UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

IN RE:

STEPHEN W. CAMARDO, Chapter 7

Debtor Case No. 98-10866

JEROME S. GERSTEIN,
Plaintiff
v.
STEPHEN W. CAMARDO,
Defendant

Adversary Proceeding
No. 98-01078

#57-1

APPEARANCES:

Jerome S. Gerstein
501 North Street, Burlington, VT 05401
Plaintiff, Pro Se

David R. Edwards, Esq.
Lynch & Edwards, 289 College Street, Burlington, VT 05401
Counsel for Defendant Stephen W. Camardo

MEMORANDUM OF DECISION ON COMPLAINT
TO DETERMINE DISCHARGEABILITY

KRECHEVSKY, U.S.B.J.[1]

[1] Sitting by assignment of the Judicial Council of the Second Circuit.

I.

ISSUE

Jerome S. Gerstein ("the plaintiff"), filed a complaint on September 8, 1998[2] objecting under Bankruptcy Code§§ 523(a)(2)(B) and (a)(4)[3] to the dischargeability of his claims against the debtor-defendant, Stephen W. Camardo ("the defendant"). With his answer objecting to the relief sought, the defendant asserted a counterclaim styled as a "derivative claim" against the plaintiff.

The claims and counterclaim concern guarantied loans to, and the operations

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[2] The Plaintiff filed an amended complaint on February 23, 1999. The differences in the two complaints are not material.

[3] Section 523(a)(2)(b) and (4) provides, in relevant part:

> (a) A discharge . . . 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--
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> . . .
>
> (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; . . .
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

11 U.S.C. § 523(a)(2)(B) and (4).

of, Vermont Waste Recovery, Inc. ("VWR"), a now-defunct Vermont corporation of which the parties were the sole shareholders. The parties each issued a personal guaranty in favor of Vermont National Bank (the "Bank') in connection with loans made by the Bank to VWR (the "VWR Loans"). After the demise of VWR, and demand by the Bank, the plaintiff paid the Bank under his personal guaranty of the VWR Loans. He now seeks to have the court determine the defendant's contribution obligation to him a nondischargeable debt.

The complaint asserts that the plaintiff's claim should be excepted from discharge under § 523(a)(2)(B) in that in connection with the application process for the VWR Loans and the issuance of the personal guaranties, the defendant provided *a materially false personal financial statement ("the statement") to the Bank and to the* plaintiff and that the plaintiff reasonably relied on the statement to his detriment. Other allegations include the defendant's misappropriation of corporate assets and breach of fiduciary duty. The defendant's counterclaim alleges that the plaintiff engaged in self-dealing and breached his fiduciary duty with respect to VWR.

On August 25, 1999, the parties submitted a stipulation of agreed facts to the court. The issues were tried on September 2, 1999. The following background is based upon the fact stipulation and the testimony presented at trial.

II.

BACKGROUND

The parties formed VWR in December 1996 to operate a waste recovery business that collected, stored, processed and sold recycled/recyclable materials. The

plaintiff and the defendant were each a 50% shareholder of the corporation. In March and June of 1997, VWR applied to the Bank for equipment and receivables financing loans (the "VWR Loans"), which were advanced. The plaintiff and the defendant, at the Bank's request, executed personal guaranties of the VWR Loans. The plaintiff and the defendant delivered to the Bank their personal financial statements, and each received a copy of the other's financial statement.

By no later than January 1998, VWR was defunct. Thereafter, the Bank made demand upon plaintiff and defendant, pursuant to their guaranties, to repay VWR's debts to the Bank. The plaintiff, alone, satisfied VWR's debt to the Bank in the amount of $13,000 and requests that the defendant's proportionate share of $6,500 be determined a nondischargeable debt.

The defendant's statement (Plaintiff's Exhibit 1), prepared in the spring of 1997, listed three parcels of real property with assigned values aggregating $415,000 (with accompanying secured debt of $303,000). The defendant's bankruptcy schedules (Plaintiff's Exhibit 6), prepared June 1998, list two parcels of real property with an aggregate value of $200,000. The assigned values of those two parcels in the bankruptcy schedules aggregate $45,000 less (i.e., $155,000). The third piece of real property, listed in the statement at $170,000, was sold before the commencement of defendant's bankruptcy case for $141,000. Certain values assigned to personal property items listed on the statement varied from the values the defendant assigned in the bankruptcy schedules. The plaintiff points out that the valuation of items, such as tools, furniture and the like, varied from $11,000 in the statement to $1,500 in the

bankruptcy schedules. The plaintiff asserts that this difference in real and personal property values is evidence of fraud and misrepresentation in the statement, designed to induce the Bank and the plaintiff, as co-guarantor, to rely on the information contained therein to their detriment. During the trial, the court dismissed both the plaintiff's claims brought under § 523(a)(4) and the defendant's "derivative" counterclaim on the ground that the parties lacked standing to bring such claims, as these causes of action belonged to VWR.[4] The plaintiff's remaining claim thus concerns the statement.

III.

DISCUSSION

A.

Before addressing the issue of dischargeability, the court must determine whether the plaintiff holds a valid claim against the defendant's bankruptcy estate. See Morris Street Associates, et al. v. Welch (In re Welch), 211 BR. 788, 795 (Bankr. D.Conn. 1997). The validity of claims against the estate generally is determined with reference to state law. Id. (citing Grogan v. Garner, 498 U.S. 279, 283-84, 111 S.Ct. 654, 657-58 (1991)).

