No. 15-147

In The
Supreme Court of the United States

BRIAN T. SULLIVAN,

Petitioner,

v.

MICHAEL R. GLENN, JR.
and MICHELE A. GLENN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CHESTER H. FOSTER, JR., ESQ.
19612 Beechnut Drive
Mokena, IL 60448
(708) 799-6300
chf@fosterlegalservices.com

Counsel for Respondents

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RESTATEMENT OF QUESTIONS PRESENTED

Should the Petition be granted where the threshold issue to be adjudicated by the Court is whether, under the controlling Illinois law of agency, the broker who made misrepresentations to the Petitioner was acting as the Respondents' agent when she did so, and where the resolution of this agency issue will, in all likelihood, render moot the need for the Court to resolve the secondary issue of the proper interpretation of the provisions of 11 U.S.C. § 523(a)(2)(A)?

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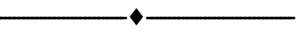
INTRODUCTION

Respondents concede that a split exists among the circuits that have considered whether the fraud of an agent may be imputed to a debtor for purposes of declaring debt incurred through such fraud non-dischargeable under the provisions of 11 U.S.C. § 523(a)(2)(A), where the debtor did not know nor had reason to know of the agent's fraud (the "Innocent Debtor Discharge Issue"). At some point, the Court may wish to hear a case to resolve this conflict. However, this is not the appropriate case for doing so, because the Court can resolve this case based solely upon Illinois agency law without addressing the conflict. The Court can do so by reversing the Appellate Court's erroneous determination that the broker who made the misrepresentations to the Petitioner did so while acting as Respondents' agent. Respondents believe the Court would reverse the Appellate Court's erroneous ruling if it grants the Petition. Thus, this case does not properly present the Innocent Debtor Discharge Issue for resolution. Accordingly, the Court should wait for a more appropriate case to present itself to the Court for resolution of the conflict.



COUNTERSTATEMENT OF THE CASE

In 2007, Respondents were engaged in the real estate development business through a number of corporate entities. (Pet. App. at 32a, ¶¶1-2) On November 1, 2007, Respondents obtained a $250,000

loan (the "Loan") from Petitioner with the assistance of Karen Chung ("Karen"), a loan broker. (Pet. App. at 35a-38a, ¶¶11-17) Petitioner is an attorney who at the time was a close personal friend of Karen, for whom he had previously provided legal services. (Pet. App. at 91a, ¶37) In order to persuade Petitioner to make the Loan to Respondents, Karen and her employee, Adrian Lopez ("Adrian"), falsely represented to Petitioner that they had prevailed upon LaSalle Bank to extend a $1 million line of credit to Respondents, which they said would soon be available to Respondents to repay the Loan (the "K&A Representations"). (Pet. App. at 35a-37a, ¶¶11, 12 & 14) Not only had the bank not approved the line of credit, Karen and Adrian had never even applied for the line of credit at the bank. (Pet. App. at 39a, ¶20) Respondents did not know nor did they have reason to know that the K&A Representations were false. (Pet. App. at 66a)

Respondents could not repay the Loan to Petitioner. (Pet. App. at 39a) Thereafter they filed separate chapter 7 bankruptcy cases. Petitioner commenced adversary proceedings against Respondents seeking declarations that their indebtedness to him arising from the Loan (the "Glenn Debt") was non-dischargeable pursuant to the provisions of 11 U.S.C. § 523(a)(2)(A). (Pet. App. at 25a-26a) In these

adversary proceedings Petitioner alleged, in part,[1] that: (1) Karen was acting as Respondents' agent when she made the K&A Representations to Petitioner (Pet. App. at 69a-70a), (2) under the laws of agency, Karen's fraud is imputed to Respondents, and (3) based upon such imputed fraud and pursuant to the provisions of 11 U.S.C. § 523(a)(2)(A), the Glenn Debt should be declared to be non-dischargeable. (Pet. App. at 44a)

At the conclusion of the trial of the adversary proceedings, the Bankruptcy Court found that, under controlling Illinois law and based upon the facts established at trial, Karen was not acting as Respondents' agent when she and Adrian made the K&A Representations to the Petitioner. (Pet. App. at 80a) After rejecting the balance of the claims Petitioner asserted in the adversary proceedings, the Bankruptcy Court declared the Glenn Debt dischargeable. (Pet. App. at 82a) Petitioner then appealed the Bankruptcy Court's decision to the District Court, which affirmed the Bankruptcy Court's ruling. (Pet. App. at 23a)

The Petitioner thereafter appealed the District Court's decision to the Appellate Court, which found that Karen was Respondents' agent. (Pet. App. at 4a) The Appellate Court nonetheless declared the Glenn Debt dischargeable because Respondents had not

[1] Petitioner asserted a number of alternative legal theories in support of his claim that the Glenn Debt should be declared to be non-dischargeable, which he is not pursuing before this Court.

known nor did they have reason to have known that the K&A Representations were false, which the Appellate Court ruled was necessary to impute an agent's fraud to his or her principal for purposes of declaring debt incurred as a result of such fraud non-dischargeable under 11 U.S.C. § 523(a)(2)(A). (Pet. App. at 5a-8a) The Petitioner thereafter sought an *en banc* rehearing by the entire Appellate Court, which was rejected. (Pet. App. at 87a)

REASONS FOR DENYING THE PETITION

If the Court grants the Petition, the Court could, and Respondents believe it would, resolve the case based solely upon an interpretation of Illinois agency law, without resolving the conflict that exists with regard to the interpretation of Section 523(a)(2)(A) of the Bankruptcy Code. As such, this case is not an appropriate vehicle for the Court to use to resolve such conflict.

Petitioner argues that the fraud of Respondents' alleged agent, Karen, may be imputed to Respondents for purposes of declaring the Glenn Debt non-dischargeable. (Pet. App. at 44a) As the Bankruptcy Court correctly ruled, State law controls the creation, existence and scope of an alleged agency relationship. (Pet. App. at 70a). See also *In re Quinlivan*, 347 B.R. 811, 816 (Bankr. E.D. La. 2006) (agency issues are matters of state law, not federal law); and

In re Waters, 90 B.R. 946, 955 (Bankr. N.D. Iowa 1988) (because "*partnership*" *is not defined in the Bankruptcy Code of 1978, the Bankruptcy Court must look to the law of the state where the alleged partnership is domiciled to determine whether there is in fact a partnership*). The term "agency" is not defined in the Bankruptcy Code of 1978. Thus, the reasoning articulated by the *Waters* court is equally applicable to the existence of an agency relationship.

Because Petitioner's claim is founded upon Karen having been Respondents' agent, the threshold issue that the Court would have to resolve if it grants the Petition is whether, under the controlling Illinois law of agency, Karen was acting as Respondents' agent when she and Adrian made the K&A Representations. Respondents believe the Court would determine that she was not. If it does so, there would be no need to consider the Innocent Debtor Discharge Issue, because, whichever way the Court were to resolve the conflict that exists with regard to that issue, Karen's fraud could not be imputed to Respondents if she was not acting as their agent.

Under Illinois agency law, the cardinal consideration in the determination of whether a person is an agent is whether that person retains the right to control the manner of doing the work. *Lawlor v. N. Am. Corp.*, 983 N.E.2d 414, 427 (Ill. 2013). See also *Chemtool, Inc. v. Lubrication Technologies, Inc.*, 148 F.3d 742, 745 (7th Cir. 1998). The secondary criteria that should be considered in determining the existence of an agency relationship are: "(1) the question

of hiring, (2) the right to discharge, (3) the matter of direction of the servant, (4) the right to terminate the relationship, and (5) the character of the supervision of the work done." (*Lawlor*, 427). Thus, in determining whether an agency relationship exists, the Court must first determine if the alleged principal had the right to control the manner in which the alleged agent performed his or her duties, and, if no such evidence exists, then look to the secondary criteria.

