IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 00-33384

KEVIN MATTHEW FLANNERY

Debtor

R. KELLEY GILLILAND

Plaintiff

v. Adv. Proc. No. 00-3140

KEVIN MATTHEW FLANNERY

Defendant

M E M O R A N D U M

APPEARANCES: MORRISON, TYREE & DUNN, P.A.
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

On November 29, 2000, the Plaintiff filed a Complaint to Determine Dischargeability (Complaint) asking the court to find a debt allegedly owed to him by the Defendant nondischargeable pursuant to 11 U.S.C.A. § 523(a)(2)(A) (West 1993). This matter was tried before the court on July 9, 2001.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

I

The Plaintiff, in the market for a 1950's era classic car, responded in October 1995 to an advertisement seen in *Old Car Trader* magazine. The ad, placed by the Defendant, offered for sale a 1956 Buick Roadmaster Convertible (Buick). In response to the Plaintiff's inquiries, the Defendant provided information on the Buick by phone and in writing over the course of several weeks. The parties' negotiations resulted in the Plaintiff's eventual agreement to buy the vehicle for $13,800.00. The present adversary proceeding stems from the circumstances surrounding the Plaintiff's acquisition of the Buick.

Relying on photographs and information provided to him by the Defendant, who represented himself to be an automobile collector **?**downsizing his collection," the Plaintiff did not inspect the Buick prior to purchase.[1] Upon delivery of the vehicle, the Plaintiff discovered what he contends were severe misrepresentations by the Defendant regarding the Buick's condition, history, and value.

[1] The Plaintiff is a resident of California. The Defendant and the Buick were located in Tennessee.

For example, an information sheet provided by the Defendant in November 1995 states that the chrome was ?[v]ery presentable not rusty," that the stainless steel was ?very good to excellent," that ?nothing [was] missing or broken on this car," and that the Buick was ?very solid." The information sheet rates the car as a ?true rating solid" 3- to 3+ on a scale of 1 to 6,[2] and reports that the car was titled in Tennessee. Additionally, in a letter accompanying the information sheet, the Defendant describes the Buick as ?impressive," ?a true classic," and ?a great future investment," which ?with very little money and effort" could become ?a very strong show car." The Plaintiff testified that similar representations were made by the Defendant during the parties' telephone discussions.

After the Buick was paid for in full, it was shipped by covered truck from Tennessee to California. During shipment, the Plaintiff received a call from the truck driver who informed him that the gas tank had fallen off of the Buick in transit due to rust. The Plaintiff then saw the Buick in person for the first time upon its arrival in California on March 4, 1996, finding the car to be ?a mass of poorly executed body repair" partially ?covered with rust."

At trial, the Plaintiff introduced the testimony, by depositions, of two expert witnesses. The first, Lance Scott Coren, is a Certified Automotive Appraiser who inspected the Buick in the Fall of 1996. Mr. Coren testified that the entire chassis of the Buick was unrestorable due to severe rust. Mr. Coren further characterized the stainless steel molding as ?tarnished and faded" and the

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[2] This 1 to 6 scale is commonly used in the valuation and rating of classic cars. *See* OLD CARS PRICE GUIDE, December 1994, at 5. A rating of 1 signifies an ?excellent" car which ?has ceased to be an automobile and has become an object of art." *Id.* Conversely, an automobile rated as a 6 would be ?an incomplete or greatly deteriorated, *perhaps rusty*, vehicle that has value only as a parts donor for other restoration projects." *Id.* (emphasis added). A rating of 3, as provided by the Defendant, represents a car in ?very good" repair, with minor wear but ?still quite presentable," and is the condition of most cars exhibited at classic car shows. *Id.*

chrome as pitted and permeated with rust. He rated the Buick a 5 because in his opinion the car requires a ?complete restoration." Mr. Coren testified that he nearly scored the Buick a 6 due to its severely rusted condition. He appraised the car at $3,500.00.

The Plaintiff's second expert witness was Fred Carmen Montesanto, a restorer of ?hot rods" and classic cars. Based upon his inspection of the Buick, Mr. Montesanto testified that the car was so badly rusted that ?it looked like it had been immersed in salt water for a long period of time." Mr. Montesanto further stated that the Buick's structural integrity was ?ruined," that the car had been poorly repaired with body filler, and that the chrome was ?rusted and extremely pitted." Mr. Montesanto rated the Buick a 6, concluding that the car was ?a piece of junk."

The Plaintiff also introduced a videotape of the Buick illustrating the problems described by Mr. Coren and Mr. Montesanto. Although the film was not made until November 29, 1998, the Defendant did not dispute that it accurately portrayed the Buick's condition at the time of sale. A review of the video satisfies the court that the Buick was not in the condition represented by the Defendant to the Plaintiff in the Fall of 1995. Mr. Montesanto accurately described the Buick's condition in his testimony.

