UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
	)	CHAPTER 7
ELIZABETH LEA DAVIS and MICHAEL JOSEPH DAVIS,	)	CASE NO. 01-65313
Debtors.	)	JUDGE RUSS KENDIG
PAUL G.A. KASAPIS,	)	ADV. PRO. NO. 02-6048
Plaintiff,	)	
v.	)	
	)	**MEMORANDUM OF DECISION**
ELIZABETH LEA DAVIS and MICHAEL JOSEPH DAVIS,	)	
Defendants.	)	

Procedural History

Plaintiff Paul G.A. Kasapis (hereafter "Plaintiff") initiated an adversary proceeding against Elizabeth Lea Davis and Michael Joseph Davis (hereafter individually "Defendant Elizabeth Davis" and "Defendant Michael Davis" or collectively "Defendants") to determine the dischargeability of debt under 11 U.S.C. § 523(a)(4) resulting from a sales transaction between Plaintiff and Defendants of commercial real estate located at 4034 Cleveland Avenue, Southwest, Canton, Ohio 44707 (hereafter "the Premises") and restaurant equipment located at the Premises. Defendants denied the allegations in their answer.

This matter came before the court for a trial on November 4, 2002. On the day of the trial, Plaintiff filed a motion for leave to file an amended complaint simultaneously with an amended complaint requesting the addition of a determination of the dischargeability of the debt under 11 U.S.C. § 523(a)(2) allegedly to conform the pleadings to the evidence elicited in discovery. The pleading sought to change the entire grounds and theory of the case. After counsel for Defendants orally opposed the motion, the court denied the motion and struck the amended complaint from the record.

The matter then proceeded to trial. In his opening statement, counsel for Plaintiff indicated that Plaintiff would introduce evidence related to one theory of nondischargeability, Defendants' nondisclosure of an environmental violation at the Premises. However, during questioning of Defendant Elizabeth Davis as if on cross-examination in Plaintiff's case, Plaintiff's counsel inquired as to restaurant equipment Plaintiff purchased from Defendant

Elizabeth Davis. Defendants' counsel objected to this line of questioning as being outside of the scope of the theory of dischargeability Plaintiff said he would pursue in his opening statement. The court admonished Plaintiff's counsel and took a short recess to enable Plaintiff to determine the focus of his case. When the court reconvened, Plaintiff's counsel stated that the only ground of dischargeability which Plaintiff would pursue was the nondisclosure of the environmental violation. At the close of the parties' evidence, counsel elected to submit posthearing briefs in lieu of making closing arguments. Both parties filed their briefs on November 18, 2002.

Jurisdiction

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a) 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 constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

Facts

At trial, Defendant Elizabeth Davis testified that she operated a restaurant, Jack's Kwik Shake, at the Premises from November 1998 to December 1999. During that time, Defendant Elizabeth Davis received two letters from the State of Ohio Environmental Protection Agency (hereafter "the EPA") regarding environmental violations. The well system required an upgrade.[1] Defendant Elizabeth Davis testified that she did not upgrade the well system as there were more pressing improvements that needed made at the Premises at that time.

After Jack's Kwik Shake closed, Plaintiff approached Defendant Elizabeth Davis about buying the Premises.[2] He testified that he was interested in purchasing the Premises because it was a corner lot, and he planned to open a restaurant or a produce stand there.[3] In the meantime, Defendants received notice that foreclosure of the Premises was imminent. Plaintiff testified at trial that he was aware of the foreclosure proceeding and Defendants' need for a quick sale. The closing occurred September 27, 2000. Although Jack's Kwik Shake had been closed for nine months, and its major operating systems, including the water, cooling, heating, and electrical systems, had not been operational for that period of time, Plaintiff did not conduct an inspection

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[1]Defendant Michael Davis testified that at the time Defendant Elizabeth Davis operated Jack's Kwik Shake, he was employed elsewhere and was not involved in the day-to-day business at the Premises. He testified that he was a co-owner of the Premises but had been unaware of the upgrades requested by the EPA.

[2]Plaintiff testified that he determined the Premises' owners by searching public records.

[3]Plaintiff co-owns a business with his father, A.K. Properties, which acquires and manages real estate. Additionally, he has held ownership interests in a produce business, a transportation company, and a bowling alley, among other businesses and properties.

of the Premises prior to the closing.[4] Defendant Elizabeth Davis testified that she offered to make the Premises available for inspection, a claim which Barbara Clapper, former manager of Jack's Kwik Shake, verified in her testimony at trial.

At trial, Plaintiff claimed that Defendant Elizabeth Davis had not informed him of the EPA violations, a fact that Defendant Elizabeth Davis confirmed in her testimony.[5] Plaintiff testified that he knew that there was a well on the Premises, as he had delivered produce there as a boy, and he was very familiar with the neighborhood surrounding the Premises and the fact that some properties were serviced by well systems. Plaintiff testified that he did not become aware of the EPA problems until November 2001, well over a year after he had purchased the Premises. He testified that had he known of the problems, he would have requested a reduction in the selling price.

At trial, William L. Roth, Sr. (hereafter "Roth") testified that he has performed well and pump work for 42 years. He inspected the well in anticipation of trial. He testified that the well casing at the Premises was level with the floor and should be raised so it is 12 to 14 inches above the floor. He testified that the cost of the upgrade could range from $700.00 to $850.00 to $7,000.00 to $8,000.00 depending on whether any difficulty is encountered in the process. Roth testified that the well problem did not compromise the condition of the water at the Premises. The water at the Premises passed the appropriate tests.

David J. Boland (hereafter "Boland"), from the EPA, testified that his office is charged with regulating the compliance of public water systems that serve 25 people at least 60 days per year. Small water sources such as these are called transient sources. The water source serving Jack's Kwik Shake was classified as a transient source. He testified that a wellhead must be raised above the floor so as not to compromise the water source by contaminants running into the well through the top of the casing. Boland testified that Roth's estimate of $700.00 to $850.00 to upgrade the well was in line with the EPA's expectations. Boland testified that if the problem was not corrected, then the local health department would take over enforcement and could eventually revoke the food service license at the Premises for noncompliance. Boland testified that EPA records are public records and that a person can request a file review to access the records. Boland opined that the buyer of a commercial property serviced by a well would not be justified in buying the property without first reviewing the EPA records.

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[4]In fact, Plaintiff testified that he often did not have professional inspections conducted on the commercial properties that he bought.

[5]The explanation for the omission offered by Defendant Elizabeth Davis at trial was that it had been some time since she had heard from the EPA regarding the violations, and further, she did not consider the matter to be serious or material to Plaintiff's desire to purchase the Premises, so disclosure of the problem to Plaintiff did not come to mind.

Arguments

In his posthearing brief, Plaintiff argues that when he and Defendants entered into a contract for the sale of the Premises, Defendants failed to disclose to him the upgrade that needed to be performed on the well system in order to bring it into compliance with the EPA's regulations. Plaintiff argued that this failure was material to his agreement to purchase the Premises as had he known of the needed upgrade, he would have negotiated a lower purchase price of the Premises. Further, Plaintiff argues that O.R.C. § 5301.253 required Defendants to disclose the repairs needed to the well system, and their nondisclosure causes them to be in violation of § 5301.253, thus making any cost Plaintiff will have to incur to upgrade the well nondischargeable. Plaintiff argues that he is also entitled to reimbursement of the attorney fees he incurred in the pursuit of this action.

In their posthearing brief, Defendants argue that the debt Plaintiff will incur to upgrade the well is dischargeable under 11 U.S.C. § 523(a)(2)(A). Defendants argue that in order for Plaintiff to prevail on this nondischargeability ground, Plaintiff must prove that: 1. Defendants obtained money through a material misrepresentation that they knew to be false or that they made with gross recklessness as to its truth; 2. Defendants intended to deceive Plaintiff; 3. Plaintiff justifiably relied on Defendants' false representation; and 4. Plaintiff's reliance caused his loss.

