United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce
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No. 19-30325

In the Matter of: Jeffrey Stephen Lawrence Green; Memory C. Green,

Debtors,

SE Property Holdings, L.L.C.,

Appellant,

versus

Jeffrey Stephen Lawrence Green; Memory C. Green,

Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:18-CV-710

Before Dennis, Graves, and Willett, *Circuit Judges*.

Don R. Willett, *Circuit Judge*:

The Bankruptcy Code offers debtors a fresh start. But not all debts are discharged. For example, § 523(a) of the Code leaves debtors on the hook for

obligations incurred by intentional wrongdoing.[1] Here, after Jeffery[2] Green filed for Chapter 7 bankruptcy, Southeast Property Holdings, LLC (SEPH) sought a judgment of nondischarge for $41 million that Green owed. SEPH argues that portions of this debt are doubly nondischargeable because they (1) were obtained by fraud (excepted from discharge under § 523(a)(2)(A)), or else (2) inflicted willful and malicious injury (excepted under § 523(a)(6)). In this appeal from summary judgment in favor of Green, SEPH argues that Green triggered both subsections of § 523(a) through two allegedly wrongful transactions. We hold that SEPH has raised a genuine dispute of material fact as to the impropriety of one transaction but not of the other. We thus affirm in part and reverse and remand in part.

I

Green owned several natural disaster remediation businesses and had personally guaranteed debts that his businesses owed to Vision Bank, the predecessor-in-interest of SEPH. After Green's businesses defaulted on those debts in 2014, SEPH sued and received a final judgment in its favor. The Southern District of Alabama later issued a charging order to facilitate SEPH's collection of that judgment. The charging order directed certain of Green's companies to "distribute to SEPH any amounts that become due or distributable to [Green]."

A few years later, Green filed for Chapter 7 bankruptcy. SEPH then filed an adversary proceeding against Green based on the 2014 judgment, which by that time exceeded $41 million (including interest). SEPH alleged that the judgment against Green was not dischargeable under

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[1] 11 U.S.C. § 523(a)(2)(A) and (a)(6).

[2] While the caption spells Green's first name "Jeffrey," Green represents that his first name is in fact spelled "Jeffery."

§§ 523(a)(2)(A) and (a)(6) because Green had engaged in fraudulent activity and willful and malicious conduct.

The bankruptcy court granted partial summary judgment in favor of Green and dismissed with prejudice all but one of SEPH's claims, which concerned improper payments that one of Green's companies made to a CPA firm and is not at issue in this case. Trial was held on the remaining claim, and the bankruptcy court found that all but $1,626 of Green's debt was dischargeable. SEPH appealed to the Middle District of Louisiana, which affirmed across the board.

On appeal, SEPH contests the bankruptcy court's grant of summary judgment on two separate claims: (1) that Green committed actual fraud and intentionally harmed SEPH by diverting funds; and (2) that Green willfully and maliciously injured SEPH by failing to transfer to SEPH funds that Green's company had received from FEMA—the "Livingston Parish receivables"—despite SEPH's security interest in those funds.

II

The fundamental rules governing summary judgment are familiar. Our review is de novo, using the same standard as the district court.[3] Under Rule 56, summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[4] And in the bankruptcy context, while the district court's analysis of the issues may be helpful, "[o]ur review is properly focused on the actions of the bankruptcy court."[5]

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[3] *Petzold v. Rostollan*, 946 F.3d 242, 247 (5th Cir. 2019).

[4] FED. R. CIV. P. 56.

[5] *In re Age Ref., Inc.*, 801 F.3d 530, 538 (5th Cir. 2015).

In assessing whether genuine disputes of material fact exist, "the court may not undertake to evaluate the credibility of witnesses, weigh the evidence, or resolve factual disputes."[6] It must instead view all facts in favor of the non-moving party—here SEPH—"disregard[ing] all evidence favorable to the moving party that the [finder of fact] is not *required* to believe."[7] And the court may not reject the nonmovant's statement "merely because it is not supported by the movant's . . . divergent statements."[8] That said, the court "is not required to accept the nonmovant's conclusory allegations, speculation, and unsubstantiated assertions which are either entirely unsupported, or supported by a mere scintilla of evidence."[9]

III

SEPH argues that Green offended § 523(a) through two improper transactions (or inactions):

1. intentionally diverting funds from SEPH by making disguised distributions to himself via sham real estate investments; and
2. purposefully withholding the Livingston Parish receivables from SEPH.

We examine each allegation in turn.

A

SEPH asserts that Green's first wrongful act was making disguised distributions to himself, in violation of the charging order, thus triggering

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[6] *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991).

[7] *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 245 (5th Cir. 2016) (internal quotation omitted) (second alteration and emphasis in original).

[8] *Id.*

[9] *Id.* (internal quotation omitted).

both §§ 523(a)(2)(A) and (a)(6). On this claim, we agree with the district court that summary judgment for Green was proper.

First, § 523(a)(2)(A): Actual Fraud. Section 523(a)(2)(A) excepts from discharge "any debt . . . for money . . . to the extent obtained by . . . actual fraud," including fraudulent conveyance schemes.[10] SEPH says Green hatched such a scheme when he made disguised distributions to himself in violation of the charging order, which required certain of Green's companies to "distribute to SEPH any amounts that become due or distributable to [Green]." Specifically, SEPH alleges that Green & Sons—a real estate holding company of which Green is 51% owner—fraudulently "loaned" $225,000 to a Panamanian entity to avoid making payments to SEPH.[11] SEPH focuses on the "due or *distributable*" language of the charging order, arguing that Alabama law construes "distribution" broadly, such that it includes this type of transfer.[12]

SEPH stumbles, however, on § 523(a)(2)(A)'s "obtained by" requirement. Even assuming that Green engaged in a fraudulent scheme, SEPH has not produced any facts to suggest that Green *obtained* a debt from

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[10] *Husky Intern. Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1590 (2016).

[11] SEPH believes the loan money was actually a disguised disbursement because (1) the $225,000 loan came from the proceeds of Green & Sons' sale of real property; (2) Green & Sons "is in the real estate business and not a lending entity"; (3) the owner of the Panamanian entity is a personal friend of Green; (4) the loan agreement was entered into months before the loan was funded; (5) Green "did not know how much of the loan had been paid back, what [the Panamanian entity] had used the money for, or other pertinent facts about the transaction"; and (6) Green has "clear ill will toward SEPH."

[12] The charging order was issued pursuant to Alabama Code § 10A-5-6.05. Under Alabama law, a "distribution" is "a transfer of money or other property from a limited liability company, or series thereof, to another person on account of a transferable interest." Ala. Code § 10A-5A-1.02(h).

his alleged fraud; therefore, SEPH has not raised a genuine dispute of material fact.[13]

Second, § 523(a)(6): Willful and Malicious Injury. Under § 523(a)(6), Green's debt is nondischargeable only if SEPH was *harmed* as an intended result of Green's actions.[14] SEPH avers that it was harmed because Green prevented it from capturing distributions to which it was entitled. Yet, even under the broad reading of "distributions," SEPH has not demonstrated that it was *entitled* to the proceeds of Green & Sons' sale of real property. Alabama law says that a creditor is entitled to the payment of distributions "to which the judgment debtor [Green] would otherwise be entitled."[15] A creditor, however, "shall have no right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of a limited liability company."[16] Here, SEPH has not offered any evidence to suggest that Green was entitled to the proceeds of Green & Sons' sale of its real property, even accepting SEPH's position that the details surrounding the loan were "suspicious." Absent competent evidence that Green & Sons was required to distribute the sale proceeds to Green instead of reinvesting the funds,

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[13] *Husky*, 136 S. Ct. at 1589 ("It is of course true that the transferor does not 'obtain' debts in a fraudulent conveyance. But the recipient of the transfer . . . can 'obtain' assets 'by' his or her participation in the fraud. If that *recipient* later files for bankruptcy, any debts 'traceable to' the fraudulent conveyance will be nondischargeable under § 523(a)(2)(A). . . ." (internal citations and alterations omitted) (emphasis added)). Here, Green & Sons is the transferor, not the recipient. Section 523(a)(2)(A) is thus inapplicable.

