UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 03-34341
Dale A. Martin, Jr.,	)	Chapter 7
Debtor.	)	Adv. Pro. No. 03-3364
Jeffrey Strong,	)	Hon. Mary Ann Whipple
Plaintiff,	)	
v.	)	
Dale Martin,	)	
Defendant.	)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court for decision after trial on Plaintiff Jeffrey Strong's amended complaint to determine dischargeability of a debt owed to him by Defendant Dale Martin. Plaintiff alleges that the debt should be excepted from discharge under 11 U.S.C. § 523(a)(4).

The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings to determine dischargeability of debts are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I). This Memorandum of Decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, Defendant is entitled to judgment on the complaint.

FINDINGS OF FACT

This case involves a home improvement contract entered into by the parties that not only was never completed but was never even begun. The only evidence before the court consists of Plaintiff's trial testimony, the parties' contract, and a civil complaint and judgment entered in state court against Defendant.[1] [*See* Pl. Ex. 2, 3, and 4].

This evidence indicates that Plaintiff entered into a contract with Defendant on July 15, 1999. Under the contract, Defendant agreed to put new roofing, gutters and siding on Plaintiff's three-bedroom split level house for the sum of $3,500. On the date the contract was signed, Plaintiff paid Defendant a $1,000 down payment and told him that he would begin work on the house on the following Monday, July 19, 1999. Likewise, the contract, stating "1 week from 7-12-99" under "Date of Plans," indicates that Defendant would begin working on July 19. But Defendant did not show up on that Monday or any day thereafter. Plaintiff called him and Defendant assured Plaintiff that he would begin work the following day. Once again, however, Defendant did not show up to work on the house and Plaintiff called him and was again assured that he would begin work the next day. This scenario was repeated several times. It is undisputed that Defendant never began any work on Plaintiff's house. Although the contract indicates that an additional $750 down payment was made on July 12, 1999, Plaintiff testified that this payment was not made until after the $1,000 payment had been made and after Defendant had failed to begin work on the house in the time frame stated by him. Plaintiff's memory, however, regarding when the $750 payment was made was less than clear.

After Defendant failed to begin work in a timely manner, Plaintiff called Defendant to cancel the contract and requested a refund of the $1,750 down payment. Defendant did not refund the money and, on July 29, 1999, Plaintiff filed suit in Toledo Municipal Court, Small Claims Division, alleging that he had paid a $1,750 deposit to Defendant for roofing and siding work and that Defendant failed to show up to do the work. [Pl. Ex. 3]. On September 14, 1999, the Toledo Municipal Court entered a default judgment in Plaintiff's favor in the amount of $1,750 plus interest. [Pl. Ex. 4].

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1 Although Plaintiff marked Defendant's deposition as an exhibit, he did not call Defendant as a witness nor did he offer the deposition as evidence at trial.

LAW AND ANALYSIS

Plaintiff argues that the $1,750 debt owed to him by Defendant is nondischargeable under the embezzlement provision of 11 U.S.C. § 523(a)(4), which provides as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual from any debt –
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> . . . .
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

11 U.S.C. § 523(a)(4). A § 523(a)(4) claim must be proven by a preponderance of the evidence. *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 178 (6th Cir. 1997).

The Sixth Circuit defines embezzlement for purposes of § 523(a)(4) as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996). A creditor proves embezzlement by establishing that (1) he entrusted his property to the debtor or debtor lawfully obtained the property, (2) the debtor appropriated the property for a use other than that for which it was intended, and (3) the circumstances indicate fraud. *Id.* at 1173. Embezzlement differs from larceny only in that the initial taking of the property is lawful. *Consumer United Ins. Co. v. Bustamante (In re Bustamante)*, 239 B.R. 770, 777 (Bankr. N.D. Ohio 1999).

Plaintiff has not proved the requisite elements of embezzlement under § 524(a)(4). While the first element is satisfied in that Plaintiff entrusted his funds in the amount of $1,750 to Defendant, there is no evidence of the fraudulent appropriation of those funds.

Plaintiff offered no evidence as to how Defendant used the funds after receiving them from him such that the court may find that Defendant appropriated the funds for a use other than that for which it was intended. Defendant was not called as a witness at trial and his credibility on this element of Plaintiff's claim is not an issue. Defendant could have used Plaintiff's down payment on the contract to purchase materials to perform the work on the house, in which case he did not misappropriate property entrusted to him. On the other hand, he could have lost the funds gambling at a Detroit casino or used the funds in any other manner that might have satisfied the second element of an embezzlement claim. Plaintiff's failure to offer any

evidence on this issue leaves to the court only speculation as to how the funds might have been used by Defendant which is, of course, insufficient to support Plaintiff's claim.

Brady, *supra*, cited by Plaintiff at trial, does not require a different conclusion. In *Brady*, the debtor did not personally benefit from any of the creditor's funds. Instead he deposited them in the bank account of his corporation. The court rejected the debtor's argument that the "appropriation" requirement for embezzlement under § 523(a)(4) required a showing that the debtor individually profit or benefit from his use of the property of the creditor. The court found that "[r]egardless of whether debtor elected to deposit the property of creditor into his own bank account or into the account of his corporation, debtor fraudulently appropriated the property for his own use." *Brady*, 101 F.3d at 1173. The salient facts in *Brady*, unlike the case at bar, demonstrate the manner in which the debtor appropriated the property of the creditor.

Plaintiff also offered no evidence from which the court may infer a fraudulent intent on the part of Defendant. The fact that Defendant did not begin the work within the time frame that he indicated he would, without more, is insufficient evidence from which the court can infer fraudulent intent. At most, ten days elapsed between the time Defendant was supposed to begin work and the time Plaintiff cancelled the contract and then commenced suit in Toledo Municipal Court Small Claims Division. That is not such an extraordinary delay that the court may infer that Defendant did not intend to do the work.

Likewise, the court may not infer a fraudulent intent from the fact that Defendant did not refund Plaintiff his down payment since, as discussed above, Defendant could have actually used those funds to purchase materials for the work to be done. A failure to begin the work or refund the down payment coupled with evidence of substantially similar conduct by Defendant with respect to other contracts may perhaps demonstrate fraudulent intent. *See Morganroth & Morganroth v. DeLorean*, 123 F.3d 374, 379 (6th Cir. 1997) (finding evidence that Defendant failed to pay other attorneys was relevant to prove the element of intent to defraud Plaintiff law firm); Fed. R. Evid. 404(b). But no such evidence is before the court in this case.[2] And Plaintiff's testimony about the size and characteristics of his house, elicited upon

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The court took judicial notice of Defendant's petition, schedules and statement of affairs in his underlying Chapter 7 case. They show numerous lawsuits and judgments against Defendant. To be probative under Rule 404(b), the evidence "must deal with conduct substantially similar and reasonably near in time to the offense for which the defendant is being tried." *United States v. Carney*, 387 F.3d 436, 451 (6th Cir. 2004). From the record, the court does not know anything about the circumstances of any of these other lawsuits or judgments such that they could be probative

questioning by the court, suggests that Defendant underbid the contract. Again, however, the court cannot infer from this evidence alone that he underbid the contract just to get money out of Plaintiff with no intention of doing any work. Perhaps Defendant is just a lousy estimator. In the absence of evidence such as Defendant's construction background, experience and training, or evidence of other similar acts, or evidence of what he did with Plaintiff's money, there is an insufficient evidentiary basis from which to infer fraud. The court cannot speculate one way or another and cannot rule on the basis of its own suspicions. So while proof of fraudulent intent is generally a matter of circumstantial evidence, the facts before the court are simply insufficient as a matter of law to create an inference of fraud by a preponderance of the evidence.[3]

At best, the evidence presented by Plaintiff demonstrates only that Defendant failed to perform the contract between the parties. A debt resulting from a simple breach of contract, however, is dischargeable in a Chapter 7 bankruptcy.

CONCLUSION

Finding that Plaintiff has not met his burden of proof on his § 523(a)(4) claim, judgment will be entered in Defendant's favor. A separate judgment in accordance with this Memorandum of Decision will be entered by the court.

/s/ Mary Ann Whipple
Mary Ann Whipple
United States Bankruptcy Judge

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of Defendant's intent.

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Although not argued by Plaintiff, the court also notes that the state court judgment admitted into evidence does not have any preclusive effect in this case since there was neither an allegation nor an adjudication of fraud in the state court proceeding. *See Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186, 189 (B.A.P. 6th Cir. 2002) (stating that the doctrine of collateral estoppel may be applied only if, among other things, the issue was actually and directly litigated in the prior action).