UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT DIVISION

In re: John J. Phelan and Sharon F. Phelan, Debtors.	Chapter 7 Case No.: 09-52366
Michael Brady, Plaintiff, v. John J. Phelan, Jr., Defendant.	Adv. Pro. No.: 10-5015

ORDER ON DEFENDANT'S MOTION TO COMPEL PRODUCTION OF TAX RETURNS

INTRODUCTION

The defendant seeks the production of tax returns which have been reviewed *in camera*. For the reasons that follow, the plaintiff is ordered to produce his 2004 and 2005 state and federal tax returns.

BACKGROUND

In December 2004, the plaintiff and his brother loaned the defendant $450,000.[1] The purpose of the loan was to allow the defendant to acquire and improve certain real property. The plaintiff alleges that the defendant, an attorney, did not properly secure and perfect the plaintiff's interest in the property as the defendant represented he would. As a result, the plaintiff became an unsecured creditor.

This chapter 7 case was filed on November 20, 2009. On February 24, 2010, the plaintiff commenced this adversary proceeding for a determination that a debt,

[1] Plaintiff's brother assigned his interest in the loan to plaintiff and is not a party in this action.

arising out of the aforesaid misrepresentation and breach of fiduciary duty, should not be discharged under code §§ 523(a)(2)(A) & (4). In relevant part those sections provide:

> (a) A discharge under section 727 . . . does not discharge an individual debtor of any debt—
>
> (2) for money, property, services . . . to the extent obtained, by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement representing the debtor's . . . financial condition;
>
> * * *
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, . . .

11 U.S.C. § 523(a)(2)(A) & (4).

It is well-settled that to prove fraud, a plaintiff must demonstrate by a fair preponderance of the evidence that the defendant made a false statement, which was known to be false at the time it was made, the plaintiff relied on the statement and suffered damages as a result. *See, e.g., Stewart Title Guaranty Co. v. Vasquez (In re Vasquez)*, Adv. Pro. No. 08-5098, 2010 WL 1487997, *1-2 (Bankr. D. Conn. Apr. 13, 2010). The resolution of this adversary proceeding centers on whether the plaintiff can demonstrate the requisite reliance on the alleged misrepresentation.

On June 20, 2011, the defendant filed the instant motion for the production of the plaintiff's state and federal tax returns for the calendar years 2004 through 2008, sought in defense of plaintiff's § 523(a)(2)(A) cause of action.[2] He claims those returns are evidence of the plaintiff's financial acumen and experience that "will factor into a determination of justifiable reliance" since justifiable reliance depends, in part, on the experience and sophistication of a plaintiff. (Def.'s Motion to Compel at ¶6; *see also id.* at ¶5 (citing *Field v. Mans*, 516 U.S. 59, 71-73 (1995)). The plaintiff objected, arguing that the production of those tax returns "is overly broad, unduly burdensome, calculated

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[2] It is noteworthy that the defendant's motion to produce does not state that he seeks the subject tax returns in the defense of the plaintiff's § 523(a)(4) cause of action. Therefore, the merits of production for that purpose will not be addressed here.

to harass and/or annoy, not reasonably calculated to lead to discoverable evidence and not relevant to the case at hand." (Pl.'s Objection at ¶ 2.)

DISCUSSION

Federal Rule of Evidence 402 provides that "[a]ll relevant evidence is admissible." "'Relevant evidence' means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401 (emphasis added). The law of the Second Circuit is that relevance is subject to a "very low standard". *United States v. Al-Moayad*, 545 F.3d 139, 176 (2d Cir 2008); *see also United States v. Quattrone*, 441 F.3d 153, 188 (2d Cir. 2006) ("[S]o long as a chain of inferences leads the trier of fact to conclude that the proffered submission affects the mix of material information, the evidence cannot be excluded at the threshold relevance inquiry.").

Moreover,

> a creditor arguing for nondischarge under § 523(a)(2)(A) need not show reasonable reliance; rather, [he] need only prove *justifiable* reliance. When it provided for this more subjective standard of reliance, the Supreme Court instructed lower courts to consider "the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case." *Field*, 516 U.S. at 71.

Owens v. Owens (In re Owens), No. 03-cv-3408 (BSJ), 2005 WL 387258, *2 (S.D.N.Y. Feb. 17, 2005)(emphasis added).

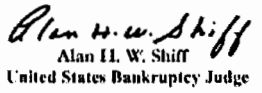
In considering the subjective standard of reliance in conjunction with the very low standard of relevance, a defendant should be entitled to discovery regarding the qualities and characteristics of the plaintiff, *i.e.*, the plaintiff's financial acumen. Since the plaintiff's tax returns might be informative on the issue of reliance, the defendant should be entitled to examine them. However, since the subject loan was made at the end of 2004, it is only the plaintiff's financial acumen close to that time period that is relevant.

CONCLUSION

Accordingly, IT IS ORDERED that the plaintiff produce his 2004 and 2005 state and federal tax returns to the defendant.

Dated this 10th day of November 2011 at Bridgeport, Connecticut.

By the court



Alan H. W. Shiff
United States Bankruptcy Judge