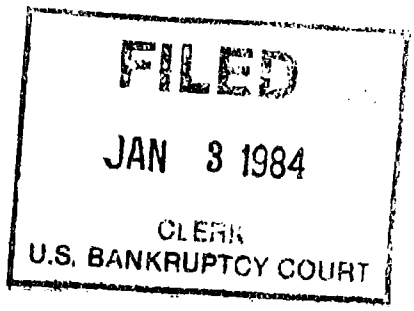
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

In re: In Bankruptcy

JOHN M. QUIGLEY
f/d/b/a Captain Quig's Tavern EF7-82-01853

Debtor



WILLIAM H. JACOBSON,

Plaintiff,

vs.

JOHN M. QUIGLEY, Adversary #83-0313

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER DETERMINING DEBT DISCHARGEABLE

William H. Jacobson, by his attorney John P. Thornton of Thornton, Black, Wachowski and Grosskopf, S.C., having filed a Complaint seeking a determination of the dischargeability of debt; and the debtor, John M. Quigley, by his attorney, David H. Raihle, having filed an Answer; and a trial having been held; and both parties having appeared in person and by attorney; and the Court having heard the evidence, and considered the trial briefs and the

complete record and file, and being fully advised in the premises, FINDS:

1. That, on October 20, 1982, the debtor, John M. Quigley, filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code.

2. That, in December of 1980, Quigley's place of business, commonly known as Captain Quig's Tavern (CQT), was destroyed by fire.

3. That, on June 22, 1981, the plaintiff, William H. Jacobson, and Quigley entered into an "Offer to Purchase" agreement regarding CQT, drafted by Quigley's attorney, which provided for, inter alia, a purchase price of $20,000 and transfer by a warranty deed free and clear of all liens and encumbrances.

4. That Jacobson was acquainted with the Quigley family.

5. That, on July 28, 1981, both parties entered into a "Real Estate Agreement", drafted by Quigley's attorney, which superceded the "Offer to Purchase" and which provided, inter alia:

> 1. The purchase price of $20,000 is paid in full this date and receipt is hereby acknowledged by the seller.
>
> 2. The deed of conveyance, a copy attached hereto, shall be delivered to the purchaser forthwith upon insurance settlement and release of existing 1st National Bank mortgages.

4. Seller reserves all rights under the fire policy and all the proceeds thereof.

5. Seller warrants the title and shall be solely responsible for the payment of existing mortgages from the insurance proceeds.

6. That, at the time the Offer to Purchase and the Real Estate Agreement were signed, the CQT property was subject to first and second mortgage claims of approximately $63,000.

7. That, at the time the Offer to Purchase and the Real Estate Agreement were signed, Quigley believed, in good faith, that the fire insurance settlement would be equal to, or in excess of, the mortgage claims.

8. That Quigley used the proceeds of the CQT sale to pay off business debts, some of which were secured by judgment liens on the CQT property.

9. That, in early August, 1981, Jacobson began demolition work on the charred remains of CQT.

10. That, sometime in August of 1981, Quigley's fire insurance carrier settled for $45,200.

11. That, on August 28, 1981, Quigley's attorney sent Jacobson a "Warranty Deed", dated July 28, 1981, which warranted that the property was free and clear of encumbrances.

12. That, on August 31, 1981, Quigley applied the fire

insurance proceeds toward the first mortgage on the CQT property.

13. That, on or about September 11, 1981, Jacobson learned that the mortgages had not been paid in full; and that the balances of the first and second mortgages were $7,226.84 and $10,971.74 respectively.

14. That, on September 14, 1981, Quigley acknowledged to Jacobson and the mortgagee that the obligation to repay the mortgages was his alone.

15. That, in late 1981 and early 1982, Jacobson attempted to obtain new financing on the CQT property; and that said new financing required an abstract of title showing that the property was held free and clear of liens.

16. That, during the same period, Jacobson contacted Quigley several times to request delivery of a "clean" abstract of title.

17. That, on or about November 16, 1981, Jacobson, at Quigley's request, lent Quigley $8,000 which Quigley used to pay the first mortgage.

18. That, on November 16, 1981, Quigley signed a promissory note (first Jacobson note), prepared by his attorney, for the $8,000 which provided for payment in full on or before May 15, 1982; and that said note is one of the two debts claimed as non-dischargeable.