After delivery, the Plaintiff contacted the Defendant to protest the Buick's condition. The Plaintiff testified that the Defendant refused to refund the purchase price or take any other remedial action in response to his complaints. On December 27, 1996, the Plaintiff then filed suit against the Defendant in the Circuit Court for Sevier County, Tennessee. That case was set to be tried

before a jury on August 24, 2000. The trial did not occur, however, because the Defendant filed his Chapter 7 Petition on the morning of trial.

By his present Complaint, the Plaintiff seeks damages for the purchase price of the Buick, the cost of transporting the vehicle to and from California, personal travel expenses to and from Tennessee for purposes of this litigation, along with court costs and attorney fees. He further seeks judgment that the Defendant's obligation to him is nondischargeable pursuant to 11 U.S.C.A. § 523(a)(2)(A) due to the misrepresentations regarding the Buick's condition, history, and value.

The Defendant counters that no damages are warranted in this case due to the Plaintiff's alleged failure to inspect the ?as is" vehicle prior to purchase. The Defendant also disclaims any personal liability, characterizing the auto sale as a transaction purely between the Plaintiff and the Defendant's corporation, American Classic Cars, Inc.

II

Section 523(a) of the Bankruptcy Code provides that a discharge under Chapter 7 does not discharge certain enumerated debts, including those ?for money . . . obtained by false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C.A. § 523(a)(2)(A) (West 1993 & Supp. 2001). Exceptions to discharge are strictly construed against the objecting creditor, who must prove each of the following elements by a preponderance of the evidence:

> (1) The debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth;

(2) The debtor intended to deceive the creditor;

(3) The creditor justifiably relied on the misrepresentation; and

(4) The creditor's reliance was the proximate cause of its loss.

See Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert), 141 F.3d 277, at 280-81 (6th Cir. 1998). Under § 523(a)(2)(A), damages caused by the misrepresentation, plus other costs and damages flowing from the misrepresentation, are nondischargeable. *See Cohen v. De la Cruz*, 118 S. Ct. 1212, 1218-19 (1998) (including consequential damages, court costs, treble damages, and attorney fees if otherwise authorized).

The court is satisfied that the Defendant failed to disclose significant facts regarding the Buick's condition and value. The omission of material facts constitutes misrepresentation. *See Coman v. Phillips (In re Phillips)*, 804 F.2d 930 (6th Cir. 1986), *abrogated on other grounds by Grogan v. Garner*, 111 S. Ct. 654 (1991). As both Mr. Coren and Mr. Montesanto testified that the Buick's problems would have been obvious to the seller, the court is further satisfied that the Defendant knowingly or recklessly misstated the Buick's condition and worth. A further example of material misrepresentation is the Defendant's assurance that the vehicle was a ?local car" from Tennessee when he in fact knew that he had purchased the car from New York.[3]

The next § 523(a)(2)(A) element, fraudulent intent, is measured by a subjective standard. *See Rembert*, 141 F.3d at 281. Subjective intent can be especially difficult to establish because parties will rarely admit an intention to defraud. *See id.* at 282. Such purpose may therefore be

[3] The Plaintiff testified the car's prior location was of critical importance to him because he was concerned about past exposure to salt and severe winter weather.

inferred from the totality of a defendant's conduct. *See Burleson Constr. Co. v. White (In re White)*, 106 B.R. 501, 505-06 (Bankr. E.D. Tenn. 1989).

There are obvious and numerous disparities between the Defendant's pre-sale representations and vehicle's actual condition. At trial, the Defendant's testimony showed him to be extremely knowledgeable regarding both the Buick Roadmaster model at issue and the necessary repair costs. Because the accuracy of the Defendant's representations is so grossly inconsistent with his knowledge and experience, the court has little difficulty inferring a fraudulent intent from the totality of the Defendant's actions.

Next, the justifiable reliance standard of § 523(a)(2)(A) looks to the individual plaintiff's knowledge, intelligence, and experience, combined with the facts of the particular case. *See Field v. Mans*, 116 S. Ct. 437, 444 (1995). A complainant's reliance need not conform to the standard of the reasonable person. *Id.* "[T]he matter seems to turn upon an individual standard of the plaintiff's own capacity and the knowledge which he has, or which may fairly be charged against him from the facts within his observation in the light of his individual case." *Id.* (quoting W. PROSSER, LAW OF TORTS § 108, at 717 (4th ed. 1971)).

A plaintiff is entitled to rely on factual representations "of such a character as to require some kind of investigation or examination on his part to discover their falsity." *Id.* (quoting 1 F. HARPER & F. JAMES, LAW OF TORTS § 7.12, at 581-83 (1956)). In the present case, while the purchase of an uninspected used car from a total stranger may have been less than prudent, the court finds that the Plaintiff was justified in his reliance on the Defendant's representations and was

not required under § 523(a)(2)(A) to inspect the car because the need for inspection was not obvious to him prior to the purchase and because he had no reason at that time to believe he was being deceived. *See id*. (citing PROSSER § 108, at 718). Further, **?**a defendant who has been guilty of conscious misrepresentation can not offer as a defense the plaintiff's failure to make the investigation or examination to verify the same." *Id*. (quoting 1 HARPER & JAMES § 7.12, at 581-83).

The court additionally finds that the Plaintiff's reliance on the Defendant's misrepresentation was the proximate cause of his loss. Accordingly, the Plaintiff has satisfied by a preponderance of the evidence the § 523(a)(2)(A) elements set forth by the Sixth Circuit. *See Rembert*, 141 F.3d at 280-81. The debt owed to the Plaintiff therefore is not discharged by the Defendant's bankruptcy.

III

The Defendant argues that he should have no personal liability in this matter because the transaction was purely between the Plaintiff and American Classic Cars, Inc. This defense is without merit.

The Defendant was president of American Classic Cars and 90% owner of the corporation's stock. As previously noted, the Defendant characterized himself as an automobile collector liquidating part of his collection and did not disclose the corporation's existence until after the purchase price had been paid in full. No documentation identifying the corporation as the seller or actual owner of the Buick was sent to the Plaintiff until *after* he had paid for the car.

The Plaintiff mailed payment by two checks, both of which were made out to the Defendant personally. Additionally, correspondences from the Defendant dated October 9, 1995, and December 4, 1995, are signed by the Defendant individually and make no reference to American Classic Cars. The first mention of the corporation was not until the blank sale and title paperwork were sent to the Plaintiff on February 6, 1996 - again, after the purchase price had been paid in full.[4] Even then, the Defendant was less than clear regarding his business activities and the Buick's ownership, explaining that "I have a Dealer's license for the purchase and sale of our rental vehicles. A while back for insurance purposes I placed the Buick into the inventory." This course of correspondence is entirely inconsistent with the claim that the Plaintiff knew of American Classic Cars' existence all along.

Generally, a corporation is an entity distinct and separate from its shareholders. *See Schlater v. Haynie*, 833 S.W.2d 919, 924 (Tenn. Ct. App. 1991). However, the corporate form may be disregarded, and liability placed upon the shareholders, under certain circumstances. *See Electric Power Bd. of Chattanooga v. St. Joseph Valley Structural Steel Corp.*, 691 S.W.2d 522, 526 (Tenn. 1985). Because American Classic Cars was incorporated in Tennessee, the court must apply Tennessee law in deciding whether to pierce the corporate veil. *See IBC Mfg. Co. v. Velsicol Chem. Corp.*, No. 97-5340, 1999 WL 486615, at *3 (6th Cir. July 1, 1999).

[4] In two of the photographs sent to the Plaintiff on October 9, 1995, the Buick bears a plate containing the words "American Classic Cars," but that alone is insufficient to alert the Plaintiff that he was actually purchasing the vehicle from a corporation.

The line between corporation and shareholder may be disregarded upon a showing that ?the corporation is a sham or dummy so that failure to disregard it would result in an injustice." *Electric Power Bd.*, 691 S.W.2d at 526. However, a shareholder is not liable for a corporation's debt merely because he controlled the enterprise. *See Schlater*, 833 S.W.2d at 924. Rather, a plaintiff must demonstrate that the shareholder used the corporation to ?commit fraud or wrong, to perpetuate the violation of a statutory or other positive legal duty, or [to commit] a dishonest and unjust act in contravention of third parties' rights." *Continental Bankers Life Ins. Co. v. Bank of Alamo*, 578 S.W.2d 625, 632 (Tenn. 1979). Factors useful in deciding whether to pierce the corporate veil include:

> (1) whether there was a failure to collect paid in capital;
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> (2) whether the corporation was grossly undercapitalized;
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> (3) the nonissuance of stock certificates;
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> (4) the sole ownership of stock by one individual;
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> (5) the use of the same office or business location;
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> (6) the employment of the same employees or attorneys;
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> (7) the use of the corporation as an instrumentality or business conduit for an individual or another corporation;
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> (8) the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another;
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> (9) the use of the corporation as a subterfuge in illegal transactions;
>
> (10) the formation and use of the corporation to transfer to it the existing liability of another person or entity; and
>
> (11) the failure to maintain arms length relationships among related entities.

