IT IS SO ORDERED.

Dated: 02:41 PM July 27 2005

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	) CASE NO.: 04-54205
	)
Donna M. Stapleton	) CHAPTER 7
	)
DEBTOR.	) JUDGE MARILYN SHEA-STONUM
_____	)
	)
Leonard Powell, et al.,	) ADV. PRO. NO. 04-5133
Plaintiffs,	)
v.	) MEMORANDUM OPINION RE:
	) DISCHARGEABILITY
Donna M. Stapleton,	)
Defendant.	)
	)

This matter comes before the Court on the complaint of Leonard and Sara Powell (the "Plaintiffs") seeking a "non-dischargeable judgment against the Defendant in the amount of the physical

damages caused by Defendant to Plaintiffs' real property and for the amount of $16,500 owed on the installment contract." *See* Complaint, p. 3. The Court conducted a trial in this adversary proceeding on April 11, 2005. Appearing at the trial were Vance Truman, counsel for Donna Stapleton (the "Defendant"), and Harry Wittbrod, counsel for Plaintiffs. During the trial the Court received evidence in the form of exhibits and in the form of testimony from the Plaintiffs, the Defendant and several other witnesses. At the conclusion of the trial, the Court took the matter under advisement.

JURISDICTION

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. In reaching its determination and whether or not specifically referenced in this Memorandum Opinion, the Court considered the demeanor and credibility of the testifying witnesses. Based upon such testimony, the evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and the Defendant - Debtor's main chapter 7 case and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following facts are not disputed by Plaintiffs and Defendant and are the subject of stipulations [docket #10].

1. Plaintiffs and Defendant entered into a land installment contract on March 13, 2003 (the "Contract"). *See* Defendant's Exhibit 1 and Exhibit 2. Under the Contract, Defendant, as vendee, agreed to purchase 2501 Delaware Ave., Akron, Ohio (the "Property") for the sum of $95,000.

2. Defendant has paid a total of $9,400 towards said Contract. Defendant has not made any payments towards the Contract since September 30, 2003.

3. On August 3, 2004 (the "Petition Date"), Defendant filed a voluntary petition for relief under chapter 7 of Title 11 of the United States Code (the "Bankruptcy Code"). In her voluntary petition, the Debtor noted her intention to surrender the Property and reject the Contract.

4. The Defendant vacated the Property.

In addition to the foregoing stipulations, the Court makes the following findings of fact.

1. Prior to entering into the Contract, the Plaintiffs owned and lived in the Property for 24 years.

2. The Defendant is a high school graduate. The Defendant testified that she is a school bus driver. In January 2003 she began working as a school bus driver in Cuyahoga Falls. Shortly thereafter, she left her job in Cuyahoga Falls and began work as a school bus driver in Stow, Ohio. The Defendant is divorced and is raising three children, ages 20, 18 and 15, without assistance from the father of the children.

3. The Contract required a down payment of $5,000. The Plaintiffs believed a down payment in at least that amount would help provide incentive for the purchaser to follow through with the terms of the Contract and to care for the Property.

4. Defendant's Exhibit 1, the Offer to Purchase Real Estate, provides in pertinent part,

> The [Defendant] agrees to pay for said property the sum of Ninety Five Thousand Dollars ($95,000), as follows: $100 check herewith, $4,900 Cash when the contract is accepted..

Pursuant to Defendant's Exhibit 1, the balance of the purchase price was to be financed by land contract payable in monthly payments in the amount of not less than $725, plus yearly payments of $2,500. The Buyer was to pay taxes and maintain insurance on the property. The Plaintiffs and the Defendant signed Defendant's Exhibit 1.

5. Defendant's Exhibit 2, the Land Contract, provides in pertinent part,

> the [Defendant] does hereby agree to pay to the Seller for the land aforesaid, the sum of Ninety Five Thousand and NO/100 dollars ($95,000) being the cash price paid and the value of said premises, payable as follows: Five

Thousand and NO/100 Dollars ($5,000) cash in hand, the receipt of which is hereby acknowledged, and the balance of Ninety Thousand and NO/100 Dollars as a Land Contract representing the unpaid balance of the cash price, payable in equal monthly installments of not less than Seven Hundred Twenty-Five & NO/100 Dollars ($725) per month.

The Defendant signed Defendant's Exhibit 2 on March 13, 2003 and the Plaintiffs signed it on March 14, 2003.

6. The Defendant testified that she paid the down payment to Gerald W. Turchin of Rubber City Realty who listed the Property, $1,600 in cash and the balance of $3,400 by check. According to the Defendant, at the time she wrote the check to Mr. Turchin she was aware that there would not be sufficient funds in her bank account to cover the check. The Defendant testified that she believed she would be receiving an inheritance in the future that would be sufficient to cover the amount of the check.

7. Mr. Turchin, although he had not cashed the $3,400 check, told the Plaintiffs that he had received the $5,000 down payment from the Defendant.

8. In addition, Mr. Turchin provided the Defendant with the keys to the Property on March 13, 2003, two weeks before the date the Defendant was to take possession of the Property pursuant to the Contract. At the time the Defendant took possession of the Property, the utilities were still in the name of the Plaintiffs.

9. Immediately prior to the time the Defendant took possession of the Property, the interior of the Property had been freshly painted, the windows had been cleaned, the kitchen flooring and the carpeting in other parts of the house were not more than 5 years old. According to Ms. Powell, the house was in very good condition.

10. On March 23, 2003, Ms. Powell secured the fireplace and stove insert at the Property to prevent the Defendant from misusing it.

11. All of the Defendant's payments under the Contract were untimely, except for the April, 2003 payment. In addition, the Debtor failed to pay the sewer charges, the insurance on the Property and the taxes on the Property.

12. After the Defendant failed to make timely payments to the Plaintiffs, the Plaintiffs' cancelled the Contract and initiated eviction proceedings against the Defendant. The Defendant vacated the Property on October 4, 2004, after having made only six payments under the Contract.

13. The Property suffered severe damage during the time the Defendant was in possession of the Property. Among the damages the Plaintiffs discovered upon entering the Property on October 5, 2004 are the following: ripped kitchen flooring; cigarette burn holes in the carpet, other flooring and counter tops; screens missing; bullet holes in the walls; BB gun pellet holes in the walls; the living room floor had dry rotted due to exposure to elements; the garage was "destroyed"; the indoor/outdoor carpet on the enclosed porch was ruined; holes in walls; fixtures were damaged or missing, including the ceiling fan light fixture in the back bedroom; a 36 inch custom made stove was destroyed. In addition, the Plaintiffs found large amounts of garbage at the Property consisting in part of empty beer cans, cigarette butts and clothes.

14. Garry Moneypenny , a Captain with the Springfield Township Police Department, Ohio, testified that he was familiar with the Defendant. In particular, Captain Moneypenny testified that he "stood by" several times in 2003 while the Plaintiffs' served paperwork on the Defendant and that he was familiar with the large number of incident reports related to the Property. Captain Moneypenny stated that in general the police department had the impression that this was a troubled home and that it appeared that the Defendant often was not home and the children were running the home.

15. In addition, Captain Moneypenny testified that he went inside the property on September 3, 2004. Captain Moneypenny said the doors and windows were ajar and the furnace was running "full blast." He did not find anyone at the Property at that time, so he secured the Property. He said the interior of the house was in disarray and compared it to a "Party House" with holes and stains in the carpet, empty beer bottles, cigarette butts and a used condom on the floor.

The Incident Reports

16. On May 29, 2003 at about 8:22 p.m., the Springfield Township Police Department responded to a call at the Property. The Incident Report, Exhibit D, reflects that a nonresident fifteen year old male found at the Property was arrested on a warrant.

17. On September 16, 2003 at 12:31 p.m., the Police Department responded to a call at the Property regarding damage to the mailbox located at the Property. The Incident Report, Exhibit G, reflects that the Defendant thought Mrs. Powell had caused the damage, but that upon investigation, the reporting officer "found no reason to believe that [Mrs. Powell] could be responsible." No suspect was listed on the Incident Report, Exhibit G.

18. On November 7, 2003 at 7:13 p.m., the Police Department responded to a call at the Property. According to the Incident Report, Exhibit J, the responding officers

discovered a nonresident seventeen year old male at the Property who appeared to be consuming alcoholic beverages and to be in possession of cigarettes. In addition, the responding officers found an unresponsive nonresident thirteen year old female at the Property. According to the Incident Report, she was transported to an area hospital by EMS.

19. On December 23, 2003 at 2:00 a.m., the Police Department responded to a call at the Property. According to the Incident Report, Exhibit L, the responding officers found and arrested an uncooperative, belligerent and intoxicated seventeen year old male, who was a resident of the Property.

The Defendant's Prior Residences

20. Prior to entering into the Contract, in late August or early September, 2002, the Defendant rented a home located at 1570 Massillon Road from John Snoderly. The Defendant told Mr. Snoderly that her prior residence in Uniontown had been struck by a tree and that she and her children were in immediate need of shelter. Although he had not yet performed a background check on the Defendant, Mr. Snoderly told the Defendant that she could move in upon his receipt of a security deposit. The Defendant drafted a check made payable to Mr. Snoderly in the amount of $1,200 and took possession of the property.

21. The check tendered to Mr. Snoderly by the Defendant was returned "NSF." The Defendant told Mr. Snoderly that she was expecting an inheritance from her father's estate and she would use that inheritance to pay Mr. Snoderly.

22. Mr. Snoderly pursued an eviction of the Defendant in January, 2003 and the Defendant was set out by the Clerk of Courts in February 2003. At that time, Mr. Snoderly and his assistant found the property trashed; there were, *inter alia*, holes in the living room wall, missing windows in the attic bedroom, holes in the first floor bedroom walls, cigarette burns in the floor and counter tops in the kitchen and bathroom. In addition, there were many bags of trash left behind in the residence and in the garage.

23. The Debtor admitted to having been evicted from three prior residence in September 1997, in July 1998 and in May 2000.

The Defendant's Testimony

24. The Defendant testified that she believed the Plaintiffs plotted to run her out of the Property. According to the Defendant, the Plaintiffs, or people acting on their behalf, harassed her by spying on her or watching her constantly.

25. The Defendant denied that the Property had been damaged. She testified that when she vacated the Property there was one hole in the wall and that the screen doors were broken. She denied doing or knowing of any other damage to the Property and said she had no idea how the damage came to exist at the Property.

DISCUSSION

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).

Nondischargeability under § 523(a)(2)

The Plaintiffs 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, . . .
>
> (B) use of a statement in writing -
>
> (I) that is materially false;
>
> (ii) respecting the debtor's ... financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made ... with intent to deceive.

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 relied on the false representation; and
>
> [4] its reliance was the proximate cause of the loss.

Field v Mans, 516 U.S. 59, 116 S.Ct. 437, 439 (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

F.3d 277, 280-81 (6th Cir. 1998). The Plaintiffs argued that absent the Defendant's representation regarding the down payment, they would not have entered into the Contract with her and that the Defendant's representation, orally and in the Contract, regarding the down payment is a material misrepresentation that the Defendant knew was false upon which the Plaintiffs' justifiably relied to their detriment and that the Defendant caused to be made with the intent to deceive.

It is undisputed that the Contract required a down payment to be made by Defendant in the amount of $5,000. It is also undisputed that the Defendant represented orally and in writing that she made the down payment. In fact, during her testimony before the Court, the Debtor stated that she tendered the down payment to Mr. Turchin of Rubber City Realty. By the Defendant's own admission, however, the check presented to Mr. Turchin was bad when she wrote it, and therefore, the Court finds that the Defendant's representation was knowingly false. The Court believes that the Debtor wanted the Plaintiffs (or their agent, Mr. Turchin) to believe that she had the means to make the down payment and in fact had made it.

With respect to whether the Plaintiff's justifiably relied on the Defendant's false representation, the Court notes that the justifiable reliance

> does not mean that his conduct must conform to the standard of the reasonable man. Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases.

Fields v. Mans, 516 U.S. at 70-71. The Court finds, based on the circumstances of this case, that the Plaintiffs' justifiably relied on the Defendant's false representation. The Court also believes that the Plaintiffs would not have entered into the Contract with the Defendant absent her representation

regarding the down payment.

For all of the reasons set forth above, the Court concludes that the Plaintiffs proved by a preponderance of the evidence that any liability resulting from the parties relationship under the Contract is nondischargeable.

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

The Plaintiffs argue that Defendant's debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(B), 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 –
>
> ...
>
> (B) use of a statement in writing -
>
> (I) that is materially false;
>
> (ii) respecting the debtor's ... financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made ... with intent to deceive.

Under this section of the Bankruptcy Code, the written statement must concern the debtor's financial condition. Typically, these are statements concerning an entity's overall financial health. *In re Soderlund*, 197 B.R. 742, 745 (Bankr.D.Mass.1996). In this circumstance, the Defendant made both an oral and a written representation regarding the down payment. However, the statement is not one respecting the Defendant's overall financial condition. Therefore, the Court finds that § 523(a)(2)(B) is not applicable in this case.

Nondischargeability under § 523(a)(6)

Pursuant to§ 523(a)(6) a debt may be declared nondischargeable "for willful and malicious

injury by the debtor to another entity or to the property of another entity." The Supreme Court has explained 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). A person will be deemed to have acted willfully when that person acts with the intent to cause injury, or is substantially certain that an injury will occur. *O'Brien v Sintobin (In re Sintobin)*, 253 B.R. 826, 829 (Bankr. N.D. Ohio 2000).

In *In re Sintobin*, a landlord asked the Court to determine that debt owed by the debtors was excepted from discharge because the debt was the result of willful and malicious injury to the property of the landlord. *Id.* The Court found that the damage to the property was deliberately caused by the debtor-defendants' children and their friends and noted that the debtor-defendants never made any attempt to remedy the situation. *Id.* at 829. After a lengthy discussion of the boundaries of § 523(a)(6) the Court wrote,

> [P]arents who are merely negligent in supervising their children are still entitled to have any liability arising from such negligent supervision discharged in bankruptcy.
>
> Notwithstanding this principle, there is no direct requirement under § 523(a)(6) that a debtor actually be the entity which physically occasions the actual damages to the person or property. Thus, any debtor who seeks or encourages another person to commit a willful and malicious act would not, for purposes of § 523(a)(6), be entitled to have any liability arising therefrom discharged in bankruptcy. Further, the types of encouragement which may lead to a finding of nondischargeability under § 523(a)(6) can range from overt encouragement to simply an omission, if such an omission was calculated by the debtor in a willful and malicious manner to cause injury. This

> interpretation is in accordance with generally accepted principles of tort law, [FN4] which as held by the Supreme Court in *Kawaauhau v. Geiger,* 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998), underpin the § 523(a)(6) exception to discharge. In addition, such an interpretation furthers the policy goal of § 523(a)(6) which is to except from a bankruptcy discharge those debts incurred by morally reprehensible conduct. *Murray v. Wilcox (In re Wilcox),* 229 B.R. 411, 418 n. 7 (Bankr. N.D. Ohio 1998). For example, in *In re Cornell,* the bankruptcy court, in addressing a parent's liability for the actions of her son, stated: "Analysis of the historical background of § 523(a)(6) demonstrates that where there is conduct of an exceptionally culpable nature, participated in or permitted by a responsible person, the liability resulting therefrom may not be dischargeable." *In re Cornell,* 42 B.R. at 864.

In re Sintobin, 253 B.R. at 826. The *Sintobin* Court held that the defendant-debtors influenced and encouraged their children to commit acts of vandalism against the property through their apathy over what occurred in the property and that the end result was, thus, intended by the defendant-debtors.

Despite the Debtor's self serving denial that there was any damage to the Property at the time she vacated it, the Court finds that there was significant damage caused to the Property. The Court believes that the Plaintiff was aware of the damage to the Property and whether she participated in causing it or just permitted it to continue to occur, she must have intended to damage the Property. Therefore, the Court finds, pursuant to § 523(a)(6), the liability resulting from the damage to the Property is not dischargeable.

CONCLUSION

The Court finds the plaintiff proved, by a preponderance of the evidence, that the liability resulting from the parties relationship under the Contract is nondischargeable and that the liability resulting from the damage to the Property is nondischargeable. The record before the Court lacks sufficient evidence or argument for this Court to undertake to liquidate the amount owing under the Contract or the amount of the damage to the Property; therefore, the Court declines to do so. Plaintiff

may pursue the liquidation of these amounts in an appropriate state court forum.

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cc: (Via Electronic Mail) Harry Wittbrod
Vance Truman