THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	Case No. 94-12856
JOSEPH T. KUBINEC,	Adversary Proceeding No. 97-1126
Debtor.	Chapter 7
	Judge Pat E. Morgenstern-Clarren
JOSEPH T. KUBINEC,	
Plaintiff,	
v.	**MEMORANDUM OF OPINION**
EUCLID STEEL & WIRE, INC.,	
Defendant.	

Plaintiff-Debtor Joseph Kubinec filed this adversary proceeding seeking a determination that a debt alleged to be owed to Defendant Euclid Steel & Wire, Inc. ("Euclid") based on a written guarantee has been discharged. Euclid filed an Amended Answer and Counterclaim in which it claims that the debt is a post-petition obligation that is not discharged under 11 U.S.C. § 727(b) or, alternatively, that it is a pre-petition debt that is excepted from discharge under 11 U.S.C. § 523 (a)(2)(A).

Euclid filed a Motion for Summary Judgment on the Complaint shortly before the August 27, 1997 trial date. (Docket 8). In light of the timing of that filing, the motion was taken under consideration for decision in connection with the trial issues. At trial, Plaintiff withdrew Count II of his Complaint. For the reasons stated below, the Motion for Summary Judgment will be

denied, judgment will be entered in favor of Plaintiff on Count I of the Complaint, and judgment will be entered in favor of Plaintiff on the Counterclaim.

JURISDICTION

The Court has jurisdiction to hear this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(I), (O).

FACTS

Joseph Kubinec and Donald Anzells, President and sole owner of Euclid, testified at trial. Their testimony, the exhibits, and the Stipulations of Fact (Docket 11) establish these facts:

1. Background

Mr. Kubinec filed his Chapter 7 case on July 8, 1994. He did not include Euclid in his schedule of creditors and Euclid did not have notice of the bankruptcy case. There was no bar date for the filing of claims. Mr. Kubinec received a discharge under 11 U.S.C. § 727 releasing him from pre-petition debts on October 11, 1996 and the case was then closed as a no asset case. (Stip. ¶ 1, 2, 3).

On February 27, 1997, Mr. Kubinec filed a motion to reopen the case to determine whether the debt alleged to be owed to Euclid had been discharged. The Court granted the motion over the objection of Euclid. This adversary proceeding followed.

2. The Guarantee

Euclid manufactures steel wire and sells it to other manufacturers to incorporate into their products. As head of this small company, Mr. Anzells is responsible for credit, sales, scheduling, and engineering. Euclid sells to both new and established customers. Before extending credit to

new customers, Mr. Anzells obtains a Dunn & Bradstreet report, gets bank references, and sometimes checks with his competitors. In evaluating credit requests from existing customers, Mr. Anzells considers their payment history with Euclid and the length of the relationship.

In January 1994, James McCarthy and Ron Limback contacted Mr. Anzells to see if Euclid would sell wire to Display Fabricators, Inc. ("Display"). Mr. Anzells first heard of Display in about 1993. He had, however, known and respected Mr. Limback for more than 20 years as a business acquaintance at various companies. There was no persuasive testimony as to who owned Display in January 1994. Mr. Anzells believed that Mr. Limback owned Display at some point in time, but did not own it at the time of this contact. He also thought at some point in time that Mr. Kubinec owned Display, but he did not have any solid factual basis for that belief. There was no persuasive testimony as to what positions, if any, Messrs. Limback and McCarthy held at Display. Additionally, there was no persuasive testimony as to Mr. Kubinec's relationship with Display.

Mr. Anzells, Mr. Limback, and Mr. McCarthy met, at which time Mr. Limback explained that Display had experienced some financial difficulties, had undergone a change in management, and was in need of a supplier who could provide wire quickly. Mr. Limback offered to have Joseph Kubinec sign a guarantee in connection with any sales made by Euclid to Display. Mr. Anzells' information about Mr. Kubinec was limited to knowing that he was Mr. Limback's long-time accountant, he lived in a nice house, and he was affiliated with a downtown accounting firm. Mr. Anzells did not do a credit check on Mr. Kubinec and did not request or review any financial statements from Mr. Kubinec. Mr. Anzells accepted Mr.

Limback's offer to obtain a guarantee from Mr. Kubinec; in doing so, he relied on his own opinion of Mr. Limback's integrity.

Mr. Anzells soon drafted and sent to Mr. Kubinec a written guarantee, which Mr. Kubinec signed on January 28, 1994. The guarantee agreement provided in part that Mr. Kubinec:

> agree[d] to personally pay for any amount owed by Display Fabricators, Inc. by sixty days after the invoice date in the event that Display Fabricators is unable to pay at that time. This agreement will be in effect for as long as Euclid Steel & Wire, Inc. provides wire to Display Fabricators.

