

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
GARY R. SHANKLIN)	CASE NO. 14-31414 HCD
)	CHAPTER 7
DEBTOR)	
)	
)	
ROBERT D. WAYMAN)	
)	
PLAINTIFF)	
vs.)	PROC. NO. 14-3055
)	
GARY R. SHANKLIN)	
)	
DEFENDANT)	

Appearances:

Trevor Q. Gasper, Esq., 4100 Edison Lakes Parkway, Suite 1000, Mishawaka, Indiana 46545, for plaintiff Robert D. Wayman.

R. William Jonas, Esq., 137 North Michigan Street, South Bend, Indiana 46601, for defendant Gary R. Shanklin.

MEMORANDUM OF DECISION

At South Bend, Indiana, on October 22, 2015.

The matter before the court is Robert D. Wayman's Complaint to Determine Dischargeability against the debtor, Gary R. Shanklin. The complaint, filed August 25, 2014, asks the court to except the debt of Shanklin to Wayman from

discharge under 11 U.S.C. § 523(a)(2)(A), and (a)(6).¹ The court conducted a trial on October 13, 2015. At that trial the court heard witness testimony and documentary evidence was admitted. At the conclusion of plaintiff Wayman's case, defendant Shanklin moved for a judgment on the evidence. Upon consideration of the testimony and documentary evidence admitted, the court granted the motion and ruled from the bench finding the debt of Gary Shanklin to Robert Wayman should not be excepted from discharge. The court is issuing this memorandum of decision to memorialize its findings of fact and conclusions of law.

Jurisdiction

In their joint amended pre-trial order, the parties note this adversary proceeding is a core proceeding within the jurisdiction of this court under 28 U.S.C. § 157(b)(1). The court finds it has jurisdiction to decide the matter before it pursuant to 28 U.S.C. §§ 1334 and 157, and the Northern District of Indiana Local Rule 200.1. Venue is proper pursuant to 28 U.S.C. § 1409(a). The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(D).

Background

The parties in this adversary proceeding became acquainted in 2002 or 2003. During 2004 or 2005 Shanklin began his own car business, GRS Sales and Marketing and GRS Motorwerks (collectively GRS). Beginning sometime in 2005, the parties began their business relationship. Shanklin originally turned to Wayman to

¹Wayman's complaint also included a count under § 523(a)(4) alleging Shanklin's fraud or defalcation while acting in a fiduciary capacity or larceny. Wayman did not pursue that ground at trial and the court considers it abandoned.

provide financing because Shanklin did not have good credit. Wayman was aware of Shanklin's poor credit situation when he began their business relationship. Under their business arrangement, Wayman was to provide funding to Shanklin to permit Shanklin to acquire vehicles for resale. In exchange for providing acquisition funding, Shanklin was to provide Wayman with vehicle titles within three to five business days. This relationship began based on the verbal expressions of the parties. The initial intention of the parties was to reduce their business agreement to writing. Wayman testified that, while Shanklin was to provide the documentation, "it did not happen." Wayman testified that he himself made no effort to obtain a written agreement.

Wayman's trial testimony outlined his understanding of the business operation. Because he did not have cash on hand to meet the business requirements, Wayman stated he refinanced his home and established a home equity line of credit. Shanklin would contact Wayman for funding to permit Shanklin to purchase a particular vehicle. Wayman would then provide cash for the acquisition, either by check or electronic fund transfers. To facilitate electronic transfers, in May 2006 Wayman became an authorized signatory on the business account of GRS. Although Wayman had full access to the business account as an authorized signer, he testified that he only used this authority to transfer funds into the account and never reviewed account information.

At trial Wayman testified about the agreement that governed his relationship with Shanklin. Contrary to testimony that the parties never

documented their business relationship, he referenced an undated document captioned "Floorplan Agreement & Terms." This document states "a title and bill of sale will be presented within 3 - 5 business days for each vehicle purchased."

Wayman testified that from the beginning of the business relationship in 2005, Shanklin failed to provide Wayman with vehicle titles or bills of sale. Wayman stated that he received neither titles nor bills of sale for any of the more than one hundred vehicles involved in his business dealings with Shanklin.

Although the floorplan agreement also states that "when a vehicle is sold a copy of the bill of sale will be presented to release the appropriate title," Wayman further testified that he never received any bills of sale. Notwithstanding these departures from the stated procedure, Wayman continued to lend funds to Shanklin for 33 months based on his feelings of trust and friendship toward Shanklin. Over the course of their business relationship, Wayman testified that he had advanced in excess of \$1.2 million to Shanklin. Wayman testified that at the time of the transactions in 2005, 2006, and part of 2007, he believed Shanklin intended to repay the loans. However in late 2007, the business relationship changed when Wayman "got a bad feeling about the activity and what was going on on the car lot." In late 2007 Wayman began to look for evidence of the monies owed. Concerned by the lack of documentation showing a connection between funds advanced and vehicle purchases, Wayman expressed his dissatisfaction with Shanklin's business practices. Wayman testified that his lending relationship with Shanklin ended in March 2008.

Included in the trial record is a copy of email communication between Wayman and Shanklin on May 8, 2008, referencing Shanklin's longstanding failure to perform the parties' agreements. Subsequent to this communication, Shanklin signed a promissory note prepared by Wayman on May 12, 2008. This note memorialized a debt owed by Shanklin to Wayman of \$146,647. Under cross examination Wayman commented that he had "no choice" but to believe that Shanklin intended to honor the terms of the agreement. Between the date of the note, May 12, 2008, and the last payment by Shanklin under the note in January or February of 2014, Shanklin paid Wayman more than \$126,000 in principal and interest on the balance due under the note. After those payments, Wayman testified the principal due on the loan is \$67,412. Shanklin has listed this amount on his Schedule F as an unsecured debt owed to Wayman.

At the close of the plaintiff's case, counsel for Shanklin moved the court for judgment on the evidence. Because all the extensions of credit that are the subject of Wayman's complaint were completed by December 2007, Shanklin's counsel asserted that the Indiana statute of limitations expired before Wayman filed this adversary proceeding. Only the May 12, 2008 promissory note is not barred by the statute. Counsel noted that Shanklin paid more than \$126,000 to Wayman on his \$146,647. promissory note during the six years prior to Shanklin's filing bankruptcy. Counsel asserted these repayments are a clear sign that Shanklin intended to repay what he owed Wayman. Counsel also argued that a floor plan agreement alone cannot be the basis of an embezzlement or a conversion claim because once funds

were advanced to GRS, they were no longer property of Wayman. According to counsel, these factors cause claims under § 523(a)(4), and (a)(6) to fail.

Findings of Fact and Conclusions of Law

Statute of Limitations

Shanklin posits that Wayman's claim to except his debt from discharge is barred by the Indiana statute of limitations. The evidence presented at trial showed that Wayman and Shanklin were engaged in business transactions between 2005 and 2008. Indiana has established a two-year statute of limitations on damages to property. I.C. § 34-11-2-4(a)². Indiana also limits actions for relief against fraud to six years after the cause of action accrues. I.C. § 34-11-2-7³. As to actions on contracts, the six-year statute of limitations begins to run from the time the right of action accrues, i.e., the time the agreement is breached, rather than the time that actual damages are sustained as a consequence of the breach. I.C. § 34-11-2-9⁴; *Meisenhelder v. Zipp Express, Inc.*, 788 N.E.2d 924, 928 (Ind. App. 2003) (citing *Penn. Co. v. Good*, 103 N.E. 672, 673 (1913)) (a cause of action for breach of contract

²I.C. § 34-11-2-4(a) reads as follows. "An action for: (1) injury to person or character; (2) injury to personal property; or (3) a forfeiture of penalty given by statute; must be commenced within two (2) years after the cause of action accrues."

³I.C. § 34-11-2-7 reads as follows. "The following actions must be commenced within six (6) years after the cause of action accrues: (1) Actions on accounts and contracts not in writing. (2) Actions for use, rents, and profits of real property. (3) Actions for injuries to property other than personal property, damages for detention of personal property and for recovering possession of personal property. (4) Actions for relief against frauds."

⁴As relevant to this adversary proceeding, I.C. § 34-11-2-9 reads as follows. "An action upon promissory notes, bills of exchange, or other written contracts for the payment of money executed after August 31, 1982, must be commenced within six (6) years after the cause of action accrues."

accrues at the time the breach occurs, and the statute of limitations begins to run from that date); *Bailey v. Skipperliner Industries, Inc.*, 278 F.Supp.2d 945, 964 (N.D. Ind. 2003) (a cause of action for breach of contract accrues at the time of breach and not when actual damages are sustained because of the breach).

The court finds the trial record establishes the business relationship between Wayman and Shanklin began in 2005 and ended in March 2008. This business relationship was not formally documented. Wayman testified his last advance to Shanklin was December 28, 2007. The only business transactions after December 2007 were repayments by Shanklin to Wayman on the May 2008 promissory note. Consequently, any claim Wayman may have against Shanklin stemming from financial transactions tied to the purchase of vehicles must have arisen before December 2007 when Wayman made his last advance to Shanklin. Wayman filed this adversary proceeding August 25, 2014. The Indiana six year statute of limitations operates to bar any right of action accruing before August 25, 2008. The court finds any right of action Wayman may have based on Shanklin's fraud or breach of contract arising before August 25, 2008 is barred by the Indiana statute of limitations. See I.C. §§ 34-11-2-7 and 34-11-2-9.

The court also finds that the evidence shows Shanklin signed a promissory note on May 12, 2008 stating his obligation to pay Wayman \$146,647. This note identifies Shanklin as the borrower and Wayman as the lender. The note does not identify any background to the loan transaction or make mention of any security or collateral. This note requires Shanklin to make regular monthly principal

payments of not less than \$1,000. plus interest. The court will not look behind the note that Wayman drafted for unstated motives or to insert gratuitous provisions. It was Wayman's testimony at trial that Shanklin repaid more than \$126,000 on the note between May 12, 2008 and January or February of 2014. Wayman claims only the unpaid balance on the note. It is clear to the court the sole basis of his debt is the May 2008 note. The court finds Shanklin did not breach the promissory note until the last payment in early 2014, and as a consequence the Indiana statute of limitations does not prevent any right of action based on the note.

Finally, the court notes that Wayman became a signatory on the GRS bank account on May 1, 2006. Although Wayman testified that he used his signatory status only to facilitate making electronic fund transfers, it gave him rights to review all banking activity of GRS. Wayman's failure to exercise reasonable care and due diligence to discover fraud, particularly in light of Wayman's knowledge from the inception of their business relationship of Shanklin's poor credit, precludes tolling of statute of limitations so as to permit commencement of action more than six years after accrual of cause of action. *Ballard's Estate v. Ballard*, 434 N.E.2d 136, 142 (Ind. App. 1982) (Failure to exercise reasonable care and due diligence to discover fraud precludes tolling of the statute of limitation.) Counsel for Wayman suggested hypothetical scenarios that could toll the statute of limitations without directing the court's attention to any authority supporting his interpretation. The court is unpersuaded by counsel's arguments.

In summary, the court finds that the Indiana statute of limitations operates to prevent a right of action by Wayman against Shanklin for any alleged fraud or breach of contract for transactions occurring before August 25, 2008. Because the last loan occurred in December 2007 and business dealings between Wayman and Shanklin had stopped by March 2008, dates beyond the statutory period, Wayman cannot claim a valid debt owed by Shanklin either for fraud or under an oral or written contract at this time. The Indiana statute does not bar a right of action on the May 2008 promissory note.

Discharge Exceptions

Under the Bankruptcy Code, a debt means liability on a claim. 11 U.S.C. § 101(12). The Code defines a claim as a right to payment. 11 U.S.C. § 101(5). Whether a creditor has a right to payment is determined here by Indiana law. *Butner v. United States*, 440 U.S. 48, 55 (1979) (“Property interests are created and defined by state law.”); *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20 (2000) (state law governs the substance of claims); *In re Latimer*, 528 B.R. 166, 170 (Bankr. N.D. Ind. 2015) (“The validity of a creditor’s claim is determined by rules of State law, which includes all nonbankruptcy law that creates substantive claims.”) The court finds that Wayman has a claim based on the May 2008 promissory note under Indiana law.

Apart from any proscription on actions supplied by state law, in order to have a debt excepted from discharge Wayman must still satisfy the requirements of federal law. As the plaintiff in this adversary proceeding, Wayman bears the

burden of proving by a preponderance of the evidence that the debt owed by Shanklin should be excepted from discharge. See *Grogan v. Garner*, 498 U.S. 279, 286 (1991). The evidence that Wayman relies on must be sufficient to overcome the principle that “exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the debtor.” *Shaw Steel v. Morris (In re Morris)*, 223 F.3d 548, 552 (7th Cir. 2000) (quoting *Goldberg Securities, Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 524 (7th Cir. 1992)).

In his complaint and at trial, Wayman alleges the amount owed to him by Shanklin should be excepted from discharge under 11 U.S.C. § 523(a)(2)(A), and § 523(a)(6). The court finds that Wayman did not carry his burden of proof at trial with respect to the elements necessary to except the debt of Shanklin from discharge under either section.

§ 523(a)(2)(A)⁵

Under § 523(a)(2)(A), Wayman must prove (1) that Shanklin made false representation of fact, (2) that Shanklin (a) knew to be either false or made with reckless disregard for its truth and (b) also made with intent to deceive, and (3) that Wayman justifiably relied on false representation. Under this section, fraud must be clearly distinguished from the mere failure to perform a promise, the later of which is not fraud but rather breach of contract. *In re Kountry Korner Store*, 221 B.R. 265,

⁵As relevant here, § 523(a)(2)(A) reads as follows.

“(a) A discharge under section 727 ... 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;”

272 (Bankr. N.D. Okla. 1998). Fraud includes misrepresentations, misleading omissions and “embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain advantage over another by false suggestions or by the suppression of truth.” *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000).

The standard of reliance under § 523(a)(2)(A) is justifiable but not reasonable reliance. *Field v. Mans*, 516 U.S. 59, 74-75 (1995) (“we hold that § 523(a)(2)(A) requires justifiable, but not reasonable, reliance.”) It is a subjective standard taking into account the qualities and characteristics of the particular creditor and the circumstances of the particular case. Under the evidence presented, the court finds that Wayman has not shown Shanklin had an intent to deceive. Wayman also failed to show he was justified in relying on representations by Shanklin concerning the purchase of vehicles. From the start of their business relationship Wayman knew of Shanklin’s poor credit. Beginning in May 2006, Wayman possessed the ability to make banking transactions in the GRS account. Wayman’s failure to take advantage of the unexercised right to review banking transactions counters any assertion he may make that he justifiably relied on Shanklin’s representations to his own detriment.

Wayman admitted under cross examination that Shanklin failed to honor significant aspects of the business agreement from the beginning. Despite Shanklin’s failure to observe the terms of their agreement from the start, Wayman chose to continue lending to Shanklin for more than three years without his

oversight. The evidence shows that Shanklin periodically asked Wayman for a loan for a particular vehicle. While Wayman lent the money based on such a request he never received a title reflecting the purchase. Wayman asserts that Shanklin's use of the money for other purposes is a classic instance of false pretenses. Under the evidence in this case, the court is unpersuaded by Wayman's argument. A creditor such as Wayman "cannot close his eyes to a known risk." *Mayer v. Spanel International, Inc.*, 51 F.3d 670, 676 (7th Cir. 1995). Shanklin's poor credit and failure to provide vehicle titles were red flags that Wayman chose to ignore. In light of his admission concerning Shanklin's failure to perform under their business agreement and the circumstances of their business practices, Wayman cannot maintain that he was justified in relying on representations by Shanklin concerning the use of funds for the purchase of vehicles. The court cannot overlook Wayman's lack of due diligence in his financial dealings with Shanklin.

§ 523(a)(6)⁶

Under § 523(a)(6), Wayman must prove by a preponderance of the evidence: (1) that Shanklin intended to and caused an injury to Wayman's property interest; (2) that Shanklin's actions were willful; and (3) that Shanklin's actions were malicious. Merely obtaining a loan that was not repaid does not rise to the level of willful and malicious injury. If it did, then all creditors could raise similar argument to prevent discharge of unpaid loans. In the Seventh Circuit, "one must act with the

⁶As relevant here, § 523(a)(6) reads as follows. "(a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt – (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;"

specific intent to cause a certain result in order to prove willfulness.” *Gerard v. Gerard*, 780 F.3d 806, 811 (7th Cir. 2015) (citing *First Weber Group, Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013)). Interpreting § 523(a)(6) more broadly would contravene the guiding principle that exceptions to discharge “should be confined to those plainly expressed.” *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998), quoting *Gleason v. Thaw*, 236 U.S. 558, 562 (1915).

Wayman has failed to provide evidence that Shanklin acted with the intent to harm Wayman. The court finds the fact that Shanklin repaid more than \$126,000. in principal and interest on his promissory note clearly shows Shanklin intended to repay the debt to Wayman. Wayman did not present any evidence that hinted at malicious actions by Shanklin. After considering all the evidence presented at trial, the court cannot find Shanklin possessed any intent to cause harm to Wayman, nor can the court find that Shanklin’s failure to make full repayment on his promissory rises to the level of a malicious act.

Conclusion

The court finds that the Indiana statute of limitations bars any claim against the debtor Gary R. Shanklin for fraud that accrued before August 25, 2008. Under Indiana law, the only cognizable debt this court can acknowledge against Shanklin relates to his May 12, 2008 promissory note. Shanklin did not stop making payments and breach the terms of the promissory note until January or February of 2014. Any cause of action on the promissory note did not accrue until the terms of

the note were breached. Any such breach occurred well within the Indiana limitations period.

With respect to their business transactions, the court finds that Wayman has failed to carry his burden of proof to establish that the debt should be excepted from discharge. Wayman's evidence does not show that he was justified in relying on representations about vehicle purchases. Wyman has not shown that Shanklin made any effort to deceive him. Wayman's claim under § 523(a)(2)(A) fails. His claim under § 523(a)(6) also fails. Wayman has not provided any evidence that Shanklin's actions were malicious or intended to cause harm.

The court grants the motion of the debtor, Gary R. Shanklin, for judgment on the evidence. The \$67,412. debt owed by Shanklin to the plaintiff, Robert D. Wayman, is dischargeable. This adversary proceeding is dismissed.

SO ORDERED.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT