UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In Re

EMORY SHELLEY and
DANA JO SHELLEY,

Case No. 03-42947-PNS3

Debtors.

FIRST NATIONAL BANK ALASKA

Plaintiff.

vs.

Adv. No. 04-03007

EMORY SHELLEY and
DANA JO SHELLEY

Defendants.

ORDER GRANTING DEFENDANTS' THIRD MOTION FOR SUMMARY JUDGMENT

John E. Venn, Jr., Attorney for Debtors, Pensacola, FL
Michael G. Gillion and Scott Hunter, Attorneys for Plaintiff, Mobile, AL

This case is before the Court on the debtors' third motion for summary judgment. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § § 157 and 1334 and the Order of Reference of the District Court. This motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is granting the defendants' third motion for summary judgment.

FACTS[1]

[1]The facts underlying this adversary have been stated and restated in the Courts previous orders on defendants' first and second motions for summary judgment and the Court incorporates those facts herein without restating them in their entirety. At the summary judgment hearing both sides pointed out at least some facts that are outside the record in this case. Those facts were not considered.

The debtors, Emory and Dana Jo Shelley, previously owned Easy Street Auto, Inc., an Alaska corporation. Easy Street Auto was in the business of selling used vehicles, and Emory Shelley was its president and chief operating officer. Dana Jo Shelley was not actively involved in the operations of Easy Street Auto.

The inventory for Easy Street was financed through a line of credit obtained from First National Bank of Alaska ("FNBA"). The FNBA line of credit was secured by Easy Street's inventory. The Shelleys got behind on their obligations to FNBA, and on July 10, 2001, Easy Street Auto and the Shelleys entered into a forbearance agreement with FNBA. Under the terms of the forbearance agreement, the Shelleys gave FNBA more collateral – mortgages on various parcels of real property owned by them – and the Shelleys agreed not to sell any more vehicles "out of trust." In exchange, FNBA agreed not to act upon the default.

After the forbearance agreement was entered into, the Shelleys and Easy Street began performing under the agreement. From the signing of the agreement on July 10, 2001, until September 10, 2001, the Shelleys and Easy Street paid the installments due under the forbearance agreement and paid FNBA the amounts for all vehicles sold during that period. On September 11, 2001, terrorists attacked the Twin Towers and the Pentagon. After this unforseen event, the Shelley's and Easy Street failed to comply with the terms of the forbearance agreement.[2] From September 11, 2001, until the Spring of 2002, vehicles were sold from Easy Street "out of trust," because, according to the debtors, Easy Street needed the money to keep the business operating. Although the Shelleys attempted to obtain financing from third parties to pay off the debt owed to

[2] The timing of the Shelleys' failure to live up to the forbearance agreement is in evidence. Although there is no place in the evidence that the Shelleys state the attacks of September 11th caused their business downturn, the facts seem self evident.

FNBA, the financing could not be obtained, and the in the Spring of 2002 the business of Easy Street discontinued its operations and surrendered the remaining collateral to FNBA.

The Shelleys could not repay and FNBA filed a lawsuit against the debtors and Easy Street Auto in the Superior Court of the State of Alaska. That Court entered a default judgment in favor of FNBA and against the debtors, Easy Street in the amount of $898,702. After crediting property recovered, the Shelleys owe $484,944.48 on the judgment. At some point, the Shelleys moved from Alaska to Florida, and in April 2003 they purchased a home in Santa Rosa County, Florida.

FNBA domesticated the Alaska judgment in the Santa Rosa County Circuit Court. FNBA then filed a judgment lien on the debtor's home in accordance with Florida law. The Shelleys subsequently filed their Chapter 7 bankruptcy on October 24, 2003. Judge Killian avoided the lien, over FNBA's objection, because it impaired the debtors' homestead. FNBA then filed the present complaint objecting to discharge under § 727, or in the alternative, objected to the dischargeability of their claim under §§ 523(a)(2)(A) & (B), (a)(4), and (a)(11). The Court has previously granted the Shelleys summary judgment on the §§ 727, 523(a)(4), and 523(a)(11) claims. Thus, this motion for summary judgment deals with the only claims remaining in this adversary – the § 523(a)(2)(A) and § 523(a)(2)(B) claims.

LAW

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, which has been made applicable to bankruptcy proceedings pursuant to Fed.R.Bankr.P. 7056. A court shall grant summary judgment to a party when the movant shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Bankr.P. 7056(c). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505,

91 L. Ed. 2d 202 (1986), the Supreme Court found that a judge's function is not to determine the truth of the matter asserted or weight of the evidence presented, but to determine whether or not the factual disputes raise genuine issues for trial. *Anderson*, at 2510, 2511. In making this determination, the facts are to be looked upon in the light most favorable to the nonmoving party. *Id*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Additionally, where a party will have the burden of proof on an element essential to its case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmovant's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 323.

FNBA asserts its § 523(a)(2)(A) claim against the Shelleys based on Emory Shelley's unfulfilled promise to not sell any more vehicles out of trust. FNBA claims that the fact that Mr. Shelley later broke his promise and sold cars out of trust evidences his fraudulent intent. FNBA argues that this evidence, along with other circumstances of the case, proves there is a genuine issue of material fact concerning the debtors' fraudulent intent. FNBA asserts its § 523(a)(2)(B) claim based on the forbearance agreement entered into between the Shelleys and FNBA.

