THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE DONALD S. LUPI, III NANCY A. LUPI Debtor(s)	)))))	CASE NO. 98-54123 CHAPTER 7
DONALD S. LUPI, III NANCY A. LUPI, Plaintiffs	))))	ADV. NO. 99-5035
v. SHEA-STONUM MARK WEAKLAND JULIE WEAKLAND, Defendants.	))))))	JUDGE MARILYN **MEMORANDUM OPINION**

This matter came before the Court on plaintiff-debtors' complaint to determine the dischargeability of a debt pursuant to 11 U.S.C. §523(a)(2)(A) and (B), which was filed on March 5, 1999 and defendants' answer, which was filed on April 5, 1999.[1] The Court held a trial in this matter on August 3, 1999. Appearing at the trial were Donald Mitchell, counsel for plaintiff-debtors and Thomas Loepp, counsel for defendants. During the trial,

[1] This adversary proceeding was initiated by debtors which is unusual in dischargeability disputes. In both the complaint and answer, neither party identified which provisions of 11 U.S.C. §523 they were relying upon to support their respective positions. Upon questioning by the Court at the beginning of the trial in this matter, the parties acknowledged that they were premising their arguments on 11 U.S.C. §523(a)(2)(A) and (B) only.

the Court received evidence in the form of exhibits and in the form of testimony from plaintiff-debtors, Donald and Nancy Lupi and defendant, Mark Weakland.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (I) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon testimony and evidence presented at the trial, the arguments of counsel and the documents of record in this adversary proceeding and the main chapter 7 case, the Court makes the following findings of fact and conclusions of law.

FACTS

At the beginning of the trial, the parties presented the Court with a list of facts which they agreed were not in dispute. Based upon the parties' stipulations and the evidence presented at trial, the Court makes the following findings of fact:

1. That plaintiff-debtors filed their chapter 7 bankruptcy petition on December 28, 1998.
2. That at all times relevant to this matter, plaintiff-debtor, Nancy Lupi, was the sole record owner of certain real property located at 521 Ewart Road, Akron, Ohio (the "Property").
3. That for approximately five years, plaintiff-debtors rented the Property to various third parties and that sometime during May 1998, plaintiff-debtors decided to sell the Property.
4. That in an effort to sell the Property, plaintiff-debtor, Mark Lupi, prepared and then placed in the window of the Property a handwritten sign (the "Sign") that set forth the following: "For Rent or Sell for $85,000. Land

Contract or Bank, $5,000 down [and] $750 [per] month (for rent $1,000 down [and] $750 [per] month, possible rent to own). (1) 4 Bedrooms, (2) Finished basement, woodburning stove, (3) new carpet, dishwasher, microwave, side-side frig., (4) new water pump, filter, water softner [sic], (5) fenced private back yard with barn, (6) upstairs long bedroom. Call 560-1300." [Defendants' Exhibits A and B].[2]

5. That in an effort to sell the Property, plaintiff-debtor, Donald Lupi, hosted an open house at the Property sometime near the end of May or the beginning of June 1998 (the "Open House").

6. That defendants attended the Open House and that while there, defendants delivered to Donald Lupi $5,750.00 in cash.

7. That in return for the $5,750.00, Donald Lupi gave the defendants the keys to the Property and also prepared and gave to the defendants a handwritten note (the "Receipt") that was dated June 1, 1998 and that set forth the following: "Mark E. Weakland and Julie D. Weakland purchase on [sic] home and property 521 Ewart. 5,000 down 750 month rent to own. Contract to be written in 2 days. Legal papers to be drawn up! If not approved by Buyer then the deposit it [sic] returned $5,000. Donald S. Lupi /s/ Donald S. Lupi." [Defendants' Exhibit C].

8. That after defendants received the keys to the Property they undertook basic maintenance such as mowing the lawn and removing trash but that

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[2] The bracketed language was not included on the Sign and was added by the Court in this opinion for the sake of clarity.

they did not move into the Property.

9. That sometime during the first week of June 1998, defendants went to the plaintiff-debtors' residence located in Ravenna, Ohio (the "Ravenna Meeting").

10. That during the Ravenna Meeting, defendants requested that plaintiff-debtors either lower the $750.00 monthly payments or return the funds given to Donald Lupi at the Open House.

11. That later in the Ravenna Meeting, Donald Lupi and Mark Weakland signed a document entitled "Residential Lease-Purchase Agreement" (the "RLPA"). [Plaintiffs' Exhibit 2].

12. That Nancy Lupi downloaded a form copy of a lease-purchase agreement from the Internet and from that form prepared the RLPA and that during the Ravenna Meeting Donald Lupi filled in the blank portions of that document.

13. That sometime shortly after the Ravenna Meeting, defendants retained an attorney to draft a land contract agreement regarding the Property (the "Land Contract Agreement"). [Defendants' Exhibit G].

14. That sometime after the Land Contract Agreement had been drafted, the attorney who prepared that document contacted Nancy Lupi at work to indicate that the document was ready for execution.

15. That the Land Contract Agreement was never executed by the parties.

16. That the $5,000.00 given to Donald Lupi at the Open House was never returned to defendants and was used by plaintiff-debtors to pay for miscellaneous living expenses.

17. That on their Schedule A - Real Property, plaintiff-debtors list the value of the Property at $74,000.00 and the amount of secured claims related to the Property at $74,000.00.

18. That on their Schedule D - Creditors Holding Secured Claims, plaintiff-debtors list the value of the Property at $80,000.00 and only one creditor holding a secured claim against the Property in the amount of $55,700.00.

19. That a real estate report dated June 2, 1998, revealed that the Property was encumbered by three separate liens totaling approximately $81,000.00.[3]

DISCUSSION

Pursuant to 11 U.S.C. §523(a)(2), a discharge under §727 does not discharge individual debtors from any debt for money, property, services or an extension, renewal, or refinancing of credit, to the extent obtained by:

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

(B) use of a statement in writing -

(i) that is materially false;
(ii) respecting the debtor's or an insider's financial condition;
(iii) on which the creditor to whom the debtor is liable for such money, property, services or credit reasonably relied; and

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[3] Although this real estate report was introduced into evidence during the trial in this matter, no evidence was presented as to whether or when those liens were either paid down or satisfied. Upon questioning by the Court, plaintiff-debtor, Nancy Lupi, indicated that to the best of her understanding, the current market value for the Property as listed on the debtors' Schedule A was determined by adding together the existing liens against the property and also factoring in the deteriorated nature of the Property. The debtors did not explain why in their Schedule D they listed the value of the Property at $80,000.00.

(iv) that the debtor caused to be made or published with intent to deceive.

See 11 U.S.C. §523(a)(2)(A) and (B). Each element set forth in §523(a)(2) must be proved by a preponderance of the evidence, *Grogan v. Garner,* 498 U.S. 279, 291 (1991); *Rembert v. AT&T Universal Card Services, Inc. (In re Rembert),* 141 F.3d 277, 281 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 438 (1998), and exceptions to discharge should be strictly construed against the objecting creditor.[4] *Rembert,* 141 F.3d at 281 (6th Cir. 1997); *Mfr. Hanover Trust v. Ward (In re Ward)*, 857 F.2d 1082, 1083 (6th Cir. 1988). In determining whether the §523(a)(2) elements are met, the bankruptcy court, as trier of fact, must weigh conflicting facts, determine the credibility of witnesses and draw inferences from the evidence presented. *Investors Credit Corp. v. Batie (In re Batie),* 995 F.2d 85, 88 (6th Cir. 1993); Fed. R. Bankr. P. 8013.

