IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

IN RE:	§	
	§	
SUZANNE WRIGHT	§	Case No. 02-63481
	§	
Debtor	§	Chapter 7
CASEY SLOAN	§	
	§	
Plaintiff	§	
	§	
v.	§	Adversary No. 02-2215
	§	
SUZANNE WRIGHT	§	
	§	
Defendant	§	

MEMORANDUM OF DECISION

This matter came before the Court for trial of the complaint of the Plaintiff, Casey Sloan ("Plaintiff"), through which he seeks a determination that the debt allegedly owed to him by the Debtor-Defendant, Suzanne Wright ("Debtor" or "Defendant") is excepted from discharge pursuant to 11 U.S.C. §523(a)(2)(A). At the conclusion of the trial, the Court took the matter under advisement. This memorandum of decision disposes of all issues pending before the Court.[1]

Factual and Procedural Background

As set forth in the parties' Joint Pretrial Order submitted to the Court, most of the

[1] This Court has jurisdiction to consider the complaint pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has the authority to enter a final judgment in this adversary proceeding since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(I) and (O).

facts in this case are not seriously disputed. The Plaintiff and the Debtor have known each other since sometime in early 1998. On or about August 17, 1998, the Debtor borrowed $3,500.00 from First National Bank in Marshall, Texas.[2] As part of the loan transaction, the Debtor executed a Consumer Note, Disclosure and Security Agreement (the "Note") identified as note #330-13151-6.[3] In addition, the Debtor received an Itemization of Amount Financed[4] and a Disclaimer of Oral Agreements,[5] and there is no dispute that the Debtor signed each of these documents as "Borrower."

The real issue in this case concerns the role, if any, that the Plaintiff played in this loan transaction. The Plaintiff admits that both the Note and the Disclaimer of Oral Agreements, as well as an additional document entitled "Notice to Cosigner,"[6] appear to contain his signature. The Plaintiff testified, however, that he never signed any document accepting responsibility as a co-signer for the Debtor, and that the signatures appearing on the various documents are forgeries made by or on behalf of the Debtor to enable her to procure the $3,500.00 loan.

Subsequent to the execution of the Note, the Debtor defaulted on her monthly payment obligations. The Plaintiff thereafter began receiving delinquency notices from

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[2] First National Bank has subsequently been purchased by Hibernia National Bank which maintains banking operations at the same address.

[3] *See* Exhibit P-1.

[4] *See* Exhibit P-2.

[5] *See* Exhibit P-3.

[6] *See* Exhibit P-4.

Hibernia National Bank stating that the Note was in default and that he was liable thereon. Because he was allegedly worried about his credit status with the Bank being adversely affected, the Plaintiff paid off the remaining balance due under the Note sometime in 1999. The Plaintiff testified that the balance remaining on the Note at the time of his repayment was approximately $2,000.00.

On June 23, 1999, the Plaintiff sued the Debtor in the Justice Court of Harrison County, Texas, under Cause No. 8523. In his Original Petition, the Plaintiff averred that the Debtor was legally obligated to him in the sum of $5,000.00 based upon the following facts:

> I co-signed a loan #330330131516 [sic] at Hibernia National Bank for Suzzane [sic] Wright. She fails to pay the note each month, I have had to pay the note and due to her [not] paying my credit has been effected [sic]. I have tried, and the bank has tried for over a month to contact her and she fails to respond. Therefore I would like to be compensated for my loss.[7]

On March 29, 2000, a default judgment was entered in that proceeding against the Debtor in the amount of $5,000.00 together with post-judgment interest at 10% interest and such other costs and damages that may be duly rendered.[8] The Plaintiff further testified that he

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[7] *See* Exhibit D-A.

[8] *See* Exhibit D-B. The Plaintiff testified that at the time of his state court lawsuit, he had only paid Hibernia National Bank approximately $2,000.00, and that he sued for $5,000.00 based upon estimated future attorney's fees in collecting the debt from the Debtor and/or costs associated with hiring a private investigator to track down the Debtor. In addition, at the time of the suit the Plaintiff had incurred an additional $67.00 due to "Filing and Sheriff/Constable Fees," and this amount is reflected in the Civil Citation issued against the Debtor by the Justice Court of Harrison County, Texas. *See* Exhibit D-A, p.3.

has tried to collect on this judgment but has yet to receive any type of satisfaction from the Debtor.

The Debtor filed her Chapter 7 bankruptcy petition on September 17, 2002. The Plaintiff thereafter filed the current adversary proceeding, seeking a determination that the debt owed to him by the Debtor was nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A).