[14] *See In re Williams*, 337 F.3d 504, 508–09 (5th Cir. 2003) (holding that, for a violation of 11 U.S.C. § 523(a)(6) to occur, the debtor must have acted with "either an objective substantial certainty of harm or a subjective motive to cause harm" (internal citation omitted)).

[15] Ala. Code § 10A-5A-5.03(b).

[16] *Id.* at § 10A-5A-5.03(f).

SEPH has not shown that it suffered a harm. On this allegation, the bankruptcy court was correct to grant summary judgment in Green's favor.

B

SEPH contends that Green's second act of impropriety was withholding the Livingston Parish receivables from SEPH, again offending § 523(a)(6).[17] Here, too, the bankruptcy court held that SEPH failed to demonstrate a genuine dispute of material fact. We see the receivables allegation differently.

To reach its decision, the bankruptcy court considered evidence submitted by Green, including the affidavit of Cheryl Ellison, an office manager at one of Green's businesses. And it found that the evidence supported Green's contention that SEPH had consented to the company's use of the Livingston Parish receivables for further disaster-relief work.

The bankruptcy court then noted SEPH's argument: "it never consented to [the company's] use of the Livingston Parish payments." The court reviewed the affidavit of Jennifer Corbitt, a vice president at SEPH. Corbitt, as relayed by the bankruptcy court, "recites that [SEPH] did not consent to a request to use the funds . . . ." The affidavit also directed the court to a letter by another SEPH vice president that denied Green's companies' request to use receivables for any use other than payment of loans held by SEPH. "The problem with [SEPH's] argument," the court found, "is that the letter denying the entities' permission to use the funds is dated

[17] In one sentence, SEPH also argues that "Green's enmity toward SEPH and other circumstances would have supported an inference that Green acted with the requisite intent under § 523(a)(2)(A)" vis-à-vis the Livingston Parish receivables. Arguments given short shrift, such as this one, are forfeited. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("A party who inadequately briefs an issue is considered to have abandoned the claim.").

April 20, 2012, nearly two years after [Green] received the vast majority of the Livingston Parish payments on which this part of SEPH's claim rests." The court also questioned the veracity of Corbitt's affidavit, describing it as "artfully worded" to "avoid[] drawing attention to the extensive time between [Green's] receipt of the payments from the Livingston Parish and SEPH's denial . . . in an effort to suggest that a disputed material fact exists." Finally, the bankruptcy court discounted Corbitt's affidavit altogether, finding that it was not based on her personal knowledge. Discounting the evidence provided by SEPH, and finding the evidence provided by Green persuasive, the bankruptcy court concluded that "no disputed material fact exists" and that "SEPH has not contradicted the affidavit of Ms. Ellison that Vision . . . consented to [Green's] use of the Livingston Parish payments." It accordingly granted summary judgment in Green's favor.

Respectfully, the bankruptcy court erred in assessing the evidence.[18] As noted above, a court must disregard all evidence in the movant's—here, Green's—favor that it is not *required* to believe.[19] So the bankruptcy court should not have evaluated the persuasiveness of Ellison's affidavit against the relative persuasiveness of Corbitt's affidavit. Nor was it proper to make credibility determinations regarding Corbitt's affidavit, regardless of whether the affidavit was "artfully worded" or unshakably veracious. The bankruptcy court was permitted to consider only whether the competing affidavits diverged on specific facts to determine whether a factual dispute existed for trial.[20] And it failed to stay within this limited scope of authority.

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[18] The district court did not address this issue; its analysis focused on whether the bankruptcy court properly discounted Corbitt's affidavit for lack of personal knowledge.

[19] *Heinsohn*, 832 F.3d at 245; *Int'l Shortstop*, 939 F.2d at 1263.

[20] *See Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 7 F.3d 1203, 1206–07 (5th Cir. 1993).

The court's error, however, is not the end of our inquiry; we still must undertake a plenary review of whether SEPH has demonstrated a genuine dispute of material fact. And "[p]lenary review requires that we first settle the record by resolving issues of evidence,"[21] such as the propriety of Corbitt's affidavit. While a court should not make credibility determinations, it may properly find that an affidavit unsupported by personal knowledge is inadmissible as competent summary judgment evidence.[22] We review the bankruptcy court's determination that "[t]he affidavit of Ms. Corbitt lacks information required by Rule 56(c)(2)" for abuse of discretion.[23]

The bankruptcy court discounted Corbitt's affidavit because, in its view, the affidavit lacked information regarding Corbitt's "personal knowledge of whether or not Vision Bank gave permission for use of the receivables at any time before the [April 2012 letter]." The court was correct that Corbitt's affidavit does not include an explicit statement of her personal knowledge, but it failed to acknowledge that "there is no requirement for a set of magic words."[24] We have held that personal knowledge can be inferred if such knowledge reasonably falls within the person's "sphere of responsibility," particularly as a corporate officer.[25] We have also held that "personal knowledge does not necessarily mean contemporaneous

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[21] *Salas v. Carpenter*, 980 F.2d 299, 304 (5th Cir. 1992).

[22] *See DirectTV, Inc. v. Budden*, 420 F.3d 521, 529 (5th Cir. 2005); *D'Onofrio v. Vacation Publ'n, Inc.*, 888 F.3d 197, 208 (5th Cir. 2018); *see also* FED. R. CIV. P. 56(c)(4).

[23] *In re SGSM Acquisition Co., LLC*, 439 F.3d 233, 239 (5th Cir. 2006). The bankruptcy court refers to Rule 56(c)(2), which refers to a party's right to object to evidence as inadmissible; Rule 56(c)(4), however, sets forth the requirement that an affidavit be based on personal knowledge.

[24] *DirectTV*, 420 F.3d at 530.

[25] *Id.*

knowledge."[26] In *Dalton v. F.D.I.C.*, for instance, we reiterated that an affidavit of an FDIC account officer is not necessarily defective just because the officer didn't have personal knowledge of the underlying loan at the time it originated.[27] Such a strict personal-knowledge requirement, we emphasized, would be impractical in the banking context.[28]

Despite this permissive rule of inference, the bankruptcy court failed to consider whether the information in Corbitt's affidavit fell within the scope of her responsibility as a vice president at SEPH. Additionally, the court seemed to suggest that Corbitt would need to have demonstrated contemporaneous knowledge of the arrangement between the bank and Green to legitimize her affidavit under Rule 56(c)(4). In so doing, the bankruptcy court held SEPH to a higher standard than our precedent requires, and accordingly, abused its discretion. Because the bankruptcy court abused its discretion, we decline to follow its logic and independently assess Corbitt's attestation.

A review of Corbitt's affidavit, with an eye toward whether personal knowledge can be reasonably inferred, suggests that the affidavit is competent summary judgment evidence. As a vice president of SEPH, Corbitt's responsibilities would likely include knowing whether the bank permitted a borrower to otherwise use money ($4.5 million) that he was contractually obligated to repay pursuant to a written security agreement. So

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[26] *Cutting Underwater Techs. USA, Inc. v. Eni U.S. Op. Co.*, 671 F.3d 512, 516 (5th Cir. 2012) (per curiam) (mem.).

[27] 987 F.2d 1216, 1223 (5th Cir. 1993).

[28] *Id.*

we can, and will, infer personal knowledge based on Corbitt's corporate position.[29]

We can now turn to whether SEPH, through Corbitt's affidavit, demonstrated a genuine dispute of material fact. SEPH's claim against Green is that certain debts Green owes to SEPH are nondischargeable because Green willfully and maliciously injured SEPH by using the Livingston Parish receivables instead of paying the money to SEPH pursuant to their written agreement.[30] We "may infer that a debtor acted with malice, for purposes of § 523(a)(6), if the debtor acts in a manner which one knows will place the lender at risk, such as converting property in which the lender holds a security interest."[31]

