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JUDGE: M. A. Mahoney

PARTIES: Vincent Duran Lacoste, Brenda C. Lacoste, First Baptist Church of Cornelia Georgia, Inc.

CHAPTER: 7

ATTORNEYS: W. A. Gray, Jr., D. S. Moyer

DATE: 11/22/00

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

VINCENT DURAN LACOSTE,
BRENDA C. LACOSTE,

Case No. 00-10174-MAM-7

Debtors.

FIRST BAPTIST CHURCH OF
CORNELIA GEORGIA, INC.

Adv. No. 00-1047

Plaintiff,

v.

VINCENT DURAN LACOSTE,

Defendant.

**ORDER DETERMINING DEBT TO BE DISCHARGEABLE
UNDER § 523(a)(2)(A) OR (B)**

W. Alexander Gray, Jr., Mobile, Alabama, Attorney for the Debtor
David S. Moyer, Mobile, Alabama, Attorney for First Baptist Church of Cornelia Georgia, Inc.

This matter is before the Court on the complaint of First Baptist Church of Cornelia Georgia, Inc. ("First Baptist Church") to determine dischargeability of a certain debt under § 523(a)(2)(A) and (B) of the Bankruptcy Code. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the debt is dischargeable under § 523(a)(2)(A) and (B).

FACTS

On June 13, 1997 First Baptist Church entered into a written agreement with Lacoste Builders, Inc. Under the agreement First Baptist Church agreed to pay \$1,666,526 for Lacoste Builders to act as general contractor and build an addition to the existing church. Debtor was the

sole shareholder of Lacoste Builders. As part of the agreement, Lacoste Builders agreed to install an elevator/conveyancing system. Pursuant to the agreement, Lacoste Builders was to submit written applications for payment as the work progressed. The contract contained the following provisions regarding payment applications:

9.3.1.2 Such applications may not include requests for payment of amounts the Contractor does not intend to pay to a Subcontractor or a material supplier because of a dispute or other reason.

...

9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

...

9.6.2 The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor or on account of such Subcontractors' portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of such Subcontractor's portion of the Work.

The form used for pay applications included the following statement:

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information, and belief, the work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.

The pay applications were based on a schedule of values submitted by Lacoste Builders and agreed to by First Baptist Church. The schedule of values assigned values for each phase and specific item of the work. The conveyancing or elevator system to be installed was assigned a value of \$50,000. Upon submission of a pay application, the architect, Oscar Woody, hired by First Baptist Church would review and verify the completion percentages and work quality. The

architect would submit the pay application to First Baptist Church and First Baptist Church would remit payment to Debtor.

Under the agreement, Lacoste Builders was to also submit partial lien waivers from each subcontractor with the pay applications. These lien waivers were to ensure that subcontractors were being paid for the work and materials they had provided at the time each pay application was submitted. However, Lacoste Builders had difficulty obtaining and keeping track of lien waivers for all the subcontractors and First Baptist Church did not enforce the requirement that they be submitted with each pay application. Lacoste Builders turned lien waivers in when it could.

Beginning in April, 1998, Lacoste submitted several pay applications to First Baptist Church for payment that included requests for payment attributable to portions of the conveyancing system. The total amount he received from First Baptist Church for the conveyancing system was \$37,500. Debtor's pay applications indicated that 80% of the work had been completed for the conveyancing system.

Lacoste subcontracted with Otis Elevators to provide the conveyancing system. Debtor agreed to pay Otis Elevators \$30,600 for work and materials. A dispute arose between Lacoste and Otis Elevators regarding the location of the equipment room and a change order to move the equipment room. There is some discrepancy in testimony as to the degree and impact of the dispute. However, at the very least it is apparent that Lacoste believed there was a valid dispute and did not pay Otis Elevators for any of the work or materials it supplied. Debtor maintains that he at all times intended to pay Otis Elevators; but not until the dispute was resolved.

At some point First Baptist Church realized there were problems with the payment of some subcontractors and suppliers and took over the responsibility of paying them directly. Due

to the problems with unpaid subcontractors and suppliers, and other issues, First Baptist Church ultimately terminated its contract with Debtor and Debtor left the job. First Baptist Church completed the construction project on its own and had to pay monies to unpaid subcontractors and suppliers including \$36,482 to Otis Elevators.

