NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 16-026

Bankruptcy Case No. 14-14241-MSH
Adversary Proceeding No. 14-01201-MSH

RICHARD C. FRAHER and
SHANNON M. FRAHER,
Debtors.

ABOVE-ALL TRANSPORTATION, INC.,
Plaintiff-Appellant,

v.

SHANNON M. FRAHER,
Defendant-Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Melvin S. Hoffman, U.S. Bankruptcy Judge)

Before
Deasy, Tester, and Finkle
United States Bankruptcy Appellate Panel Judges.

Bill N. Jacob, Esq., on brief for Appellant.
Patrick M. Culhane, Esq., on brief for Appellee

February 21, 2017

Deasy, U.S. Bankruptcy Appellate Panel Judge.

Above-All Transportation, Inc. ("Above-All") appeals from that part of the adversary proceeding judgment wherein the bankruptcy court ruled in favor of Shannon Fraher on the count it brought under 11 U.S.C. § 523(a)(2)(A).[1] For the reasons set forth below, the Panel **AFFIRMS**.

BACKGROUND

Shortly after Shannon and Richard Fraher filed their joint chapter 13 bankruptcy petition, Above-All filed an adversary proceeding against the Frahers seeking either a judgment denying their discharge under § 727(a)(4)(A) or (a)(5) or, alternatively, ruling any debt they owed Above-All was nondischargeable under § 523(a)(2)(A) or (a)(6).[2] In the complaint, Above-All alleged that although Ms. Fraher was the principal of SMA Transportation, Inc. ("SMA"), a livery service company, Mr. Fraher was the true owner and operator of the corporation. Above-All explained that in February 2014 and pursuant to an asset sale agreement, the Frahers sold to Above-All most of the assets of SMA including the corporate name, two vehicles, various websites, and telephone numbers, and customer lists. The sale agreement provided, *inter alia*, that SMA, Ms. Fraher, and Mr. Fraher would not compete in any manner with Above-All for a specified period of time after the sale.

Above-All asserted that thereafter, both during and after his employment at Above-All and despite the provisions of the sale agreement, Mr. Fraher continued to run SMA and provided services to the customers Above-All acquired from SMA. As a result, Above-All filed suit against SMA and Mr. Fraher in state court under a variety of theories. On April 28, 2014, and May 21, 2014, the state court

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq. All references to "Rule or Rules" are to the Federal Rules of Civil Procedure. References to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure.

[2] Above-All confirmed at trial that it was not pursuing the count it brought under § 523(a)(6).

entered orders enjoining SMA, Mr. Fraher, and Ms. Fraher from competing with Above-All. Above-All explained that despite the non-compete provision of the sale agreement and the injunctions, SMA continued to operate a livery service in Massachusetts through at least June 2014.

With respect to Count III, the one it brought under § 523(a)(2)(A), Above-All asserted that the Frahers "fraudulently induced [Above-All] to enter into the Sale Agreement, to make payment in the amount of Sixty Thousand and 00/100 ($60,000.00) Dollars thereunder, to employ Fraher and pay him a salary while diverting both SMA and Above[-]All business to their own benefit, constituting fraud and deceit." With respect to that count, the Frahers answered that they had fully disclosed SMA's assets prior to the sale and that they disputed Above-All had suffered damages. For an affirmative defense, Ms. Fraher asserted Above-All had failed to state a claim against her.

The parties then filed a Joint Pre-Trial Statement.[3] In its narrative statement of the controversy, Above-All wrote that the action under § 523 was based upon the Frahers' "fraudulent and intentional actions in breaching [the sale agreement] . . . ." In their narrative statement, the Frahers claimed they did not violate the sale agreement and that Above-All did not suffer damages. The parties provided the following paraphrased issues of fact were all that remained to be litigated:

> **Plaintiff**:
> (i) Whether the Debtors made a false oath in connection with their bankruptcy filing;
> (ii) Whether the Debtors failed to keep books, records, and to observe the corporate formalities as they relate to SMA, including comingling money;
> (iii) Whether the Debtors intentionally breached the provisions of the sale agreement by diverting certain SMA accounts and new business to their own benefit;
> (iv) Whether the Debtors operated a livery business in violation of the sale agreement and non-compete covenant, and in direct violation of the state court injunction, and derived income from their intentional actions, and received money or other consideration from former clients or customers of SMA Transportation, Inc., Marshfield Coach, Hingham Coach, Brite Lights Limousine, Brite Lites Limousine, Pride Limousine or Special Delivery Limousine, which funds were not turned over to the Plaintiff; and
> (v) Whether the Plaintiff is a creditor of the Debtors.

