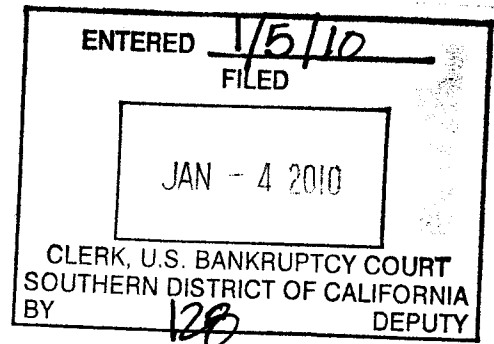


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WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re:

Bill Stevenson Lewis

Debtor.

) Bankruptcy No. 08-06586-LT7

) Adversary No. 08-90451-LT

Mark Rutley DDS, individually and dba  
Dentistry of Del Mar

Plaintiff,

v.

Bill Stevenson Lewis

Defendant.

) MEMORANDUM DECISION

Dr. Mark Rutley requests that the Court determine that his claim against debtor Bill Stevenson Lewis ("Debtor") is non-dischargeable under 11 U.S.C. § 523(a)(2)(A)<sup>1</sup>. Dr. Rutley alleges that Debtor obtained services through false representations and pretenses in that he fraudulently induced Dr. Rutley to provide a root canal by agreeing to make payment when he had no intention of performing on his promise. The Debtor in response claims that Dr. Rutley provided poor quality dental services and that this justified his non-

<sup>1</sup> Hereinafter, references to code sections refer to Title 11 of the United States Code, also referred to as the "Bankruptcy Code", unless otherwise specified. References to the transcript of the

1 payment. He also argues generally that he had every intention to pay at the time he  
2 procured the services and formed his intention not to pay only after Dr. Rutley rendered  
3 dental services.

4  
5 The Court has carefully considered the facts as provided to the Court during trial, the  
6 evidence submitted in connection therewith, and the argument of counsel and the Debtor,  
7 who represented himself *pro se* during the course of this case. The Court concludes that the  
8 Debtor's claim that Dr. Rutley provided a poor quality of care is meritless, but also  
9 determines that Dr. Rutley has not met his heavy burden in this case and that findings of  
10 fraud and non-dischargeability are not appropriate.

## 11 12 BACKGROUND

13  
14 The Court, after consideration of the evidence, concludes that the facts relevant to  
15 this case are as follows:

16  
17 1. On or about February 16, 2008, a Saturday, Debtor began experiencing  
18 excruciating dental pain.

19  
20 2. Debtor provides credible testimony that he consulted several dentists by  
21 telephone to request assistance.

22  
23 3. Eventually, Debtor spoke with Dr. Rutley who identified his problem as likely  
24 requiring an emergency root canal, prescribed anti-inflammatories and antibiotics, and  
25 agreed to see Debtor on an emergency basis on Monday, February 18th. Debtor claims that  
26 Dr. Rutley also agreed to a reduced price in connection with this emergency procedure. The

27  
28 \_\_\_\_\_  
trial in this matter, docket # \_\_, are abbreviated "Tr. \_\_: \_\_".

1 Court, however, finds more credible the testimony of Dr. Rutley and his office manager that  
2 the fee charged to Debtor was the standard fee.

3  
4 4. The Court also, however, finds credible the Debtor's assertion that he  
5 conducted some research and selected Dr. Rutley because his services were the least  
6 expensive.

7  
8 5. The Debtor arrived at Dr. Rutley's office on the 18th. Dr. Rutley saw him  
9 with reasonable promptness. After a preliminary examination, Dr. Rutley confirmed that  
10 Debtor required a root canal. Debtor received information regarding the procedures that  
11 Dr. Rutley suggested and the cost related to these procedures. The Debtor then signed  
12 consent documents agreeing to the treatment and to payment in connection therewith.  
13 Dr. Rutley's office manager, Paula King, met with Debtor to discuss treatment and payment.  
14 At trial, she testified that she believed that the Debtor intended to pay for the root canal  
15 when he signed these documents. See, Tr. 126:20-23.

