Not intended for publication

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE:

JEREMY BRYNILDSON, **CASE NO. 98-10430**

Debtor. **Chapter 7**

BANK OF ALAMO,

Plaintiff,

v. **Adv. Pro. No. 98-5108**

JEREMY BRYNILDSON,

Defendant.

MEMORANDUM OPINION AND ORDER RE
COMPLAINT OBJECTING TO DISCHARGE

The Court conducted a trial in this matter on September 28, 1998. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2)(J), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACTS

Prior to the trial in this adversary proceeding, the parties entered into the following Stipulation of Facts:

> 1. On or about February 8, 1996, Jeremy Brynildson executed a loan and security agreement with the Bank of Alamo in the amount of $14,500.00 to purchase a 1994 Mitsubishi 3000GT sports car, a copy of which note is . . . incorporated herein by reference and made Exhibit "A" to the Stipulations, with a present outstanding balance of $12,052.83.
> 2. On or about June 12, 1995, Jeremy Brynildson executed a loan and security agreement with the Bank of Alamo in the amount of $12,000.00 to purchase a 1994 Mazda Miata, a copy of which note is . . . incorporated herein by reference and made Exhibit "B" to the Stipulations with an outstanding balance of $12,531.66.
> 3. On or about August 15, 1994, Jeremy Brynildson executed a financial statement in conjunction with loans with the Bank of Alamo, a copy of which is incorporated herein by reference and made Exhibit "C."

> 4. On or about October 12, 1995, Jeremy Brynildson executed a financial statement in conjunction with loans with the Bank of Alamo, a copy of which is incorporated herein by reference and made Exhibit "D."
> 5. Jeremy Brynildson wrecked the 1994 Mitsubishi 3000GT, which was subject to the security interest of the Bank of Alamo (See Stipulation "1" above) on or about January 10, 1997 as is evidenced by the accident report made Exhibit "E" to these Stipulations.
> 6. Jeremy Brynildson d/b/a J B Automotive received an insurance check from the insurance company for the damage done to said 1994 Mitsubishi 3000GT in the amount of $11,687.84 as is evidenced by a check from Calvert Insurance Company . . . made Exhibit "F."

This stipulation was submitted to the Court on September 18, 1998.

In addition to the facts set forth in the Stipulation, the Court also finds that:

1. The $14,500.00 loan made by the Bank to the debtor for the purchase of the 1994 Mitsubishi 300GT was loan number 43391. In executing this note, the debtor granted the Bank a security interest in the 1994 Mitsubishi 3000GT.[1]

2. The $12,000.00 loan made by the Bank to the debtor for the purchase of the 1994 Mazda Miata was loan number 41789. In executing this note, the debtor granted the bank a security interest in the Miata.[2]

3. The insurance check received by the debtor for the 1994 Mitsubishi 3000GT was made payable to "JB Automotive." The memo line of said check read "94 Mistu [sic] 3000GT."

4. The top of the deposit slip for said insurance check reads "The Bank of Alamo, Alamo, Tenn." The stamp on the deposit slip reads "Bank of Alamo, Alamo, TN."

5. When the debtor took the insurance check to the Bank, he received $1,600.00 in cash and deposited $1,869.00 into his checking account. The remaining proceeds of $8,218.63 were applied to pay off loan number 44849 which was secured by a 1994 Dodge Caravan.

6. The debtor's residence is Maury City, TN.

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[1] Although Tennessee law requires security interests in automobiles to be perfected by noting the lien on the certificate of title, the uncontradicted testimony of the Bank established that obtaining the notation on the titles of reconstructed automobiles is a lengthy and involved process which can take up to six months to complete. As a result of this testimony, the Court finds that the Bank did have a security interest in the Mitsubishi even though it was not noted on the title.

[2] *Id.*

7. The debtor experienced difficulty in timely repairing the subject automobiles because he was unable to find the necessary parts.

II. CONCLUSIONS OF LAW

Section 523(a)(2)(A) excepts from discharge any debt obtained by "false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). This Court has previously held that in order to have a debt declared nondischargeable pursuant to this section, the creditor must prove (1) the debtor made a material representation, (2) the debtor knew the representation was false at the time of making it, or made the representation with gross recklessness as to the truth, (3) the debtor made the representation with the intention of deceiving the creditor, (4) the creditor justifiably relied on such representation, and (5) the creditor sustained loss and damage as the proximate result of the representations." *A T & T Universal Card Serv. v. Crutcher (In re Crutcher)*, 215 B.R. 696,699 (Bankr. W.D. Tenn. 1997).

The party asking for the exception to discharge bears the burden of proof in a § 523(a)(2)(A) action. *In re Martin*, 698 F.2d 883, 887 (7th Cir. 1983). Exceptions to discharge are to be strictly construed against the creditor and liberally in favor of the debtor. *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985). The burden of proof on the objecting creditor is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991).

Based on these standards, the Court has no choice but to deny the creditor's complaint objecting to discharge. There was no compelling proof presented to the Court that the debtor intended to deceive the bank by applying the proceeds of the insurance check on the Mitsubishi to another loan. In fact, the Court is unconvinced that this misapplication was even the debtor's doing. The debtor's uncontradicted testimony at trial was that the normal course of dealings between himself and the bank was that he would deposit money towards repayment of the various loans and the loan officer or other bank official would then decide how to allocate the money between the loans.

The "cornerstone," for lack of a better word, of the Bank's argument was that by depositing the proceeds of the insurance check at the Maury City branch, the debtor deliberately tried to deceive the Bank and misappropriate the money. At trial, the debtor testified that he did not deposit the money at the Maury City branch, but instead deposited the money at the Alamo branch–the branch he usually transacted business at. The only notation on the deposit slip indicating the location of the deposit reads "Bank of Alamo, Alamo, Tenn." The Bank did not present any proof which disproved the debtor's assertion. Even if the transaction had occurred at the Maury City branch, however, the Court fails to see

how this proves the debtor was engaged in a scheme of deception in light of the fact that the debtor lives in Maury City.

Based on the foregoing conclusions, the Court finds that the outstanding balances on notes 43391 and 41789 ($12,538.66 and $12,052.83 respectively) are dischargeable. The Bank's complaint will be denied.

III. ORDER

It is therefore **ORDERED** that the Plaintiff's Complaint Objecting to Discharge is **DENIED.**

It is **FURTHER ORDERED** that the remaining balances on notes 43391 and 41789, $12,538.66 and $12,052.83 respectively, are **DISCHARGED.**

IT IS SO ORDERED.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge
Date: October 27, 1998