[3] Although Above-All did not include the Joint Pre-Trial Statement in the record, we may review the document. See Fed. R. Bankr. P. 8009(e)(2)(C). The parties filed the Joint Pre-Trial Statement pursuant to the Pre-Trial Order. In that order, the bankruptcy court explained that if a party wanted to file a trial memorandum, it could file one with the Joint Pre-Trial Order. The court further explained that it would not permit other briefs or memoranda at trial unless it so ordered and that it might, but need not, set a deadline for post-trial pleadings.

Defendant:
(i) Whether the Plaintiff suffered irreparable harm as a result of the sale agreement;
(ii) Whether both Defendants intended to harm the Plaintiff;
(iii) Whether both Defendants, particularly Shannon Fraher, breached the sale agreement by engaging in a business in competition with the Plaintiff;
(iv) Whether Plaintiff has produced financial records to establish he lost money due to the actions of the Defendants;
(v) Whether Shannon Fraher violated the non-compete covenant;
(vi) Whether the Defendants understood the sale agreement and intended to breach the agreement.

The parties agreed the following issues of law, and no others, remained to be litigated:

Plaintiff:
(i) Whether the Debtors are entitled to a Discharge; and
(ii) Whether the SMA corporate veil should be pierced.

Defendant:
(1) Whether both Defendants intentionally harmed the Plaintiff; and
(2) Whether the Plaintiff suffered substantial harm and loss of property due to the Plaintiff.

At the end of the Joint Pre-Trial Statement the parties acknowledged that the document "shall supersede the pleadings and govern the course of the trial of this cause." Above-All confirmed that there were no other matters that might affect the trial.

When the trial commenced,[4] Above-All opened by reciting the facts and claiming that because the Frahers diverted business after they signed the sale agreement, Above-All did not receive the benefit of its bargain. In their opening statement, the Frahers' primarily argued that Above-All was pursuing a vendetta and could not show it was damaged.

Mr. Fraher testified how he and Ms. Fraher decided to start SMA and subsequently when and why they decided to sell it to Above-All. He offered that any livery service SMA provided after the sale would simply have been doing a favor for a friend. Ms. Fraher testified that despite being the sole officer, director, and shareholder of SMA and the sole signator on its bank accounts, she did not take an

[4] Although Above-All designated the entire transcript, it only provided the Panel with a partial transcript in its appendix. The Panel, however, may review the entire transcript. See Fed. R. Bankr. P. 8009(e)(2)(C).

active role in the operation of SMA. She testified she had no idea about Mr. Fraher's activities after he stopped working for Above-All.

At the close of the trial, the parties did not ask to make closing arguments or file post-trial briefs. Instead, the bankruptcy court immediately announced its decision from the bench. First, the court found for the Frahers on Counts I and II. Then it summarily ruled in favor of Ms. Fraher on Count III on the grounds that Above-All failed to establish that "she had anything to do with the debt that was created as a result of the allegations being made here . . . ."[5] In ruling against Mr. Fraher on Count III, the court first cited to the definition of actual fraud that Justice Thomas cited in his dissent in Husky Int'l Elec., Inc. v. Ritz, 136 S.Ct. 1581, 1593 (2016) (Thomas J., dissenting) (explaining actual fraud "[c]onsists of any deceit, artifice, trick, or design involving direct and active operation of the mind used to circumvent and cheat another."). It then cited to the evidence demonstrating that after the parties signed the sale agreement, Mr. Fraher operated SMA in violation of the non-compete provisions of the sale agreement. It ruled that Mr. Fraher's indebtedness was nondischargeable and that that the amount of the debt should be adjudicated in state court.

Two days later, the bankruptcy court entered a judgment in favor of Ms. Fraher on all counts, in favor of Mr. Fraher on Count I, II, and IV, and in favor of Above-All and against Mr. Fraher on Count III. The court also issued a supplemental order on the same date explaining Count IV was dismissed and granting Above-All relief from stay to proceed in the state court against Mr. Fraher.

The bankruptcy docket reflects that neither party filed a post-judgment motion. Above-All timely appealed the judgment and Mr. Fraher did not cross-appeal. In its statement of issues, Above-All listed only one: Whether the bankruptcy court erred in ruling in favor of Ms. Fraher on Count III of the complaint.

[5] The court made no mention of the outstanding issue of piercing the corporate veil.

JURISDICTION

A bankruptcy appellate panel is "'duty-bound'" to determine its jurisdiction before proceeding to the merits, even if not raised by the litigants. Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724, 725-26 (B.A.P. 1st Cir. 1998) (quoting Fleet Data Processing Corp v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998)). A panel may hear appeals from final judgments, orders, and decrees of the bankruptcy court. See 28 U.S.C. § 158(a)(1). Where, as here, the appeal is one from a judgment disposing of all counts of a complaint, the judgment is final. See, e.g., Stalnaker v. Gratton (In re Rosen Auto Leasing, Inc.), 346 B.R. 798, 800 (B.A.P. 8th Cir. 2006). As such, the Panel has jurisdiction over this appeal.

STANDARD OF REVIEW

The panel applies a de novo review to conclusions of law. See, e.g., deBenedictis v. Brady-Zell (In re Brady-Zell), 500 B.R. 295, 301 (B.A.P. 1st Cir. 2013). "A bankruptcy court's determination of whether a requisite element of a nondischargeability claim under § 523(a)(2) is present is a factual determination which we review for clear error." See id. (citing Douglas v. Kosinski (In re Kosinski), 424 B.R. 599, 607 (B.A.P. 1st Cir. 2010)).

ARGUMENTS OF THE PARTIES

In its brief, Above-All assigns error to the bankruptcy court's ruling against Ms. Fraher based on a variety of arguments. First, it mentions fraud and that to prevail on this prong, a plaintiff must demonstrate the debtor actually intended to defraud. Next, it contends that the court should have imputed Mr. Fraher's fraudulent intent to Ms. Fraher, citing for support, Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa), 287 B.R. 515 (B.A.P. 9th Cir. 2002). It then explains that a plaintiff can establish intent to deceive by proving reckless indifference to or a reckless disregard of the truth. In support it cited Ins. Co. of North America v. Cohn (In re Cohn), 54 F.3d 1108, 1119 (3rd Cir. 1995) and Equitable Bank v. Miller (In re Miller), 39 F.3d 301, 305 (11th Cir. 1994).[6] It further cited to

[6] These cases address recklessness as it pertains to the element of intent to deceive in § 523(a)(2)(B).

cases reviewing the elements of false representation. See, e.g., Palmacci v Umpierrez, 121 F.3d 781 (1st Cir. 1997). Above-All concludes that the totality of circumstances as represented by the Frahers' testimony reflects that Ms. Fraher had no intent to perform her obligations under the sale agreement, the Frahers operated a livery service in violation of state court injunctions, and, as such, the Panel should reverse the grant of judgment for Ms. Fraher on Count III.

In her brief, Ms. Fraher argues Above-All failed to establish that she played any role in creating the debt other than signing the sale agreement. As a result, she contends, there was no evidence to establish that she made a false representation. With respect to the agency argument, Ms. Fraher asserts Above-All failed to establish that Mr. Fraher was her agent or that she had actual knowledge or a reckless indifference regarding Mr. Fraher's actions after they signed the sale agreement.

In its reply brief, Above-All addressed the theory of imputing fraud and also discussed how intent to deceive can be established by demonstrating a reckless disregard for the truth.

At oral argument, Above-All offered that the bankruptcy court erred because Mr. Fraher's acts should have been imputed to Ms. Fraher—an issue it believes it raised in the Joint Pre-Trial Statement. It also discussed actual fraud and offered that Ms. Fraher was willfully ignorant of Mr. Fraher's fraud and she benefitted either personally or through SMA from that fraud.

