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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
02 JUN 13 PM 2:07
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 01-12949
)
PATRICK J. REYNOLDS,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
_____)
)
TELEPHONE CREDIT UNION, INC.,) Adversary Proceeding No. 01-1301
)
Plaintiff,)
)
v.) **MEMORANDUM OF OPINION**
)
PATRICK J. REYNOLDS,)
)
Defendant.)

The Plaintiff Telephone Credit Union Inc. filed an Amended Complaint in this Adversary Proceeding seeking a determination that a debt in the amount of \$7,631.00 owed by the Debtor-Defendant Patrick Reynolds is non-dischargeable under 11 U.S. C. § 523(a)(2). (Docket 5). The Amended Complaint alleges that the Debtor deposited 11 checks with the Credit Union that were dishonored for insufficient funds, that the Debtor knew there were insufficient funds to cover the checks when he made the deposits, that the Debtor intended to deceive the Credit Union when he so acted, that the Credit Union relied on the Debtor's representation that the checks would clear, and that these actions constitute false pretense, false representation, and/or actual fraud.

The Debtor filed a *pro se* Answer, a Counterclaim, and a Third-Party Complaint against his former counsel, Barbara Brown-Daniels. (Docket 10). Taken as a whole, this pleading denies fraud and asks for \$7 million in damages against the Credit Union based on its alleged

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failure to garnish the Debtor's wages prepetition and failure to have agents explain the debt, leading to the Debtor suffering "a. Mental, Punitive, and Social damage; b. Credit and privacy damage; c. Employment problems [and] d. Extreme Financial hardship." (Docket 10). The Third-Party Complaint alleges that Ms. Brown-Daniels provided ineffective assistance of counsel, including being late for a pretrial hearing, which caused the Debtor to suffer emotional and mental damages for which he seeks \$7 million in damages. At trial, the Debtor raised these damage amounts to \$28 million against the Credit Union and \$14 million against Ms. Brown-Daniels.

JURISDICTION

Jurisdiction exists 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)(A) and (I).

TRIAL

The Debtor and Robin Thomas, the Credit Union's acting president and CEO, testified at trial. The Court has considered the testimony, the exhibits that were admitted into evidence, and the arguments of counsel and the parties.

A. The Amended Complaint

Facts and Discussion

In December 1995, the Debtor and non-debtor, non-party Bonnie Reynolds had accounts at the Credit Union. Checks were deposited into their accounts during that month that were returned for insufficient funds. Apparently, the Debtor and/or Bonnie Reynolds drew funds out of the accounts at about the time at least some of the checks were deposited. The facts at trial were sketchy as to the dates, amounts, and circumstances surrounding the deposits and

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withdrawals. In part, this is because the witness for the Credit Union was Robin Thomas, who did not begin work at the Credit Union until 1999. Because he does not have independent knowledge of the Debtor's actions, he based his testimony on his review of the Credit Union's business records. Those records included copies of checks drawn on the two accounts that indicate they were returned for insufficient funds. The Credit Union also relied heavily in its case on a letter dated January 9, 1996 from the Credit Union to the Debtor that states:

Patrick J. Reynolds defrauded The Telephone Credit Union by depositing several items via ATM: representing insufficient deposits. This action has resulted in The Credit Union being damaged in the amount of \$4,180.00.

Pursuant to Ohio Revised Code Section 2307.61, Telephone Credit Union has the right to recover for the the [sic] willful damage or theft caused by Patrick J. Reynolds. Patrick Reynolds agrees to waive his right to written demand for payments and further agrees to make restitution of \$4,180.00 plus 20.9% interest. The agreement for the repayment of same is memorialized by a Promissory Note dated January 09, 1996 executed by Patrick J. Reynolds.

Thank you for your cooperation in resolving this matter.

Very truly yours,

Felecia Johnson
Collection Specialist

The document has the Debtor's name typed at the bottom and his handwritten name is above it. Based on the letter, the Credit Union then agreed to loan him money to repay the Credit Union, which according to Mr. Thomas's testimony was not an unusual procedure. The Credit Union wrote on the loan document that the "Purpose" was "fraud refinances" [sic]. The dollar amount of the loan was \$3,885.10. The testimony did not explain how this amount linked to the amount

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of the NSF checks or the amount identified in the Amended Complaint. The Debtor did not deny signing the letter; he testified, however, that he did not intend to admit to a legal finding of fraud by signing the letter or the loan document.

Mr. Thomas does not have any personal knowledge of facts relating to the Debtor's state of mind or Bonnie Reynolds' state of mind when they deposited the checks/withdrew the cash at issue.

The Credit Union's position is that the signed letter and loan document together with the objective facts of deposits followed by cash withdrawals show that the Debtor knew that the checks would bounce and intended to defraud the Credit Union. The Credit Union did not specify whether its case is based on "false pretenses, a false representation, or actual fraud." The Debtor argued that the Credit Union did not prove its case.

