

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
LORENZO GARCIA,)	CASE NO. 08-32121 HCD
)	CHAPTER 7
)	
DEBTOR,)	
)	
)	
LaHACIENDA BRANDS, INC.,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 08-3086
)	
LORENZO GARCIA,)	
)	
DEFENDANT.)	

Appearances:

Jamie C. Woods, Esq., for plaintiff, Thorne Grodnik, LLP, P.O. Box 1210, Mishawaka, Indiana 46546-1210;

Michael A. Trippel, Esq., for plaintiff, Thorne Grodnik, LLP, P.O. Box 1210, Mishawaka, Indiana 46546-1210; and

Gerald L. Shidaker, Esq., for defendant, 1717 South Bend Avenue, Suite E, South Bend, Indiana 46637.

MEMORANDUM OF DECISION

At South Bend, Indiana, on July 6, 2009.

Before the court are the plaintiff's Complaint, the defendant's Answer, and the parties' Joint Stipulation of Facts. The Complaint alleges that the defendant, debtor Lorenzo Garcia, owes the plaintiff LaHacienda Brands, Inc., a debt that is nondischargeable under § 523(a)(2)(A) of the Bankruptcy Code. Trial in the matter was held on May 26, 2009. At the trial, counsel for the defendant was present, but the defendant failed to appear. After having heard the arguments of counsel for the plaintiff and defendant, the court entered judgment for the plaintiff and granted the relief sought in the plaintiff's Complaint. This Order memorializes the court's ruling.

The underlying facts are not in contention. On February 16, 2007, Antonio Garcia, President of Los Galanes Supermarket, Inc., entered into a promissory note in favor of the plaintiff, in the amount of \$961,560.03. On the same day, Antonio Garcia and the defendant Lorenzo Garcia, a shareholder in Los Galanes, signed a personal continuing guaranty in favor of the plaintiff, promising the payment of all indebtedness represented by the promissory note. *See* R.1, Ex. B. Los Galanes defaulted under the terms of the note, and the defendant failed to make payments under the Guaranty. On February 21, 2008, the Elkhart Superior Court granted a Judgment in favor of the plaintiff and against the defendant (and defendants Antonio Garcia, Los Galanes and others) in the amount of \$1,094,678.51. *See id.*, Ex. A.

On July 2, 2008, the defendant filed a voluntary chapter 7 petition. The plaintiff then filed its Complaint objecting to the discharge of the state court judgment pursuant to 11 U.S.C. § 523(a)(2)(A).¹ The plaintiff claimed that the defendant entered into the Guaranty under false pretenses and through false representations by failing to acknowledge to the plaintiff that he could not cover the funds secured by the Guaranty. The plaintiff alleged that such action amounted to actual and/or constructive fraud.

The defendant's bankruptcy counsel in his bankruptcy case appeared on his behalf in this adversary proceeding and filed an Answer to the Complaint. However, the defendant himself failed to appear for mediation, the scheduled deposition, or the trial. He also failed to participate in a joint pretrial statement or to present to the court a list of witnesses and exhibits. At trial, with no defendant to examine,

¹ To succeed under § 523(a)(2)(A), a plaintiff has the burden of proving by a preponderance of the evidence that the debt owed to him by the defendant was obtained by actual fraud, false pretenses, or misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890, 893-94 (7th Cir. 2000) (stating that fraud is not limited to misrepresentations and misleading omissions); *In re Bero*, 110 F.3d 462, 465 (7th Cir.1997) (setting forth burden of proof). The Seventh Circuit has required a plaintiff to establish that (1) the defendant obtained the plaintiff's loan through representations that the defendant either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the defendant acted with an intent to deceive the plaintiff; and (3) the plaintiff justifiably relied on the defendant's false representations to his detriment. *See In re Sheridan*, 57 F.3d 627, 635 (7th Cir. 1995); *Mayer v. Spanel Int'l, Ltd.*, 51 F.3d 670, 673 (7th Cir.), *cert. denied*, 516 U.S. 1008 (1995); *In re Maurice*, 21 F.3d 767, 774 (7th Cir. 1994); *see also Field v. Mans*, 516 U.S. 59, 74-75, 116 S. Ct. 437, 446, 133 L.Ed.2d 351 (1995) (holding that a creditor's reliance need only be justifiable, not reasonable).

the plaintiff sought judgment on the pleadings based upon the defendant's continuing failure to participate in this adversary proceeding and his failure to follow the court's scheduling and pretrial orders.

When allegations of a party's pretrial misconduct are raised, the court considers the alleged improper conduct under Rule 7016 of the Federal Rules of Bankruptcy Procedure, which applies Rule 16 of the Federal Rules of Civil Procedure to adversary proceedings. Rule 16(f) allows the imposition of sanctions on a party or the party's attorney if the court's scheduling or pretrial order is not followed. *See In re Maurice*, 21 F.3d 767, 773 (7th Cir. 1994) (describing wide range of sanctions available under Rules 16(f) and 37(b)(2); finding no abuse of court's discretion); *Michael v. Khan (In re Khan)*, 321 B.R. 709, 711-12 (Bankr. N.D. Ill. 2005) (finding that failure to comply with pretrial order led to barring of witnesses and exhibits at trial). In this adversary proceeding, the court's Order of January 23, 2009, set forth pretrial and trial requirements on the parties. The Order stated that a party's failure to file a list of exhibits and witnesses with the court "will constitute a waiver of the opportunity to submit evidence or arguments and may subject the matter to a summary disposition without further hearing." R. 14; *see* N.D. Ind. L.B.R. B-7016-1; *see also In re LTV Steel Co., Inc.*, 307 B.R. 37, 48-49 (Bankr. N.D. Ohio 2004) (stating that Rule 7016(f) empowers a court to use any sanction under Rule 37(b)(2)(B), (C), or (D)). It further described another possible sanction: "Absent showing of good cause, parties will be bound at trial to the exhibit and witness lists previously exchanged." R. 14. The plaintiff timely filed its exhibit and witness lists. The defendant filed nothing and requested no extension of time for filing.

At the conclusion of the hearing, the court found that the sanction of summary disposition was appropriate in this case. The defendant clearly had failed to comply with the court's Order of January 23, 2009. He also had made no attempt to show good cause for failing to follow the court's instructions. In addition, the defendant chose not to mediate and refused to appear at his deposition and at trial. When questioned by the judge, counsel for the defendant stated that the defendant had cooperated from time to time, early in the proceedings, but that he then had disappeared. According to his counsel, the defendant had

not responded to letters, even certified letters, and his cell phone was no longer working. Counsel admitted, nevertheless, that the letters sent to the defendant had not been returned as undeliverable and that the defendant had not contacted him.

The court found that defendant's counsel had presented good cause to explain his own conduct in this proceeding but that the defendant's "disappearance" warranted sanctions. Because the defendant had not exchanged witness and exhibit lists, he could be barred from offering evidence at trial. *See In re Khan*, 321 B.R. at 711 (implementing this sanction under similar circumstances). However, since the defendant also failed to appear at trial and had not contacted, responded to or cooperated with his attorney for many months, he could not participate in his defense at trial, and his attorney could neither cross-examine nor argue on his behalf. Based, therefore, on the defendant's continuing nonappearances and misconduct throughout the adversary proceeding, his failure to provide exhibit and witness lists as required by the court's Order, and the lack of any defense (no witnesses, exhibits, or arguments) on the day of trial, the court entered judgment in favor of the plaintiff and against the defendant on the Complaint. *See Bibby Fin'l Servs. (Midwest), Inc., v. Weadley (In re Weadley)*, Adv. No. 07 A 683 (Bankr. No. 06 B 1854), 2008 WL 2397590 at *2 (Bankr. N.D. Ill. June 11, 2008) (granting judgment under § 523(a)(2)(B) after imposing Rule 16(f) sanctions for violations of pretrial order).

However, one point of clarification should be made. At the trial, counsel for the plaintiff had requested a "judgment on the pleadings." A motion for judgment on the pleadings may be made pursuant to Federal Rule of Civil Procedure 12(c), which is applied in adversary proceedings under Federal Rule of Bankruptcy Procedure 7012. When considering the motion, a court may consider only the pleadings, "which consist of the complaint, the answer, and any written instruments attached as exhibits." *Housing Auth. Risk Retention Group, Inc., v. Chicago Hous. Auth.*, 378 F.3d 596, 600 (7th Cir. 2004). When the parties present matters outside the pleadings, however, and when those matters are not excluded by the court, "the motion [under . . . Rule 12(c)] must be treated as one for summary judgment under Rule 56." *Doss v. Clearwater*

Title Co., 551 F.3d 634, 639 (7th Cir. 2008) (quoting Rule 12(d)); *see also Cincinnati Ins. Co. v. Leighton*, 403 F.3d 879, 885 (7th Cir. 2005).

In this case, counsel for the plaintiff argued his case by setting forth the elements of § 523(a)(2)(A) in the Complaint. Its central allegation was that the defendant had entered into the Guaranty under false pretenses: He had failed to acknowledge to representatives of the plaintiff that he could not cover the funds secured by the Guaranty, either at that time or in the future. However, counsel also relied upon the defendant's admission (in the parties' Joint Stipulation of Facts) that "Garcia's financial condition at the time of signing the Guaranty was such that he could not reasonably make payments under the Guaranty if the same were requested by La Hacienda." R. 13, ¶ 4. The court acknowledged the defendant's concession in the stipulated facts. In the court's view, the defendant had admitted his inability to pay on February 16, 2007, when he signed the Guaranty; on February 21, 2008, when the state court judgment was entered against him; and on July 2, 2008, when he filed bankruptcy. His nonappearance at trial was a further admission that he could not respond to the elements of § 523(a)(2)(A). In the view of the court, the only appropriate sanction for the defendant's nonappearance was a waiver of the opportunity to deny the plaintiff's allegations of fraud, pursuant to § 523(a)(2)(A). The court therefore subjected the matter to a summary disposition pursuant to Federal Rule of Civil Procedure 16(f), made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 7016. The plaintiff's motion for judgment on the pleadings could not be granted because the plaintiff directed the court to additional documents outside the pleadings, and the court reviewed and relied upon those stipulated facts when making its determination.

Therefore, the court enters judgment in favor of the plaintiff and against the defendant on the Complaint. It determines that the debt owed to the plaintiff from the defendant debtor is nondischargeable in the defendant's bankruptcy proceeding pursuant to 11 U.S.C. § 523(a)(2)(A).

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT