

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
SAN ANGELO DIVISION

IN RE: §  
§  
GARY LEE ABBOTT AND § CASE NO. 99-60353-7  
LINDA SHARON ABBOTT, §  
§  
Debtors §

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BENCHMARK SUPPLY CO., INC., §  
§  
Plaintiff §  
§  
vs. § ADVERSARY NO. 99-6024  
§  
GARY LEE ABBOTT AND §  
LINDA SHARON ABBOTT, §  
§  
Defendants. §

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Findings of Fact**

1. The Plaintiff, BenMark Supply Co., Inc. (BenMark), contends the Debtors should be denied a discharge under § 727(a)(2)(A), for transferring property of the Debtors within one year of the date of filing of the petition with intent to hinder, delay, or defraud BenMark; or under § 727(a)(4)(A), for knowingly and fraudulently making a false oath on their schedules.

Alternatively, BenMark submits that the debt owed it by the Debtors should be declared nondischargeable under § 523(a)(2)(B), contending the Debtors obtained credit (and forbearance of collection) from BenMark through use of intentionally misleading written statements relied upon by BenMark.

2. The Debtors/Defendants, Gary Lee Abbott and Linda Sharon Abbott, deny each of the allegations made by BenMark. The Debtors submit that any transfer of property was made in the ordinary course of business and was thus not made with intent to hinder, delay, or defraud

BenMark; that any false oath contained in the schedules was inadvertent and was ultimately corrected by amended filings made by the Debtors, and thus could not be construed to have been made knowingly and fraudulently. Regarding the objection to dischargeability, the Debtors contend that any written statements relied upon by BenMark were accurate and contain no false statements or omissions, and, therefore, do not give rise to a claim under § 523(a)(2)(B).

3. The Debtors, primarily Linda Abbott, operated the Debtors' landscaping and irrigation business as a sole proprietorship under the name "Environmental Design Group" (EDG)<sup>1</sup>.

4. In June, 1998, the Debtors contracted to perform landscaping and irrigation work on the "Cornell" prison job in Big Spring, Texas. The original amount of the contract was \$149,500.00.

5. In July, 1998, the Debtors contacted BenMark regarding the purchase on credit of materials needed for the Cornell job.

6. Linda Abbott completed and signed BenMark's form "Application for Credit". The application is a one-page form and requests one bank reference and three business references. Abbott listed the Security State Bank, with address and phone number, as the bank reference; as business references she listed Earthco, Jenco Nursery, and Kennedy Arbor, each with their location and phone number. Linda Abbott supplied all information requested by the application. Plaintiff's Exh. 1.

7. BenMark's office manager, Susan Sandberg, contacted both Earthco and Jenco and received a favorable reference from each. She learned that the Debtors had a zero balance with Earthco and an \$1,800.00 balance with Jenco.

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<sup>1</sup>The court will sometimes refer to "EDG" rather than "the Debtor" or "the Abbotts".

8. Given the size of the Debtors' request, Susan Sandberg deferred to William Reinert, President of BenMark, for approval of the credit. Mr. Reinert thought the Cornell job was a bonded federal job, which fact weighed heavily on his decision to approve the credit. He testified that the completed Application for Credit and the favorable credit references "sealed the deal".

9. BenMark did not contact Security State Bank, the bank reference listed on the Application for Credit. None of the information provided by Linda Abbott on the Application for Credit was incorrect.

10. The Application for Credit provided that the terms of repayment were "net 30 days", meaning payment was required within 30 days after delivery of the materials. Susan Sandberg testified that, as a general rule, she calls customers concerning unpaid invoices after approximately forty-five to sixty days. When the August and September, 1998, EDG invoices became delinquent, Susan Sandberg attempted to contact Linda Abbott and was told, during a phone conversation with Linda Abbott on October 16, 1998, that EDG had a \$100,000.00 job that was still unpaid, which caused the problems in paying BenMark. In fact, by letter dated October 29, 1998, from Linda Abbott to Susan Sandberg, Linda Abbott advised that since she had not been paid on the "UTPB" job, EDG was having financial difficulty. Plaintiff's Exh. 2. The letter further states that EDG had initially contacted BenMark as EDG had reached its credit limit with Western Industrial for the same type of materials. *Id.* She stated that they had over \$100,000.00 of receivables over 180 days past due and as soon as some were collected, she would see that BenMark was paid "regardless of whether it comes from a job where we purchased your materials or not." *Id.*

11. Susan Sandberg testified that she relied upon the representations made by Linda Abbott on October 16, 1998. Susan Sandberg further testified that, had she known that BenMark

had reached its credit limit with Western Industrial as represented in the October 29, 1998, letter, BenMark would not have granted credit to the Debtors.

