UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re	)	
	)	
RANDOM ROGERS BURNETT AND BROP KELLY BURNETT	)	Case No. 6:09-bk-01279-KSJ Chapter 7
	)	
Debtors.	)	
	)	
JAMES R. THERRIEN	)	
	)	
Plaintiff,	)	Adversary No. 6:09-ap-00077
vs.	)	
	)	
RANDOM ROGERS BURNETT,	)	
	)	
Defendant.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff, James R. Therrien, agreed to sell certain real property to Barry Larkins, a Volusia County man who runs a landscaping company and also invests in real estate. The closing never occurred. Mr. Therrien now asserts substantial claims against everyone involved in the transaction including the debtor, Random Burnett, who had two roles in the transaction. Initially, the debtor served as legal counsel to Mr. Larkins. At some later point he also offered to lend Mr. Larkins the needed purchase monies. In this adversary proceeding, Mr. Therrien argues that any debt due to him by the debtor is not dischargeable under § 523(a)(2)(A) of the Bankruptcy Code[1] (Count 2) and that he should obtain relief from the automatic stay to return to state court to pursue his claims against the debtor (Count 1). After a lengthy trial, the Court finds in favor of the debtor and against Mr. Therrien.

[1] Unless otherwise stated, all references to the Bankruptcy Code refer to Title 11 of the United States Code.

On July 26, 2004, Mr. Therrien and Mr. Larkins signed a simple sales contract together with an addendum.[2] The contract was drafted by Frederic Rugg, a real estate agent. The contract was poorly drafted. As Judge Pleus, with the Fifth District Court of Appeals, later noted in his dissenting opinion, "If you were to sit ten judges in a room and ask them to interpret the contract, you would likely get ten different interpretations of what was meant."[3] No attorney, including the debtor, was involved in the drafting, editing, or execution of the contract. The debtor had absolutely no responsibility for any of the contractual ambiguities that is causing this litigation six years later.

Rather, in November 2004, months after the contract was signed and shortly before the scheduled closing on January 26, 2005, Mr. Larkins hired the debtor, his long-time attorney. The debtor was retained primarily to obtain title insurance and to otherwise prepare needed closing documents. The debtor consulted with Mr. Larkins and started the work to obtain the needed title insurance.

The debtor secured a proposed Commitment for Title Insurance issued by Commonwealth Land and Title.[4] The debtor was unable to testify as to what exact date he received the initial title policy from Commonwealth Title, and, for the purposes of this ruling, the Court assumes he got it on or about November 22, 2004. The policy contained significant exceptions, including one that would have required the parties to cure certain title defects.[5] It also required a formal survey. For unknown reasons, the debtor did not notify the other parties involved in the transaction about the exception until January 11, 2005, when he sent Mr. Rugg, the real estate broker, a copy of Commonwealth Title's proposed Commitment for Title.[6] The

[2] Plaintiff's Ex. No. 2.
[3] Plaintiff's Ex. No. 4.
[4] Plaintiff's Ex. No. 3A.
[5] Mr. Therrien had obtained his interest in the real property at a forced sale. He held only a Sheriff's Deed. Commonwealth Title was insisting that the parties either file a formal quiet title action in the Florida state courts and name every prior title holder or obtain quit claim deeds from these parties in order to avoid any future title problems. Any attempt to comply with Commonwealth Title's request would take time and necessarily delay the closing.
[6] Plaintiff's Ex. No. 3A.

debtor wrote in a letter to Mr. Rugg that Mr. Therrien was responsible for satisfying the exception, and asked that Mr. Rugg send the information to Mr. Therrien.[7] The letter also referenced the provision requiring a survey, but did not state Mr. Therrien was responsible for obtaining a survey.[8]

Because the exception required substantial legal work and cost, on January 20, 2005, the debtor wrote to another title insurance company, Chicago Title Insurance Company, asking them to remove the exception.[9] At this point, just days before the scheduled closing, Mr. Therrien belatedly hired his own lawyer, Robert Kramer. The debtor worked to keep Mr. Therrien, Mr. Kramer, and his client, Mr. Larkins, informed of his efforts to obtain different title insurance. He ultimately succeeded. On January 24, 2005, Chicago Title agreed to issue the policy *without* the exception requiring the quiet title action.[10]

Unfortunately for all parties involved, no title insurance was ever purchased (or needed) because the closing never occurred. On January 26, 2005, the scheduled closing date, Mr. Larkins, through his selected purchasing entity, Westview Place, LLC, submitted a proposed note and mortgage obligating Mr. Therrien to finance the purchase.[11] Mr. Therrien did not accept the note and mortgage tendered by Mr. Larkins. Mr. Therrien did not have enough funds available to pay off the multiple mortgages already encumbering the property, so the only way he could deliver clear title was if Mr. Larkins paid the purchase price in cash. The confusion concerning whether the sale was for cash or via seller financing is attributable to the ambiguities in the sales contract.

