

FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

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**In the United States District Court
for the District of Utah, Central Division**

**JOHN CHIVERS, aka OWEN JOHN
CHIVERS,**

Appellant,

vs.

**SKULL VALLEY BAND OF GOSHUTE
INDIANS,**

Appellee

**MEMORANDUM DECISION
AND
ORDER**

Case No. 2:02 CV 545 JTG

This matter is before the Court on cross-appeals from an order rendered by the United States Bankruptcy Court for the District of Utah. The Bankruptcy Court, on cross motions for summary judgment, found the \$625,000 judgment debt ("the debt") owed by John Chivers ("Chivers") to the Skull Valley Band of Goshute Indians ("the Goshute Band") non-dischargeable under 11 U.S.C. 523(a)(2)(A). The parties cross appealed the decision of the Bankruptcy Court, and filed briefs. The matter was submitted for decision and taken under advisement. Now being fully advised, the Court issues its Memorandum Decision and Order.

STATEMENT OF THE FACTS

In 1992, Chivers, president of LE&B, was considering building a recycling facility ("Recycling Facility") in Tooele County. LE&B courted investment for the project from the Goshute Band, but failed to entice an investment at the time. Later, in early 1994, after

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construction on the Tooele recycling project was well underway, Chivers met with the Goshute Band's attorney, Danny Quintana, to discuss possible investment. Many aspects of such a transaction looked to be promising and mutually beneficial. Among other reasons to invest, the Goshute Band was looking to establish a business relationship with National Ecology, which corporation was involved with the recycling facility at the time. LE&B was in need of additional cash to finish construction and to comply with bonding requirements, and this was communicated to Quintana.

The Goshute Band visited the facility and noted the construction activity. At about the time of that visit, the Goshute Band was presented a proposed copy of a joint venture agreement between LE&B and National Ecology as well as a Pre-commercial Services Agreement, both dated January 14, 1994, outlining certain services National Ecology would perform in order to begin recycling operations. The Goshute Band was also presented with a tipping fee agreement entered into between LE&B and Tooele County.

A business entity named EnviroSolutions was formed, intended to assume the liabilities of LE&B. LE&B invested nearly \$800,000 for a 50% interest in EnviroSolutions. The Goshute Band agreed to purchase stock in EnviroSolutions for \$750,000, a figure approximately the size of the outstanding construction debts on the project. In February of 1994, Chivers and Quintana began negotiating a shareholders agreement relating to the Goshute Band's investment in EnviroSolutions. It was initially contemplated that National Ecology would be a shareholder, however they declined. The parties agree that Chivers represented that the \$750,000 would be used to pay the balance of the construction debts, but they disagree over whether Chivers

represented that this would satisfy all the indebtedness. The parties agreed that the Goshute Band's investment would trigger a transfer of title of the Recycling Facility to EnviroSolutions, though the timing of such a transfer was never determined.

Chivers sent a letter to Quintana dated February 25, 1994. The subject of the letter was "Tooele Tissue Mill Funding," but the letter referenced both the nearly completed Recycling Facility and a proposed Tooele Tissue Facility that was never constructed. The letter falsely represented that LE&B had expended over \$2,000,000 on the "facility" and that LE&B had obtained a credit line for the Recycling Facility in the amount of \$4,500,000.

The Recycling Facility was completed in early March of 1994. Both LE&B and the Goshute Band worked to secure additional funding. On March 7, 1994, an Amended Shareholders Agreement was executed by the Goshute Band and EnviroSolutions whereby the Goshute Band invested money in EnviroSolutions for use in the Recycling Facility. The agreement involved payment by the Goshute Band of \$750,000 for 150,000 shares in EnviroSolutions and detailed a payment schedule. In execution of this agreement, the Goshute Band claims to have relied on the Letter as well as the claimed representation by Chivers that the Recycling Facility would be transferred into EnviroSolutions in exchange for the investment. Between March 29, 1994 and December 8, 1994 the Goshute Band made payments towards its investment in EnviroSolutions. The first two \$100,000 payments were timely, however by October 30, 1994, the due date of the third and final \$550,000 payment, the Goshute Band was approximately \$75,000 short. As of December 8, 1994, the Goshute Band had invested approximately \$760,000.

During the payment period, on April 11, 1994, Chivers provided information to Quintana including a ten year projection for the "Tooele M.S.W. Reduction & Recycling Facility", which projected a debt service of \$466,000 per year from year one through ten.¹ The Goshute Band also received a "List of Debts" of EnviroSolutions dated May 31, 1994, which stated a "Total Direct Debt" of \$757,907, indirect "LE&B Construction Costs" of \$638,492, and a "Total Projected Debt" of \$1,396,399.

In December of 1994, LE&B filed a bankruptcy petition, listing the recycling facility as an asset. Mechanics' liens totaling approximately \$1,000,000 had been filed on the recycling facility in June of 1994. From April 1, 1994 through December, 1994, the only asset held by EnviroSolutions was the bank account containing cash contributed by the Goshute Band.

The Goshute Band filed suit against Chivers for violations of state and federal securities laws and for common law fraud. A judgment was entered against Chivers for \$625,000 for securities law violations, but not for common law fraud ("Judgment"). Chivers then filed for bankruptcy under Chapter 7. On cross motions for summary judgment, the Bankruptcy Court held the Judgment to be non-dischargeable under 11 U.S.C. § 523(a)(2)(A). Chivers now appeals the Bankruptcy Courts decision that the debt owed by Chivers to the Goshute Band was non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). The Goshute Band filed a cross appeal raising certain other issues only in the event that this Court disturbed the

¹ M.S.W. stands for Municipal Solid Waste.

Bankruptcy Court's decision below.²

STANDARD OF REVIEW

The Bankruptcy Court Rule 7056 in substance adopts Fed. R. Civ. Proc. 56. See Fed. R. Bankr. P. 7056. Under those rules, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c). See Heyman v. Commerce & Industry Insurance Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975). However, "[w]hen a motion for summary judgment is . . . supported . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e).

The district court's review of the Bankruptcy Court's legal determinations is *de novo*, and review of its factual findings is under the clearly erroneous standard. In this regard, the Tenth Circuit has set forth the following concerning determination of clearly erroneous factual findings: "A finding of fact is clearly erroneous if it is without factual support in the

² In its memorandum the Goshute Band states "if and only if, the District Court should determine that the Bankruptcy Court erred in its decision on the primary issue on appeal, the Goshutes assert that the Bankruptcy Court's Judgment should also be affirmed on the two alternative grounds identified:" (1) Whether the bankruptcy court correctly concluded that under § 523(a)(2)(B) Chivers did not make false statements relating to his financial condition; and (2) Whether the bankruptcy court correctly applied the doctrines of collateral estoppel and/or res judicata. (See Brief of Appellee 1-2.)

record or if, after reviewing all of the evidence, [the Court is] left with the definite and firm conviction that a mistake has been made.” In re Miniscribe Corp., 309 F.3d 1234, 1240 (10th Cir. 2002) *citing* Conoco, Inc. v. Styler, 82 F.3d 956, 959 (10th Cir.1996).

ANALYSIS

11 U.S.C. § 523(a)(2)(A) provides that discharge under the various bankruptcy sections does not discharge any debt which is obtained by “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.”

11 U.S.C. § 523(a)(2)(A). The Tenth Circuit Court of Appeals has adopted the following requirements concerning non-dischargeable claims under § 523(a)(2)(A): (a) the defendant made a false representation; (b) the defendant made the representation with intent to deceive the creditor; (c) the creditor relied on the representation; (d) the creditor’s reliance was justifiable; and (e) the debtor’s representation caused the creditor to sustain a loss. In re Young, 91 F.3d 1367 (10th Cir. 1996).

At issue here is the allegation that Chivers represented to the Goshute Band that if the Goshute Band invested \$750,000 in EnviroSolutions for 25% stock in EnviroSolutions, Chivers would transfer the Recycling Facility to EnviroSolutions. The Goshute Band alleged that Chivers made the representation and submitted supporting affidavits from Quintana and Leon Bear, a member of the Goshute Band’s Executive Committee. Chivers admitted in his deposition that the agreement between the parties was consistent with the alleged representation.