A. Dischargeability Pursuant to §523(a)(2)(A)

In order for a debt to be deemed nondischargeable pursuant to §523(a)(2)(A), it must be demonstrated: (1) that the debtors made a false representation as to a material fact; (2) that when the false representation was made the debtors had an intent to deceive; (3) that the creditors relied upon the debtors' false representation and that the reliance was justifiable under all the circumstances; and (4) that the creditors sustained a loss as a result of the debtors' false representation. *See Field v. Mans*, 516 U.S. 59, 73 (1995); *Longo v. McLaren (In re McLaren),* 3 F.3d 958, 961 (6th Cir. 1993). In the case at bar, the Court

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[4] As noted earlier (*see* footnote 1, supra) this adversary proceeding was commenced by debtors, rather than the more typical initiation of dischargeability litigation by the "objecting creditor." Despite this plaintiff-defendant role reversal, the parties agreed that the creditor had the standard burden of proof.

finds that all of the foregoing elements have been shown.

1. False Representation as to a Material Fact: Based upon the testimony adduced at trial, the Court finds that debtors made two separate false representations as to material facts. Each of those false representations is discussed below.

a. Transfer of the Property by Land Contract: In the trial of this matter, defendant, Mark Weakland, testified that during both the Open House and the Ravenna Meeting he discussed entering into a land contract agreement regarding the Property with plaintiff-debtor, Donald Lupi. Mr. Weakland also testified that during those two meetings, Mr. Lupi agreed to sell defendants the Property through a land contract arrangement.

During his testimony, Mr. Lupi denied that those conversations ever took place or that he and his wife ever intended to enter into a land contract agreement with the Weaklands or with any other party. When questioned as to the land contract language included on the Sign, Mr. Lupi stated that, although he prepared the Sign, he did not include such language. During her testimony, Mrs. Lupi claimed that she had never seen the Sign and indicated that she did not recognize any of the handwriting.

The handwritten reference on the Sign to a land contract looks identical to all the other handwriting on the Sign. During the trial, neither party presented evidence from a handwriting expert regarding the land contract language, but the spacing, color of marker and uniformity of handwriting leaves this Court confident of the conclusion that such language was placed there by Mr. Lupi's hand. Such conclusion is further bolstered by Mr. Lupi's inability to explain how such language came to be placed on the Sign and Mrs. Lupi's purported inability to recognize any portion of her husband's handwriting on the Sign. In short, the Court finds that the Lupis' testimony is not consistent with the physical

evidence, and in a credibility battle with the Weaklands, the Lupis simply lose.

During the trial, plaintiff-debtors relied upon the executed RLPA as evidence that neither they nor defendants ever intended to enter into a land contract agreement regarding the Property. Upon review of that document, however, such intent cannot inferred. In that document defendants are listed as both as the "the Landlord" and "the Tenant(s)" and the property that is the subject of that document is not identified. Moreover, the "purchase price" of the Property is set at $80,000.00 and, despite plaintiff-debtors' admission that they received $5,000.00 from defendants, the "deposit" amount set forth in the agreement is identified as $0.00.[5]

Pursuant to the land contract language on the Sign and the testimony of Mr. Weakland regarding conversations with plaintiff-debtors in which they agreed to sell the Property through a land contract arrangement, and given the Lupis' inability to convincingly contradict that collective evidence, the Court finds that plaintiff-debtors falsely represented to defendants that they would sell them the Property pursuant to a land contract.

b. Debtors' Failure to Return Defendants' Deposit: During the Open

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[5] Upon questioning by the Court, plaintiff-debtors' counsel argued that pursuant to Ohio law, the RLPA is enforceable against the defendants and that plaintiff-debtors intended to but were unable to perform under the agreement. Even assuming that the agreement is enforceable, additional evidence would be needed to determine the parties' intent under that document because it is both ambiguous and incomplete. *See Yoder v. Columbus & Southern Ohio Elec. Co.*, 316 N.E. 477, 39 Ohio App. 2d 113 (Ohio Ct. App. 1974); *Tillotson and W. Co. v. Scottdale Machine and Mfg. Co.*, 155 N.E. 409, 23 Ohio App. 399 (Ohio Ct. App. 1926). Moreover, ambiguities in a contract are to be construed against the drafters which, in this case, were plaintiff-debtors. *See, e.g., Central Realty Co. v. Cutter*, 406 N.E.2d 515, 62 Ohio St. 2d 411 (Ohio 1980).

