IT IS SO ORDERED.

Dated: 02:32 PM September 16 2011

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 07-50843
	)	
SCOTT D. MCGURK	)	CHAPTER 13
DEBTOR(S)	)	
	)	
	)	**ADVERSARY NO. 07-5142**
ROBERT PERHACS	)	
PLAINTIFF(S),	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	
SCOTT D. MCGURK	)	
	)	
DEFENDANT(S).	)	**MEMORANDUM DECISION**

This matter comes before the Court on plaintiff's 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 July 22, 2011. Appearing at the trial were Guy Tweed, counsel for plaintiff and Maryann Chandler, counsel for defendant-debtor. During trial, the Court received evidence in the form of exhibits and in the form of testimony from the following: (1) Robert Effinger; (2) plaintiff, Robert Perhacs and (3) defendant-debtor, Scott McGurk. At the conclusion of trial, the Court granted plaintiff additional time to file a post-trial brief. After that pleading was filed, 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, 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.[1]

FINDINGS OF FACT

1. Sometime prior to April 2005 an "Agreement to Form a Limited Liability Company" was drafted (the "Agreement"). The Agreement provides, *inter alia*, that:

> In consideration of the mutual promises set forth below, the parties agree to organize a Limited Liability Company to be known as SRB Development LLC under the laws of the State of Ohio within 30 days after the date of this agreement, for the purpose of purchasing from BPJ Investments, Inc., and developing eleven (11) parcels of real estate lots into residential real estate located in Lorain County, Ohio.

[1] Defendant-debtor's underlying bankruptcy case was originally filed under chapter 7 of the Bankruptcy Code and later converted to chapter 13. The complaint in this adversary proceeding was filed on July 16, 2007 when debtor's bankruptcy case was still pending as a chapter 7. Given the conversion of debtor's case to chapter 13, this adversary proceeding was held in abeyance and then referred to mediation pursuant to a joint request of the parties. Mediation was conducted and concluded. Pursuant to the "Final Report of Mediator," filed on May 20, 2011, no consensual resolution of the matter could be achieved. Although debtor's underlying bankruptcy case is still pending as a chapter 13, counsel requested to move forward with a trial of this adversary proceeding. At the beginning of the trial, and notwithstanding the provisions of § 1328(a) of the Bankruptcy Code, counsel for plaintiff clarified that his client was proceeding *only* under 11 U.S.C. § 523(a)(6). Defendant-debtor did not object to the trial going forward.

The Agreement further provides that "[t]he Limited Liability Company shall not commence business until it has received consideration of $117,000.00 from each of the Members." The initial paragraph of one copy of the Agreement entered into evidence indicates that it was to be entered into by "Robert Effinger, Robert Perhacs, and Scott McGurk." [Ex. A]. Another copy of the Agreement entered into evidence indicates that it was to be entered into by "Loren McGurk, Robert Perhacs, and Scott McGurk." [Ex. B].

2. An "Organization/Registration of Limited Liability Company" was submitted to the Ohio Secretary of State on behalf of SRB Development LLC (the "Registration Form"). The copy of the Registration Form that was entered into evidence at trial is dated April 15, 2005 and is signed by Scott McGurk and Robert Effinger as "authorized representative(s)." No articles of organization (or any other document) was attached to that copy of the Registration Form.

3. Although no documents from the Ohio Secretary of State certifying the existence of SRB Development LLC were presented at trial, the parties stipulated that SRB Development LLC was a duly-filed Ohio limited liability company.

4. On April 13, 2005, SRB Development LLC entered into a "Construction Loan Agreement" with Park View Federal Savings Bank for a loan amount of $125,625.00 (the "Loan Agreement") to acquire land on which to build a prefabricated model home. The Loan Agreement was signed by Scott D. McGurk, Loren D. McGurk and Robert A. Perhacs as members of SRB Development LLC. The funds from the Loan Agreement were wired directly from the lender to the seller.

5. Also on April 13, 2005 SRB Development LLC executed an "Open-End Mortgage Deed" in favor of Park View Federal Savings Bank (the "Mortgage") to secure the Loan Agreement.

The Mortgage was signed by Scott D. McGurk, Loren D. McGurk and Robert A. Perhacs as members of SRB Development LLC.

6. On or about April 26, 2005, Scott McGurk completed a "Small Business Online Banking Enrollment" form for a SRB Development LLC account at FirstMerit Bank (the "First Merit Account"). Attached to that form was an "Authorization of Depository" which provides, *inter alia,* the following:

> (2) That this Company is composed of the following members or managers and until otherwise ordered, the said funds of this Company shall be subject to withdrawal upon the check, draft, note, or order . . . of this Company signed by any 1 of the following:
>
> | NAME | TITLE | SIGNATURE |
> |---|---|---|
> | Scott D McGurk | V.P./CFO | _____ |
> | Robert Effinger | President | _____ |
> | Robert Perhacs | Secretary | _____ |

7. In or about May 2005 Robert Perhacs paid $109,910.56 to SRB Development LLC, as a capital contribution. Those funds were deposited into the First Merit Account. At the time Mr. Perhacs paid over those funds to SRB Development, LLC, neither defendant-debtor nor Robert Effinger had made any capital contribution to that entity.

8. Scott McGurk and Robert Effinger were friends and joint owners of a corporate entity named Comfort Resolutions, Inc. Robert Effinger and Robert Perhacs were neighbors. Robert Effinger approached Robert Perhacs about forming SRB Development LLC. It was through Robert Effinger that Mr. McGurk and Mr. Perhacs became acquainted. Loren McGurk is Scott McGurk's father.

9. SRB Development LLC built one home. Construction was started in the spring of 2006 and completed in October of 2006. The construction of the one home built by SRB Development LLC was managed by Comfort Resolutions, Inc. and/or Robert Effinger. The home was never sold and eventually foreclosed upon.

10. Defendant-debtor was the controller of SRB Development LLC and cut 8 checks totaling $47,400.00 from the First Merit Account to Comfort Resolutions, Inc. and/or Robert Effinger.

11. Defendant-debtor also cut 13 checks totaling $13,200 from the First Merit Account to Robert Perhacs. That amount, combined with one other payment from Comfort Resolutions, Inc., resulted in Robert Perhacs receiving total distributions from SRB Development LLC of $14,140.00. SRB Development LLC is no longer operating and has no remaining assets.

12. Robert Perhacs is the owner and operator of a balloon and floral distribution company. In addition to this business Mr. Perhacs purchases, revamps and attempts to re-sell residential real property. Since 2002 Mr. Perhacs has purchased and sold four such homes.

13. Scott McGurk filed his bankruptcy petition on March 23, 2007. On Schedule D - Creditors Holding Unsecured Nonpriority Claim he lists, *inter alia*, Robert Perhacs as holding a business debt of unknown amount. To date, Robert Perhacs has not filed a proof of claim in defendant-debtor's bankruptcy proceeding.

DISCUSSION

Section 523(a)(6) of the Bankruptcy Code provides that any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" can be excepted from a debtor's discharge. Plaintiff bears the burden of proving all necessary elements under § 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). In determining whether plaintiff has proved the necessary elements of his 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.

For purposes of § 523(a)(6), a "willful and malicious injury" 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, any debt owed from defendant-debtor to plaintiff could be excepted from discharge only if it arose due to the deliberate and intentional actions of debtor.

Plaintiff contends that defendant-debtor willfully and maliciously misrepresented to him certain material facts which induced plaintiff to contribute funds to SRB Development LLC and that, because of such misrepresentation, plaintiff was financially harmed by not receiving full repayment of his capital contribution to that entity. The only evidentiary support for this contention that was presented at trial was plaintiff's self-serving testimony that defendant-debtor pressured him into making a capital contribution and, in so doing, claimed that both he and Mr. Effinger had already provided SRB Development LLC with capital contributions of their own. This testimony was contradicted by other evidence presented at trial, and, even if assumed to be true, could not support a finding of dischargeability pursuant to § 523(a)(6).

Plaintiff claims that he felt pressure from defendant-debtor to make a capital contribution to SRB Development LLC because, during May 2005, defendant-debtor called him three to four times a day to ask for the funds. Plaintiff further claims that he made a capital contribution to SRB Development LLC only after being told by defendant-debtor that he and Mr. Effinger had already made their capital contributions. During his testimony, defendant-debtor specifically denied ever pressuring plaintiff to make a capital contribution to SRB Development LLC and also specifically denied ever representing to plaintiff that he and Robert Effinger had made capital contributions to the company. Defendant-debtor also testified that he never had the financial ability to make the $117,000.00 capital contribution contemplated in the Agreement and that Mr. Perhacs was aware of that fact.

Defendant-debtor testified that he and Mr. Effinger intended to take out a loan to acquire the lots on which SRB Development LLC would build homes. He also testified that he and Mr. Effinger had been unable to obtain loans in the past on behalf of Comfort Resolutions, Inc. because of a prior bankruptcy filed by Robert Effinger. Defendant-debtor then explained that his father (Loren McGurk) agreed to assist him with SRB Development LLC and that, although Loren McGurk was not a member of SRB, he agreed to be a signatory to the Loan Agreement so that his son could acquire funds. Mr. Perhacs was present at the bank with defendant-debtor and Loren McGurk when they all signed the Loan Agreement as "members" of SRB Development LLC. That agreement was executed *before* Mr. Perhacs made his capital contribution to SRB Development LLC.

Both plaintiff and defendant-debtor acknowledged that, in addition to the Agreement, several oral agreements between members of SRB Development LLC were made. Based upon such undocumented oral agreements and the evidence presented at trial, it is unclear exactly what was agreed to between Mr. Perhacs and defendant-debtor regarding the formation, capitalization and operation of SRB Development LLC. In fact, no executed copy of the Agreement was presented at trial nor does there exist any competent evidence from which this Court can even determine who constituted the members of the LLC or how the LLC was to be run.[2] Notwithstanding the provision in the Agreement that each member had to make a $117,000.00 capital contribution before the SRB Development LLC could begin operations, none of the members (including Mr. Perhacs) ever contributed that full amount.

During trial, defendant-debtor testified that the funding and operation of SRB Development LLC was "adjusted on fly." Although the credibility of all the witnesses at trial was strained, the Court fully credits this "adjusted on the fly" description and concludes that SRB Development LLC was a loosely run business venture that, for a variety of reasons including under capitalization, ultimately failed.

Based upon the foregoing the Court finds that plaintiff has failed to meet his burden of proving that defendant-debtor willfully and maliciously misrepresented to him certain material facts

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[2] A "member" of a limited liability company is "a person whose name appears on the records of the limited liability company as the owner of a membership interest in that company." Ohio Revised Code § 1705.01(G). The articles of organization of a limited liability company shall, *inter alia*, set forth "[a]ny other provisions that are from the operating agreement or that are not inconsistent with applicable law and that the members elect to set out in the articles for the regulation of the affairs of the company." O.R.C. § 1705.04(A)(3). The members of a limited liability company may also adopt bylaws "that are not inconsistent with the articles of organization or the operating agreement and that are for the regulation of the members, the managers, or another matter affecting the management of the company . . . ." O.R.C. § 1705.27.

which induced plaintiff to contribute funds to SRB Development LLC or that, because of a misrepresentation, plaintiff was financially harmed by not receiving full repayment of his capital contribution.

As previously noted (*see* footnote 1, *supra*), counsel for plaintiff indicated at the onset of trial that his client was proceeding only under § 523(a)(6).[3] Notwithstanding such disavowal of the other provisions of § 523(a) referenced in the complaint, counsel for plaintiff addresses the applicability of § 523(a)(2)(A) in the post-trial brief he was given leave to file.

Section 523(a)(2)(A), provides 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, . . .

Creditors seeking to except a debt from discharge under § 523(a)(2)(A) must prove by a preponderance of the evidence that:

> [1] the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to is truth;
>
> [2] the debtor intended to deceive the creditor;
>
> [3] the creditor justifiably relied on the false representation; and
>
> [4] its reliance was the proximate cause of the loss.

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[3] Because of plaintiff's failure to meet his burden of proof under § 523(a)(6), the Court need not address whether an action under only that provision is appropriate under the circumstances of this case, given that plaintiff mainly relies upon alleged misrepresentations by defendant-debtor and nondischargeability of debts pursuant to misrepresentations are specifically addressed in § 523(a)(2)(A).

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).

Plaintiff's claim under § 523(a)(6) was based upon an alleged misrepresentation by defendant-debtor that he and Robert Effinger had made capital contributions to SRB Development LLC. As noted above, plaintiff failed to meet his burden of proof on that issue. Even assuming that defendant-debtor did make such a statement, nothing was presented at trial to support a finding that defendant-debtor intended to deceive plaintiff, that plaintiff relied upon the statement and that such reliance resulted in his loss.

CONCLUSION

Based upon the foregoing the Court finds that plaintiff has failed to meet his burden of proving that any debt owed to him by debtor should be discharged pursuant to 11 U.S.C. § 523(a). An entry of judgment consistent with this opinion will be entered separately in this case.

# # #

cc (*via* electronic mail):
GUY TWEED, Counsel to Plaintiff
MARYANN CHANDLER, Counsel to Defendant-Debtor