IT IS SO ORDERED.

Dated: 03:49 PM March 30 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 05-50753
	)	
INDERJIT SONI,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	
	)	
STANLEY SHULMAN AND IRINA SHULMAN,	)	**ADVERSARY NO. 05-5085**
	)	
	)	JUDGE MARILYN SHEA-STONUM
PLAINTIFF(S),	)	
	)	
vs.	)	
	)	**MEMORANDUM AND OPINION**
INDERJIT SONI	)	
	)	
DEFENDANT(S).		

Stanley and Irina Shulman ("Plaintiffs") timely commenced this adversary proceeding seeking a determination that their claim in the bankruptcy case of debtor Inderjit Soni

("Defendant") be found nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (B). After Defendant answered (docket #8), Plaintiffs filed a Motion to Stay this case given a pending state court action against Defendant and other parties. The Court denied that motion, but noted that it would address only the issue of dischargeability, recognizing that the state court should address the underlying claim if Plaintiffs succeeded in this adversary proceeding (docket #12). After the Plaintiff rested their case at trial, Defendant moved for judgment as a matter of law on Count III, which relied upon 11 U.S.C. § 523(a)(2)(B). This decision addresses the balance of Plaintiff's claims.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I) over which this Court has jurisdiction pursuant to 28 U.S.C. §§1334(b), 157(a) and (b).

FINDINGS OF FACT

The parties stipulated to the authenticity of all trial exhibits (docket #18). Based on the contents of the documentary evidence, the pleadings filed in this case, and the argument and witness testimony adduced at trial, the Court makes the following findings of fact.

1. Defendant filed for chapter 7 relief on February 16, 2005, and listed "Mr. and Mrs. Stan Shulman" as creditors holding an unsecured nonpriority claim on Schedule F of his petition. The petition designated the claim as contingent, unliquidated, and disputed in the amount of $100. (Docket #1, Schedule F).
2. Defendant owned two contiguous lots (collectively, the "Property") which he attemped to sell in early 2000 through Chestnut Hill Realty. The residence at 821 West Hill, Gates

Mills, Ohio was constructed on the five acre lot, and the adjoining lot is unimproved.

3. Pursuant to O.R.C. § 5302.30, Defendant executed a Residential Property Disclosure Form in August 2000. Under the heading "DRAINAGE:" on the disclosure form that accompanied the listing, Defendant recorded the following quoted responses:

   Do you know of any current flooding, drainage, settling, or grading problems affecting the property? "No." If yes, please describe: "Grading of backyard and installation of French draining system." ("First Disclosure"). (Joint Exhibit A).

4. In August 2000, Shirley and Randall Price (the "Buyers") submitted an "Offer to Purchase Real Estate and Acceptance" to Defendant, agreeing to pay $1,900,000 to purchase the Property.[1] (Joint Exhibit B).

5. As a condition of sale, Buyers hired EDP Consultants, Inc. in September 2000 to conduct a geotechnical survey of the Property. EDP issued a "preliminary report" dated November 20, 2000, (the "EDP Preliminary Report") to Defendant which reads, in part:

   > The stability calculations indicate that the factor of safety against failures on the lower part of the slope east of your home is greater than 1.5. The factors of safety against failure on the upper part of the slope, generally above the flat area at mid slope between the lawn and the property to the north, range between 0.73 and 1.33 depending on the groundwater level and soil parameters used in the analysis. For our best estimate of the soil parameters for all soil

[1] Although the timing and nature of the transaction were unclear, witness testimony represented that there was an offer to purchase the Property that preceded Buyers' offer in August 2000. Though no evidence was proffered as to why Defendant did not consummate the sale with that initial offeror, the Court considers it noteworthy that Plaintiffs in this case represent the third offer to purchase the Property.

> layers and highest estimated groundwater level, the factor of safety against failures on the upper part of the slope was calculated to be about 1.0, indicating that the slope may be moving at a very slow rate or may be near failure. Given three dimensional effects that could not be taken in account in our slope stability analysis, we expect that the probable range of the factor safety for these upper slope failures is about 1.0 to 1.2. . . .
>
> The soils immediately below foundation bearing elevation at the northeast corner of the house are medium consistency cohesive silts and stiff consistency clays. The soils are somewhat compressible. Consolidation of these soils and/or very slow movement of the slope have probably caused the cracks observed at the northeast corner of the house.
>
> The stability of the slope can be improved by the addition of engineered fill to eliminate the steep drops in the areas of boring B-2 and by reinforcing the slope with reinforced straight shaft drilled piers. . . .

(Joint Exhibit C).

6. On November 28, 2000, EDP issued a final report captioned "Slope Evaluation" which detailed findings of the degree of soil instability and extent of the slope movement on the Property, particularly addressing slope movement that might affect the northeast corner of the house and the backyard (the "EDP Final Report"). (Joint Exhibit D).

7. The EDP Final Report offered methods to stabilize the slope, such as re-grading, adding fill to the slope, or installing lines of drilled piers. The cost of stabilization with fill only was estimated to be in the range of $60,000 - $80,000. The cost of placing fill with the

addition of two lines of drilled piers "would probably double this cost." (Joint Exhibit D, numbered page 6).

8. Buyers declined to purchase the Property after receiving the EDP Preliminary Report and the EDP Final Report.

9. Defendant received a copy of the EDP Preliminary Report and the EDP Final Report when issued by EDP.

10. Defendant retained Farrokh N. Screwvala, Inc. (Screwvala) to evaluate the EDP Final Report and to offer an "independent professional opinion" on its findings.

11. On February 2, 2001, Screwvala directed a twenty-one page letter to Defendant contradicting the majority of the findings in the EDP Final Report, but did note that "[t]he existence of the scarp does confirm the occurrence of former slope movement at your property, but it is not evidence of possible slope movement which justifies the kind of analysis Mr. Esser undertook" (the "Initial Screwvala Report"). (Joint Exhibit E, page 3). The Initial Screwvala Report's "RE:" caption read, in part, "Evaluation of EDP Consultants, Inc. Report on Slope Evaluation 821 West Hill Drive Gates Mills, Ohio." (Joint Exhibit E, page 1).

12. The Initial Screwvala Report noted throughout that there was "visible ground settlement" and "that a shallow slide occurred just east of the scarp" but concluded that these conditions do not indicate slope instability or slope movement.

13. On February 26, 2001, Screwvala directed a two page letter to Defendant with a "RE:" caption stating: Evaluation of Slope Stability 821 West Hill Drive Gates Mills, Ohio" (the "Second Screwvala Report"). (Joint Exhibit F). The Second Screwvala Report excluded

all references to any of the EDP Final Report findings and omitted the majority of Screwvala's detailed assessment of the Property's soil conditions, including photos of the Property which were listed in the Initial Screwvala Report. The Second Screwvala Report also did not mention or refer to the existence of the Intitial Screwvala Report or that any other geotechnical experts had evaluated the Property.

14. The Second Screwvala Report concluded (as did the Initial Screwvala Report) with the sentence "[r]easonable buyers of your property may wish to look into the construction of the north wall of the house to satisfy themselves that the cracks are as insignificant as they appear to be." (Second Screwvala Report, unnumbered page 2).

15. Defendant received a copy of a letter directed to his builder, James Mendlik, dated December 5, 2000, which reflected an evaluation of the property done on December 4, 2000, by Isaac Lewin, professional engineer ("Lewin"). Lewin examined a wall crack at the Property at the request of James Mendlik. The crack was in the northeast corner of the residence, and was described as "a hairline in width with a maximum gap of 1/16 inch. . . . It starts at the foundation line and goes vertically approximately 4 feet, turns the corner about 12 inches and stops" (the "Lewin letter"). (Joint Exhibit N). Lewin's December 5, 2000 letter to Mr. Mendlik reads:

> It is this office's professional opinion that the crack is most likely due to foundation movement. The movement may be due to localized settlement of the foundations during construction. Its is this office's professional opinion that this crack is not of major significance due to lack of additional cracking in this or other parts of the residence.