Discussion

Judicial Estoppel

Before reaching the merits of the evidence presented in support of the Plaintiff's cause of action, the Court must address whether the Plaintiff is precluded from maintaining this action due to the doctrine of judicial estoppel. Because judicial estoppel is considered to be a matter of federal procedure, federal law governs its application. *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 600 (5th Cir. 1996); *accord Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 530 (5th Cir. 2000); *see also Exxon Corp. v. Burglin*, 42 F.3d 948, 950 (5th Cir. 1995) [holding that even where federal courts are adjudicating claims under diversity jurisdiction and therefore applying state substantive law, they apply federal procedural law to the proceedings]. The use of federal standards in this area has been expressly endorsed when arising in a bankruptcy case. *Matter of Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999).

As explained by the Fifth Circuit:

> The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. *United States v. McCaskey,* 9 F.3d 368, 378 (5th Cir. 1993), *cert. denied,* 511 U.S. 1042, 114 S.Ct. 1565, 128 L.Ed.2d 211 (1994). We recognize the applicability of this doctrine in this circuit because of its laudable policy goals. The doctrine prevents internal inconsistency, precludes litigants from "playing fast and loose" with the courts, and prohibits parties from deliberately changing positions based upon the exigencies of the moment.

Ergo Science, 73 F.3d at 598.

"In this Circuit, two bases for judicial estoppel must be satisfied before a party can be estopped. First, it must be shown that the position of the party to be estopped is clearly inconsistent with its previous one; and [second,] that party must have convinced the court to accept that previous position." *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (citations and internal quotations omitted).[9] *Hall* further recognized that the Supreme Court had endorsed a third consideration: "whether the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Hall,* 327 F.3d at 399 (*citing New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S.Ct. 1808, 1815, 149 L.Ed.2d 968 (2001).

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[9] "The 'judicial acceptance' requirement minimizes the danger of a party contradicting a court's determination based on the party's prior position and, thus, mitigates the corresponding threat to judicial integrity." *Coastal Plains,* 179 F.3d at 206 (*citing United States for Use of American Bank v. C.I.T. Construction Inc. of Tex.*, 944 F.2d 253, 258 (5th Cir. 1991)). However, "the judicial acceptance requirement does not mean that the party against whom the judicial estoppel is to be invoked must have prevailed on the merits. . . . [it] means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." *Coastal Plains,* 179 F.3d at 206 (*citing Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988) (internal quotations omitted)).

"Because the doctrine is intended to protect the judicial system, rather than the litigants, detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary." *Coastal Plains,* 179 F.3d at 205.

According to the Debtor, the Plaintiff's admission in his state court petition that he "co-signed a loan . . . for Suzzane [sic] Wright" precludes the Plaintiff from now arguing that the Debtor forged his signature on the loan documents. The Plaintiff does not dispute that his original petition in state court was premised on his assertion that he co-signed the note for the Debtor, but he now claims that he chose to plead his case in this manner for "business reasons"; namely that he did not want to become involved in any type of litigation with Hibernia National Bank.

However, it is admitted that the Plaintiff obtained a default judgment against the Debtor based solely on the averments contained within that original petition in which he clearly and unequivocally made a sworn statement that he had co-signed the loan for the Debtor. The Plaintiff was not fraudulently induced into making this averment, nor did he make this statement based on any type of mistake or under duress. In fact, the Plaintiff testified that he voluntarily and deliberately chose to plead his cause of action in this manner because he was worried about the possible harm that his reputation would suffer in the business community if he challenged his liability to Hibernia National Bank under the Note. Moreover, it was based upon the Plaintiff's averment acknowledging his execution of the Note that the Justice Court of Harrison County, Texas, awarded to him the $5,000.00 default judgment against the Debtor.

Accordingly, because the position now asserted by the Plaintiff is absolutely inconsistent with his previous stance upon which he sought and actually received a judgment against the Debtor-Defendant, the Plaintiff cannot proceed with his current complaint against the Debtor because the acceptance by this Court of his allegations of forgery as a basis for the nondischargeability of the debt would clearly create the "perception that either the first or the second court was misled." *New Hampshire*, 532 U.S. at 750, 121 S.Ct. at 1815 (*citing Edwards v. Aetna Life. Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)). Additionally, to allow the Plaintiff to assert such an inconsistent position in a subsequent proceeding simply because his litigation needs have changed due to the filing of the Debtor's bankruptcy case violates the basic tenets of the doctrine which "forbids use of intentional self-contradiction . . . as a means of obtaining unfair advantage." *Id.*, 532 U.S. at 751, 121 S.Ct. at 1815 (*citing Scarano v. Central R. Co.,* 203 F.2d 510, 513 (3rd Cir. 1953)). Accordingly, any relief sought by the Plaintiff on the basis of that self-contradiction must be denied.

