

**IT IS SO ORDERED.**

**Dated: 11:10 AM October 20 2005**

  
MARILYN SHEA-STONUM **AFL**  
U.S. Bankruptcy Judge



**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE:	)	CASE NO.: 04-50202
	)	
Frank M. Whitaker and Jodi L. Whitaker,	)	CHAPTER 7
	)	
DEBTOR.	)	JUDGE MARILYN SHEA-STONUM
_____	)	
	)	
Cleveland Construction, Inc.,	)	ADV. PRO. NO. 04-5099
	)	
Plaintiff,	)	ORDER AND MEMORANDUM OPINION
v.	)	RE: DISCHARGEABILITY
	)	
Frank M. Whitaker, et al.,	)	
	)	
Defendant.	)	

This matter comes before the Court on the complaint of Cleveland Construction, Inc. (the “Plaintiff” or “Cleveland Construction”) seeking a judgment against Frank Whitaker and Jodi Whitaker (collectively, the “Defendants”) in an amount not less than \$727,885.29 that is non-

dischargeable under 11 U.S.C. § 523(a)(2)(A), 523(a)(2)(B) or 523(a)(4). The Court conducted a trial in this adversary proceeding on May 6, 2005. Appearing at the trial were Stephen Hobt, counsel for the Defendants, and Patrick Keating, counsel for Plaintiff. During the trial the Court received evidence in the form of exhibits and in the form of testimony from the Defendants and from Keith Ziegler, vice president of Cleveland Construction. During the trial, the Plaintiff stated that, with respect to Jodi Whitaker, it was only pursuing a claim for non-dischargeability pursuant to § 523(a)(2)(A). 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. In addition, prior to the trial, Plaintiff and Defendants entered into certain stipulations (the “Stipulations”) [docket #25]. Based upon such Stipulations, the testimony and documentary evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. On January 16, 2004 (the “Petition Date”), the Defendants filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Prior to the Petition Date, Frank Whitaker operated a business known as Whitaker Masonry, Inc.

(“Whitaker Masonry”).<sup>1</sup>

## The Construction Contracts

2. On April 29, 2002, Whitaker Masonry entered into a contract with Plaintiff to serve as Plaintiff’s subcontractor on a residence facility construction project at Kent State University (the “Residence Contract”). *See* Joint Exhibit A. The original retainage on the Residence Contract was 10% of the work completed of the project amount. In or around the end of October 2002, the retainage on the contract changed to 5%.
3. On January 13, 2003, Whitaker Masonry entered into a contract with Plaintiff to serve as Plaintiff’s subcontractor on a food service facility construction project at Kent State University (the “Food Service Contract,” and together with the Residence Contract, the “Contracts”). *See* Joint Exhibit B. The retainage on the Food Service Contract was 5%.
4. Under the Contracts, Whitaker Masonry was obligated to perform certain masonry and additional work on the Kent State University construction projects.
5. Pursuant to Article 11 of the Contracts, Whitaker Masonry submitted periodic Applications and Certificates for Payment to Plaintiff (the “Applications”). Some of the Applications were signed by Frank Whitaker and, sometimes, his signature was notarized by Jodi Whitaker. The Application sought payment for work performed by Whitaker Masonry and its suppliers, laborers, materialmen and subcontractors. The form of Application was dictated by Cleveland Construction.
6. Each of the Applications contains a paragraph above a signature line for the subcontractor (the “Payment Language”) which reads as follows:

In consideration of the payment of the sum approved by Cleveland Construction, Inc. On this pay application, the Subcontractor does hereby: (1) Certify that all laborers, materialmen, and subcontractors furnishing labor, materials, equipment, machinery and fuel to Subcontractor with respect to the Subcontract **have been paid in full, or that the Subcontractor will promptly pay** said parties when Subcontractor receives the progress payment set forth in this application. ... (3) Agree to indemnify Cleveland

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<sup>1</sup> Frank Whitaker was a principal of Whitaker Masonry. Jodi Whitaker may have been an officer of Whitaker Masonry. Although she and Frank Whitaker testified that they were not sure whether Jodi Whitaker was an officer of Whitaker Masonry, at various points in time Jodi Whitaker has held herself out as President of Whitaker Masonry. *See* Exhibits JJ and KK dated July 27, 2000.

Construction, Inc. and/or the Owner together with their sureties for any and all costs, losses, damages, or expenses, including but not limited to any and all legal costs incurred in the defense of and/or claims made as a result of the Subcontractor's failure to pay its vendors after payment has been made to Subcontractor by Cleveland Construction, Inc. [**emph. added**]

7. During the time that Whitaker Masonry was working on the projects governed by the Residence Construction Contract and the Food Service Construction Contract, it had no other projects that it was performing or from which it was receiving substantial revenue.

#### **Applications related to the Residence Contract**

8. On May 20, 2002, Whitaker Masonry submitted an Application to the Plaintiff. *See* Joint Exhibit C. The May 20, 2002 Application was signed by Frank Whitaker and his signature was notarized by Jodi Whitaker. The May 20, 2002 Application requested a progress payment in the amount of \$57,593.75 for work performed in April 2002. The Plaintiff paid such amount to Whitaker Masonry (\$40,000 of the progress payment was paid on June 27, 2002 and the remainder was paid on July 24, 2002).
9. On or about June 20, 2002, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit D. The June 20, 2002 Application was signed by Frank Whitaker and his signature was notarized by Jodi Whitaker. The June 20, 2002 Application requested a progress payment in the amount of \$178,897.91 for work performed in May 2002.
10. Plaintiff made the progress payments requested by Joint Exhibit D to Whitaker Masonry in the amount of \$178,897.91 (\$24,406.25 on July 24, 2002 and \$154,491.66 on August 1, 2002).
11. On or about August 19, 2002, Whitaker Masonry, through Frank Whitaker, submitted an Application to the Plaintiff. *See* Joint Exhibit E. The August 19, 2002 Application was signed by Frank Whitaker. The August 19, 2002 Application requested a progress payment in the amount of \$292,853.58 for work performed in July 2002.
12. On August 27, 2002, Plaintiff made the progress payments requested by Joint Exhibit E to Whitaker Masonry in the amount of \$292,853.58 by three separate checks (one check in the amount of \$49,203.54 made payable to Whitaker Masonry and Valley City Builders; one check in the amount of \$131,176.65 made payable to Whitaker Masonry and W.L. Tucker Supply; and one check in the amount of \$112,473.39 made payable to Whitaker Masonry). Mr. Ziegler testified

Cleveland Construction would issue joint checks to Whitaker Masonry and its suppliers, materialmen or laborers as necessary to insure payment of Whitaker Masonry's suppliers, materialmen or laborers.

13. On or about September 20, 2002, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit F. The September 20, 2002 Application was signed by Frank Whitaker and his signature was notarized by Jodi Whitaker. The September 20, 2002 Application requested a progress payment in the amount of \$127,608.24 for work performed in August 2002.
14. On September 30, 2002, Plaintiff made the progress payments requested by Joint Exhibit F to Whitaker Masonry in the amount of \$127,608.74 by two separate checks (one check in the amount of \$10,000 made payable to Whitaker Masonry and W.L. Tucker Supply; and one check in the amount of \$117,608.74 made payable to Whitaker Masonry).
15. On or about October 28, 2002, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit G. The October 28, 2002 Application was signed by Frank Whitaker and his signature was notarized by Jodi Whitaker. The October 28, 2002 Application requested a progress payment in the amount of \$126,380.83 for work performed in September 2002.
16. On October 28, 2002, Plaintiff paid \$126,380.83 to Whitaker Masonry towards the progress payment requested by Joint Exhibit G.
17. On or about October 22, 2002, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit H. The October 22, 2002 Application requests a progress payment in the amount of \$204,516.57 for work performed in September 2002.
18. On November 26, 2002, Plaintiff paid \$192,764.18 to Whitaker Masonry towards the progress payment requested by Joint Exhibit H by two checks (one check in the amount of \$100,802.36 made payable to Whitaker Masonry and Valley City Builders and one check in the amount of \$91,961.82 made payable to Whitaker Masonry).
19. On or about November 22, 2002, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit I. The November 22, 2002 Application requested a progress payment in the amount of \$315,013.33.
20. On December 31, 2002, Plaintiff made the progress payments requested by Joint Exhibit I to Whitaker Masonry in the amount of \$315,013.33 by five separate checks (one check in the amount of \$16,010.25 made payable to Whitaker Masonry and WACO; one check in the amount of \$30,000 made payable to

Whitaker Masonry and W.L. Tucker Supply; one check in the amount of \$27,684 made payable to Whitaker Masonry and Valley City Builders; one check in the amount of \$9,683 made payable to Whitaker Masonry and Valco Equipment; and one check in the amount of \$231,636.08 made payable to Whitaker Masonry).

21. On or about January 28, 2003, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit J. The January 28, 2003 Application requested a progress payment in the amount of \$188,515.85 for work performed in December 2003.
22. On February 11, 2003, Plaintiff made the progress payments requested by Joint Exhibit J in the amount of \$188,515.85 by three separate checks (one check in the amount of \$82,480.39 made payable to Whitaker Masonry and W.L. Tucker Supply; one check in the amount of \$12,145.38 made payable to Whitaker Masonry and Homing Builders Supply Co.; and one check in the amount of \$93,890.08 made payable to Whitaker Masonry).
23. On or about January 20, 2003, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit K. The January 20, 2003 Application requested a progress payment in the amount of \$83,966.78 for work performed in January 2003.
24. On March 11, 2003, Plaintiff paid \$83,966.77 to Whitaker Masonry towards the progress payment requested by Joint Exhibit K by four separate checks (one check in the amount of \$8,000 made payable to Whitaker Masonry and Valco Equipment; one check in the amount of \$15,000 made payable to Whitaker Masonry and WACO; one check in the amount of \$7,000 made payable to Whitaker Masonry and Valley City Builders; and one check in the amount of \$53,966.77 made payable to Whitaker Masonry).
25. On or about April 15, 2003, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit L. The April 15, 2003 Application was signed by Frank Whitaker and his signature was notarized by Jodi Whitaker. The April 15, 2003 Application requested a progress payment in the amount of \$80,524.14 for work performed in March 2003.
26. On April 25, 2003 Plaintiff paid \$40,524.68 to Whitaker Masonry towards the progress payment requested by Joint Exhibit L.
27. At the end of May 2003, Whitaker Masonry, through Frank Whitaker, submitted an Application to the Plaintiff. *See* Joint Exhibit M. The May 2003 Application requested a progress payment in the amount of \$144,099.13 for work completed in April 2003.

28. On May 30, 2003 Plaintiff paid \$138,277.15 to Whitaker Masonry towards the progress payment requested by Joint Exhibit M.
29. In June 2003, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit N. The June 2003 Application marked as Joint Exhibit N requested a progress payment in the amount of \$166,250.01 for work performed in May 2003.
30. Cleveland Construction did not make the progress payment requested by Joint Exhibit N.

#### **The Food Service Contract Applications**

31. On or about February 21, 2003, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit O. The February 21, 2003 Application was signed by Frank Whitaker and his signature was notarized by Jodi Whitaker. The February 21, 2003 Application requested a progress payment in the amount of \$100,350.00 for work performed in February 2003.
32. On or about March 12, 2003, Plaintiff made the progress payments requested by Joint Exhibit O to Whitaker Masonry in the amount of \$105,925.00 by three separate checks (one in the amount of \$15,295.44 made payable to Whitaker Masonry and Valley City Builder; one in the amount of \$85,054.54 made payable to Whitaker Masonry and one in the amount of \$5,575.00 made payable to Whitaker Masonry).
33. On or about March 27, 2003, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit P. The March 27, 2003 Application was signed by Frank Whitaker and his signature was notarized by Jodi Whitaker. The March 27, 2003 Application requested a progress payment in the amount of \$47,045.67 for work performed in March 2003.
34. On March 27, 2003 Plaintiff made the progress payment requested by Joint Exhibit P to Whitaker Masonry in the amount of \$47,045.68.
35. On or about May 2, 2003, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit Q. The May 2, 2003 Application was signed by Frank Whitaker and his signature was notarized by Jodi Whitaker. The May 2, 2003 Application requested a progress payment in the amount of \$25,540.27 for work performed in April 2003.
36. On May 2, 2003 Plaintiff paid \$25,540.26 to Whitaker Masonry towards the progress payment requested by Joint Exhibit Q.

37. In June 2003, Whitaker Masonry, through Frank Whitaker, submitted an Application to Plaintiff. *See* Joint Exhibit R. The Application marked as Joint Exhibit R requested progress payment in the amount of \$44,967.67 for work performed in May 2003.
38. Cleveland Construction did not make the progress payment requested by Joint Exhibit R.

### **Work Stoppage**

39. On June 25, 2003, following nonpayment of the progress payments requested in Joint Exhibits N and R, Whitaker Masonry stopped work on the Kent State University construction projects governed by the Residence Contract and the Food Service Contract. Whitaker Masonry did not complete the Kent State University construction projects.

### **Damages and Affidavits of Laborers, Materialmen and Suppliers**

40. On or about July 15, 2003, Bricklayers and Allied Craftsmen Local 7 executed an Affidavit for Lien and Notice for Claim Upon Funds Due Laborers. *See* Joint Exhibit S. As set forth in Joint Exhibit S, Bricklayers and Allied Craftsmen Local 7 alleges that Whitaker Masonry did not make payments to laborers who participated in the project governed by the Residence Contract. In large part, the unpaid amounts appear to be for work performed in June, 2003.
41. On or about July 14, 2003, Valley City Builders Supply, Inc. filed an Affidavit for Lien on Public Funds. *See* Joint Exhibit I. According to the Affidavit of Valley City Builders Supply, Inc. the last day it supplied materials to Whitaker Masonry was June 27, 2003. The Affidavit notes that the value of the material furnished by Valley City Builders Supply, Inc. for which payment had not been received is \$54,491.48.
42. On or about July 25, 2003, Ohio Laborers' District Council – Ohio Contractors' Association Insurance Fund; Ohio Laborers' District Council and Contractors' Pension Fund; Ohio Laborers' Training and Upgrading Trust Fund; and Ohio Laborers' District Council – Ohio Contractors' Association Cooperation and Education Trust, executed an Affidavit for Lien and Notice for Claim Upon Funds Due Laborers. *See* Joint Exhibit U. The Affidavit contains allegations that Whitaker Masonry did not make payments to laborers who participated in the project governed by the Residence Contract. The Affidavit does not identify with specificity the month to which the missed payments relate and no additional evidence was presented to the Court regarding the allegations in the Affidavit.
43. On or about August 5, 2003, W.L. Tucker Supply Co. executed a First Amended



and Fully Restated Claim Affidavit. *See* Joint Exhibit V. According to the Affidavit of W.L. Tucker the last day on which it supplied labor, work and materials was July 16, 2003 and thus, there is due to W.L. Tucker the sum of \$155,170.22.

44. On or about July 15, 2003, Bricklayers and Allied Craftsmen Local 7 executed an Affidavit for Lien and Notice for Claim Upon Funds Due Laborers related to the Food Service Contract. *See* Joint Exhibit W. As set forth in Joint Exhibit W, Bricklayers and Allied Craftsmen Local 7 alleges that Whitaker Masonry did not make payments to laborers who participated in the project governed by the Food Service Contract. In large part, the unpaid amounts were for work performed in June, 2003.
45. On or about July 14, 2003, Valley City Builders Supply, Inc. filed an Affidavit for Lien on Public Funds related to the Food Service Contract. *See* Joint Exhibit X. According to the Affidavit of Valley City Builders Supply, Inc. the last day it supplied materials to Whitaker Masonry was June 27, 2003. The Affidavit notes that the value of the material furnished by Valley City Builders Supply, Inc. for which payment had not been received is \$4,861.18.
46. On or about July 23, 2003, Laborers' International Union of North America, AFL-CIO Laborers' District Council of Ohio Local Union No. 894 executed an Affidavit for Lien and Notice for Claim Upon Funds Due Laborers. *See* Joint Exhibit Y. The Laborers' International Union of North America, AFL-CIO Laborers' District Council of Ohio Local Union No. 894 alleges that Whitaker Masonry did not make payments to laborers who participated in the project governed by the Food Service Contract. In large part, the unpaid amounts were for work performed in June, 2003.
47. Whitaker Masonry had some outstanding debts related to prior jobs at the time it began working on the Kent State University projects. Whitaker Masonry used some of the monies received in progress payments made by Plaintiff on the Residence Contract and the Food Service Contract to pay debts of Whitaker Masonry that were unrelated to either of these projects.
48. Mr. Ziegler said that prior to May 2003, he was not aware of any nonpayment by Whitaker Masonry. He said that it was only at some point later, after Whitaker Masonry ceased work on the Kent State University projects, that Mr. Ziegler received phone calls from certain suppliers, materialmen and laborers regarding nonpayment by Whitaker Masonry.
49. Notwithstanding his claimed lack of knowledge, in the spring of 2003, Mr. Ziegler had begun insisting that the applications for progress payments be signed by

Whitaker Masonry, despite the prior practice of approving unsigned applications for progress payments.

50. In addition, in June 2003, Cleveland Construction refused to turn over the progress payments requested in Joint Exhibit N and Joint Exhibit R to Whitaker Masonry unless Frank Whitaker signed a personal guaranty with respect to Whitaker Masonry's obligations.
51. The \$727, 885.29 in damages asserted by Cleveland Construction against Frank and Jodi Whitaker are, in large part, the result of Cleveland Construction's tactics in the spring of 2003 with respect to its refusal to make the requested progress payments. The Court does not find the damages asserted by Cleveland Construction to be the result of any actions taken (or not taken) by Frank or Jodi Whitaker.
52. During closing argument, counsel for Cleveland Construction suggested that the damages were the result of a "Ponzi" scheme, of sorts, undertaken by Whitaker Masonry and Frank and Jodi Whitaker. The record is devoid of any evidence to support such an assertion. In fact, the Court finds that the damages appear more aptly to be characterized as a self-inflicted wound resulting from Cleveland Construction's attempt to bully Whitaker Masonry and the Defendants into adding additional requirements, such as the execution of a personal guaranty, to its relationship with Whitaker Masonry.

## **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 Plaintiff argues that Defendants owe Plaintiff a debt that 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 its 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 Plaintiff argued that the Payment Language in each Application constituted a material misrepresentation that the Defendants knew was false upon which the Plaintiff justifiably relied to its detriment and that the Defendants caused to be made with the intent to deceive.

With respect to the Plaintiff's claim against Jodi Whitaker, the Plaintiff argues that she committed fraud by omitting to disclose the accurate financial picture of Whitaker Masonry. The Plaintiff did not identify with any specificity the false pretense, false representation or actual fraud committed by Ms. Whitaker, but argues that it is through her failure to speak, where the Plaintiff says she had a duty to speak, that she committed actual fraud. In support of its position, Plaintiff relies on two Ohio Court decisions: *Biggins v Garvey*, 90 Ohio App. 3d 584 (Ohio App. 11 Dist. 1993) and *Geygan v Queen City Grain Co.* (Ohio App. 12 Dist. 1991). These Ohio appellate court cases deal with the fiduciary duties owed by directors and officers to shareholders. These cases do not provide any support for Plaintiff's proposition that Frank Whitaker and/or Jodi Whitaker owed a duty to Cleveland Construction.

