UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re:

CARMINO JOSEPH DELNERO and TAMMY LYNN DELNERO, *Debtor(s)*	:	Case No. 03-21711T
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DAVID J. FERMATO, *Plaintiff(s)*	:	
v.	:	Adv. No. 03-2319
CARMINO JOSEPH DELNERO, *Defendant(s)*	:	

ORDER

AND NOW, this 20th day of December, 2005, it is ORDERED that JUDGMENT ON THE COMPLAINT IS ENTERED IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF as the court find that the debt in issue is DISCHARGEABLE under 11 U.S.C. §523(a)(2)(A) and (4).[1]

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1. Plaintiff first argues that the debt in question should be found nondischargeable under 11 U.S.C. §523(a)(2)(A) as a debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by - 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).

In order to prevail on a section 523(a)(2)(A) cause of action, the plaintiff bears the burden of proving the following elements by a preponderance of the evidence:

> *(1)* that the debtor made the [mis]representation[s]; *(2)* that at the time he knew they were false; *(3)* that he made them with the intention and purpose of deceiving the creditor; *(4)* that the creditor [relied] on such representations; [and] *(5)* that the creditor sustained the alleged

loss and damages as a proximate result of the representations having been made.

First Options of Chicago, Inc. v. Kaplan (In re Kaplan), 162 B.R. 684, 701-02 (Bankr. E.D. Pa. 1993), aff'd 189 B.R. 882 (E.D. Pa.1995) (quoting In re Henderson, 134 B.R. 147, 162 (Bankr. E.D. Pa. 1991)). See also, Gordon v. Bruce (In re Bruce), 262 B.R. 632, 636 (Bankr. W.D. Pa. 2001); Griffith, Strickler, Lerman, Solymos & Calkins v. Taylor (In re Taylor),195 B.R. 624, 627 (Bankr. M.D. Pa. 1996). It is well established that exceptions to discharge are strictly construed against the creditor and in favor of the debtor. Bruce, 262 B.R. at 636.

Turning to the facts before us, we note that it is undisputed that Plaintiff made two loans to Defendant, in the amount of $5000.00 each, which Defendant never repaid. Plaintiff argues that Defendant represented that he needed the first $5000.00 to pay off credit card debt so that he could refinance the mortgage on his residence and that he would pay off the loan to Plaintiff with the proceeds he received from the refinancing. Defendant did refinance his residence, but failed to pay Plaintiff the $5000.00. As such, Plaintiff argues that Defendant obtained the first $5000.00 loan from Plaintiff by false pretenses, misrepresentation or actual fraud and that therefore, this $5000.00 obligation should be found nondischargeable under section 523(a)(2)(A).

However, a review of the evidence presented at trial reveals that Plaintiff failed to establish that Defendant represented that he would repay the first $5000.00 loan with the proceeds from the refinancing. In fact, Plaintiff testified that Defendant did "not particularly [advise him] what he was going to do with [the proceeds from the refinancing]." Notes of Testimony, May 11, 2005 ("N.T.") at 7. Accordingly, we find that Plaintiff failed to meet his burden of establishing that Defendant obtained the first $5000.00 loan from Plaintiff by false pretenses, misrepresentation or actual fraud and we find that this $5000.00 indebtedness is dischargeable under section 523(a)(2)(A).

Plaintiff next argues that the second $5000.00 indebtedness should be found nondischargeable under section 523(a)(2)(A) because Defendant allegedly advised Plaintiff that he had inherited an automobile and a mobile home and its contents from his mother's estate and that he would sell these items to repay the loan. However, a review of the evidence presented at trial reveals that Plaintiff testified that this representation was made to him by Defendant after the second $5000.00 loan was made to Defendant by Plaintiff. N.T. at 11. As such, this representation is not actionable under section 523(a)(2)(A) since it did not induce Plaintiff to make the loan in question.

Finally, Plaintiff argues that the debt should be found nondischargeable under section 523(a)(4) because Defendant allegedly committed fraud or defalcation while acting in a fiduciary capacity. However, Plaintiff offered no evidence to support this argument and we therefore find that Plaintiff failed to meet his burden of proof on this issue.

Moreover, we note that we find Defendant's testimony concerning these two loans to be supported by the documentary evidence and to be the most convincing and credible. Defendant testified that he and Plaintiff were attempting to open a trucking business, to be known as Genco Rapid Freight ("Genco"), and that both loans were made to him by Plaintiff to compensate him for the time he spent and the expenses he incurred while working to start up this joint business venture. N.T. at 37-38, 54-55. In fact, the Note signed by Defendant evidencing the second loan specifically states, "the said terms as will be a cash advance or retainer for expenses incurred during the research and administrative work period (November - December 2000) enabling GENCO RAPID FREIGHT to come to fruition." This Note also states that interest would

Reading, PA

THOMAS M. TWARDOWSKI
United States Bankruptcy Judge

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be paid from Genco salary. Exhibit P-2. Defendant further testified that the understanding between the parties was that Genco would generate funds sufficient to pay Defendant a salary and enable him to repay the indebtedness to Plaintiff. N.T. at 54. Unfortunately, the parties were unable to obtain financing to start their business. As a result, Genco never commenced operations and Defendant was unable to pay the indebtedness he owed to Plaintiff. N. T. at 53, 55, 67.

In conclusion, we find that Plaintiff failed to meet his burden of proof and that the debt in issue is dischargeable.