Dated: August 12 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 04-34980
	)	
Brian Scott Hockenberry and	)	Chapter 7
Jessica Marie Hockenberry,	)	
	)	Adv. Pro. No. 04-3357
Debtors.	)	
	)	Hon. Mary Ann Whipple
Deborah A. Saunders,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
Brian Scott Hockenberry, Jessica Marie	)	
Hockenberry, and William T. Fisk,	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION AND ORDER

Deborah A. Saunders ("Plaintiff") is before the court on the Motion to Deny Discharge of Debts or, in the Alternative to Allow Creditor to Pursue Causes of Action that she filed on September 27, 2004, which the court treated as a complaint initiating this adversary proceeding. After trial, the court now makes

its findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

The court has jurisdiction over this adversary proceeding as against Debtors, only, under 28 U.S.C. § 1334(b) and (d) and the general order of reference entered in this district. Actions to determine dischargeability and requests for relief from the automatic stay are core proceedings that this court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(G) and (I).

FACTUAL AND PROCEDURAL BACKGROUND

On or about March 23, 2000, Brian Scott Hockenberry and Jessica Marie Hockenberry ("Debtors") purchased the real property located at 2220 Pennsylvania Avenue, Sandusky, Erie County, Ohio (the "Property"). Debtors executed a Mortgage Note in the original principal amount of $54,781.44 in favor of Minority Environmental Association, Inc. ("MEAI"), and a Mortgage Deed in favor of MEAI to secure repayment of the note. The mortgage instrument was recorded on July 6, 2000. In 2001, MEAI, doing business as MEA Partnership Homes ("MEAPH"), filed a foreclosure complaint in the Court of Common Pleas of Erie County, Ohio, against Debtors and National City Community Development Corporation ("NCCDC"). Plaintiff now claims an interest in the Property as an assignee of the MEAI mortgage.

On June 14, 2004, Debtors filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, commencing the above-styled case.[1] Their Schedule A listed the Property as having an "unknown" value. Their Schedule D disclosed a secured debt held by MEAI, doing business as MEAPH, with the value of the collateral stated as zero and the amount of the claim and the extent to which the claim is unsecured stated to be "unknown." Also listed as the holder of a security interest in the Property was NCCDC, since it was named as a defendant in the foreclosure action, with the amount of its claim stated to be zero. Debtors' Schedule H indicated that William T. Fisk ("Fisk") is a codebtor on the MEAI loan. Their statement of intention regarding secured consumer debts declared an intention to surrender the

[1] The court takes judicial notice of the contents of its case docket and Debtors' schedules. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *Calder v. Job (In re Calder)*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

Property. On August 2, 2004, Elizabeth A. Vaughan, as trustee ("Trustee"), filed a Report of Trustee in No-Asset Case, certifying that "the estate of the above-named debtor(s) has been fully administered." On August 27, 2004, Debtors amended their Schedule D to add Plaintiff as the holder of a secured claim secured by a mortgage on the Property, again stating that the value of the collateral is zero and the amount of the claim and the extent to which the claim is unsecured are "unknown."

On September 27, 2004, Plaintiff filed the motion initiating this adversary proceeding against Debtors and Fisk. Construing the *pro se* pleading liberally, *see Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594 (1989), the motion appears to seek (1) a determination that Debtors' indebtedness to Plaintiff is nondischargeable under 11 U.S.C. § 523(a)(2)(A) due to their failure to list Plaintiff in their original bankruptcy schedules and their valuation of the Property at zero in their original and amended bankruptcy schedules,[2] (2) denial of Debtors' discharge under 11 U.S.C. § 727 on the same grounds, and (3) relief from the automatic stay to pursue the foreclosure action against the Property.[3] Also on September 27, 2004, Plaintiff filed a Proof of Claim, asserting a claim in the amount of $106,000, secured by the Property. Attached was a copy of an instrument dated February 19, 2004, entitled Corporation Assignment of Open-End Mortgage, purporting to assign the MEAI mortgage to Plaintiff. It appears that the instrument was signed by Plaintiff and attested to by Michael Johnstone, apparently as president of MEAI; Mr. Johnstone's

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[2] Paragraph 5 of the pleading initiating this proceeding uses the language found in § 523(a)(2)(A), although the statute is not mentioned in the motion. The Adversary Proceeding Cover Sheet submitted with the motion describes the paper as a "motion to deny discharge due to fraud, (misrepresentation)."

[3] The motion also appears to seek the appointment of a trustee pursuant to 11 U.S.C. § 1104(a), but that provision does not apply in Chapter 7 cases and, in any event, a trustee was appointed at the outset of Debtors' case. Paragraph 8 of the motion appears to seek additional relief, but the court finds that paragraph unintelligible and so will deny such relief. Paragraph 9 of the motion appears to seek to subordinate (although the motion uses the word "subrogate") Fisk's rights against Debtors to those of Plaintiff, but no grounds for subordination were pleaded or proved. Attached to the motion is a demand for reclamation of the Property pursuant to Section 2-702 of the Uniform Commercial Code as enacted in Ohio, but reclamation is available only with respect to "goods," i.e., personal property, as opposed to real property. The motion also alleges that Debtors damaged the Property, but does not appear to seek a determination that their debt to Plaintiff is nondischargeable by virtue of such damage. *See* 11 U.S.C. § 523(a)(6). In any event, no proof of any such damages was introduced at trial.

signature was acknowledged by a notary public.[4] On October 7, 2004, Debtors received a discharge in their Chapter 7 case. The case has not yet been officially closed.

The court issued a summons in this proceeding on October 20, 2004, and Plaintiff has filed certificates indicating that she served process by mail on October 27, 2004. On October 18, 2004, Debtors filed an answer to the complaint. The answer responded to the averments of Plaintiff's motion, raised certain affirmative defenses, and did not assert any counterclaims but sought in the prayer for relief the dismissal of the proceeding and an award of costs, expenses, and attorney's fees. Also on October 18, 2004, Debtors filed a motion asking the court to hold Plaintiff in contempt for violating the automatic stay by attempting to enter the Property on May 20, 2004, and by entering and damaging the Property on September 29, 2004. On December 15, 2004, Plaintiff filed a motion to strike Debtors' motion. On December 22, 2004, the court entered an order that the motion for contempt be treated as a counterclaim and the motion to strike treated as a reply.

On November 5, 2004, Plaintiff filed (without leave of court) a Supplement Petition, which does not appear to alter the relief sought. The pleading appears to add Trustee as a fourth defendant, but no summons was ever issued to or served on Trustee. *See* Fed. R. Bankr. P. 7004(a); Fed. R. Civ. P. 4(m) (defendant must be dismissed if service of process is not made on defendant within 120 days after complaint was filed). On November 18, 2004, Debtors filed an Answer to Supplement Petition, which responded to the averments of that pleading, raised certain affirmative defenses, and did not assert any counterclaims but sought that Plaintiff take nothing and that costs be assessed against her.

On February 7, 2005, Plaintiff filed a Motion for Summary Judgment. On March 8, 2005, the court denied the motion.

The court conducted a trial of this proceeding on June 9, 2005. As a general matter, the court finds the testimony of both Brian Hockenberry and Jessica Hockenberry to be credible. Although the court does not find Plaintiff's testimony lacking in credibility on any specific material point, she failed to present any

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[4] In addition to the MEAI officer and Plaintiff signing in the wrong places, it is not altogether clear that the instrument purports to effect an assignment of the MEIA mortgage as the property descriptions are not identical and the file numbers are different.

evidence to overcome Debtors' credible testimony and, overall, failed to present evidence sufficient to prevail on any of the claims that might be discerned from her filings.

Debtor Brian Scott Hockenberry testified that he did not know about the assignment of the MEAI mortgage to Plaintiff at the time the bankruptcy petition was filed. Both Debtors acknowledged not making all payments on the mortgage, but asserted that they withheld payments because the house on the Property was never completed so they never received an occupancy permit, because the deed was not received for several months after the closing, due to questions about a prior mortgage continuing to encumber the Property, and because of the failure of an anticipated grant to materialize. During the period that Debtors' attorney attempted to get these issues resolved, their payments were deposited into the attorney's escrow account. When it became clear that some or all of the issues would not be resolved in the foreseeable future, the payments into escrow stopped and the funds held by Debtors' attorney were returned to them. By the time they filed their bankruptcy petition, they had moved from the Property.