The Bankruptcy Court found that no evidence was introduced as to any agency relationship between Karen and Mrs. Glenn, and that Petitioner had failed to show that Mr. Glenn had supervised Karen in the performance of her services consistent with his theory that Karen was acting as Respondents' agent. (Pet. App. at 79a-80a) After applying these and the balance of its findings of fact to the foregoing controlling criteria for establishing the existence of an agency relationship (Pet. App. at 73a-80a), the Bankruptcy Court correctly ruled that Karen was not acting as Respondents' agent when she made the K&A Representations to Petitioner. (Pet. App. at 80a)

The District Court affirmed the Bankruptcy Court's decision in all respects. (Pet. App. at 23a) However, the Appellate Court found that Karen was acting as Respondents' agent when she made the K&A Representations to Petitioner. In doing so, the Appellate Court relied upon: (a) one Illinois appellate court case, *Petty v. Cadwallader*, 482 N.E.2d 225 (Ill. App. 1985), (b) two Illinois District Court cases, applying Illinois law, *Whitley v. Taylor Bean & Whitaker*

Mortgage Corp., 607 F. Supp. 2d 885 (N.D. Ill. 2009) and *First Nat. Bank v. El Camino Resources, Ltd*., 447 F. Supp. 2d 902 (N.D. Ill. 2006), (c) an Eighth Circuit Appellate Court decision, applying Missouri law, *Armstrong v. Republic Realty Mortgage Corp.*, 631 F.2d 1344 (8th Cir. 1980), and (d) a decision of this Court arising out of the Second Circuit, applying apparent agency principles to an antitrust case, *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp*., 456 U.S. 556 (1982).

The Appellate Court did not explain why it chose to ignore the Illinois Supreme Court precedent cited in Respondents' briefs and instead rely upon decisions rendered by the Illinois Appellate and Federal District Courts. It also failed to discuss the propriety of relying upon a case decided under Missouri agency law, rather than limiting its consideration to Illinois agency law. Moreover, in its reference to the *Hydrolevel* case, the Appellate Court infers that Karen might have been acting as Respondents' apparent agent when she made the K&A Misrepresentations to Petitioner. However, the Appellate Court did so without considering Illinois apparent agency law or the arguments and authorities contained in Respondents' appellate brief explaining why an apparent agency relationship did not exist between Karen and Respondents. (Pet. App. at 4a-5a) Thus, it was error for the Appellate Court to find that Karen was acting as Respondents' agent or apparent agent when she made the K&A Misrepresentations to Petitioner. This error

is the threshold issue that this Court would be called upon to correct if it grants the Petition.

Respondents are not herein attempting to convince the Court that the Appellate Court's agency finding was erroneous. This is not the time for doing so. Rather, they are pointing out that, if the Court grants the Petition and reverses the agency finding, as Respondents believe the Court would do, the conflict with regard to the Innocent Debtor Discharge Issue would be rendered moot. Thus, if the Court grants the Petition, it will be doing so for the threshold purpose of considering and resolving this State law agency issue. Only after resolving the agency issue and, provided the Court affirms the Appellate Court's agency finding, would the Court have occasion to consider the Innocent Debtor Discharge Issue.

At some point, the Court may wish to hear a case to resolve the conflict that exists over the Innocent Debtor Discharge Issue. However, this case does not properly present the issue for resolution. As such, the Court should reject the Petition and wait for a more appropriate case to present itself.

CONCLUSION

For the foregoing reasons, Respondents Michael R. Glenn, Jr. and Michele A. Glenn, oppose the Petition for Writ of Certiorari and respectfully request that the Petition be denied.

Respectfully submitted, this 30th day of October, 2015.

CHESTER H. FOSTER, JR., ESQ.
19612 Beechnut Drive
Mokena, IL 60448
(708) 799-6300
chf@fosterlegalservices.com

Counsel for Respondents