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PAUL L. BADGER
Clerk

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

IN RE)	
FRED HUNTER and NANCY HUNTER,)	Bankruptcy No. 85A-00955
)	Adversary No. 85 PA 581
Debtors.)	
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WASATCH BANK OF LEHI,)	
Appellant,)	
v.)	D E C I S I O N
FRED R. HUNTER and NANCY HUNTER,)	
Appellees.)	Case No. 86-C-0018S

This appeal is from the Bankruptcy Court's judgment granting the motion by defendants Fred and Nancy Hunter (the "Hunters") to dismiss the action of plaintiff Wasatch Bank of Lehi ("Wasatch Bank"). The Bank sought below an 11 U.S.C. § 523(a)(2)(A) determination that a debt owed by the Hunters to Wasatch Bank should be adjudged non-dischargeable because the Hunters allegedly obtained the subject loan by false pretenses, false representation, or actual fraud.

UNCONTROVERTED FACTS

Early in 1979, Fred Hunter began negotiating with Ben McKinney ("McKinney") for the purchase of 5 acres of a 29.6

acre non-conforming lot located in Fairfield, Utah County, Utah.¹ By letter dated April 20, 1979, Rod Capel, Utah County Zoning Inspector, notified McKinney that the sale of 5 acres of his 29.6 acre lot would be in violation of the zoning ordinance and that a building permit could not be issued to Mr. Hunter. On April 23, 1979, Hunter and McKinney filed a Building Permit Application for the 29.6 acres which provided that one acre be given to the Bank for security. The application stated in bold capital letters: "OCCUPANCY OF STRUCTURE IS PROHIBITED UNTIL AFTER FINAL INSPECTION AND A ZONING AND OCCUPANCY COMPLIANCE CERTIFICATE IS ISSUED." A Certificate of Occupancy was later issued to McKinney indicating compliance with the Building Code under Permit 3890, and the Hunters began construction of their house on the lot they purchased.

On January 26, 1981, Wasatch Bank issued to the Hunters an installment promissory note which was secured by a Second Deed of Trust on their house and the one acre of land addressed in the Building Permit Application. The Hunters aver they did not know at the time the loan was made that a

¹The controlling zoning regulation required that no more than one building permit be issued per 50 acres.

zoning violation still existed on the 29.6 acre lot and no one at Wasatch Bank enquired about zoning regulations.

The Hunters made the scheduled installment payments until they defaulted on the bank's trust deed in the fall of 1982, eighteen months after the loan was issued. On March 28, 1985, the Hunters filed a petition for relief under Chapter 7 of the Bankruptcy Code. Wasatch Bank commenced the present action requesting determination that the loan amount in default was a non-dischargeable debt on the grounds the Hunters intentionally withheld information concerning the zoning violation that greatly decreased the stated value of their property.

In its Findings of Fact and Conclusions of Law, the Bankruptcy Court set out as Finding No. 10 its determination that Wasatch Bank failed to show, by clear and convincing evidence, the following:

- (a) That defendant made a false representation and/or failed to make material disclosures regarding zoning violations on the 29.6 acres;
- (b) That the defendants knew that zoning violations existed at the time the subject property (one (1) acre) was given to Wasatch Bank as collateral under the Deed of Trust;
- (c) That defendants intended to deceive the creditors with false information and/or non-disclosures regarding zoning violations on the 29.6 acres and/or one (1) acre given to plaintiff as security;

- (d) That the plaintiff failed to show that it reasonably relied upon any false representations and/or non-disclosures by the defendants.

Findings of Fact and Conclusions of Law at 2, 3.

The Bankruptcy Court reached the legal conclusions therefrom that Wasatch Bank's complaint against the Hunters should be dismissed with prejudice.

Wasatch Bank raises two issues on appeal: 1) whether the lower court erred in dismissing its complaint against the Hunters and 2) whether the lower court erred by not accepting into evidence Wasatch Bank's Exhibit No. 8 which is a statement by Hunters concerning the worth of the trust deed collateral.

I. Dismissal of the Complaint.

This court must apply the "clearly erroneous" standard of review to an appeal from the Bankruptcy Court as per Fed. R. Civ. P. 52(a) and Bankruptcy Rule 8013, and although Findings of Fact are not conclusive on appeal, the party who seeks to overturn them bears a heavy burden. C. Wright, Law of Federal Courts § 96 (1981). "It is settled that a finding is clearly erroneous, within the meaning of Rule 52(a), when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been

committed.'" Id. (quoting U.S. v. Gypsum Co., 333 U.S. 364, 395 (1948)).

