

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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IN RE: CASE NO. 04-92943

Edith Christine Mitchell,

CHAPTER 7

Debtor.

JUDGE MASSEY

_____|

IndyMac Bank, F.S.B.,

Plaintiff,

v.

ADVERSARY NO. 04-6555

Edith Christine Mitchell,

Defendant.

_____|

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Defendant Edith Mitchell, who is the Debtor in this Chapter 7 case, owes Plaintiff IndyMac Bank, F.S.B. a debt for a residential construction loan. Plaintiff seeks a determination that this debt is nondischargeable pursuant to three subsections of section 523 of the Bankruptcy Code: 523(a)(2)(A), 523(a)(2)(B), and 523(a)(6). Plaintiff moves for summary judgment on all claims.

Pursuant to Fed. R. Civ. P. 56(c), made applicable by Fed. R. Bankr. P. 7056, a party moving for summary judgment prevails if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex*

Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party carries the initial burden of proof and must establish that no genuine factual issue exists. *Celotex*, 477 U.S. at 323; *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The moving party must point to the pleadings, discovery responses or supporting affidavits which tend to show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The court will construe the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987).

Section 523(a)(2) of the Bankruptcy Code provides in relevant part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from a 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;

(B) use of a statement in writing-

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive;

11 U.S.C. § 523(a)(2)(A) and (B).

The Supreme Court held in *Field v. Mans*, 516 U.S. 59, 73 (1995) that to prevail under section 523(a)(2)(A) a creditor must show it justifiably relied on the debtor's alleged

misrepresentation. Section 523(a)(2)(B) requires reasonable reliance on a false written statement concerning the debtor's financial condition. When proving either justifiable reliance or reasonable reliance, a plaintiff must first show he in fact relied on the false statement. To show this reliance-in-fact a creditor must prove that but for the allegedly false statement, it would not have made the loan or extended the credit.

Plaintiff claims in its Statement of Material Facts Not in Dispute that in making the loan it relied on allegedly false statements Defendant made in her loan application. Defendant denies Plaintiff's allegations. *Compare* Plaintiff's Statement of Material Facts Not in Dispute, ¶¶ 20-22, 25, 28,31 *with* Answer to Plaintiff's Motion for Summary Judgment, ¶¶ 20-22, 25, 28, 31. The only evidence before the Court on the issue of reliance is an affidavit from Edward L. Massey, one of Plaintiff's vice presidents.

In the affidavit, Mr. Massey states he is "familiar with the home construction loan to Edith Mitchell," but does not state he made the loan or was involved in making the loan. The affidavit contains the following relevant passages:

9. In determining whether to approve an individual for a residential construction loan, IndyMac relies upon the information contained in the loan application and the other supporting documentation. IndyMac requires the loan application to be signed by the individual averring the information is true and correct.

10. IndyMac approved a residential construction loan in the original amount of \$299,820.00 based upon the above representations and other representations made by Edith Mitchell at and during the time she applied for and obtained said loan.

11. One of the criteria that is relied upon by IndyMac in determining to fund a residential construction loan is whether the individual intends to reside in the residence and occupy the premises. If IndyMac had been informed that Edith Mitchell did not intend to occupy the premises, it would not have approved and made the residential loan to her. This information directly relates to IndyMac's assessment of the degree of risk it would be undertaking with respect the [sic] loan and collateral.

12. Another of the criteria that is relied upon by IndyMac in determining to fund a residential construction loan is the reported monthly income of the potential borrower. If IndyMac had been informed that this projected monthly income was incorrect it would not have approved and made the loan to her. This information directly relates to IndyMac's assessment of the degree of risk, namely the purported ability to repay the loan.

13. An additional criteria that is relied upon by IndyMac in determining to fund a residential construction loan is the appraised value of the home. If IndyMac had been advised of the correct appraised value of the home, it would not have approved the residential construction loan to Edith Mitchell. This information directly relates to IndyMac's assessment of the degree of risk and its corresponding security.

14. IndyMac relied upon these various representations of Edith Mitchell in analyzing and approving her residential home construction loan. Without these representations and IndyMac's reliance upon them, the residential loan to Edith Mitchell would not have been approved.

Plaintiff cannot prove reliance by showing (1) that its corporate policies require loans like the loan to Defendant to meet certain standards and (2) that those standards were not met. Banks often make loans through loan officers who fail to follow corporate policy. The factual predicates to the conclusion that a corporate lender relied on a statement made by the borrower include the following: (1) identification of the decision maker, the person or persons who approved the loan, (2) a showing that the decision maker was aware of the borrower's statement and (3) a showing that the decision maker would not have made the loan had the truth been known.

Mr. Massey may be of the opinion that Plaintiff relied on statements made by Defendant, but his conclusion that it relied on Defendant's statements would be accurate only if one assumes that the person or persons who approved the loan knew what the application stated and would have made a different decision had they known that the application was inaccurate in some material respect. The Court cannot presume facts not in evidence. Mr. Massey does not state

how he knows that IndyMac relied on the statements made by Defendant other than it is its policy to rely on such statements. He states that it would not have made the loan if it had been informed of facts different from those stated in the application, but again he does not show how he knows this except that such a course of action would comport with corporate policy. Thus, his affidavit can be read either as hearsay or as wishful thinking. Either way, Plaintiff has not shown that there is no dispute of fact as to what the persons who actually made the loan knew, what they based their decision on and what they would have done had they been presented with different representations. To prevail on its motion for summary judgment, Movant had to demonstrate that there is no disputed fact in a set of facts adding up to reliance, but it has not done so.

Plaintiff alternatively requests that the Court declare the debt to be nondischargeable under section 523(a)(6), which provides in pertinent part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from a debt-

...

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

11 U.S.C. § 523(a)(6).

Section 523(a)(6) deals with most, but not all, intentional torts resulting in an injury to the person or property of the plaintiff. IndyMac obviously is not asserting a personal injury. Nor has it explicitly identified the property injured by Defendant's alleged fraud. Examples of injuries to property interests covered by section 523(a)(6) include conversion of collateral for a loan, physical destruction of property and defamation (reputation being a property interest). All Defendant can say is the collateral it received was insufficient to pay the debt and as a

consequence it suffered a general financial injury: a loss on the loan it would not have made but for the alleged fraud.

Courts try to avoid an interpretation of one part of a statute that renders another part unnecessary. Plaintiff's theory that section 523(a)(6) covers injuries resulting from fraud would render section 523(a)(2) completely superfluous.

The rule against superfluities complements the principle that courts are to interpret the words of a statute in context. See 2A N. Singer, *Statutes and Statutory Construction* § 46.06, pp. 181-186 (rev. 6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (footnotes omitted)).

Hibbs v. Winn, 542 U.S. 88, 124 S.Ct. 2276, 2286 (2004). In *Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 974 (1998), the Court declined to extend the reach of section 523(a)(6) to intentional torts dealt with in other subsections of section 523, stating

Furthermore, "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 2189, 100 L.Ed.2d 836 (1988). Reading § 523(a)(6) as the Kawaauhaus urge would obviate the need for § 523(a)(9), which specifically exempts debts "for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance." 11 U.S.C. § 523(a)(9); see also § 523(a)(12) (exempting debts for "malicious or reckless failure" to fulfill certain commitments owed to a federal depository institutions regulatory agency).

Id. at 62 (footnote omitted). Section 523(a)(6) does not pertain to debts for general financial injury caused by fraud because such debts are covered by section 523(a)(2).

For these reasons, it is

ORDERED that Plaintiff's motion for summary judgment is DENIED.

Dated: August 16, 2005.


JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE