

IT IS SO ORDERED.

Dated: 03:32 PM August 2 2012



UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|----------------------|---|---------------------------|
| IN RE: |) | CASE NO. 11-52963 |
| |) | |
| SHERRI J. NICODEMUS, |) | ADV. NO. 11-5189 |
| |) | |
| Debtor. |) | CHAPTER 13 |
| |) | |
| LAVERNE K. LOWRY, |) | JUDGE MARILYN SHEA-STONUM |
| |) | |
| Plaintiff |) | |
| |) | MEMORANDUM OPINION |
| v. |) | |
| |) | |
| SHERRI J. NICODEMUS, |) | |
| |) | |
| Defendant. |) | |
| |) | |

This matter is before the Court on the complaint (the “Complaint”) of Laverne K. Lowry (“Plaintiff”) seeking a determination that the debt owed to him by Sherri J. Nicodemus (the “Debtor” or “Defendant”) is non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (a)(7).¹ The Plaintiff also moved at the close of trial to have the Court conform the Complaint to

¹ At the conclusion of the trial, the Plaintiff conceded that the debt at issue was not payable to a government entity and therefore, 523(a)(7) is not applicable to the facts of this case.

the evidence presented and find that the debt owed by Defendant is excepted from discharge pursuant to 11 U.S.C. § 523(a)(6). Section 523(a)(6), which provides that a debt for willful and malicious injury to property will not be discharged, doesn't apply in this Chapter 13 case at the moment.² Section 1328(a) governs the debtor's discharge in this Chapter 13 case. Pursuant to § 1328(a), the discharge in a Chapter 13 will not discharge a debtor for any debt for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual. 11 U.S.C. § 1328(a)(4). There is no assertion of personal injury. Thus, § 1328(a)(4) is also not applicable to the case at hand.

On May 1, 2012, a trial was conducted in this matter. During the trial, the Court heard testimony from the Plaintiff and the Defendant. The Court also received evidence in the form of exhibits and stipulations.

This proceeding arises in a case referred to this Court by Order No. 2012-7 entered in this District on April 4, 2012. 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.

Based upon the parties' stipulations ("Stipulations") [docket #10], the testimony and evidence presented at trial, the arguments of counsel, the pleadings, and pursuant to Fed. R. Bankr. P. 7052, the Court determines that the debt the Debtor owes Plaintiff is non-dischargeable. The Court makes the following findings of fact and conclusions of law.

² The § 523(a)(6) claim is not ripe for decision because "resolution of the issue has no meaningful effect until and unless the debtor moves for hardship discharge, a contingency that occurs only in a small percentage of Chapter 13 cases." In re Liescheidt, 404 B.R. 499, 505 (Bankr. C.D.Ill. 2009).

FACTS

On July 29, 2011 (the “Petition Date”), Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code.

In her schedules, the Debtor listed Plaintiff as the holder of an unsecured non priority claim in the amount of \$32,736.79 based on a 2007 civil judgment. The Debtor did not list the debt as contingent, unliquidated or disputed.

Prior to the Petition Date, the Debtor was married to the Plaintiff’s son, John Lowry. Plaintiff and John Lowry had an extensive collection of model trains. In large part, the collection of trains was kept at the marital home occupied by the Debtor and her husband, John Lowry. On April 27, 2007, John Lowry died. Following John Lowry’s death, a dispute arose between the Plaintiff and the Debtor over the train collection.

On July 18, 2007, Plaintiff filed suit against Defendant in the Portage County, Ohio Court of Common Pleas (the “Common Pleas Court”) seeking more than \$25,000 in damages resulting from the Defendant’s alleged conversion of the train collection, which Plaintiff said belonged to him (the “Litigation”).

On July 31, 2007, the Common Pleas Court entered an order agreed to by Plaintiff and Defendant restraining and enjoining certain action with respect to the train collection. Specifically, the Order provided that Defendant was “restrained and enjoined from selling, transferring, removing, moving, encumbering, or otherwise disposing of any trains, accessories, train memorabilia, displays or other personal property associated with the train collection located at the [Defendant’s] premises.” Stipulations, Exhibit B.

In Portage County, Ohio Probate Court, the Defendant was appointed Administratrix of her late husband's estate in September 2007.

On November 5, 2007, a Magistrate Judge of the Common Pleas Court entered an order in the Litigation which set forth the parties' agreement to have Amy Richards conduct an inventory of the train collection.

Following the completion of the inventory, on July 13, 2009, Plaintiff and Defendant, individually and as Administratrix of John Lowry's estate, entered into a settlement agreement resolving the Litigation and matters in the Probate Court (the "Settlement Agreement"). The Settlement Agreement identified certain parts of the train collection as belonging to Plaintiff and required Defendant to deliver possession of those parts to Plaintiff. The remainder of the train collection was to be sold at auction and the proceeds were to be split among the parties to the Settlement Agreement.

On August 5, 2009, the Common Pleas Court entered an order dismissing the Litigation "pursuant to separate settlement agreement entered by the parties" with prejudice. Defendant Exhibit E.

Believing Defendant failed to comply with the terms of the Settlement Agreement, Plaintiff filed a motion to enforce the Settlement Agreement in Common Pleas Court. Defendant admits that terms of the Settlement Agreement were not fully implemented and certain portions of the train collection were not delivered to Plaintiff. (Paragraph 14 of the Complaint, which was admitted by the Debtor in Paragraph 7 of her answer, provides "Defendant failed to return the specific trains to Plaintiff as agreed and on September 23, 2009, Plaintiff filed a Motion to Enforce Settlement Agreement.")

The parties stipulated that at various points in time, portions of the train collection were sold by Defendant. Stipulation #6. At trial, Defendant testified that she sold some of the train collection before she entered into the Settlement Agreement. She says she sold trains belonging to “John only” and those trains she purchased through ebay. According to the Debtor, the purchaser was a friend of her now estranged husband.³ She said the total of the sale proceeds was less than \$500. She does not have a receipt showing what was sold or for how much any item was sold. The Defendant testified that her attorneys told her she could sell the trains, without court order, despite the pendency of the Litigation and the matters in Probate Court. She claims to have used the proceeds of sale toward her monthly mortgage payment.

In response to the Motion to Enforce, the Common Pleas Court entered several orders regarding the failure to comply with the Settlement Agreement, including, an order directing compliance with the Settlement Agreement (Stipulation Exhibit G) and an order finding Defendant in contempt for failure to comply with the Settlement Agreement and the prior order of the Common Pleas Court. In addition, the Common Pleas Court entered a judgment for Plaintiff against the Defendant in the amount of \$32,186.90 plus interest, consisting of \$9,386.90 in damages for failure to comply with the Settlement Agreement and \$22,800.00 in sanctions for contemptuous failure to comply (the “Judgment”).

On November 3, 2011, the Plaintiff timely filed a complaint with this Court asking the Court to determine this debt should not be discharged. The Plaintiff argues that the Defendant, at the time she entered into the Settlement Agreement, did not intend to comply with the terms of the Settlement Agreement and “fraudulently induced Plaintiff into settling the Litigation. Therefore, pursuant to 11 U.S.C. § 523(a)(2)(A), this debt should be excepted from discharge.

³ In late 2007 or early 2008, the Defendant began living with her now estranged husband in the marital home she had shared with the Plaintiff’s son.

At trial, Defendant, citing *Connelly v. Studor*, 2008 WL 850169 (Ohio App. 7th Dist. 2008), argued that the Common Pleas Court had no jurisdiction to enforce the Settlement Agreement. Therefore, Defendant argues the orders finding her in contempt and entering judgment against her are a nullity and this Court cannot consider the orders of the Common Pleas Court stemming from the Motion to Enforce Settlement Agreement in making its ruling.

In *Connelly*, the court wrote,

Trial courts possess the authority to enforce a settlement agreement voluntarily entered into by the parties to a lawsuit. *Gibson v. Meadow Gold Dairy* (2000), 88 Ohio St.3d 201, 205, citing *Mack v. Polson Rubber Co.* (1984), 14 Ohio St.3d 34. However, a trial court will lose the authority to proceed in a matter when the court unconditionally dismisses an action as the court no longer retains jurisdiction to act. *State ex rel. Rice v. McGrath* (1991), 62 Ohio St.3d 70.

When an action is dismissed pursuant to a stated condition, such as the existence of a settlement agreement, the court retains the authority to enforce such an agreement in the event the condition does not occur. *State ex rel. Flynt v. Dinkelacker*, 156 Ohio App.3d 595, 598, 2004-Ohio-1695. A conditional dismissal either incorporates the settlement into the dismissal judgment or the court makes a specific indication that it is retaining jurisdiction for enforcement purposes. *Lamp v. Goettle, Inc.*, 1st Dist. No. C-040461, 2005-Ohio-1877, ¶ 10, citing *Grace v. Howell*, 2d Dist. No. 20283, 2004-Ohio-4120, ¶ 12.

When moving for enforcement of a settlement agreement and there are asserted factual disputes concerning the existence or the terms of a settlement agreement, a hearing is required to determine whether the agreement constituted a valid contract. *Palmer v. Kaiser Found. Health* (1991), 64 Ohio App.3d 140; *Estate of Berger v. Riddle* (Aug. 18, 1994), 8th Dist. Nos. 66195, 66200.

Here, in the trial court's April 17, 2006 dismissal, the court not only incorporated the settlement agreement by reference, but also specifically retained jurisdiction to enforce the settlement. Thus, while the dismissal was a final order, it was also a conditional dismissal. Accordingly, Judge Olivito's April 6, 2007 indication that Judge Martin lacked jurisdiction on September 27, 2006, to rule on the motion to enforce was incorrect.

Id.

In the eleventh district of Ohio, the appellate court found that a dismissal entry which stated, "Case settled and dismissed" was conditional. *Hines v. Zofko*, 1994 WL 117110 (Ohio Ct. App. 1994). The court explained that the "judgment entry which dismissed the instant case stated: 'Case settled and dismissed.' It did not merely state that the case was dismissed. Thus, the dismissal was conditioned upon the settlement of the case. When the settlement was not performed, the condition upon which the action was dismissed failed, and the trial court retained authority to proceed in the action." *Id.* In addition, in *State of Ohio, ex. Rel., Continental Mortgage Servs., Inc. v. Kilbane-Koch*, 1999 WL 14002 (Ohio Ct. App. 1999), the eighth district court of appeals agreed that the determination of whether a dismissal deprived the trial court of jurisdiction to enforce a settlement agreement is dependent upon the terms of the dismissal order. *Id.* at *2 (finding jurisdiction to hear motion to enforce settlement agreement where dismissal entry provided "Pursuant to the settlement and agreement All claims ... are settled and dismissed, with prejudice.")

In this case, the dismissal was specifically made "pursuant to a settlement agreement." Based on the terms of the dismissal, I determine that the state court had jurisdiction to entertain Plaintiff's motion to enforce the settlement agreement. The judgment of the state court is not void.

The Defendant also moved at trial to dismiss Count 1 of the Complaint, which asserts a claim for relief under § 523(a)(2), for failure to adduce sufficient evidence. The Court denied the motion for the reasons stated on the record.

LAW AND DISCUSSION

Plaintiff's complaint alleges that the debt owed by the Debtors is non-dischargeable under § 523(a)(2)(A).⁴ Pursuant to § 523(a)(2)(A):

A discharge...does not discharge an individual debtor from any debt—for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained, by—false pretenses, a false misrepresentation, or actual fraud, other than a statement respecting the debtor's or an insider's financial conditions.

In *Sanderson Farms, Inc. v. Gasbarro*, 299 Fed.Appx. 499, 504 (6th Cir. 2008), the Sixth Circuit Court of Appeals stated, “discharge exceptions, such as § 523(a)(2)(A) ... are narrowly construed in favor of the debtor. *Meyers v. I.R.S. (In re Meyers)*, 196 F.3d 622, 624 (6th Cir.1999). The creditor bears the burden of proving by a preponderance of the evidence that a discharge exception applies. *Id.*”

The intent of § 523(a)(2)(A) is to “except from discharge any debt which arises from a debtor's dishonest conduct, thereby implementing a fundamental bankruptcy policy that only those debts which are honestly incurred may be discharged.” *In re Finnegan*, 428 B.R. 449, 452-53 (Bankr. N.D. Ohio 2010), citing *EDM Machine Sales, Inc. v. Kay Harrison (In re Harrison)*, 301 B.R. 849, 853 (Bankr. N.D. Ohio 2003).

In order to sustain a finding of nondischargeability under § 523(a)(2)(A), these four elements must exist: (1) a material misrepresentation which the debtor knew, at the time, to be false or which was 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) the creditor's reliance was the proximate cause of its loss.

Rembert v. AT & T Universal Card Servs., Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir.1998) (footnote and citation omitted).

⁴ It was also confirmed at one of the pre-trial conferences that Plaintiff intended to proceed under § 523(a)(2)(A) only.

Material Misrepresentation and Intent to Decieve

Defendant misrepresented to Plaintiff that she could and would deliver the trains as set forth in the Settlement Agreement. Her admission, at trial, that she had already sold some trains before she entered into the Settlement Agreement and that she didn't really know which ones makes clear that either she knew at the time she could not comply with the Settlement Agreement or that she entered into the Settlement Agreement without regard for whether she could comply with it. Through her testimony, the Defendant attempted to paint a picture that she tried to and intended to deliver the trains required by the Settlement Agreement, but that she had been taken advantage of by her now estranged husband. That picture is belied by her testimony that she had possession of the train collection and the opportunity to become aware of what trains were in her possession. She did not review the inventory, she did not compare what was in her possession to the exhibit lists to the Settlement Agreement.

“Where a person knowingly or recklessly makes false representations which the person knows or should know will induce another to act, the finder of fact may logically infer an intent to deceive.” *Bletnitsky v. Jairath (In re Jairath)*, 259 B.R. 308, 315 (Bankr. N.D. Ill. 2001). Because direct proof of fraudulent intent is often unavailable, fraudulent intent may be inferred from the surrounding circumstances. *See Fifth Third v. Collier (In re Collier)*, 231 B.R. 618, 623 (Bankr. N.D. Ohio 1999).

Based on the evidence presented at trial, the Court finds that either the Defendant did not intend to comply with the Settlement Agreement or she entered into it with reckless disregard to her ability to perform as promised. Either way, by entering into the Settlement Agreement, the Defendant made a material misrepresentation with the intent to deceive.

Justifiable Reliance and Proximate Cause of Loss

The evidence at trial established that the Plaintiff relied on the Defendant's representation that she would and could comply with the terms of the Settlement Agreement. Because the trains in dispute were last in the possession or control of the Defendant, the Court finds the Plaintiff's actually relied on the Defendant's representation and said reliance was justifiable. As a result of the Defendant's representations, upon which the Plaintiff justifiably relied, the Plaintiff suffered damages.

CONCLUSION

For the reasons set forth above, the Court finds that the debt Defendant owes to Plaintiff is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A).

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cc (via electronic mail):

| | | |
|-----------------|-----------------------|-----------|
| Mike Moran | <i>as counsel for</i> | Debtor |
| Walter Lawrence | <i>as counsel for</i> | Plaintiff |