UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:15-bk-005370-FMD
Chapter 7

Paul Brian Manke,

Debtor.
_____/

James Shull,

Plaintiff,

v. Adv. Pro. No. 9:16-ap-269-FMD

Paul Brian Manke

Defendant.
_____/

ORDER DENYING
MOTION FOR RECONSIDERATION

Plaintiff has moved for reconsideration of this Court's Order Granting Defendant's Motion for Nonsuit. For the reasons set forth below, the Court will deny the motion.

I. FACTUAL BACKGROUND

Defendant, Paul Manke ("Defendant"), filed a Chapter 7 bankruptcy case but did not list Plaintiff, James Shull ("Plaintiff"), as a creditor. When Plaintiff learned of the bankruptcy, he filed a complaint to except his debt from discharge under 11 U.S.C. § 523(a)(2)(A).[1] The Court conducted a trial on March 23, 2018. The following facts were established in Plaintiff's case in chief.

In July of 2014, Plaintiff wanted to a build a pool and spa at his home in Lee County, Florida. So he contacted Venetian Pools and Spas, Inc. ("Venetian Pools") and spoke with John Varkis ("Varkis").

Venetian Pools is a Florida corporation. As of September 2014, Varkis owned 90% of the stock in Venetian Pools, and Defendant owned the remaining 10%.[2] Defendant was Venetian Pools' president, and Varkis was its Chief Financial Officer. Defendant was licensed as a pool contractor and was the qualifying license holder for Venetian Pools. Defendant's father had started Venetian Pools, and Defendant had worked for his dad all of his life. Defendant's job responsibilities included making sure that all relevant codes, statutes, and ordinances were followed and conducting inspections of pools under construction. On direct examination, Defendant acknowledged being Varkis' "business partner" and that they both had time and money invested in the business and would have shared in the business' profits. However, Defendant testified there were no profits.

Shortly after speaking with Varkis, Plaintiff contracted with Venetian Pools to construct his pool. Under the written contract (the "Contract"),[3] the price for the pool was $40,000.00, with this payment schedule:

20% Initial Down Payment	$8,000.00
15% payment upon excavation	$6,000.00
35% payment upon installation of pool shell	$14,000.00
20% payment upon pouring of pool deck	$8,000.00
8% payment upon pool start up	$3,200.00
2% payment upon completion	$800.00

[1] Under 11 U.S.C. § 523(a)(3) debts that are of the kind specified in § 523(a)(2)(4) or (6) that are not listed by the debtor in time for the creditor to timely file a request for determination of dischargeability of the debt are excepted from discharge.

[2] There is no evidence of Defendant's and Varkis' ownership interests in Venetian Pools as of July 2014.

[3] Plaintiff's Exhibit 1.

Upon execution of the Contract in July 2014, Plaintiff paid the initial deposit of $8,000.00. The funds were deposited into a bank account owned by Avion Holdings, LLC, an entity owned and controlled by Varkis but not related to Venetian Pools. Several months passed with no work being done on the pool construction.

On November 19, 2014, Varkis emailed Plaintiff. Varkis stated that two phases of construction, the excavation and the pool shell, would be completed by that Friday – three days later.[4] In the email, Varkis represented that upon completion of these two phases, 70% of the pool construction would be completed. Varkis requested the payment of draws under the Contract for the "Dig Draw" and the "Pool Shell Draw" totaling $20,000.00. In the email, Varkis also mentioned that the $20,000.00 should be sent to Venetian Pools' bank account, stating "[P]lease make the payment to Chase Bank, I know you had a question about the account the last time, [s]o I am including the Venetian Pools and Spas account at Chase Bank." The email included a bank account number and routing number.

Plaintiff testified that in reliance on Varkis' representation that the excavation and the pool shell would be completed within the next few days, he paid Venetian Pools the $20,000.00 requested by Varkis — before the work was completed. There was no evidence that Defendant knew of Varkis' statements to Plaintiff or that Defendant himself received any of the $28,000.00 paid by Plaintiff to Venetian Pools, including the $8,000.00 that had been deposited into the Avion Holdings account.