16. On June 22, 2001, Defendant listed the Property for sale for $1,999,900 with Realty One, engaging Monique Plociak ("Plociak") as the seller's agent. (Joint Exhibit H).

17. On June 22, 2001, Defendant completed another Residential Property Disclosure Form regarding the Property. Specifically, when asked: "STRUCTURAL COMPONENTS (FOUNDATIONS, FLOORS, INTERIOR AND EXTERIOR WALLS): Do you know of any movement, shifting, deterioration, material cracks (other than visible minor cracks or blemishes) or other material problems with the foundation, floors, or interior/exterior walls?" the Defendant recorded "No." In response to "OTHER KNOWN MATERIAL DEFECTS: The following are other known material defects currently in or on the property:" the Defendant wrote "None." ("Second Disclosure") (Joint Exhibit I).

18. Defendant testified that when he signed the listing agreement on June 22, 2001, he gave Plociak copies of the Initial Screwvala Report and the Second Screwvala Report, but not the EDP Preliminary Report, the EDP Final Report, or the Lewin letter (collectively, the "Property Reports"). Defendant testified that he also faxed the Second Screwvala Report to Plociak on that same day. (Joint Exhibit G-2).

19. Plociak testified that, although the June 22, 2001 fax does bear her name, she did not receive it, nor was there any copy of the Second Screwvala Report in any of Realty One's corporate files until after the sale closed.

20. Defendant testified that he pointed out the crack at the northeast side of the house to Plociak while they walked the Property when listing the house, and that he showed her the erosion in the landscaping due to water runoff.

21. Plociak testified that Defendant never informed her that any Property Reports existed and

that Defendant did not show her any cracks in the foundation when they walked the Property. She further stated that, had she known of the existence of the Property Reports, she would have asked for copies and executed an addendum to the disclosure form that included copies of the reports.

22. Defendant testified he walked around the Property with Shulman and with Shulman's inspection company, Egal, and pointed out the crack at the northeast side of the house to the inspection company.

23. Plaintiffs engaged Mary Jo Tomaselli ("Tomaselli") (a colleague of Plociak's) of Realty One as a buyer's agent and purchased the Property for $1,875,000 from Defendant and his wife in December 2001. The sale closed in January 2002 and Plaintiffs moved into the house mid-2002.

24. Plaintiff hired Egal to inspect the home prior to closing on the Property. Egal recorded the grading drainage as "adequate" and the exterior walls as "needs repair." (Joint Exhibit O, unnumbered page 6).

25. Tomaselli testified that she had not seen any of the Property Reports prior to the sale of the Property, and that if she had, she would have forwarded any reports on to Plaintiffs as is her typical practice with regard to disclosure material.

26. Tomaselli testified that she first saw the Second Screwvala Report in April or May 2002 after the sale had closed when she was showing Defendant homes to purchase and that she then faxed the report to her manager at Realty One for review and handling. (Joint Exhibit

G-1).[2]

27. In the spring of 2004, Plaintiffs discovered that the soil and slope of the land were shifting, damaging their residence and landscaping. Plaintiff engaged EDP Consultants, Inc. ("EDP") to conduct an assessment of the Property and then learned that EDP had previously studied the soil stability and slope of the Property. EDP prepared a report for Plaintiff of the required repairs necessary to stabilize the Property.

28. Plaintiff estimates that his repair costs to date have exceeded $600,000 ($400,000 for anchor installation to the residential structure, $100,000 in engineering fees, and $100,000 in landscaping). These cost pertain only to stabilizing the residence and its surrounding land; Plaintiff estimates an additional $400,000 in expenses to repair the outlying vacant land on the Property.

29. Defendant's wife, Mrs. Soni ("Soni"), testified that she is a "housewife" and that in the past twenty-five years, has only worked outside the home to occasionally help her husband with his business.

30. On November 19, 2004, Plaintiffs filed a complaint against Defendant, Plociak, Tomaselli and other parties in Cuyahoga County Court of Common Pleas (CV-04-544084) alleging fraud, misrepresentation, and negligent misrepresentation (the "State Court Litigation"). (Joint Exhibit L).

31. This Court explicitly does not resolve any credibility issues with respect to the testimony summarized in items 18 through 22 and 25 and 26 above.

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[2] Despite the facsimile transmission header that reads "08/14 '00," all parties agree that the date recorded on the facsimile is not accurate and the fact that Tomaselli faxed the report to her manager after the sale closed in January 2001 was undisputed at trial.

DISCUSSION

As a named creditor on Defendant's petition, Plaintiffs allege that Defendant's[3] lack of disclosure surrounding the sale of the Property constitute a nondischargeable claim under 11 U.S.C. § 523(a)(2)(A). Section 523(a) provides that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or1328(b) of this title 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, other than a statement respecting the debtor's or an insider's financial condition;

To prevail on a claim of nondischargeabilty under § 523(a)(2)(A), a creditor must prove: (1) that the debtor obtained money, property, services, or an extension, renewal, or refinancing of credit through a material misrepresentation that was false or that the misrepresentation was made with gross recklessness as to its truth; (2) that the debtor intended to deceive the creditor; (3) that the creditor justifiably relied on the false representation; and (4) that its reliance was

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[3] Despite Defendant's attempts to assert that he was not, in fact, the owner of the Property at the time of the transaction at issue, the Court finds that argument without merit, in that Soni's testimony was that she had no knowledge of the First Disclosure or Second Disclosure that she did not have knowledge of the EDP Preliminary Report, the EDP Final Report, the Initial Screwvala Report or the Second Screwvala Report. Therefore, the Court treats Defendant as the owner and seller of the Property.

the proximate cause of loss. *Field v. Mans*, 516 U.S. 59, 71 (1995) (concluding that the proper standard is justifiable, not reasonable, reliance); *In re McLaren*, 3 F.3d 958, 961 (6th Cir. 1993); *In re Rembert*, 141 F.3d 277, 280-281 (6th Cir. 1998); *In re Sprague*, 205 B.R. 851, 859 (Bankr. N.D. Ohio1997). Exceptions to discharge are strictly construed in the debtor's favor. *In re Ward*, 857 F.2d 1082, 1083 (6th Cir. 1988). The creditor bears the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 290 (1991).

1. Debtor's Representations

When examining the nature of Defendant's representations, the Court applies the following construct:

> A "false pretense" involves an implied misrepresentation or conduct intended to create or foster a false impression. By comparison, a "false representation" involves an expressed misrepresentation by a debtor. Notably, a debtor's silence may constitute a materially false representation thus prohibiting discharge of indebtedness. On the other hand, "actual fraud" has been defined to include a "deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed."

In re Sprague, 205 B.R. at 859 (citing cases). As of July 1, 1993, the Ohio legislature requires under O.R.C. § 5302.30 that a seller of residential real estate complete a property disclosure form that discloses, in "good faith," any "material matters relating to the physical condition of the property to be transferred and any material defects in the property that are within the actual knowledge of the transferor." O.R.C. § 5302.3(A)(1) and (E)(1). This legal duty to disclose requires owners to record in writing "the conditions of the property and of information

concerning the property actually known by the transferor." O.R.C. § 5302.30 (D)(1).

Here, Defendant executed the Second Disclosure, which included negative responses to all disclosure categories. However, the Second Disclosure was executed less than twelve months after the First Disclosure, which included limited disclosure relative to the grading and draining on the Property and during which period Defendant received professional opinions on the grading and soil stability of the Property from at least three firms (two reports from EDP, two reports from Screwvala, and the letter from Lewin). Defendant's testimony as to what reports he provided, to whom, and at what point in time were vague, inconsistent, and not credible.[4] Defendant failed to disclose on the state mandated disclosure form that any evaluation, regardless of its ultimate findings, had been performed on the Property's drainage, grading or soil stability when completing the Second Disclosure.

