UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Grady L. Wicker and Lorraine W. Wicker, Debtors.	C/A No. 99-07108-W Adv. Pro. No. 99-80392-W
Fort Jackson Federal Credit Union, Plaintiff, v. Grady L. Wicker, Defendant.	**JUDGMENT** Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Grady L. Wicker's Motion for Partial Summary Judgment is granted; therefore, judgment shall be entered in favor of Grady L. Wicker and the debt to Fort Jackson Federal Credit Union shall not be excepted from discharge pursuant to §523(a)(2)(A), nor shall Debtors be barred from discharge pursuant to §727(a)(4)(A).

The Court has been informed that the parties have settled Debtor's counterclaim for attorney's fees and costs pursuant to §523(d). Therefore, this Judgment is complete and represents the final judgment in this adversary proceeding.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
May 23, 2000.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Grady L. Wicker and Lorraine W. Wicker, Debtors.	C/A No. 99-07108-W Adv. Pro. No. 99-80392-W
Fort Jackson Federal Credit Union, Plaintiff, v. Grady L. Wicker, Defendant.	**ORDER** Chapter 7

THIS MATTER comes before the Court upon Motion for Partial Summary Judgment (the "Motion") filed by Grady L. Wicker ("Defendant") on April 21, 2000. Fort Jackson Federal Credit Union ("Plaintiff") filed a Memorandum in Opposition to Motion for Partial Summary Judgment on May 1, 2000. The adversary proceeding which is the subject of Plaintiff's Motion arises out of a loan that Defendant obtained from Plaintiff in connection with the purchase of a Lexus automobile. Plaintiff brought this action seeking to bar Debtor's discharge pursuant to 11 U.S.C. §727(a)(4)(A)[1] and to determine the loan non-dischargeable pursuant to §523(a)(2)(A). Both claims allege misrepresentations about the purchase price of the vehicle at issue. After considering the pleadings in the adversary proceeding, the evidence presented at the hearing on the Motion, and the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made

[1] Further references to the Bankruptcy Code shall be by section number only.

applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.[2]

FINDINGS OF FACT

1. In January of 1998, Defendant was in the market for a car and filed an application with Plaintiff's Newberry office in anticipation of locating a suitable prospect.

2. In early March, Defendant saw a classified ad for a 1995 Lexus GS300 offered by an individual identified as Terrence Davis in the Greenville area.

3. Defendant arranged to drive the car to Plaintiff's office on or about March 3, 1998. Vaughn Ernst, the loan officer with whom Defendant had been dealing in connection with the loan, inspected the car and approved the loan. Ernst evaluated the car as worth about $29,000 and agreed to loan Defendant $14,000 toward its purchase. Defendant told Ernst that he would take care of the balance of the purchase price of the vehicle. Ernst did not require Defendant to confirm his ability to pay the balance because he was confident that the seller would not part with the vehicle without a substantial payment beyond Plaintiff's $14,000 loan.

4. Ernst arranged to close the loan subject to Davis providing the vehicle's title work.

5. On March 4, 1998, Defendant provided Ernst with the title and apparently two alternate forms of a bill of sale. Ernst approved the title work and disbursed the loan by check. Later that evening, Defendant met Davis, paid the purchase price and took delivery of the vehicle.

6. The bill of sale reflected that the purchase price for the 1995 Lexus was $25,500.

7. By Affidavit, Defendant testified that upon delivery of the vehicle, Defendant gave Davis Plaintiff's check in the amount of $14,000, cash in the amount of $8,000, and a personal check in

---

[2] The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

the amount of $3,500. Defendant told Davis that he would need to wait to deposit the check because there were not enough funds in Defendant's account at that time. Defendant was waiting to sell his Ford Probe to a car dealer in Newberry, which would have brought in approximately $2,000. The $3,500 was never ultimately paid to Davis because he learned the car was stolen in the interim.

8. About four weeks after the purchase of the vehicle, Defendant was approached by a SLED agent who informed him that the car was stolen. SLED repossessed the stolen car on behalf of the rightful owner.

9. Plaintiff has admitted that there is no evidence that Defendant was involved in the theft of the vehicle or knew that the car was stolen.