Mr. Anzells did not ask Mr. Kubinec if he was able to pay on the guarantee at the time it was signed. Euclid probably shipped goods to Display before receiving the Kubinec guarantee.

Starting on April 5, 1994, Display began to run a balance with Euclid for greater than 60 days. (Stip. ¶ 6). When an invoice reached this age, Mr. Anzells would call Display and payment would be arranged. At times, Mr. Anzells called Mr. Kubinec directly to request payment from Display. In February or March of 1995, Mr. Kubinec promised that he would personally pay $5,000 to Euclid, but he never made the payment. Mr. Kubinec did not mention his own bankruptcy filing during any of these conversations. He did, however, tell Mr. Anzells that he was "broke".

In about January or February 1996,[1] Mr. Anzells went to Display to try to obtain some payment and found the business closed. He then went to Mr. Kubinec's accounting office. In response to an inquiry as to what was going on at Display, Mr. Kubinec replied that he had no

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[1] Mr. Anzells testified that the events described took place in January or February of 1995. The exhibits, however, indicate that the year was 1996. (Defendant Exhibits 2, 3).

idea. On February 5, 1996, Euclid made written demand on Mr. Kubinec to honor the guarantee, followed by another letter attempting to resolve the problem. Mr. Kubinec did not respond and Euclid then sued Mr. Kubinec in state court.

It was not until after Euclid filed the lawsuit that Mr. Anzells learned of Mr. Kubinec's July 1994 bankruptcy filing. In explaining this omission at trial, Mr. Kubinec described the procedure he followed when he determined who should be included in his schedule of creditors. He sat down with a stack of bills and took the names and addresses of his creditors from them. As he did not have anything from Euclid in that documentation, he did not remember to include the company in the filing.

Mr. Anzells testified that if he had known of the bankruptcy when it was filed, he would have asked for assurance that the guarantee would be renewed. In the absence of that assurance, Euclid "probably" would not have sold any other goods to Display. There is a total of $26,793.91 in unpaid invoices from Euclid to Display that date from October 17, 1994 through July 19, 1995. (Defendant Exhibit 7).

ISSUES

1. Did Euclid's claim against Mr. Kubinec arise pre-petition or post-petition?

2. If the claim arose pre-petition, is the claim excepted from discharge under 11 U.S.C. § 523?

DISCUSSION

1. Did Euclid's claim against Mr. Kubinec arise pre-petition or post-petition?

The issue of whether Euclid's claim arose pre-petition or post-petition is central both to Count I of the Complaint and Euclid's Motion for Summary Judgment. Count I requests a determination that the amounts owed to Euclid under the guarantee are pre-petition, discharged debt. Euclid seeks a summary judgment that the debt is post-petition. Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c), made applicable to these proceedings by Bankruptcy Rule 7056; *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The parties agree that there are no genuine issues of material fact on this part of the claim.

Euclid contends that even though the guarantee was entered into pre-petition, Mr. Kubinec was not called upon to make payments under the guarantee until post-petition. Euclid also takes the position that the failure to schedule the debt and give notice of the bankruptcy deprived it of the opportunity to stop extending credit to Display. In this connection, Euclid notes that Mr. Kubinec never terminated his guarantee. Euclid argues that, as a result, the unpaid invoices are post-petition debt that it is free to collect from Mr. Kubinec despite the discharge. Mr. Kubinec, on the other hand, contends that the guarantee created a contingent claim in favor of Euclid on the date it was signed. As that date was pre-petition, Mr. Kubinec argues that the debt is a pre-petition debt that was discharged.

The circumstances under which a Chapter 7 debtor is entitled to a discharge are set forth in 11 U.S.C. § 727(a). With certain exceptions,[2] a discharge under that section:

> discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

11 U.S.C. § 727(b). A "claim" is broadly defined to include the "right to payment, whether or not such right is . . . unliquidated . . . [or] contingent . . . " 11 U.S.C. § 101(5)(A). When an individual agrees to guarantee a debt in the event of non-payment, a contingent right to payment is created when the agreement is signed. "A guarantee is a classic example of a contingent obligation." *In re Fox*, 64 B.R. 148, 153 (Bankr. N.D. Ohio 1986). A debtor's pre-petition guarantee provides the basis for a contingent claim from the moment of its execution. *In re Stucker*, 153 B.R. 219 (Bankr. N.D. Ill. 1993); *In re Drexel Burnham Lambert Group, Inc.*, 151 B.R. 674 (Bankr. S.D. N.Y. 1993).