During the time Lacoste was working on the First Baptist Church job, his Alabama license was revoked. He was not licensed in Georgia at any time during his work on First Baptist church. Debtor did his own accounting and used one bank account for all his construction jobs. Debtor operated his business under three names: Lacoste Construction, Vincent Lacoste (a sole proprietorship), and Lacoste Builders, Inc.

On January 18, 2000, Lacoste filed for relief pursuant to Chapter 7 of the Bankruptcy Code. His statement of financial affairs lists 40 suits and administrative proceedings to which he is or was a party within one year immediately preceding the filing of his bankruptcy case. Debtor's Schedule F lists 35 judgments that total over \$1,000,000.00. There are about 11 debts to churches listed with breach of contract claims and two churches to which Debtor assigned promissory notes that total \$406,572.00. Debtor testified that he has contracted to do construction jobs for about 25 different Churches and most of them have resulted in liens or lawsuits being filed against him. First Baptist Church filed this adversary proceeding to determine that the portion of the debt owed to First Baptist Church that resulted from Debtor's failure to pay Otis Elevator constituted a nondischargeable debt under § 523(a)(2)(A) and (B) of the Bankruptcy Code.

LAW

A.

Section 523(a)(2)(A) excepts from discharge a debt for money, property, or services obtained by false pretenses, a false representation, or actual fraud. The Eleventh Circuit has ruled that in order to have a particular debt excepted from discharge on the basis of fraud, the plaintiff must prove that: (1) the debtor made a false representation; (2) with the purpose and intention of deceiving the creditor; (3) the creditor relied on the representation; and (4) the creditor sustained a loss as a result of the representation. *In re Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986). Each element must be proved by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991). Each element is discussed below.

1.

Debtor submitted payment applications that stated that the work covered by the applications for payment had been completed “in accordance with the Contract Documents,” and that “all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.” Debtor’s pay applications indicated that 80% of the work had been completed for the conveyancing system; but, Debtor never paid the subcontractor, Otis Elevator, for the work or materials they provided. Thus, the work had not been completed in accordance with the contract documents which required Debtor to “promptly pay each Subcontractor, upon receipt of payment” from First Baptist Church and required that “all work for which Certificates for Payment have been previously issued and payments received... to the best of the Contractor’s knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances” in favor of subcontractors or material suppliers. These requirements were not met in regard to the work done on the conveyancing system. Thus, the Debtor made a false

representation when he signed and submitted payment applications that included work on the conveyance system.

2.

Did First Baptist Church rely on the false representations? First Baptist Church testified that if it had known that Debtor had not paid Otis Elevator, it would have withheld the money until Debtor brought payment current. First Baptist Church was aware that Debtor was not obtaining lien waivers from all the subcontractors and it continued to pay Debtor anyway. However, at least as far as First Baptist Church was aware, the difficulty with obtaining partial lien waivers from each subcontractor was due to administrative problems and not because subcontractors had not been paid. When First Baptist Church became aware that subcontractors were not being paid, it took over the responsibility of paying subcontractors directly and eventually took Debtor off the job completely. Therefore, First Baptist Church relied on the representations and in fact terminated its contract with Debtor once it became apparent that those representations were false.

3.

Did First Baptist Church sustain a loss as a result of the false representations? First Baptist Church had to complete the construction project on its own and had to pay monies to unpaid subcontractors and suppliers, including \$36,482 to Otis Elevator. Clearly, that constitutes a loss.

4.

