

HONORABLE RONALD B. LEIGHTON

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

In re

RONNIE L. REGISTER
CARRIE L. REGISTER,

Debtors.

HIGHLINE CAPITAL CORP.,

Appellant,

v.

RONNIE L. REGISTER
CARRIE L. REGISTER,

Appellees.

USDC CASE NO. C10-5156-RBL

Bankruptcy No. 08-44241-PBS

Internal Appeal No. 10-T002

Adversary No. 08-04138

MEMORANDUM OPINION

THIS MATTER comes before the Court on appeal from a Memorandum Decision, Findings of Fact, Conclusions of Law and Order Granting Discharge entered by the Bankruptcy Court for the Western District of Washington on February 19, 2010. Appellant filed a Statement of Election to have this appeal heard by the District Court rather than the Bankruptcy Appellant Panel (BAP), pursuant to General Rule 7 of the United States District Court for the Western

1 District of Washington. This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C.
2 § 158(a).

3 The Court has reviewed the materials submitted by the parties and, where appropriate,
4 has reviewed excerpts of the record. Except as noted below, the facts are not disputed. The
5 statements of the law are likewise not controverted. Following a bench trial before the
6 Bankruptcy Judge, it was ordered that the debt owed by Debtors to Highline Capital Corp. as
7 Assignee of the debt from Americorp was dischargeable.

8 Appellant raises two issues on appeal:

- 9 1. Should the trial court's conclusion that the debtors did not intend to deceive by their
10 false personal financial statement be reversed?
- 11 2. Should the trial court's conclusion that the lender did not reasonably rely on the false
12 financial statement be reversed?

13 The parties are familiar with the facts of this case and they will not be repeated here. The
14 case ultimately turns on the trial court's finding that Gary Barnett was the agent of the original
15 lender and that the debtors were honest with him. Information conveyed to Barnett was deemed
16 received by the lender. The appellant here, as assignee of the original lender (assignor), stands in
17 the shoes of the assignor and is bound by what was known by the original lender and its agent,
18 Gary Barnett.

19 **STANDARD OF APPELLATE REVIEW**

20 In an action brought under 11 U.S.C. 253(a)(2)(B), the trial court's findings of fact are
21 reviewed under the clearly erroneous standard, but conclusions of law are entitled to de novo
22 review. *In re Candland*, 90 F.3d 1466, 1469 (9th Cir. 1996).

1 A finding of fact is clearly erroneous when, although there is evidence to support it, the
2 reviewing court, on the evidence, is left with the definite and firm conviction that a mistake has
3 been committed. *In re Drehsen*, 190 B.R. 441, 442 (M.D. Fla. 1995).

4 Whether a claim is nondischargeable is reviewed for gross abuse of discretion. *In re*
5 *Smith*, 242 B.R. 664, 669. The “gross abuse” standard is the same as reviewing findings of fact
6 for clear error and reviewing conclusions of law de novo. *Id.* Review under the clearly
7 erroneous standard is significantly deferential, requiring a “definite and firm conviction that a
8 mistake has been committed.” *Id.* If the district court’s account of the evidence is plausible in
9 light of the record viewed in its entirety, the court of appeals may not reverse it even though
10 convinced that had it been sitting as the trier of fact, it would have weighed the evidence
11 differently. *Id.* At 700.

12 DISCUSSION

13 The finding of fact critical to the trial court’s decision states that “[a]lthough Barnett was
14 not an agent of Highline, the uncontradicted evidence indicates that Barnett held himself out as
15 an agent of the original lender.” Memorandum Decision, 6-7. Evidence supporting that
16 conclusion comes from the testimony of the debtors, as well as the finance agreement between
17 Americorp Financial, LLC (original lender) and the debtors’ corporation (a personal guaranty
18 was also signed) on June 28, 2005 and a letter dated September 22, 2005 thanking the debtors for
19 their business and signed by Gary Barnett as Vice President of Sales for Americorp Financial,
20 LLC.

21 This evidence, coupled with the testimony that Mr. Barnett was later removed from the
22 list of recommended lenders given by Figaro’s Italian Pizza to prospective franchises when
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1 Figaro's determined that he was no longer reliable, clearly affected the court's credibility
2 assessment of the witnesses.

3 The trial court found the debtor's testimony to be credible on each of the creditor's
4 examples of intent to defraud. All information relied upon by the creditor to prove intent to
5 deceive comes from a June 6, 2005 financial statement prepared by Gary Barnett and signed by
6 the debtors. This financial statement was admittedly different from the handwritten financial
7 statement prepared in February by the debtors. The earlier, handwritten financial statement
8 showed about one-half of the net worth that the Barnett-prepared statement showed. The
9 creditor established that the February financial statement resulted in the denial of the loan
10 application, but the trial court believed the debtors' testimony that Barnett told them the loan was
11 approved. In response, they then signed a Lease Agreement and Personal Guaranty on the real
12 property and a Bill of Sale for the business equipment, expending more than \$5,500 in deposits
13 and down payments.

14 The creditor argues that the June 2005 financial statement prepared by Barnett failed to
15 state that the debtors had personally guaranteed lease payments on the franchise premises, and
16 failed to disclose the amount of that obligation. The evidence showed, and the trial court
17 believed, that Ronnie Register advised Gary Barnett at some point after the execution of the lease
18 that the debtors had personally guaranteed the lease. Since the debtors believed they were
19 already approved for the loan, they did not pay close attention to the representations made by
20 Barnett in their stead in the June 2005 up-dated financials.

21 The creditor argues that the June 2005 financial statement failed to disclose that debtors
22 had a contingent offer to buy a home in Battle Ground, provided they could sell their home in
23 Sedro Wooley. That purchase did not close until August 2005, but was contingent as of the
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1 signing of the June financial statement. The trial court found credible the debtors' testimony that
2 Ronnie Register disclosed to Gary Barnett their intent to purchase a new home, and that Barnett
3 advised them that this information did not need to be disclosed because the sale had not yet
4 closed and they currently had no mortgage.

5 The creditor reserves its strongest criticism for the court's acceptance of debtors'
6 explanation of why their June financial statements overstated income and understated expenses
7 to increase their net worth. The trial court accepted the debtors' explanation that the statement of
8 annual income was for the previous year (calendar year 2004) and therefore included Ronnie
9 Register's income from his Taco Time job, which he had quit to start his new business. The trial
10 court noted that the February financial statement, handwritten by debtors, did disclose to Barnett
11 that Ronnie Register was going to manage the pizza business and that only Carrie Register was
12 to keep her employment at an annual salary of \$48,000.00. The Court found the debtors'
13 testimony credible particularly because the financial statement form itself was ambiguous.
14 Section 4 of the Form was titled "Annual Income for Year Ended," and the specific year is left
15 blank. In February and June 2005, the "year ended" was 2004.

16 The creditor argues persuasively that the June 2005 financial statement chose 2004 to
17 state income but chose the year 2005 to state expenses, all to bolster net worth. The
18 inconsistency, arguably, is itself evidence of debtors' chicanery. The bankruptcy judge found the
19 debtors, as unsophisticated consumers, to be credible witnesses. The lease guaranty for the pizza
20 store was disclosed, as evidenced by the lender's attempt to secure a "landlord waiver" prior to
21 executing the finance agreement. The lender was in direct contact with the landlord and
22 guarantees for lease payments are every bit as common as personal guarantees for business
23 loans.

1 Another contingent liability left off the June 2005 financial statement prepared by Barnett
2 and signed by the debtors was the contingency of mortgage payments on the house at Battle
3 Ground. Mr. Register testified that he told Barnett of the intent to purchase a new home, and that
4 Barnett advised the debtors that they did not need to disclose that intent because the sale had not
5 yet closed and they had no existing mortgage debt. The trial court believed the debtors and again
6 focused on the inherent ambiguity of the financial statement form.

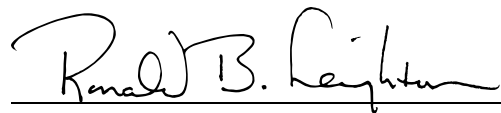
7 Finally, the creditor argues that the overstatement of cash on hand was evidence of an
8 intentional or reckless misstatement. The February statement prepared by debtors showed cash
9 on hand of \$58,000. The June statement revealed more cash and an anticipated inheritance from
10 Register's father's estate in the amount of \$280,000. What was not revealed was that much of
11 the new wealth was already spoken for because of the new house. Again, the court found the
12 debtors' testimony to be credible on the subject of the house purchase and the timing of receipt
13 of the inheritance.

14 With regard to all the misstatements found in the June 2005 financial statement, the trial
15 court found it probable that they originated with Barnett, the agent of the lender, and not with the
16 debtors. Given the totality of the circumstances, it is more than plausible that Gary Barnett was
17 more interested in pursuing the business than he was in pursuing the truth. If this court had
18 heard the testimony and reviewed the evidence, it may have ruled differently, but no fault can be
19 found in the conclusions of the court once the credibility determinations were made. If Gary
20 Barnett was an agent of the lender, and the court believed the testimony of the debtors, there is
21 ample evidence to support the conclusion that debtors did not make false representations with the
22 intention of deceiving the creditor as required under 11 U.S.C. § 523(a)(2)(B). The creditor's
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1 case law submitted to the Court fails to address the situation here, where the lender's agent
2 prepared the false financial statement. It is therefore inapposite.

3 As the Court has resolved the first issue in favor of appellees, it need not resolve the
4 second issue of reliance and declines to do so. The rationale stated above is more than sufficient
5 to support the decision of the trial court, and that decision is **AFFIRMED**.

6 Dated this 15th day of March, 2011.

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9 RONALD B. LEIGHTON
10 UNITED STATES DISTRICT JUDGE
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