

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8616
Summary Calendar

IN THE MATTER OF: FREDERICK & KATHRYN PARKE,
Debtors,
FREDERICK PARKE,
Appellant,
versus
BANK OF AUSTIN,
Appellee.

Appeal from the United States District Court for the
Western District of Texas
(91-CV-598)

(February 17, 1993)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

Debtor/defendant-appellant Frederick Parke (Parke) appeals the district court's affirmance of a bankruptcy court's order denying

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

the dischargeability of a debt Parke owed to plaintiff-appellee Bank of Austin. Finding no error warranting reversal of the bankruptcy court's order, we affirm.

Facts and Proceedings Below

Parke and Benitar Corporation, which he controlled, were involved in real estate development, property management, and leasing in the area of Austin, Texas known as West Campus, an area directly west of the main campus of the University of Texas at Austin. He had been involved in the West Campus real estate business for several years and had aspirations of expanding his business in that area.

In December 1987 and January 1988, Parke was presented with the opportunity of opening a new business location at 2404 Rio Grande Street, Austin, Texas, but needed funds to remodel the office and for other start-up costs. He spoke of his expansion aspirations to a joint venture partner of his named Dr. Tom Barnett (Barnett), who was also a director on the board of Bank of Austin. Barnett put Parke in touch with the president of Bank of Austin, Dr. George Berry.

Shortly thereafter, according to Parke's testimony, Barnett called Parke and told him that his loan had been approved and that Parke should call George Berry to finalize the deal. Also according to Parke, George Berry confirmed that Bank of Austin would loan him the money to open his new office and that he should come to the bank to complete the paperwork on the loan. Parke further testified that immediately after George Berry informed him

that his loan had been approved, but before he had completed the loan documents, he made various commitments to start work on the office.

Shortly thereafter, Parke contacted another bank employee as instructed by George Berry in order to complete the paperwork on the loan. Parke was instructed, among other things, to bring a current financial statement to the closing. On January 25, 1988, Parke went to Bank of Austin to sign the loan documents and at that time presented Bank of Austin with a financial statement dated March 1, 1987. The financial statement, however, contained several material misstatements of which Parke claimed that he was unaware.

A few months later, in June 1988, Parke deposited \$100,000 in a certificate of deposit account at Bank of Austin. The money did not belong to Parke, but was rental proceeds from property that Parke was managing. Bank of Austin issued the certificate of deposit in Parke's name individually, and later claimed that Parke had told Bank of Austin that the money belonged to him. Parke later claimed that he had never made such a statement, but that Bank of Austin had assumed that the money was Parke's and erroneously issued the certificate of deposit in his name without being instructed to do so.

Throughout 1988 and the first half of 1989, Bank of Austin continued to make new loans and renew old loans to Parke for various real estate ventures. One new loan, in the amount of \$95,000, was for the remodelling of a building at 2401 Rio Grande Street, Austin, Texas (2401 Rio Grande). Part of the 2401 Rio

Grande project involved the installation of a Bank of Austin automatic teller machine (ATM) in the building. Parke bought an option to lease the building and began remodeling, but had to borrow another \$18,000 from Bank of Austin in November 1988 to finish the project.

During the second half of 1988, Parke was experiencing financial difficulties with a number of his properties and ventures. He claims that he spoke frequently and candidly about these financial difficulties with his primary contact at Bank of Austin, John Berry (a vice-president of Bank of Austin and George Berry's son). Parke testified that John Berry orally asked for an updated financial statement in January 1989, but also instructed Parke to furnish one that reflected Parke's financial condition before the downturn in his business ventures. Parke provided Bank of Austin with a financial statement dated June 1988. This statement, however, was not only out of date, but moreover contained the same misstatements of assets that were present in the financial statement that Parke had given to Bank of Austin a year earlier.

John Berry testified that he knew nothing of Parke's financial difficulties in January 1989, and that Parke had lied in so testifying. John Berry sent a letter to Parke dated January 27, 1989, expressing doubt about the continued accuracy of the financial statement provided by Parke, but, according to John Berry, Parke orally assured him that the financial statement was still materially accurate. Bank of Austin thereafter renewed two

earlier loans.

On May 4, 1989, Bank of Austin loaned Parke another \$24,000. Parke claimed that he discussed with John Berry in March or April 1989 the inevitability of filing personal bankruptcy. John Berry claimed that Parke never discussed bankruptcy with him and that the loan was made, as the others had been, on the strength of Parke's financial statement. The Bank of Austin made a final loan to Parke's wife as late as July 20, 1989, the day before Parke and his wife filed for bankruptcy.

Bank of Austin foreclosed on Parke's leasehold interest in 2401 Rio Grande, among other collateral, and held a public auction to sell the leasehold rights to the property. No other person or entity bid at the sale, however, and Bank of Austin bought Parke's leasehold interest for exactly its rental value of \$2,000 per month. Thus, the sale brought no net proceeds to offset Parke's debt to Bank of Austin.

Bank of Austin brought this suit in bankruptcy court to have its debt declared nondischargeable for reason of fraud. A Bank of Austin officer testified at trial that Parke's total remaining indebtedness to Bank of Austin was \$162,824.89, after applying the money received as a result of the sale of collateral and \$25,000 paid to Bank of Austin in settlement of litigation over the \$100,000 certificate of deposit. After a bench trial, the bankruptcy court found for Bank of Austin and ordered that Parke's debt to it was nondischargeable. The district court affirmed the bankruptcy court's judgment.

Discussion

Parke first argues that the sale of the leasehold interest in 2401 Rio Grande was not "commercially reasonable" under Texas Business and Commerce Code § 9.504 (West 1991), and that this fact bars Bank of Austin's recovery for the deficiency on the notes. In their briefs, the parties argue over which of them has the burden of proving commercial reasonableness. Though this was, until recently, a controversial issue in Texas law, the Texas Supreme Court has settled the matter with its holding in *Greathouse v. Charter National Bank-Southwest*, 35 Tex. Sup. Ct. Journ. 1017, 1020 (Tex., July 1, 1992). The *Greathouse* Court held that (so long as the issue has been specifically raised in the pleadings) the burden of proof that the circumstances of a foreclosure sale were commercially reasonable falls on the creditor.

In this case, we note that the bankruptcy court did not explicitly address the burden of proof of commercial reasonableness despite the matter's having been raised by Parke (though it seems to place that burden nearer to Parke than to Bank of Austin). Such an error of law would ordinarily require reversal. However, in this case, we are satisfied that such error is harmless. Fed. R. Civ. P. 61.

The bankruptcy court did make the factual finding that Parke's leasehold interest in 2401 Rio Grande had no net value because the lease was worth what it cost in rent. We review the factual findings of the bankruptcy court only for clear error. *In re Sutton*, 904 F.2d 327, 329 (5th Cir. 1990). Valuation of property

is clearly such a factual determination. After review of the evidence presented at trial, we cannot say that the bankruptcy court was clearly erroneous in its finding that Parke's leasehold interest in 2401 Rio Grande had no net value at the time of foreclosure. Indeed, the only evidence on the then value of the leasehold supports the bankruptcy court.

Because the asset disposed of by Bank of Austin had no net value, Parke could not have suffered any damage from a sale that was not commercially reasonable. See *Piney Point Investment Corp. v. Photo Design, Inc.*, 691 S.W.2d 768, 770 (Tex. App.--Houston 1985, n.w.h.); *FDIC v. Blanton*, 918 F.2d 524, 529 (5th Cir. 1990). Thus, any error made by the bankruptcy court in weighing the evidence presented on the issue of commercial reasonableness with regard to the sale of the leasehold rights was harmless.

Parke also contends that the bankruptcy court erred in finding that Bank of Austin reasonably relied on his financial statements in approving several of the loans made to him. Because of the conflicting testimony recounted *supra*, we have no difficulty affirming the bankruptcy court's finding that Bank of Austin reasonably relied on the financial statements and Parke's oral affirmation in January 1989 that the June 1988 financial statement was still accurate in all material respects.

George Berry testified as to the importance of several of the assets misstated on the financial statement in assessing Parke's ability to pay back the loans in the event that he incurred financial difficulty. John Berry testified that he knew nothing

about Parke's financial difficulties in the latter half of 1988. Furthermore, John Berry sent a letter to Parke after receiving the June 1988 financial statement requesting confirmation of the accuracy of its contents. This letter could, as Parke points out, be interpreted as evidence that John Berry knew Parke's financial statement could not be trusted. However, the letter can also, and just as logically, support an inference that John Berry put a great deal of reliance on the financial statements in deciding whether to continue funding Parke's ventures.

There is support in the record for the bankruptcy court's finding that Bank of Austin reasonably relied on Parke's financial statements. As stated *supra*, the factual findings of the bankruptcy court are afforded the deference of clearly erroneous review. Such deference is especially appropriate here where the finding of reasonable reliance was dependent on making credibility choices between mutually contradictory witness testimony. The bankruptcy court was well within its powers in choosing to believe George and John Berry and disbelieve Parke on this issue. We affirm the bankruptcy court's finding of reasonable reliance.

Finally, Parke calls into question the calculation used by the bankruptcy court in setting the amount of Parke's nondischargeable debt to Bank of Austin. An officer of Bank of Austin provided uncontradicted testimony at trial that the net amount of the debt owed by Parke to Bank of Austin after reduction for receipts from collateral and other amounts was \$162,824.89. Bank of Austin was awarded pre-judgment interest on its award at 18% per annum and the

calculation of the amount of interest that accrued between October 21, 1989, and May 15, 1991 is set forth in Bank of Austin's brief before this Court. We are satisfied that this calculation is correct and that as of May 15, 1991, Parke owed Bank of Austin interest of \$45,769.41 on the debt. Therefore, the judgment as of that date was the sum of debt and interest, or \$208,594.30.

Conclusion

We find no reversible error in the bankruptcy court's order denying dischargeability of Parke's debt to Bank of Austin nor in the calculation of the amount of the debt and interest due thereon. That order is therefore

AFFIRMED.