Shortly after the failed closing, the buyer sued Mr. Therrien seeking specific performance.[12] The debtor initially acted as Mr. Larkins' lawyer in the litigation, but later

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[7] *Id.*
[8] *Id.*
[9] Plaintiff's Ex. No. 3B.
[10] Plaintiff's Ex. No. 3D.
[11] Plaintiff's Ex. No. 3E.
[12] Plaintiff's Ex. No. 1.

withdrew from the case.[13] Mr. Larkins was successful at the trial court level, and the state judge ordered a rescheduled closing to occur in March 2006. It was at this point that the debtor offered, through a related entity, Black & White Investment Company, LLC, to supply financing of $500,000 to Mr. Larkins.[14] Now, however, Mr. Therrien was unwilling to sell the property. He instead chose to appeal the trial court order. Again, the closing did not occur.

Mr. Therrien won his appeal.[15] The Fifth District Court of Appeals concluded that Mr. Larkins breached his obligation under the contract because he failed either to pay the purchase price or to obtain an extension of the closing date. Mr. Therrien had no obligation to supply seller financing or to accept Mr. Larkins' proffered note and mortgage. Therefore, Mr. Larkins failed to prove an essential element entitling him to specific performance—he failed to prove that he "was ready, willing and able to perform the contract." Judgment was entered in favor of Mr. Therrien.

Mr. Therrien then filed a state court action against Mr. Larkins, Mr. Rugg, Rugg's real estate company, and the debtor.[16] Mr. Therrien asserted only one count against the debtor, Count IV, for negligence, asserting that the debtor failed to timely notify the seller of the troublesome exception Commonwealth Title sought. The allegation is that the debtor deliberately delayed notifying the seller of the title insurance problem in order to "drag out the closing to a later date upon which he would be the lender for the [b]uyer."[17]

On February 5, 2009, the debtor and his wife filed this Chapter 7 bankruptcy case.[18] In this adversary proceeding, Mr. Therrien seeks (1) to modify the automatic stay to continue litigating his damages claim against the debtor in the pending state court action, and (2) a finding

[13] Mr. Burnett withdrew from any representation of Mr. Larkins in this state court action almost immediately. He realized that he would be a key witness in the case and could not act as both a witness and as an attorney. The debtor helped Mr. Larkins find a new lawyer at Rice & Rose, P.A.
[14] Plaintiff's Ex. No. 5.
[15] Plaintiff's Ex. No. 4.
[16] Debtor's Ex. No. 1.
[17] Debtor's Ex. No. 1, paragraph 52.
[18] Mr. and Mrs. Burnett received a discharge on October 30, 2009 (Doc. No. 47).

that any judgment he receives is not dischargeable under § 523(a)(2)(A). Because none of the other defendants in the pending state court action are involved in a bankruptcy case, Mr. Therrien may continue the litigation against them without restriction. The only issue is whether he can continue to assert a damage claim against the debtor.

The primary purpose of bankruptcy law is to provide an honest debtor with a fresh start by relieving the burden of indebtedness.[19] Exceptions to discharge are construed strictly against the creditor and liberally in favor of the debtor.[20] The party objecting to the debtor's discharge has the burden of establishing that the debtor is not entitled to receive a discharge by the preponderance of the evidence.[21] Accordingly, the plaintiff bears the burden of proving by a preponderance of the evidence that any debt owed to him by the defendant should be excepted from discharge.

Under § 523(a)(2)(A), a debtor cannot discharge a debt to the extent the debt is obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."[22] To establish fraud under § 523(a)(2)(A), a plaintiff must prove: (i) the debtor made a false representation to deceive the creditor; (ii) the creditor relied on the misrepresentation; (iii) the reliance was justified; and (iv) the creditor sustained a loss as a result of the misrepresentation.[23] Mr. Therrien has failed to meet any element of this test.

Mr. Therrien's argument has two components. First, he alleges the debtor intentionally tried to delay the closing. Mr. Therrien argues a delay benefited the debtor because it allowed his company, Black & White Investments, to provide financing for the deal, and let his client,

[19] *Perez v. Campbell*, 402 U.S. 637 (1971); *In re Price*, 48 B.R. 211, 213 (Bankr. S.D. Fla. 1985); *Matter of Holwerda*, 29 B.R. 486, 489 (Bankr. M.D. Fla. 1983).
[20] *In re Cox*, 150 B.R. 807, 809 (Bankr. N.D. Fla. 1992) (*citing In re Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986); *Kiester v. Handy (In re Handy)* 164 B.R. 355 (Bankr. M.D. Fla. 1994)).
[21] *Grogan v. Garner*, 498 U.S. 279 (1991); *In re Chalik*, 748 F.2d 616 (11th Cir. 1984); *In re Metz*, 150 B.R. 821 (Bankr. M.D. Fla. 1993).
[22] 11 U.S.C. § 523(a)(2)(A).
[23] *SEC v. Bilzerian (In re Bilzerian)*, 153 F.3d 1278, 1281 (11th Cir. 1998).

Mr. Larkins, look for another buyer so he could "flip" the property without having to pay more than the deposit money already paid. Second, Mr. Therrien alleges the debtor misrepresented to Mr. Therrien that he, and not Mr. Larkins, was responsible for obtaining a survey and satisfying other exceptions in the proposed Commonwealth Title policy.

Mr. Therrien's intentional delay argument has three parts: (i) the debtor failed to timely notify him of the troublesome exception in the title insurance commitment in order to delay the closing; (ii) the debtor failed to obtain a survey needed to close the sale; and (iii) the debtor acted improperly in agreeing to serve as a lender for Mr. Larkins at the rescheduled closing ordered by the state trial court for March 2006.

Without doubt, the closing did not occur as scheduled on January 26, 2005. Moreover, the Fifth District Court of Appeals already has held that the closing did not occur because Mr. Larkins breached his obligations under the sales contract.[24] Mr. Therrien indeed may have damages claims against Mr. Larkins, Mr. Rugg, or others. However, as to the debtor, Mr. Therrien's arguments fail.

Mr. Therrien first argues the debtor deliberately delayed the closing by failing to timely notify him of the title insurance exception. The argument is that the Commonwealth Title policy had an effective date of November 22, 2004, but that the debtor waited until January 11, 2005, two weeks before the closing, to inform Mr. Therrien of the problem. Even assuming that the debtor received the initial title policy from Commonwealth Title on or about November 22, 2004, the fact that he waited six weeks to send it to Mr. Therrien is irrelevant. Failing to timely notify Mr. Therrien of the title policy exception does not constitute any type of intentional misrepresentation.

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[24] Plaintiff's Ex. No. 4.

In fact, the debtor affirmatively solicited another offer from Chicago Title[25] rather than simply accepting a policy with the exception required by Commonwealth Title.[26] The new proposed policy removed the exception.[27] Therefore, by January 24, 2005, two days before the scheduled closing, the debtor had obtained a title insurance commitment that would not delay the closing.

Second, Mr. Therrien argues the debtor somehow acted fraudulently by failing to obtain a survey. The debtor is a lawyer. He is not a surveyor. He was not the purchaser of the property. He is not responsible if his client failed to obtain the needed survey. The debtor's failure to obtain a survey is not a misrepresentation. Again, Mr. Therrien may have a damages claim against the buyer, Mr. Larkins, for failing to timely obtain the survey, but the claim does not lie against his attorney, the debtor.

Third, Mr. Therrien argues the debtor acted improperly by agreeing to lend monies to Mr. Larkins at the second closing set for March 2006, and that he helped delay the closing to put himself in the position of financing the transaction. The evidence is undisputed that the debtor withdrew from any type of attorney-client relationship with Mr. Larkins relating to this transaction when he offered to lend Mr. Larkins $500,000. However, even if he had not withdrawn as Mr. Larkins' attorney when he offered to finance the sale, Mr. Therrien simply fails to state any type of misrepresentation or fraud. The debtor changing his role from being Mr. Larkins' lawyer to offering to lend money to Mr. Larkins did not result in any untrue statements or fraudulent conduct. An attorney offering to lend money to his client does invoke ethical concerns. And, although the debtor is required to comply with all ethical obligations he owes to his client Mr. Larkins, Mr. Therrien has failed to demonstrate why he is a beneficiary of this confidential attorney-client relationship between Mr. Larkins and the debtor. The debtor

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[25] The debtor, an attorney since 1976, primarily practiced real estate law. He was a title agent for both Commonwealth Title and Chicago Title, and perhaps other title insurance companies.