Kinard v. Cook, 1991 WL 27378, at *4-5 (Tenn. Ct. App. Mar. 6, 1991) (quoting *FDIC v. Allen*, 584 F. Supp. 386, 397 (E.D. Tenn. 1984)).

At least in this transaction, American Classic Cars was nothing more than a conduit for the business dealings of the Defendant. The court is satisfied from the record before it that the Defendant represented himself as an automobile collector seeking to liquidate his collection. The Defendant did so in order to best facilitate the profitable sale of a vehicle that had perhaps sat in inventory a bit too long. Then, at the time of sale, then Defendant raised the mask of American Classic Cars to insulate himself from potential liability. This ?sham" use of the corporate form clearly warrants the imposition of personal liability on the Defendant. *See Electric Power Bd.*, 691 S.W.2d at 526.[5]

IV

The Plaintiff seeks the following damages: $13,800.00 representing the purchase price of the Buick[6]; $1,200.00 for initial shipping expenses to California; $995.00 shipping expenses to return the car to Tennessee for trial; travel expenses to and from Tennessee on three separate occasions,[7] and; court costs and attorney fees.

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[5] Additionally, the nondischargeability of this debt under § 523(a)(2)(A) is not affected by the Defendant's deposit of sales proceeds into the corporation's bank account. The funds at issue need not have been obtained for the Debtor personally. *See Mendez v. Cram (In re Cram)*, 178 B.R. 537, 541 (Bankr. M.D. Fla. 1995). If a corporate officer acquires money or property for the corporation through misrepresentation, ?the corporate form will not shield him" from a § 523(a)(2)(A) complaint. *Id.*

[6] The Plaintiff apparently wants the sale rescinded (as opposed to keeping the car and receiving the difference between the price paid and the value received).

[7] Because the Plaintiff offered no proof of the amount of his travel expenses, no damages will be awarded on this component of his claim. *See Grantham & Mann, Inc. v. American Safety Prods., Inc.*, 831 F.2d 596, 601 (6th Cir. (continued…)

The Bankruptcy Code does not expressly provide for attorney fee awards to prevailing creditors in § 523 actions. *See Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1167-68 (6th Cir. 1985); *cf.* 11 U.S.C.A. § 532(d) (West 1993) (providing for attorney fees for prevailing § 523(a)(2) debtor-defendants if the complaining creditor's position was not substantially justified). Generally, absent a statutory or contractual provision to the contrary, litigants are responsible for their own attorney fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 95 S. Ct. 1612, 1621 (1975); *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998). Because there is no such statutory or contractual provision in the present case, the court declines to award attorney fees to the Plaintiff.[8]

The court, after considering the testimony of the Plaintiff's experts and viewing the video, concludes that the Buick is, and was at the time purchased by the Plaintiff, essentially worthless. The Plaintiff is, therefore, entitled to damages totaling $15,995.00, which consists of the Buick's purchase price, $13,800.00, charges for transporting the Buick from Tennessee to California, $1,200.00, and charges for transporting the Buick from California to Tennessee for the state court trial, $995.00. Costs will also be taxed against the Defendant.

An appropriate judgment will be entered.

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[7](…continued)
1987).

[8] In his Complaint, the Plaintiff alleges violations of the Tennessee Consumer Protection Act, which authorizes attorney fees and, in certain cases, treble damages. However, this theory was not incorporated into the Pretrial Order and was neither briefed by the Plaintiff nor argued by him at trial. Accordingly, the Tennessee Consumer Protection Act cannot be applied to authorize attorney fees in this case. *See* FED. R. CIV. P. 16(e) (The Pretrial Order ?control[s] the subsequent course of the action."); FED. R. BANKR. P. 7016.

FILED: July 26, 2001

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 00-33384

KEVIN MATTHEW FLANNERY

Debtor

R. KELLEY GILLILAND

Plaintiff

v. Adv. Proc. No. 00-3140

KEVIN MATTHEW FLANNERY

Defendant

J U D G M E N T

For the reasons stated in the Memorandum filed this date containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Plaintiff, R. Kelley Gilliland, shall have and recover from the Defendant, Kevin Matthew Flannery, the sum of $15,995.00.

2. The judgment awarded the Plaintiff herein is nondischargeable under 11 U.S.C.A. § 523(a)(2)(A) (West 1993).

3. The Plaintiff is allowed to recover his costs pursuant to Rule 7054(b) of the Federal Rules of Bankruptcy Procedure.

ENTER: July 26, 2001

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE