IT IS SO ORDERED.

Dated: 04:02 PM September 28 2011

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 10-52048
	)	
JOHN D. BROSKA, SR.,	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
ROGER TAN,	)	**ADVERSARY NO. 10-5114**
	)	
PLAINTIFF,	)	JUDGE MARILYN SHEA-STONUM
	)	
v.	)	
	)	
JOHN D. BROSKA, SR.,	)	
	)	**MEMORANDUM OPINION**
DEFENDANT.	)	

This matter is before the Court on the complaint of Roger Kintia aka Roger Tan ("Plaintiff") seeking a determination that the debt owed to Plaintiff by the Debtor, John D. Broska ("Broska"), is excepted from Broska's discharge pursuant to 11 U.S.C. § 523(a)(2)(A). Joseph Spoonster appeared as counsel for Plaintiff and Scott Scharf appeared as counsel for Broska. During the trial, the Court heard testimony from Plaintiff, Broska, William Moot and John Deel. In addition the Court received evidence in the form of exhibits and stipulations. 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 the parties' stipulations [docket ## 16 and 28], the testimony and evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and debtor's main chapter 7 case and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following findings of fact and conclusions of law.

FACTS

Broska filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on April 29, 2010. Plaintiff commenced this adversary proceeding on August 26, 2010 seeking to have the Court determine that the debt owed to him by Broska is not dischargeable under 523(a)(2)(A). The issues in this case arise from a construction project on Plaintiff's property by Sunsational Patio & Sunrooms, Inc. ("Sunsational"). Debtor Broska is a 50% shareholder in Sunsational. Sunsational's business primarily involved the construction of sun rooms and patios.

Sunsational's tax returns for the 2007, 2008 and 2009 tax years each show an ordinary business income loss. Broska testified that Sunsational began to experience cash flow problems in mid 2009. Several judgments were rendered against Sunsational in 2009. *See* Plaintiff's Exhibit A-1 - Judgment in favor of Allied Modular Building Systems, Inc. was entered on May 5, 2009, Plaintiff's Exhibit Q-1 - Judgment in favor of RBS Citizens National Association on November 10, 2009 as the result of Sunsational's default on a business loan in mid 2009.

On the petition date, the Debtor had unsecured debt listed on Schedule F, consisting almost entirely of Sunsational's business debts, in excess of $300,000.00. The debts listed appear to have

been incurred between 2005 and the date of filing. They include debts to Sunsational's suppliers and guaranties of business loans and leases.

On August 13, 2009, Broska began consulting with counsel regarding the possibility of filing a petition for relief under the Bankruptcy Code.

In early January, 2010, Broska began working as an employee for Whitesell International.

The Project

In May 2009, Tan contracted with Sunsational for the construction of a deck/ sunroom on the front (facing the lake) of his home. Plaintiff and Gary Zenobi, the other shareholder in Sunsational, negotiated the terms of the original contract dated May 29, 2009. *See* Plaintiff's Exhibit B. The parties agreed that the cost to complete the patio would be $36,025 and that the work would be complete within 60 days from the start date. The contract was amended on June 8, 2009. *See* Plaintiff's Exhibit C. Based on Broska's representation that the payment would be used for materials on Plaintiff's project, Plaintiff made a payment of $11,500 on June 8, 2009. In addition, Plaintiff paid $600 to Sunsational, which he understood would be used to pay the costs for obtaining the necessary permits.

At the time Sunsational contracted with Plaintiff, Sunsational was experiencing financial difficulties. Sunsational had over $300,000 owing to vendors and lenders. Broska testified that at that time Sunsational was making only the minimum payments due on its accounts.

By October, 2009, ground still had not been broken on the Plaintiff's project. Broska testified that although physical construction had not begun, Broska had been engaged in the engineering and administrative work required for this job. He said the project was complicated by the existence of a septic system in the area where the deck was to be built, which upon its discovery required a change in the project design. The Court believes that Broska overestimates the amount of time he spent on this project.

As a result of the delay and having already paid $12,100 to Sunsational based on Broska's representations, Plaintiff became concerned that the project would not be completed by Sunsational before winter weather arrived. In addition, Plaintiff was worried about whether there was a bond in place to cover him in the event Sunsational did not complete the project. In October 2009, Broska was aware of the Plaintiff's concerns. Plaintiff had made clear to Broska that he wanted a bond in place that would protect him in the event of the Sunsational's default. Broska assured Plaintiff that the appropriate bonds were in place and that Plaintiff was covered by them. *See* Plaintiff's Exhibit J & K. In addition, Broska represented to Plaintiff that winter weather would not stop Sunsational's work on Plaintiff's project. *See* Plaintiff's Exhibit X-2.

Following these reassurances and representations by Broska, Plaintiff signed another amended contract to deal with the design changes required as a result of the location of the septic system, which, apparently, was previously unknown and somehow difficult to discern. *See* Plaintiff's Exhibit I. The contract asserts that Sunsational had all necessary bonds in place. A copy of the bond from West Bend Mutual Insurance company for the Plaintiff's project was attached to the amended contract. *See* Plaintiff's Exhibits H and I. The payment schedule set forth in the amended contract reflected the $12,100 previously paid and provided for a payment of (a) 10% "after the post holes"; (b) 30% "after roof framed"; (c) 20% "after catwalk enclosed"; (d) 25% "after siding installed and (e) 15% "after substantial completion."

Sunsational finally started construction work on the project on November 16, 2009. On November 18, 2009, following assurances from Broska that the bond was in place, Plaintiff wrote a check made payable to Sunsational in the amount of $2,370.50 with a notation that it was a "deposit only". Plaintiff credibly testified that the same pattern of demand for payment, reassurance from Mr.

Broska regarding the existence of the bond and the ability to work through the winter occurred each time before Plaintiff wrote Sunsational a check.

For instance, on December 22, 2009, Sunsational's office manager called Plaintiff to request payment. Plaintiff contacted Broska and Broska again assured Plaintiff that the bond was in place to cover him in the event Sunsational did not complete the work. Thus, Plaintiff made payment in the amount of $7,111.50 to Sunsational although the work had not progressed to Plaintiff's satisfaction.

On December 28, 2009 a new crew appeared at Plaintiff's home to work on the project. Again the office manager called and asked for payment. Plaintiff refused until Broska came to his house on December 29, 2009 and assured Plaintiff that the bond had been renewed for 2010 and that work would continue quickly at this point. Broska provided a hand written receipt to Plaintiff. *See* Plaintiff's Exhibit W. In reliance on Broska's representations, Plaintiff wrote a check in the amount of $4,507.77 made payable to Sunsational. In addition, Plaintiff scheduled two weeks off of work in early January 2010 to allow the workers access to the interior as required by the work Broska represented would be done week of 12/28/09. *See* Plaintiff Exhibit W.

Sunsational never returned to work on the Plaintiff's project. Initially, the reason given to Plaintiff was the winter weather.

In total, Plaintiff made payments in the amount of $26,089.77 to Sunsational.

As it turned out, and as Broska was aware, the premium for the bond had not been paid and it was cancelled in November 2009 as the result of nonpayment. *See* Plaintiff's Exhibits S and T. Broska did not tell Plaintiff that the Bond had been cancelled. Rather he continued to represent to Plaintiff that the Bond was in place and that it would be or had been renewed for 2010.

In addition, in early January 2010, Mr. Broska took employment with Whitesell Fasteners.

In March 2010, Broska finally indicated to Plaintiff that Sunsational would not finish the project.

Broska has not produced receipts for payment of materials he says were used in Plaintiff's project.

John Deel, the replacement contractor Plaintiff hired to complete the work started by Sunsational, testified that the value of the labor and materials expended on the project by Sunsational was no greater than $7,500. Plaintiff paid John Deel, the replacement contractor, $39,410.13 to complete the project.

DISCUSSION

Debts for money, property, or services to the extent obtained, by false pretenses, a false representation, or actual fraud are excepted from a debtor's chapter 7 discharge. 11 U.S.C. § 523(a)(2)(A). As exceptions to discharge are strictly construed against the creditor, a creditor 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 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. *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998); *Longo v. McClaren (In re McLaren*), 3 F.3d 958, 961 (6th Cir. 1993).

[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.

> A "false pretense" involves an implied misrepresentation or conduct intended to create or foster a false impression. *In re Cole*, 164 B.R. 951, 953 (Bankr.N.D.Ohio 1993) (citing *In re Begun*, 136 B.R. 490 (Bankr.S.D.Ohio 1992)); *In re McCoy*, 114 B.R. 489, 490 (Bankr.S.D.Ohio 1990). By comparison, a "false representation" involves an expressed misrepresentation by a debtor. *In re Begun, id.* (citing *In re Dunston*, 117 B.R. 632, 639–40 (Bankr.D.Colo.1990)). Notably, a debtor's silence may constitute a materially false representation thus prohibiting discharge of indebtedness. *In re Begun, id*. (citing *In re McCoy*, 114 B.R. at 489). 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 Cole*, 164 B.R. 951, 953 (citing *United States v. Lichota*, 351 F.2d 81 (6th Cir.1965), cert. denied, 382 U.S. 1027, 86 S.Ct. 647, 15 L.Ed.2d 540 (1966)).

Blascak v. Sprague (In re Sprague), 205 B.R. 851, 859 (Bankr. N.D. Ohio 1997).

In construction cases, generally fraud or misrepresentation is proven in one of two ways. *In re Henderson*, 423 B.R. 598,622 (Bankr. N.D. NY 2010) (dismissing pro se homeowners' complaint under 523(a)(2)(A) for failure to state a claim). "First, to show that the debtor entered into the contract with the intent of never complying with the terms; or second, that there was an intentional misrepresentation as to a material fact or qualification when soliciting or obtaining the work. ... Substandard performance or a mere breach of the construction contract do not rise to the level of fraud necessary to except the debt from discharge." *Id.*

In this case, the Plaintiff met his burden of showing several material misrepresentations by Broska. First, Broska made representations regarding how payments would be used. In particular the initial payment of $12,100. Deel's Credible testimony is that the total value of the labor and materials used by Sunsational was approximately $7,000 versus the over $26,000 Plaintiff paid to Sunsational. Second, on multiple occasions, Broska represented that a bond was in place and would protect the Plaintiff. Broska knew that Plaintiff would not have proceeded with the project without a bond in place. Broska reassured Plaintiff that the bond was in place in order to induce the Plaintiff

to make payments on November 18, 2009 in the amount of $2,370, on December 22, 2009 - $7,111.50 and on December 29, 2009 in the amount of $4,741. At the time he made these representations, he was or should have been aware that there was no bond in place. He did not tell Plaintiff that the bonds had not been paid for nor that the bond had been cancelled. Broska also represented to Plaintiff that winter weather would not stop Sunsational's work on the project, but in March 2010, Broska said it was because of the winter weather that the work on the project had stopped on December 28, 2010. If it was winter weather that stopped Sunsational's work, than Broska's representation that weather would not impact this project were false. If it wasn't winter weather, but rather a cessation of Sunsational's business operations due to ongoing financial difficulties, it is difficult to believe that on December 29, 2010, when Broska convinced Plaintiff to write one more check by telling Plaintiff that the bond was in place and that work would move quickly now, that Broska did not know those statements were false. Broska made material representations that, at the time, he knew were false or were made gross recklessness as to their truth.

[2] The debtor intended to deceive the creditor.

Furthermore, the Court finds that Plaintiff proved that Broska intended to deceive him when he made those material misrepresentations. Debtor's rarely admit they intended to deceive, therefore, when there is no direct testimony regarding the debtor's intent, the intent of the debtor can be inferred from the evidence presented to the Court. *See Fifth Third Bank v. Collier* (*In re Collier*), 231 B.R. 618, 623 (Bankr. N.D. Ohio 1999)*; Blascak v. Sprague* (*In re Sprague*), 205 B.R. 852, 861 (Bankr. N.D. Ohio 1997).

> An intent to deceive may logically be inferred from a false representation or false pretense which the debtor knows or should know will induce another individual to part with property (or services).*First Nat'l. Bank v. Kimzey*, 761 F.2d 421, 424 (7th

> Cir.1985). A "false pretense" involves an implied misrepresentation or conduct intended to create or foster a false impression. *Howard & Sons, Inc. v. Schmidt (In re Schmidt),* 70 B.R. 634, 640 (Bankr.W.D.Ind.1986); *Minority Equity Capital Corp. v. Weinstein (Matter of Weinstein),* 31 B.R. 804, 805 (Bankr. E.D. N.Y.1983). A false pretense has been defined to include a "mute charade," where the debtor's conduct is designed to convey an impression without oral representation. *In re Thomas,* 12 B.R. 765, 769 (Bankr. N.D. Ga.1981). A "false representation," on the other hand, is an expressed misrepresentation. It need not be a written misrepresentation; oral misrepresentations have been found to be actionable. *In re Falk of Bethlehem,* 3 B.R. 266, 274 (Bankr D.N.J.1980); *See* L. King, 3 *Collier on Bankruptcy,* Para. 523.08, 523–48 (15th ed. 1989). Even a debtor's silence may constitute a materially false misrepresentation prohibiting discharge of the indebtedness.

James v. McCoy (*In re McCoy*), 114 B.R. 489, 498 (Bankr. S.D. Ohio 1990).

In this instance, the Court infers from the evidence presented that Broska intended to deceive the Plaintiff. Broska cites to two cases for the proposition that there is a sliding scale between performance and intent to defraud :

> An often employed indicia, especially with respect to fraudulent actions under § 523(a)(2)(A), centers on a debtor's subsequent conduct. *Williamson v. Busconi*, 87 F.3d 602, 603 (1st Cir.1996). Of particular evidentiary weight in this regard, especially in situations such as this involving a debtor/contractor, is whether the debtor undertook any of the steps necessary to perform as promised. *Mack v. Mills* (*In re Mills*), 345 B.R. 598, 605 (Bankr.N.D.Ohio 2006). In this way, a type of an inverse relationship can be found. On the one side, a debtor acting with an intent to defraud will usually not undertake any significant measures toward the performance of their obligation. *Accord Anastas v. American Savings Bank* (*In re Anastas*), 94 F.3d 1280, 1285 (9th Cir.1996). Conversely, the opposite is also logically true—when a debtor undertakes significant steps to perform as promised, inferences of fraud are muted. Thus, as a general rule, this Court has observed that the greater the extent of a debtor's performance, the less likely it will be that they possessed an intent to defraud. Id.

In re Rahrig, 373 B.R. 829, 834 (Bankr. N.D. Ohio 2007) (finding that inference of fraud negated in part by the fact that homeowner did not permit contractor to return to the premises to complete work); accord *In re Mills*, 345 B.R. 598, 605 (Bankr. N.D. Ohio 2006) (finding the considerable time and effort put into the renovation by the debtor muted any inference of fraud).

Sunsational did start work on the project. However, in this case, the inference of fraud, that might be negated by performance, is not negated in this case in light of the state of Sunsational's financial affairs, Broska's pattern of making repeated misrepresentations to the Plaintiff concerning the bond, and the ability to complete the project completely. Having considered the evidence in this case and weighed the credibility of the witnesses, the Court finds that Plaintiff proved that Broska intended to deceive him when he made those material misrepresentations.

[3] The creditor justifiably relied on the false representation and , as a result, plaintiff suffered a loss.

Justifiable reliance is different from reasonable reliance. *Fellows, Read & Associates, Inc. V. Rieder, 194 B.R. 734* (S.D. N.Y. 1996) aff'd 116 F.3d 465 (2nd Cir. 1997). Justifiable reliance is a subjective standard; it is a less stringent standard in between actual reliance and reasonable reliance. *Id.*

> Although the plaintiff's reliance on the misrepresentation must be justifiable ... this 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. *Mans* at ——, 116 S.Ct. at 444 (citing Restatement (Second) of Torts, § 545A, Comment b (1976)).

In re Sprague, 205 B.R. at 858. In *Sprague,* the bankruptcy court held, "a plaintiff has met the new standard of justifiable reliance if the plaintiff was justified in relying upon representations whose falsity, although ascertainable from some investigation, are nevertheless not ascertainable from a cursory glance or appearance to one of like knowledge and intelligence. *Field v. Mans*, 516 U.S. at ——, 116 S.Ct. at 444." *In re Sprague*, 205 B.R. at 862. Plaintiff met this burden of proof. The evidence clearly shows that plaintiff relied on Broska's representations and did so justifiably. As a result of his reliance on Mr. Broska's misrepresentation Plaintiff suffered loss.

Corporate Form

As Plaintiff notes, Broska can be personally liable for the debt to Plaintiff. *See Automart v. Wendt (In re Wendt), 355 B.R. 769, 772 (Bankr. W.D. Mo. 2006)* citing *In re Sobel*, 37 B.R. 780, 786 (Bankr.E.D.N.Y.1984) (The court ... stated that "[n]othing is more commonplace than for the owners of a small closely-held corporation, to engage in fraud for the benefit of the corporation rather than for themselves directly. That a corporation is the beneficiary does not make the fraud any less." *See also, In re Dallam*, 850 F.2d 446, 449 fn. 2 (8th Cir.1988). Therefore, it is possible that Debtor could be held personally liable on the transaction at issue if he either participated in it or benefitted by it.") *See also, 6050 Grant, LLC v. Hanson (In re Hanson),* 428 B.R. 475, 493 (Bankr. N.D. Ill. 2010).

CONCLUSION

Broska made representations to the Plaintiff that were materially false at the time they were made. He did so with the intent to deceive the Plaintiff. The Plaintiff was justified in his reliance on Broska's representations and as a result, Plaintiff has suffered loss, in whatever amount a state court determines appropriate. For these reasons, the Court determines that pursuant to 11 U.S.C. § 523(a)(2)(A), the debt owed to Plaintiff, in whatever amount a state court determines is appropriate, is excepted from Broska's discharge.

# # #

cc (*via* electronic mail):

Joseph Spoonster, Counsel for Plaintiff-

Scott Scharf, Counsel for Defendant