SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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JAMES GLEESON and BERNADETTE GLEESON

Plaintiffs,

-against-

JOHN PHELAN

Defendant.

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Index No. 654187/2015

DECISION AND ORDER

Motion Seq. No. 001

OSTRAGER, J.:

In this Motion for Summary Judgment in Lieu of Complaint under CPLR §3213, Plaintiffs, James Gleeson and Bernadette Gleeson ("Plaintiffs" or "Gleesons"), seek reimbursement of $302,214.35 that they paid under a Guaranty Agreement after the Defendant, John Phelan ("Phelan"), defaulted on a Promissory Note ("Note"). Defendant filed a Cross Motion to Dismiss under CPLR §3211(a)(1) and (7). The Defendant asserts that his 2010 "No Asset" Chapter 7 Bankruptcy discharged all of his prior debts, including the Note and the underlying Guaranty (reply affirmation of Defendant, ¶ 6; tr at 6).

The Defendant's Cross Motion to Dismiss is denied, and the Plaintiff's Motion for Summary Judgment in Lieu of Complaint is denied and case will be converted to a plenary action (*see Schulz v Barrows*, 94 NY2d 624 [2000]; *see also* CPLR §3213).

This Court must rule on the dischargeability of the Plaintiff's debt as a matter of fact, pursuant to provisions of Sections 727 and 523 of the U.S. Bankruptcy Code ("Code"). (*In re Candidus*, 327 B.R. 112 [Bankr E.D.N.Y 2005]; *see also Upper Manhattan Empowerment Zone Development Corp. v Van Brackle Enterprises, Inc.*, 8 Misc 3d 601798, 2005 NY Slip Op 52156 [Sup Ct, NY County 2005]).

On September 7, 2007, Phelan borrowed $425,000 from private lenders, Merrick Bahar and Scott Garrett (hereinafter "Lenders"), for 2 years at an interest rate of 11% (Plaintiffs' exhibit A). Phelan was required to make monthly interest payments of $4,830.54 and repay principal at maturity date on September 7, 2009. A Guaranty was also executed on September 7, 2007 in which the Plaintiffs "absolutely and unconditionally" guaranteed Phelan's debt under the Note (Plaintiffs' exhibit B). On November 20, 2009, Phelan filed for a voluntary Chapter 7 Bankruptcy in a U.S. Bankruptcy Court in the District of Connecticut (Defendant's exhibit D). On March 29, 2010, the Bankruptcy Court ordered discharge of Phelan's debts under §727 of the Code (Defendant's exhibit C). On January 13, 2011, the Lenders sued the Gleesons under the Guaranty in the Supreme Court of Westchester County ("Westchester Court"), for $264,369.29 (Plaintiff's exhibit D at 2).[1] On August 15, 2011, the Westchester Court entered judgment in favor of the Lenders and against the Gleesons in the amount of $271,081.68 (Plaintiff's exhibit D at 5).[2] On September 15, 2012, the Gleesons and the Lenders entered into a Settlement Agreement to satisfy the Judgment (Plaintiffs' Memorandum of Law in Support of the Motion at 2); (Plaintiffs' exhibit G). On November 6, 2015, the Gleesons filed the instant motion to recover $302,214.35 from Phelan for monies paid to satisfy the judgment, legal fees, and other expenses that resulted from Phelan's default under the Note (aff of Plaintiff, ¶ 11).

In their moving papers, the Plaintiffs asserted that this was a simple matter: a personal guaranty was executed by the Plaintiffs, the Defendant defaulted under the Note, the Plaintiffs were obligated to pay the Lenders under to the Guaranty, and the Plaintiffs now seek reimbursement (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25

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[1] This was the amount that the Lenders claimed was due and owing to them under the Note at that time.
[2] The Gleesons later moved to re-argue and renew the motion, but the Westchester Court denied the motion (Plaintiffs' Exhibit F). A Satisfaction of Judgment dated May 21, 2014 was entered by the County Clerk of Westchester County, indicating that the sum of $273,170.84 was fully paid by the Gleesons pursuant to the August 2011 Court Order (Plaintiff's Exhibit H).