12. EDG's account with BenMark continued in a delinquent status after October, 1998.

13. EDG experienced significant cost overruns on the Cornell job. By letter dated February 15, 1999, Linda Abbott advised Cornell Correction, Inc. (Cornell) that because EDG encountered a "solid rock table", it expended an additional \$64,823.00 on the project.

Defendants' Exh. 3. EDG contended it was owed for these cost overruns. *Id.* Cornell immediately disputed this, asserting that EDG was bound by the terms of the contract between the parties. Defendants' Exh. 4. EDG and Cornell attempted to negotiate their dispute; in fact, they participated in a formal mediation. Cornell ultimately paid EDG approximately \$143,500.00, and, by letter dated May 12, 1999, offered to make partial payments direct to EDG's unpaid subcontractors, including BenMark. In effect, counting direct payments, Cornell offered to pay a total of \$159,849.81. This offer was rejected by EDG, however. Defendants' Exh. 12.

14. In a letter dated March 3, 1999, from Linda Abbott to "Vendors, Tradesmen, and Sub-Contractors", a copy of which was received by BenMark, Abbott advised that Cornell was not paying for EDG's work, that Abbott's attorney was preparing a lawsuit against Cornell and would attempt to collect all monies owed EDG's vendors as part of the suit, and, specifically, requested that each vendor, in this case BenMark, confirm the amount owed to it. Plaintiff's Exh. 15A.

15. Because of its serious financial problems, the Abbots filed bankruptcy on July 27, 1999. The Debtors contend the filing was an emergency filing because John Deere had filed a lawsuit against them and was proceeding with collection efforts. An amended petition was filed a few days after the original filing, reflecting that the number of creditors, assets, and debts were

far greater than those represented on the original petition. The Debtors filed their schedules on August 5, 1999. The schedules contain sixteen pages of unsecured creditors, totaling \$240,270.59. They reflect secured claims in excess of \$800,000.00, and ten pending lawsuits.

16. Schedule F was amended on May 10, 2000, listing thirty creditors, eight of which were listed for notice purposes only. Of the thirty, the largest creditor had a claim of \$3,816.00; four creditors exceeded \$1,000.00. The majority of creditors are listed with amounts owing in the low \$100.00's.

17. On August 1, 2000, the schedules were amended again to add Dean Hawkins as a creditor for the sum of \$600.00.

18. At the time of the bankruptcy filing, the Debtors owed BenMark approximately \$12,000.00.

19. The Abbotts had obtained a loan from Security State Bank, now American State Bank, for the purchase of machinery and equipment used in the landscaping business. As of February 16, 1999, Linda Abbott was obligated to the bank under three promissory notes in an amount in excess of \$249,000.00. In addition, they had a factoring arrangement with the bank whereby the Abbotts would sell invoices (and/or accounts receivable) to the bank on a discounted basis.

20. From January 1, 1998, through July 30, 1998, Linda Abbott's business checking account for EDG fluctuated greatly and was frequently overdrawn. On the day the Application for Credit was signed by Linda Abbott, July 6, 1998, she had \$5.06 in the account. However, for each bank statement from January, 1998, through July, 1998, the resulting balance at the end of each month was positive, in fact significantly so. The ending balance for January was \$8,742.30; for February, \$13,031.85; for March, \$570.79; for April, \$10,488.16; for May, \$910.87; for June, \$50.09; and for July, \$10,902.03.

21. Mario Morales is an independent contractor who was hired by Linda Abbott to provide irrigation work on some of EDG's jobs, including the Cornell job. Morales was licensed to do irrigation work that involves tapping into a city line. Both Daniel Torres and Paul Arizpe worked for Mario Morales but, on the Cornell job, were apparently paid with checks made payable directly to them by EDG.

22. Gary Abbott testified that he informed Mario Morales to hold certain tools and components owned by EDG until he was paid by EDG. Gary Abbott further testified he thought another creditor, Jett Johnson, had been listed in the original bankruptcy filing but had apparently been left off through oversight.

23. The Abbotts also had a loan with Farm Services Agency secured by ranch land owned by the Abbotts. The Abbotts were delinquent on two annual payments to FSA. In April, 1998, they made one of the annual payments in the amount of \$18,500.00. Gary Abbott testified that such payment was, very likely, made from the sale of cattle.

24. If appropriate, these findings of fact shall be considered conclusions of law.

### **Conclusions of Law**

25. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding. 28 U.S.C. § 157(b).

#### Section 727(a)(2)(A) Claim

26. Section 727(a)(2)(A) states as follows:

- (a) The court shall grant the debtor a discharge, unless—
  - (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition;

A transfer is defined under § 101 of the Bankruptcy Code as “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor’s equity of redemption.” 11 U.S.C. § 101 (54).

27. The burden of proof on an objection to discharge rests with the objector.

Fed. R. Bankr. P. 4005. The burden must be met by a preponderance of the evidence. *In the Matter of Beaubouef*, 966 F.2d 174 (5<sup>th</sup> Cir. 1992).

28. There is no evidence that the Debtors “removed, destroyed, mutilated, or concealed their property.” The issue is whether the Debtors’ payments to certain creditors and not others, specifically BenMark, constitute a transfer of the Debtors’ property, i.e. money, with actual intent to hinder, delay, or defraud BenMark.

29. The payments to other suppliers or creditors in this case was done for a legitimate business purpose. While certain creditors were paid, many others, as reflected in the Debtors’ schedules, were not paid. Though the Debtors arguably “preferred” certain creditors over BenMark, as well as many others that were still owed at the time of the bankruptcy filing, the court cannot and does not conclude the Debtors acted with the specific intent to hinder, delay, or defraud BenMark, or any other creditor not paid. *See In re Miller*, 39 F.3d 301 (11<sup>th</sup> Cir. 1994) (the intent to prefer creditors is not equivalent to the intent to hinder, delay, or defraud other creditors.); *Equitable Bank v. Miller*, 39 F.3d 301 (11<sup>th</sup> Cir. 1994) (transfers made by debtors in an attempt to keep their business alive and satisfy creditors are not fraudulent.).

30. BenMark’s claim under § 727(a)(2)(A) is denied.

Section 727(a)(4)(A) Claim

31. Section 727(a)(4)(A) states as follows:

(a) The court shall grant the debtor a discharge, unless—

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

32. As with the § 727(a)(2) claim, the Plaintiff has the burden of proof and must prove its case by a preponderance of the evidence.

33. The Fifth Circuit has stated that the following five elements must be met in order to establish a false oath sufficient to deny discharge: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with a fraudulent intent; (5) the statement related materially to the bankruptcy case. *In the Matter of Beaubouef*, 966 F.2d 174 (5<sup>th</sup> Cir. 1992).

34. The court may infer the debtor's knowledge of falsity and fraudulent intent from the existence of the false statement. *In re Dreyer*, 127 B.R. 587, 593 (Bankr. N.D. Tex. 1991). A false oath may consist of a false statement or omission in the debtor's schedules or a false statement by the debtor at any examination. *In the Matter of Beaubouef* at 178.

35. The alleged false oath in this case relates to the Debtors' failure to list several creditors in the Debtors' initial list of creditors filed on Schedule F. While the Debtors amended their schedules to include the omitted creditors, an amendment does not necessarily cure a false oath. *Mazer v. United States*, 298 F.2d 579 (7<sup>th</sup> Cir. 1962) (debtor's amendment to schedule listing stock that had been previously omitted did not relieve him of discharge bar arising from false oath); *In re Schnabel*, 61 F.Supp. 386 (D.C. Minn. 1945) (the offense of making false oath in petition and schedules which omitted nine creditors was not expunged so as to warrant bankrupt's discharge merely because bankrupt, after discovery of omission at first meeting of creditors, filed amendment listing eight of omitted creditors); *In re Parnes*, 200 B.R. 710 (Bankr.

N.D. Ga. 1996) (for purposes of denial of discharge for making false oath or account, court may consider correction in the schedules, and explanation of such correction by the debtor, when deciding whether debtor made bona fide effort to value his assets when preparing the original schedules; however, amendment including omitted assets in response to creditors' objections will support finding that assets were deliberately omitted).

36. The failure to list a creditor *may* constitute a false oath and warrant denial of the debtor's discharge. *In re McDaniel*, 232 B.R. 674 (Bankr. N.D. Tex. 1999) (bankruptcy schedules are filed under penalty of perjury, and the knowing failure to list a creditor may constitute a criminal offense); *In re: Moix-McNutt*, 220 B.R. 631 (Bankr. E.D. Ark. 1998) (intentional failure to list a creditor on bankruptcy schedules is ground to deny debtor a discharge and may constitute a crime).

37. As the debtor will usually not benefit from a failure to list a creditor, such failure may not be as readily used to infer fraudulent intent. 3 NORTON BANKR. LAW & PRAC. 2d § 74:11 (2000), citing *In re Steiker*, 380 F.2d 765 (3<sup>rd</sup> Cir. 1967).