Nondischargeability Under 11 U.S.C. §523(a)(2)(A)

Even if the Court were to ignore the principles of judicial estoppel and proceed to decide this dispute based upon its merits, judgment in favor of the Debtor would still be mandated. Section 523(a)(2)(A) of Title 11 provides that:

> A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt for money, property, or services, or an extension, renewal, or refinancing of credit, to the extent obtained by false

pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

The language of §523(a)(2)(A) encompasses similar but distinct causes of action. Though other circuits have applied a uniform standard to all §523(a)(2)(A) actions,[10] the Fifth Circuit has distinguished the elements of "actual fraud" on the one hand and "false pretenses and false representations" on the other. *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1292 (5th Cir. 1995).

To have a debt excepted from discharge pursuant to the "actual fraud" provision in 11 U.S.C. §523(a)(2)(A), an objecting creditor must prove that: (1) the debtor made representations; (2) at the time they were made the debtor knew they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) that the creditor justifiably relied on such representation; and (5) that the creditor sustained losses as a proximate result of the representations. *Id.* at 1293, *modified*, *Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995) [regarding the proper standard of reliance].

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[10] *See, e.g., Britton v. Price (In re Britton)*, 950 F.2d 602, 604 (9th Cir. 1991); *Caspers v. Van Horne (In re Van Horne)*, 823 F.2d 1285, 1287 (8th Cir. 1987). Though some bankruptcy courts outside of the Fifth Circuit have cited the decision of the United States Supreme Court in *Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed.2d 351(1995), in support of their proposition that all of the §523(a)(2)(A) actions are governed by the elements for actual fraud, *see, e.g., AT&T Universal Card Services v. Ellingsworth (In re Ellingsworth)*, 212 B.R. 326 (Bankr. W.D. Mo. 1997); *AT& T Universal Card Services v. Alvi (In re Alvi),* 191 B.R. 724 (Bankr. N.D. Ill. 1996); the Supreme Court in that case was actually distinguishing the language used in §523(a)(2)(A) from that utilized in §523(a)(2)(B) in order to determine the degree of reliance necessary above mere reliance in fact in order to exempt a debt from discharge under (a)(2)(A). Since the Supreme Court specifically refused to even apply their direct holding regarding the degree of reliance in actual fraud cases to cases of false pretense or false representation, 116 S.Ct. at 443, n. 8, the statement that the Court erased all distinctions between the three (a)(2)(A) actions strains credibility.

However, a debt may also be declared nondischargeable if it was obtained by false pretenses or by a false representation. While "false pretenses" and "false representation" both involve intentional conduct intended to create and foster a false impression, the distinction is that a false representation involves an express statement, while a claim of false pretenses may be premised on misleading conduct without an explicit statement. *In re Patten*, 225 B.R. 211, 215 (Bankr. D. Ore. 1998). In order for a debtor's representation to constitute a false pretense or a false representation:

> it must have been: (1) [a] knowing and fraudulent falsehood [ ], (2) describing past or current facts, (3) that [was] relied upon by the other party. *In re Allison*, 960 F.2d at 483; see also *In re Bercier*, 934 F.2d at 692 ("[T]o be a false representation or false pretense under §523(a)(2), the 'false representations and false pretenses [must] encompass statements that falsely purport to depict current or past facts.'").

RecoverEdge L.P., 44 F.3d at 1292-93 (changes in original) (*quoting Keeling v. Roeder (In re Roeder)* 61 B.R. 179, 181 (Bankr. W.D. Ky. 1986)).[11]

Thus, the distinction recognized by the Fifth Circuit appears to be a chronological one, resting upon whether a debtor's representation is made with reference to a future event as opposed to a representation regarding a past or existing fact. *Bank of Louisiana v. Bercier (In re Bercier)* 934 F.2d 689, 692 (5th Cir. 1991) ["(A debtor's) promise . . . related to (a) *future action* (which does) not purport to depict current or past fact . . .

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[11] Though the Supreme Court in *Field v. Mans* avoided a determination of the degree of reliance required in a false pretense or false representation case, it is reasonable to assume that justifiable reliance, in addition to reliance in fact, is the correct level of reliance required to sustain a finding of nondischargeability in a false pretense or false representation case. *In re Hernandez*, 208 B.R. 872, 876, n. 4 (Bankr. W.D. Tex. 1997).

therefore cannot be defined as a *false representation or a false pretense*."] (changes and emphasis in original with citations omitted).[12]

