

captioned matters were consolidated for trial.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I). The Court, upon review of the pleadings, evidence, arguments of counsel, and briefs now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. Plaintiff is an attorney who has represented Willard Newman, Sr., and Willard Newman, Jr., in the past. However, he has not represented the Newmans since 1985 and has never represented Bi-State Manufacturing and Distributing, Inc.

2. Willard Newman, Sr. and Rosetta Newman are husband and wife and the parents of Willard Newman, Jr.

3. Willard Newman, Sr. is 59 years of age and has organized and operated businesses for several years.

4. Willard Newman, Sr. is the president and was the sole operating officer of Bi-State Manufacturing and Distributing, Inc., an Illinois Corporation, which began business on September 1, 1986. Bi-State was in the business of manufacturing and sales of exercise equipment. Bi-State ceased operations in May 1988.

5. Willard L. Newman, Jr. and Susan Newman are husband and wife. He has been employed by John Deere for 15 years. Willard, Jr. was secretary/treasurer of Bi-State toward the end of Bi-State's operating life. He did not draw salary from Bi-State and was not employed by said corporation. However, he regularly talked with his father about the business and consulted with his father about the operations of Bi-State.

6. In late 1987 and early 1988, Defendants executed and

delivered the following written promissory notes to Bowman:

October 6, 1987	\$12,500.00
October 12, 1987	14,000.00
October 16, 1987	6,500.00
November 13, 1987	1,300.00
December 3, 1987	6,200.00
January 14, 1988	5,000.00
January 28, 1988	2,900.00

7. The promissory notes all bear the signatures of Willard L. Newman, Sr., Rosetta Newman, Willard L. Newman, Jr., and Susan Newman.

8. These funds were for the use of Bi-State. It was understood that monies borrowed from Bowman were not to be used for salary purposes.

9. Willard Newman, Sr. caused projections for Bi-State to be reduced to writing. These writings were projections only and were not actual orders or work in progress. Willard Newman, Sr. presented these documents to Bowman and represented these projections as purchase orders and work in progress for which he, Willard, Sr., needed materials. Willard, Sr. also provided written statements to Bowman regarding sales, monthly expenses, accounts receivable and accounts payable of Bi-State. Willard, Sr. knew this information was false and misleading when he presented it to Mr. Bowman. Bowman loaned money to the Newmans for the purchase of materials based upon the information presented by Willard, Sr.

10. These loan funds were used to pay a weekly salary for Willard, Sr. and to pay operating and overhead expenses. Willard, Sr. did not cash all of these checks immediately and toward the end of Bi-State's operating life the checks were not cashed because there

were insufficient funds in Bi-State's account to cover the checks.

11. Bi-State was insolvent when Bowman commenced loaning money to the Newmans, although this information was not furnished to Bowman by the Defendants.

12. Rosetta Newman and Susan Newman had no knowledge of the day-to-day operations of Bi-State and made no representations to Bowman regarding its operations.

13. Willard Newman, Jr. made no representations to Bowman regarding the operations of Bi-State. However, Willard, Jr. attended at least one meeting with Bowman and his father whereby a loan was negotiated. Further, Willard, Jr. knew or had reasonable cause to believe that Bi-State was experiencing financial difficulties.

CONCLUSIONS OF LAW

Bowman filed his petition in this adversary relying on 11 U.S.C. §523(a)(2)(A) and §523(a)(2)(B). In his pretrial brief, Bowman conceded that he had no evidence to support the §523(a)(2)(B) complaint, and he presented evidence at trial solely in support of his §523(a)(2)(A) complaint.

The Court accepts the testimony of Willard Newman, Sr., despite the fact that his attorney filed his witness list late, as Willard Newman, Sr. is a party to the action and consideration of his testimony by the Court is not prejudicial to Plaintiff but is fair and equitable to all parties.

Bankruptcy Code section 523 lists ten exceptions to discharge and provides in relevant part:

- (a) A discharge under section 727. . .
does not discharge an individual debtor
from and debt--

. . .

(2) for money, property, services, or an extension, renewal, or re-financing 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. . .

11 U.S.C. §523(a)(2)(A).

To prevent discharge because of fraud under section 523(a)(2)(A), a plaintiff must prove actual fraud, not fraud implied in fact. In re Simpson, 29 B.R. 202, 209 (Bankr.N.D.Iowa 1983). The elements of actual fraud include: (1) the debtor made false representations; (2) at the time the representations were made the debtor knew they were false; (3) the debtor made the representations with the intent to deceive the creditor; (4) the creditor relied upon such representations; and (5) the creditor sustained the alleged loss and damages as a proximate result of the false representation. Matter of van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987; Simpson, 29 B.R. at 209.

The plaintiff has the burden of proving each of the elements of actual fraud by clear and convincing evidence. Id. Regarding the evidence presented, the Eighth Circuit has stated that it:

must be viewed consistent with the congressional intent that exceptions to discharge be narrowly construed against the creditor and liberally against the debtor, thus effectuating the fresh start policy of the Code. These considerations, however, "are applicable only to honest debtors."

Van Horne, 823 F.2d at 1287 (citations omitted).

The first two elements of actual fraud are self-explanatory. Concerning the third element, intent to deceive the creditor, the Eighth Circuit recently stated:

Because direct proof of intent (i.e., the debtor's state of mind) is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred. When the creditor introduces circumstantial evidence proving the debtor's intent to deceive, the debtor "cannot overcome [that] inference with an unsupported assertion of honest intent." The focus is, then, on whether the debtor's actions "appear so inconsistent with [his] self-serving statement of intent that the proof leads the court to disbelieve the debtor."

Id. at 1287-88 (citations omitted).

Although intent to deceive may be inferred from the circumstances of the case, such a finding of intent generally requires a showing that the defendant knew or should have known of the falsity of his statement. In re Valley, 21 B.R. 674, 679-80 (Bankr. D. Mass. 1982). In assessing the defendant's knowledge and liability for fraud, the court will scrutinize the acumen and experience of the defendant. Matter of Newark, 20 B.R. 842,857 (Bankr. E.D.N.Y. 1982).

The fourth element of actual fraud is creditor's reliance on a false representation. The Eighth Circuit does not require that the creditor's reliance be shown to be reasonable. In re Ophaug, 827 F.2d 340 (8th Cir. 1987). In Ophaug the Court stated that the statute was clear on its face and that section 523(a)(2)(A) does not require a creditor to prove that his reliance on the debtor's fraudulent misrepresentations was reasonable. The creditor need only prove that he relied on the debtor's fraudulent misrepresentations in

extending credit to the debtor.

The fifth and final element, proximate cause, requires that the debtor's action was the act, without which the plaintiff would not have suffered the alleged loss and damages. Van Horne, 823 F.2d at 1288-89.

The evidence before the court in this case is clear and convincing that Willard Newman, Sr. made false representations to Bowman, knowing them to be false, in representing that loans made by Bowman would not be used to pay salaries, and in presenting false information regarding pending orders to Bowman. Paraphrasing the testimony of Marcie Tindal, the documentation Willard Newman, Sr. presented to Bowman represented nothing but Willard Sr.'s hopes and dreams reduced to writing and presented as fact.

The evidence is also clear and convincing that Willard Newman, Sr. made these representations with the intent to deceive Bowman. He wished to paint the picture of a valid operation with on-going sales to induce Bowman to loan money to Bi-State when he knew, in fact, that all orders to Bi-State were at best contingent.

Finally, it is clear that Bowman would not have made the loans had he known of the intended use of the funds and the falsity of the sales reported to him, which falsehoods resulted in Bowman sustaining the loss of the funds loaned.

The complaints by Bowman were substantially justified in both cases, though the Court finds only Willard Newman, Sr. responsible for infraction of §523(a)(2)(A).

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes

that Defendants Willard L. Newman, Jr., Rosetta U. Newman, and Susan E. Newman did not violate 11 U.S.C. §523(a)(2)(A) and are entitled to the discharge of the debt to John A. Bowman.

FURTHER, the Court concludes that Defendant Willard L. Newman, Sr. obtained money and financing from Bowman by means of fraud, false pretenses and false representation pursuant to 11 U.S.C. §523(a)(2)(A).

IT IS ACCORDINGLY ORDERED that Defendant Willard L. Newman, Sr.'s debt to Bowman is nondischargeable.

FURTHER, the debt of Willard L. Newman, Jr., Rosetta U. Newman, and Susan E. Newman to John A. Bowman is discharged.

FURTHER, Defendants' request for costs, including attorney's fees, is denied.

Dated this _____ day of March, 1990.

Russell J. Hill
U.S. Bankruptcy Judge