Unfortunately, Venetian Pools did not perform the work as Varkis promised; Plaintiff was left with a partially excavated pool. Not surprisingly, Varkis failed to answer Plaintiff's repeated phone calls. Once, Plaintiff called Venetian Pools and asked to speak with Defendant, but his call was not returned. Ultimately, Plaintiff terminated the Contract and completed the pool construction with another contractor, incurring even more expense.

At the close of Plaintiff's case, Defendant moved for a directed verdict,[5] which in a non-jury trial is a motion for judgment under Federal Rule of Civil Procedure 52(c). The Court granted the motion, finding that although Varkis' misrepresentations could be imputed to Venetian Pools, there was no basis to impute Varkis' fraud to Defendant individually.[6]

In his Motion for Reconsideration,[7] Plaintiff argues this Court erred when it ruled that no partnership between Defendant and Varkis existed. Plaintiff contends that Defendant's trial testimony that Varkis was his "business partner" and would have shared in any of Venetian Pools' profits or losses is sufficient to establish a partnership under the Florida Revised Uniform Partnership Act, and, therefore, to impute liability for Varkis' misrepresentations to Defendant. Plaintiff also contends that Florida courts have recognized the existence of partnerships notwithstanding the form of the business entity.

II. ANALYSIS

A. Standard for Motion for Reconsideration

To prevail on a motion for reconsideration under Federal Rule of Civil Procedure 59(e), incorporated by Federal Rule Bankruptcy Procedure 9023, the moving party must demonstrate that the court committed clear legal error in its ruling that would result in a manifest injustice, that there has been an intervening change in controlling law, or that new evidence is available that could not have been presented prior to the entry of judgment. Although Plaintiff does not state the legal ground for his motion for reconsideration, he appears to contend that the Court made a clear error in its ruling that would result in manifest injustice.

Courts have discretion in whether to grant a motion for reconsideration; the court's denial of a motion for reconsideration is reviewed for an abuse of discretion.[8] A motion is appropriate where the court has patently misunderstood a party or made

[4] Plaintiff's Exhibit 2.
[5] Doc. No. 92.
[6] Doc. No. 93.
[7] Doc. No. 95.
[8] *Alexander v. HarperCollins Publishers, Inc.*, 132 F. App'x 250, 251 (11th Cir. 2005).

an error not of reasoning but of apprehension.[9] "Such problems rarely arise and the motion to reconsider should be equally rare."[10]

B. Plaintiff's § 523(a)(2)(A) Claim

11 U.S.C. § 523(a)(2)(A) excepts from discharge debts 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 elements of a § 523(a)(2)(A) claim are: (1) the debtor made a false representation with the intention of deceiving the creditor; (2) the creditor relied on the false representation; (3) the reliance was justified; and (4) the creditor sustained a loss as a result of the false representation.[11]

Even if Plaintiff can establish all the elements of a claim under § 523(a)(2)(A) as they relate to Varkis,[12] because Plaintiff had no dealings whatsoever with Defendant, his § 523(a)(2)(A) claim depends upon whether Varkis' alleged fraudulent representations may be imputed to Defendant.

C. Imputed Liability

Generally, an individual shareholder or corporate officer is not liable for the acts of the corporation or other officers or shareholders unless that shareholder or officer was personally involved in the fraudulent activity.[13] Insulation from personal liability is one advantage to the corporate structure.[14] This is unlike a partnership, where the wrongful acts of one partner may be imputed to another partner even if the partner was not personally involved.

The United States Supreme Court in *Strang v. Bradner*[15] recognized a court's ability to impute liability to an innocent party who did not actively participate in the wrongdoing if the party would be vicariously liable under agency law for a debt incurred through the fraud of his partner or agent. And bankruptcy courts have imputed the fraudulent acts of partners and agents on debtors in cases under § 523(a)(2)(A).[16]

But *Strang* and its progeny do not apply here. The Eleventh Circuit Court of Appeals, in *In re Villa*,[17] declined to extend *Strang*'s rationale beyond its roots in agency law. The *Villa* court found that "a debt may be excepted from discharge when the debtor personally commits actual, positive fraud, and also when such actual fraud is imputed to the debtor under agency principles."[18] The latter analysis requires the court to consider whether the debtor would be jointly and severally liable with the wrongdoing party.

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[9] *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002).

[10] *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d at 1369.

[11] *Stewart Title Guaranty Company v. Denise Roberts-Dude (In re Denise Roberts-Dude)*, 697 F. App'x 615, 619 (11th Cir. 2015).

[12] As the Court has found that fraudulent misrepresentations cannot be imputed to Defendant the Court need not address whether Plaintiff established all the elements of a § 523(a)(2)(A) claim.

[13] *First New Mexico Bank v. Bruton (In re Bruton)*, 2010 WL 2737201, at *5-6 (Bankr. D.N.M. Jul. 12, 2010); *White v. Wal-Mart Stores, Inc.*, 918 So. 2d 357, 358 (Fla. 1st DCA 2005)("officers or agents of corporations may be individually liable in tort if they commit or participate in a tort, even if their acts are within the course and scope of their employment.").

[14] *Toyota Tsusho Am., Inc. v. NSC Alliance LLC*, 2010 WL 556316 (S.D. Fla. Feb. 11, 2010) ("[o]ne purpose of the corporate fiction is to insulate stockholders from liability for corporate acts[,]")(quoting *Adams v. Brickell Townhouse, Inc.*, 388 So.2d 1279, 1280 (Fla. 3d DCA 1980).

[15] 114 U.S. 555 (1885).

[16] *BancBoston Mtg. Corp. v. Ledford (In re Ledford)*, 970 F.2d 1556-62 (6th Cir. 1992); *Impulsora Del Territorio Sur, S.A. v. Cecchini (In re Cecchini)*, 780 F.2d 1440, 1443 (9th Cir. 1986); *Moore v. Gill (In re Gill)*, 181 B.R. 666, 673-74 (Bankr. N.D. Ga. 1995); *Terminal Builder Mart of Piedmont, Inc. v. Warren (In re Warren)*, 7 B.R. 571, 573 (Bankr. N.D. Ala. 1980); *W-V Enters., Inc. v. Croft (In re Croft)*, 150 B.R. 955, 958 (Bankr. E.D. Mo. 1993); *Love v. Smith (In re Smith)*, 98 B.R. 423, 426 (Bankr. C.D. Ill. 1989); *Citizens State Bank of Maryville v. Walker (In re Walker)*, 53 B.R. 174, 179 (Bankr. W.D. Mo. 1985).

[17] 261 F.3d 1148, 1151 (11th Cir. 2001).

[18] *Id.* at 1151.

Outside of traditional partnership or agency relationships, numerous courts have declined to impute fraudulent representations to an innocent debtor. In *In re Bruton*,[19] the creditor sued a husband and wife, codebtors and the coowners of a limited liability company ("LLC"), for a determination of non-dischargability under § 532(a)(2)(A) arising from misrepresentations made in connection with the sale of the LLC's business. The evidence at trial was that the wife had made no representations to the creditor regarding the sale and had not actively participated in the business at all.

The court in *Bruton* refused to impute the alleged fraud on the wife finding she had not actively participated in the wrongdoing. While the court acknowledged that under certain circumstances liability may be imputed to parties who did not actively participate in the alleged wrongdoing, it held those circumstances are limited to partnerships or agency relationships and do not extend to limited liability companies or corporations. The court reasoned that the law surrounding limited liability companies and corporations differs from partnership law in that limited liability companies and corporations shield their principals from wrongdoing if they did not engage or participate in the wrongful act themselves.

