

September 28, 2005

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE BENNETT ALLEN BUCKNER,
Debtor.

BAP No. EO-05-034

HAROLD O'STEEN, JR. and
LAVERNE O'STEEN,
Plaintiffs – Appellants,
v.
BENNETT ALLEN BUCKNER,
Defendant – Appellee.

Bankr. No. 04-71359
Adv. No. 04-7073
Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

Before NUGENT, McNIFF, and THURMAN, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Harold O'Steen, Jr. and Laverne O'Steen (O'Steens) appeal a bankruptcy court judgment that an alleged debt owed to the O'Steens by Bennett Allen

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Buckner (Debtor), the chapter 7 debtor, was dischargeable under 11 U.S.C. § 523(a)(2)(A). For the reasons stated, we AFFIRM.

I. Background

The Debtor was in the construction business, building houses in Tarrant County, Texas. The Debtor operated his business through a solely owned corporation, Castle Creek Investments, Inc. (Castle Creek). In April 2001, the O'Steens purchased a newly constructed home from Castle Creek.

The Debtor built the O'Steens' house between two other houses he had previously built, on a lot he had owned for several years. The back of the property purchased by the O'Steens abuts a canal, separated from the O'Steens' property by a retaining wall. The retaining wall and fifteen feet of the lot are owned by the area homeowners' association. The retaining wall was installed before the Debtor acquired the property.

Both O'Steens testified at the trial that they each asked the Debtor whether any fill dirt was present on the lot. They contend the Debtor replied that there was none. The O'Steens believe the presence of fill dirt will cause settling and damage to a foundation and house. The O'Steens also contend the Debtor told Mr. O'Steen the soil had been tested and the foundation was "engineered." The Debtor testified that he could not recall the conversations, but if the O'Steens did ask him, he would have told them that to his knowledge there was no fill dirt.

The Debtor testified that the foundation was designed by an engineering firm to the specifications of the city's building codes. He also stated that he was unaware of any fill dirt on the property, he did not place any fill dirt on the property, and the house was built on native soil as far as he knew.

On April 17, 2001, before the closing, the parties signed a contract titled "Seller's Disclosure of Property Condition" (Disclosure). The Debtor marked "N" [for none] on the Disclosure at the entry for "Landfill, Settling, Soil

Movement, Fault Lines.” In the comments, the Debtor wrote: “Some settlement at rear of lot due to back fill after canal wall was completed. Will be graded properly before closing.”

The O’Steens purchased and moved into the house on April 27, 2001. The following weekend the area experienced a four-inch rainfall. During that rain, a considerable amount of dirt washed out along the retaining wall (May 2001 event). Since then, the bottom of the retaining wall is rotating, the O’Steens’ fence is leaning, and the property belonging to the homeowners’ association is sinking along the O’Steens’ fence. The O’Steens’ house is also settling, resulting in damage such as cracks and separations.

At the trial, the O’Steens introduced the trial depositions of their neighbors, Richard Lair, Kelli Agan and James Lallande, and of two Professional Engineers, Kelly S. Lee and Garrett Williams. Ms. Agan and Mr. Lallande both testified that erosion similar to the May 2001 event occurred in March 2001 along the retaining wall. After the March 2001 erosion, the Debtor told Mr. Lallande that he believed the dirt had not been compacted when the wall was built, which resulted in pockets where debris washed out and the soil settled. After the March 2001 erosion, the Debtor fixed the slope and repaired Ms. Agan’s fence. The O’Steens were unaware of this repair when they purchased their house.

Mr. Lee testified about a report he prepared after examining the retaining wall in 2003. He attributed the rotation of the wall to a design problem and the subsequent development of a slip plain, possibly due to earth compaction. Mr. Lee stated that an experienced builder should have been aware of any slip plain development.

Mr. Williams’ firm prepared a report based on a 2003 geotechnical investigation of the O’Steens’ property. Mr. Williams, based on four drill cores, testified that the property had two feet of fill dirt toward the street and six to

eight feet of fill dirt on the homeowners' association's property next to the retaining wall. Mr. Williams attributed the post-construction heave to the moisture content of the soil. Mr. Williams did not testify that the presence of fill dirt caused the damage to the O'Steens' property. He stated that the presence of fill dirt would not be apparent by looking at the surface location, and he could not determine when the fill dirt had been placed on the property.

At the beginning of the trial, the bankruptcy judge and the O'Steens' attorney had a conversation about the admission of the trial depositions. The judge's comments show he knew the names of the engineering firms by whom Mr. Lee and Mr. Williams were employed. At one point in the trial the bankruptcy judge stated: "I started reading them [engineers' reports] and I'm not sure I can – I haven't read the deposition. I hope it explains the report." Transcript at 47, Appellants' Appendix at 0079.

Following the trial, the bankruptcy court issued its April 13, 2005 Order (Order) finding the Debtor did not intend to deceive the O'Steens and concluding the debt was dischargeable. In the Order, the bankruptcy court stated that the findings and conclusions were entered "[a]fter hearing the testimony of the witnesses and reviewing the evidence presented." Order at 1, Appellants' Appendix at 0023. The Order also contained the bankruptcy court's observation that he found it interesting the O'Steens failed to obtain a professional inspection of the property prior to closing. Order at 7, Appellants' Appendix at 0029.

II. Discussion

The O'Steens timely appealed the bankruptcy court's final judgment. Fed. R. Bankr. P. 8002(a). This Court, with the consent of the parties, has jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(b)(1) and (c)(1). The parties have consented to this Court's jurisdiction because neither party has elected to have the

appeal heard by the United States District Court for the Eastern District of Oklahoma. Fed. R. Bankr. P. 8001(e).

Standard of Review

We review the bankruptcy court's legal determinations *de novo* and its findings of fact, including those regarding intent, under a clearly erroneous standard. *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1292 (10th Cir. 1997); Fed. R. Bankr. P. 8013. A finding of fact is clearly erroneous if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been committed. *Holaday v. Seay (In re Seay)*, 215 B.R. 780, 788 (10th Cir. BAP 1997) (citations omitted). Review under the standard is significantly deferential. *Id.*

Two issues are raised in this appeal: whether the bankruptcy court reviewed the deposition testimony prior to making its ruling; and whether the bankruptcy court erred in finding insufficient evidence to establish the element of intent under 11 U.S.C. § 523(a)(2)(A).

Deposition Testimony

The O'Steens contend the bankruptcy court did not review or consider the testimony submitted in the trial depositions. The assumption is based on the failure of the bankruptcy court to refer to or discuss the deposition testimony in its Order.

Under Fed. R. Bankr. P. 7052, incorporating Fed. R. Civ. P. 52 (a), a trial court must make findings of fact in support of the court's judgment. However, the court is not required to "make findings as to every detail." *Hjelle v. Mid-State Consultants, Inc.*, 394 F.3d 873, 880 (10th Cir. 2005), citing *Nulf v. Int'l Paper Co.*, 656 F.2d 553, 561 (10th Cir. 1981). In *Nulf*, the court stated that the trial court's "findings do not have to contain evidence supporting every possible viewpoint." *Id.*

This Court believes the bankruptcy judge consulted all of the evidence. In the Order, the bankruptcy court stated that the decision was based on a review of the evidence. The trial transcript shows that by the beginning of the trial, the bankruptcy judge was aware of the deposition testimony and had already read at least a portion of the engineering reports. These references to the depositions suggest the bankruptcy judge reviewed the trial depositions.

Granted, the bankruptcy judge did not specifically state that he considered the deposition testimony, and he did not discuss that testimony in the findings. But even if he did not read the trial depositions, the O'Steens have pointed to nothing in the record to show the result would have been different if he had.

The evidence was sufficient to support the bankruptcy court's ultimate finding that the Debtor did not intend to deceive the O'Steens. The bankruptcy court was not required to discuss evidence unnecessary to support its decision or to elaborate on evidence not relevant or probative on the intent element of the claim. Without a finding of intent, the claim fails. Therefore, we find no reversible error based on an alleged failure to consider all of the evidence.

Exception to Discharge

The O'Steens contend the Debtor's liability for their damages is a nondischargeable debt under 11 U.S.C. § 523(a)(2)(A) which provides:

(a) A discharge under section 727 . . . does not discharge an individual debtor from any debt —

. . .

(2) 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 debtor's or an insider's financial condition[.]

To sustain a claim under § 523(a)(2)(A), the creditor must prove the debtor made a false representation with the intent to deceive the creditor; that the creditor

reasonably relied on the misrepresentation; and the misrepresentation caused the creditor to sustain a loss. *Fowler Brothers v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996). Intent to deceive may be inferred from the totality of the circumstances. *Blue Ridge Bank and Trust v. Cascio (In re Cascio)*, 318 B.R. 567, 575 (Bankr. D. Kan. 2004), citing *Driggs v. Black (In re Black)*, 787 F.2d 503, 506 (10th Cir. 1986), *abrogated in part on other grounds by Grogan v. Garner*, 498 U.S. 279 (1991), *aff'd without published opinion*, 2005 Bankr. LEXIS 1462 (10th Cir. BAP August 4, 2005). The creditor has the burden to prove each element of the claim by a preponderance of the evidence. *Id.* at 576.

The O'Steens' fraudulent misrepresentation claim is based on two allegedly false statements made by the Debtor: that the lot on which the O'Steens' house was built contained no fill dirt and the Debtor's concomitant implication that he knew there was no fill dirt because he had hired an engineer to design the foundation; and the notation the Debtor made on the Disclosure that no landfill, settling, soil movement or fault lines had occurred on the lot. Without determining whether or not the Debtor's statements were in fact false, the bankruptcy court concluded that the O'Steens failed to prove the requisite element of fraudulent intent.

Intent is a question of fact. The bankruptcy court evaluated the Debtor's demeanor and testimony, found him credible and believed his testimony. This Court will not substitute its judgment for that of the trial court.

Moreover, the bankruptcy court's findings are amply supported by the record. The Debtor stated that he had no knowledge of fill dirt on the property. There was no direct proof the Debtor knew of or placed fill dirt on the property. Mr. Williams could not determine when the fill dirt had been placed on the property, and he did not conclude that the fill dirt caused the settling or slippage.

The Debtor testified that he believed the slippage at the retaining wall was

caused by erosion and soil compaction. Mr. Lee testified similarly. The record shows the Debtor purchased the property some years after the canal wall was installed. The Debtor believed the erosion in March 2001 was due to the heavy rain, lack of vegetation, and poor soil compaction at the retaining wall. The Debtor disclosed the retaining wall slippage on the Disclosure.

The Debtor also explained that when he stated on the Disclosure that there was no landfill, settling, soil movement or fault lines, he was referring to the O'Steens' lot and not the canal wall property owned by the homeowners' association. Based on the record, the bankruptcy court found a lack of intent to deceive, and that finding is not clearly erroneous.

III. Conclusion

The trial deposition testimony was not relevant to the bankruptcy court's ultimate conclusion, even though the record shows the bankruptcy court considered the evidence. The bankruptcy court's findings were not clearly erroneous, and the judgment is AFFIRMED.