The guarantee in this case gave Euclid a right to payment that was contingent on an invoice reaching a point where it was due for more than 60 days. That right existed as of the date on which the guarantee was signed. Since the guarantee was signed pre-petition, the right to payment arose pre-petition, and consequently the obligation owed to Euclid is a pre-petition claim.

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[2] For purposes of this first issue the exceptions are not relevant.

In urging the opposite conclusion, Euclid relies on *In re Haught,* 120 B.R. 233 (Bankr. M.D. Fla. 1990). That case is, however, factually distinguishable and does not consider the line of cases holding that a guarantee creates a contingent right at the time it is given. Euclid's additional argument that the failure to schedule the debt makes it non-dischargeable because Euclid lost the opportunity to stop extending credit is not supported by the case law cited. That Mr. Kubinec did not terminate the guarantee under state law is irrelevant under the facts of this case.

The undisputed facts establish that Euclid is not entitled to judgment as a matter of law on Count I of the Complaint because this is a pre-petition debt. Euclid's Motion for Summary Judgment will, therefore, be denied. Categorizing the debt as pre-petition does not, however, necessarily mean that Mr. Kubinec is entitled to judgment on this Count. That will depend on whether the pre-petition debt is discharged under 11 U.S.C. § 727(b) or is, instead, excepted from discharge under 11 U.S.C. § 523.

2. If the claim arose pre-petition, is the claim excepted from discharge under 11 U.S.C. § 523?

Euclid argues in the alternative that, even if its claim arose pre-petition, it nonetheless survives the bankruptcy because it is excepted from discharge under 11 U.S.C. § 523(a)(2)(A).[3]

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[3] 11 U.S.C. § 523(a)(3)(B) precludes discharge of a debt which is not scheduled in time to permit "if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had actual notice or knowledge of the case in time for such timely filing and request." The parties reached the issue of dischargeability under 11 U.S.C. § 523(a)(2)(A) through this section.

Mr. Kubinec argues that the evidence did not establish a basis for a determination of non-dischargeability under this section.

A discharge under 11 U.S.C. § 727(b) does not discharge an individual from a debt:

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition; . . . .

11 U. S.C. § 523(a)(2)(A). As the Bankruptcy Code's policy is to give honest debtor's a fresh start, exceptions to discharge are to be narrowly construed against the creditor and in favor of the debtor. *In re Ward*, 857 F.2d 1082 (6th Cir. 1988). In order to have a debt declared non-dischargeable under this section, the creditor must prove by a preponderance of the evidence that the debtor obtained an extension of credit through a material misrepresentation known to the debtor to be false when made or made with gross recklessness as to its truth; the debtor intended to deceive the creditor; the creditor justifiably relied on the misrepresentation; and the reliance was the proximate cause of the loss. *In re McClaren*, 990 F.2d 850, 852 (6th Cir. 1993) citing *In re Phillips*, 804 F.2d 930, 932 (6th Cir. 1986), as modified by the holding in *Field v. Mans*, 116 S.Ct. 437 (1995) that the legal standard is justifiable reliance, rather than reasonable reliance.

Euclid's dischargeability claim is based on the premise that if Mr. Kubinec had disclosed his bankruptcy filing, Euclid probably would not have continued to sell goods to Display without some further assurance that the guarantee would be honored. Additionally, Euclid argues that Mr. Kubinec's promise to pay $5,000 was a fraudulent misrepresentation.

a. Nondisclosure of the July 1994 bankruptcy

Euclid contends that Mr. Kubinec's failure to disclose his July 1994 bankruptcy filing was a fraudulent misrepresentation. A debtor's intentional failure to disclose material facts can constitute a misrepresentation under § 523(a)(2)(A). *In re Allied Supermarkets, Inc.*, 951 F.2d 718 (6th Cir.1991), *In re Van Horne*, 823 F.2d 1285 (8th Cir. 1987). In closing argument, Mr. Kubinec's counsel acknowledged that the filing of a bankruptcy case is a material fact in connection with the execution of a guarantee. He argued, however, that Euclid did not prove either (1) an intent to deceive Euclid; or (2) justifiable reliance by Euclid on the guarantee, unaffected by any bankruptcy filing. Euclid did fail to prove these two elements of its case, as discussed below. Based on this failure, it is unnecessary to address the evidence relating to the other elements of a case under 11 U.S.C. § 523(a)(2)(A).

There was no evidence to support a finding that Mr. Kubinec's failure to schedule Euclid or to inform it of his bankruptcy was intentional. His explanation that the debt was not scheduled because he did not remember to include it was credible. He also told Mr. Anzells that he was "broke" even though he did not reference an actual bankruptcy filing.