16  
17 6. The Debtor complains bitterly that Dr. Rutley did not provide services with  
18 sufficient speed. The Court concludes, however, that Dr. Rutley provided a tremendous  
19 service to the Debtor by seeing him on such short notice and fitting him into an already  
20 crowded schedule. In short, Debtor's complaints regarding the promptness of treatment are  
21 entirely unreasonable. The initial examination revealed that Debtor suffered from a massive  
22 abscess that seriously threatened his health and, if untreated, his life. Dr. Rutley deserves  
23 praise not abuse for rendering aid to Debtor in his distress. Similarly, the fact that  
24 Dr. Rutley apparently did not charge extra for the "emergency" nature of this treatment  
25 reflects well on Dr. Rutley.

1           7.     Debtor also complains bitterly about the quality of the treatment he received  
2 from Dr. Rutley, but after hearing testimony from the Debtor, Dr. Rutley, and his assistant,  
3 the Court concludes that the Debtor received an appropriate quality of care.

4  
5           8.     Debtor complains, for example, that Dr. Rutley burned him. However, in his  
6 testimony at trial he indicated that the burn was not serious and, indeed, that it left no mark.  
7 The Court finds Debtor's suggestion that he was burned to be an exaggeration.

8  
9           9.     Debtor also complains that Dr. Rutley improperly administered multiple  
10 injections of numbing agent. Dr. Rutley explained on direct examination, however, that the  
11 nature and extent of the Debtor's infection necessitated more than one injection to  
12 completely numb the area surrounding the infected tooth. The Court concludes that the  
13 Debtor did not receive any unnecessary shots.

14  
15          10.    The Debtor further complains that a dental assistant "poked" his injured tooth.  
16 The Court concludes that a dental assistant may have touched his tooth, but that there is no  
17 evidence that this was an extraordinary event justifying either non-payment of fees or  
18 Debtor's apparent level of animosity.

19  
20          11.    Finally, the Debtor complains that Dr. Rutley was "not gentle." He provides  
21 no specifics, however. In summary, the Court concludes that the Debtor was a difficult  
22 patient in extreme pain likely as a direct result of prior dental work that was poorly done.  
23 There is no evidence other than Debtor's unsupported complaints that supports Debtor's  
24 claim that he did not receive appropriate care from Dr. Rutley. Indeed, the Debtor  
25 acknowledged in testimony at trial that he eventually received a crown from a low-cost  
26 dentist in Mexico and that his tooth remains intact and pain free to this day.

1           12.     After his root canal, the Debtor was tired and thinking with less than complete  
2 clarity. He paid for the root canal with a check, but dated the check as of February 20,  
3 2008, a date two days in the future. The Debtor asserts that he misdated the check by  
4 mistake. Ms. King also testified as to her belief that the Debtor improperly dated the check  
5 through error. See, Tr. 126: 8-10. The Court finds the Debtor's explanation believable.  
6

7           13.     Debtor left Dr. Rutley's office and later decided that he would not return for a  
8 follow-up appointment. He also determined that he would not pay Dr. Rutley the total price  
9 agreed to for the root canal. As a result, he contacted his bank and stopped payment on the  
10 check he previously wrote to Dr. Rutley. Debtor acknowledged at trial that he had an  
11 obligation to make at least partial payment to Dr. Rutley. Notwithstanding, as a result of the  
12 stop payment notice, he made no payment to Dr. Rutley for his root canal. The evidence  
13 establishes that the Debtor had sufficient funds to cover the check when written and prior to  
14 the stop payment notice. Shortly thereafter, however, the Debtor's bank account balance  
15 dwindled. Debtor, ultimately, filed this chapter 7 case as a result of his adverse financial  
16 situation.  
17

18           14.     The Court concludes that the Debtor based his decision to stop payment on the  
19 check in large part on a misunderstanding of the treatment plan. It is clear from Dr. Rutley's  
20 testimony that he completed the root canal on February 18th and that this is consistent with  
21 the current standard of care that requires completion of a root canal in a single procedure.  
22 Thus, the second appointment was a mere follow-up appointment to allow for adjustment of  
23 the temporary crown, if necessary, planning for a permanent crown, and a general  
24 evaluation of the Debtor's recovery. The permanent crown would require an additional  
25 appointment and an additional payment. Debtor understood that the payment he made on  
26 the 18th did not cover the permanent crown. He always intended to have this work done in  
27 Mexico. Debtor, however, misunderstood the nature of the second appointment with  
28 Dr. Rutley. Debtor previously received root canals that were not completed at the first

1 appointment. As noted above, this is not the current standard of care, apparently due to the  
2 risk of infection. Indeed, it is possible that the serious infection eliminated by Dr. Rutley  
3 originated from such a two step root canal. As a result of this misunderstanding, Debtor  
4 believed that the second visit would involve significant additional dental work. As he had  
5 decided not to utilize Dr. Rutley's services further, he erroneously believed that he would  
6 need to make additional payment to another dentist to complete the root canal and that he  
7 had overpaid Dr. Rutley. The Court ultimately concludes that the Debtor was sincere in his  
8 erroneous belief, but that the misunderstanding arose from his lengthy past dental history  
9 and his extreme dental distress on the 18th and not from any misstatement by Dr. Rutley or  
10 his staff.

11  
12 15. After Debtor stopped payment on the check and prior to initiation of the  
13 chapter 7 case, Dr. Rutley brought a small claims action against the Debtor and prevailed  
14 thereon.

15  
16 16. It is clear that there is substantial animosity in this case. In particular,  
17 Dr. Rutley was victimized by a series of email complaints that he alleges Debtor posted.  
18 The Debtor does not directly deny that the email postings were his and, indeed, they are  
19 eerily similar to the complaints he lodges in this action. Dr. Rutley generally alleges  
20 damages as a result of these emails, but provides no specific evidence of the same. The  
21 Court can easily conclude that these email postings were more than annoying to Dr. Rutley.

## 22 23 STANDARDS

24  
25 Section 523(a)(2)(A) provides that:

26 (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an  
27 individual debtor from any debt - . . .

1 (2) for money, property, services, or an extension, renewal, or refinancing of credit,  
2 to the extent obtained, by -

3  
4 (A) false pretenses, a false representation, or actual fraud, other than a  
5 statement respecting the debtor's or an insider's financial condition.

6 In the Ninth Circuit, to prove actual fraud, a creditor must establish each of the  
7 following elements:

8 (1) that the debtor made the representations;

9 (2) that at the time he knew they were false;

10 (3) that he made them with the intention and purpose of deceiving the creditor;

11 (4) that the creditor relied on such representations; [and]

12 (5) that the creditor sustained the alleged loss and damage as the proximate result of  
13 the representations having been made.

14  
15 *Britton v. Price (In re Britton)*, 950 F.2d 602, 604 (9th Cir. 1991); *Eugene Parks Law Corp.*

16 *Defined Benefit Pension Plan v. Kirsh (In re Kirsh)*, 973 F.2d 1454, 1457 (9th Cir. 1992).

17 The creditor must prove each element of fraud by a preponderance of the evidence.

18 *Grogan v. Garner*, 498 U.S. 279, 290 (1991).

19  
20 **DISCUSSION**

21  
22 There is no question that the Debtor's conduct in relation to Dr. Rutley was not  
23 appropriate. The Debtor was the lucky recipient of emergency dental care of appropriate  
24 quality. The Debtor was not Dr. Rutley's prior patient. Thus, Dr. Rutley had no  
25 particularized obligation to speak with Debtor on a Saturday, to see the Debtor on an  
26 emergency basis, or otherwise to aid him in his extreme distress. Dr. Rutley, however,  
27 obviously takes his obligations as a member of a healing profession seriously. As a result, it  
28 is deeply regrettable that he has been treated by Debtor in the manner evident in this case.

1 Here, however, the question is whether Dr. Rutley's claims against the Debtor are  
2 non-dischargeable as a result of Debtor's fraud in obtaining services from Dr. Rutley. In  
3 particular, Dr. Rutley argues that the Debtor obtained his services and contracted to make  
4 payment for these services knowing that he did not intend to pay for the services once  
5 provided. Dr. Rutley bears the burden of proof of fraud and that burden is a heavy one.

6  
7 In order to establish fraud, it is not enough that the Debtor determined that he would  
8 not honor his check after receipt of dental services. Instead, Dr. Rutley must establish that  
9 the Debtor intended non-payment when he signed various documents agreeing to pay for  
10 services and when he obtained the services themselves. As one Court noted:

11 The making of a promise normally implies at the very least that the promisor does  
12 not have a fixed intention not to honor it; so, if he does have that intention, he is  
13 guilty of misrepresentation.... But courts naturally are concerned lest every breach  
14 of contract be levered into fraud by the too-facile expedient of asking the jury to infer  
15 from the fact that the defendant did not perform his promise that he never intended to  
16 perform it. So the rule has grown up that nonperformance is not enough to ground  
such an inference; there must be additional evidence of the defendant's intentions at  
the time he made the promise.

17 *Milwaukee Auction Galleries, Ltd. v. Chalk*, 13 F.3d 1107, 1109 (7th Cir. 1994) (internal  
18 citations omitted).

19  
20 In determining the Debtor's intent, the Court carefully considered a variety of factors.  
21 First, as discussed above, the Court does not find the Debtor's story uniformly credible. In  
22 particular, the Court does not find that the quality of the services provided by Dr. Rutley in  
23 any way justifies nonpayment. The Court finds that Dr. Rutley was in the unenviable  
24 position of rendering services to someone who was incapable of being pleased.

25  
26 Further, the Court concludes that the Debtor justified nonpayment by the erroneous  
27 belief that additional root canal work was required, his determination that he would not  
28



1 return to Dr. Rutley, and the resultant erroneous conclusion that he had overpaid Dr. Rutley.  
2 The Court does not find these conclusions reasonable, but does conclude that Debtor's belief  
3 was sincere and that Debtor reached these conclusions after treatment.  
4

5 Dr. Rutley argued in closing that the most compelling evidence of fraud is Debtor's  
6 payment through a check dated two days after services were rendered. In particular, he  
7 asserts that by so dating the check the Debtor obtained an opportunity to stop payment. The  
8 Court, however, finds the Debtor's explanation for the erroneous date on the check to be  
9 credible. The Debtor persuasively testified that he was tired and not thinking straight after  
10 the multiple hour root canal and that the dating of the check was an innocent error. The  
11 Court also notes that there is no evidence that a bank refused or would have refused to  
12 accept the check if tendered on the date of the delivery. Further, the evidence is clear that  
13 the Debtor did not immediately stop payment on the check. This factor, while not  
14 dispositive, supports Debtor's version of the facts.  
15

16 Finally, the Debtor also supports his position that he intended payment prior to  
17 receipt of services by the fact that he actively searched for a dentist providing services at the  
18 lowest cost and by the fact that he had enough money in his bank account to cover the check  
19 when it was written. The Court agrees that these facts support the Debtor's case.  
20

21 Having made these determinations, the Court concludes that the Debtor did not  
22 obtain services from Dr. Rutley with the intention of avoiding payment for the same. As a  
23 result, Dr. Rutley's claim does not arise from an act of fraud by the Debtor and the claim  
24 may be discharged in Debtor's bankruptcy. A judgment in favor of the Debtor will follow.  
25

26 DATED: January 4, 2010

  
LAURA S. TAYLOR, JUDGE  
United States Bankruptcy Court

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