Bankruptcy Code § 523(a)(2)(A) states that:

- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any 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 or an insider's financial condition;

The Sixth Circuit has held that:

In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at the

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time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation and (4) its reliance was the proximate cause of loss.

Rembert v. AT&T Univ. Card Services, Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1997)

(citations and footnotes omitted). The Credit Union has the burden of proving its case by a preponderance of the evidence. *Id.* Exceptions to discharge are strictly construed against the creditor. *Id.*

Put simply, the Credit Union did not meet its burden of proof on this issue, regardless of which subpart of § 523(a)(2)(A) is applied. There was insufficient evidence to establish which transactions in which account underlay the Credit Union's case. Similarly, there was insufficient evidence to show that the Debtor made material misrepresentations or acted with the requisite intent in his dealings with the Credit Union. While the Court considered the January 9, 1996 letter, the letter is conclusory rather than fact-based. The Court also found convincing the Debtor's statement that he did not intend to admit to fraud by signing the letter. The Credit Union did not prove justifiable reliance or that the reliance caused the loss. The circumstantial evidence that some withdrawals followed deposits that bounced is insufficient in this case to prove fraud. Judgment will, therefore, be entered in favor of the Debtor on the Complaint.

B. Counterclaim

Facts and Discussion

The Debtor had the obligation to plead facts setting forth a counterclaim that stated a cause of action and to prove those facts at trial. He did not do so. While the Court understands that the Debtor feels the Credit Union treated him unfairly, there was insufficient evidence to

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prove a claim against the Credit Union. For that reason, the Credit Union is entitled to judgment in its favor on the Counterclaim.

C. Third-Party Complaint

Facts and Discussion

The Debtor's Third-Party Complaint against attorney Barbara Brown-Daniels is for legal malpractice. The elements of a legal malpractice claim in a civil case are: "(1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach." *Krahn v. Kinney*, 43 Ohio St. 3d 103, 105, 538 N.E.2d 1058 (1989). The parties agree that Ms. Brown-Daniels and the Debtor had an attorney-client relationship. The Debtor testified that he expected Ms. Brown-Daniels to appear and represent him at the meeting of creditors held under 11 U.S.C. § 341. She did not do so, but instead sent another lawyer, Paul Bayer, who the Debtor had not met before and had not retained.¹ Assuming that Ms. Brown-Daniels had a duty to represent the Debtor at the 341 meeting and that she breached that duty by failing to appear and sending someone who the Debtor had not retained, the Debtor still had the burden of proving that he was injured by that breach. He did not do so. Judgment will, therefore, be entered in favor of Ms. Brown-Daniels on the Third-Party Complaint.

¹ Mr. Bayer and Ms. Brown-Daniels are not partners. Mr. Bayer represented Ms. Brown-Daniels at trial until the Debtor brought to the Court's attention that Mr. Bayer had represented him at the 341 meeting. The Court then granted the Debtor's oral motion to disqualify Mr. Bayer from representing Ms. Brown-Daniels at trial because her interests were adverse to the Debtor's. Ms. Brown-Daniels elected to go forward at trial without a continuance, with Attorney Charles Van Ness representing her.

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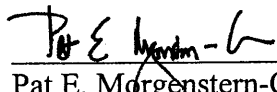
CONCLUSION

For the reasons stated:

- (1) judgment will be entered in favor of the Debtor Patrick Reynolds on the Amended Complaint;
- (2) judgment will be entered in favor of Telephone Credit Union, Inc. on the Counterclaim; and
- (3) judgment will be entered in favor of Barbara Brown-Daniels on the Third-Party Complaint.

A separate order will be entered reflecting this decision.

Date: 13 June 2002



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Edward Bailey, Esq.
Barbara Brown-Daniels, Esq.
Charles Van Ness, Esq.
Mr. Patrick Reynolds

By: Joyce L. Gordon, Secretary

Date: 6/13/02

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Debtor.) Judge Pat E. Morgenstern-Clarren
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TELEPHONE CREDIT UNION, INC.,) Adversary Proceeding No. 01-1301
)
Plaintiff,)
)
v.) **JUDGMENT**
)
PATRICK J. REYNOLDS,)
)
Defendant.)

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

ORDERED that:

- (1) Judgment on the Amended Complaint is entered in favor of the Defendant-Debtor Patrick Reynolds;
- (2) Judgment on the Counterclaim filed by Defendant-Debtor Patrick Reynolds is entered in favor of the Plaintiff, Telephone Credit Union, Inc.; and
- (3) Judgment on the Third-Party Complaint filed by Defendant-Debtor Patrick Reynolds is entered in favor of Barbara Brown-Daniels.

Date: 13 Jun 2002

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

Served by mail on: Edward Bailey, Esq.
Barbara Brown-Daniels, Esq.
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