Likewise, *In re Daviscourt*,[20] husband and wife codebtors owned a corporation. A creditor sued to except its debt from discharge under § 523(a)(2) for alleged misrepresentations made by the husband. As with *Bruton*, the bank sought to impute liability on the wife under agency principles relying on cases that involved partnerships, not corporations. The bankruptcy appellate panel affirmed the bankruptcy court's finding that the alleged fraud of the husband could not be imputed to the wife merely because she was a 50% owner of the corporation as she had not participated in any misrepresentations to the bank. In *Daviscourt*, the court similarly emphasized the significant distinction between partnerships and corporations for vicarious liability purposes.[21]

D. Florida's Revised Uniform Partnership Act Does Not Control.

Plaintiff correctly states that under Florida's Revised Uniform Partnership Act, Chapter 620, Florida Statutes (the "Partnership Act"), a partnership exists when two or more persons carry on as coowners a business for profit. Section 620.8202(1) provides for the formation of a partnership, stating:

> *Except as otherwise provided in subsection (2),* the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership.[22]

But § 620.8202(2) expressly provides that "[an] association formed under a statute, other than this act, a predecessor statute, or a comparable law of another jurisdiction is not a partnership under this act." The Uniform Comment to § 620.8202 explains that subsection (2) was drafted to clarify that business associations, including statutory organizations such as corporations, that are organized under other statutes are not partnerships. The Uniform Comment explains that a general partnership is the residual form of for-profit business organizations and exists only if another form of business association does not. Here, Venetian Pools, a Florida corporation, was incorporated under the Florida Business Corporation Act, Chapter 607, Florida Statutes. Because Venetian Pools is "an association formed under a statute" other than the Partnership Act, by definition, Venetian Pools is not a partnership.

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[19] 2010 WL 2737201, at *5-6 (Bankr. D.N.M. Jul. 12, 2010).

[20] 353 B.R. 674 (B.A.P. 10th Cir. 2006).

[21] *See also RecoverEdge, L.P. v. Pentecost*, 44 F.3d 1284, 1287 (5th Cir. 1995); *Porter Capital Corp. v. Campbell (In re Campbell)*, 2008 WL 4682785, at *4-5 (Bankr. E.D. Tenn. Oct. 21, 2008).

[22] (emphasis supplied).

E. There Is No Basis to Recognize a Partnership Between Debtor and Varkis.

Plaintiff also argues Florida courts have recognized the existence of a partnership notwithstanding the form of the business entity. Plaintiff's reliance on the cases he cites to support his position is misplaced because the cases were decided in the context of joint ventures, which, under Florida law, is a form of partnership.[23]

For example, in *Donahue v. Davis*,[24] a dispute arose between the parties to a joint venture. Four parties agreed to purchase a piece of real property and sell it for a profit, forming a corporation for this purpose. One party represented to the others that he had paid $15 per acre to acquire the property, although he only held an oral understanding with the property owner to purchase it at a lower price and intended to make a secret profit on the deal. The Florida Supreme Court found that a joint venture existed between the parties for purposes of purchasing property; the fact that a corporation was formed to carry out this purpose did not change the essential nature of the parties' relationship. Because a joint venture is governed by the same principles as partnerships, the court found that the party owed fiduciary duties of loyalty and honesty to his co-adventurers and had to disgorge his earnings from the venture due to his material misrepresentations regarding the purchase price.

Similarly, in *Sheridan Healthcorp, Inc. v. Amko*,[25] one member of a joint venture sued the others for breach of fiduciary duty. A group of doctors entered into a joint venture to provide medical services to uninsured patients at a hospital and formed a corporation for the purpose of contracting with the hospital. When the corporation terminated the employment of one of the doctors, he sued the others as members of the joint venture for breach of fiduciary duty. The trial court granted the defendants' motion for summary judgment holding that to the extent there was a joint venture, it was terminated upon the formation of the corporation. The trial court concluded that the defendant doctors were protected by the business judgment rule and had no individual liability. On appeal, the Fourth District Court of Appeal reversed, holding there were disputed issues of fact as to the existence and formation of the joint venture and that the existence of the corporation did not necessarily end the joint venture if its purpose was not merely to create the corporation.

In both *Donahue* and *Sheridan Healthcorp*, the courts addressed disputes between shareholders, not the claim of a third party who sought to impute personal liability against a shareholder for the misrepresentations of another shareholder.

Likewise, Plaintiff's argument that the "legal doctrine that partnership law can be applied to other business entities"[26] can be inferred from the bankruptcy court's ruling *In re Nascarella*[27] is also misplaced. In *Nascarella*, the debtor and his son had no formal business relationship. But the debtor owned an LLC and authorized his son to use the LLC to sell wine owned by son, not the debtor. A purchaser of the wine sued the son, the LLC, and the debtor for misrepresentations about the quality of the wine sold by the son and obtained a default judgment against them. When the debtor filed for bankruptcy, the purchaser sought to have the judgment excepted from discharge under § 523(a)(2)(A).

The bankruptcy court found there was no partnership between the debtor and his son. The court held that although the son may have had apparent authority as the LLC's agent, such that liability could be imputed against the LLC, the son was not acting as the debtor's agent and liability could not be imputed against the debtor. *Nascarella* recognized that an LLC differs from partnerships and, unlike partnerships, the LLC form of ownership generally protects its shareholders or members from liability unless "they actively participated in the wrongful act."[28]

Plaintiff's argument that "[i]f partnership law could not be applied to an LLC, then the court in *In*

[23] *Burger v. Hartley*, 896 F. Supp. 2d 1157 (S.D. Fla. 2012).
[24] 68 So. 2d 163 (Fla. 1953).
[25] 993 So. 2d 167 (Fla. 4th DCA 2008).
[26] Doc. No. 95, p. 2.
[27] 492 B.R. 327, 335 (Bankr. M.D. Fla. 2013).
[28] *Id.* at 337-338.

re Nascarella would merely have found that an LLC existed and ended the inquiry"[29] is erroneous. The *Nascarella* court merely analyzed the debtor's potential liability as though a partnership between the debtor and the son had existed, given the fact that they had no formal business relationship. The court's findings were first, that there was no partnership between the debtor and his son, and second, that while the son's wrongful acts could be imputed to the LLC, they could not be imputed to the debtor.

Finally, Plaintiff cites *In re Reuter*[30] as holding that "two co-owners of an LLC were partners and ruling further that one partner could not receive a discharge for debts incurred through fraud of the other partner."[31] The plaintiff in *Reuter* was a victim in a securities fraud case, in essence, a Ponzi scheme, orchestrated by a Mr. Brown. The Court found that despite the debtor's having formed an LLC, the debtor and Brown had conducted themselves as though they were partners, and the debtor had himself alleged in state court litigation that he and Brown had entered into a partnership agreement. The court analyzed recent Eighth Circuit cases that hold that more than an agent-principal relationship is necessary to charge the agent's fraud to the principal; there must be evidence that the debtor knew or should have known of the fraud or was recklessly indifferent to acts of his agent.

On the specific facts before it, the *Reuter* court found that even under the Eighth Circuit's heightened requirement, there was ample evidence that the debtor should have known that Brown was engaged in fraudulent conduct. The court found that Brown's bad acts should be imputed to the debtor such that the plaintiff's claim was excepted from discharge. While the *Reuter* court's reasoning might help Plaintiff in this case, Plaintiff presented no evidence that Defendant should have known of Varkis' alleged fraud or was recklessly indifferent to it.

III. CONCLUSION

The testimony at trial was clear: there were no communications between Defendant and Plaintiff and no evidence that Defendant knew of Varkis' statements to Plaintiff. Plaintiff offered no evidence to support the imputation of Varkis' alleged fraudulent misrepresentations to Defendant. The Court concludes that it did not commit clear legal error in its ruling that would result in a manifest injustice.

Accordingly, it is

ORDERED that the Motion for Reconsideration is DENIED.

DATED: June 4, 2018.

/s/ Caryl E. Delano

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Caryl E. Delano
United States Bankruptcy Judge

[29] Doc. No. 95, pp. 2-3.
[30] 427 B.R. 727 (Bankr. W.D. Mo. 2010).
[31] Doc. No. 95, p. 3.