Plaintiff was upset that she did not immediately learn of Debtors' June 14, 2004, Chapter 7 filing. She acknowledged that the address for MEAI set forth in their schedules was a correct address for the corporation, but stated that she was no longer employed by MEAI at the time the bankruptcy case was commenced. Plaintiff further testified that neither she nor her spouse ever went onto the Property since she learned of the bankruptcy filing on July 30, 2004, and no admissible evidence was presented to the contrary.

LAW AND ANALYSIS

Dischargeability

Plaintiff appears to seek a determination that Debtors' indebtedness to her is nondischargeable under 11 U.S.C. § 523(a)(2)(A), which provides:

> A discharge under section 727 . . . of this title 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 representation, or actual fraud.

The Sixth Circuit has enumerated the elements under this provision as follows:

> In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (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 Services, Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998). The party seeking the exception to discharge bears the burden of proof on each element of its claim by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). The Sixth Circuit also held in *Rembert* that "[w]hether a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A) is measured by a subjective standard." *Rembert*, 141 F.3d at 281. However, "gross recklessness is sufficient to establish an intent to deceive." *Bank One, Lexington, N.A. v. Woolum (In re Woolum),* 979 F.2d 71, 73 (6th Cir. 1992).

There may be two points in time at which Plaintiff might be alleging fraud. She may claim that she was fraudulently induced to extend credit to Debtors when they purchased the Property in 2000. However, there is no evidence that they made any false representations to Plaintiff or her predecessor in interest in connection with the transaction. While a promise to pay may itself constitute a misrepresentation if made with the intent not to pay or with knowledge of an inability to pay, *see ITT Fin. Servs. v. Szczepanski (In re Szczepanski),* 139 B.R. 842, 844 (Bankr. N.D. Ohio 1991), there is no evidence that Debtors had no intention or ability to pay at the time they signed the MEAI note and mortgage. Indeed, Plaintiff acknowledges receiving the first two payments on the note, and Debtors credibly testified that they deposited a number of additional payments into their former attorney's escrow account while he was attempting to resolve the many serious issues about the Property, the loan and its documentation, and the state of Debtors' interest in the property. Indeed, the motion initiating this proceeding does not allege that any fraud was committed in connection with the purchase of the Property.

Rather, the motion contends that the debt is nondischargeable because the bankruptcy schedules fraudulently misrepresented the identity of the holder of the MEAI mortgage and the value of the Property. None of the requirements set forth in *Rembert* have been shown in that regard. First, Debtors did not obtain money through the representations set forth in the schedules. Rather, they obtained money's worth

– the Property – more than three years before the schedules were filed. If the representation that the debt was owed to MEAI was false, i.e., if MEAI did, in fact, make an enforceable assignment to Plaintiff, there is no proof that Debtors knew who the holder of the claim was when the original schedules were filed or were grossly reckless in disclosing that the debt was owed to MEAI. It does appear that Debtors' Schedule A was not incorrect, as the value of the Property was "unknown" to Debtors,[5] particularly in that there appears to be a prior mortgage thereon. Second, there was no proof that Debtors subjectively intended the schedules to deceive Plaintiff: there is no question that Plaintiff knew the entity to which the indebtedness was owed and had as much information about the value of the Property as Debtors. Third, Plaintiff did not take any action in reliance on the representations set forth in the schedules. Fourth, since there was no reliance, such reliance could not have been the proximate cause of a loss.

Plaintiff was not defrauded by virtue of the schedules' identification of the holder of the MEAI mortgage or their valuation (or lack of a valuation) of the Property. Moreover, Plaintiff neither pleaded nor proved the existence of any material misrepresentations in connection with Debtors' purchase of the Property. Accordingly, Plaintiff is not entitled to a determination that Debtors' indebtedness to her is excepted from their bankruptcy discharge by § 523(a)(2)(A) of the Bankruptcy Code. "Mere breach of contract, without more, does not render a consequent debt nondischargeable under Section 523(a)(2)(A)." *McPheron v. Bice (In re Bice)*, 139 B.R. 662, 666 (Bankr. N.D. Ohio 1991).