NY3d 485, 492 [2015]). They further asserted that this matter could be summarily resolved as a matter of law since an unconditional guaranty is an instrument for the payment of "money only" within the meaning of CPLR §3213 (*see European Am. Bank & Trust Co. v Schirripa,* 108 AD2d 684 [1st Dept 1985]). However, after the Defendant filed a Cross Motion to Dismiss, the Plaintiffs brought forth allegations of fraud and forgery in their reply documents. Specifically, the Plaintiffs alleged that Bernadette Gleeson's signature on the Guaranty was forged by the Defendant and that James Gleeson was not aware that he was signing a Guaranty for the Defendant's $425,000 Note (aff of Plaintiff, ¶ 5-7).[3] Further, the Plaintiffs argue that the Defendant did not list the Plaintiffs as creditors when the Defendant filed for Bankruptcy in 2009, resulting in lack of proper notice that prevented the Plaintiffs from participating in the Bankruptcy proceedings as required by §341 of the Code (affirmation of Plaintiff's counsel, ¶ 24-29; *see also* 1 Richard I. Aaron, Bankruptcy Law Fundamentals § 1:3 at 1 [2015]). In its reply to the allegation of fraud and forgery, the Defendant denied such allegations and re-stated that his "No Asset" Chapter 7 Bankruptcy discharge order extinguished all his prior debts.

A state court is a judicial tribunal with concurrent jurisdiction to determine the dischargeability of debt not scheduled in bankruptcy cases (*In re Candidus* at 114). Typically, when a discharge order is granted under §727(b) of the Code, all of a debtor's prior debts are automatically discharged (*id.* at 116). However, a debt that meets one of the 19 exceptions listed in §523(a) of the Code is not automatically discharged (*see In re Strano,* 248 B.R. 493, 498 [Bankr. D.N.J. 2000]). Three exceptions – namely §523(a)(2), (4), and (6) - encompass claims arising out of actual fraud, false pretenses, false representations, embezzlement, larceny, or

[3] The Plaintiffs claim they did not raise the fraud claims in their motion for summary judgment in lieu of complaint because they thought they could prevail on the guaranty claim (Plaintiff's aff, ¶2). It should be also noted that the Plaintiffs did not allege fraud when defending against the Lenders' claim in the Westchester Court in 2011 (Plaintiffs' exhibits D, F); (affirmation of Plaintiff's counsel, ¶ 4).

willful or malicious injury to person or property, collectively referred to as "Intentional Tort Debts" (*id.* at 498). Section 523(a)(2) of the Code specifically addresses "money, property, services... obtained by ... false pretenses, a false representation, or actual fraud" (*see* 11 U.S.C. §523(a)(2)).

Typically, creditors must file a complaint in a Bankruptcy court within 60 days from the date first set for the meeting of creditors during Bankruptcy proceedings when allegations of Intentional Tort Debts are involved (*see* 11 U.S.C. § 523(c); *see also* Fed Rules Bankr Pro rule 4007(c)). However, when debtors fail to list or schedule debt, creditors are given the right to litigate the dischargeability of alleged Intentional Tort Debts outside of the prescribed time limits (*id.; see also In re Candidus* at 117). The statute treats intentional tort debts differently and thus permits creditors to request that a court determine whether or not these debts are, in fact, dischargeable—i.e., whether or not the creditor actually committed an intentional tort (11 U.S.C. §523(a)(3)(B); *see also Manhattan Empowerment Zone Development Corp.* at 852). In such an action, a court must determine whether a particular debt is an Intentional Tort Debt within the rubric of § 523(a)(3)(B)[4] (*see In re Candidus* at 118).

Thus, the debtor would have the burden of proving, by a preponderance of evidence, that the debt was not a fraud class debt under §523(a)(2), (4), or (6) of the Code (*see In re Thompson*, 177 B.R. 443, 450 [Bankr E.D.N.Y 1995]). If the debtor prevails, the debt is not of the fraud class (*id.*). A separate issue that may be determined is whether the creditor had notice or actual knowledge of the debtor's bankruptcy case (*see* 11 U.S.C. §523(a)(3)(B)). If the creditor had

[4] "If such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request (11 U.S.C. §523(a)(3)(B)).

notice or actual knowledge of the case, and did not timely act to preserve its rights, then §523(a)(3) does not except the debt from discharge even if unscheduled (*id.*).

Accordingly, this cross motion is denied. A preliminary conference is scheduled for Tuesday, June 28, 2016, at 9:30AM.

Dated: May 31, 2016

BARRY R. OSTRAGER
JSC

J.S.C.