DISCUSSION

Before we address the applicable statute, we must first review certain bedrock principles that guide us in assaying bankruptcy appeals in this circuit. Absent extraordinary circumstances, it is apodictic that legal theories not squarely addressed and litigated below cannot be raised for the first time on appeal. J.R. Insulation Sales & Serv., Inc. v. P.R. Elec. Power Auth., 482 B.R. 47, 54-5 (D.P.R. 2012) (explaining issues raised before trial court without developed argumentation waived); Iverson v. City of Boston, 452 F.3d 94, 102 (1st Cir. 2006) (collecting cases and explaining the "echolalic regularity" with which the First Circuit applies the waiver rule); Campos-Orrego v. Rivera, 175 F.3d 89, 95 (1st Cir. 1999) (explaining issue neither raised in pleadings nor argued before *nisi*

prius court was waived). If a litigant has somehow changed its strategy during the course of litigation, it must seek reconsideration or run the risk of waiving the argument on appeal. See, e.g., MCI Telecommun. Corp. v. Matrix Commun. Corp., 135 F.3d 27, 33 (1st Cir. 1998).

Failure to list an issue in the statement of issues and/or to brief the issue with reasoned arguments may also result in waiver. See, e.g., City Sanitation, LLC v. Allied Waste Serv. of Mass., LLC (In re Amer. Cartage, Inc.), 656 F.3d 82, 91 (1st Cir. 2011) (explaining issue waived unless explicitly listed or "the substance of the issue reasonably can be inferred" from the issues listed); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (explaining issues raised via cursory reference in appellate brief are deemed waived).

The First Circuit has explained that an appellate court may exercise its discretion and grant relief from waiver based upon the following nonexhaustive list of factors:

> (1) whether the failure to raise the issue has deprived the appellate court of useful fact-finding, or whether the facts have been sufficiently developed and the issue was of a purely legal nature; (2) whether the omitted argument raises an issue of constitutional magnitude; (3) whether the argument was highly persuasive and failure to reach it would threaten a miscarriage of justice; (4) whether considering the issue would cause prejudice or inequity to the adverse party; (5) whether the failure to raise the issue was inadvertent and provided no tactical advantage; and (6) whether the issue implicates "matters of great public moment."

Nat'l Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 627-28 (1st Cir. 1995). See also Montalvo v. Gonzalez-Amparo, 587 F.3d 43, 48-49 (1st Cir. 2009); Banco Bilbao Vizcaya Argentaria v. Wiscovitch-Rentas (In re Net-Velázquez), 625 F.3d 34, 41 (1st Cir. 2010).

With these principles in mind, we turn to the substance of this appeal. Pursuant to § 523(a)(2)(A), a discharge may not include a debt 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 respecting the debtor's or an insider's financial condition; . . . ." The three prongs of this subsection are distinct. Privitera v. Curran (In re Curran), 554 B.R. 272, 284 (B.A.P. 1st Cir. 2016). The necessary elements of either of the first two prongs, false pretense or false

representation, require a plaintiff must satisfy six necessary elements. Id. at 285.[7] To establish the third prong, a debt is excepted from discharge for actual fraud, a plaintiff must show that a debtor committed an act that "counts as 'fraud' and is done with wrongful intent . . . ." Husky Intern. Elec., Inc. v. Ritz, 136 S.Ct. at 1586 (ruling fraudulent conveyance scheme can constitute actual fraud notwithstanding lack of false representation). It can be "effected without a false representation." Id. The Supreme Court explained that "[a]lthough 'fraud' connotes deception or trickery generally, the term is difficult to define more precisely." Id.[8] To prevail under any of the three prongs, a plaintiff is subject to a preponderance of the evidence standard. See Grogan v. Garner, 498 U.S. 279, 287 (1991).

