

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

IN RE:	)	CHAPTER 7
	)	
THOMAS RICHARD PIKE and	)	CASE NO. 97-60484
HOLLY KAY PIKE,	)	
	)	JUDGE RUSS KENDIG
Debtors.	)	
-----	)	
ALAN K. GOLDBERG,	)	ADV. NO. 02-6003
	)	
Plaintiff,	)	
	)	
v.	)	
	)	<b>MEMORANDUM OF DECISION</b>
THOMAS RICHARD PIKE,	)	
	)	
Defendant.	)	

In this adversary proceeding, Plaintiff Dr. Alan K. Goldberg (hereafter “Plaintiff”) seeks to have a debt owing him by Debtor Thomas Richard Pike (hereafter “Debtor”) deemed nondischargeable for alleged fraud. Plaintiff initiated the proceeding by filing a complaint January 7, 2002, which was subsequently amended on January 16, 2002. Debtor filed an answer and the matter came before the court for trial on July 8, 2002. Terrence L. Seeberger represented Plaintiff and Donald M. Miller represented Debtor. Following trial, both parties submitted post-trial briefs.

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and the General Order of Reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). The following are the court’s findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

**BACKGROUND**

Debtor filed a petition under Chapter 13 of the United States Bankruptcy Code on February 24, 1997. Prior and subsequent to the filing, Debtor operated a business known as

“Alpine, Inc.” (hereafter “Alpine”) which contracted to provide residential remodeling services. On or about March 22, 2000, Plaintiff and Debtor entered into a contract for remodeling services at Plaintiff’s home located at 5475 Peninsula Drive, N.W., Canton, Ohio. The home is architecturally designed and is unique because it has no square corners.

Debtor and Plaintiff were personally acquainted with one another and had known each other many years. Prior to the contract, both were members of the same country club and played golf together and socialized frequently.<sup>1</sup> When Plaintiff decided to pursue a remodeling project, he contacted Debtor. Upon discussing the project, Debtor agreed to provide remodeling services to Plaintiff.

The project involved the remodeling of Plaintiff’s tandem garage. After brainstorming ideas, Plaintiff and his wife ultimately decided, in addition to smaller projects, to de-tandemize the garage and add a bedroom and bath above the garage. On March 22, 2000, Plaintiff and Debtor signed a written contract memorializing the remodeling project and the contract price of \$94,977.00. *See* Exhibit 1. Debtor was to act as the general contractor for the project.

After signing the contract, Plaintiff and his wife changed their minds about the scope of the project and decided merely to expand the garage and use the tandem portion of the existing garage as a storage area. The plans for the second floor bedroom and bath were abandoned. The parties did not enter into a new written contract for this project. The change was the first change of *many* by Plaintiff and his wife,<sup>2</sup> none which were memorialized in writing. Eventually, the final project required Debtor to expand the garage and turn a portion of the tandem area into a family room with a view of the lake and an entranceway to the kitchen.

Debtor began work under the oral contract, but left the site in December 2000. Problems with the construction were identified, including use of the wrong insulation in the ceiling and installation of the wrong size drywall on the ceiling. Further, the parties now do

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<sup>1</sup> The relationship was such that Debtor discussed his marital problems with Plaintiff and eventually Plaintiff’s wife, a professional mediator, provided mediation services to Debtor and his wife.

<sup>2</sup> The changes not only affected the final product (storage room v. living room), but also affected the details. For example, both Plaintiff and Debtor testified that the living room was to originally contain an eight foot ceiling, but after the interior decorator saw the room, and recommended that it be raised, Plaintiff and his wife asked for the ceiling to be raised.

not agree on the scope of the work which was to be performed under the oral contract.<sup>3</sup> Plaintiff made substantial payments, in excess of \$100,000.00, to Debtor under the amended contract. Eventually, Plaintiff hired other contractors to complete the work and later, on May 29, 2001, initiated a breach of contract complaint in state court. In the state court action, Plaintiff sought damages of \$42,000.00 in damages, including \$27,000.00 in damages allegedly resulting from the expenditure for repair and completion of work under Debtor's contract.

Debtor converted his Chapter 13 case to a Chapter 7 case on September 12, 2001. Plaintiff was added to the schedules as an unsecured creditor. Subsequently, Plaintiff filed an adversary proceeding to find the debt nondischargeable.<sup>4</sup>

### **ARGUMENTS OF THE PARTIES**

Plaintiff alleges that Debtor committed fraud in the execution of the contract, thereby entitling him to a nondischargeable debt under 11 U.S.C. § 523(a)(2)(A). According to Plaintiff, Debtor failed to disclose that he was in bankruptcy and that he had prior judgments against him when Plaintiff contracted with him to perform the remodeling work. Plaintiff also argues that Debtor affirmatively misrepresented that he previously built a house. It is Plaintiff's position that the failure to complete the work in a workmanlike manner evidences Debtor's lack of competence and gives rise to badges of fraud. Also, plaintiff alleges that Debtor failed to pay subcontractors and materialmen. Plaintiff seeks a nondischargeable judgment to compensate him for the damages incurred in correcting and completing Debtor's work on the house.

Debtor counters by arguing that he did not make any misrepresentations as alleged by Plaintiff. Debtor accuses Plaintiff of failing to make payments, thereby breaching the contract, which resulted in Debtor leaving the job. Plaintiff denies that the work was not completed in a workmanlike manner and denies any intent to mislead or misrepresent facts to Plaintiff.

### **LAW AND ANALYSIS**

#### **A. Statutory Framework**

The purpose of Chapter 7 is to provide Debtors with relief from debts by granting a

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<sup>3</sup> For example, Plaintiff and his wife testified that they never expected a portion of the kitchen to be materially changed, yet it was gutted in placing the entry door from the new living room to the kitchen. Debtor, however, testified that Plaintiff and his wife selected new countertop and cupboards for the project.

<sup>4</sup> Plaintiff's original complaint cited 11 U.S.C. § 523(a)(2)(A) and (6). The amended complaint did not contain any code references.

general discharge. Pursuant to section 727(b), the discharge generally discharges debtors from all debts incurred prior to the order for relief. However, the provision contains an exception to the general discharge: it does not discharge a debtor from debts provided for under section 523.

Section 523(a)(2) is the “fraud” dischargeability provision and excludes debts incurred by fraud from application of the general discharge. The provision provides, in applicable part:

(a) A discharge under section 727 . . . of this title 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, other than a statement respecting the debtor’s or an insider’s financial condition . . . .

A mere breach of contract will not render a debt nondischargeable. In order to prove nondischargeability, a creditor must demonstrate 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 loss.” Rembert v. AT&T Universal Card Serv., Inc. (In re Rembert), 141 F.3d 277, 280-81 (6<sup>th</sup> Cir. 1998) (citing Longo v. McLaren (In re McLaren), 3 F.3d 958, 961 (6<sup>th</sup> Cir. 1993)). In order to succeed to prove the debt is nondischargeable, Plaintiff must prove these elements by a preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 291 (1991). In an effort to enable Debtor to obtain a fresh start, all exceptions to discharge are strictly construed against the creditor. See Rembert, 141 F.3d at 281 (citing Manufacturer’s Hanover Trust v. Ward (In re Ward), 857 F.2d 1082, 1083 (6<sup>th</sup> Cir. 1988)).

As a preliminary matter, the court would like to comment on the testimony of the witnesses at trial. After listening to the direct examination and cross-examination of Plaintiff at the trial, the court concludes that Plaintiff has lost command of the facts of this case. The Plaintiff often appeared confounded and, on occasion, contradicted prior testimony. Understandably, Plaintiff has gone over the testimony and events numerous times in his mind. During his testimony, however, the court came to the conclusion that Plaintiff did not clearly distinguish between what really did occur from what he thought might have occurred and why it might have occurred, probably due to his profound frustration from a home improvement nightmare. While the court believes that Plaintiff was entirely sincere in his testimony, the court cannot accept all of his testimony as an accurate recollection of events.

Debtor, on the other hand, was not entirely credible, although his testimony was more cohesive than Plaintiff's. The court found the testimony of the remaining witnesses to be credible.

## **B. Material Misrepresentations**

Looking at the first element of a section 523(a)(2) action, the court must determine whether Plaintiff proved that Debtor made a material misrepresentation that Debtor knew to be false or which was made with gross disregard for its truth. Plaintiff focuses on both alleged actual misrepresentations and failures to disclose which Plaintiff alleges constitute misrepresentations. Specifically, Plaintiff alleges that Debtor misrepresented that he had previously built a house, was competent to complete this project, failed to disclose that he had prior judgments and consumer complaints against him, and failed to disclose that he was a debtor in a pending chapter 13.

With regard to the alleged failures to disclose facts, it has been established that silence can constitute a material misrepresentation. *See, e.g., Rowe v. Steinberg (In re Steinberg)*, 270 B.R. 831 (Bankr. E.D. Mich. 2001); *In re Sprague*, 205 B.R. 851 (Bankr. N.D. Ohio 1997). In order for a failure to disclose to be actionable, however, a duty to disclose must exist. *See In re Steinberg*, 270 B.R. at 835 (citing *In re Embrace Sys. Corp.*, 178 B.R. 112 (W.D. Mich. 1995)). No such duty to disclose has been alleged, nor is the court convinced that one exists. Further, Plaintiff did not testify that he inquired about any of these matters, so there is no foundation that Debtor made any affirmative misrepresentations. Without a duty, Debtor's silence on the existence of his bankruptcy case and prior judgments and complaints cannot rise to misrepresentations.

Any representations Debtor made regarding his previous construction experience, however, could constitute material misrepresentations. However, the court is not convinced that Debtor made any representations to Plaintiff about his previous construction experience before entering into the contract with Debtor. Debtor denies that Plaintiff made such inquiries. After listening to the testimony of the witnesses, the court is left with the impression that this contract resulted not from any representations made by Debtor, but as a result of the parties' previous social relationship. The court draws the conclusion that Plaintiff had developed a general impression of what Debtor did and the experience he had and used this as a basis for entering into the contract without actually ascertaining the extent of Debtor's knowledge and experience and without the Debtor specifically discussing such experience. The court cannot find that Debtor affirmatively misrepresented any facts to Plaintiff prior to entering into the contract, nor during the course of the project.

## **C. Intent to Deceive**

The second element requires Plaintiff to demonstrate that Debtor intended to deceive. Because of the difficulty of proof of an objective intent to deceive, Plaintiff merely needs to

show Debtor operated with a subjective deceptive intent, *see* Field v. Mans, 516 U.S. 59, 70-72 (1995), based on the specific facts of each individual case. In re Rembert, 141 F.3d at 282.

Debtor unequivocally testified that he did not intend to deceive Plaintiff. While cognizant of the benefit such testimony supplies Debtor, combined with the facts of the case, the court believes Debtor and finds that Debtor did not intend to deceive Plaintiff. Again, the parties' prior social relationship is important – the parties were friends and maintained a nonprofessional relationship. Debtor could not recall any discussions about his experience, nor did Plaintiff identify any specific questions. There is no evidence, subjective, circumstantial, or otherwise, which suggests that Debtor intended to deceive Plaintiff with any alleged misrepresentations. Debtor was lending assistance to help a friend and had every intention of completing the project to Plaintiff's satisfaction.

Further, Debtor did not exhibit a lackadaisical attitude toward Plaintiff or the project. Plaintiff testified that Debtor was at the site working almost every day and that he was available to discuss the myriad changes and to incorporate the changes for Plaintiff and his wife. He hired the variety of subcontractors needed to see the project through to completion. Such attentiveness is no indicative of an intent to deceive. It appears more likely that Debtor was incompetent, which was misjudged equally by Debtor and Plaintiff.

#### **D. Justifiable Reliance by Plaintiff**

If successful in proving elements one and two, Plaintiff would need to prove that he justifiably relied on the misrepresentations, both which have to do with Debtor's previous experience in the industry. To any extent that Plaintiff would have relied on a representation that Debtor had built a house, and that he could complete this job, the court finds that Plaintiff's reliance was not justifiable.

First, the house was a very unique, architect-designed home. Thus, the fact that Debtor may have had construction and remodeling experience does not equate to the ability to complete a project involving a house with no square corners. Further, Debtor testified that he did not have a license or a trade card.

Second, the project changed with regularity. There was no testimony that the Plaintiff inquired about the Debtor's previous work experience in connection with the changes. Thus, even if Plaintiff did inquire prior to entering into the written contract, by the time the parties agreed (or disagreed) on the substantially changed final project, any reliance on representations made prior to the written contract may not have been applicable.

The court finds that Plaintiff did not rely justifiably rely on alleged representations by the Debtor in entering into the contract. Plaintiff relied on the parties' previous history. He specifically admitted that he had confidence in Debtor's abilities and trusted him because he

was a friend. It was not the representations about previous work history and experience upon which Plaintiff relied.

### **CONCLUSION**

Because Plaintiff has failed to demonstrate that Debtor made any material misrepresentations with the intent to deceive and upon which Plaintiff relied, the court will not examine the final element under section 523(a)(2)(A). Plaintiff has not carried the burden in proving fraud by a preponderance of the evidence. Therefore, the debt owing Plaintiff is dischargeable.

The court does not understate the severity or the disruption and expense borne by Plaintiff, but that is not the legal standard.

An order will enter forthwith.

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**RUSS KENDIG**  
**U.S. BANKRUPTCY JUDGE**

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this \_\_\_\_\_ day of September, 2002, the above Memorandum of Decision and Order was sent via regular U.S. Mail to:

Donald M. Miller  
Attorney for Debtor  
1400 N. Market St.  
Canton, Ohio 44714-2608

Terrrence L. Seeberger  
1000 Unizan Plaza  
220 Market Avenue South  
Canton, Ohio 44702

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Deputy Clerk



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THOMAS RICHARD PIKE and	)	CASE NO. 97-60484
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	)	JUDGE RUSS KENDIG
Debtors.	)	
-----	)	
ALAN K. GOLDBERG,	)	ADV. NO. 02-6003
	)	
Plaintiff,	)	
	)	
v.	)	
	)	<b>ORDER FINDING DEBT TO BE</b>
THOMAS RICHARD PIKE,	)	<b>DISCHARGEABLE</b>
	)	
Defendant.	)	

This adversary proceeding is before the court following trial of the matter on July 8, 2002. Donald M. Miller represented Debtor-defendant and Terrence L. Seeberger represented Plaintiff.

For the reasons set forth in the accompanying Memorandum of Law, the court finds that Debtor has failed to demonstrate the elements of fraud under 11 U.S.C. § 523(a)(2)(A). The balance of the complaint was orally dismissed at the time of trial. Therefore, the court hereby orders that Plaintiff's complaint be dismissed with prejudice and the debt discharged.

It is so ordered.

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RUSS KENDIG  
U.S. BANKRUPTCY JUDGE