10. Debtors filed this Chapter 7 case on August 23, 1999. Plaintiff was the major creditor in the bankruptcy case.

11. At the first meeting of creditors, counsel for Plaintiff questioned Defendant about his payment of the purchase price for the Lexus vehicle. *Defendant testified that in addition to* Plaintiff's $14,000 loan, he gave Davis $8,000 in cash.

12. In response to a very confusing line of questioning at the §341 meeting, Defendant also testified that he eventually got together the remaining $3,500 of the purchase price, but never paid these funds to Davis because he learned the car was stolen.

13. Ernst admitted that he was not present when Defendant took delivery of the car and does not know what Defendant paid Davis for the vehicle.

CONCLUSIONS OF LAW

A. Standard for Summary Judgment

Rule 56(c) of the Fed. R. Civ. P., made applicable to adversary proceedings under the

Bankruptcy Code by Fed. R. Bankr. P. 7056, provides that a party may move for summary judgment, and that such judgment "shall be rendered forthwith" if the evidence and pleadings "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment should ultimately be granted "against a party who fails to make a showing sufficient to establish the evidence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Hotel Assoc. v. Hyatt Corp. (In re Dunes Hotel Assoc.), 194 B.R. 967, 976 (Bankr. D.S.C. 1995). "'[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party . . . . If the evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted.'" Glover v. Lockheed Corp., 772 F.Supp 898, 904 (D.S.C. 1991) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). After the party seeking summary judgment has shown that the non-moving has failed to establish an essential element of a claim and the absence of any genuine issue of material fact, the burden then shifts to the non-movant to point out specific facts showing that a genuine issue exists for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Therefore, once defendant has set forth evidence, pleadings, and affidavits to show that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law, unless Plaintiff presents evidence of specific facts showing the existence of genuine factual issues for trial, Defendant is entitled to summary judgment.

2. Causes of Action Pursuant to §§ 727 and 523

Plaintiff claims that Defendant is not entitled to the discharge of the debt to Plaintiff pursuant to §727(a)(4)(B) because he did not use $1,500 for a portion of the purchase price of the vehicle, as allegedly stated at the §341 meeting. Furthermore, Plaintiff requests that Defendant's

debt be deemed non-dischargeable pursuant to §523(a)(2)(A) on the basis that Defendant materially misrepresented the purchase price of the automobile.

A party challenging the dischargeability of a debt has the ultimate burden of establishing, by a preponderance of the evidence, that the debt falls within one of the exceptions of §523 or §727. See, e.g., Grogan v. Garner, 498 U.S. 279, 286 (1991); Grainger v. Bailey (In re Bailey), C/A No. 99-05056-W; Adv. Pro. No. 99-80332-W (Bankr. D.S.C. 03/13/2000); see also Fed. R. Bankr. P. 4005 ("At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection.").

To bar discharge pursuant to §727(a)(4)(A), the movant must show that Debtor "knowingly and fraudulently, in or in connection with the case-- (A) made a false oath or account."[3] Plaintiff bases its §727 claim solely on a statement that Defendant made at the §341 meeting regarding a $1,500 check. More specifically, Defendant testified as follows:

L. Lang:	And, when did you sell the 1990 Probe to Ms. Sly?
G. Wicker:	I don't remember exactly when, but it was like a month after I bought the car, it was about a month after.
. . .	
L. Lang:	And, you got how much money?
. . .	
G. Wicker:	She gave me $2,000.00 for the car.
L. Lang:	And, you got another $1,500.0 from some place else?
G. Wicker:	Yes, out of my savings.

Plaintiff interpreted Defendant's testimony as meaning that he used a check in the amount of

---

[3] A party alleging fraud must specifically identify the representation he contends is fraudulent. More specifically, Fed. R. Civ. P. 9(b) provides: "In all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity." These circumstances include the time, place, and the contents of the allegedly false representations. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999). "Mere allegations of 'fraud by hindsight' will not satisfy the requirements of Rule 9(b)." Id. Therefore, the Court notes that the Complaint is also deficient in meeting the requirement of Fed. R. Civ. P. 9(b).