To determine whether Defendants made a material representation to Plaintiff without regard to its truth when they failed to disclose the EPA violation, Defendants argue that they must have had a duty to disclose the EPA violation in the first place. Defendants argue that although O.R.C. § 5302.30[6] requires the affirmative disclosure of certain information, this statute is only applicable to the sale of residential real property and has no application to the sale of commercial real property. Instead, Defendants argue that the doctrine of caveat emptor, "let the buyer beware," is applicable. Further, Defendants counter Plaintiff's argument regarding the applicability of § 5301.253 by stating that this provision requires the disclosure of building or housing code violations prior to a sale, and therefore is inapplicable to the EPA violations. Alternatively, Defendants argue that even if they had a duty to disclose the EPA violations, the EPA violations would not have been material to the sale of the Premises. Defendants point to several facts in support of their argument. First, Plaintiff did not request to inspect the premises. Second, Plaintiff did not ask whether any problems existed with the well system. Third, the condition of the Premises was not of great concern to Plaintiff as he desired the Premises because it was a corner lot on which he thought ideal to locate a produce stand. Fourth, Plaintiff was familiar with the area and knew that well systems serviced several properties in the area. Finally, Boland testified that the condition of the water provided by the well system was fine, and therefore, the upgrade could not have been material to the sales transaction.

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[6]Actually, Defendants cite to O.R.C. § 5302.20, which deals with survivorship tenancies. Clearly, this is a typographical error and in actuality, Defendants meant to cite to O.R.C. § 5302.30, which requires the completion of a property disclosure form to transfer residential real property, instead.

Defendants argue that they did not intend to deceive Plaintiff when they failed to disclose the necessity of upgrading the well system, and Defendant Michael Davis did not know of the need for the well upgrade and could not have intended to deceive Plaintiff. Defendants argue that the overwhelming evidence demonstrates that Defendant Elizabeth Davis did not intend to deceive Plaintiff. Defendant Elizabeth Davis offered to allow Plaintiff to inspect the property, but he declined. Further, Defendant Elizabeth Davis received the last correspondence from the EPA over 15 months prior to the time that Plaintiff approached Defendants about selling the Premises.

Defendants argue that Plaintiff did not justifiably rely on Defendants' silence regarding the well upgrade. Defendants argue that Plaintiff is an experienced businessman whose family-owned business specializes in acquiring and managing real estate. Further, Defendants argue that Plaintiff is familiar with public records. Defendants argue that Plaintiff did not rely on Defendants' silence, but his own business experience. Therefore, Defendants argue that Plaintiff's reliance was not justifiable.

Defendants argue that Plaintiff must show that he was damaged as a result of his justifiable reliance. Defendants argue that the only testimony provided regarding his damages is that Plaintiff testified that he would have requested a deduction in the selling price had he known about the needed well upgrade. Defendants point to the fact that Plaintiff did not testify that he would have unequivocally refused to purchase the Premises but that he would not have paid "as much" as evidence that his reliance on Defendants' silence did not cause him damage.

Defendants argue that Roth testified, and Boland agreed, that the cost to upgrade the well should be between $750.00 and $850.00. Defendants argue that Plaintiff's attempt to elicit testimony that the upgrade may cost more was speculative. Further, Defendants point out that Plaintiff testified not that he would have required Defendants to pay for the entire cost of the upgrade, just that he would have demanded a reduction in the selling price, therefore, Defendants should not be responsible for the entire cost of an upgrade.

In conclusion, Defendants argue that Plaintiff has failed to prove that the cost to upgrade the well system should be passed to Defendants and found to be a nondischargeble debt under § 523(a)(2)(A). Defendants argue that but for the fact that the transaction was commercial in nature rather than consumer, they would ask for attorney fees for the defense of this action.

Analysis

I. Dischargeability under 11 U.S.C. § 523(a)(4)[7]

The court denied Plaintiff's last minute request for a motion to leave to amend his complaint instanter. At trial, Plaintiff chose to go forward only on his claim for nondischargeability as to the EPA violation. Accordingly, the court will analyze this allegation under 11 U.S.C. § 523(a)(4). This is the only ground set forth in Plaintiff's complaint.

