UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
	:	Case No. 90-224-C H
DAVID C. ROSENBERGER,	:	
	:	Chapter 7
Debtor.	:	
	:	
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GREYHOUND FINANCIAL CORPORATION,	:	Adv. No. 90-240
Plaintiff,	:	
	:	
v.	:	
	:	
DAVID C. ROSENBERGER,	:	
	:	
Defendant.	:	

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ORDER--COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

A trial on the Plaintiff's Complaint to Determine Dischargeability of a Debt was held March 1-2, 1993. Plaintiff, Greyhound Financial Corporation ("Greyhound"), was represented by Mark D. Walz and the Defendant, David Rosenberger, was represented by George T. Qually. A briefing deadline was scheduled and the matter taken under advisement. The parties have filed post-trial briefs and the matter is fully submitted.

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

FINDINGS OF FACT

1. The Defendant, David Rosenberger, was the co-owner and president of Rose Way, Inc., a trucking corporation located in Des Moines, Iowa. Defendant and his wife, Doris Rosenberger, were the sole shareholders of the corporation.

2. Rose Way entered into an arrangement with Greyhound wherein Greyhound agreed to purchase 14 semi-tractors from Freightliner Truck Centre, Ltd. ("Freightliner") for lease to Rose Way. Greyhound purchased the tractors for $1,099,000, which was the amount sought by Rosenberger for financing and the amount listed on the invoices. Greyhound paid the purchase price directly to Freightliner after independent verification of the accuracy with Freightliner and the blue book listing. Greyhound made an independent evaluation and concluded that each semi-tractor had a value of $78,500.00.

3. In October 1985, the tractors were leased to Rose Way pursuant to the "Equipment Lease Agreement" executed by the parties.

4. The Rosenbergers personally guaranteed Rose Way's performance under the lease.

5. In 1989, Rose Way defaulted under the lease. Thereafter, Rose Way filed for bankruptcy protection and an involuntary Chapter 7 proceeding was instituted against David Rosenberger.

6. Subsequently, Greyhound learned that $210,000 of the

original purchase price had been returned to Rosenberger by Freightliner pursuant to a private agreement between the parties. Rosenberger agreed to add certain equipment to the tractors and perform other services usually performed by Freightliner in exchange for a "manufacturers incentive," or rebate, of $210,000. This rebate was paid in the form of checks made out to David Rosenberger which were then deposited into his personal checking account. The added equipment reverted to Greyhound at the expiration of the contract.

7. Greyhound now brings this complaint to determine dischargeability of a debt. Greyhound argues that the amount of $210,000 is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6). Rosenberger objects on the grounds that the Plaintiff has failed to prove by a preponderance of the evidence the elements required for relief under the above stated Code sections.

DISCUSSION

The Plaintiff relies on § 523(a)(2)(A) which provides in relevant part:

> (a) A discharge under section 727 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 reporting the

> debtor's or an insider's financial condition.

To succeed in a § 523(a)(2)(A) claim, a creditor must prove the following elements:

1) the debtor made false representations;
2) at the time made, the debtor knew them to be false;
3) the representations were made with the intention and purpose of deceiving the creditor;
4) the creditor relied on the representations; and
5) the creditor sustained the alleged injury as a proximate result of the representations having been made.

Matter of Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987). The standard of proof required under the § 523(a) exceptions to dischargeability is the ordinary preponderance of the evidence standard. Grogan v. Garner, ____ U.S. ____, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991).

The Court finds that the preponderance of the evidence shows that the Debtor did indeed make false representations to Greyhound. Rosenberger misrepresented the purchase price of the tractors and failed to disclose to Greyhound the existence of his side agreement with Freightliner which led to reimbursement of $210,000. Moreover, the Court finds that Rosenberger knew this representation to be false at the time and intended to deceive Greyhound. However, this, without more, will not constitute a § 523(a)(2)(A) nondischargeable debt. Greyhound must also prove that it relied on this misrepresentation and that the injury was a proximate result.

Greyhound has argued that reliance is presumed in actions based on § 523(a)(2)(a). In support of this proposition, Greyhound cites In re Figge, 94 B.R. 654, 666 (Bankr. C.D. Cal. 1988) and In re Cerar, 97 B.R. 447 (Bankr. C.D. Ill. 1989). The Court believes that Greyhound's reliance on these cases is misplaced. Figge and Cerar were based on a doctrine which holds that where a debtor's fraud is performed in conjunction with his creditors for the purpose of deceiving banking examiners and the FDIC, the FDIC is presumed to have reasonably relied on the debtor's misrepresentations. See Figge, 94 B.R. at 668; see also Cerar, 97 B.R. at 449. These cases are clearly distinguishable from the facts of the case at hand. Accordingly, Greyhound is required to prove the element of reliance in this case.

Generally, in cases of fraud, while the representation need not be the sole cause of damage, it must have been a material influence or a substantial factor in bringing about such injury. See SEDCO International v. Cory, 683 F.2d 1201 (8th Cir. 1982). The creditor need not prove that his reliance on the fraudulent misrepresentation was reasonable. In re Ophaug, 827 F.2d 340, 343 (8th Cir. 1987). The Court finds that Greyhound has failed to show by a preponderance of the evidence that it substantially relied on Debtor's representation or that it proximately caused the loss. Greyhound concedes that it conducted its own independent

verification of the purchase price. Absent proof of these last two elements, the Court must find that the debt does not come within the § 523(a)(2)(A) exception to discharge.

Additionally, Greyhound contends that the $210,000 is nondischargeable under 523(a)(6) which provides in relevant part:

> (a) A discharge under section 727 of this title does not discharge an individual debtor from any debt--
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

The Eighth Circuit has held that the requirement of willful and malicious injury requires a two prong analysis. In re Long, 774 F.2d 875, 881 (1985). Nondischargeability turns on whether the conduct is (1) headstrong and knowing ("willful") and, (2) targeted at the creditor ("malicious"), at least in the sense that the conduct is certain to cause financial harm. Id.; see also In re Miera, 926 F.2d 741, 744 (8th Cir. 1991). The Court finds that Rosenberger's conduct was willful and deliberate in misrepresenting the purchase price of the tractors. Therefore, the first prong of the test is satisfied.

However, a finding of malice is more difficult in this case. The culpability must go beyond recklessness or beyond the intentional violation of a security interest to make a finding of malice. Long, 774 F.2d at 881. In this case, there

is evidence that the tractors purchased by Greyhound were actually valued at or above the purchase price paid by Greyhound. In fact, Greyhound's own independent verification of the purchase price supports this evidence. There is also evidence that Rosenberger misrepresented the price for the purpose of receiving reimbursement for adding equipment to the tractors and performing other services. In addition, David and Doris Rosenberger personally guaranteed the performance of the contract by Rose Way. The Court finds that while Rosenberger may have acted in reckless disregard of Greyhound's rights, his conduct was not certain to cause Greyhound financial harm and does not rise to the required level of malice. Accordingly, the Court finds that the debt should not be excepted from discharge pursuant to § 523(a)(6).

ORDER

IT IS THEREFORE ORDERED, in accordance with the above discussion, that the debt to Greyhound Financial Corporation is not excepted from discharge pursuant to § 523(a).

Dated this 29th day of September, 1993.

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RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE