

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

BARRE BARNES dba B & C  
CONSTRUCTION,

Debtor.

Case No. 91-5-2819-MM

Chapter 11

BANK OF THE WEST,

Plaintiff,

Adversary No. 91-5423

vs.

BARRE BARNES, individually and dba B &  
C CONSTRUCTION,

Defendant.

Under F.R.C.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Only genuine disputes over material facts that might determine the outcome of the suit under the applicable law will properly preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986). A dispute over material facts is "genuine" if the evidence is such that a fact finder could reasonably find in favor of the non-moving party. Id. The non-moving party must therefore counter the motion with specific facts showing that there is a genuine issue for trial. Id.

1 The Court must also consider the applicable standard of proof and which party bears the  
2 burden of proof. Id. at 2512. Summary judgment is proper if a party fails to make a sufficient  
3 showing of an element essential to that party's case, and on which that party bears the burden of  
4 proof. Celotex Corp. v. Catrett, 477 U.S. 316, 106 S.Ct. 2548, 2552 (1986). In this case, the  
5 plaintiff bears the burden of proof by a preponderance of the evidence. Grogan v. Garner, 111 S.Ct.  
6 654, 661 (1991).

7 However, for purposes of summary judgment, the moving party bears the initial responsibility  
8 of informing the Court of the basis for its motion and of identifying the evidence that demonstrates  
9 the absence of a genuine issue of material fact. Celotex, 106 S.Ct. at 2553. The evidence is to be  
10 viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be  
11 drawn in his favor. Anderson, 106 S.Ct. at 2513.

12 "Summary judgment is such a drastic procedure that it should be used sparingly so that no  
13 party having a scintilla of merit to his claim or defense should be denied his day in court." In re  
14 Schuck, 13 Bankr. 461, 465 (Bankr. M.D. Pa. 1980). "Even if the Court surmises that the [non-  
15 moving] party is unlikely to prevail at trial, that by itself is not justification for granting summary  
16 judgment." Id. at 463.

17 To prevail on a claim to except a debt from discharge under § 523(a)(2)(A), a creditor must  
18 establish each of the elements set forth in In re Kirsh, 973 F.2d 1454, 1457 (9th Cir. 1992). The only  
19 elements that the parties have addressed in their briefs are misrepresentation and reliance.

20 "False pretenses" for nondischargeability purposes under § 523(a)(2) involves implied  
21 misrepresentation or conduct that is intended to create and foster a false impression. In re Schmidt,  
22 70 Bankr. 634, 640 (Bankr. N.D. Ind. 1986). In In re Wilson, 114 Bankr. 249 (Bankr. E.D. Cal.  
23 1990), the debtor converted funds by endorsing checks made jointly payable to the debtor and its  
24 subcontractor. The Court acknowledged that the debtor's conduct induced the plaintiff to extend  
25 credit to the debtor, but it declined to conclude that the resulting debt was nondischargeable only  
26 because the plaintiff failed to prove another element, that the debtor performed the act with the intent  
27 to deceive. Id. at 252. In In re Yagow, relied on by the plaintiff, the Court held that the debtor's  
28 endorsement of a two-party check was an implied representation that he had the exclusive right to the

1 proceeds or the authority to accept the funds on behalf of the second payee.

2 In this case, the plaintiff has presented evidence regarding the debtor's authority to negotiate  
3 the two-party checks, the debtor's account activity, the underlying invoices for the checks and the  
4 debtor's interest in the proceeds of the checks. It has presented sufficient facts such that one may  
5 reasonably find in its favor. Thus, a genuine issue of material fact with respect to the element of  
6 misrepresentation exists for trial.

7 For a creditor to prevail in a dischargeability action, it must have justifiably relied on the  
8 representations of the debtor. Kirsh, 973 F.2d at 1460. This is a subjective standard that takes into  
9 account the knowledge and relationship of the parties. Id. at 1458. It does not require the creditor to  
10 verify all of the debtor's representations. In re Ashley, 903 F.2d 599, 604-05 (9th Cir. 1990).  
11 Reliance is determined on a case-by-case basis and in view of the totality of circumstances. Although  
12 representatives of Bank of the West testified in depositions that they did not rely on any factual  
13 representations made by the debtor, the Bank asserts that it relied on the debtor's implied  
14 representation that it was authorized to negotiate the two-party checks. Factual issues remain as to  
15 whether the bank justifiably relied on the debtor's single endorsement, thus precluding summary  
16 judgment.

17 Therefore, the motion is denied.

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28