To support its claim, SEPH points to uncontroverted evidence that Green knew SEPH possessed a security interest in the Livingston Parish receivables under the parties' written security agreement. Green does not disagree that SEPH had such a security interest or that he failed to pay SEPH the Livingston Parish receivables. Instead, Green argues that SEPH (via

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[29] Green does not contest that the information in Corbitt's affidavit falls within the sphere of her responsibility. He instead challenges the affidavit by arguing that "Ms. Corbitt could not even claim that she was employed by Vision Bank at the relevant time much less that she had any personal knowledge of or involvement in the actual lending relationship. . . ." Corbitt's affidavit is silent on her dates of employment. Though we have sometimes observed that the affiant was employed during the relevant time period, we have not required an explicit statement of employment dates to infer personal knowledge, focusing instead on the affiant's job title. *Compare Cutting Underwater*, 671 F.3d at 516 (noting that affiant maintained his employment role during the relevant time period), *with DirectTV*, 420 F.3d at 530 (relying on affiant's corporate position without reference to dates of employment to infer personal knowledge), *and Campbell Harrison & Dagley, L.L.P. v. PBL Multi-Strategy Fund, L.P.*, 744 F. App'x 192, 198 (5th Cir. 2018) (unpublished) (same).

[30] *See* 11 U.S.C. § 532(a)(6).

[31] *In re Lobell*, 390 B.R. 206, 217 (Bankr. M.D. La. 2008).

Vision Bank) "consented to [Green's] use [of the proceeds] to pay such things as payroll, taxes, insurance, [and] fuel . . . in the ordinary course of business." If SEPH agreed with Green's contention—admitting (or failing to refute) that it did give such permission—summary judgment would be proper. SEPH is not so agreeable.

To contest Green's motion for summary judgment, SEPH offered Corbitt's affidavit, which explicitly states that SEPH did not consent to the use of the Livingston Parish receivables for anything other than making payments to SEPH.[32] Green argues that these statements are insufficient to create a dispute of fact because Corbitt does not attest to whether Vision Bank—as opposed to SEPH—consented to Green's use of the receivables. However, SEPH acquired Vision Bank via merger, meaning that Vision Bank was absorbed into SEPH and ceased to exist as a separate entity.[33] Therefore, drawing reasonable inferences in favor of SEPH, as we must, it is reasonable to conclude that Corbitt's statements regarding "SEPH" refer to Vision Bank as well. As such, Corbitt's attestation that Green was never authorized to use the Livingston Parish receivables for anything other than making payments to SEPH—including her reference to the Security Agreement, which she avers still controls—is sufficient to create a genuine dispute of

[32] Corbitt Aff. 2 ("Documents filed contemporaneously herewith restrict and restricted the ability of the Green entities . . . to use collections from the Livingston Parish. . . . [T]he loan documents, including those guaranteed by [Green], clearly required that collections on receivables such as those from Livingston Parish were to be held in trust. . . . SEPH was unaware of the Green entities' failure to hold [the Livingston Parish receivables] in trust or to transfer them to SEPH. . . .").

[33] *See Engel v. Teleprompter Corp.*, 703 F.2d 127, 131 (5th Cir. 1993) ("A merger of two corporations contemplates that one corporation will be absorbed by the other and will cease to exist while the absorbing corporation remains. . . . In a merger, both the assets and liabilities of the disappearing corporation are vested in the surviving corporation."). Prior to the merger, Vision Bank was a wholly-owned subsidiary of Park National Corporation. SEPH is also a wholly-owned subsidiary of Park National Corporation.

material fact. Who to believe—Green (that he did receive consent) or SEPH (that no such consent was given)—is a credibility determination for a finder of fact, not a query for summary judgment review.[34]

CONCLUSION

SEPH cannot avoid summary judgment regarding whether Green committed fraud or intentionally harmed SEPH by loaning funds from Green & Sons. But SEPH *has* raised a genuine dispute of material fact regarding whether Green received consent to use the Livingston Parish receivables for anything other than making payments to SEPH.

Accordingly, we AFFIRM in part and REVERSE and REMAND in part.

[34] *See Int'l Shortstop*, 939 F.2d at 1263.