There was also little, if any, evidence that Euclid actually relied on Mr. Kubinec's guarantee in extending credit to Display. The greater weight of the evidence instead establishes that Mr. Anzells relied on his relationship with Mr. Limback in extending the credit. Mr. Anzells initially decided to sell to Display and accept the guarantee of Mr. Kubinec based entirely on the statements of Mr. Limback. He followed Euclid's credit policy for known customers based on his relationship with Mr. Limback. Mr. Anzells accepted the guarantee of Mr. Kubinec with no personal knowledge of his finances and he made no inquiry in that regard, either at the time of

the first sale or any later time. He had no facts whatsoever that would have indicated that Mr. Kubinec's guarantee had any value at the time it was given or any time after that. Display ran a balance on which Euclid could have called Mr. Kubinec's guarantee from April of 1994 through July of 1995, the date of the last invoice. Despite that, Euclid did not demand that he honor the guarantee until February of 1996, long after the last sale had been made. It is clear that Euclid's decisions to extend credit to Display were not based on the financial condition of Mr. Kubinec and, therefore, did not depend on the viability of his guarantee.

Mr. Anzells did testify that if he had known about the filing he probably would not have extended more credit without some additional assurance from Mr. Kubinec. This statement is unconvincing to establish reliance, however, both because Mr. Anzells was not definite on the point and because he took this position long after Display closed down. All of his actions and statements before that time pointed to his reliance on his relationship with Mr. Limback. Considering all of the circumstances, there is insufficient evidence to establish that Euclid actually relied on the guarantee.

Finally, to the extent Euclid did rely on the guarantee, there was no evidence that Mr. Anzells ever obtained any information about Mr. Kubinec or Mr. Kubinec's finances that could have been the basis for justifiably relying on the guarantee. Here, the only information Mr. Anzells had about Mr. Kubinec was that he was an accountant affiliated with a downtown firm, lived in a nice house, and did accounting work for Mr. Limback. Mr. Anzells testified that he generally did not extend credit to new customers (i.e., rely on a customer's ability to pay the debt at a later point in time) without checking bank references, reviewing a Dunn & Bradstreet report, and perhaps talking with others in the same industry about payment history. At a minimum, and

absent some mitigating factor, Mr. Anzells would have had to follow his own procedures before any reliance on Mr. Kubinec's guarantee would be justifiable. He did not do so. Euclid did not, therefore, justifiably rely on Mr. Kubinec's guarantee, even if there was reliance in fact.

b. The promise to pay $5,000

The only evidence on this issue was that Mr. Kubinec promised to pay $5,000 to Euclid and did not do so. There was no evidence that this statement was a material misrepresentation when made, that Mr. Kubinec intended Euclid to rely on it, that Euclid did justifiably rely on it, or that the reliance proximately caused the loss. Euclid did not, therefore, meet its burden of proof on this claim.

* * *

Euclid did not meet its burden of proving that the alleged debt is excepted from the discharge granted to Mr. Kubinec. Judgment will, therefore, be entered in favor of Plaintiff on Count I of the Complaint and on the Counterclaim.

CONCLUSION

For the reasons stated above, Euclid's Motion for Summary Judgment will be denied, judgment will be entered in favor of Plaintiff on Count I of the Complaint, and judgment will be entered in favor of Plaintiff on the Counterclaim. A separate judgment will be entered in accordance with this Memorandum of Opinion.

Date: 5 September 1997

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: David Simon, Esq.
Adam Gross, Esq.

By: Joyce L. Gordon, Secretary
Date: 9/5/97

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 94-12856
	)	
JOSEPH T. KUBINEC,	)	Adversary Proceeding No. 97-1126
	)	
Debtor .	)	Chapter 7
	)	
JOSEPH T. KUBINEC,	)	Judge Pat E. Morgenstern-Clarren
	)	
Plaintiff,	)	
	)	
v.	)	**JUDGMENT**
	)	
EUCLID STEEL & WIRE, INC.,	)	
	)	
Defendant.	)	

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that Judgment is entered in favor of Plaintiff Joseph T. Kubinec on Count I of the Complaint and on the Counterclaim filed by Euclid Steel & Wire, Inc. Additionally, the Motion for Summary Judgment on the Complaint filed by Euclid Steel & Wire, Inc. is denied.

Date: 5 September 1997

Pat E. Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served on: David Simon, Esq. (by mail)
Adam Gross, Esq. (by mail)

By: Joyce L. Gordon, Secretary

Date: 9/5/97