$1,500 for a portion of the purchase price of the 1995 Lexus and asserts that that statement was false in that Defendant's bank statements do not reflect such a balance. However, the Court finds that Defendant's testimony did not contain such a statement. During the §341 meeting, the line of questioning and respective responses by Defendant were very confusing, and the fact that Defendant purchased a 1992 Lexus soon after SLED's repossession of the 1995 Lexus, which is the subject matter of this adversary proceeding, rendered the testimony at the first meeting of creditors even more confusing and easily misconstrued. The Court finds that Plaintiff did not meet its burden to prove that Defendant's made any false oath during the §341 meeting; and, because Defendant did not testify as Plaintiff has attributed to him in the Complaint, the §727 claim cannot survive and summary judgment is thus granted in favor of Defendant.

The Court also finds that there is no genuine issue of material fact as to the §523(a)(2) claim. Section 523(a)(2) provides that a debt cannot be discharged if it is "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 debtors' or an insider's financial condition." In order to establish a claim under §523(a)(2), the creditor must prove (1) a present material misrepresentation by the debtor; (2) the debtor's knowledge that the representation is false; (3) the debtor's intent to defraud and deceive; (4) justifiable reliance by the creditor; and (5) resulting damage. Hurlbert v. Talbot (In re Talbot), C/A No. 98-10581-W; Adv. Pro. No. 99-80064-W (Bankr. D.S.C. 09/20/1999).

In order to show justifiable reliance, a creditor must identify a representation that the debtor made before the creditor decided to grant the loan. Green v. Geyen (In re Geyen), 11 B.R. 70, 72 (Bankr. W.D. La. 1981); see also Hurlbert v. Talbot (In re Talbot), C/A No. 98-10581-W; Adv. Pro. No. 99-80064-W (Bankr. D.S.C. 09/20/1999). The only acts the Complaint identifies

that could conceivably be construed as material misrepresentations are that Defendant obtained a bill of sale and a receipt showing the purchase price s $25,500. However, the Court finds that there is no evidence that Plaintiff relied on these documents in order to ultimately approve the loan. In fact, Ernst decided to make the loan after inspecting the car on March 3, but both the bill of sale and the receipt were executed and delivered to Ernst on March 4, 1998. Furthermore, Ernst admitted that he does not recall seeing the receipt at the time he made the loan; therefore, Plaintiff could not have relied on either of these documents in deciding to make the loan.

Furthermore, the Court notes that Plaintiff has not met its burden to prove that Defendant misrepresented the purchase price to Ernst in order to get approved for a loan. There is no evidence that Defendant did not in fact pay Davis $25,500 for the car. Defendant introduced an Affidavit in which he testified that on the day that delivery of the vehicle took place, Defendant gave Davis the $14,000 check which represented Plaintiff's loan, as well as $8,000 in cash and a $3,500 check which Defendant gave Davis with the warning to hold it for at least 30 days until sufficient funds were deposited in the account. Defendant's testimony was further supported by an Affidavit of Charles W. Wicker, Defendant's brother, who was present on the date Defendant accepted delivery of the 1995 Lexus. The Court finds that there is no evidence of any misrepresentations by Defendant that Plaintiff relied on to its detriment; furthermore, the Complaint alleged neither reliance nor any representation on which Plaintiff could have relied. Therefore, summary judgment is granted in favor of Defendant on the §523(a)(2) cause of action.

In his Answer to the Complaint, which was filed by Defendant on January 18, 2000, Defendant counterclaimed on the basis of §523(d) which provides as follows:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the

> debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

The Court has been informed that the parties have settled Debtor's counterclaim for attorney's fees and costs pursuant to §523(d). It is therefore,

ORDERED that Defendant's Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that, because the parties have settled Debtor's counterclaim for attorney's fees and costs pursuant to §523(d), this Judgment is a complete and final judgment in this adversary proceeding.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
May 23, 2000.

CERTIFICATE OF MAILING

The undersigned Deputy Clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

MAY 24 2000

Lang Rogerson UST via mail jgmt index

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

VANNA L. DANIEL
Deputy Clerk