To support Count III, Above-All offered in its complaint that by fraudulently inducing it to enter into the agreement, to make the payment described therein, to employ Fraher while diverting both SMA and Above[-]All business to their own benefit, the Frahers engaged in fraud and deceit. It did not specify which of the three statutory prongs it was relying upon with respect to Ms. Fraher and did not raise imputed fraud. In the Joint Pre-Trial Statement, Above-All claimed the only legal issue remaining to be litigated was whether "the SMA corporate veil should be pierced."[9] It did not list imputed or actual fraud in the Joint Pre-Trial Statement. At trial, Above-All did not specify which of three prongs it considered applicable and did not raise the issue of imputed fraud. The bankruptcy court did not refer to the statute when ruling in favor of Ms. Fraher and Above-All did not pursue post-trial clarification from the court.

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[7] In order to establish a debt is nondischargeable under § 523(a)(2)(A) due to a false representation, the plaintiff must show that: (1) the debtor made a knowingly false representation or one made in reckless disregard of the truth; (2) the debtor intended to deceive; (3) the debtor intended to induce the creditor to rely upon the false statement; (4) the creditor actually relied upon the misrepresentation; (5) the creditor's reliance was justifiable; and (6) the reliance upon the false statement caused damage. In re Curran, 554 B.R. at 284 (citing McCrory v. Spigel (In re Spigel), 260 F.3d 27, 32 (1st Cir. 2001).

[8] Prior to Husky, any case brought under § 523(a)(2)(A) was subject to a five-part test. While the cases are few since Husky, it appears that cases under actual fraud would no longer be subject to the five-part test. See, e.g., BBI Architectural Serv. v. Janney (In re Janney), 557 B.R. 476, 480-81 (Bankr. M.D.La. 2016); In re Chicago Patrolmen's Fed. Credit Union v. Fenner (In re Fenner), 558 B.R. 877, 884-85 (Bankr. N.D. Ill. 2016) (explaining for actual fraud creditor must show debtor intended fraudulent act which resulted in debt). The intent may be established through direct evidence or inference from the facts and circumstances. Id. at 885.

[9] Of the two issues of law it listed, this is the only one which pertained to Count III.

Pursuant to Bankruptcy Rule 8009(a)(1)(A), Above-All filed its statement of issues in which it simply stated that the bankruptcy court had erred in failing to conclude Ms. Fraher's debt nondischargeable under § 523(a)(2)(A). As before, it did not cite to the prong of the statute on which it relied and it did not raise the issue of imputed fraud.

In its opening brief, Above-All claims that at trial it produced sufficient evidence to meet its burden as to Ms. Fraher. For the first time, it mentioned imputing the fraud of Mr. Fraher but instead of developing the argument, it moved on to address the first element of the six-factor test in conjunction with an action brought under one of the first two prongs of the statute—a representation made in reckless disregard of the truth. It did not address the additional elements of those two prongs. It then proceeded on to an argument that appears to touch upon actual fraud. In its reply brief, Above-All again mentioned the first element of the first two prongs to argue for imputing Mr. Fraher's fraud, and to suggest Ms. Fraher could be liable for actual fraud. In neither of these briefs did Above-All present developed argumentation with respect to actual or imputed fraud.[10]

When questioned at oral argument, Above-All offered that it had addressed the theory of imputed fraud in the Joint Pre-Trial Statement.

After this conspectus, it is evident that Above-All never provided in its complaint, in the Joint Pre-Trial Statement, in its opening statement, at trial, in its statement of issues, or in its appellate briefs developed arguments that pertain to the theories which it now urges this Panel apply—imputed and actual fraud.[11] Under the First Circuit standards applicable to waiver, we are constrained to conclude that Above-All has waived the theories of imputed and actual fraud. As this appeal does not present issues of constitutional magnitude or matters of great public moment, we will not exercise our discretion and grant relief from waiver.

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[10] For example, in neither its opening brief nor in its reply brief does Above-All cite to cases such as Husky Int'l Elec., Inc. v. Ritz, 136 S.Ct. 1581 (2016) or Sauer, Inc. v. Lawson (In re Lawson), 791 F.3d 214 (1st Cir. 2015).

[11] Even if we were to read the record with respect to actual fraud more generously, there is no basis upon which we could conclude that the bankruptcy court's findings were clearly erroneous.

CONCLUSION

For the reasons set forth herein, the Panel **AFFIRMS** the judgment as to Ms. Fraher on Count III.