

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

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)	
IN RE:)	CHAPTER 7
)	
JOHN VANFOSSEN,)	
RHONDA VANFOSSEN,)	CASE NO. 05-60778
)	
Debtors.)	ADVERSARY NO. 05-6071
)	
)	
ERIC BRADLEY,)	JUDGE RUSS KENDIG
PORTIA BRADLEY,)	
)	
Plaintiffs,)	MEMORANDUM OPINION
)	
vs.)	
)	
JOHN VANFOSSEN,)	
)	
)	
Defendant.)	

This matter comes before the court upon John VanFossen's (hereinafter "Defendant") motion for summary judgment, filed September 30, 2005. Eric and Portia Bradley (hereinafter "Plaintiffs") filed a memorandum in opposition to motion for summary judgment on October 14, 2005. For the following reasons, Defendant's motion for summary judgment is **GRANTED**.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334, 157, and the general order of reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2). Venue in this district and division is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

FACTS & PARTIES' ARGUMENTS

Plaintiffs filed their complaint on May 13, 2005. The complaint alleges that Defendant's debt is non-dischargeable under 11 U.S.C. § 523(a)(2). Plaintiffs state that they were granted a judgment

on a complaint alleging violations of Ohio Revised Code Sections 1345.02, 1345.03, and 1345.21 by the Tuscarawas County Common Pleas Court. Plaintiffs allege that they entered into a contract with Defendant on October 24, 2005, for which they paid him \$4,743.01. Plaintiffs state that Defendant violated the Ohio Consumer Sales Practices Act (hereinafter "OCSPA") by failing to include a statement of the buyers' right to cancel and failing to provide a notice of cancellation. Plaintiffs allege that these violations constitute unfair, deceptive, and contributable acts which were known.

Defendant filed his answer on June 14, 2005. He denies that the common pleas court judgment was for a violation of the OCSPA. Rather, he claims that the common pleas decision was a "general judgment," as the complaint also had claims for breach of contract and unjust enrichment. Defendant denies violating the OCSPA, but admits that he did not include in the contract the buyer's right to cancel. Defendant asserts that Plaintiffs' complaint fails to state a claim upon which relief can be granted.

Defendant's motion for summary judgment states that the complaint does not state any grounds recognized by the dischargeability statute, because the state court judgment was not based on a claim of fraud and the state court judgment is res judicata on the issue of fraud. Defendant's "applicable law" section states that a breach of promise to perform a future act is not fraud, that OCSPA claims are not fraud claims, that the court cannot take evidence outside the state court record, and that the state court judgment is res judicata on the issue of fraud.

In their response, Plaintiffs argue that collateral estoppel does not apply in case, since the Plaintiffs were granted only a default judgment in common pleas court. Further, that, pursuant to In re Rebarcheck, collateral estoppel was not applicable to a dischargeability proceeding that alleged a violation of the OCSPA.

DISCUSSION

1. Summary Judgment Standard

The standard for summary judgment is set forth in Federal Rule of Civil Procedure 56, made applicable through Federal Rule of Bankruptcy Procedure 7056, which provides that:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The evidence "must be viewed in the light most favorable" to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment is not appropriate if a genuine dispute of material fact exists, "that is, if the evidence is such that a

reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The court must first consider the basis for the moving party’s motion for summary judgment, as the “party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the ‘pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any’, which it believes demonstrates the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Subsequently, the nonmoving party must demonstrate that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The nonmoving party “may not rest upon the mere allegations or denials of his pleadings, but... must set forth specific facts showing there is a genuine issue for trial.” Id.

2. Pleading Non-Dischargeability under 11 U.S.C. § 523(a)(2)(A)

Pursuant to 11 U.S.C. § 523(a)(2)(A), a debt can be non-dischargeable if money or services “are obtained by – false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.” Further, a plaintiff seeking to have a debt declared non-dischargeable under this section must prove: (1) debtors made false representations ; (2) debtors knew such representations to be false at the time they were made ; (3) representations were made with the intent to defraud the creditor ; (4) the creditor reasonably relied on these representations ; and (5) creditor incurred resulting damage. Van Wert Nat’l Bank v. Druckemiller, 177 B.R. 859 (Bankr. N.D. Ohio 859).

The complaint in the instant case asserts that this “action is brought pursuant to 11 U.S.C. § 523(a)(2)(A).” However, Plaintiffs fail to provide any statement or information as to why they are entitled to relief under this code section.¹ The complaint alleges that: Plaintiffs are buyers under OCSPA, the contract was in violation of OCSPA, and Defendant’s acts and failures to act were known violations of OCSPA. While an OCSPA violation could provide a basis for non-dischargeability, a simple allegation of a violation of the OCSPA is not sufficient to plead a non-dischargeability action. The five elements that Plaintiffs are required to prove in order to have a debt declared non-dischargeable under 11 U.S.C. §523(a)(2)(A) are not alleged in the complaint. Thus there is no genuine issue of material fact in this case, as Plaintiffs failed to set forth any specific facts showing there is an issue for trial. The court need not address Defendant’s remaining arguments for summary judgment, as his motion for summary judgment is **GRANTED** based on Plaintiffs failure to properly plead non-dischargeability in their complaint.

¹ Fed. R. Civ. P. Rule 8 (incorporated by Federal Bankruptcy Rule 7008) requires that a claim for relief include a statement “showing that the pleader is entitled to relief.”

A separate order is issued herewith.

/s/ Russ Kendig **DEC 09 2005**

Judge Russ Kendig
U.S. Bankruptcy Judge

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