UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
	)	CASE NO. 02-54908
KONSTANTINOS M. STAMATELOPOULOS,	)	CHAPTER 7
DEBTOR,	)	
	)	**ADVERSARY NO. 02-5272**
THOMAS AND MARGARITA PATOUHAS,	)	JUDGE MARILYN SHEA-STONUM
PLAINTIFF,	)	
vs.	)	
KONSTANTINOS M. STAMATELOPOULOS,	)	**MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
DEFENDANT.	)	

This matter is before the Court on the plaintiffs', Thomas and Margarita Patouhas (the "Plaintiffs"), Motion for Summary Judgment (the "Motion") [docket # 32] filed on November 15, 2004. The defendant, Konstantinos Stamatelopoulos (the "Defendant"), filed an Answer in this Adversary Proceeding [docket # 8], but did not respond to the Plaintiffs' Motion for Summary Judgment. This matter was taken under advisement by the Court once the Defendant's response time elapsed.

This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I), over which this Court has jurisdiction under 28 U.S.C. §1334(b) and the Standing Order of Reference entered in this District on July 16, 1984. Based upon review of the pleadings filed in this

Adversary Proceeding and the corresponding chapter 7 case, and the uncontroverted affidavits and attendant exhibits filed in support of the Motion, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Plaintiffs and the Defendant are of Greek descent; the Plaintiffs speak fluent Greek, and have a limited ability to read and speak English. The Defendant speaks both Greek and English fluently. (M. Patouhas Aff. at ¶4).

2. In November, 2000, the Plaintiffs entered into an oral contract (the "Contract") with the Defendant for repairs to their home located at 4232 West 36th Street, Cleveland, Ohio. (Id. at ¶3).

3. The terms of the Contract were not reduced to writing. The Defendant provided the Plaintiffs with a written estimate of the work to be performed under the Contract. (Id. at ¶3).

4. The estimate listed the following services as the work contemplated under the Contract: removal and installation of a new roof, installation of gutters and down spouting, installation of vinyl siding, installation of windows with screen replacements, replacement of two doors, and replacement of outdoor steps. (Ex. A, M. Patouhas Aff., Answer at unnumbered p. 1).[1]

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[1] In addition to the six services stated herein, the Plaintiffs' Motion and the Affidavit of Margarita Patouhas list the following additional services as part of the oral agreement between the parties: upgrading of electrical service, repair of ceiling fan in upstairs rental unit, closing off the chimney from the outside, repair of a second chimney, and installation of replacement tile in the downstairs fireplace and various doorways. However, the Plaintiffs also submitted evidence that only referenced six services that the Defendant was to perform – those six services stated in the above Finding of Fact No. 4. *See* Ex. D, M. Patouhas Affidavit (proposing to resolve their objection to the Defendant's chapter 13 plan). These six services were to be performed for a total price of $23,000 per the proposed resolution (which became moot upon the Defendant's conversion to a

5. The contemplated cost for the Contract was $23,000 to $25,000. (M. Patouhas Aff. at ¶3, Answer at unnumbered p. 1).

6. The Contract did not establish a start or completion date for the work.

7. The Plaintiffs issued a personal check to the Defendant for $10,000 on November 16, 2000, as a down payment on the Contract. (Ex. B, M. Patouhas Aff.).

8. The Plaintiffs contacted the Defendant by phone multiple times during the period from November 16, 2000, to May, 2001, to determine when the Defendant would initiate performance under the Contract. (M. Patouhas Aff. at ¶5).

9. In May, 2001, the Defendant initiated and substantially completed the roof removal and replacement, but failed to install the necessary flashing to the roof. The Defendant also failed to install the gutters and down spouts, or any of the other work agreed to under the Contract. (Id. at ¶5).

10. When the Defendant performed the roof repairs in May, 2001, he requested an additional $4,000 payment from the Plaintiffs to complete the remaining work. The Plaintiffs issued a second personal check to the Defendant for an additional amount of $4,000 on May 14, 2001. (M. Patouhas Aff. at ¶5; Ex. C, M. Patouhas Aff.).

11. In June, 2001, the Defendant contacted the Plaintiffs requesting payment of an additional $3,000 in cash. The Defendant indicated that he needed the money to meet a "family emergency" and that he would promptly initiate the remaining work

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chapter 7). Because the Defendant's admits in his Answer that these six services were part of the parties oral agreement, the Court will treat those six services as a stipulation between the parties and as the basis of the Contract between the parties, but the Court cannot incorporate the additional services into its factual findings as they remain in dispute.

under the Contract once the additional funds were received. The Plaintiffs paid the Defendant $3,000 in cash as requested. (M. Patouhas Aff. at ¶8.b).

12. The Defendant did not perform any additional work under the terms of the Contract after the roof repairs were performed in May, 2001. (Id. at ¶6).

13. The Plaintiffs repeatedly contacted the Defendant after June, 2001, to determine when the remaining work under the Contract would be completed, and the Defendant repeatedly assured them that he would perform under the Contract. (M. Patouhas Aff. at ¶8.a).

14. A separate and independent contractor, M.P. Construction, provided the Plaintiffs with an appraisal of the work completed by the Defendant in May, 2001. The appraisal estimated that $4,500 worth of work was performed by the Defendant. (Ex. F, M. Patouhas Aff.).[2]

15. The Plaintiffs maintain they were concerned about the completion of the Contract because the City of Cleveland Building Department's (the "City") was monitoring of the status of the repairs on an ongoing basis because the funds used to pay for the repairs were obtained through a low interest loan. (M. Patouhas Aff. at ¶8.a).

16. The Plaintiffs continued to advise the City that the Defendant would complete the work based on the Defendant's representations to the Plaintiffs when they

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[2] The appraisal from M.P. Construction listed the work performed by the Defendant as "Roofing – Tear off existing roof asphalt shingles remove all debris; install new asphalt shingles #15 felt [illegible] flushings, chimney, take off loose bricks and rebuild the same." This estimate appears to include repairs not documented in the written estimate originally prepared by the Defendant for the Plaintiffs (i.e., chimney repairs), and also seems to contradict the Plaintiffs' contention that the roof flashing was incomplete. The Court does not, however, consider the variance between these statements so significant, in light of all the repairs contemplated, to preclude making a factual finding with respect to the value of the work that the Defendant performed.

contacted him. (M. Patouhas Aff. at ¶8.a).

17. The Defendant filed a voluntary chapter 13 bankruptcy petition on February 12, 2002,[3] and listed the Plaintiff, Margarita Patouhas on his Schedule F - Creditors Holding Unsecured Nonpriority Claims as a holding a claim for "work performed" and listed the amount of the claim as $0.00 [docket # 1, Main Case]. The Defendant voluntarily converted his chapter 13 case to a chapter 7 case on June, 3, 2002 [docket # 24, Main Case].

18. As of June 2002, the Plaintiffs were working with the Defendant's counsel to resolve their objection to the Defendant's chapter 13 plan [docket # 14] and to have the Defendant complete the work pursuant to the Contract. (M. Patouhas Aff. at ¶7).

19. In May 2003, the Plaintiffs engaged M.P. Construction to complete the work remaining under the Contract, which they did for the following amounts:

Installed 45 replacement windows	$ 8,500
Installed new vinyl siding and trim	$ 7,750
Installed new gutters and down spouts	$ 850
Interior painting, tiles, cabinets, electrical	$ 2,000
Exterior painting	$ 1,750
TOTAL FOR LABOR AND MATERIALS	$ 20,850

(Ex. E, M. Patouhas Aff.)

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[3] This case was originally filed in Canton, as that is where the Defendant resides. On September 24, 2002, Judge Kendig, the Bankruptcy Judge handling this case in Canton, recused himself, whereupon the case was transferred to the Akron Bankruptcy Court for further adjudication [docket # 53, Main Case].

20. The above captioned Adversary Proceeding was timely filed on October 23, 2002 [docket # 1]. The Defendant, through attorney Robert Eckinger, filed an Answer where he admitted that he agreed to perform the six services stated in this Court's Finding of Fact No. 4 and that he as to perform those services for $23,000 to $25,000; otherwise, the Defendant answered with a general denial to all other claims [docket # 8]. On September 19, 2004, Mr. Eckinger filed a Motion to Withdraw from Legal Representation (the "Motion to Withdraw") [docket # 20], in which he stated that the Defendant had failed to communicate and consult with him, and that the Defendant had not abided by the fee representation agreement established between the parties. On February 8, 2005, the Court entered an order granting counsel's Motion to Withdraw [docket # 41]. The Defendant is currently acting *pro se* in this case.