The only remaining issue is whether Debtor submitted the application for payment with the intent to deceive. This element is usually the hardest one for a plaintiff to prove because it

ordinarily must be proven by circumstantial evidence. *In re Hicks*, 79 B.R. 45, 49 (Bankr. N.D. Ala. 1987). The debtor always asserts that he or she did not intend to deceive. This is true in this case. Debtor contends that he did not intend to deceive First Baptist Church. The Court viewed Mr. Lacoste and the witness for the church. Both were very credible men. Debtor testified that he intended to pay Otis Elevator in full; but, he had a disagreement with Otis Elevator concerning the location of the equipment room and refused to pay Otis Elevator until the matter was resolved. The contract between First Baptist Church and Debtor specifically states that payment applications “may not include requests for payment of amounts the Contractor does not intend to pay to a subcontractor or material supplier because of a dispute.” However, Debtor testified that he fully expected to resolve the matter with little effort from either party and to pay Otis Elevator; but, that the matter needed to be addressed first. Debtor testified that he had informed Otis Elevator and First Baptist Church of the problem and did not think it was of great concern. The evidence lends some credibility to this statement. If Debtor had wanted to defraud First Baptist Church he could have withheld payment from the numerous other subcontractors that were working on the \$1,666,526 project, not just Otis Elevator. The only subcontractor of which the court is aware who was totally unpaid was Otis Elevator and Otis Elevator never complained of its nonpayment until long after the interim payment was due.

Debtor’s administrative problems and financial difficulties increased as the project progressed and First Baptist Church contends that Debtor must have known that he would not be able to pay all his subcontractors. Debtor’s Alabama contractor’s license was revoked during the time of the First Baptist Church job and he did not have a license in Georgia. However, Georgia does not require contractors to be licensed. Debtor switched back and forth between the three different names he operated under. Debtor did his own accounting and used the same bank

account for all of his jobs. Debtor has numerous lawsuits and liens filed against him and most of the 25 or so churches he contracted to do were not completed without liens or lawsuits being filed against him. First Baptist Church contends that all of the above is evidence of Debtor's intent to deceive. Debtor maintains that his financial and administrative difficulties caused him great stress and caused him to develop health problems which further increased his inability to successfully administrate the First Baptist Church job; but, that his intention was always to pay his subcontractors and to complete the job. Carelessness, without more, will not sustain a Section 523(a)(2)(A) claim. *In re Jones*, 197 B.R. 949, 963 (Bankr. M.D. Ga. 1996). This Court is obligated to construe exceptions to discharge liberally in favor of the debtor, recognizing that the reasons for denying the discharge must be substantial and not merely conjectural. *Gleason v. Thaw*, 236 U.S. 558 (1915); *Equitable Bank v. Miller (In re Miller)*, 39 F.3d (11th Cir. 1994). "Fraud must be affirmatively proven, and not presumed. If there is room for an inference of honest intent, the question of fraud must be resolved in favor of the debtor." *In re Cornner*, 191 B.R. 199 (Bankr. N.D. Ala. 1995) (*citing In re Hunt*, 30 B.R. 425, 436 (M.D. Tenn.1983)). This Court finds the facts do not show intentional deceit. At best, the evidence is in equipoise with some circumstantial evidence buttressing each party's assertion. Therefore, this element was not proven by plaintiff by a preponderance of the evidence. The First Baptist Church has not proven all four elements and cannot prevail on its § 523(a)(2)(A) claim.

B.

A debt is nondischargeable under § 523(a)(2)(B) if it was obtained by a writing: (1) that is materially false; (2) respecting the debtor's or an insider's financial condition; (3) on which the creditor to whom the debt is liable for such money, property, services, or credit reasonably relied; and (4) that the debtor caused to be made or published with the intent to deceive. As

under § 523(a)(2)(A), the plaintiff has the burden of proving each of these elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991). Debtor obtained money by submitting writings, the payment applications, stating that the work covered by the applications for payment had been completed “in accordance with the Contract Documents,” and that “all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.” This statement concerns Debtor’s financial condition and as explained above, was a false representation that was relied on by First Baptist Church. However, the same analysis used above must also be applied here to the issue of intent. For the reasons stated above, this Court finds that the evidence as to intent is in equipoise and must be resolved in favor of Debtor.

THEREFORE, IT IS ORDERED AND ADJUDGED that the debt owed to First Baptist Church of Cornelia, Georgia, Inc. for the conveyancing system is dischargeable under § 523(a)(2)(A) and (B).

Dated: November 22, 2000

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE