2003 BNH 001 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:	*	Bk. No. 00-13136-MWV
	*	Chapter 7
Frank L. Garofalo,	*	
Debtor	*	
Stephen Schlosser and Phyllis Schlosser,	*	Adv. No. 01-1104-MWV
David Rutter and Ann Rutter,	*	Adv. No. 01-1106-MWV
Kenneth Evans and Arlene Evans,	*	Adv. No. 01-1108-MWV
Charles Weithman and Patricia Weithman,	*	Adv. No. 01-1109-MWV
Thomas Kuck and Janice Kuck, and	*	Adv. No. 01-1112-MWV
Gerard Weithman and Dollayne Weithman,	*	Adv. No. 01-1113-MWV
Plaintiffs	*	
	*	
v.	*	
	*	
Frank L. Garofalo,	*	
Defendant	*	

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MEMORANDUM OPINION

The Court has before it six complaints brought by Stephen and Phyllis Schlosser, David and Ann Rutter, Kenneth and Arlene Evans, Charles and Patricia Weithman, Thomas and Janice Kuck, and Gerard and Dollayne Weithman (collectively "Plaintiffs") seeking exception to discharge pursuant to section 523(a)(2)(A) of the United States Bankruptcy Code (the "Code").[1] Each complaint also contains a count seeking to pierce the corporate veil regarding Numismatic Investments of America, Inc. ("NIA") of which Frank L. Garofalo ("Debtor"/"Defendant") is a shareholder, president and director. Each of the complaints

[1] Unless otherwise noted, all statutory section references herein are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, *et seq*.

is essentially the same, other than the dates of the investments and the amounts of the investments. The Court held an evidentiary hearing on May 6 and 7, 2002, at which a representative of each of the Plaintiffs, the Debtor, and Mr. Russell Vaughn, also an owner of NIA, testified.

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

All of the Plaintiffs invested in rare coins during the period August 1995 through May 1998.[2] All monies invested were sent to NIA. The Plaintiffs further testified that they all attended seminars put on by P.R.O.F.I.T., whose principal, Mr. Frank Simon, became the Plaintiffs' financial advisor. All of the Plaintiffs were introduced to investing in rare coins at these seminars at which the Defendant provided information and NIA brochures.

[2]

Plaintiffs	**Date(s) of Investment**	**Amount Invested**	**Coins Allegedly Delivered**
Stephen and Phyllis Schlosser	08/11/1995	$ 50,000	$10,000
David and Ann Rutter	05/07/1998	$ 60,000	None
Kenneth and Arlene Evans	01/19/1998 01/26/1998	$150,000	$14,500
Charles and Patricia Weithman	05/08/1996	$186,750	$132,500
Thomas and Janice Kuck	10/08/1997	$ 90,000	None; $12,500 (cash refund)
Gerard and Dollayne Weithman	05/08/1996	$187,880	$152,500

The representation upon which the Plaintiffs rely seeking an exception from discharge is on page 3 of the NIA Information Guide to Rare Coin Investments. Pl. Ex. 37. In the column on that page entitled, "How to Invest in U.S. Rare Coins," the following sentence exists: "Your funds are always secure - from the time you write your check until the time you have taken possession of your coin portfolio."

For the most part, the Plaintiffs assumed that these funds were being segregated, but did not specifically ask if that was the case or demand that they be segregated. Plaintiffs Gerard and Dollayne Weithman testified that they asked what happened to the funds and were told that they were put in a money market account. That statement, if made, was in fact true as NIA apparently utilized such an account as its general account into which all funds were put. However, the Weithman plaintiffs couldn't agree when the meeting took place where such a statement was made.

The Debtor testified that he had been in the coin business since 1958. In 1977, it became his full-time occupation. In 1982, he and Russell Vaughn did business under the name of Numismatic Investments of New England and formed the corporate entity, Numismatic Investments of America, Inc., in October 1990. He further testified that, through these entities, 45,000 coins were sold with a value of over $46,000,000 to 4,000 clients. There was uncontradicted testimony that the Debtor and Russell Vaughn invested $156,403.25 in NIA in October 1998 as a result of the sale of real estate held personally by them; that the Debtor and Vaughn each cashed in insurance policies resulting in $12,000 going into NIA on behalf of each of them; that between February 2000 and September 2000, the Debtor loaned NIA $95,000; and that commencing in 1998, each of the principals of the company took cuts in salary.

DISCUSSION

The complaints in each of the adversary proceedings allege, in Count I, actual fraud constituting a violation of section 523(a)(2)(A) and, in Count II, that the Debtor used the corporate entity, NIA, to commit a fraud upon the Plaintiffs such that the Debtor should not be protected by NIA's corporate veil.

Count II only becomes relevant if this Court finds that the evidence at trial supports a finding by the Court that actual fraud has been committed. Thus, the Court will first consider the section 523(a)(2)(A) count.

Section 523 provides, in relevant part, that:

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

11 U.S.C. § 523(a)(2)(A). "Exceptions to discharge are narrowly construed in furtherance of the Bankruptcy Code's 'fresh start' policy and the claimant must show that his claim comes squarely within an exception enumerated in the Bankruptcy Code's section 523(a)." Century 21 Balfour v. Menna (In re Menna), 16 F.3d 7, 9 (1st Cir. 1994). See In re Bajgar, 104 F.3d 495, 498 (1st Cir. 1997). The statutory requirements for a discharge are construed liberally in favor of the debtor, and "[t]he reasons for denying a discharge to a bankrupt must be real and substantial, not merely technical and conjectural." Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir. 1987)(internal quotation marks omitted).

The six elements under section 523(a)(2)(A) are as follows:

1. The Debtor made a false representation;
2. The Debtor did so with fraudulent intent, i.e., with scienter;
3. The Debtor intended to induce the Plaintiffs to rely upon the misrepresentation;
4. The misrepresentation actually induced reliance;
5. The reliance was justifiable; and
6. The reliance caused damage.

See McCrory v. Spigel (In re Spigel), 260 F.3d 27, 32 (1st Cir. 2001); Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir.1997). In a complaint brought under section 523(a)(2)(A), the Plaintiffs must prove, by a

preponderance of the evidence, that each and every element has been met. Grogan v. Garner, 498 U.S. 279 (1991). Failure to prove any one of the elements will result in a judgment for the Defendant.

The representation upon which all the Plaintiffs mainly rely is contained in a brochure of NIA entitled, "Information Guide to Rare Coin Investment." Pl. Ex. 37. Under a section entitled, "How to Invest in U.S. Rare Coins," which outlines how a customer places an order through his or her investment advisor, in this case, Frank Simon, a statement is made as follows: "Your funds are always secure - from the time you write your check until the time you have taken possession of your coin portfolio." It is this statement upon which the Plaintiffs rely.

The evidence at trial showed that each of the Plaintiffs was introduced into rare coin investment through financial seminars conducted by P.R.O.F.I.T. by its principal, Frank Simon.[3] At these seminars, NIA would be asked to attend and provide information on rare coin investments. The attendance was usually through NIA's president, the Debtor herein. Evidently, NIA participated not only in these seminars, but in seminars throughout the country for various financial advisors.

Each of the Plaintiffs testified that they had seen or read the NIA brochure. Only Gerard and Dollayne Weithman testified that they inquired as to where their money would go and was told that it would go into a money market account. They inquired no further. The other Plaintiffs assumed, but did not inquire of the Debtor, that their money would be segregated. This was not the fact, and the money was placed in a money market account which, in fact, was NIA's general account.

In order for a representation to be false, it must be shown that the Debtor knew or should have known that the representation was false at the time NIA obtained the money from the Defendants. It is not sufficient to show that, in fact at some point, these payments were not secure, but it must be shown that to be the case at the time the payments were made. While it is true that the intent required is usually inferred from the facts of the case, in the instant case, there is just insufficient proof.

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[3]Neither the Plaintiffs nor the Defendant produced Mr. Simon at the time of trial.

First, the Plaintiffs' testimony is vague as to the timing of when they received the brochure, when they read it and whether it was before or after they placed their orders through their financial representative, Frank Simon. Second, the evidence shows that all of the Plaintiffs, save Rutter, either received partial shipments of the coins they purchased or some return of funds. Third, the uncontradicted testimony of the Debtor is that he had been a dealer buying and selling coins since 1961, that he and Russell Vaughn formed NIA of New England in 1982, which continued in business until 1990, when NIA was formed, which did business until the end of 1998. During this time period, 45,000 coins were sold with a value of $46,000,000 to over 4,000 clients. The testimony of both Vaughn and the Debtor was that at the time the orders were received, they believed they were able to fill them. The Debtor further testified that, in order to stay alive and keep the company afloat, he had to borrow against his 401(k) plan, borrow from Vaughn, and put the entire proceeds of the real estate sale mentioned above into NIA, resulting in a huge obligation to the IRS and a tax lien on his home. The Court finds that these factors are not the kind of factors that it can rely on in finding that the Debtor had the requisite intent to deceive required by section 523(a)(2)(A).

The Court also found credible the explanation of the Debtor as to why NIA failed. His testimony was that in the second half of 1998, the following events occurred: the advance in the stock market took investors out of the less traditional investment in coins and into the stock market; a drop off in the amount of orders from representatives; and lastly, the termination of the primary source for business, i.e., financial seminars.

The Court does not take lightly the loss to the Plaintiffs herein and the harm these losses have resulted in. There is no question that contracts were breached by NIA, but that alone is insufficient to find that the debt should be excepted from discharge of this individual Debtor.

For the sake of judicial economy, the Court will briefly touch on the issue of piercing the corporate veil. The Court first finds that traditional factors are not present in piercing the corporate veil. See Harman v. Bertholet, Jr. (In re Cycle-Rama, Inc.), 91 B.R. 647, 649 (Bankr. D.N.H. 1988) (New

Hampshire law requires some showing of suppression of the fact of corporate existence, fraud, or some misleading as to corporate assets in order to justify disregard of the corporate entity); Druding v. Allen, 122 N.H. 823, 827-28 (N.H. 1982). There is no evidence that the Debtor attempted to hide the existence of NIA. Indeed, the brochure the Plaintiffs rely on is clearly an NIA brochure. All correspondence is on NIA letterhead. Order forms are NIA order forms. Essentially all communications with the Plaintiffs are from NIA. There is insufficient evidence of undercapitalization. NIA was not a recently formed corporation. There is insufficient evidence that the Debtor used the corporation as personal piggy bank. While the Debtor took a salary and, at times, incentives, there is no testimony that these were unreasonable. Indeed, the evidence shows that the Debtor in fact used personal assets in an effort to keep NIA afloat, to the extent that he had to file personal bankruptcy, and is subject to a tax liability which will survive the bankruptcy.

While not formally adopting the theory that a corporate officer may be individually liable if he or she participated in corporate fraud, having found no fraud, there is no liability under this theory.

CONCLUSION

The Plaintiffs did not meet their burden under section 523(a)(2)(A) and, accordingly, the relief requested in each of the above-captioned adversary proceedings is hereby denied. 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 14th day of January, 2003, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge