

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

RONALD WAYNE HENSLEY and
DONNA CAROLE HENSLEY,

Debtors.

No. 97-22756
Chapter 7

STEPHEN CRAIG STEPHENS,

Plaintiff,

vs.

Adv. Pro. No. 98-2004

RONALD WAYNE HENSLEY and
DONNA CAROLE HENSLEY,

Defendants.

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, the plaintiff seeks reimbursement of child support and medical expenses paid by him and a determination that the obligation is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Pending before the court is the debtors' motion for summary judgment filed October 16, 1998. The motion will be granted as to the debtor Ronald Wayne Hensley because the complaint fails to state a claim for relief against him and his unrefuted affidavit establishes that he was not a participant in the alleged fraud. As to the debtor Donna Carole Hensley, however, summary judgment will be denied because a genuine issue of material fact exists as to whether plaintiff justifiably relied upon the representations in question. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(I).

I.

The plaintiff, Stephen Craig Stephens, is the ex-husband of debtor Donna Hensley, the couple having been married on February 6, 1988, and divorced on October 11, 1994. One child was born during the marriage, Brittani* Stephens, on December 10, 1991.

*Although counsel for plaintiff and debtors both spell the child's name as "Brittney" throughout the documents filed in this proceeding, it appears the correct spelling of her name is "Brittani" as evidenced by a copy of the state court complaint attached as an exhibit to plaintiff's complaint and Schedule I filed by the debtors in their bankruptcy case.

Child support and certain medical expenses for Brittani were paid by the plaintiff after the parties' divorce, although the exact amount may be in dispute. In early 1997 after the plaintiff petitioned the state trial court for overnight and regularly scheduled visitation with Brittani, Ms. Hensley, Brittani and an individual by the name of Randall Dean Rueb underwent DNA testing in order to establish Brittani's paternity. The test conclusively established that Mr. Rueb was Brittani's biological father. Upon learning of the test result, the plaintiff filed suit against Ms. Hensley in state court for fraud, asserting that she fraudulently misrepresented Brittani's true paternity in order to obtain child support from him. That state court action was stayed on November 4, 1997, when the debtors initiated the case underlying this proceeding by filing a bankruptcy petition under chapter 7 of the Bankruptcy Code.

This adversary proceeding was commenced on January 29, 1998. Plaintiff contends in the complaint that debtor Donna Hensley knew or should have known when she filed her sworn complaint for divorce and child support on March 23, 1994, that he was not Brittani's natural father, that this fact was concealed from him in order to "exact substantial sums of money from him for child support and expenses," and that he otherwise

would have had no duty to support Brittani. Debtor Donna Hensley denies in her answer that she obtained any monies from the plaintiff by false pretenses, false representations or actual fraud, and avers that plaintiff "knew the circumstances of the child's paternity before the child was born and that he insisted and voluntarily assumed the responsibility" of the child support obligations.

II.

Summary judgment under Fed. R. Civ. P. 56(c), made applicable to bankruptcy adversary proceedings by Fed. R. Bankr. P. 7056, is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2554 (1986). Any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. See *McCafferty v. McCafferty (In re McCafferty)*, 96 F.3d 192, 195 (6th Cir. 1996)(citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). The debtors have filed the affidavit of debtor Ronald Hensley and a copy of the plaintiff's discovery deposition in support of their motion for summary judgment. The court also has before it the parties'

pleadings which include a copy of the state court complaint filed by plaintiff. Plaintiff has not responded to the motion.

III.

11 U.S.C. § 523(a)(2)(A) excepts from discharge a debt "for money ... to the extent obtained by ... false pretenses, a false representation, or actual fraud" if a complaint to determine dischargeability is timely filed and the requisite elements of the cause of action are thereafter established. Those elements are: (1) the debtor obtained the money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied upon the false representation; and (4) its reliance was the proximate cause of the loss. See *Rembert v. AT&T Universal Card Serv., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998), *reh'g and sugg. for reh'g en banc denied, cert. denied*, ___ U.S. ___, ___ S. Ct. ___, 1998 WL 552230 (U.S. Nov. 2, 1998)(citing *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993)). Each of these elements must be proven by a preponderance of the evidence. See, e.g., *In re Rembert*, 141 F.3d at 281 (citing *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 661 (1991)). Exceptions to discharge are to be

strictly construed against the creditor. See, e.g., *In re Rembert*, 141 F.3d at 281 (citing *Manufacturer's Hanover Trust v. Ward*, (*In re Ward*), 857 F.2d 1082, 1083 (6th Cir. 1988)).

With respect to the debtor Ronald Hensley, there is no assertion in the complaint that he even owes a debt to the plaintiff even though he is named as a defendant. In fact, the complaint sets forth no factual allegations regarding Mr. Hensley whatsoever other than the statement that Donna Hensley and her current husband have filed for bankruptcy relief. Thus, the complaint fails to state a basis for relief against the debtor Ronald Hensley. Furthermore, Mr. Hensley states in his affidavit that he did not know that plaintiff was not the biological father of Brittani until after the DNA testing and that at no time did he conspire with Donna Hensley to defraud the plaintiff of any money including the child support and medical payments made by plaintiff on Brittani's behalf. The plaintiff has offered no evidence which contradicts this affidavit. Accordingly, Mr. Hensley is entitled to summary judgment in his favor and will be dismissed from this proceeding.

Debtor Donna Hensley asserts that she is entitled to summary judgment because plaintiff cannot prove that he justifiably relied upon her alleged false representations concerning the

paternity of Brittani. She notes that plaintiff admitted in his deposition testimony that when she was approximately seven months pregnant, she told him she had engaged in a sexual affair with Randall Rueb. The plaintiff also testified in his deposition that at some point after he learned of the affair, he received a telephone call from Randall Rueb wherein Mr. Rueb stated that he thought Brittani was his child. Furthermore, when asked if he ever suspected that Brittani was not his child before the paternity testing, plaintiff admitted that "there's always that burning question in the back of your mind."

As authority for her summary judgment motion, Ms. Hensley cites the U.S. Supreme Court case of *Field v. Mans*, 516 U.S. 59, 116 S. Ct. 437 (1995), wherein the court, in Ms. Hensley's words, "expanded the 'reliance' requirement by adopting the new standard of 'justifiable reliance.'" Ms. Hensley notes that in discussing whether this new standard imposes a duty to investigate, the Supreme Court quoted the following language from William Prosser's treatise on common law torts: "It is only where, under the circumstances, the facts should be apparent to one of [the victim's] knowledge and intelligence from a cursory glance, or [the victim] has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." *Mans*, 516 U.S.

59, 71, 116 S. Ct. 437, 444 (1995)(quoting W. PROSSER, LAW OF TORTS § 108, p. 718 (4th ed. 1971)). Ms. Hensley argues that based on plaintiff's deposition admissions, he was on "warning" to further investigate the paternity of Brittani since "[h]e knew or should have known that it was impossible for Donna Hensley to know for certain without testing" who was Brittani's biological father. Because plaintiff failed to conduct such an investigation despite these warnings, Ms. Hensley maintains that the plaintiff was not "justified" in relying on her representations of paternity.

Notwithstanding the cited references to plaintiff's deposition transcript, this court is unable to conclude as a matter of law that the plaintiff will be not be able to establish justifiable reliance at trial. Initially, it must be emphasized that the reliance standard established by the Supreme Court in *Mans* was not an expansion of § 523(a)(2)(A)'s reliance requirement, but a narrowing. The lower courts in *Mans* had concluded that § 523(a)(2)(A) requires a creditor to demonstrate "reasonable reliance" which is defined as "what would be reasonable for a prudent man to do under [the] circumstances." *Id.* at 63, 116 S. Ct. at 440. *Mans* involved a property owner who sold encumbered real property without seeking permission for the sale from the mortgage holder even though the mortgage deed

specified that any unauthorized conveyance of the real estate would trigger an acceleration of the debt. The day after the sale, the property owner wrote the mortgage holder asking for a waiver of the due on sale clause without mentioning that the property had already been conveyed. When the parties failed to agree on compensation for the waiver, the matter was dropped. Three years later when the property owner filed bankruptcy, the mortgage holder learned of the unauthorized conveyance and sought to have the debt excepted from discharge under § 523(a)(2)(A). The bankruptcy court found that the property owner's letter constituted a false representation upon which the creditor had relied but concluded that the reliance was not reasonable because a reasonable person would have checked for a conveyance after the waiver request and would not have ignored further reason to investigate upon being informed the next year that a third party was claiming to be the owner of the property. *Id.*

Upon review, the U.S. Supreme Court rejected the objective "reasonable reliance" approach in favor of what it characterized as the "less demanding" standard of justifiable reliance, which requires a subjective analysis. *Id.* at 61, 116 S. Ct. at 439. Under this criterion, a person may be justified in relying on a representation of fact "although he might have ascertained the

falsity of the representation had he made an investigation." *Id.* at 70, 116 S. Ct. at 444 (quoting RESTATEMENT (SECOND) OF TORTS § 540 (1976)). "Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases." *Id.* at 71, 116 S. Ct. at 444 (quoting RESTATEMENT (SECOND) OF TORTS § 545A cmt. b.(1976)). See also *Sanford Inst. for Sav. v. Gallo*, 156 F.3d 71, 74 (1st Cir. 1998)("The rationale for placing this relatively low burden on the victim of the misrepresentation is rooted in the common law rule that the victim's contributory negligence is not a defense to an intentional tort.").

The Supreme Court did note that justifiability is not without some limits.

[A] person is "required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, the rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses."

Mans, 516 U.S. at 71, 116 S. Ct. at 444 (quoting RESTATEMENT (SECOND) OF TORTS § 541 cmt. a.(1976)).

When the *Mans* case was remanded to the bankruptcy court so that it could apply the justifiable rather than the reasonable reliance standard, the court concluded that justifiable reliance had been demonstrated (even though reasonable reliance had not) notwithstanding the creditor's failure to investigate. *Field v. Mans (In re Mans)*, 200 B.R. 293, 295 (Bankr. D.N.H. 1996), *mot. to amend denied*, 203 B.R. 355, *rev'd on other grounds*, 210 B.R. 1 (1st Cir. BAP 1997), *rev'd Field v. Mans*, ___ F.3d ___, 1998 WL 696000 (1st Cir. Oct. 13, 1998). In the bankruptcy court's view, the waiver request and assertion of ownership by a third party were not sufficient warnings of deceit when all of the facts of the case were considered and, therefore, further investigation by the creditor was not warranted or required. *Id.*

Similarly, this court is not convinced as a matter of law that the facts as known to the plaintiff sufficiently alerted him that further investigation was needed so as to preclude justifiable reliance on Ms. Hensley's representations that plaintiff was the father of Brittani. See *In re Mans*, 210 B.R. 1, 5 (1st Cir. BAP 1997), *rev'd on other grounds Field v. Mans*, ___ B.R. ___, 1998 WL 696000 (1st Cir. Oct. 13, 1998)("[T]he sufficiency of the warning is a question of fact."). In his deposition, the plaintiff testified that he took no steps to

ascertain the true parentage after he learned of the affair because, "I asked her if it was mine and she said yeah and I believed her." He also indicated during his deposition that he did not know when the affair with Mr. Rueb had occurred or how long it had lasted. The plaintiff could have inferred that the relationship had been brief, thus lessening the possibility that the child had been fathered by Mr. Rueb, because when the plaintiff questioned Ms. Hensley as to how often she had "slept" with Randall Rueb, plaintiff states that Ms. Hensley responded, "Once, twice. I don't know."

The plaintiff testified in his deposition that after the affair was disclosed and his wife assured him that he was the father, the issue of paternity was never raised again until the DNA testing, over five years later. The plaintiff stated that he truly believed that he was the father and his subsequent actions as disclosed in the deposition are consistent with that belief. Although the plaintiff and Ms. Hensley were separated at the time of the confession and when Brittani was born, the plaintiff was with his wife throughout the labor, held her hand while she gave birth, and he cut the umbilical cord. The couple reconciled a couple of months after Brittani's birth. When the parties subsequently divorced, plaintiff was directed to pay child support and granted visitation.

Based on the foregoing, the court finds that a genuine issue of material fact exists as to whether the plaintiff justifiably relied on Ms. Hensley's representations of paternity. Accordingly, summary judgment for the debtor Donna Hensley is inappropriate.

IV.

Consistent with the foregoing, an order will be entered contemporaneously with the filing of this memorandum opinion granting summary judgment to debtor Ronald Hensley and denying debtor Donna Hensley summary judgment.

FILED: November 9, 1998

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE