IT IS SO ORDERED.

Dated: 10:51 AM April 28 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
	)	CASE NO. 04-52977
THOMAS J. HARPLEY,	)	
	)	CHAPTER 7
DEBTOR	)	
	)	
	)	
	)	
KENDRA ST. CHARLES,	)	**ADVERSARY NO. 04-05147**
	)	
PLAINTIFF,	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	
THOMAS J. HARPLEY, et. al.,	)	
	)	
DEFENDANT.	)	**MEMORANDUM OPINION AND**
	)	**ORDER GRANTING PLAINTIFF'S**
	)	**MOTION FOR SUMMARY**
	)	**JUDGMENT**
	)	

This matter is before the Court on the Motion For Summary Judgment ("Motion") [docket #29] filed by New Party Plaintiff, First Place Bank ("First Place") on January 27,

2006.[1] This Court issued Defendant-Debtor, Thomas J. Harpley, ("Harpley") a deadline of March 3, 2006 in which to reply to First Place's Motion, but he did not file a response. This matter was taken under advisement by the Court once Harpley'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, together with the uncontroverted affidavit and attendant exhibits filed in support of the Motion,[2] the Court recites the following underlying facts established by these submissions.

FACTUAL BACKGROUND

1. On or about February 28, 2001, St. Charles entered into a contract with Harpley for the sale of the property located at 315 Spyglass Drive, Fairlawn, Ohio, ("Property") in the amount of $77,500 plus an additional $1,256.50 in expenses. (Affidavit at ¶1, ¶2; Exhibit B).

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[1] **On January 12, 2006, this Court granted Plaintiff, Kendra St. Charles' ("St. Charles") motion to substitute First Place as a New Party Plaintiff in this adversary proceeding based on the transfer of her interest and claim to First Place [docket #27].**

[2] **The affidavit of Kendra St. Charles ("Affidavit") is labeled as Exhibit A. In addition to the Affidavit, First Place has attached the following documents to its Motion: Exhibit B, Purchase Agreement between Harpley and St. Charles; Exhibit C, copy of the warranty deed executed by St. Charles in favor of Harpley Builders; Exhibit D, copy of the second (construction) mortgage taken on the Property by Harpley from First Place; Exhibit E, loan application for Harpley's second mortgage; Exhibit F, Journal Entry granting Harpley's release from incarceration.**

2. At that time, Harpley was the owner and sole shareholder of Thomas Harpley Builder and Developer, Inc. ("Harpley Builders").

3. In accordance with the contract, Harpley, as representative of Harpley Builders, agreed to sign a note and mortgage in favor of St. Charles for $77,500, plus interest at a rate of 9% per annum, in exchange for the transfer of the real estate. (Affidavit at ¶3, ¶4; Exhibit B).

4. As part of the transaction, Harpley was supposed to deliver the signed note and mortgage to Midland Commerce Group ("Midland"), and the mortgage was to be recorded in second position behind the eventual construction mortgage with First Place. (Affidavit at ¶6, ¶11).

5. On March 26, 2001, St. Charles executed the deed in favor of Harpley Builders,[3] and in reliance on the representations of Harpley that the note and mortgage were delivered to Midland, granted the warranty deed on the Property to Harpley Builders. (Id. at ¶7; Exhibit C).

6. Harpley never delivered the note or mortgage to either Midland or St. Charles. (Affidavit at ¶8, ¶9).

7. Harpley provided St. Charles with unsigned copies of the note and mortgage. (Id. at ¶5).

8. On January 14, 2002, Harpley took a second mortgage on the Property in the amount of $61,950 with First Place. (Exhibit D).

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[3] **St. Charles executed the deed in favor of "Harpley Builders, Inc." However, no such corporation ever existed. The name of the owner of the real estate has been changed pursuant to a Summit County Common Pleas Court case to "Thomas Harpley Builder and Developer, Inc."**

9. On the loan application for the second mortgage, Harpley never disclosed the mortgage granted to St. Charles. (Exhibit E).

10. Neither Harpley nor Harpley Builders have paid any money for the transfer of the deed to the Property. (Affidavit at ¶14).

11. Harpley was for a time during the pendency of this matter in prison. However, he was released on September 15, 2005 and believed to be residing at the address listed on his bankruptcy petition, i.e., 2327 North Revere Rd., Akron, Ohio, 44333. (Exhibit F).

12. Harpley filed a voluntary chapter 7 bankruptcy petition on June 4, 2004. He identified St. Charles on his Amended Schedule F- Creditors Holding Unsecured Nonpriority Claims as holding a claim for a "Note," and listed the claim as $78,000. [docket #9]

13. The above-captioned Adversary Proceeding objecting to the dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(2)(A) was timely filed by St. Charles through attorney Dean Konstand on September 17, 2004. St. Charles requested judgment in her favor and against Harpley in the amount of $78,756.50, plus interest at the contract rate of 9% per annum from February 28, 2001, together with costs expended in this adversary case. Harpley, through attorney Michael Moran, filed an answer [docket #8] containing general denials to St. Charles' claims. On January 24, 2005, Mr. Moran filed a Motion For Leave to Withdraw as Counsel for Harpley ("Motion to Withdraw"), in which he stated that despite significant effort, he had not been able to effectuate contact with Harpley, and as a

consequence, could not provide adequate representation in the adversary proceeding [docket #13]. On August 26, 2005, after several rescheduled pre-trial conferences, this Court granted Mr. Moran's Motion to Withdraw. [docket #24]. Harpley is currently acting *pro se* in this matter.

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).

"[A] district court cannot grant summary judgment in favor of a movant simply because the adverse party has not responded. The court is required, at a minimum, to examine the movant's motion for summary judgment to ensure that he has discharged that

[initial] burden." *Carver v. Bunch*, 946 F. 2d. 451 (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, First Place argues that St. Charles agreed to grant Harpley a warranty deed to the Property for the value of $77,000 under false pretenses, specifically, that Harpley, with the intent to deceive, represented that the original note and mortgage were given to Midland, as escrow agent for processing and filing, when in truth, he never delivered them or intended to do so, thus preventing the mortgage from being secured by the Property and allowing him to avoid the debt owed. Accordingly, First Place contends that Harpley's failure to complete performance under the terms of the contract constitutes a debt owed to it, and that the debt should be excluded from discharge in accordance with 11 U.S.C. § 523(a)(2)(A).

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

First Place argues that Harpley'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[4] rely on the false representation; and
> [4] its reliance was the proximate cause of the loss.

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).

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[4] 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).

This Court turns now to its assessment of the dischargeability of the debt at issue. In so doing, and for the reasons that follow, the Court credits the uncontested Affidavit and the attendant exhibits attached to First Place's Motion as supportive of a finding that Harpley falsely represented to St. Charles that the note and mortgage were recorded, and that St. Charles reasonably relied to her detriment in conveying the Property to Harpley through execution of the warranty deed.

The uncontested record evidence and exhibits presented by First Place establish that Harpley acquired the Property through a material misrepresentation of fact. Harpley purported to deliver to Midland the original note and mortgage for the purchase price of $77,000, and represented to St. Charles that the mortgage was to be recorded in second position after the construction loan he would later obtain from First Place. Harpley provided St. Charles with unsigned copies of the note and mortgage as additional proof of this alleged delivery to Midland. However, Harpley knew at the time he made such representation that the note and mortgage had not been delivered to Midland and therefore, that the mortgage had not been recorded. Harpley's intent in making the false representation was to prevent the debt from being secured by the Property. St. Charles reasonably and to her detriment relied on these false representations and granted Harpley a deed to the Property.

Harpley's intent to deceive is further evidenced by his failure to disclose the mortgage to St. Charles on his loan application for the second mortgage from First Place. Had there truly been an inadvertent error or some other legitimate reason for the mortgage not having been recorded, he would have disclosed the existence of the mortgage to St.

Charles on the loan application, and the error would have ultimately been corrected. However, Harpley did not list St. Charles as a liability on the loan application.

The Court further notes that Harpley's failure to respond to the Motion results in a waiver of his opportunity to designate facts that would demonstrate the existence of a genuine issue of material fact. As noted earlier, Harpley filed an answer in the case, but such answer, even through the most liberal of interpretations, and when viewed in the light most favorable to him, cannot be construed as demonstrating the existence of genuine issues of material fact as to the matters established by First Place in its pleadings, Motion, and supporting documentary evidence.

After review of all the uncontroverted record evidence in this case, the Court finds that First Place has discharged its burden of showing an absence of a genuine dispute over any material fact, and that Harpley acquired the Property through a material misrepresentation. Therefore, the Court concludes that First Place is entitled to a determination that the claim of St. Charles is excepted from discharge in accordance with 11 U.S.C. § 523(a)(2)(A).

CONCLUSION

For the reasons discussed in this Memorandum Opinion, the Court grants summary judgment in favor of First Place and against Harpley, holding that First Place's claim in the amount of $78,256.50 is nondischargeable under 11 U.S.C. § 523(a)(2)(A), as it was obtained through fraudulent misrepresentation. **IT IS HEREBY ORDERED :**

1. That First Place's Motion is granted with respect to 11 U.S.C. §

523(a)(2)(A) in the amount of $78,256.50 plus interest computed at 9% per annum; and

2. 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.

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CC: (VIA ELECTRONIC MAIL) **DAVID A. FREEBURG**
KATHRYN A. BELFANCE

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