THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 98-14039
	)	
RAYMOND J. KACZMARCZYK and SHARON M. KACZMARCZYK,	)	Chapter 7
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
	)	
ROBERT R. HARTMAN, dba HARTMAN COMMUNICATIONS GROUP,	)	Adversary Proceeding No. 98-1383
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
RAYMOND KACZMARCZYK,	)	
	)	
Defendant.	)	

The Plaintiff-Creditor, Robert R. Hartman dba Hartman Communications Group, asks in this Complaint that a debt owed by the Debtor-Defendant, Raymond Kaczmarczyk, be declared non-dischargeable under 11 U.S.C. § 523(a)(2)(A). The dispute arises out of a transaction in which Mr. Hartman loaned money to a company owned by the Debtor. The Debtor guaranteed the loan. The loan was to be secured by a mortgage, but the Debtor did not execute or record the mortgage. The property that was to secure the loan was sold and Mr. Hartman did not receive any proceeds. Mr. Hartman claims that the Debtor never intended to file the mortgage despite his agreement to do so. He requests that the debt be found non-dischargeable in the amount of $19,950 based on this alleged false representation. Trial was held on June 29, 1999.

JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered in this District on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS

The parties stipulated to certain facts and exhibits. (Docket 17,19). Robert R. Hartman dba Hartman Communications Group ("the Plaintiff" or "Mr. Hartman") presented the rest of his case through his trial testimony and that of the Debtor as if on cross-examination. The Debtor also testified on his own behalf. To the extent that the facts are disputed, this recitation reflects the version that the Court found to be credible after reviewing the evidence and considering the demeanor of the witnesses.

The Debtor owned a corporation called Tradeworks Designers & Builders, Inc., which was in the business of designing and building homes ("Tradeworks"). Mr. Hartman is in the marketing and communications business. The two men met in about 1990 when their businesses became neighbors in an office building. They had a casual business relationship over the years. Tradeworks did some remodeling work for Mr. Hartman and he provided some marketing services for Tradeworks. They were not personal friends, although they were friendly. Apart from the remodeling job, the Debtor visited Mr. Hartman's home five or six times over the years primarily to discuss financial matters.

At some point before November 1997, the Plaintiff's son, Robert Hartman II ("Rob")[1], became the Chief Executive Officer at Tradeworks. He was responsible for securing short and long-term financing and marketing services for the company. Rob participated in at least some of the financial discussions that took place in his father's house.

Tradeworks had serious financial difficulties starting in the summer of 1997. In November 1997, Rob asked his father if he would loan $17,000 to Tradeworks because the company was in need of short term cash. Mr. Hartman agreed to do so by taking cash advances on two of his credit cards. Rob then approached the Debtor and asked if $17,000 would help the business. The Debtor never asked Mr. Hartman to loan this money and the two men had no direct conversations about this issue. Instead, Rob initiated the transaction and served as the go-between. Rob explained to the Debtor that the transaction would be a loan from Mr. Hartman to Tradeworks to be secured by a mortgage on real estate owned by Tradeworks ("the Property"). Tradeworks was in the process of building a home on the Property. Both the Debtor and Mr. Hartman understood from Rob that the loan would be secured in this fashion. The Debtor and Mr. Hartman also both understood that Rob was acting as a Tradeworks employee in this transaction.

Mr. Hartman gave a check in the amount of $17,000 to Rob (sometimes referred to as "the Loan"). Rob in turn gave the money to the Debtor with instructions to deposit it in the bank and draw two checks: one in the amount of $2,500 to Mr. Hartman and the balance to

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[1] Because of the similarity in names between father and son, Robert Hartman II will be referred to by his first name.

Tradeworks.[2] The Debtor drafted a Cognovit Note, which Rob reviewed and edited. The Debtor signed the Note both personally and on behalf of Tradeworks on November 18,1997 ("the Note"). (Joint Exh.1). Rob gave the Note to his father in exchange for the check. The Note stated that it was in the principal amount of $17,000 with interest at the "flat rate" of 15%. The Note also provided that Tradeworks would give certain instructions to an escrow agent about paying the Note out of the proceeds of a sale. Although the Note terms are vague, the parties agree that these instructions related to the Property. The Debtor did send a letter dated November 19, 1997 from Tradeworks to an escrow agent with instructions to pay $19,550 to Hartman Communications Group from the proceeds of sale of the Property. (Joint Exh.3; Stip.5).

The remaining item was the mortgage. As the Debtor had never drafted or filed a mortgage, it took him a few days to draft the document. (Joint Exh. 2). He left the draft on Rob's desk with a note asking him to review it and get back to him. The Debtor then intended to sign the mortgage in the presence of the office manager, who was a notary, and have it filed. When Rob did not respond to the note and did not come to work, the Debtor called him several times. The phone calls were both to follow up on the mortgage and to see what Rob's general intentions were with respect to continuing to work at Tradeworks. Rob did not reply to the messages.

Tradeworks' financial condition worsened and the next month the Debtor vacated the office space and moved the business, papers and all, into his home. In the transition, the Debtor forgot about the mortgage and it was never signed or recorded.

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[2] The $2,500 was apparently viewed by Mr. Hartman as some kind of brokers fee, although the testimony on this point was inconclusive.

The Note states that the Property is encumbered by a first mortgage to Strongsville Savings Bank and a second mortgage to Douglas W. Smith. There was no evidence that Mr. Hartman asked for any information about the value of the Property or the amount of these two mortgages before he agreed to make the Loan. There was no evidence that he requested a mortgage as a condition to making the Loan or that he would not have made the Loan without a mortgage being granted. And there was no evidence that Mr. Hartman asked to see an executed mortgage at the time of this transaction.

In January 1998, the Debtor concluded that Tradeworks did not have the ability to finish building the home on the Property. Tradeworks then entered into a transaction with Sweda and Sweda ("Sweda"), a real estate broker that did business with Tradeworks. Tradeworks gave Sweda a mortgage on the Property which recited that it was in exchange for $6,000 consideration. There was no evidence as to the details surrounding that mortgage or the underlying obligation, although the parties appear to agree that the mortgage was recorded. Sweda bought the Property, finished the house, and closed the sale to the homeowner. At the closing, the first and second mortgages were paid, together with taxes and closing costs. The net amount paid to Sweda as the seller was $453.46. There was no evidence that the Sweda mortgage was paid out of the proceeds. (Joint Exh. 7). Mr. Hartman did not receive any money from the sale of the Property and the Note was not paid according to its terms.

THE POSITIONS OF THE PARTIES

Mr. Hartman argues that the debt should not be discharged because the Debtor made a false representation in connection with it. The argument is that the Debtor never intended to record the mortgage at the time they entered into the transaction. Mr. Hartman looks to this

factual sequence to support his position: the Debtor agreed that Tradeworks would grant a mortgage on the Property, the Debtor did not cause that mortgage to be granted, therefore, the Debtor never intended to grant the mortgage at the time he signed the Note and accepted the Loan. Mr. Hartman also argues that he and the Debtor had a long-standing relationship and that the friendship establishes that he justifiably relied on the representation that the mortgage would be given, even though he did not take any concrete steps to see that it was done. Finally, he contends that he suffered a loss because he was not paid out of the Property sale proceeds. While he concedes that those proceeds would have been insufficient to pay the Loan, his counsel argued in closing that he was still damaged because with the third mortgage, he would have been able to negotiate at the closing for some payment.

The Debtor contends that he did intend for the mortgage to be granted, but that circumstances caused it to be forgotten. He says that Mr. Hartman did not prove a material misrepresentation, intent, justifiable reliance, or damage.

DISCUSSION

A discharge under 11 U.S.C. § 727(b) does not discharge an individual from a 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, other than a statement respecting the debtor's . . . financial condition; . . . .

11 U. S.C. § 523(a)(2)(A). Exceptions to discharge are to be narrowly construed against the creditor and in favor of the debtor based on the Bankruptcy Code's policy to give honest debtors a fresh start. *Mfrs. Hanover Trust Co. v. Ward (In re Ward)*, 857 F.2d 1082 (6th Cir. 1988).

To have a debt declared non-dischargeable under this section, a creditor must prove that the debtor obtained property through a material misrepresentation known to the debtor to be false when made or made with gross recklessness as to its truth; the debtor intended to deceive the creditor; the creditor justifiably relied on the misrepresentation; and the reliance was the proximate cause of the loss. *Rembert v. A T & T Universal Card Servs., Inc. (In re Rembert),* 141 F.3d 277 (6th Cir. 1998). The debtor's intent is measured subjectively. *Id.* The question is whether it is more probable than not that the debtor had a fraudulent intent, taking into account all of the circumstances. *Id.* The creditor has the burden of proving each element under § 523 by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991).

Mr. Hartman did not prove any element of § 523(a)(2)(A). First, he did not prove that the Debtor made a material misrepresentation when he agreed to grant a mortgage in connection with the Loan. The Debtor's explanation about drafting the mortgage and leaving it for Rob to review was not contradicted in any way by the Plaintiff. If the Debtor did not intend to follow through on the mortgage, there would be no reason for him to draft it and leave it for Rob. There also would not have been a reason for the Debtor to give written instructions to the escrow agent to pay Mr. Hartman from the sale proceeds. The fact that the Debtor agreed to grant a mortgage, but did not do so, is insufficient under these circumstances to prove that the Debtor never intended to grant the mortgage.

Next, even if there had been a material misrepresentation with intent to deceive, Mr. Hartman did not prove that he relied on the agreement to grant the mortgage in making the Loan. As noted, there was no testimony that Mr. Hartman would not have loaned the money but for the

mortgage. Also, there was no testimony that Mr. Hartman even asked for any information about whether there was equity in the Property in November 1997. His suggestion that the parties had a special relationship that made any reliance justifiable is also not supported by the evidence. Mr. Hartman knew very little about the Debtor personally beyond the fact that he was married and had children. He had never been to the Debtor's home and their social relationship was limited to going out for drinks together. The testimony from both parties showed nothing more than a cordial business relationship between them. The special relationship that caused Mr. Hartman to make the Loan was not with the Debtor, it was with his son Rob.

Finally, there was no evidence that any justifiable reliance proximately caused a loss in the amount of $19,950. A properly recorded mortgage in favor of Mr. Hartman would have come in time before the mortgage to Sweda. There was no evidence that the Sweda mortgage was paid out of the proceeds and there was no testimony as to the priority that would have been given to a Hartman mortgage at the closing. While counsel argued that the closing statement showed $7,000 paid to Sweda unrelated to the mortgage and that those funds would have been available for Mr. Hartman, the evidence did not establish that. The most that the evidence showed was that $453.46 might have been available to apply toward the debt if the Note had been secured by a mortgage on the Property.

CONCLUSION

The Plaintiff, Robert R. Hartman dba Hartman Communications Group, did not meet his burden of proof under 11 U.S.C. §523. A separate judgment will be entered granting judgment in favor of the Defendant, Raymond Kaczmarczyk, on the Complaint.

Date: 30 Jun 1999

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on:

Alan C. Hochheiser,Esq.
David O. Simon, Esq.
Marvin Sicherman, Trustee

Date: Joyce L Gordon, Secretary
By: 6/30/99

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NORTHERN DISTRICT OF OHIO
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In re:	)	Case No. 98-14039
RAYMOND J. KACZMARCZYK and SHARON M. KACZMARCZYK,	)	Chapter 7
Debtors.	)	Judge Pat E. Morgenstern-Clarren
ROBERT R. HARTMAN, dba HARTMAN COMMUNICATIONS GROUP,	)	Adversary Proceeding No. 98-1383
Plaintiff,	)	
v.	)	**JUDGMENT**
RAYMOND KACZMARCZYK,	)	
Defendant.	)	

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that Judgment on the Complaint is entered in favor of Defendant Raymond Kaczmarcyk.

Date: 30 Jun 1999

Pat E Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Alan C. Hochheiser, Esq.
David O. Simon, Esq.
Marvin Sicherman, Trustee

By: Joyce L. Gordon, Secretary
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