Denial of Discharge

Although inaccurate bankruptcy schedules generally do not give rise to a claim of nondischargeability of a particular debt to a particular creditor, such inaccuracies may lead to a denial of discharge pursuant to 11 U.S.C. § 727(a)(4)(A).[6] That statute provides that "[t]he court shall grant the debtor a discharge, unless . . . the debtor knowingly and fraudulently, in or in connection with the case .

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[5] Schedule D indicates a zero value for the Property, but that is likely how Debtors' attorney's software carries over the "unknown" value stated on Schedule A. In any event, Schedule D's primary purpose is to disclose secured debts, while Schedule A's primary purpose is to disclose assets.

[6] The Adversary Proceeding Cover Sheet accompanying the motion initiating this proceeding apparently erroneously mentions Paragraph (3) of § 727(a).

. . made a false oath or account." The Sixth Circuit has enumerated the elements under this provision as follows:

> In order to deny a debtor discharge under this section, a plaintiff must prove by a preponderance of the evidence that: 1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Whether a debtor has made a false oath under section 727(a)(4)(A) is a question of fact.
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> "'Complete financial disclosure'" is a prerequisite to the privilege of discharge. The Court of Appeals for the Seventh Circuit has explained that intent to defraud "involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression." A reckless disregard as to whether a representation is true will also satisfy the intent requirement. "'[C]ourts may deduce fraudulent intent from all the facts and circumstances of a case.'" However, a debtor is entitled to discharge if false information is the result of mistake or inadvertence. The subject of a false oath is material if it "'bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.'"

Keeney v. Smith (In re Keeney), 227 F.3d 679, 685-86 (6th Cir. 2000) (citations omitted).

In this case, the statements contained in the schedules were made under oath and were material. However, as explained above, the statements were either true or Debtors did not know they were false and did not make the statements with reckless disregard for their truth or falsity. In addition, Plaintiff has, again, failed to prove that the statements were made with fraudulent intent. The court finds that Debtors simply did not file false schedules in an attempt to hide the debt to Plaintiff or their ownership of the Property; rather, the schedules made Trustee and creditors well aware that Debtors own the Property subject to the MEAI mortgage. Accordingly, Plaintiff is not entitled to an order barring Debtors from receiving a discharge pursuant to § 727(a)(4)(A) of the Bankruptcy Code.[7]

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[7] Debtors' discharge has actually already been granted. In reviewing the case for discharge, neither the Clerk nor the court initially construed the motion as an objection to Debtors' overall right to discharge, if indeed it be such. And the court does not withhold discharge when complaints are filed under 11 U.S.C. § 523 seeking exception from discharge of specific debts, which is what the motion was reasonably construed as seeking. Had the court decided that Plaintiff should prevail on this claim, it would have

Claim Against William T. Fisk

William Fisk also appears to have been named as a defendant in this proceeding. He has not answered or otherwise appeared in response to the motion. However, as with Trustee, the record does not show that he was ever served with the summons and the motion. (*See* Doc. #6.) The return of service for the summons in the record certifies only that service was made on an attorney for Debtors in their Chapter 7 case. (*Id.*) As service on Fisk has not been perfected within 120 days after filing of the document construed as the complaint, he shall be dismissed. *See* Fed. R. Bankr. P. 7004(a); Fed. R. Civ. P. 4(m). Even if service has been perfected, the court cannot discern that any cognizable claims against him have been set forth in Plaintiff's filings and there was no evidence as to any claims against him presented and argued by Plaintiff at trial. Moreover, the court cannot conceive of any claims that Plaintiff might have against him over which it would have jurisdiction in the context of Debtors' Chapter 7 case. Unlike the Hockenberrys, he is not a debtor in this court.

