

IT IS SO ORDERED.

Dated: 03:12 PM February 20 2008



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

IN RE:)	CASE NO. 06-52796
)	
MELVIN L. HICKS,)	CHAPTER 7
BETTIE J. HICKS)	
DEBTOR(S))	
)	
MICHAEL LEE, ET AL.)	ADVERSARY NO. 07-5070
)	
PLAINTIFF(S),)	JUDGE MARILYN SHEA-STONUM
)	
vs.)	
)	
MELVIN L. HICKS, ET AL.)	
)	
DEFENDANT(S).)	MEMORANDUM DECISION

This matter comes before the Court on plaintiffs' complaint to determine the dischargeability of a debt pursuant to 11 U.S.C. §523(a)(6). The Court held a trial in this matter on October 29 and November 19, 2007. Appearing at the trial was Guy Tweed, counsel for plaintiffs. Also appearing were Melvin and Bettie Hicks, *pro se* defendant-debtors. During the trial, the Court received evidence in the form of exhibits and in the form of testimony from the following: (1) plaintiff, Michael Lee; (2) defendant-debtor, Melvin Hicks; (3) defendant-debtor, Bettie Hicks; (4) Brian Giallombardo, a private home inspector; (5) John Marrelli, Jr., a private home inspector and (6) George Foster, a housing and electrical inspector for the city of Bedford Heights, Ohio. At the conclusion of the trial, the Court took the matter under advisement.

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(b). Based upon testimony and evidence presented at the trial, the arguments of counsel and *pro se* defendant-debtors, the pleadings in this adversary proceeding and defendant-debtors' 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

1. Defendant-debtors were occupants of real property located at 6710 Deer Court in Bedford Heights, Ohio (the "Premises") since January of 1998. Sometime thereafter defendant-debtors also became the owners of the Premises which they offered for sale in 2005.

2. The Premises is a split level, single family residence that is approximately thirty years old. The Premises was built on sloping ground and the vegetation around the Premises is mature.

3. In conjunction with offering the Premises for sale, defendant-debtors completed and signed a Residential Property Disclosure Form (the "Disclosure Form"). [Plaint. Ex. B]. The Disclosure Form is dated February 24, 2005.

4. On the Disclosure Form, defendant-debtors answered "no" to the following questions: "Do you know of any leaks, backups or other material problems with the sewer system servicing the property?," "Do you know of any current leaks or other material problems with the roof or rain gutters?," "Do you know of any previous or current water leakage, water accumulation, excess moisture or other defects to the property, including but not limited to any area below grade, basement or crawl space?," "Do you know of any water or moisture related damage to floors, walls or ceilings as a result of flooding; moisture seepage; moisture condensation, ice damming; sewer overflow/backup; or leaking pipes,, plumbing fixtures, or appliances?," "Do you know of any movement, shifting, deterioration, material cracks/settling (other than visible minor cracks or blemishes) or other material problems with the foundation, basement/crawl space, floors, or interior/exterior

walls?,” “Do you know of any current flooding, drainage, settling or grading or erosion problems affecting the property?” (collectively, the “Pertinent Questions”).

5. Prior to entering into a contract to purchase the Premises, plaintiffs received a copy of the Disclosure Form. Plaintiffs also hired Brian Giallambardo of Heartland Quality Home Inspection, LLC (“Heartland”) to conduct an inspection of the Premises (the “Heartland Inspection”). The Heartland Inspection was conducted on May 28, 2005 and thereafter Mr. Giallambardo prepared a written “Home Inspection Report” (the “Heartland Inspection Report”). [Plaint. Ex D].

6. Mr. Giallambardo inspected both the inside and the outside of the Premises and defendant-debtors did not prohibit him from accessing any portion of the Premises.

7. During the Heartland Inspection Mr. Giallambardo inspected the roof from the ground via binoculars. Mr. Giallambardo did not use a ladder to inspect the roof due to safety concerns because the ground surrounding the Premises was damp.

8. In the Heartland Inspection Report, Mr. Giallambardo indicates that the landscaping affecting the foundation of the Premises is satisfactory but indicates that the trees and shrubberies should be trimmed back. *See* Plaint. Ex. D at pg. 3.

9. In the Heartland Inspection Report, Mr. Giallambardo does not indicate any problems with the gutters and downspouts of the Premises. *See* Plaint. Ex. D. At trial, Mr. Giallambardo testified that, during his inspection, all downspouts were connected.

10. Mr. Giallambardo also testified at trial that, during his inspection, he did not uncover any problems with water intrusion and the Heartland Inspection Report does not indicate that any water or sewer problems were detected on the Premises. *See* Plaint. Ex. D.

11. In July 2005, plaintiffs entered into a contract to purchase the Premises from defendant-debtors and the Premises was transferred to plaintiffs by General Warranty Deed dated July 26, 2005. [Plaint. Ex. C].

12. Plaintiffs relied upon the Disclosure Form and the Heartland Inspection Report in deciding to purchase the Premises.

13. Plaintiffs took possession of the Premises on July 27, 2005 and began moving into the Premises on or about August 1, 2005. The carpeting in the family room of the Premises was not replaced prior to plaintiffs moving in.

14. On Saturday, August 20, 2005, after heavy rains, water intruded into the garage and family room, which are both at the same first floor level of the Premises. Due to such water intrusion, plaintiffs incurred monetary damage (the "Damages").¹

15. On Monday, August 22, 2005, Mr. Hicks contacted the City of Bedford Heights to report the water intrusion into the Premises and on August 23, 2005 the city sent Mr. and Mrs. Hicks a letter setting forth the following:

Service Explanation:

Sewer crew checked downspouts on the house. Gutter downspouts on the north side of the house are pulled out of the drains. Ran water through using garden hose in the driveway drain and the downspout drain. Water backs up in downspout drains when running water through. Resident did not want crew to snake through line. He is going to contact previous home owner regarding problem with water backing up when it rains.

See *Plaint. Ex. E.*

16. Mr. Hicks again contacted the City of Bedford Heights and on August 30, 2005 the city sent Mr. and Mrs. Hicks a letter setting forth the following:

Service Explanation:

Sewer crew tried to run snake in northeast corner downspout, it would not go through. Line is full of roots. Ran 16' of snake in driveway crock. Found line infiltrated with roots. Could not get through blockage with snake. Advised resident that storm system around house is full of roots.

See *Plaint. Ex. F.*

¹ Although plaintiffs' complaint makes a general reference to damages "in an amount in excess of Twenty-Five Thousand Dollars (\$25,000.00)" [Complaint at ¶19] no evidence regarding the exact amount such damage was presented during trial.

17. On or about September 5, 2005, defendant-debtor, Melvin Hicks, went to the Premises to pick up bicycles that were left behind. While at the Premises, Mr. Hicks and plaintiff, Michael Lee, had a conversation regarding the recent water intrusion. Mr. Lee claims that during that conversation, Mr. Hicks acknowledged that there had been water intrusion into the Premises prior to plaintiffs' purchase. Mr. Hicks denied such acknowledgment.

18. In November 2005, plaintiffs contracted with John Marrelli, Jr. of Quailty Home Inspections ("Quality Home") for another inspection of the Premises (the "Quality Home Inspection"). The Quality Home Inspection was conducted on November 5, 2005 and thereafter Mr. Marrelli prepared a written report (the "Quality Home Inspection Report"). [Plaint. Ex R].

19. The Quality Home Inspection Report sets forth the following findings regarding the family room of the Premises.

1. The rear wall has two colors of paint, white on the lower half and beige on the upper half.
2. There are stains bleeding through (water marks) on the rear wall drywall extending to the northwest corner.
3. With the carpet pulled back in the southwest corner, it is evident that water had penetrated the wall at the floor. Rust marks are visible on the carpet at the underside. Dark mold is visible on the baseboard and carpet edges. Note the paint on the carpet from having the wall painted with the carpet down and against the baseboard.
4. The northwest corner drywall at the floor is soft and the paint is bubbled. Staining is evident as in the SW corner.
5. Using a moisture meter, I detected moisture levels of over 30% (pegging the meter) at its maximum scale along the entire dry walled/rear wall area, from the SW to NW corners.

See Plaint. Ex. R at unnumbered pgs. 1-2 (references to photographs have been excluded).

20. The Quality Home Inspection Report sets forth the following findings regarding the exterior of the Premises.

- A. Garage Area
 1. The driveway and garage floor are at the same level as the family room floor

(+2"). The drive catch basin remains filled for nearly an hour once it is filled with water.

B. North Wall

1. There are two down spouts on the north wall (common on the entire street). Both are disconnected from their storm sewer connections.
2. When tested with water, the clay pipe filled within 15 minutes. The rear north down spout had a gallon milk jug plastic bottom covering the abandoned storm sewer connection.

C. House Front

1. The front landscape beds on either side of the steps contain overgrown arborvitae and stumps of removed arborvitae.
2. The storm sewer connections and piping have had roots removed from the piping previously.
3. The area where the sewer snake binds up is left of the steps where a stump is located. This area is close to or at the point where the down spout drains and footer drains are likely to connect to the storm piping main, leading to the street.

See Plaintiff. Ex. R at unnumbered pg. 2 (references to photographs have been excluded).

21. Based upon the Quality Home Inspection, Mr. Marrelli opined that “because the storm sewer main is blocked, the footing drains are unable to evacuate sub-surface water, causing them to overflow, sometimes under pressure, into the lower level of the house.” *See* Plaintiff. Ex. R at unnumbered pg. 3. During trial, Mr. Marrelli testified that the problems with the Premises that were identified in the Quality Home Inspection Report were a long-standing condition.

22. On November 17, 1997 the then-owner of the Premises completed an “Inspection Application for Occupancy Permit” for the Premises. Plaintiff. Ex. O. That inspection application identified Melvin and Bettie Hicks as the “prosepective occupant[s].” *See id.* Pursuant to a November 18, 1997 inspection of the Premises, the following “[r]epairs required to meet minimum standards of code” were listed on that inspection application:

1. Fill all open joints in driveway with elasticized caulk [and]
2. Fasten downspout to crock at rear of house by patio.

Id. By January of 2000 those repairs had been made. *Id.*

23. On June 2, 2003, Mr. Hicks completed an “Inspection Application for Occupancy Permit” for the Premises. [Plaint. Ex. L]. Pursuant to a June 4, 2003 inspection, the City of Bedford Heights sent Melvin Hicks a letter that identified, *inter alia*, the following violations on and required repairs of the Premises:

3. Replace the damaged concrete around the storm sewer.

5. Fill all open seams in the drive with elasticized caulk.
6. Connect the downspout to the crock (northside).

See Plaint. Ex. K.

24. On December 29, 2004, Mr. Hicks again completed an “Inspection Application for Occupancy Permit” for the Premises. [Plaint. Ex. I]. Pursuant to an inspection of the Premises, the following “[r]epairs required to meet minimum standards of code” were listed on that inspection application:

1. Replace damaged concrete in driveway and apron (saw-crock) [and]
2. Inst. GFCI receptable at rear.

See Plaint. Ex. I. By June of 2005 those repairs had been made. *Id.*

25. On October 4, 2005 Mr. Lee received a letter from the City of Bedford Height’s waste water department setting forth, in pertinent part, the following:

This letter is a follow up to the request of information on water/sewer problems for the property at 6710 Deer Ct. The presale report shows that at the time of the first inspection, the downspout [sic] were disconnected from the storm crocks. Upon a second inspection, the downspouts were most likely reconnected since it was not on the second visitation list and the same inspector inspected the property.

The presale inspection was an exterior inspection only. The inspector was never inside the house for an inspection. Interior inspections are only required for vacant or rental properties within the City.

See *Plaint. Ex. G.*

26. Prior to defendant-debtors' bankruptcy filing plaintiffs had initiated a state court action against defendant-debtors to recover on the Damages. That action was stayed by defendant-debtors' bankruptcy filing.²

DISCUSSION

Whether or not defendant-debtors are liable to plaintiffs for the Damages is an issue of Ohio law that was not finally determined prior to defendant-debtors' bankruptcy filing or specifically raised by plaintiffs in their complaint. Instead, plaintiffs contend that any liability that defendant-debtors may have for the Damages is a debt (the "Liability for Damages") that should be excepted from defendant-debtors' chapter 7 discharge pursuant to 11 U.S.C. § 523(a)(6).³ *See* 11 U.S.C. § 101(12) (defining "debt" as "liability on a claim") and 11 U.S.C. § 101(5) (defining "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"). *See also, In re Glance*, 487 F.3d 317, 320 (6th Cir. 2007) (noting that, by defining "claim" broadly as any "right to payment" or "any right to an equitable remedy," Congress has adopted the broadest possible definition of "debt"). The dischargeability of a debt is a matter that is separate from the merits of the debt itself. *See In re Sweeney*, 276 B.R. 186, 195 (6th Cir. BAP 2002).

² Given the Court's decision in this matter, that state court litigation need no longer be stayed and plaintiffs are free to proceed with that matter.

³ Although the complaint references both § 523(a)(6) and § 523(a)(2)(A) and (B), plaintiffs' counsel stated at the beginning of trial that his clients were now only relying upon subsection (a)(6). Accordingly, no further reference will be made to subsection (a)(2).

Section 523(a)(6) provides that a discharge under §727 does not discharge an individual debtor from any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” It is plaintiffs’ burden to prove all necessary elements of §523(a)(6) by a preponderance of the evidence, *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661 (1991); *Barclays/American Business Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 394 (6th Cir. 1994), and exceptions to discharge are to be strictly construed in defendant-debtors’ favor. *Mfr. Hanover Trust v. Ward (In re Ward)*, 857 F.2d 1082, 1083 (6th Cir. 1988), citing *Gleason v. Thaw*, 236 U.S. 558, 562 (1915). In determining whether plaintiffs have proved the necessary elements of their case, the bankruptcy court, as trier of fact, must weigh conflicting facts, determine the credibility of witnesses and draw inferences from the evidence presented. *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 88 (6th Cir. 1993); FED. R. BANKR. P. 8013.

A “willful and malicious injury” for purposes of § 523(a)(6) is an injury that an actor intended to occur as a result of some deliberate act and not merely an injury that happened to occur because an intentional act was taken. *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). See also *In re Markowitz*, 190 F.3d 455, 464 (6th Cir. 1999) (interpreting the Supreme Court’s *Geiger* decision). Debts that arise from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6). *Id.* Accordingly, the Liability for Damages will be excepted from discharge only if it arose due to the deliberate and intentional actions of defendant-debtors.

As evidenced by the Quality Home Inspection Report and the testimony of John Marrelli, water had intruded into the family room of the Premises well before plaintiffs purchased that property. Pursuant to the testimony of Michael Lee, plaintiffs specifically relied upon the fact that neither the Disclosure Form nor the Heartland Home Inspection Report disclosed any water intrusion problems in deciding to purchase the Premises.

The family room of the Premises had wall to wall carpeting whose underside had rust marks and mold because water had penetrated the wall at the floor and only the lower half of the walls in the family room had

been painted. In some portions of that room the paint on the lower half of the walls was bubbling and there were bleed-through water marks from the water intrusion. During trial, defendant-debtors testified that they spent considerable amounts of time in the family room but both claimed to have no knowledge of any water problems. Mrs. Hicks testified at trial that the only reason the lower half of the walls in the family room were painted was to cover up fingers prints left by her grandchildren. The Court does not find that explanation to be credible.

The Quality Home Inspection Report and the testimony of Mr. Marrelli points to a finding that water intrusion into the Premises had been a long-standing problem. Given that the Premises was built on a slope and that the landscaping around the Premises is mature, it appears that at least one source of water intrusion into the Premises is sewer lines blocked by roots. Given repeated findings by the City of Bedford that the down spouts of the Premises were disconnected from the sewer lines, it appears that those sewer line blockage problems had existed for several years and during the entire time that defendant-debtors resided in the Premises.

The long-standing nature of the water intrusion problems coupled with the amount of time that defendant-debtors spent in the family room and the fact that defendant-debtors painted only the lower half of the family room walls, leads this Court to find that defendant-debtors knew of the existence of such problems when they completed the Disclosure Report. That defendant-debtors were aware of such problems is further evidenced by the September 5, 2005 conversation between Mr. Lee and Mr. Hicks. *See* Finding of Fact #17, *supra*. Although Mr. Hicks denied acknowledging problems with water intrusion, the Court finds Mr. Lee's testimony as to that conversation to be the more credible.

Notwithstanding that defendant-debtors were aware of the problems with water intrusion, they failed to disclose *any* problems on the Disclosure Form by answering "no" to *every* Pertinent Question. While one might construe an inaccurate answer to one or two of those questions as a mere oversight, defendant-debtors' wholesale denial of any problems with water points to a deliberate and intentional decision to give false

answers. Had defendant-debtors been truthful in the Disclosure Report, plaintiffs may have opted to not purchase the Premises or required that the problems with water intrusion be remedied prior to entering into a contract for purchase. Therefore, but for defendant-debtors' deliberate and intentional actions, plaintiffs would not have incurred the Damages.⁴

CONCLUSION

Based upon the foregoing, the Court finds that defendant-debtors' conduct of inaccurately answering the Pertinent Questions was "willful and malicious" pursuant to §523(a)(6) of the Bankruptcy Code, and that such "willful and malicious" conduct contributed to the Damages. Accordingly, defendant-debtors' Liability for Damages will not be discharged in their chapter 7 bankruptcy case. A judgment consistent with the Memorandum Opinion will be entered separately in this case.

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cc (via electronic mail): GUY TWEED, Counsel for Plaintiffs

cc (via regular US mail): MELVIN & BETTIE HICKS, *Pro Se* Defendant-Debtors

⁴ Whether or not the water intrusion problems should have been discovered during the Heartland Inspection is not at issue in this dischargeability action but instead may be a matter that is litigated in state court.