

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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March 15, 2004

Brad C. Smith, Esq.
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Ogden, Utah 84403

Gustav K. Johnson, Esq.
Attorney for Debtors-Defendants
P.O. Box 522
Rapid City, South Dakota 57709-0522

Subject: *Guliuzza v. Wood*
(In re Glenn E. and Janet L. Wood)
Adversary No. 03-5015
Chapter 7; Bankr. No. 03-50375

Dear Messrs. Smith and Johnson:

The matter before the Court is the question of whether Plaintiffs Frank Guliuzza and Kathy Guliuzza (the "Guliuzzas") have pled sufficient facts to support a cause of action against Debtors-Defendants Glenn E. Wood and Janet L. Wood (the "Woods") under either 11 U.S.C. § 523(a)(2)(A) or § 727(a)(4)(C). This is a core proceeding under 28 U.S.C. § 157(b)(2)(I) and (J). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the facts pled by the Guliuzzas do not support either cause of action. The Court will therefore enter an order dismissing this adversary proceeding.

Summary. In April 2001, the Guliuzzas sold certain real property in Ogden, Utah to the Woods. The Guliuzzas financed a portion of the purchase price. The Guliuzzas allege that during the course of the negotiations leading up to the sale, the Woods told them that the sale of their real property in Arizona would allow a quick payoff of the amount they owed the Guliuzzas and that Glenn Wood would be receiving a managerial position with

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Wal-Mart in Brigham City, Utah, which would ensure that the Woods remained in Northern Utah. However, if the Woods sold their real property in Arizona,¹ the Guliuzzas apparently did not receive any portion of the proceeds, and according to the Guliuzzas, shortly after the sale, Glenn Wood was offered and accepted a better position in South Dakota. The Woods subsequently defaulted on their obligation, and in May 2003, the Guliuzzas obtained a judgment against the Woods for \$25,232.34.

The Woods filed for relief under chapter 7 of the bankruptcy code on July 18, 2003. They listed the Guliuzzas as unsecured creditors on their Schedule F. On October 27, 2003, the Guliuzzas timely filed a complaint to determine the dischargeability of their claim against the Woods and to deny the Woods a discharge. In Count I of their complaint, the Guliuzzas referred the Court to 11 U.S.C. § 523. In Count II of their complaint, they referred the Court to 11 U.S.C. § 727. However, they did not identify the specific subsection of either §§ 523 or 727 under which they were seeking relief. The Woods answered the Guliuzzas' complaint on November 26, 2003.

The Court held an initial pre-trial conference on December 11, 2003. Following that hearing, the Court entered an order directing the Guliuzzas to amend their complaint to identify the specific subsections of §§ 523 and 727 under which they were seeking relief. The Guliuzzas filed an amended complaint on December 29, 2003. In their amended complaint, the Guliuzzas clarified that in Count I, they were proceeding under §§ 523(a)(2)(A), and in Count II, they were proceeding under 727(a)(4)(C).

On January 27, 2004, the Court held a final pre-trial conference, at which two issues were discussed: (1) whether the

¹ The Woods listed no real property on their Schedule A and listed no transfers of any real property in Arizona within the year prior to the filing of their chapter 7 petition on their Statement of Financial Affairs.

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Woods' oral representations regarding their real property in Arizona and Glenn Wood's job prospects in Utah were statements respecting their financial condition that would not be actionable under § 523(a)(2)(A); and (2) whether the Woods' oral representations, which did not appear to have been made in or in connection with the case, were actionable under § 727(a)(4)(C). The Guliuzzas' attorney admitted at the hearing that the Woods' oral representations were statements respecting their financial condition. Nevertheless, the Court agreed to accept briefs on both issues. The matter was taken under advisement after the briefs were received.

Discussion. With respect to Count I of the Guliuzzas' complaint, a chapter 7 discharge does not relieve an individual debtor from liability for a debt -

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*[.]

11 U.S.C. § 523(a)(2)(A) (emphasis added). The bankruptcy code does not define the term "financial condition." As a result, two lines of cases have developed.

Some Courts have narrowly defined statements of "financial condition" as those contained in balance sheets, profit and loss statements, and statements of net worth. However, the majority of the reported decisions on the issue articulate a broader definition of "financial condition" - one which encompasses statements concerning the condition or quality of a single asset or liability impacting on the debtor's financial picture.

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Beneficial National Bank v. Priestley (In re Priestley), 201 B.R. 875, 882 (Bankr. D. Del. 1996) (citations omitted). See also *Fairfax State Savings Bank v. McCleary (In re McCleary)*, 284 B.R. 876, 884 (Bankr. N.D. Iowa 2002) (citations therein).

Not surprisingly, in their brief, the Guliuzzas urge the Court to follow those courts adopting the narrower definition of "financial condition." However, the Eighth Circuit appears to have aligned itself with those courts using the broader definition. See *First National Bank of Olathe v. Pontow (In re Pontow)*, 111 F.3d 604, 609 (8th Cir. 1997) (citing *Barclays American/Business Credit, Inc. v. Long, (In re Long)*, 774 F.2d 875, 877 (8th Cir. 1985)).

Using the broader definition, this Court concludes that both oral representations the Woods are alleged to have made are statements respecting their financial condition. The representation regarding their Arizona property was clearly intended to demonstrate they had the wherewithal to pay the Guliuzzas. Likewise, the representation regarding Glenn Wood's employment prospects was clearly intended to demonstrate they had a steady source of income with which to pay the Guliuzzas. Thus, both representations reflected the Woods' ability to pay the debt owed to the Guliuzzas. Such representations regarding a debtor's ability to pay are statements respecting that debtor's financial condition. *Hayhoe v. Cole, (In re Cole)*, 226 B.R. 647, 656 n.12 (9th Cir. BAP 1998) (citations therein).

The facts pled by the Guliuzzas do not support a cause of action under § 523(a)(2)(A). Accordingly, Count I of their complaint will be dismissed.

With respect to Count II of the Guliuzzas' complaint, a chapter 7 debtor is not entitled to a discharge if -

the debtor knowingly and fraudulently, *in or in connection with the case* -

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. . .

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act[.]

11 U.S.C. § 727(a)(4)(C) (emphasis added). By its express terms, § 727(a)(4)(C) applies only to acts "in or in connection with the case."

In this case, the Woods' representations were made prior to the sale in April 2001, more than two years before the Woods filed their chapter 7 petition. In their brief, the Guliuzzas did not address the question of the applicability of § 727(a)(4)(C). Thus, they failed to offer any argument that the Woods' representations were made in or in connection with the Woods' chapter 7 case or point to any facts that would support such a finding. The Court therefore assumes they have conceded that the Woods' oral representations do not fall within the scope of § 727(a)(4)(C).

The facts pled by the Guliuzzas do not support a cause of action under § 727(a)(4)(C). Accordingly, Count II of their complaint will also be dismissed.

The Court will enter an appropriate order.

Sincerely,

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: adversary file (docket original; serve copies on parties in interest)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:) Bankr. No. 03-50375
)
GLENN E. WOOD,) Chapter 7
Soc. Sec. No. 525-23-6522,)
)
JANET L. WOOD,)
Soc. Sec. No. 558-15-2682,)
)
Debtors.)

FRANK GULIUZZA and) Adv. No. 03-5015
KATHY GULIUZZA,)
)
Plaintiffs,) ORDER DISMISSING ADVERSARY
-vs-)
)
GLENN E. WOOD and)
JANET E. WOOD,)
)
Defendants.)

In recognition of and in compliance with the letter decision entered this day, and for cause shown,

IT IS HEREBY ORDERED that the above-captioned adversary proceeding is DISMISSED.

So ordered this 15th day of March, 2004.

BY THE COURT:

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk
(SEAL)