Relief from Automatic Stay

Plaintiff also seeks relief from the automatic stay to proceed with the foreclosure action. The docket in the underlying Chapter 7 Case No. 04-34980 does not reflect that Plaintiff ever filed a motion for relief from the automatic stay therein. Insofar as the stay protects property of Debtors, it terminated when they received a discharge in October 2004.[8] 11 U.S.C. § 362(c)(2). Insofar as the stay protects property of the bankruptcy estate, the stay continues until the Property is no longer property of the estate. *Id.* § 362(c)(1). While Trustee has not formally abandoned the Property, she has certified that the estate has been fully administered and the case is ready to close and, when the clerk closes the case, the Property will be abandoned, *id.* § 554(c), and thus will no longer be property of the estate. Accordingly, the court will direct the clerk to proceed with the closing of Debtors' Chapter 7 case. Following the closing of the case,

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vacated the discharge order under Rule 60(a) of the Federal Rules of Civil Procedure, which applies to this proceeding through Rule 9024 of the Bankruptcy Rules.

[8] The stay's protection of Debtors personally also terminated at that time, but was replaced by a permanent "discharge injunction." 11 U.S.C. § 524(a)(2).

Plaintiff may proceed with her rights *against the Property*, such as by proceeding with her foreclosure action, because bankruptcy does not discharge *liens*.[9] Plaintiff may not, however, seek to enforce her rights *against Debtors personally*, such as by seeking a money judgment against them or seeking to enforce a judgment such as by garnishing their wages or bank accounts, because bankruptcy *does* discharge debtors' personal liability on *debts. Johnson v. Home State Bank*, 501 U.S. 78, 84-85, 111 S. Ct. 2150, 2154 (1991).

Counterclaim

Debtors' counterclaim asserts that Plaintiff violated the automatic stay by attempting to enter the Property in May 2004 and by entering and damaging the Property in September 2004. Debtors have failed to prove that Plaintiff took either such action. Moreover, Debtors have further failed to prove that they suffered any injury as a result of any such action. *See* 11 U.S.C. § 362(h). Judgment will be entered for Plaintiff on Debtors' counterclaim.

Attorney's Fees

Debtors also seek an award of their attorney's fees and other costs and expenses incurred in connection with this adversary proceeding. Although they do not specify the legal basis for their request, they appear to be relying on 11 U.S.C. § 523(d), which provides:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

The motion initiating this proceeding appears to request a determination of dischargeability of a consumer debt under § 523(a)(2), and the debt will be discharged. Moreover, the court finds that Plaintiff's position

[9] This court makes no determination in this decision whether the lien claimed by Plaintiff is valid, or whether she was validly and effectively assigned the mortgage. Nothing in this decision should be construed as making such a determination.

was not substantially justified, and that there do not appear to be any special circumstances that would make an award of costs and attorney's fees unjust. However, Rule 7008(b) of the Federal Rules of Bankruptcy Procedure requires that "[a] request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate." Thus, in an adversary proceeding in bankruptcy court, attorney's fees must be sought by a separate count of the complaint or other pleading and not merely in the prayer for relief. *E.g.*, *Leonard v. Onyx Acceptance Corp.*, Nos. 02-8125, Civ. 03-1117 ADM, 2003 WL 1873283, at *2 (D. Minn. Apr. 11, 2003); *Citibank USA, N.A. v. Spring (In re Spring)*, Nos. 03-35552 (LMW), 04-3007 (LMW), 2005 WL 588776, at *6, 2005 Bankr. LEXIS 319, at *21-*22 (Bankr. D. Conn. Mar. 7, 2005); *Garcia v. Odom (In re Odom)*, 113 B.R. 623, 625 (Bankr. C.D. Cal. 1990); *see V.M. v. S.S. (In re S.S.)*, 271 B.R. 240, 244 (Bankr. D.N.J. 2002). Debtors have not pleaded their request for attorney's fees as a separate claim, so the request must be denied.

The court will enter a separate judgment as to the parties' claims and counterclaims in accordance with this memorandum of decision, and, for good cause shown,

IT IS ORDERED that a copy of this Memorandum of Decision and Order, only, shall be filed in the underlying Chapter 7 Case No. 04-34980 solely for the purpose of specifying of record therein the court's direction that Case No. 04-34980 shall be immediately administratively closed by the Clerk.