1999 BNH 017 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
for the
DISTRICT OF NEW HAMPSHIRE

In re:
Alfred and Sharon Almeder,
Debtors

Bk. No. 97-14646-MWV
Chapter 7

Francis J. Duggan,
Winifred Duggan,
Francis J. Duggan, Jr., and
Francis J. Duggan, as Assignee of
Lawrence Duggan,
Plaintiffs

v.

Adv. No. 98-1035-MWV

Alfred Almeder,
Defendant

MEMORANDUM OPINION

The Court has before it the complaint of Francis J. Duggan, Winifred Duggan (Francis J. Duggan's wife), Francis J. Duggan, Jr., and Francis J. Duggan, as Assignee of Lawrence Duggan ("Plaintiffs"). The complaint asks this Court to find that certain investments made by the Plaintiffs in a venture referred to as DreamWorld be excepted from discharge under section 523(a)(2)(A) of the Bankruptcy Code.[1] Specifically, the complaint seeks to except the sum of $80,000 invested by Lawrence Duggan, which claim has been assigned to Francis Duggan, the sum of $30,000 jointly invested by Francis and Winifred Duggan, and the sum of $10,000 invested by Francis J. Duggan, Jr.

At the conclusion of the trial, the Court denied the complaint of Lawrence Duggan, as assigned, for the reasons set out in the record.[2]

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[1] The complaint also refers to section 523(a)(2)(C), but that provision is not relevant to the issues present at trial.

[2] Lawrence Duggan did not appear or testify at the trial. The Defendant, Alfred J. Almeder, represented himself at trial and denied all allegations.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

FACTS

The debts involved in this action arise out of investments made in September through November 1992 in a project referred to herein as Dreamworld. The Defendant and a Mr. Lee were apparently the principals of the venture and were referred to at trial as "inventors" in the DreamWorld, Inc. Executive Presentation. (Pls.' Ex. 5.) DreamWorld was to be a theme park located in Bourne, Massachusetts, at the entrance to Cape Cod. The Duggans, who apparently own an oil company on Cape Cod, are not sophisticated investors. There was apparently a family relationship present since the Defendant's father's sister was formerly married to Lawrence Duggan.

As a result of two meetings at which the Plaintiffs allege certain representations were made, the Plaintiffs made the investments. The alleged representations included:

1. DreamWorld had options to purchase sufficient land for the project.
2. The Arab Investment Group ("AIG") was willing to invest $400,000,000 in the project.
3. The stock issued, or to be issued, was "blue skied."
4. The investments were safe, because if the theme park fell through, DreamWorld already had the land and permits for an equestrian center.

Suffice it to say, the theme park never got off the ground and the Plaintiffs lost their investment.

DISCUSSION

In order for a debt to be excepted from discharge under section 523(a)(2)(A), in this case, the money that the Plaintiffs invested, such debt must have been obtained by "false pretenses, a false

representation or actual fraud." 11 U.S.C.A. § 523(a)(2)(A) (1988 & Supp. 1999). In the case at bar, a finding of fraud under section 523(a)(2)(A) would require the Court to find that Mr. Almeder ("Defendant") made a representation, that the representation was false, that the Defendant knew or should have known that the representation was false, and that the Plaintiffs justifiably relied on the representation resulting in damages to the Plaintiffs. Id.; see also Palmacci v. Umpierrez, 121 F. 3d 781 (1st Cir. 1997) (providing a detailed analysis of the requirements of section 523(a)(2)(A)). At trial, Plaintiffs Francis Duggan and Francis Duggan, Jr. testified. Mr. Almeder also testified and presented his own case. Not unlike other section 523(a)(2)(A) trials, the Plaintiffs' testimony conflicted with that of the Defendant's. The Court finds the Plaintiffs' testimony to be credible. On the other hand, the Defendant denied the Plaintiffs' allegations, but produced no evidence to refute the premise that the representations were false. Both Plaintiffs testified that the Defendant represented to them that there was sufficient land under option to complete the project. Mr. Duggan (Sr.) testified that he later found out that if there had been any options, they had expired prior to the meetings in the fall of 1992. While the Defendant testified that there were options, he produced no documentation in support of his testimony. Based on the record, the Court finds that the Defendant did, in fact, make this representation which the Defendant knew was false at the time it was made.

Both Plaintiffs testified that the Defendant represented that AIG was prepared to put $400,000,000 into the project. They further testified that they were not told of any contingencies such as a requirement that the borrowers deposit $21,000,000 prior to closing the investment. An unsigned term sheet dated May 1992 (Pls.' Ex. 32) was admitted into evidence. While there is evidence that the Defendant had discussions with AIG, these discussions never reached the point where AIG was prepared to make the investment. The Court finds that the representation was false and that the Defendant knew it was false at the time it was made. Both Plaintiffs testified that the Defendant represented to them that the stock in DreamWorld had been "blue skied." First, the Court would have to find that neither of the Plaintiffs knew what that term meant, but assumed that the stock was legally issued. It turned out not to be the case, and the Defendant testified that the project terminated as a result of a Securities and Exchange Commission investigation.

Once again, the Court finds that the Defendant made this representation and should have known that the representation was false at the time it was made.

Finally, both Plaintiffs testified that the Defendant represented to them that their investment was safe because, in the worse case, the land and permits were available for an equestrian park. This also proved to be false, and the Court finds the Defendant knew it to be false at the time the representation was made. Both Plaintiffs testified that they relied on these representations in deciding to invest in DreamWorld. The Court finds that this reliance based on all of the circumstances surrounding the investment was justified. Field v. Mans, 36 F.3d 1089 (1st Cir. 1994) (proper standard is justifiable reliance), aff'd, 516 U.S. 59 (1995); Sanford Institution for Savs. v. Gallo, 156 F.3d 71, 74 (1st Cir. 1998) ("A party may justifiably rely on a misrepresentation even when he could have ascertained its falsity by conducting an investigation.") (internal citations omitted). Further, it is not disputed that the Plaintiffs have not been repaid and have, thus, suffered damages. See generally Cohen v. de la Cruz, 118 S. Ct. 1212, 1215 (1998) ("The most straightforward reading of § 523(a)(2)(A) is that it prevents discharge of 'any debt' respecting 'money, property, services, or . . . credit' that the debtor has fraudulently obtained, including treble damages assessed on account of the fraud.") (citing Field v. Mans, 516 U.S. 59, 61, 64 (1995) ("describing § 523(a)(2)(A) as barring discharge of debts 'resulting from' or 'traceable to' fraud")).

The Court notes that an executive summary dated January 22, 1992, was introduced at trial as Plaintiffs' Exhibit 5. The Plaintiffs' testimony was that this document was passed around at one or both of the meetings. While this document does contain some information that would have put a more sophisticated investor on notice of the risk of the investment, both Plaintiffs testified that they only glanced at it, and they did not pay much attention to it. Further, it is evident that to the extent risks were identified in this document, they were not stressed at the two meetings which led to the investment by the Plaintiffs. For the reasons stated herein, the Court finds that the claim of Francis and Winifred Duggan in the amount of $30,000 and the claim of Francis Duggan, Jr. in the amount of $10,000 are excepted from discharge pursuant to section 523(a)(2)(A) of the Bankruptcy Code. See Williamson v. Busconi, 87 F.3d 602 (1st Cir. 1996) (proper application of the totality of the circumstances test in determining fraudulent intent for

purposes of 11 U.S.C. § 523(a)(2)(A) often warrants consideration of post-transaction conduct and consequences, as well as pre-transaction conduct and contemporaneous events).

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 20th day of May, 1999, at Manchester, New Hampshire.

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Mark W. Vaughn
Chief Judge