Defendant's post-trial brief points to several Ohio cases where courts have held that disclosure of defects in "less severe terms" than what is actually accurate is sufficient notice to the purchaser such to preclude claims of fraud or misrepresentation (docket #29, page 5). The distinguishing feature between the two reported cases cited by Defendant and the facts of this

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[4] Defendant, a business owner and a master's level chemist who at one point pursued a doctorate degree in polymer science, often testified that he didn't understand the conclusions in the EDP Preliminary or EDP Final Reports or the Initial Screwvala Report, and that is why he requested the Second Screwvala Report. Yet, Defendant later testified that he didn't provide the EDP Preliminary or EDP Final Reports to the realtors or any purchasers because he did not think they were they were true and disagreed with their conclusions. He further indicated that he provided only the Screwvala Reports to the realtors because they referenced the EDP Report's findings; however, the Second Screwvala Report which Defendant asserts he provided to Plociak *did not, in fact, reference any EDP findings*, nor that any other reports on the Property existed. Furthermore, during Plaintiff's examination of Defendant, he testified that he "thought" he provided the Initial and Second Screwvala Reports to Plociak, but that he could not recall exactly when; Defendant later testified that he gave both the Initial and Second Screwvala Report to Plociak when he executed the sale's agreement and disclosure form on June 22, 2001, and that he also faxed a copy of the Second Screwvala Report only to Plociak's office that same day, although stating he was not sure why he did so.

case are that, at some level, there *was limited disclosure* of a defect by the sellers on the seller's disclosure form as required under O.R.C. 5302.30 so that the purchaser was put on notice; here, however, there was simply no disclosure on the form delivered to Plaintiffs. It is beyond the scope of this proceeding to resolve the conflicts inherent in the testimony summarized in Findings of Fact #18 - 22, 25, and 26. The State Court Litigation is the appropriate venue for such determination. *See generally,* Alan M. Ahart, *Enforcing Nondischargeable Money Judgements: The Bankruptcy Courts' Dubious Jurisdiction,* 74 Am. Bankr. L.J. 115 (Spring 2000) (discussing jurisdictional issues associated with nondischargeability actions). With respect to this bankruptcy, the Court finds that the sale of the Property, in which Defendant received $1,900,000, was transacted under false pretenses and by a false representation, which at the time it was made was done so in reckless disregard for the truth.[5]

2. Intent to Deceive

In the Sixth Circuit, "fraudulent intent must be determined from the totality of the circumstances." *In re Shartz,* 221 B.R. 397, 400 (B.A.P. 6th Cir.1998) (citing *In re Rembert,* 141 F.3d at 281-82). Because a debtor is not likely to admit that he acted with the intent to deceive, courts can infer from a debtor's actions at or near the time of the transaction "whether the circumstances, as viewed in the aggregate, present a picture of deceptive conduct by the

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[5] Because the Court finds the Defendant made a false representation, Defendant's additional post-trial brief argument that the "as-is" clause in the sales agreement acts as a bar to any recovery for non-disclosure is not controlling in this case. *See Rogers v. Hill,* 706 N.E.2d 468, 471 (Ohio App. 4 Dist. 1998) (finding that an "as is" clauses preclude suits for "passive non-disclosure" but do not protect sellers who commit an act of fraud, such as fraudulent mispresentation). Furthermore, even with an "as-is" clause, a seller has a "duty to disclose material facts which are latent, not readily observable or discoverable through a purchaser's reasonable inspection." Layman v. Binns (1988), 519 N.E.2d 642, 644 (Ohio 1988).

debtor which indicates an intent to deceive the creditor." *In re Patrick*, 265 B.R. 913, 916-917 (Bankr. N.D. Ohio 2001); *see also In re Begun*, 136 B.R. 490, 496 (Bankr. S.D. Ohio 1992); *In re Monfort*, 276 B.R. 793, 796 (Bankr. N.D. Ohio 2001). Intent to deceive also can be inferred where the Court finds the debtor made false impressions or representations with a reckless disregard for their accuracy. *In re Woolley*, 145 B.R. 830, 835- 836 (Bankr. E.D. Va. 1991); *In re Booth*, 174 B.R. 619, 624 (Bankr. N.D. Ala. 1994).

