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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
SEAN P. TUCKER, dba TUXEDO
INNOVATIONS, TUXEDO CONCEPTS
INNOVATIVE FRANCHISING, INC.,
Debtor.

Case No. 92-5-4057-MM
Chapter 7

WEST MILL CLOTHES, INC., a New York
Corporation, and, TUXACCO, INC., a
Pennsylvania Corporation,
Plaintiffs,

Adversary No. 92-5-466

MEMORANDUM DECISION

vs.
SEAN P. TUCKER, dba TUXEDO
INNOVATIONS, TUXEDO CONCEPTS
and SEAN P. TUCKER, Individually,
Defendant(s).

FACTS

The debtor, Tucker, is in the tuxedo rental and sales business. He filed a chapter 7 petition in June 1992. In February 1989, he entered into an agreement with the plaintiff, West Mill, whereby West Mill would supply inventory to the debtor on credit. His original credit limit was \$3,000. When the debtor requested an increase in his credit limit in the spring of 1989, the plaintiff requested a personal guaranty and the guaranty of his mother. Tucker allegedly furnished the two guaranties in April 1989.

1 In December 1991, Tucker was delinquent on his account in the amount of \$85,000. The
2 parties negotiated a payment plan. There are disputed facts regarding the debtor's promise of security
3 and West Mill's agreement to subordinate to conventional secured financing. The parties executed an
4 agreement on scheduled payments and a confession of judgment in March 1992, and West Mill
5 recorded a UCC-1 covering the debtor's assets on March 16, 1992. However, Union Bank, which
6 extended secured financing to Tucker, had recorded a UCC-1 covering the debtor's assets on March
7 9, 1992.

8 Tucker defaulted on the agreement and payment schedule with West Mill and filed the
9 petition. West Mill filed suit against the debtor's mother on her guaranty. She filed a verified answer
10 stating that she had neither signed nor authorized the guaranty. The debtor disputes having forged his
11 mother's guaranty.

12 DISCUSSION

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

22 The Court must also consider the applicable standard of proof and which party bears the
23 burden of proof. *Id.* at 2512. Summary judgment is proper if a party fails to make a sufficient
24 showing of an element essential to that party's case, and on which that party bears the burden of
25 proof. *Celotex Corp. v. Catrett*, 477 U.S. 316, 106 S.Ct. 2548, 2552 (1986). In this case, the
26 plaintiff bears the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 111 S.Ct.
27 654, 661 (1991).

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

6 Based on this standard, there appears to be too many factual questions raised in this case,
7 precluding summary judgment.

8 To prevail on a claim to except a debt from discharge under § 523(a)(2)(A), a creditor must
9 establish each of the elements set forth in *In re Kirsh*, 973 F.2d 1454, 1457 (9th Cir. 1992). [Forgery
10 is a false representation.]

11 The debtor must have acted with the intention and purpose of deceiving the creditor. *In re*
12 *Hulquist*, 101 Bankr. 180, 184 (Bankr. 9th Cir. 1989). The intent to deceive required for a finding of
13 non-dischargeability can be inferred from the surrounding circumstances. *Id.* at 183.

14 The creditor must have also justifiable relied on the representations of the debtor. *Kirsch*, 973
15 F.2d at 1460. The standard is a subjective one that takes into account the knowledge and relationship
16 of the parties. *Id.* at 1458. It does not require the debtor to verify all of the debtor's representations.
17 *In re Ashley*, 903 F.2d 599, 604-05 (9th Cir. 1990).

18 Finally, the representations must have proximately caused the creditor's damages. Causation
19 is proximate if the conduct was so significant that, as a matter of policy, the defendant should be held
20 legally responsible. *In re Siriani*, 967 F.2d 302, 306 (9th Cir. 1992).

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