[26] Plaintiff's Ex. No. 3B.

[27] Plaintiff's Ex. No. 3D.

was not serving as Mr. Therrien's legal counsel and was not offering him legal advice. Rather, Mr. Therrien had his own lawyer, Mr. Kramer, to advise him during this transaction.

The second component of Mr. Therrien's argument is that the debtor misrepresented to him that he was responsible for satisfying certain requirements of the Commonwealth Title policy, including obtaining a survey. This theory also fails. The debtor did send a letter to Mr. Therrien stating that Mr. Therrien was responsible for addressing some of Commonwealth Title's requirements.[28] It did not state that Mr. Therrien was responsible for obtaining a survey, though the letter is somewhat unclear.[29]

But even if the Court construed the letter to state that Mr. Therrien had the obligation to get a survey, Mr. Therrien has not shown this to be an untrue statement. The sales contract required Mr. Larkins to pay for "all engineering," but never defined what "engineering" included.[30] Was the buyer or the seller responsible for getting the survey? The Fifth District Court of Appeals did not answer this question when it ruled that Mr. Larkins breached the contract. Mr. Therrien has not shown the debtor's letter discussing the survey was incorrect, nor that he wrote it intending to mislead Mr. Therrien.

In sum, Mr. Therrien has failed to establish that the debtor made any type of false misrepresentation with the intent of deceiving him or to prove any of the four elements required by § 523(a)(2)(A). Mr. Therrien, understandably, is upset that the debtor's client, Mr. Larkins, breached the sales contract. Mr. Therrien may continue to seek damages against Mr. Larkins or others; however, he has lost the ability to pursue any further relief against the debtor. He has failed to establish any basis to except any debt that the debtor may owe him from the discharge entered in this case.

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[28] Plaintiff's Ex. No. 3A.

[29] The letter said Mr. Therrien was responsible for exceptions 3 through 10, and that a lien affidavit described in exception 14 would be executed at closing. In fact, exception 14 spelled out the obligation to provide a survey. Another exception, exception 15 addresses the required lien affidavit. The letter did not state Mr. Therrien was required to provide a survey. Plaintiff's Ex. No. 3A.

[30] Plaintiff's Ex. No. 2.

Because any debt due by the debtor to Mr. Therrien is discharged, he also has failed to establish any basis to modify the automatic stay. Section 362(d)(1) allows relief from the automatic stay "for cause." The Code does not define "for cause," so courts decide on a case-by-case basis by examining the totality of the circumstances, including balancing the prejudice to the debtor against the hardship to the movant if the stay remains in effect.[31] The decision to modify the stay is within the Bankruptcy Court's discretion, and the movant has the burden to establish "cause."[32]

Mr. Therrien has not met his burden. He seeks a judgment for damages against the debtor in the state court action, but the debtor received a discharge on October 30, 2009. Mr. Therrien has not established that a judgment from that litigation should be excepted from discharge. Allowing the state court litigation to continue against the debtor would not accomplish Mr. Therrien's goals, but it would impose a burden on the debtor. Mr. Therrien has not shown any reason or "cause" why the Court should modify the stay.

In conclusion, the Court finds that Mr. Therrien has failed to prove any reason why the debtor's liability to him, if any, is excepted from discharge or why he is entitled to relief from the automatic stay. Put plainly, the automatic stay and discharge injunction prohibit Mr. Therrien from ever seeking any recovery from the debtor. A separate final judgment in favor of the debtor and against Mr. Therrien and consistent with these Findings of Fact and Conclusion of Law shall be entered.

DONE AND ORDERED on September 29, 2010.

KAREN S. JENNEMANN
United States Bankruptcy Judge

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[31] *In re Aloisi*, 261 B.R. 504, 508 (Bankr. M.D. Fla. 2001).
[32] *In re Dixie Broad Inc.*, 871 F.2d 1023, 1026 (11th Cir. 1989); *In re Coachworks Holdings*, 418 B.R. 490, 492 (Bankr. M.D. Ga. 2009).

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