By alleging that the Debtor procured her loan from First National Bank by forging the Plaintiff's name as a co-signer to the loan, the Plaintiff has basically alleged that the Debtor made a representation regarding a past or existing fact. As evidenced above, however, reliance is a required element under the actual fraud cause of action, as well as under the false pretense and the false representation causes of action under §523(a)(2)(A). *See, e.g., RecoverEdge L.P.*, 44 F.3d at 1292-93; *see also* 11 U.S.C.A. §523 (1993) (*quoting* H.R. 95-595 (1978)) [stating that under §523(a)(2)(A), "the creditor must not only have relied on a false statement in writing, but the reliance must have been reasonable"]. In the present case, there is no evidence of the Plaintiff's reliance upon the alleged forgery by the Debtor. In fact, the Plaintiff testified that he was not even aware of the alleged forgery until he started to receive delinquency notices from Hibernia National Bank several months after the Note was executed. Certainly he cannot properly claim reliance based upon his voluntary payment of a promissory note he now says he never signed. Nor as a result of that voluntary payment can he properly stand in the shoes of Hibernia National Bank — the only party who might have relied on the alleged forgery in extending credit to the Debtor. Accordingly, the Plaintiff cannot prevail under a cause of

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[12] Though some in this circuit have rejected these parallel tests as a distinction without a difference and proceeded with a unitary approach to the problem, *see In re Melancon*, 223 B.R. 300, 308 (Bankr. M.D. La. 1998), this Court feels compelled to recognize and to attempt to apply the distinction drawn by the circuit court.

action based upon §523(a)(2)(A) because he cannot satisfy his burden to demonstrate that he relied to his detriment upon the Debtor's fraud or misrepresentations.

Even if the §523(a)(2)(A) standards could potentially be established in this case, the evidence submitted by the Plaintiff is insufficient to sustain the burden of proof imposed upon him. In an action to determine the dischargeability of a debt, the creditor has the burden of proof under a preponderance of the evidence standard. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). "Intertwined with this burden is the basic principle of bankruptcy that exceptions to discharge must be strictly construed against a creditor and liberally construed in favor of a debtor so that the debtor may be afforded a fresh start."[13] *Hudson v. Raggio & Raggio, Inc. (In re Hudson)* 107 F.3d 355, 356 (5th Cir. 1997); *In re Whitaker*, 225 B.R. 131, 139 (Bankr. E.D. La. 1998). Thus, without satisfactory proof of each element of the cause of action pled, judgment must be entered for the debtor.

Here, other than his own testimony, the Plaintiff introduced no evidence supporting his contention that the Debtor forged his signature on the Note to First National Bank.[14] No expert testimony was presented to corroborate the forgery allegation. On the other hand, Ms. Edie Gobert, the Bank's clerical employee who supervised the execution of the Note, testified that, although she did not specifically

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[13] However, a fresh start is not promised to all who file for bankruptcy relief, but only to "the honest but unfortunate debtor." *Grogan,* 498 U.S. at 286-87; 111 S.Ct. at 659-60.

[14] Again, as mentioned previously, First National Bank has since been purchased by Hibernia National Bank.

remember this particular transaction nor whether she witnessed the Plaintiff actually sign the Note in question, it was her usual and normal procedure to require a co-signer to sign a note in her presence so that she could explain the consequences of that action. In addition, there is credible evidence that the Plaintiff later acknowledged his execution of the Note to the Debtor's father during his attempt to locate the Debtor for the purpose of obtaining reimbursement from her. Thus, without the benefit of any corroborating evidence, the Plaintiff essentially rests the viability of his case upon his own credibility — *i.e.*, upon his testimony that his present denials of responsibility for the Note constitute the truth, notwithstanding the fact that he had previously claimed in sworn allegations before a judicial officer that he did, in fact, co-sign the Note for the Debtor, and notwithstanding his own unilateral decision to satisfy the obligations of that Note. These contradictions render the Plaintiff's testimony incredible and unreliable.

Consequently, because the Plaintiff should be judicially estopped from bringing the current nondischargeability action and because, in the presentation of his case on the merits, the Plaintiff has failed to prove by a preponderance of the evidence that any funds were obtained from the Plaintiff by the Debtor through false pretenses, a false representation or actual fraud, judgment must be rendered for the Debtor-Defendant on this §523(a)(2)(A) complaint. All further relief requested by either party is denied.[15]

This memorandum of decision constitutes the Court's findings of fact and

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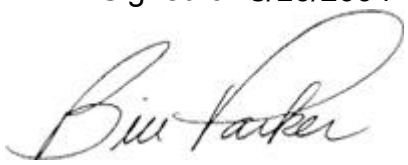
[15] This includes the Debtor's request for reimbursement of attorney's fees, costs, and expenses, regarding which no evidence was presented.

conclusions of law[16] pursuant to Fed. R. Civ. P. 52, as incorporated into contested matters in bankruptcy cases by Fed. R. Bankr. P. 7052 and 9014. An appropriate judgment will be entered which is consistent with this opinion.

Signed on 3/16/2004



BILL PARKER
CHIEF UNITED STATES BANKRUPTCY JUDGE

[16] To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as necessary or as may be requested by any party.