CONCLUSIONS OF LAW

Summary Judgment Standard

The court shall grant a movant's motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. The party seeking summary judgment bears the initial burden of production by demonstrating the absence of any genuine issue of material fact, but the ultimate burden of demonstrating that an issue of fact still remains for trial lies with the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If a motion for summary judgment is

unopposed, the movant is not automatically entitled to a judgment in his favor, and judgment shall only be entered if the movant has met his burden and summary judgment is "appropriate" under Fed. R. Civ. P. 56. *Carver v. Bunch,* 946 F.2d 451, 454 (6th Cir. 1991). However, when the non-moving party fails to respond to the motion for summary judgment, the court is not required to search the record to establish an absence of a genuine issue of material fact. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir.1989). Instead, the court can rely upon the facts presented and designated by the movant, *Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 404 (6th Cir.1992), bearing in mind that all inferences drawn from these facts must be considered in the light most favorable to the non-movant, despite having filed no opposition. *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *In re Parton*, 137 B.R. 902, 905 (Bankr. S.D. Ohio 1991).

In actions opposing dischargeability, the plaintiff must prove, by a preponderance of the evidence, that the debt is nondischargeable. *Grogan v. Garner*, 498 U.S. 279 (1991); *Spilman v. Harley*, 656 F.2d 224 (6th Cir. 1981). Here, the Plaintiffs argue that the Defendant's failure to complete performance under the terms of the contract constitutes a debt (the "Debt") owed to them, and that the Debt should be nondischargeable under 11 U.S.C. § 523(a)(2)(A) and/or (a)(6) in the amount of $12,850.[4]

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[4] This amount is the difference between the total amount the debtors paid for the repairs ($37,850, which is the sum of $17,000 paid to the Defendant plus the $20,850 paid to M.P. Construction) less the Defendant's estimate that the project would not exceed $25,000. The Plaintiffs are also seeking $10,000 punitive damages and reimbursement for reasonable attorney's fees. Under Ohio law, an award of punitive damages requires a showing of actual malice, which the Court does not find present in this proceeding (*discussed infra*). *See* Ohio Rev. Code 2315.21 (b); *Gonzales v. Moffitt (In re Moffitt)*, 252 B.R. 916, 923 (6th Cir. B.A.P. 2000). Additionally, punitive damages are not awarded in breach of contract actions unless the conduct underlying the breach is also a tort where punitive damages could be appropriately awarded. *Demczyk v. Mutual Life Ins. Co. of N.Y.,*

Nondischargeability under § 523(a)(2)(A)

The Plaintiffs first argue that Defendant's debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(a), which provides in relevant part that:

> (a) A discharge under section 727, . . . of this section does not discharge an individual debtor from any debt –
>
> (2) 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, . . .

In the Sixth Circuit, creditors seeking to exempt a debt from discharge under § 523(a)(2)(A) must prove that:

> [1] the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to is truth;
>
> [2] the debtor intended to deceive the creditor;
>
> [3] the creditor justifiably[5] rely on the false representation; and
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> [4] its reliance was the proximate cause of the loss.

(*In re Graham Square, Inc.,)* 26 F.3d 823, 828 (6th Cir. 1997). Also, attorney's fees are not typically awarded in dischargeability actions, except as allowed under § 523(d). *Pan Western-Life Ins. Co. v. Galbreath (In re Galbreath)*, 112 B.R. 892, 906 (Bankr. S.D. Ohio 1990). Additionally, there is no assertion that the Contract contained any agreement with respect to attorney's fees which would entitle the Plaintiffs to such relief. *Compare, e.g. Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1167-68 (6th Cir. 1985) (awarding creditor attorney's fees because of express contract language providing for the entitlement).

5 The Supreme Court held in *Field v. Mans* that the reliance standard for a creditor under § 523(a)(2)(A) is a subjective one of "justifiable" reliance, not the objective "reasonable" reliance standard previous employed by the Sixth Circuit. 516 U.S. 59, 74-54 (1995).

Longo v. McClaren (In re McLaren), 3 F.3d 958, 961 (6th Cir. 1993); *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F3d 277, 280-81 (6th Cir. 1998). The Sixth Circuit has long held that "cases involving state of mind issues are not necessarily inappropriate for summary judgment." *Street*, 886 F.2d at 1479, and that summary judgment may be granted for the movant if the only reasonable inferences that could be drawn from the evidence indicate it is appropriate. *Kand Medical Inc. v. Freund Medical Products, Inc.*, 963 F.2d 125,127 (6th Cir. 1992). Furthermore, intent can be inferred from an evaluation of the evidence as a whole, including consideration of circumstantial evidence, as a defendant will rarely disclose any indication of deceitful conduct. *Fifth Third Bank v. Collier (In re Collier)*, 231 B.R. 618, 623 (Bankr. N.D. Ohio 1999).