House defendants gave Mr. Lupi $5,000.00 to accept plaintiff-debtors' offer to transfer the Property via land contract and, in return for that money, Mr. Lupi gave defendants the Receipt. In the Receipt, Mr. Lupi set forth that a contract reflecting the parties' agreement was to be drawn up within two days and, that if the parties' agreement was not documented to defendants' satisfaction, the $5,000.00 would be returned.[6]

At trial, Mr. Weakland testified that during the Ravenna Meeting, which occurred at the most only one week after the Open House,[7] the only document presented for defendants' signature was the RLPA. Mr. Weakland also testified that during the Ravenna Meeting, he and his wife requested a return of their deposit but were told by plaintiff-debtors that they no longer had the money. According to Mr. Weakland, plaintiff-debtors also indicated that although they would still enter into a land contract agreement with defendants, they did not have any funds to pay for the drafting of that document.

Mr. Weakland testified that knew the RLPA was not a land contract agreement. When asked why he signed that document, Mr. Weakland explained that, given plaintiff-debtors' inability to return the deposit, he signed the RLPA in an effort to somehow protect his interests. Mr. Weakland also testified that he signed the RLPA to appease plaintiff-debtors' because, at some point during the Ravenna Meeting, Mrs. Lupi

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[6] Without the testimony adduced at trial regarding the parties' agreement, the Receipt on its own is nonsensical as it references both "purchase" and "rent to own" and is replete with typographical and grammatical errors.

[7] The testimony as to exactly when the Ravenna Meeting occurred was unclear as Mr. Lupi testified that the Ravenna Meeting occurred one week after the Open House and Mr. Weakland indicated that the Ravenna Meeting took place three days after the Open House.

was on the telephone claiming that she was trying to contact other prospective purchasers of the Property.

During his testimony, Mr. Lupi could not clearly recall whether, during the Ravenna Meeting, defendants ever requested a return of their $5,000.00 deposit. However, both Mr. and Mrs. Lupi testified that when defendants expressed a concern over the condition of the Property, plaintiff-debtors independently offered to return the deposited funds. According to the Lupis' version of what transpired at and from the Ravenna Meeting, defendants refused to take back their deposit and willingly signed the RLPA and then, without any further discussions with plaintiff-debtors, retained an attorney to draft the Land Contract Agreement.

Based upon the demeanor of the witnesses at trial, combined with plaintiff-debtors' illogical explanation of the events at the Ravenna Meeting and subsequent events, the Court finds Mr. Weakland's testimony to be the more credible. Given Mr. Lupi's representations at the Open House regarding transfer of the Property pursuant to a land contract and the language in the Receipt, the Court finds that plaintiff-debtors falsely represented to defendants that if the parties' agreement was not documented to

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[8] The materiality of the debtors' representations is without question as those representations went to the very heart of the parties' legal rights relative to the Property and the protection of defendants' deposited funds pending acceptable documentation of those rights. The distinction between a land contract and a lease with an option to purchase is that the land contract conveys a present ownership interest in realty, while a lease with an option to purchase conveys an interest less than ownership. Until the option to purchase is exercised, the lessee has no present right of ownership but only those rights which flow from the parties' agreement. *Compare, e.g.*, Ohio Rev. Code §5313.01(A) (defining land contract) *with George Wiedemann Brewing Co. v. Maxwell*, 84 N.E. 595, 78 Ohio St. 54 (Ohio 1908) (discussing option contracts) and *Jones v. Keck*, 74 N.E.2d 644; 79 Ohio App. 549 (Ohio Ct. App. 1946) (defining lease).

defendants' satisfaction, the $5,000.00 deposit would be returned.[8]

