Restaurant Qi - The Water
20 Bar, located at San Francisco International Airport. Chen obtained a
21 \$3,025,000 line of credit from Bank of America to fund the construction.
22 The loan agreement provided that the funds borrowed were to be used "only

23

24 ³ Absent contrary indication, all "Code," chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
26 its amendment by the Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
which the adversary proceeding and these appeals arise was filed
before its effective date (generally 17 October 2005).

27 All "Rule" references are to the Federal Rules of Bankruptcy
28 Procedure, and all "FRCP" references are to the Federal Rules of Civil
Procedure.

1 for financing costs associated with construction of a restaurant and bar
2 located at San Francisco International Airport." Terra Nova's principal,
3 Ron Taylor, was aware of this loan, although there was conflicting
4 testimony as to whether Chen informed Taylor directly. As the cost of
5 the project was estimated at \$1.9 million, he was unconcerned about
6 Chen's ability to pay. Moreover, Taylor was aware that the City and
7 County of San Francisco ("CCSF") had a program whereby airport tenants
8 would be reimbursed for the cost of improvements to storefront areas.

9 Terra Nova commenced work on the project, periodically submitting
10 payment applications to Chen as provided in the contract. It submitted
11 eight applications, of which five were paid in full. The check in
12 payment for application no. 6, made on 11 October 2000, was returned for
13 insufficient funds. Chen later paid Terra Nova \$165,000 by assigning a
14 distribution from another of his corporations, Pejui Wu. He made no
15 further payments to Terra Nova.

16 Unbeknownst to Taylor, in August 2000 the Bank of America line of
17 credit had run out. Also unbeknownst to Taylor, between August and
18 November 2000 GQC Holdings received reimbursement checks from CCSF
19 totaling approximately \$1.7 million. Chen never informed Taylor of these
20 developments.

21 To qualify for reimbursement from CCSF, Chen had to certify that
22 Terra Nova had been paid. On 11 October 2000 Chen wrote to David
23 Pfeiffer of Pacific Gateway Partnership (a firm hired by the airport to
24 assist in construction and leasing of the food and beverage program).
25 The letter enclosed a final cost breakdown. Chen stated therein: "Ron
26 Taylor of Terra Nova has certified that these items have been paid to
27 date and is [sic] substantially complete." Taylor had not certified
28 payment.

1 Ultimately, Restaurant Qi proved unsuccessful, losing \$600,000 over
2 four months, and closed its doors in March 2001. Debtor filed for
3 chapter 13 relief on 25 July 2003. Shortly thereafter, the case was
4 converted to chapter 11. Terra Nova filed a complaint objecting to
5 discharge on 1 December 2003. In an amended complaint, filed on
6 17 November 2004, it sought a determination of nondischargeability under
7 § 523(a)(2)(A), naming a number of non-debtor entities and seeking a
8 determination that they were Chen's alter egos.

9 After a three-day trial, the bankruptcy court ruled in Chen's favor,
10 orally stating its findings and conclusions on the record, as Rule 7052
11 permits. Transcript, 24 June 2005, pages 545-48. The bankruptcy court
12 concluded that Terra Nova had not established an intent not to pay. The
13 court found that although Chen knew he did not have sufficient proceeds
14 from the construction loan, he expected funds from the reimbursement
15 program, and he believed that he would have profits from his business
16 that could be used. The bankruptcy court cited Chen's assignment of the
17 distribution from Pejiu Wu as inconsistent with an intent not to repay.
18 Further, the bankruptcy court found that Terra Nova had not established
19 justifiable reliance with respect to any work performed after it was paid
20 with an NSF check in October 2000.

21 Because of its finding that the debt was dischargeable, the
22 bankruptcy court did not rule on the alter ego question, nor did it
23 determine the amount of Terra Nova's claim in Chen's bankruptcy.

24 The bankruptcy court entered judgment declaring Chen's debt to Terra
25 Nova dischargeable; Terra Nova timely appealed.

1 V. DISCUSSION

2 **A. Finality/Leave to Appeal**

3 Although the parties have not raised finality as an issue, we have
4 an independent duty to determine our own jurisdiction, In re Aheong, 276
5 B.R. 233, 238-39 (9th Cir. BAP 2002), and we have no jurisdiction over
6 interlocutory appeals except upon granting leave. 28 U.S.C. § 158(a)(3);
7 In re NSB Film Corp., 167 B.R. 176, 180 (9th Cir. BAP 1994).

8 The judgment on appeal is interlocutory: it does not dispose of the
9 alter ego claims or resolve any claims against the non-debtor entities,
10 nor did the parties obtain a certification pursuant to FRCP 54(b),
11 applicable in bankruptcy via Rule 7054, that there is no just reason for
12 delay, and directing entry of a judgment. See In re Belli, 268 B.R. 851,
13 855-56 (9th Cir. BAP 2001). Nor did they request leave to appeal.

14 We may grant leave where (1) the appeal involves a controlling
15 question of law as to which there is substantial ground for difference
16 of opinion, (2) an immediate appeal would materially advance the ultimate
17 termination of the litigation, and (3) denying leave would result in
18 wasted litigation and expense. In re Roderick Timber Co., 185 B.R. 601,
19 604 (9th Cir. BAP 1995).

20 Here, although the issues are framed as factual, the dispositive
21 question is whether the court's findings, if correct, are legally
22 sufficient to support the result - here, dischargeability of a debt. And
23 there is no question the last two elements are met: the bankruptcy
24 court's conclusion that the Terra Nova debt was discharged rendered moot
25 any issue regarding the amount of the debt, or whether the named non-
26 debtors-defendants were alter egos of the debtor.

1 We will exercise our discretion to treat the notice of appeal as a
2 motion for leave to appeal, see Rule 8003; In re Wilborn, 205 B.R. 202,
3 206 (9th Cir. BAP 1996), and will grant that motion.

4
5 **B. Merits**

6 Section 523(a)(2)(A) excepts from discharge debts incurred "for
7 money, property, services, or an extension, renewal, or refinancing of
8 credit, to the extent obtained by . . . false pretenses, a false
9 representation, or actual fraud"

10 To prevail in an action under this section, a creditor must prove
11 by a preponderance of the evidence:

- 12 1. that the debtor made a representation;
- 13 2. that he knew was false at the time;
- 14 3. that the debtor made the representation with the intention and
15 purpose of deceiving the creditor;
- 16 4. the creditor justifiably relied on the representation; and
- 17 5. the creditor sustained damage as the proximate result of the
18 representation. In re Apte, 96 F.3d 1319, 1322 (9th Cir. 1996); In re
19 Eashai, 87 F.3d 1082, 1086-87 (9th Cir. 1996). Failure to disclose a
20 material fact may give rise to liability under this section. Apte, 96
21 F.3d at 1323-24.

22 Terra Nova argues that the bankruptcy court clearly erred in
23 finding that it had not met its burden of proving intent to deceive, and
24 in finding that it was no longer justified in relying on Chen's
25 assurances in continuing its construction work once Chen presented an NSF
26 check. Terra Nova also argues that the bankruptcy court clearly erred
27 in finding that it had no right to either the loan or reimbursement funds
28 that would justify reliance upon those funds as a source of payment.

1 But, having omitted portions of the trial transcript from the
2 excerpts of record, it is nearly impossible for Terra Nova to show clear
3 error. As appellant, it has the burden of providing the entire record
4 on appeal, In re Kritt, 190 B.R. 382, 387 (9th Cir. BAP 1995); see also
5 Rule 8009; 9th Cir. BAP Rule 8006-1, and a reversal of the trial court's
6 findings of fact requires the entire record relied upon by the court.
7 Kritt, 190 B.R. at 387. Where an appellant has omitted something from
8 the excerpts, we are entitled to presume that the appellant does not
9 regard the missing items as helpful to the appeal. In re Gionis, 170
10 B.R. 675, 680-81 (9th Cir. BAP 1994), aff'd, 92 F.3d 1192 (9th Cir. 1996)
11 (table).

12 Terra Nova argues that Chen's nondisclosure that he had received all
13 of the construction loan and most of the CCSF reimbursements by 30 August
14 2000, that he had used over \$1.8 million of these funds to pay expenses
15 not related to construction at all, or not related to Restaurant Qi
16 construction, and that he did not have or expect to have sufficient funds
17 to pay Terra Nova to complete the project, was fraud. Taylor testified
18 at trial that he relied upon Chen's assurances of payment, and upon the
19 fact that Chen had the funding sources outlined above.

20 The essence of Terra Nova's argument is that Chen's intent not to
21 pay is established by the fact that he used some of the Bank of America
22 loan proceeds to pay for items other than construction, in violation of
23 the loan agreement, and that he falsely stated to CCSF (via Pacific
24 Gateway) that Taylor had certified the project was paid in full.

25 But the bankruptcy court's finding of lack of intent has support in
26 the partial record we have been provided. Chen testified that he
27 anticipated paying for the balance of the construction with the CCSF
28 reimbursement funds, distributions from other business ventures, and