§ 523(a)(2)(A)

Section 523(a)(2)(A) provides:

> (a) A discharge under section 727 . . . 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;

11 U.S.C. § 523(a)(2)(A). For a creditor to prevail in a nondischargeability proceeding under this section, all five elements of traditional common law fraud must be established by a preponderance of the evidence. *See Field v. Mans*, 516 U.S. 59, 68-70 (1995); *Grogan v. Garner*, 498 U.S. 279 (1991); *Fuller v. Johannessen (In re Johannessen)*, 76 F.3d 347, 350 (11th Cir. 1996); *AT&T Universal Card Services Corp. v. Dawson (In re Reynolds)*, 221 B.R. 828, 833-34 (Bankr. N.D. Ala. 1998). To prevail under § 523(a)(2)(A), the plaintiff must establish that:

1. The debtor made representations;
2. knowing the representations were false at the time they were made;
3. with the intent to deceive the creditor;
4. the creditor justifiably relied on the representations; and
5. the creditor's loss was the proximate result of the misrepresentation having been made.

Field, 516 U.S. at 74-76; *Reynolds*, 221 B.R. at 834.

FNBA's § 523(a)(2)(A) claim is based on the unfulfilled promise of Emory Shelley to not sell any more vehicles out of trust. Proof of fraud in cases involving unfulfilled promises requires the plaintiff to prove that at when the promises were made, the defendant either knew he could not fulfill them, or had no intention of fulfilling them. *Bropson v. Thomas (In re Thomas)*, 217 B.R. 650, 653 (Bankr. M.D. Fla. 1998). When a defendant enters into an agreement, he implicitly represents that he will fulfill the promise therein. *Id.* Therefore, fraudulent intent may be established by proof that the defendant entered into a contract intending to default. *Id.* at 653-54.

FNBA alleges that it justifiably relied, to its detriment, on Emory Shelley's representation that he would change his business practices and would no longer sell vehicles out of trust. According to FNBA, however, Mr. Shelley never had any intention of fulfilling this promise or repaying the loans. FNBA offered no evidence of Mr. Shelley's fraud except his failure to pay after

September 2001. Furthermore, FNBA's representative, David Stringer, testified at his deposition that he knew of no other evidence.

The Court finds FNBA's evidence insufficient to show that Mr. Shelley knew he could not fulfill, or did not intend to fulfill his promises to FNBA. Although FNBA asserts that the circumstances prove the Shelleys never intended to fulfill the promises, the evidence shows: (1) the debtors were paying back their debts and fulfilling their obligations under the forbearance agreement until the occurrence of the unforseen events of September 11, 2001; (2) the debtors attempted to refinance their obligations to FNBA through a third-party; and (3) the forbearance agreement gave FNBA more collateral to secure the Shelleys' debt. These factors indicate Emory Shelley intended to fulfill his promise to FNBA at the time he made the promise.

When considering a motion for summary judgment, issues of motive and intent as to the conduct of any party will normally preclude the Court from granting summary judgment. *Cruz-Baez v. Negron-Irizarry*, --- F. Supp.2d ----, 2005 WL 564067 (D. Puerto Rico 2005); *see also Tew v. Chase Manhattan Bank, N.A.*, 728 F. Supp. 1551, 1555 (S.D. Fla. 1990) ("Certain issues such as fraud, intent, and knowledge lend themselves to trial, rather than summary judgment."). However, "even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences [or] unsupported speculation." *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 95 (1st Cir. 1996). Because FNBA presented only conclusory allegations and unsupported speculation, summary judgment is appropriate. Additionally, since FNBA would have the burden of proving intent at trial and it has not established the existence of that essential element by even a scintilla of evidence, summary judgment must be granted in favor of the Emory Shelley. *See*

Celotex, 477 U.S. at 323 (where a party will have the burden of proof on an element essential to its case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmovant's case necessarily renders all other facts immaterial).

Regarding Dana Jo Shelley, the Court finds that FNBA has failed to produce any evidence demonstrating Mrs. Shelley's involvement in any of the alleged fraudulent conduct at issue in this adversary proceeding. Although she did cosign the forbearance agreement, FNBA offered no evidence she was involved in the operations of Easy Street Auto or that she made any false representations at all to the plaintiff, which induced FNBA's justifiable reliance. Therefore, summary judgment is granted in favor of Dana Jo Shelley.

§ 523(a)(2)(B)

FNBA also asserts that the Shelleys' debt to it is nondischargeable pursuant to § 523(a)(2)(B). For a debt to be dischargeable under § 523(a)(2)(B), the debtor must have used a false financial statement to induce the creditor into providing money, property, services, or an extension, renewal, or refinancing of credit. *See* 11 U.S.C. § 523(a)(2)(B). FNBA relies on the forbearance agreement for this claim. However, after examining the forbearance agreement the Court finds it is not a financial statement. Since FNBA has not provided any evidence of any other statement in writing, summary judgment in favor of the Shelleys must be granted on FNBA's § 523(a)(2)(B) claim.

Therefore, IT IS ORDERED, that the defendants' third motion for summary judgment is GRANTED. IT IS FURTHER ORDERED that all debts owed by the debtors, Emory and Dana Shelley, to First National Bank of Alaska are discharged.

Dated: April 28, 2005

Margaret A. Mahoney
MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE