IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET
TAWANA C. MARSHALL, CLERK

IN RE:	§	
	§	
HUSSAM MUSTAFA RIMAWI and wife	§	
NAJWA ABDO ABDALLAH	§	
Debtors	§	CASE NO. 03-90994-DML-7
	§	
	§	
	§	
MAHMOD QALAWI,	§	
Plaintiff	§	
	§	
vs.	§	ADV. NO. 04-04060
	§	
HUSSAM MUSTAFA RIMAWI and	§	
NAJWA ABDO ABDALLAH,	§	
Defendants	§	

MEMORANDUM OPINION

Before the court is Plaintiff Mahmoud Qalawi's ("Qalawi") Objection to Discharge of Debt (the "Objection") by which he seeks an order declaring non-dischargeable a debt allegedly owed to him by Debtors as compensation for services rendered. The Objection commenced this adversary proceeding. *See* Fed R. Bankr. P. 4007(a). Defendants filed their Original Answer to Objection to Discharge of Debt. The court tried this adversary and received evidence and heard oral argument on July 9, 2004. The court's exercise of jurisdiction is predicated upon 28 U.S.C. §§ 1334(a) and 157(b)(2)(I). This memorandum constitutes the court's conclusions in this matter. *See* Fed. R. Bankr. P. 7052.

I. Background[1]

[1] The statement of facts here given generally tracks Qalawi's allegations. For the reasons hereafter stated, the court need not determine the truth of the allegations.

Qalawi was once an owner of N & N Food Store, a food mart. Qalawi and his partner sold the store to Debtor Hussam Rimawi and Hussam's cousin Ayman Rimawi, who then changed the name of the business to East Wood Food Mart. Hussam Rimawi later contacted Qalawi and informed him that Ayman Rimawi had poorly managed the food mart and was misappropriating the assets of the business. Hussam Rimawi told Qalawi that he and his wife had taken over the operation of the store from Ayman Rimawi. He then asked Qalawi to take over the day-to-day operations of the store. Qalawi understood that if he operated the store as requested, Defendants promised to convey to him a one-half interest in the business as compensation, though Defendants deny ever making such a promise and Qalawi produced no written evidence of any promise.

Qalawi, based upon his expectation that he would receive a one-half stake in the business, began operating the East Wood Food Mart. He devoted a considerable amount of his time to these business operations, working twelve hours per day, seven days per week at the store from January 1, 2000 until March 31, 2000. However, Defendants never transferred to him the one-half interest in the business that he believed he had been promised. Rather, without consulting with Qalawi, Defendants sold the business to a third party.

Qalawi sued and obtained a final judgment against Defendants in the 134th Judicial District Court of Dallas County on May 16, 2003, for the reasonable value of his management services plus interest,[2] which, at the time Defendants filed their voluntary bankruptcy petition, amounted to $10,699.89. This judgment was not appealed and is

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[2] The state court judgment makes no reference to any promise to grant Qalawi an ownership interest in the business.

final and enforceable but for the automatic stay imposed through Defendants' bankruptcy case.

Qalawi asserts that the debt owed to him by Defendants is a debt for services obtained by false pretenses, false representations, or actual fraud (though the state court made no such finding) and so should be declared non-dischargeable under section 523(a)(2)(A) of the Bankruptcy Code (the "Code").[3] Defendants do not agree with Qalawi's version of the facts, maintaining that Hussam Rimawi never promised to give Qalawi a one-half interest in the East Wood Food Mart as compensation for his operation and management services therein. They deny that Rimawi ever made any promises, fraudulent or otherwise, upon which Qalawi relied to his detriment. Defendants, therefore, urge that the debt owed to Qalawi pursuant to the judgment of the district court be declared dischargeable.

II. Discussion

Qalawi brings this nondischargeability action under Code section 523(a)(2)(A). That provision states that a debtor will not be discharged in bankruptcy from any debt for services to the extent those services were obtained by "false pretenses, a false representation, or actual fraud."[4] Qalawi did not specify in his complaint under which of

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[3] 11 U.S.C. §§ 101, *et seq.*

[4] 11 U.S.C. §523(a)(2)(A) reads:

> (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

these terms he brought this action. Consequently, the court will explore the definition and applicability of each in turn.

The Fifth Circuit Court of Appeals has held that in order for a defendant's representation to constitute false pretenses or a false representation, "it must have been: (1) a knowing and fraudulent falsehood, (2) describing *past* or *current* facts, (3) that was relied upon by the other party." *Recoveredge, L.P. v. Pentecost, et al.*, 44 F.3d 1284, 1293 (5th Cir. 1995) (quoting *In re Allison*, 960 F.2d 481, 484 (5th Cir. 1992)) (emphasis added). The Defendants' alleged representation that is the basis for this nondischargeability action is a promise to act in the future, not a statement concerning past or present facts. As a result, Qalawi has no cause of action under either the false pretenses or false representation prong of section 523(a)(2)(A). *In re Bercier*, 934 F.2d 689, 692 (5th Cir. 1991). He must show then that Defendants committed "actual fraud" in order to avoid having his claim discharged.

In the Fifth Circuit, in order for an objecting creditor to have his claim declared nondischargeable on the basis of actual fraud under Code section 523(a)(2)(A), he must prove that "(1) the debtor made representations; (2) at the time they were made, the debtor knew they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) the creditor relied on such representations; and (5) the creditor sustained losses as a proximate result of the representations." *In re Bercier,* 934 F.2d at 692 (quoting *In re Roeder,* 61 B.R. 179, 181 (Bankr. W.D. Ky. 1986)). *See also Recoveredge,* 44 F.3d at 1293.

Assuming *arguendo* that Hussam Rimawi did promise to give Qalawi a one-half interest in his business, Qalawi cannot demonstrate actual fraud on the part of

Defendants. A mere showing that Defendants made an unfulfilled promise to Qalawi upon which he relied to his detriment is not sufficient to make his debt nondischargeable, even if Defendants have no excuse for their non-performance. *In re Bercier*, 934 F.3d at 692. *See also* 4 COLLIER ON BANKRUPTCY ¶523.08[1][d] (15th ed. rev. 2004). Qalawi must prove that at the time Hussam Rimawi made the promise he was aware of its falsity and that he made this false promise with the intent to defraud Qalawi. Qalawi has not met his burden of proving these elements by a preponderance of the evidence.[5] "Fraudulent intent may be proved by circumstantial evidence." *U.S. v. West*, 22 F.3d 586, 595 (5th Cir. 1994). However, Qalawi has presented the court with *no* evidence, circumstantial or otherwise, that shows Defendants made a promise that they knew at the time given to be false in order to induce Qalawi into managing their store for them. The focus of the parties in their pleadings and at trial was on the issue of *whether or not a promise was made*; little attention was given to the issue of scienter. In the absence of evidence, the issue must be resolved against the party bearing the burden of proof, which in the present case is Qalawi. Since Qalawi has not presented evidence that Defendants knew they would not perform their alleged promise at the time they made it or that they intended not to perform it, Qalawi's claim is dischargeable.

III. Conclusion

For the foregoing reasons, the court finds in favor of Defendants. Counsel for Defendants is directed to prepare and submit to the court an appropriate judgment. Each party will bear its own costs.

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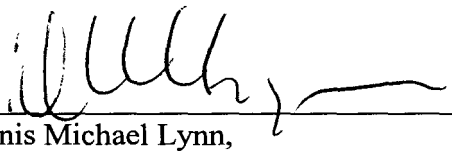
5 Fed. R. Bankr. P. 4005 provides that the plaintiff has the burden of proof in a trial on a complaint objecting to discharge.

SIGNED this the 11th day of August 2004.



Hon. Dennis Michael Lynn,
UNITED STATES BANKRUPTCY JUDGE