2. Intent to Deceive When the False Representation was Made: The Court finds that when plaintiff-debtors represented that the Property would be sold pursuant to a land contract arrangement and that the deposited funds would be returned if the parties' agreement was not properly documented, plaintiff-debtors had no plans to perform on those promises and, as such, intended to deceive defendants. Although there was no direct testimony regarding such intent, it can be inferred from the evidence presented in this case. *See Blascak v. Sprague (In re Sprague)*, 205 B.R. 851, 861 (Bankr. N.D. Ohio 1997) (noting that intent to deceive may be inferred from an evaluation of the evidence as a whole); *See also Western Union Corp. v. Ketaner (In re Ketaner)*, 154 B.R. 459, 465 (Bankr. E.D. Va. 1992) (noting that intent to deceive may be inferred if defendants knowingly made false representations which they should know will induce another to rely on them).

When defendants gave Mr. Lupi their $5,000.00 to accept plaintiff-debtors' land contract offer, Mr. Lupi provided defendants with the Receipt. As was previously discussed, the Receipt indicates that if the parties' land contract agreement was not

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[8] The materiality of the debtors' representations is without question as those representations went to the very heart of the parties' legal rights relative to the Property and the protection of defendants' deposited funds pending acceptable documentation of those rights. The distinction between a land contract and a lease with an option to purchase is that the land contract conveys a present ownership interest in realty, while a lease with an option to purchase conveys an interest less than ownership. Until the option to purchase is exercised, the lessee has no present right of ownership but only those rights which flow from the parties' agreement. *Compare, e.g.*, Ohio Rev. Code §5313.01(A) (defining land contract) *with George Wiedemann Brewing Co. v. Maxwell*, 84 N.E. 595, 78 Ohio St. 54 (Ohio 1908) (discussing option contracts) and *Jones v. Keck*, 74 N.E.2d 644; 79 Ohio App. 549 (Ohio Ct. App. 1946) (defining lease).

documented to defendants' satisfaction, the deposited funds would be returned. Despite those promises and despite the fact that defendants did request the return of their money, plaintiff-debtors failed to return the $5,000.00 deposit during the Ravenna Meeting or at any time thereafter. If plaintiff-debtors had actually intended to enter into a land contract arrangement with defendants, they should have held the $5,000.00 in tact pending finalization of the parties' agreement. Instead, apparently, they immediately began to spend those funds.

The Court's finding that plaintiff-debtors did not intend to perform on their promises is further evidenced by Mr. Weakland's testimony that during the Ravenna Meeting, plaintiff-debtors made further assurances that they would enter into a land contract agreement but claimed that they could not afford to have the necessary documents drafted. Given those further assurances, which defendants still took for the truth, defendants engaged and ultimately paid for the services of the attorney who drafted the Land Contract Agreement. However, when plaintiff-debtors were contacted by the attorney who drafted the Land Contract Agreement, they refused to sign, or for that matter even review, that document.[9]

3. The Creditors' Reliance Upon the Debtors' False Representations:

It is clear in this case that defendants relied upon plaintiff-debtors' representations that they would sell them the Property pursuant to a land contract arrangement or return

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[9] Because the information contained in the debtors' Schedules is unclear as to the amount of liens that were on the Property, an issue may also exist as to whether plaintiff-debtors' could have even delivered marketable title to a purchaser who paid the $85,000.00 sale price. Because that issue was not sufficiently addressed by either party, it will not be discussed further.

defendants' $5,000.00 deposit. However, in order that a debt be found nondischargeable pursuant to §523(a)(2)(A), such reliance must be justifiable under the circumstances. *Field v. Mans,* 516 U.S. 59, 70 (1995). *See also Bank One, Lexington v. Woolum (In re Woolum),* 979 F.2d 71, 76 (6th Cir. 1992), *cert. denied,* 507 U.S. 1005 (1993) (noting that the reliance requirement in dischargeability proceedings is not a rigorous requirement but only one directed at creditors acting in bad faith).

During the trial Mr. Weakland testified that, because of the Sign and his conversation with Mr. Lupi at the Open House, he was comfortable giving Mr. Lupi the $5,000.00 deposit to enter into a land contract agreement. Mr. Weakland further testified that it was not until the Ravenna Meeting, when the deposit could not be returned, that defendants became truly concerned that plaintiff-debtors may not follow through on their promise to enter into a land contract arrangement. Because of the further assurances of plaintiff-debtors, defendants engaged and ultimately paid for the services of the attorney who drafted the Land Contract Agreement.

Prior to their experience with plaintiff-debtors, Mr. Weakland testified that he and his wife had never attempted to purchase a home. In contrast, plaintiff-debtors owned their own home, owned a rental property and also owned a business.[10] Mr. Weakland also stated during trial that in one of his conversations with plaintiff-debtors, Mr. Lupi represented that his uncle was a mortgage broker and that he could call on his services to

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[10] In their Schedules, plaintiff-debtors indicate that Mrs. Lupi was the sole shareholder of a bar by the name of Casino's Nightclub that was located in Cuyahoga Falls, Ohio and that closed for business in May 1998. Plaintiff-debtors' Schedules further indicate that Mr. Lupi was the record owner of a liquor license that was used in conjunction with that business and that was eventually sold by the trustee in the debtors' main chapter 7 case.

assist in the discussed transaction. Mr. Weakland's testimony as to such representation was not challenged at trial by plaintiff-debtors.

Although on their face the facts in this case might seem to reflect carelessness on the part of defendants, when viewed in light of the witnesses' demeanor during trial, these facts reflect instead the level of misplaced trust that defendants accorded plaintiff-debtors' representations. The Weaklands' relative lack of sophistication is an important factor in the Court's determination of this issue. The "con" artist in circumstances such as these cannot be allowed to defend by saying that the victim should have known better. Accordingly, the Court finds that defendants' reliance on plaintiff-debtors' representations was not unjustifiable.

4. Creditors' Loss as a Result of the Debtors' False Representation: As a result of plaintiff-debtors' false representations, defendants clearly suffered a monetary loss in that their $5,000.00 deposit was never returned. Defendants suffered additional monetary loss in that they expended $403.75 for a lien search on the Property and the preparation of the Land Contract Agreement that was never executed. It is unclear whether defendants suffered additional damage from plaintiff-debtors' conduct because no evidence of any additional damage was presented during trial.[11]

Although a bankruptcy court has the authority to render a monetary award in an action under §523 of the Bankruptcy Code, defendants' answer in this adversary proceeding only prays that their claim against the debtors be determined to be

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[11] In a pre-petition state court complaint filed against debtors and based upon the same failed land contract transaction, defendants sought compensatory damages in excess of $25,000.00 and punitive damages in excess of $100,000.00. [Plaintiffs' Exhibit 4]. This action was stayed by the debtor's chapter 7 bankruptcy filing.

nondischargeable. *Alexander v. Hillman*, 296 U.S. 222 (1935); *Longo v. McClaren (In re McLaren)*, 3 F.3d 958 (6th Cir. 1993); *Atassi v. McClaren (In re McClaren)*, 990 F.2d 850 (6th Cir. 1993); *Matter of Hallahan*, 936 F.2d 1496 (7th Cir. 1991). Accordingly, unless and until defendants file an appropriate and timely post-trial pleading, the exact amount of damages suffered by defendants due to plaintiff-debtors' false representations must be determined at some other time and, perhaps, by some other court.

B. Dischargeability Pursuant to §523(a)(2)(B)

Although §523(a)(2)(B) was also raised in this adversary proceeding, this subsection is limited in application to situations involving alleged fraud or misrepresentation procured through a written statement pertaining to a person's financial condition. Because the Court has already determined that the claim at issue is not dischargeable pursuant to §523(a)(2)(A) and because the instant case does not involve a written misrepresentation as to the debtors' financial condition, §523(a)(2)(B) is not applicable and need not be further addressed.

CONCLUSION

Based upon the foregoing, the Court determines that defendants' claim against plaintiff-debtors is not dischargeable in plaintiff-debtors' bankruptcy pursuant to §523(a)(2)(A). A separate judgment consistent with these findings of fact and conclusions of law will be entered.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 9/29/99