

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:)
)
G.S. SMITH and PLAINS MANUFACTURING,))
LTD.,)
)
Debtors.)

Chapter 11
Case No. 0-04-bk-00683-EWH

PHOENIX PROCESS EQUIPMENT CO.,)
)
Plaintiff,)

Adv. No. 04-00036

v.)
)
GORDON SLOAN SMITH and PLAINS)
MANUFACTURING, LTD.,)
)
Defendants.)

MEMORANDUM DECISION

INTRODUCTION

Debtor Gordon Sloan Smith ("Smith") presented plaintiff Phoenix Process
Equipment Co. ("Phoenix Process") with financial statements which contained material
omission and/or misrepresentations. Phoenix Process relied on the financial statements in
financing over \$500,000 of a sale of mining equipment ("Equipment) to Plains
Manufacturing, Ltd. ("Plains"). Smith personally guaranteed the obligation.

1 dispute about that interest. However, I found that evidence would have to be presented on
2 the issue of Phoenix Process' reasonable reliance on Smith's misrepresentations. The
3 minutes of the February 15th hearing do not indicate whether partial summary judgment was
4 granted under 11 U.S.C. § 523(a)(2)(A) or § 523(a)(2)(B).

6 On February 21, 2005, I entered an order submitted by Phoenix Process' counsel
7 granting partial summary judgment on "each of the elements of the plaintiff's common law
8 fraud claim, with the exception of reasonable reliance." A trial was held on May 19, 2005
9 solely on the issue of whether Phoenix Process' reliance upon Smith's misrepresentation
10 was reasonable. Counsel elected to submit their closing arguments by submitting briefs.
11 Thereafter, Smith's counsel withdrew. New counsel was retained on July 21, 2005.
12 Closing briefs were submitted on September 16, 2005. The matter is now ready for
13 decision.
14
15
16
17

18 ISSUES

- 19 1. Does Phoenix Process' claim fall under § 523(a)(2)(A) or § 523(a)(2)(B)?
- 20 2. Did Phoenix Process' reliance on Smith's financial statements fall within the
21 applicable reliance standard under § 523?
22

23 JURISDICTIONAL STATEMENT

24 The court has jurisdiction over the Complaint under 28 U.S.C. § 1334 and 28 U.S.C.
25 § 157(b)(2)(I). Venue is proper under 28 U.S.C. § 1409 (a).
26
27

1 The investigation into whether a creditor's reliance was reasonable under
2 § 523(a)(2)(B) requires the court to consider all the circumstances surrounding the
3 transaction, including whether the creditor followed its normal business practices in
4 investigating a borrower's credit, whether there was a previous course of dealing between
5 the creditor and the borrower, and whether, during the course of negotiations, so called "red
6 flags" appeared, which should have put the creditor on notice that a deeper investigation of
7 the borrower's financial condition should be undertaken. In re Osborne, 257 B.R. 14, 21
8 (Bankr. C.D. Calif. 2000); In re Gertsch, 237 B.R. 160, 170-171 (9th Cir. B.A.P. 1999).
9 Industry standards for granting credit in a similar situation, while relevant, are "merely a
10 guideline, and not an element that must be proven before reliance can be said to be
11 reasonable." Gertsch, 237 B.R. at 170.

12
13
14
15 B. Reliance Standard Applicable in this Case

16 The parties disagree about which reliance standard applies in this case and,
17 unfortunately, the record is of little help. It is clear, however, that subsections
18 § 523(a)(2)(A) and (B) are mutually exclusive. Statements regarding a debtor's financial
19 condition are expressly excluded from the reach of § 523(a)(2)(A) and are only actionable
20 under § 523(a)(2)(B). In re Folsom, 2002 WL 32001419 (Bankr. C.D. Ill. 2002).
21
22

23 The minute entry for the hearing regarding Phoenix Process' Motion for Summary
24 Judgment held on February 15, 2005 does not reference the applicable section of § 523
25 under which partial summary judgment was granted. It does refer to setting a trial on the
26 "reasonable reliance issue." On February 21, 2005, an order granting partial summary
27

1 judgment was submitted by Phoenix Process, which states that partial summary judgment is
2 granted against the Debtors “on each of the elements of the Plaintiff’s common law fraud
3 claim, with the exception of the element of reasonable reliance.” While the reference to
4 “common law fraud” is a § 523(a)(2)(A) claim, as discussed earlier, reasonable reliance is
5 the standard for measuring a creditor’s reliance under § 523(a)(2)(B). Therefore, it is
6 unclear whether Phoenix Process was granted partial summary judgment under
7 § 523(a)(2)(A) or (B). However, a review of Phoenix Process’ Complaint and Motion for
8 Summary Judgment demonstrates that its objection to discharge is based on Smith’s
9 statements regarding his personal financial condition. Phoenix Process’ claim, therefore,
10 is a § 523(a)(2)(B) claim governed by the reasonable reliance standard.²

11
12
13
14 C. Application of the Reasonable Reliance Standard in this Case

15 Phoenix Process bears the burden of proof by a preponderance of the evidence that
16 it reasonably relied on Smith’s statements regarding his financial condition. Grogan v.
17 Gardner, 498 U.S. 279, 291, 11 S. Ct. 654, 661, 112 L.Ed. 775 (1991). Exceptions to
18 discharge are to be strictly construed in favor of the debtor in order to effectuate the fresh
19 start policy of the Bankruptcy Code. In re Riso, 978 F.2d 1151, 1154 (9th Cir. 1992).

20
21 The testimony of Phoenix Process’ witnesses was that the transaction as proposed
22 by Plains, in which it was to be the sole borrower, immediately raised concerns when no
23 Dun and Bradstreet reports were available for Plains. Those witnesses testified that they
24

25
26
27

² In order to clarify the record, an amended order will be entered pursuant to Rule 9024 granting
28 Phoenix Process partial summary judgment under § 523(a)(2)(B).

1 routinely rely on such reports in extending credit to corporate purchasers of equipment.
2 Therefore, from almost the beginning of the parties' dealings, the proposed purchase and
3 financing of the Equipment by Plains was not routine. Furthermore, there was no history of
4 previous dealings between Phoenix Process and the Debtors on which Phoenix Process
5 could rely in deciding to extend credit. This was a brand new transaction with a corporation
6 with no track record and insufficient assets to pay for the Equipment. As a result, Phoenix
7 Process demanded a personal guarantee from Smith.
8
9

10 As part of the demand for Smith's guarantee, Phoenix Process required Smith to
11 submit financial statements and provide outside credit references. Smith responded to the
12 request for a personal financial statement by submitting an unsigned compilation report
13 ("Compilation Report") prepared by a certified public accountant (CPA). He responded to
14 the request for outside references by providing names of individuals or companies who had
15 done business with Smith or one of his companies.³
16
17

18 Phoenix Process' witnesses testified that even though they were aware that the
19 Compilation Report was significantly different from an audited financial statement, they
20 felt they could rely on the Compilation Report because it was prepared by a CPA.
21 However, the unsigned cover letter, which accompanied the Compilation Report, included
22 the following statement:
23

24 "A compilation is limited to presenting in the form of financial statement
25 information that is the representation of Mr. Smith whose financial
26

27 ³ According to Smith's schedules, he is the alter ego of a number of corporations.
28

1 statements are presented. I have not audited or reviewed the accompanying
2 statement of financial condition and accordingly do not express an opinion
3 on any other form of assurance on it.”

4 The letter then notes that there is at least one departure from generally accepted
5 accounting principles in the statements in terms of how the asset values were presented.
6 Instead of presenting the assets at current estimated values, the assets were listed at a cost
7 value. If the fact that there were no Dun and Bradstreet reports available for Plains was not
8 a red flag, the CPA’s unsigned cover letter explaining the limits of the Compilation Report
9 and how the assets were valued should have alerted Phoenix Process that a further
10 investigation of Smith was required. However, other than calling the credit references
11 submitted by Smith, Phoenix Process did nothing to independently check Smith’s credit
12 worthiness. No call was made to the CPA, no effort was made to independently confirm
13 the existence of any of the assets listed on the Compilation Report and, most significantly,
14 no independent credit report was obtained on Smith.
15
16

17
18 When there is evidence of material, fraudulent statements, little investigation is
19 required for a creditor to have reasonably relied on the representation. See In re Gosney,
20 205 B.R. 418, 421 (9th Cir. B.A.P. 1996), In re Candaland, 90 F.3d 1466 (9th Cir. 1996), In
21 re Lansford, 822 F.2d 902, 904 (9th Cir. 1987). However, little investigation does not
22 mean no independent investigation. Some independent investigation should be undertaken
23 for a creditor to satisfy the reasonable reliance standard under § 523(a)(2)(B). Otherwise,
24 there would be no difference between the justifiable and the reasonable reliance standards,
25 an outcome which would be contrary to the Supreme Court’s holding in Field v. Mans.
26
27
28

1 Ninth Circuit decisions, which have interpreted the reasonable reliance standard
2 involved cases where the creditor requested and received information independent from
3 what was provided by the borrower. For example, in Gosney, the creditor obtained a loan
4 package which included employment verification, bank statements and IRS tax returns.
5 205 B.R. at 419. In Lansford, the creditor ran an independent check of real estate records.
6 822 F.2d at 904. In Candaland, the creditor reviewed a credit report “to assure that there
7 were no outstanding judgments and to assure that the applicant was in a position to repay
8 debts.” 90 F.3d at 1468. See also In re Gertsch, 237 B.R. 160, 171 (9th Cir. B.A.P. 1999)
9 (creditor reviewed cash flow analysis, pro forma income statement, tax returns and credit
10 reports).
11
12
13

14 Phoenix Process argues in its post-trial brief that three separate visits to the Plains’
15 mining site and calls to Smith’s references satisfied its obligations to investigate the
16 Debtors. It is clear, however, from the testimony of Phoenix Process’ witnesses, that
17 Phoenix Process was not relying on Plain’s successful mining operation in extending
18 credit, but on Smith’s guarantee. However, in investigating Smith’s representations,
19 Phoenix Process only called people named by Smith himself to verify his credit.
20
21

22 Phoenix Process was a sophisticated lender extending a significant amount of credit
23 in a business transaction. Considering the totality of the circumstances surrounding the
24 transaction, I find that Phoenix Process did not “take reasonable steps to inquire as to the
25 credit worthiness” of Smith. Gertsch, 237 B.R. at 172 (citing Gosney 205 B.R. at 421).
26 Phoenix Process has failed to demonstrate by a preponderance of the evidence that it
27
28

1 reasonably relied on Smith's misstatements regarding his financial condition. Accordingly,
2 it is not entitled to a non-dischargeability judgment against the Debtors.
3

4
5 CONCLUSION

6 The foregoing constitute my findings of fact and conclusions of law required by
7 Fed. R. Bankr. P. 7052. Judgment for the Debtors will be separately entered this date.
8

9 DATED this 6th day of October, 2005.

10 

11 EILEEN W. HOLLOWELL
12 United States Bankruptcy Judge

13 Copy of the foregoing mailed this
14 6th day of October, 2005, to:

15 Alan A. Meda
16 Mark H. Candioto
17 Stinson Morrison Hecker LLP
18 1850 North Central Ave. #2100
19 Phoenix, AZ 85004-4584

20 Gordon Sloan Smith
21 Plains Manufacturing, Ltd.
22 Desert Gardens Airport Way #4
23 POB 2601
24 Quartzsite, AZ 85346

25 Janessa Erin Koenig
26 Jaburg & Wilk, P.C.
27 3200 N Central Avenue, Suite 2000
28 Phoenix, AZ 85012

29 By 
30 Judicial Assistant