Further, the payments made by Cleveland Construction were made to Whitaker Masonry,

not to the Defendants. The Plaintiff argued that, without support, that the Court should simply disregard the corporate structure. The Plaintiff did not provide the Court with any factual basis for doing so. Therefore, the Plaintiffs failed to show that the Defendants obtained any money from Cleveland Construction.

With respect to the Plaintiff's justifiable reliance, the Court notes that 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. While it is undisputed that each Application contains the language recited in paragraph 6 above, only some of the Applications were signed by Frank Whitaker. Jodi Whitaker only signed the Applications, if she signed them at all, as a notary. To the extent the Applications were unsigned, the Court does not believe that Plaintiff justifiably relied on the Payment Language in the Application.

Further, the Plaintiff did not submit any evidence to show that the representation was false at the time it was made. The affidavits concerning the non-payment of suppliers, materialmen and laborers by Whitaker Masonry all appear to relate to the time period from May 2003 forward. There is no dispute that Cleveland Construction did not make the progress payment requested in June 2003 (Joint Exhibits N and R). There is no evidence before the Court that prior to May 2003 Whitaker Masonry failed to pay its materialmen, suppliers and laborers promptly for work related to the Kent State University construction projects. Therefore, there is no proof that the representation contained in the Applications was false.

For all of the reasons set forth above, the Court concludes that the Plaintiff did not prove by a preponderance of the evidence that the Defendants owe a non-dischargeable debt to Plaintiff

pursuant to § 523(a)(2).

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

The Plaintiff argues that Frank Whitaker owes Cleveland Construction a debt that 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). The Plaintiff argues that the Payment Language in each Application, whether signed or not, constitutes a materially false writing that meets the requirements of § 523(a)(2)(B).

As noted by the Court above, not all of the Applications were signed by Frank Whitaker. To the extent the Applications were unsigned the Court does not believe that Cleveland Construction reasonably relied upon those Applications. Further, there is no evidence in the record before the Court that the representations in the Applications were false when made. Similarly, nothing in the record shows that Frank Whitaker acted with the intent to deceive Cleveland Construction. Therefore, the Court finds that Plaintiff failed to prove that Frank Whitaker owes a debt to Cleveland Construction that is nondischargeable pursuant to §

523(a)(2)(B).

**Nondischargeability under § 523(a)(4)**

In its Complaint, the Plaintiff argues that Defendants owe Cleveland Construction a debt for fraud or defalcation while acting in a fiduciary capacity that is nondischargeable pursuant to 11 U.S.C. § 523(a)(4). In its Statement of Issues in Dispute [docket # 27] at paragraph 5, the Plaintiff states that there remains a dispute over whether the Defendants obtained progress payments and financial accommodations from Plaintiff through fraud and defalcation while acting in a fiduciary capacity. Nonetheless, at trial, the Plaintiff did not pursue its claim against the Defendants pursuant to 11 U.S.C. § 523(a)(4) and did not present any evidence to show whether the Defendants obtained progress payments and financial accommodations from Plaintiff through fraud and defalcation while acting in a fiduciary capacity.

**CONCLUSION**

The Court finds the plaintiff failed to prove, by a preponderance of the evidence, that either of the Defendants owe a debt to Cleveland Construction that is nondischargeable under § 523(a)(2)(A), (a)(2)(B) or (a)(4). Therefore, judgment is hereby entered in favor of Frank and Jodi Whitaker against Cleveland Construction.

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cc: (Via Electronic Mail) Stephen Hobt  
Patrick Keating