A. Debts for fraud or defalcation while acting in a fiduciary capacity

Debt is excepted from discharge under § 523(a)(4) "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). Fraud under this subsection of § 523 must be intentional and not implied or constructive. In re Tripp, 189 B.R. 29 (Bankr. N.D.N.Y. 1995). Defalcation requires proof of a fiduciary's failure to produce entrusted funds. Quaif v. Johnson, 4 F.3d 950 (11th Cir. 1993).

The phrase "while acting in a fiduciary capacity" qualifies "fraud or defalcation" but not "embezzlement" or "larceny." 4 Collier on Bankruptcy, ¶ 523.10[1][c] (15th ed. rev. 2002). "Acting in a fiduciary capacity" is limited to those instances where a technical or express trust has been created. Cashway v. Johnson (In re Johnson), 691 F.2d 249 (6th Cir. 1982). The trust must preexist the act from which the debt arose. In re Casey, 181 B.R. 763 (Bankr. S.D.N.Y. 1995).

The trust must be established under state law. Johnson v. Woldman, 158 B.R. 992 (N.D. Ill. 1993). "The Supreme Court favors a narrow construction of the term 'fiduciary capacity' and defines the term as meaning arising from an express or technical trust." In re Twitchell, 91 B.R. 961, 964-65 (D. Utah 1988) (citing Davis v. Aetna Acceptance Co., 293 U.S. 328, 333 (1934)). Therefore, this phrase does not encompass those trusts that may be implied in law from contracts. In re Spector, 133 B.R. 733 (Bankr. E.D. Pa. 1991); *see also* Klott v. Associates Real Estate, 41 Ohio App. 2d 118, 120, 122-23 (10th App. Dist. 1974) (no special relationship exists between vendor and vendee requiring higher duty of care). The relationships generally recognized as

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[7]Section 523(a)(4) reads in relevant part:

(a) A discharge . . . does not discharge an individual debtor from any debt –

. . . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

11 U.S.C. § 523(a)(4).

involving fiduciary obligations have arisen pursuant to state statute or common law doctrine or involve positions such as that of bank officer, executor, administrator, guardian, or receiver. 4 Collier on Bankruptcy, ¶ 523.10[1][c] (15th ed. rev. 2002).

In order for Plaintiff to prevail on a theory of dischargeability for fraud or defalcation while acting in a fiduciary capacity, Plaintiff must first prove that a fiduciary relationship existed. Clearly, the commercial sales transaction of the Premises did not create a fiduciary relationship between Plaintiff and Defendants under state law. Defendant Elizabeth Davis was not under a heightened standard of duty to disclose the well problem to Plaintiff because of their relationship. Plaintiff's claim that Defendants' debt for the cost he has to incur to upgrade the well does not rise to the level of a nondischargeable debt under debts for fraud or defalcation while acting in a fiduciary capacity under § 523(a)(4).

B. Debts for embezzlement or larceny

The term "while acting in a fiduciary capacity" does not qualify "embezzlement" or "larceny." 4 Collier on Bankruptcy, ¶ 523.10[2] (15th ed. rev. 2002). Thus, any debt for embezzlement or larceny falls within the exception of § 523(a)(4). In re Booker, 165 B.R. 164 (Bankr. M.D.N.C. 1994).

Embezzlement is defined as "[t]he fraudulent appropriation of property by one lawfully entrusted with its possession." Black's Law Dictionary 522 (6th ed. 1990). To prove embezzlement, a creditor must demonstrate: 1. that the debtor appropriated funds for his or her own benefit by fraudulent intent or deceit; 2. that the debtor deposited the resulting funds in an account accessible only to the debtor; and 3. that the debtor disbursed or used those funds without explaining his or her reason or purpose. In re Bryant, 147 B.R. 507 (Bankr. W.D. Mo. 1992).

Larceny is defined as "[f]elonious stealing, taking and carrying, leading, riding, or driving away another's personal property, with intent to convert it or to deprive owner thereof." Black's Law Dictionary 881 (6th ed. 1990). Embezzlement differs from larceny in that the original taking of the property is lawful with embezzlement, whereas with larceny, the felonious intent is present at the getgo. 4 Collier on Bankruptcy, ¶ 523.10[2] (15th ed. rev. 2002) (citing Black's Law Dictionary (6th ed. 1990)). Therefore, § 523(a)(4) excepts from discharge those debts that result "from the fraudulent appropriation of another's property, whether the appropriation was unlawful at the outset, and therefore a larceny, or whether the appropriation took place unlawfully after the property was entrusted to the debtor's care, and therefore was an embezzlement." 4 Collier on Bankruptcy, ¶ 523.10[2] (15th ed. rev. 2002)

Clearly Defendants have not engaged in embezzlement or larceny. Defendants received money from Plaintiff pursuant to a purchase contract regarding the sale of the Premises. Plaintiff voluntarily paid this money to Defendants, and Defendants were lawfully in control of this money upon receipt. Nothing rising to the level of embezzlement or larceny occurred here.

Plaintiff's claim for nondischargeability under § 523(a)(4) on these grounds fails as well.

II. Dischargeability under 11 U.S.C. § 523(a)(2)(A)[8]

Although the court denied Plaintiff's last minute motion for leave to amend his complaint to include a claim under 11 U.S.C. § 523(a)(2)(A) after Defendants' counsel's strenuous objection, this is the only dischargeability ground Defendants' counsel addressed in her closing argument briefed to the court. Therefore, the court will examine Plaintiff's claim under this nondischargeability provision as well.

To determine whether Plaintiff has satisfied the criteria of § 523(a)(2)(A), the Sixth Circuit Court of Appeals has held:

> It is well established that in order to except a debt from discharge under section 523(a)(2)(A) "the creditor must prove that 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. The creditor must also prove the debtor's intent to deceive. Moreover, the creditor must prove that it reasonably[9] relied on the false representation and that its

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[8]Section 523(a)(2) provides in pertinent part:

(a) A discharge . . . 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.

11 U.S.C. § 523(a)(2)(A).

[9]The standard of reliance was modified by the Supreme Court in Field v. Mans, 516 U.S. 59 (1995). The proper standard of reliance is not reasonable reliance but the lesser standard of justifiable reliance. Id. at 440-47. The Court distinguished between reasonable and justifiable reliance:

> 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

reliance was the proximate cause of the loss."

Longo v. McLaren (In re McLaren), 3 F.3d 958, 961 (6th Cir. 1993) (citations omitted) (footnote added). *See also* In re Ward, 857 F.2d 1082, 1083 (6th Cir. 1988). Plaintiff has the burden of proof by a preponderance of the evidence, *see* Grogan v. Garner, 498 U.S. 279, 291 (1991), and the failure to prove any one factor is determinative of the whole. G.E. Capital Corp. v. Taylor (In re Taylor), 211 B.R. 1006, 1013 (Bankr M.D. Fla. 1997). Exceptions to discharge are strictly construed against the creditor. Manufacturer's Hanover Trust v. Ward (In re Ward), 857 F.2d 1082, 1083 (6th Cir. 1988).

A. Misrepresentation

A "false pretense," as used in § 523(a)(2)(A), is defined as "an implied misrepresentation or conduct intended to create or foster a false impression." In re Begun, 136 B.R. 490, 494 (Bankr. S.D. Ohio 1992). In effect, a false pretense "is designed to convey an impression without oral representation." Id. In contrast, a "false representation," as used in § 523(a)(2)(A), "is an expressed misrepresentation." Id. "A debtor's silence may constitute a materially false representation prohibiting discharge of the indebtedness." Id. at 495. "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 (Bankr. N.D. Ohio 1993) (citing United States v. Lichota, 351 F.2d 81 (6th Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966)).

"[I]t is well established that silence, failure to disclose, can amount to misrepresentation," Rowe v. Steinberg (In re Steinberg), 270 B.R. 831, 835 (Bankr. E.D. Mich. 2001), but first, there must be a duty to disclose. Id. (citing In re Embrace Systems Corp., 178 B.R. 112, 124 (Bankr. W.D. Mich. 1995)). To determine whether Defendants had a duty to disclose to Plaintiff the need for the well upgrade, the court must examine state law. *See* Castro v. Zeller (In re Zeller), 242 B.R. 84 (Bankr. S.D. Fla. 1999); Russell v. Piercy (In re Piercy), 96 B.R. 953 (Bankr. W.D. Mo. 1989).

> circumstances of the particular case, rather than of the application of a community standard of conduct to all cases.

Id. at 70 (quoting Restatement (Second) of Torts, § 545A, Comment *b* (1976)).

1. Duty to disclose defect on commercial[10] real estate under state law

a. O.R.C. § 5301.253

Plaintiff argues that Defendants had a duty to disclose the defective well system under § 5301.253, which requires a seller of property which is in violation of a building or housing code to provide written notice of the code violation prior to entering into a purchase agreement for the transfer of title to the property. O.R.C. § 5301.253. The statute, by its literal wording, does not appear to apply to the case at hand. An examination of case law interpretation determines that only one case exists, which is not on point. *See* Perez v. Williams, 1984 WL 7569 (Ohio App. 5th Dist. 1984). EPA violations are not building or housing code violations. While Boland testified that a continuing violation of the EPA regulations may invoke the local health department's jurisdiction, this does not equate to a violation of which disclosure is compulsory under this section of the code. Defendants did not have a duty to disclose the well defect under this statute.

b. Caveat emptor

Defendants argue that caveat emptor is applicable. Caveat emptor is a viable rule of law in real estate sales in the state of Ohio. Layman v. Binns, 35 Ohio St. 3d 176, 177 (1988). The Supreme Court of Ohio has stated the rule as follows:

> The principle of *caveat emptor* applies to sales of real estate relative to conditions open to observation. Where those conditions are discoverable and the purchaser has the opportunity for investigation and determination without concealment or hindrance by the vendor, the purchaser has no just cause for complaint even though there are misstatements and misrepresentations by the vendor not so reprehensible in nature as to constitute fraud.

Id. (quoting Traverse v. Long, 165 Ohio St. 249, 252 (1956) (citations omitted)). Conditions apply to the rule's application: 1. the defect must be observable or discoverable upon inspection; 2. the purchaser must have an unhindered opportunity to inspect the property; and 3. the seller must not engage in fraud. Id.

In the case at bar, the problem with the well was easily discoverable upon inspection or examination of the EPA records or by looking at the well. Flush and near flush wellheads are

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[10]Ohio Revised Code § 5302.30 requires a seller of residential real estate to complete a property disclosure form alerting a buyer to defects in the property. There is no corresponding obligation for a seller of commercial real estate.

not permissible. Boland testified that EPA records are public records. Plaintiff testified that he knew that the Premises was serviced by a well. Plaintiff testified that he determined who owned the Premises by consulting public records. Surely, Defendants did nothing to conceal the well or its condition. The problems with the well were patent and not latent; they were easily discoverable upon both a physical and documentary inspection. Defendant Elizabeth Davis offered Plaintiff the opportunity to inspect the premises, but Plaintiff declined. Defendants did not have a duty to disclose the well defects to Plaintiff. Plaintiff has not met his burden of proof on the misrepresentation prong under § 523(a)(2)(A).

B. Intent to deceive

To meet his burden of proof under the second prong of § 523(a)(2)(A), Plaintiff must demonstrate that Defendants' representations were made with an intent to deceive. Begun, 136 B.R. at 496. "[I]ntent to deceive may be inferred from an evaluation of the evidence as a whole. This includes consideration of circumstantial evidence." Blascak v. Sprague (In re Sprague), 205 B.R. 851, 861 (Bankr. N.D. Ohio 1997).

No evidence, direct or circumstantial, was presented that Defendants attempted to deceive Plaintiff. Defendant Michael Davis testified that he was not aware of the EPA problem. Given the fact that he was an owner in name only, his testimony was credible, and his statement believable. Defendant Elizabeth Davis testified that such a long time passed between the last communication from the EPA and the sale negotiation with Plaintiff, that the violation did not come to mind and that she did not consider the matter to be material to Plaintiff's purchase of the Premises as Plaintiff indicated he planned to open a produce stand there. The testimony of Defendant Elizabeth Davis was also credible, and the court cannot find that she intended to deceive Plaintiff. Plaintiff has failed to prove Defendants intended to deceive Plaintiff beyond a preponderance of the evidence.