Therefore, it is undisputed that Chivers did make the representation.³

All of the requirements concerning non-dischargeable claims as set forth by the Tenth Circuit are present in this case as follows:

A. False Representation

Representations which are statements “respecting the debtor’s or an insider’s financial condition” are excepted from non-dischargeability under 11 U.S.C. § 523(a)(2)(A). This Court agrees with the Bankruptcy Court’s determination that the proper definition of “financial condition” in 11 U.S.C. § 523 is the strict interpretation seemingly favored by the United States Supreme Court. *See Field v. Mans*, 516 U.S. 59, 76-77, 77 n.13 (1995). Under that interpretation, the representation in this case is not a statement of financial condition as argued by Chivers because it does not contain sufficient information to have described LE&B’s net worth or overall ability to generate income.⁴ *See In re Mercado*, 144 B.R. 879, 885 (Bankr. C.D. Cal. 1992). Contrary to the representation, transfer of the Recycling Facility never took place.⁵ Chivers admits that he knew the Goshute Band’s investment was insufficient to pay off the debts owing on the Recycling Facility and that it was not possible to make such a transfer

³ Contrary to Chivers’ current stance on appeal, in his October 29, 2001 deposition, Chivers admitted that the agreement between the parties was that the Goshute Band “would assume the assets of the corporation for a given amount of money that would be used to pay off the debts of the corporation . . . if they come up with X amount of money as per the agreement that the money will be used to pay off the debts of LE&B, but then they will receive the assets.” (Chivers Deposition 282.) Later Chivers denies making any statements to the Goshute Band in the Answer as well as in a Declaration and uses those denials as a basis for this issue on appeal. For purposes of summary judgment, the Tenth Circuit ignores subsequent contradictory affidavits. *See Bohn v. Park City Group Inc.*, 94 F.3d 1457, 1463 (10th Cir. 1996).

⁴ Chiver’s argues that the alleged statement was a statement of financial condition and therefore within an exception provided by 11 U.S.C. § 523(a)(2)(A).

⁵ Although it is unclear when the transfer was to take place, lack of a specified time of transfer is immaterial since the transfer did not and cannot now take place.

until the debts were paid. Therefore, it is undisputed that the representation was false.

B. Intent to Deceive

The representation was made during efforts made by Chivers to induce investment by the Goshute Band manifests that the representation could only have been intended to deceive the Goshute Band, and the Court so finds.

C. Reliance

It is undisputed that the Goshute Band relied on the representation as evidenced by its execution of the Amended Shareholders Agreement. The representation was the heart of the executed agreement.

D. Justifiable Reliance

Justifiable reliance, as defined by the United States Supreme Court, does not require “reasonable reliance” but instead only requires that the reliance be “justifiable.” “Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than the application of a community standard of conduct in all cases.” Field, 516 U.S. at 70 (citing Restatement (Second) of Torts § 545A, cmt. b (1976)). A party may justifiably rely on a misrepresentation even when a simple, inexpensive investigation would have ascertained the falsity of the misrepresentation. *See* Restatement (Second) of Torts § 540-1. Chivers held himself out to have experience in the recycling business, to have participated in previous successful projects, displayed a nearly completed facility under the final stages of construction, and presented contracts with other entities involved in the project. Information showing the facility to be in “dire financial straits” only came after

the Goshute Band relied on the representation and executed the Amended Shareholders Agreement, obligating the Goshute Band to invest.⁶ This Court finds that the Goshute Band justifiably relied on the representation pursuant to § 523(a)(2)(A).

E. Loss

It is undisputed that the Goshute Band sustained a loss of \$625,000.

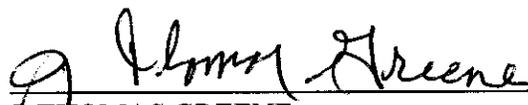
Based upon the foregoing, this Court rules, in accordance with the Tenth Circuit test for non-dischargeability under 11 U.S.C. § 523(a)(2)(A), that the Bankruptcy Court correctly determined the \$625,000 judgment to be non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

Accordingly, it is

ORDERED, that the ruling of the bankruptcy court is AFFIRMED and the Motion for Summary Judgment of Appellee is Granted.⁷

IT IS SO ORDERED.

DATED this 15th day of June, 2004.


J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

⁶ Furthermore, although the Goshute Band failed to precisely adhere to the investment schedule of the Amended Shareholders Agreement, deviation only came after the mechanics liens were filed and therefore such deviation cannot have been the cause of the financial troubles leading to the bankruptcy of LE&B.

⁷ Having affirmed the bankruptcy court's decision below, it is unnecessary to address the additional and alternative grounds presented by the Goshute Band for affirmation of the Bankruptcy Court's determination of non-dischargeability.

United States District Court
for the
District of Utah
June 16, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cv-00545

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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