Due to the multiple verbal exchanges that took place between the parties over an extended period of time and the episodic payments that give rise to the Defendant's Debt, the Court will consider the circumstances surrounding each payment to the Defendant separately. In doing so, the Court first turns to the initial $10,000 down payment the Plaintiffs paid to the Defendant in November 2000. When viewing the facts in the light most favorable to the Defendant and in consideration of the overall nature of the services under the Contract, the size of the initial down payment does not appear unreasonable to the Court, were the Defendant to begin purchasing the supplies necessary to complete the roof, siding, and window repairs as contemplated. Additionally, the Plaintiff admits that the Defendant did approximately $4,500 worth of work in this regard, thus completing nearly half of the work for which he was paid under the first down payment. Furthermore, in the absence of any definitive start or completion dates documented on the estimate, the

Court does not consider the Defendant's delay in attending to the repairs indicative of intent to defraud the Plaintiffs.[6] If the possibility exists for an inference of honest intent, the question of nondischargeability must be resolved in favor of the debtor. *Van Wert Nat'l Bank v. Druckemiller (In re Druckemiller)*, 177 B.R. 859, 861 (Bankr. N.D. Ohio 1994) (holding that doubts as to dischargeability need to be construed in favor of the debtor). Here, such possibility exists with respect to the initial $10,000 down payment, and the Plaintiff's Affidavit admits that, after a delay, the Defendant completed nearly half the work anticipated under the initial down payment. Therefore, the Court does not find that amount nondischargeable under § 523(a)(2)(A).

The Court next turns to the Defendant's subsequent requests for additional payments from the Plaintiffs. Because the Defendant's requests for additional payments in the amount of $4,000 and $3,000 were both made within weeks of one another (and six to seven months respectively after the initial down payment), the Court will assess dischargeability of these two payments together, as the circumstances surrounding each request are substantially the same. When assessing dischargeability of these payments, the Court credits the uncontroverted Affidavit filed with the Plaintiffs' Motion, and further notes that the Defendant has failed to respond to the Motion, thereby, waiving his opportunity to designate facts that would demonstrate the existence of a genuine issue of material fact on this issue. The uncontradicted facts presented by the Plaintiff's Affidavit support summary judgment with respect to these later payments. The Court also notes that

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[6] Specifically, the Court notes that the parties agreed to the Contract in November, 2000, which was to include repairs to, *inter alia*, the roof, siding, and down spouting of Plaintiffs' house. The Court does not consider that these repairs were not undertaken during the winter months in Northeastern Ohio to be indicative of an intent to defraud by the Defendant.

the Defendant's conduct is consistent with circumstances where other courts, after a full trial, have found similar debts nondischargeable. For example, fraudulent intent has been found where a debtor failed to reduce a contract to writing, requested to alter the payment arrangements between the parties, or did not use all materials purchased with the Plaintiff's funds for repairs to the Plaintiff's home. *See e.g., Heeter v. Birt (In re Birt)*, 173 B.R. 346 (Bankr. N.D. Ohio 1994) (finding a debt nondischargeable where the debtor failed to reduce an oral contract to writing, requested payment be made to him personally instead of his company); *see also Sweeney, et al. v. Lombardi (In re Lombardi),* 263 B.R. 848 (Bankr S.D. Ohio 2001) (discharging a portion of the debt where the plaintiffs produced evidence they paid debtor for construction materials that were not ultimately used in their home).

The Defendant's failure to respond to the Plaintiffs' Motion indicates that there is no material factual dispute as to the matters addressed in Plaintiff's Affidavit. The Plaintiff's Affidavit is sufficient proof that the Defendant's repeated assurances that he would promptly commence work upon receipt of additional payments were an material misrepresentation that he made with the intent to deceive the Plaintiffs. Further, the Plaintiffs' justifiably relied on the Defendant's repeated assurances that he would promptly return to initiate completion of the project, in large part because of the similar ethic background of the parties and the Defendant's ability to speak to the Plaintiffs in fluent Greek. The Court also finds that the Plaintiffs' reliance served as the proximate cause of their financial loss.

After review of all the uncontested record evidence in this case, the Court finds

that the Defendant fraudulently induced the Plaintiffs into paying him an additional $7,000 for home repairs that he did not intend to perform. Moreover, the Plaintiffs justifiably relied on the Defendant's fraudulent statements. The Plaintiffs were harmed as a result of this misrepresentation in the amount of $7,000. The Court concludes that this amount is nondischargeable under §523(a)(2)(A).

Nondischargeability under 11 U.S.C. § 523(a)(6)

The Plaintiffs also allege that the Defendant committed conversion by deception, in that he continued to request additional money while knowing that it was extremely unlikely that he would complete the work under the Contract. Section 523(a)(6) excepts debts from discharge that were the results of a "willful and malicious injury by the debtor to another entity or to the property of another entity." While the Bankruptcy Code does not define either term, the Supreme Court has clarified that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Geiger v. Kawaauhau*, 523 U.S. 57, 61 (1998) (emphasis in original). The Sixth Circuit has concluded that a malicious injury is one that is wrongful and without just cause or excuse; it does not require a showing of hatred, spite or ill-will. *Hooker v. Hoover, (In re Hoover)* 289 B.R. 340, 353 (Bankr. N.D. Ohio 2003).

Here, the Plaintiffs base their § 523 (a)(6) claim on the Defendant's alleged conversion of their property. Conversion is the wrongful control or exercise of dominion over another's property that is inconsistent with or in denial of the rights of the owner *Baltimore & Ohio Railroad Co. v. O'Donnell*, 49 Ohio St. 489 (1892), and can constitute a

willful and malicious injury if the debtor intended to cause harm or that harm was substantially certain to occur. *In re Lombardi,* 263 B.R. at 853. The Plaintiffs allege that the Defendant knew his requests for subsequent demands for additional payments of $4,000 and $3,000 beyond the initial down payment were an act of act of tortious conversion and meant to harm them, because he never intended to complete the repairs, despite his assertions otherwise. While the Plaintiffs' evidence might constitute an action for breach of contract, it does not support a finding of nondischargeability under § 523(a)(6), in that it fails demonstrate that the Defendant willfully, consciously or maliciously intended to injure the Plaintiffs by requesting payment from them. Many courts have held that even if there was evidence that conversion occurred, "not all acts of conversion rise to the level of willful and malicious conduct." *Beard, et. al. v. Devore, et. al. (In re Devore)* 282 B.R. 643, 645 (Bankr. S.D. Ohio 2002) (finding a debt was dischargeable even though the defendant had thousands of dollars in unaccounted for contracting funds from the plaintiff)*; see also Southern Concrete Constr. Co., v. Lennard (In re Lennard)*, 245 B.R. 428, 433 (Bankr. M.D. Ga., 1999) (concluding that "not every technical conversion is nondischargeable," and that there was not sufficient evidence of debtor's intent to injure). Additionally, given the circumstances giving rise to the Debt in this case, the Court notes that breach of contract actions do not constitute the willful and malicious injury required to declare a debt nondischargeable, as § 523(a)(6) encompasses tortious conduct only. *See Salem Bend Condo. Ass. v. Bullock-Williams (In re Bullock-Williams),* 220 B.R. 345, 347 (B.A.P. 6th Cir.1998). Based on the foregoing, the Court finds that summary judgement is inappropriate and the Debt will not be excepted from discharge under § 523(a)(6).

CONCLUSION

For the reasons mentioned in this Memorandum Opinion, the Court grants summary judgment to the Plaintiffs holding that their claim in the amount of $7,000 is nondischargeable under § 523(a)(2)(A), as it was obtained through fraudulent misrepresentations to the Plaintiffs. The Court also finds that the Plaintiffs have failed to prove that the Defendant intended to injure under the "willfulness and malicious" standard of § 523(a)(6), therefore, summary judgment on that claim is inappropriate.

For the reasons articulated in this Memorandum, **IT IS HEREBY ORDERED :**

1. That the Plaintiffs' Motion is granted with respect to§ 523(a)(2)(A) in the amount of $7,000;
2. That the Plaintiffs' Motion is denied with respect to § 523(a)(6); and
3. That the Court will make a separate entry of judgment in this proceeding that is consistent with this Memorandum Opinion. Upon that entry of judgment, this case will be closed.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of MARCH, 2005, the foregoing Order was sent via regular U.S. Mail to:

S. Hannah
Clerk

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