C. Justifiable reliance

The Supreme Court has placed a limitation on justifiability:

> a person is "required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, the rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any

> experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses."

Field, 516 U.S. at 71 (1995) (quoting Restatement (Second) of Torts (1976), § 541, Comment *a*).

In the case at hand, Plaintiff did not demonstrate any inability on his part to determine the source of the water at the Premises or the condition of the well system. *See* Klott v. Associates Real Estate, 41 Ohio App. 2d 118, 123 (Ohio App. 10th Dist.1974) (holding vendors had no duty to disclose water provided by well rather than city where vendee could have inquired as to source of water and equipment used). Defendant Elizabeth Davis provided him with an opportunity to inspect the premises. Plaintiff declined. Plaintiff is an experienced businessman who was knowledgeable about public records and capable of hiring an inspector to examine the Premises. "Commentators have recognized that even with the advent of seller's disclosure laws that purchasers remain obligated to protect their own interests by obtaining, '. . . a complete inspection of the physical condition of the property . . . . A buyer that is not familiar with building components and systems should hire a professional inspector . . . .'" Redmond v. Finch (In re Finch), 2003 WL 1053731, *1 (Bankr. S.D. Ohio 2003) (quoting Katherine A. Pancak, Thomas J. Miceli and C.F. Sirmans, "Residential Disclosure Laws: The Further Demise of Caveat Emptor," 24 Real Est. L.J. 291, 319 (1996)). Therefore, Plaintiff's reliance on Defendants' silence regarding the EPA violations was not justifiable.

D. Causation

Plaintiff can establish proximate cause by showing that Defendants' conduct was a substantial factor in his loss or that his loss reasonably follows therefrom. Finch, 2003 WL 1053731 at *3 (citing In re Hoover, 232 B.R. 695, 700 (Bankr. S.D. Ohio 1999)). As Plaintiff has failed to prove that he justifiably relied on Defendants' silence, he cannot prove that his reliance proximately caused his damages. Therefore, Plaintiff has failed to meet the fourth prong of § 523(a)(2)(A).

Conclusion

Plaintiff commenced a nondischargeability proceeding against Defendants for the failure to disclose EPA violations on the Premises that Plaintiff purchased from Defendants. Plaintiff pursued this action under 11 U.S.C. § 523(a)(4) and, arguably, under 11 U.S.C. § 523(a)(2)(A).

The court found that Plaintiff failed to meet his burden of proof on the nondischargeability grounds under § 523(a)(4) and all four prongs of the nondischargeability grounds under § 523(a)(2)(A).

An order in accordance with this memorandum of opinion shall enter forthwith.

_____
RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
ELIZABETH LEA DAVIS and MICHAEL JOSEPH DAVIS,	)	CHAPTER 7
Debtors.	)	CASE NO. 01-65313
PAUL G.A. KASAPIS,	)	JUDGE RUSS KENDIG
Plaintiff	)	ADV. PRO. NO. 02-6048
v.	)	
ELIZABETH LEA DAVIS and MICHAEL JOSEPH DAVIS,	)	**ORDER**
Defendants.	)	

For the reasons set forth in the accompanying memorandum of decision, the court finds Plaintiff's complaint to determine dischargeability of debt to be not well taken, and accordingly, judgment is entered for Defendants and against Plaintiff. Defendants' alleged debt to Plaintiff is discharged.

It is so ordered.

_____
RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of March 2003, the above Memorandum of Opinion and accompanying Order was sent via regular U.S. Mail to:

Michael J. Yemc, Jr.
One East Livingston Avenue
Columbus, Ohio 43215

Anne Piero Silagy
110 Central Plaza South
Citizens Building #424
Canton, Ohio 44702

_____

Deputy Clerk