38. The Abbotts' business affairs were, at the time of filing, in disarray. They had numerous creditors and the filing was rushed. The court can discern no motive on their part to purposely omit creditors. While their failure to rectify the situation for several months is disturbing, such failure does not evince the requisite intent on the Debtors' part to make a false oath.

39. BenMark's claim under § 727(a)(4)(A) is denied.

#### Section 523(a)(2)(B) Claim

40. Section 523(a)(2)(B) states as follows:

(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—

(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;

The burden is on the creditor to prove, by a preponderance of the evidence, that the debt is nondischargeable. *Grogan v. Garner*, 498 U.S. 279 (1991); *In the Matter of Young*, 995 F.2d 547, 549 (5<sup>th</sup> Cir. 1993).

41. To sustain an objection to dischargeability under § 523(a)(2)(B), the creditor must establish the debt was obtained by the use of a written statement that is: (1) materially false; (2) respecting the debtor's or an insider's financial condition; (3) on which the creditor to whom the debtor is liable for money, property, services, or credit reasonably relied; (4) that the debtor caused to be made or published with intent to deceive. *In the Matter of Norris*, 70 F.3d 27, 29 (5<sup>th</sup> Cir. 1995).

42. A financial statement which omits liabilities, understates liabilities, fails to reveal encumbrances or assets, overstates assets, or otherwise contains substantially untruthful information of the type which would normally bear on a credit making decision is considered materially false. See *In the Matter of Jordan*, 927 F.2d 221 (5<sup>th</sup> Cir. 1991) *overruled on other grounds by*, *In the Matter of Coston*, 991 F.2d 257 (5<sup>th</sup> Cir. 1993); *In re Robinson*, 192 B.R. 569 (Bankr. N.D. Ala. 1996).

43. BenMark contends that the Application for Credit constitutes the statement in writing which was relied upon by BenMark in extending credit to the Abbotts. The application asks for: (1) the name, address, and years that the business has been in existence; (2) the name of the principal; (3) a bank reference; and (4) three business references. It does not inquire of the assets of the business or outstanding liabilities, and it makes no request for credit histories or the overall financial condition of the company. Linda Abbott completed the Application for Credit as required and none of the information provided on the Application for Credit was false or incorrect.

44. The Application for Credit was not facially false or misleading.

45. BenMark also asserts that by signing the Application for Credit, Linda Abbott promised to pay for received materials “net 30 days”, or within thirty days after delivery, but she never actually had the ability to pay, of which she was aware at the time she signed the application. If it is assumed that Linda Abbott’s “promise to pay” constitutes an affirmative representation, and not an implied representation, the court must then determine whether her promise was false when made. To be false, the court must find that Linda Abbott did not intend to pay BenMark. The evidence is insufficient to support this conclusion. The materials from BenMark were needed for the Cornell prison job. The Abbotts experienced significant cost overruns on this project and perhaps mismanaged the project to some extent. They engaged in extended negotiations with Cornell in an attempt to recover their additional costs. The fact that they were unsuccessful does not establish that they never intended to pay BenMark.

46. BenMark further contends that the March, 1999, letter from Linda Abbott to BenMark caused it to relax its collection efforts. In effect, BenMark argues this forbearance was sufficient to constitute an extension of credit under the statute. This letter, as well as other representations made by Linda Abbott, did not paint an untruthful picture of their financial

condition. The Abbotts were having serious financial problems, in part because of their problems collecting from Cornell on the cost overruns. BenMark was clearly provided notice of the Abbotts' financial problems by Linda Abbott. While BenMark may have delayed its collection efforts, its decision to do so was not based on false or misleading information provided by the Abbotts. The March, 1999, letter does not constitute a statement in writing concerning the Debtors' financial condition, it was not materially false, and, therefore, cannot give rise to a claim under § 523(a)(2)(B). *In re Nelson*, 134 B.R. 838, 851 (Bankr. N.D. Tex. 1991) (an affidavit which renounced and disclaimed any homestead claim to a piece of property was not the type of financial statement contemplated by § 523(a)(2)(B)); *In re Snyder*, 75 B.R. 130 (Bankr. S.D. Ohio 1987) (preliminary loan application, which merely asked for credit references, was not a written financial statement upon which a creditor could reasonably rely for the purpose of excepting debt from discharge).

47. BenMark's claim under § 523(a)(2)(B) is denied.

48. If appropriate, these conclusions of law shall be findings of fact.

Signed November 13, 2000.

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Robert L. Jones  
UNITED STATES BANKRUPTCY JUDGE