Upon review of the entire record on appeal, this court holds that Wasatch Bank fails to meet the clearly erroneous standard because after examination of the bank's evidence, the court is not "left with a definite and firm conviction that a mistake has been committed."

Wasatch Bank claims that all evidence supports its position except for a statement made by Fred Hunter. The court agrees that Wasatch Bank's evidence shows the Hunters did not reveal the zoning violation at any point during their loan application period. However, the issue on which the dischargeability of a debt turns is one of intent, and Wasatch Bank was left below with the burden of proving by clear and convincing evidence that the Hunters received the money by false pretenses, a false misrepresentation, or actual fraud. 11 U.S.C. § 532(a)(2)(A). The debt may be determined non-dischargeable only upon proof the Hunters applied for the loan with the intent to deceive. 1 B.R. 354 (Bankr. Utah 1979). This court agrees with the lower court that Wasatch failed to come forth with clear and convincing evidence of the Hunters' intent to deceive.

As to the weight that should be given Fred Hunter's testimony concerning his wife's and his knowledge and intent when applying for the loan, this court is bound by Rule 52(a) to give due regard to "the opportunity of the trial court to judge of the credibility of witnesses." Fed. R. Civ. P. 52(a). This court is not inclined to disturb the lower court's Findings of Fact where it appears Fred Hunter's testimony was the sole evidence presented that went directly to the question of intent, and the lower court had the opportunity to examine his demeanor during direct and cross examination. However, neither this court nor the lower court was left to determine the questions of knowledge and intent solely on what could viewed as subjective or self-serving evidence. An objective review of the historic facts demonstrates the reasonableness of the Hunters' belief that the previous zoning violation did not affect the value of their property at the time of the loan application. As stated above, after receiving notice that Hunter could not receive a building permit because the 29.6 acre lot violated the governing zoning ordinance, McKinney applied for a permit on the 29.6 acres, and in the application he provided that one acre should be given to Wasatch Bank as collateral for the trust deed. That application was approved,

whereupon a Certificate of Occupancy was issued to McKinney indicating compliance with the Building Code under Permit 3890. The court can find no evidence of misrepresentation or failure to disclose in the building permit applications, and it appears McKinney and Hunter there set out in full the intended use of the property.

The Hunters continued in possession of their home constructed on the lot until they defaulted on their loan three years after obtaining the occupancy permit, at which time, Wasatch Bank discovered the zoning violation decreased the value of the Hunters' house and lot. Clearly, the Hunters had reason to believe the granting of the Certificate of Occupancy permit was contingent upon compliance with the zoning ordinance, and there is no evidence they were ever notified to the contrary after the Certificate was issued. The reasonableness of the Hunters' position coupled with Fred Hunter's testimony concerning their lack of knowledge of the zoning violation supports the Bankruptcy Court's finding that at the time they applied for the loan, Hunters lacked both knowledge of the zoning violation and intent to deceive Wasatch Bank by failing to disclose the violation in the loan application. The court also here rules that where it was reasonable for Hunter to

assume his home and lot met the requirements for the issuance of the Certificate of Occupancy, failure to disclose the zoning violation did not show gross recklessness as contemplated in Carini v. Matera, 592 F.2d 378 (7th Cir. 1978) and In Re Martin, 761 F.2d 1163 (6th Cir. 1985).

Accordingly, the court finds no compelling reason to overturn the lower Court's Finding No. 10 as set out above.

II. Failure to admit Wasatch Bank's Exhibit No. 8.

The exhibit at issue purports to be a statement by Hunters concerning the value of the trust deed collateral. Wasatch Bank claims it should have been admitted because it was relevant to the zoning violation and part of the bank's records kept in its ordinary course of business.

The Hunters counter that although Exhibit No. 8 might be relevant to a cause of action arising under 11 U.S.C. § 5232(a)(2)(B) that addresses use of a statement in writing, it is not relevant to a determination under § 523(a)(2)(A), the only cause of action pled. Without specifically reaching the Hunters' argument, the court observes both subclauses require that intent to deceive be shown, and Exhibit No. 8 provides no more proof of the


Hunters' knowledge and intent at the time of the loan application than did the other exhibits submitted. It is merely cumulative evidence showing the Hunters did not account for the zoning violation in listing the value of their property. Therefore, the lower court's failure to admit Exhibit No. 8 does not amount to reversible error.

AFFIRMED.

DATED this 4th day of September, 1986.

BY THE COURT:

cc: attys, 8/9/86:dp
S. Rex Lewis, Esq.
Stanley R. Smith, Esq.
bankruptcy



DAVID SAM
U.S. DISTRICT JUDGE