Under Vermont law, a guarantor is subrogated to the rights of a creditor against

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[4] The claims related to harms alleged to have been committed against VWR, and, thus, belonged in the first instance to that corporation. Eureka Marble Co. v. Windsor Mfg. Co., 47 Vt. 430, 447 (1874) (as a general rule, all causes of action based on harm to the corporation must be prosecuted in the name of the corporation, and not in the name of the stockholders thereof).

the primary obligor or co-guarantor, as the case may be. See, e.g., Putney Credit Union v. King, 130 Vt. 86, 90, 286 A.2d 282, 284 (1971) (surety for principal is subrogated to creditor's rights upon payment of principal's debt); Walker Proc. Equip. Co., Inc. v. Cooley Bldg. Corp., 129 Vt. 333, 339, 278 A.2d 713, 718 (1971) ("[s]ubrogation is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of . . . remedies which the creditor may hold . . ."). [5] Likewise, subrogation is expressly recognized by the Bankruptcy Code. 11 U.S.C. § 509(a). [6] As a co-guarantor, the plaintiff became subrogated to the rights of the Bank against the defendant upon payment of more than his proportionate share of VWR's obligations to the Bank.

Vermont law also has long recognized the right of contribution. Thomas v. Clark, 133 Vt. 492, 494-95, 346 A.2d 189, 191 (1975) ("when several persons enjoy a common benefit, all must contribute ratably to the discharge of the burdens incident

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5 It is generally accepted practice that a guarantor would be subrogated to the rights not only of the creditor against the primary obligor, but of the creditor against the co-guarantor, as well. See generally 83 C.J.S. Subrogation § 47 (1953 and 1999 Supp.).

6 Section 509(a) provides:

> Except as provided in subsection (b) or (c) of this section, an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment.

11 U.S.C. § 509(a).

to the existence of the benefit"); Miller v. Sawyer, 30 Vt. 412, 417-18 (1858) (specific enunciation of the rule with respect to co-sureties); see also Vermont Dev. Credit Corp. v. Kitchel, 149 Vt. 421, 430-31, 544 A.2d 1165, 1170 (1988) (guarantor entitled to seek reimbursement/contribution from primary obligor). Under the well-settled principles of contribution, the plaintiff holds a valid contribution claim against the debtor's bankruptcy estate for $6,500. Miller, 30 Vt. at 419 ("the balance [of the debt] to be shared and borne equally by them").

B.

Dischargeability of debts is a federal question governed by Bankruptcy Code § 523. Grogan v. Garner, 498 U.S. 279, 284, 111 S.Ct. 654, 658 (1991). To prevail under § 523(a)(2)(B) in a dischargeability action, the complainant must demonstrate by a preponderance of the evidence each of the following elements with respect to the written statement concerning financial condition: (i) that it is materially false; (ii) that it was issued with intent to deceive; and (iii) that it was reasonably relied upon. Grogan, 498 U.S. at 291, 111 S.Ct. at 661.

(1)

The Subrogation Claim

With respect to the subrogation claim, as subrogee, the plaintiff "stands in the shoes" of the Bank. Green v. McDonald, 75 Vt. 93, 97, 53 A. 332, 333 (1902) (subrogee succeeds to, and is limited to, the rights of subrogor). The plaintiff, however, has offered no evidence that the Bank relied on the statement, or that its reliance was reasonable. See Mortgage Guar. Ins. Corp. v. Pascucci (In re Pascucci), 90 B.R. 438,

447 (Bankr. C.D. Cal. 1988) (subrogee must show that subrogor has reasonably relied); see also Powell v. Judd (In re Judd), 207 B.R. 708, 716 (Bankr. D.Kan. 1997) (same). Lacking any such evidence, the plaintiff's subrogation claim fails.

(2)

The Contribution Claim

Turning to the plaintiff's contribution claim against the defendant, the court must determine whether the plaintiff has satisfied his burden of proof.

"'A materially false statement is one which paints a substantially untruthful picture of financial condition by misrepresenting information of the type which would normally affect the decision to grant credit.'" People's Bank v. Kayser (In re Kayser), 121 B.R. 666, 668 (Bankr. D.Conn. 1990) (citations omitted). The sole evidence offered by the plaintiff as proof of the falsity of the information contained in the statement consists of the bankruptcy schedules (Plaintiff's Exhibit 6) and the assigned values contained therein. The plaintiff presented no independent valuation evidence.

To explain the valuation differences, the defendant testified that: (i) the real property values set forth in the statement primarily were based on tax assessment values and that the bankruptcy schedule values primarily were based on his inability to refinance the properties at those values; and (ii) the bankruptcy schedule values were prepared from a forced sale standpoint rather than on a market value basis. The defendant, as the property owner, is qualified to give opinion testimony on the value of his property. With regard to the property sold prepetition, the defendant testified there were zoning problems, and the property had to be sold quickly.

With regard to the personal property, there was no testimony that the items of personal property were the same in the statement and the bankruptcy schedules. The defendant also testified that the personal property values were reassessed based upon forced sale values.

The court credits the defendant's testimony. On the record made, the court cannot conclude that the information contained in the defendant's statement was materially false. The plaintiff has not met his burden of proof regarding material falsity as required by § 523(a)(2)(B)(i). In addition, as required by § 523(a)(2)(B)(iv), the plaintiff has not presented evidence, direct or circumstantial, sufficient to persuade the court that, under the totality of the circumstances, the defendant issued the statement with an intent to deceive the plaintiff.

IV.

CONCLUSION

For the foregoing reasons, a judgment will enter that the debt of the defendant to the plaintiff with respect to the VWR Loans is discharged.

Dated this 23rd day of September, 1999.

ROBERT L. KRECHEVSKY
UNITED STATES BANKRUPTCY JUDGE