In this case, there is unequivocal evidence that Defendant had more knowledge about material conditions or latent defects on the Property than what he recorded on the Second Disclosure. The Court also notes that, when the second potential sale of the home failed to materialize when the Property was listed with Chestnut Hill Realty, and with Chestnut Hill Realty now fully aware of the existence of competing expert reports on the Property, Defendant switched real estate agencies and executed a disclosure statement that reflected none of the disclosures he had previously made about the Property in the First Disclosure. Therefore, when viewing the totality of the circumstances surrounding the sale of the Property, the Court finds that Defendant acted with the intent to deceive.

3. Creditor's Justifiable Reliance

Next, a creditor must prove that he justifiably relied on the debtor's false pretenses or material misrepresentations. *In re Sprague*, 205 B.R. at 861. A creditor exercises justifiable reliance if he acts appropriately given the circumstances, including "rely[ing] on a misrepresentation even when the falsity of the representation could have been ascertained by an investigation." *In re Bethel*, 302 B.R. 205, 209 (Bankr. N.D. Ohio 2003). Additionally, a material fact is one that a buyer would consider "important in the making of th[e] decision" to

purchase, and "the nondisclosure of a material fact, in the face of a duty to disclose" satisfies the element of justifiable reliance when proving fraud under the Bankruptcy Code. *In re Apte*, 96 F.3d 1319,1322 (9th Cir. 1996).

Plaintiff testified that he did receive the Second Disclosure,[6] and based on the contents of that form, assumed the property was free from any drainage, soil, or grading defects. As a reasonable purchaser, Plaintiff also had an inspection of the Property conducted, however, given the defects at issue, even a home inspection service company could not readily identify the nature and extent of the issues undisclosed by the Defendant. Furthermore, Defendant offered no credible evidence to contradict Plaintiffs' justifiable reliance. Therefore, the Court finds that Plaintiffs' reliance on Defendant's nondisclosure of material facts related to the Property that were known to him, given that he had a duty to disclose such facts, as sufficient evidence to find that there was justifiable reliance under § 523(a)(2)(A).

4. Creditor's Reliance Caused Loss

Finally, the creditor must prove that his reliance was the proximate cause of his loss. *In re Rembert*, 141 F.3d at 281. Though this Court is not liquidating the amount of the Plaintiffs' claim, the Court finds that Plaintiff has suffered a loss based on his reliance, and credits his testimony that he has expended funds to stabilize the soil surrounding the residence and to resolve issues of slope movement and grading on the Property. Furthermore, work remains to be done on the outlying areas of the Property, for which Plaintiff will continue to incur expense to remedy.

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[6] Joint Exhibit I does not include Plaintiffs' signatures in the area entitled "Receipt and Ackknowledgement of Potential Purchasers," however, Plaintiff testified that he did receive a copy of the form before consummating the purchase of the Property.

CONCLUSION

Based on the foregoing, the Court finds that Plaintiff has met his burden of proving that his claim is this case is nondischaragble under 11 U.S.C. § 523(a)(2)(A). The Court does not, however, make any determination as to the degree of liability between the defendants named in the State Court Ligation, nor does it liquidate the amount of Plaintiff's claim; those determinations remain solely within the purview of the state court. The Court will file an Entry of Judgement consistent with this Memorandum and Opinion.

# # #

cc: Christopher DeVito (via electronic mail)
Kylie Grumbine
Terrence Steel
Jeffrey Posner
Inderjit Soni (via regular mail)