19. That, on or about January 8, 1982, Jacobson assumed the second mortgage.

20. That, on January 8, 1982, at Jacobson's request, Quigley signed a promissory note (second Jacobson note) for $12,000 (the approximate balance of the second mortgage), prepared by his attorney, which provided for payment in full on or before May 15, 1982; and that said note is one of the two debts claimed as non-dischargeable.

21. That, on January 9, 1982, at Jacobson's request, Quigley signed an amendment to the second Jacobson note, prepared by Jacobson, which provided, inter alia, for monthly payments of $100.

22. That, at the time Quigley signed the Jacobson notes, he was employed as an insurance agent and believed that he would qualify for a loan from his employer after six months of employment (on or before May 15, 1982).

23. That, on February 2, 1982, the Chippewa County Register's Office recorded the Quigley warranty deed.

24. That, in September or October of 1982, Quigley first consulted his attorney regarding bankruptcy.

25. That Quigley has made no payments on either Jacobson note.

26. That, on December 14, 1982, Jacobson filed a Complaint alleging that the debt represented by the Jacobson notes is non-dischargeable under 11 U.S.C. sec. 523(a)(2)(A) (1982).

27. That sec. 523 provides, in pertinent part,

> (a) A discharge . . . does not discharge an individual debtor from any debt —
>
> (2) for obtaining money . . . or refinance of credit, by —
>
> (A) false pretenses, false representation or actual fraud . . .

28. That a debt is not dischargeable under sec. 523(a)(2)(A) only when the following elements were present at the time the debt was incurred:

(1) the debtor made representations which he knew to be false or made with reckless disregard for the truth;

(2) the representations were made to deceive;

(3) the creditor actually and reasonably relied on the representations.

In re Schnore, 13 B.R. 249, 252 (Bankr. W.D.Wis. 1981) (interpreting Carini v. Matera, 592 f.2d 378, 380-1 (7th Cir. 1979)).

29. That the party objecting to dischargeability must show

all three of the Schnore elements with clear and convincing evidence. In re Brink, 27 B.R. 377, 378 (Bankr. W.D.Wis. 1983).

30. That Quigley made no intentionally deceitful representations at the time of the Offer to Purchase or at the time of the Real Estate Agreement. E.g. finding of fact 7. See In re Carneal, 33 B.R. 922, 925 (Bankr. E.D. Va. 1983) (proof of bad business judgment is not proof of false representation).

31. That Jacobson did not rely on the receipt of the Warranty Deed to give money to, or to refinance the credit of, Quigley. See id. at 926 (subsequent misrepresentation does not affect discharge of debt).

32. That, even if this Court were to infer from the circumstances surrounding the Jacobson notes that Quigley recklessly and deceitfully represented an ability to repay the balloon payments, see In re Schnore, supra at 254, Jacobson's reliance on such a representation would have been unreasonable in the face of Quigley's prior failure to pay off the CQT mortgages with his own resources and the improbability of an insurance company lending an agent $20,000 after six months of employment.

33. That, even if this Court were to infer that Quigley recklessly and deceitfully represented an ability and willingness to pay monthly installments on the second Jacobson note, Jacobson

did not rely on such a representation to give money to (or, on behalf of), or to refinance the credit of, Quigley. See In re Carneal, supra.

34. That, at all times relevant to this matter, Mr. Raihle was representing Mr. Quigley and Mr. Jacobson was representing himself.

35. That, while this Court finds little to commend in Quigley's actions in the transactions set forth above, there is no basis in the record to determine his debts to Jacobson to be non-dischargeable under sec. 523(a)(2)(A) of the Bankruptcy Code.

CONCLUSIONS OF LAW

1. That, in regard to each of the transactions set forth above, Jacobson has failed to show at least one of the three Schnore elements required to find a debt non-dischargeable.

2. That the Quigley debt represented by the Jacobson notes should be found dischargeable.

ORDER

NOW, THEREFORE, IT IS ORDERED that the debt owed by John M. Quigley to William H. Jacobson and evidenced by two

promissory notes dated November 16, 1981, and January 8, 1982, should be, and the same hereby is, dischargeable.

Dated: January 3, 1984.

BY THE COURT:

William H. Frawley
Bankruptcy Judge